GIUSTIZIA INSIEME

Diritto e Processo Amministrativo

The limits to the freedom of economic initiative in EU: between (absence of) commercial planning and protection of historic Town centers

di Bernardo A. Masso

10 giugno 2021

The limits to the freedom of economic initiative in EU: between (absence of) commercial planning and protection of historic Town centers. VII Euro Regione North Adriatic International Colloquium. Trieste, 19 marzo 2021. Report.

Bernardo A. Masso

The logic of the free economic initiative and competition, principles on which the European Union was founded and still followed by the European legislation, evokes the dire necessity of a thorough discussion on how the aforementioned principles should be balanced with the protection of cultural heritage, landscape and historic urban centers. On the issue inferred from this possible friction, the conference, formally hosted by the University of Trieste, held in form of a webinar on the 19th March 2021 – under the supervision of the members of the scientific committee: Prof. Andrea Crismani, Prof. Dario Đerđa, Prof. Marcello M. Fracanzani and Prof. Erik Kerševan – tried answering by collecting, in a certainly worthwhile debate, the different experiences of the administrative legal systems of the northern Adriatic region. In fact each of them presents the mutual need to weigh sheer economic interests and historical, cultural and artistic legacy conservation.

The relevance and the frequency of the issue in the different legal systems, all distinguished by an important historic urban heritage to be preserved, was immediately highlighted in the institutional greetings of the presidents of the administrative Courts of Ljubljana, Jasna Segan, of Rijeka, Alen Rajko, and of Trieste, Oria Settesoldi, including the former president Umberto Zuballi.

The very question at issue concerning the critical relationship between economic activities and protection of cultural heritage was stressed by the introductive speech of the President of the V section of the highest Italian administrative court, the Council of State, Giuseppe Severini.

Pres. Severini pointed out how a common European perspective gives to the closeness of the different systems a legal meaning by harmonizing their legislation and case law, especially in such cases that require a proportional balancing of public interests such as the safeguarding of economic freedom, the interest in proper urban governance through the planning of the material and functional municipal transformation and enhancement, along with the preservation of the cultural assets.

Granted that individual activities and public interest do not always collide and may even support each other, oftentimes their relationship can occur as critical, raising the decisive question of what should be the right balance between these opposing interests and which one should ultimately prevail, thus if a hierarchy can be possibly defined. In this defining balancing it should always be considered that the cultural heritage represents, as a matter of fact, the most fragile interest with an unrepeatable value for society, whereas commercial activities are subject to the inherent dynamism that demands a fast urban development.

From this perspective the issue was subject of attention since the 60's, as it is confirmed by the Charter of Gubbio of 1960, which develops the Charter of Athens of 1933, and the Italian urban legislation of 1967 that grant special protection to the historic town centers. On one hand, it is thanks to this kind of legislation that Italy was able to display, on average, some of the best preserved historic town centers in Europe, on the other hand the country must now face the growing problem of a relevant desertification of the historic centers, which might entail a certain decay in the long run, especially in terms of "living urbanism" of the same areas, since historic areas cannot provide services to its residents in the same way as newly built neighborhoods.

Indeed the main challenge for the Italian urban system is to adjust the historical identity with the habitability of the urban centers, thus provoking a significant return of residents and supporting, at once, their commercial vocation, of which one of the main aspects is tourism. In fact giving too

much space to the commercial offers for tourists would entail a fatal rebound effect on the ordinary habitability of the historic centers. It is important to stress that the administrative courts have performed a great service to avoid this risk, in cases concerning historic city centers of Rome and Florence the case law has favored the “urban decorum” over the interest in starting new private commercial activities.

In order to grant an adequate balance the legislation should take not an episodic approach but a comprehensive one, while the administrative courts should always follow the principle of proportionality taking into account the presence of a hierarchy of the aforesaid concepts, a hierarchy that stems from the unique and fragile essence of the urban historic tangible and intangible heritage.

