

## Public procurement with SMEs and the mafia

In September, the ECJ ruled in favour of Vitali SpA in *Vitali SpA v Autostrade per l'Italia SpA* (C-63/18) EU:C:2019:787 where the judges held that the Article 105 of Legislative Decree 50/2016 was unlawful.

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In September, the ECJ ruled in favour of Vitali SpA in *Vitali SpA v Autostrade per l'Italia SpA* (C-63/18) EU:C:2019:787 where the judges held that the Article 105 of Legislative Decree 50/2016 was unlawful. This ruling not only states that Directive 2014/24/EU precludes national legislation but also shows the importance of adapting public procurement to the needs of SMEs (and to be mindful of the mafia!!)

### Background

The Italian legislature when creating the Legislative Decree 50/2016 wanted to restrict subcontracting and subdividing work due to the link with criminal operations which prevailed in Italy at the time. With that objective in mind, Article 105(2) restricted subcontracting in public procurement by not allowing it to exceed 30% of the total amount of the contract for works, services or supplies. As well as this, Article 105(5) reiterated the 30% cap and introduced that subdividing work cannot happen without objective reasons. These articles were used as a deterrent for criminal organisations as it makes participating in public purchasing less attractive and this is capable of preventing the mafia's infiltration.

In August 2016, Autostrade per l'Italia began a restricted tendering procedure for the works to widen the fifth lane of the Italian A8 motorway for approximately 82million Euro, so now small contract. However, Vitali was excluded during the tendering procedure because they had exceeded the 30% limit on subcontracting laid out in Article 105.

### Dispute

As a result of their exclusion, Vitali brought action seeking its readmission to the tendering procedure. The referring court rejected all of Vitali's pleas in law except the plea alleging that the 30% limit on subcontracting provided by Italian law did not conform with EU law, specifically in regards to:

- Article 49 TFEU regarding Freedom of Establishment which prohibits Member States' restricting the set-up of agencies, branches or subsidiaries by nationals;
- Article 56 TFEU which prohibits Member States restricting the freedom of nationals to provide services within the Union;
- Article 78 of Directive 2014/24 that states that public procurement should be adapted to the needs of SMEs; and
- The principle of proportionality which seeks to set actions taken by EU institutions within specified bounds and regulates the action of the EU to keeping the content and form of their action related to the aim.

Nevertheless, they also considered that the Consiglio di Stato (Council of State, Italy) had already previously ruled that the national legislatures was entitled to fix limits on subcontracting as long as the decision is justified with consideration to social sustainability or values set out in Article 36 TFEU regarding public policy and public security. This is also in line with Recital 41 of Directive 2014/24 which states that "*Nothing in this Directive should prevent the imposition or enforcement of measures necessary to protect public policy, public*

*morality [and] public security... provided that those measures are in conformity with the TFEU.*" Article 71 of Directive 2014/24 also states that member states may provide for more stringent liability rules under national law as long as those rules are compatible with EU law.

The ECJ found that although the national legislature is able to create restrictions following Article 71 of Directive 2014/24, the quantitative limit on the use of subcontracting goes beyond that of a reasonable restriction. That is because the quantitative limit restriction provided is applied to whatever the economic sector concerned by the contract at issue. The type of work or identity of the subcontractor is not taken into consideration and therefore does not allow for any assessment on a case-by-case basis where it is possible for Member States to exclude subcontractors under Article 57 of Directive 2014/24. The Commission pointed out that the objective of the Italian legislature to deter criminal organisation from participating in public purchasing could be achieved by less restrictive measures and the Italian law has measures in place already to prohibit the mafia from infiltrating public procurement. The 30% limit on subcontracting was found to mainly discriminate against SMEs as well who are more likely to subcontract and therefore, the 30% limit on subcontracting was found not to be compatible with Directive 2014/24.

This case is a good reminder of how to best set procurement policy in a public body. It is not uncommon to find generic requirements or restrictions within a body's financial or contract standing orders. This case emphasises the point that all procurements should be run on their own merits and may have distinctive issues that required specific restrictions. If your organisation maintains very specific requirements or criteria across all of its tender documents or contracts then it is worth remembering that these should be reviewed on a case by case basis to ensure that particular types of economic operator are not being discriminated against without good reason.

Should you wish to discuss these issues further please contact [Anja Beriro](#) or [Peter Ware](#).

## Contact



Anja Beriro

Partner

[anja.beriro@brownejacobson.com](mailto:anja.beriro@brownejacobson.com)

+44 (0)115 976 6589

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