Similar conclusions can be drawn by the report of Prof. Vera Parisio, from the University of Brescia and general secretary of AIDRU (*Association Internationale de Droit de l’Urbanisme*), who stressed out how the roots of a necessary, and not equal, balance can be identified in the provision of the Italian Constitution itself, namely in articles 9, which “safeguards natural landscape and the historical and artistic heritage” in the section of the fundamental principles, and 41, which grants private economic freedom in harmony with the “common good”. Provided that a hierarchy can result from the constitutional provisions, it should be considered that if a proportional and reasonable balancing of a public interest with an opposing private one can result in a quite easy outcome in favor of the public one, some care is needed in the case of balancing two public interests. The latter situation has been often matter of judgment before national administrative courts, a clear example of that is the judgment n. 3225/2020 of the Italian Council of State, which tackles the conflict between the general interest to trade and the architectural protection of historic urban heritage.

Given the special conditions of economic crisis due to the pandemic, Prof. Parisio proposes a potential new approach to this topic, which may elicit a new relationship between the duty to preserve the cultural urban heritage and the need to develop commercial activities, a relationship based on synergy rather than conflict and, on this wise, promoting economic activities through the protection of architectural heritage. This may be accomplished thorough different tools already used in the environmental law field, such as taxation and incentives.

In a European perspective Prof. Ana Pošćić, University of Rijeka, has pointed out that the collision between the protection of historic city centers and the economic freedom does not necessarily violate the EU law, which actually accommodates national interests in the protection of historical and artistic heritage by recognizing specific justifications for possible limitations on

the freedom to provide services. Nevertheless this balancing may be not so easy and the administrative Croatian case law provides an example: in 2019 the city of Dubrovnik became the first Croatian city to regulate the installation of ATM cash machines in the historic city center (which constitutes a UNESCO heritage site). This regulation entailed the removal of some cash machines and a precise list of esthetic requirements for the ones to be installed. The High Administrative Court of the Republic of Croatia has ruled not to postpone the execution of the municipal regulation, highlighting that the protection of the individual economic interest cannot take precedence over the cultural common good.

In a wider context such a barrier may be considered an obstacle to the freedom to provide services, as granted by the broad definition of “service” given by art. 57 of the Treaty on European Union. However, according to the EU law, restrictions on the freedom to provide services may be justified, among others, for overriding reasons such as the protection of social and artistic heritage. This is clearly stated by the European Court of Justice in the series of cases during late 80’s and 90’s concerning Italy, France, Greece and Spain whose regulations required tourist guides from other countries to possess a specific license that proved their qualification in order to protect the image of the historical and cultural heritage other than the service recipients. The Court confirmed that those grounds could constitute overriding reasons to limit the freedom to provide services, though in those cases the regulations failed to pass the proportionality test since the measure of a license requirement exceeded what was necessary to safeguard those public interests, hence integrating an overly restrictive and disproportionate measure of the market freedom.

In fact, being subject of a relevant liberalization due to the Bolkestein directive, the freedom to provide services entails more difficulties than the other single market freedoms to harmonize the national regulations with the EU law. An accurate, and precious due to its importance in the topic under discussion, analysis of the Internal Market Directive 2006/123/EC was given by Ass. Prof. Adrijana Martinović, University of Rijeka. As a directive, this legislative act is designed to harmonize the legislations of the member states, in particular the Bokestein directive was adopted on a double legal basis, namely the freedom to provide services and the tightly intertwined freedom of establishment.

The Directive lead to a relevant transformation of the regulatory regimes of the member states: it specifically demands administrative simplification and cooperation for the service providers willing to establish into another member state, whereas for the service providers without establishment the Directive allows the host member state to keep certain requirements provided

that they are justified, not discriminatory, necessary and proportionate. This resulted into an abandoning of the country of origin principle, according to which it is only the country of origin that has the obligation to exercise control over service providers having their seats in the home territory, inasmuch as another member state must not interfere in the process recognizing the legitimacy of the services.

On a closer scrutiny of the regulation for the establishment of service providers, member states may impose certain barriers to the freedom to provide service only for overriding reasons related to public interest and provided that they comply with the test of proportionality. The Directive envisages innovative tools such as a peer review of the national legislations in which each member State is able to assess possible justifications and the proportionality of their regulation on requirements for service providers.

Granted the legal definition of “requirement” given by art. 4 par. 7 (“any obligation, prohibition, condition or limit provided for in the laws, regulations or administrative provisions of the Member States or in consequence of case-law, administrative practice, the rules of professional bodies, or the collective rules of professional associations or other professional organizations, adopted in the exercise of their legal autonomy”), a list of “suspicious requirements” that needs to be evaluated as to their compatibility with the Directive is included in art. 15. According to the Court of Justice, this provision has direct effects on the legal system of the member states, since it imposes a sufficient precise and unconditional obligation on the member States.

These requirements must correspond with overriding reasons related to public interest that may in fact justify restrictions. Those are indicated in art. 4 par. 8, and they include “the conservation of the national historic and artistic heritage”. It is important to highlight that the discipline of articles 14 (which indicates prohibited requirements in any case), 15 and 9 (which regulate the possibility for a member state to make access to a service activity subject to an authorization scheme) applies also to purely internal situations concerning national service providers, since it is part of Chapter III of the Directive which establishes a regulatory regime for all service providers. For the sake of completeness, it is crucial to note that zoning and urban regulation can easily be subject to the scrutiny of the Court of Justice on the account of the Service Directive. This is proved by the Visser case, a leading case concerning municipal zoning rules and retail activities considered to be included in the discipline of the Directive.

Therefore it is possible to affirm that the protection of cultural and historical urban heritage can constitute an overriding reason to set barriers to economic activities not only according to the Treaties, but also under the Directive 2006/123/EC, even though some critical aspects may arise

by the different discipline concerning transnational service providers.

From an Italian perspective Prof. Anna Simonati, University of Trento, pointed out a “double soul” of the Italian statutes in the friction between economic activities and historical protection: indeed the Italian legislation seems on one hand to prohibit any activity incompatible with the protection of the cultural value of the historic city centers, on the other hand some commercial activities deemed as traditional are subject themselves of a special preservation. The relevant liberalization carried out by the law decree n. 1/2012 includes possible, and proportional, limits on economic activities if based on a public interest, besides the legislative decree n. 114/1998 provides the possibility for the Regions to issue general guidelines for commercial activities in such wise.

Art. 52 of the Code of the Cultural and Landscape Heritage also gives the possibility to identify specific municipal areas deemed to have archaeological, historical, artistic, or landscape value, where commercial activities can be limited. It is a matter of interest to point out that after a later amendment, the legal provision also grants the possibility to take positive measures to preserve traditional activities that are entwined with the cultural identity of the area, hence proving a special attention also for the immaterial value of cultural identity. This is one of the many examples in the Italian legislation that show the aforementioned “double approach”: protection through prohibition on one hand, positive measures on the other. It is not farfetched to notice this attention to the immaterial value of the cultural heritage in the administrative case law, especially in the decisions concerning the renewal of licenses for certain economic activities rooted in a specific municipal area.

It is crucial to face some critical points of the Italian statutes, like the absence of a legal definition of “historic urban center”: in fact a significant complexity may arise by the different definitions given by soft law acts (such as the Charter of Gubbio), by the civil and administrative case law, administrative acts and Regional sources, which, moreover, have to cope with divergent issues concerning historic urban centers, such as desertification or gentrification.

The Italian overview was completed by the presentation of President Marco Lipari, Council of State, focusing on the Italian administrative case law which reveals the need for a reasonable balance between the protection of the cultural value and the economic freedom. These principles can be inferred from European sources such as the Court of Justice case law, the European Landscape Convention (or Florence Convention) and especially the Convention on the Value of Cultural Heritage for Society (or the Faro Convention), both of them Council of Europe treaties. These documents preserve cultural and historical identity as part of fundamental human rights,

in particular in the context of the individual right to freely take part into the cultural life of the community. Notably the Faro Convention provides a broader understanding of cultural heritage in the relationship with the communities.

It is of the utmost utility to analyze the Italian case law citing some of the most relevant judicial examples on the topic, since, in the Italian experience, the relationship between economic activities and public interest causes a vast litigation. A relevant case is the one concerning the renewal of the concessions of some municipality buildings in the notorious Milan gallery. The decision of the Milan municipality to hold a public tender, supported by an opinion of the National Anticorruption Authority (ANAC), in order to grant the maximal economic competition was later canceled by the Administrative Regional Tribunal of Lombardy and confirmed by the Council of State with the judgment n. 5157 of the 3rd September 2018.

This decision identifies an accurate limit on the principle of economic competition deriving from the system, even in the absence of a specific written rule and recognizes the prevalence of the cultural value. The same decision also considers the limit on private economic initiative for cultural interest with a particular broad definition that includes the individual protection of outgoing operators, but also the public interest related to the destination of the assets. According to the judgment the cultural and historical value must be deemed as a utility itself, regardless any economic considerations.

The decision resumes a principle expressed by the EU Court of Justice with the decision of the 24th March 2011 C-400/08, according to which public administrations are allowed to regulate economic activities even trough authorizations, namely preventive control of the activities.

It is not easy, especially in Italy, to balance the economic vocation of historic urban areas, particularly concerning tourism, with the protection of the historic heritage. Specific legislative measures are necessary in order to weigh the different interests at stake in different economic sectors, especially to avoid the loss of historical identity in those areas that also comprise traditional activities. In fact specific and traditional activities have been defined as “cultural assets” by the administrative case law and by Regional statutes too.

Other cases confirmed the legitimacy of measures that limited economic freedom on account of a prevailing public interest stemming from the conservation of “urban decorum”. This approach may also be noted into certain legislative acts like the legislative decree n. 222 of 2016, which granting a considerable liberalization of the economic activities enlists some cases related to the historic value of some areas worthy of a special protection, without this resulting into a

crystallization of the commercial activities. This kind of regulation indeed may also be found in other European metropolitan urban centers such as Paris or London.

The discussion was enhanced by the perspective from another EU member State, Slovenia, thanks to the presentation of Cons. Borut Smrdel, judge of the Administrative Court of the Republic of Slovenia. As to the answer to the question whether economic freedom may be limited on the grounds of public interests, and especially the concern to protect historic town centers, specific administrative case law in Slovenia is actually missing. Nevertheless, in an inevitable theoretical approach, it is worth mentioning the Slovenian legal regime for the land planning and the protection of cultural heritage.

The main law regulating land planning in Slovenia is the “Spatial planning act”, according to which the State is responsible for preparing the state spatial plan, whereas the municipalities keep the competence to regulate the municipal and inter-municipal plans. This legislative act stresses the importance to take into consideration the “identity of the space” due to specific geographical, cultural-historical, social, economic and other conditions of development.

Specific provisions in the Slovene legal system are also included in the “Cultural Heritage Protection Act” which covers registered heritage, national treasures, monuments, heritage sites and archaeological remains. Monuments of national importance are declared as such by government decrees, while monuments of local importance are subject to an act of proclamation that consists in a decree of the representative body of the province or the municipality and comprises the reasons justifying the proclamation and the specific protection regime. Any intervention on monuments or heritage sites must obtain a “cultural protection consent” from the body responsible for the preservation of cultural heritage, unless it is urgent, immediately necessary to avoid an unforeseeable danger or damage.

The presentation proceeded with the analysis of the specific spatial planning of Ljubljana, whose goal is to preserve, protect and restore the historic city, especially the areas of cultural monuments and other cultural heritage. It should be considered that the city’s regulation permits interventions in space and spatial arrangements if they contribute to the permanent preservation of heritage and increase its value. The provisions define “interventions” as any works, activities and actions that affect the protected values due to which a building or an area acquired the special protection status. These regulations result in some requirements in the dimension, the materials, the construction design and the appearance of the protected assets. The city of Ljubljana has also identified certain areas as “characteristic” – namely areas distinguished by rich cultural heritage as well as areas of particular urban-architectural quality recognized by

planning instruments – that are worthy of a special protection, and so granting, as a matter of fact, different levels of preservation to cultural assets.

According to this legislation, it is reasonable to believe that limitations on economic activities would occur if they affected specific historic areas. Public calls for tenders concerning the lease of public areas for economic activities often comprise specific criteria in order to favor participants that prove to better preserve the tradition and the cultural identity of the area.

The presentation of Cons. Hrvoje Miladin, Judge of the Administrative Court in Zagreb and long-term exchange participant at the European Court of Justice, focused on the European overview of the issue, specifically the ECJ's practice regarding the application of the Service Directive, hence the landmark decision of 30th January 2018 regarding the *Visser* case (joined cases C-360/15 and C-31/16), which deals with fundamental questions regarding the scope of the directive 2006/123 and the interpretation of the concept "services".

The judicial question regarding the interpretation of the Service Directive was referred to the European Court by the Dutch Council of State, the highest administrative court in Netherlands. Visser is a company that owns commercial premises in the commercial area of Woonplein, outside the historic center of the municipality of Appingedam (north-east Netherland). According to the zoning plan of the municipality, Woonplein was designated as an area for the exclusive retail trade in bulky goods, such as furniture and cars. The zoning plan did not allow Visser to let its commercial property to a shoe and clothing retailer, since this retailer did not sell bulky goods.

Visser disputed that, in regulating so, the municipality plan breached the Service Directive violating the principle of freedom of establishment. The Council of State of Netherlands referred questions of interpretation of the Directive to the ECJ for a preliminary ruling. To the question whether a shoe and clothing retail may be qualified as a "service" within the meaning of the Directive, the European court replied that the activity of retail trade in goods such as shoes and clothing falls within the scope of the concept of "service" within the meaning of art. 4 of that Directive, since the rules of the zoning plan regard not the goods as such, but concern the conditions governing the access to the service activities. The decision has also answered to other important interpretative questions: the European judges stated that protection of the urban environment can be considered an overriding reason of public interest that may justify restrictions on commercial activities and, moreover, that the Directive also applies to merely domestic situations in which service providers are willing to establish in their own country. Cons. Miladin has underlined the practical meaning of such a statement, it is in fact reasonable to

think that this could lead more service providers to challenge local regulations in purely internal situations. The conclusion of the ECJ were widely supported by the opinion of the Advocate General.

Cons. Miladin proceeded focusing on Croatian legislation that includes specific statutes like the "Act on the Protection and Preservation of Cultural Goods", which similarly to the abovementioned legislation, regulates the intervention on historic assets and is intently implemented by the administrative national courts.

The conference was concluded by the presentation of Prof. Erik Kerševan, University of Ljubljana and judge of the Slovenian Supreme Court, who has stressed the complexity of the protection of heritage pursued by different levels of regulation, national and European, in the constant weighing of conflicting values and interests. The main question whether it should be the legislation or the administration to resolve these balancing issues remains open.

In this context, it is duty of the administration to identify problems – that is in other terms to identify values – hence define policies, which is of the utmost importance in case of conflicting interests. These decisions are shaped into normative acts, from European legislation to municipal regulation, that set abstract rules with a wide margin of discretion for the legislator. The following administrative acts do not deal with policies, but instead they rule certain specific cases and they are legally bound acts. To determine if a decision that grants protection to cultural and historic heritage is a legislative or an administrative act entails important consequences, for instance the jurisdiction of administrative courts.

This was the issue arisen in the Slovenian legal system and resolved by the Constitutional Court in 2012 (U-I-144/12, 18th October 2012), which affirmed the nature of administrative decision rather than a normative act of the declaration of a national monument that recognizes a special protection as heritage. As such this kind of declarations should be adjudicated by administrative courts.

It remains to be asked what the role of administrative justice is then. In this delicate area, where interests and values collide, the judges are facing an enormous task, indeed if the questions of protection of heritage are dealt with administrative acts, and not normative ones, there arises the need to rule on their validity and, in order to do so, it is necessary to go into the core not only of the legislation but into the very core of values. In this way a priority of values and interests is set, however, in the opinion of Prof. Kerševan, these kind of conflicts should be resolved by the policy makers, not by the administration nor by the judges.

It is also unanswered the question whether there should be an absolute discretion left to the administration concerning the decision to protect something as heritage stemming from the highly technicality of the decision, which falls outside the scope of the judicial review, or it should rather be considered a legal reasoning that a judge could examine in detail.

These questions, which regard vital sectors and values of the European legal systems, prove that the topic constitutes still an open issue and deserves to be studied in order to fully determine what direction the European member states are willing to pursue in order to preserve their historical identity and not hinder economic growth.