

ITALIAN LIMIT ON SUBCONTRACTING IN PUBLIC CONTRACTS IS NOT  
LAWFUL. COURT OF JUSTICE OF THE EUROPEAN UNION, JUDGMENT OF  
THE COURT (FIFTH CHAMBER) OF 26TH SEPTEMBER 2019, CASE C-63/18.

The Court of Justice rendered its judgment on the longstanding issue regarding the compatibility of the limit to subcontracting provided by art. 105 of Legislative Decree n. 50/2016 (i.e. the “Public Contracts Code”) with article 71 of European Directive 2014/24/EU.

The issue raised by Regional Administrative Court of Lombardy Region, Italy, regarded whether Articles 49 and 56 TFEU and Directive 2014/24 must be interpreted as precluding national legislation to limit subcontracting in public works. In particular, the provision at stake is art. 105 of the Public Contracts Code, which limits to 30% the share of the contract which a tenderer is permitted to subcontract to third parties.

The Court of Justice – in its judgment in case C- 63/18 – examined the discipline of subcontracting contained in Directive 2014/24/EU, highlighting that *“it cannot be inferred from the intention of the EU legislature to circumscribe more precisely, by means of the adoption of such rules, the situations in which the tenderer uses subcontractors that Member States now have the power to limit that use to a share of the contract fixed in abstract terms as a certain percentage of the contract, as in the case of the limit imposed by the legislation at issue in the main proceeding.*

The Italian Government submitted that subcontracting has always been one of the mechanisms used to carry out criminal operations, and therefore, said limit is intended to prevent the phenomenon of infiltrations by criminal organisations in public works.

In this context, the Court declared that even if the prevention of crimes constitutes a legitimate objective capable of justifying a restriction on the fundamental rules and general principles of the TFEU which apply in public procurement procedures, the 30% limit of subcontracting provided by the Italian Public Contracts Code exceeds what is necessary to achieve that aim.

For further info, please contact:



Avv. Marco Padovan  
mpadovan@studiopadovan.com



Avv. Michele Bonomini  
mbonomini@studiopadovan.com

Avv. Maria Buonanno  
mbuonanno@studiopadovan.com

Therefore, the Court concluded that the subcontracting restriction at issue cannot be regarded as compatible with Directive 2014/24.

It is worth noting that the Court ruled its decision on the old version of Art. 105 of the Public Contracts Code which has been modified by Legislative Decree n. 32/2019 as modified by the Law n. 55/2019. The current wording of Art. 105 still provides a restriction on subcontracting which is set at 40% of the total amount of the contract. However, in view of the aforementioned Judgment of the Court, also the current version of Art. 105 of the Public Contracts Code – even if recently modified – shall be considered as not compatible with the European Directive 2014/24.

The Court decision is binding for the national courts, which shall construe national law in compliance with the principles laid down in such judgment.

The Firm is ranked in the Legal 500 EMEA for Real Estate and Construction (with Avv. Marco Padovan as leading individual) and is also ranked for Commercial Corporate and M&A.

The Firm has extensive experience in major infrastructures and administrative law, with specific regard to public work contracts and real estate development initiatives.

In relation to public contracts the Firm provides its out-of-court assistance to economic operators in all stages of tender procedures, from the identification of the procedure to interpretation of tender documents and rules and the issues arising during the contract performance.

In relation to the private real estate initiatives the Firm provides assistance in all the phases of the development procedures, provides legal opinions on specific complex matters, assists in negotiating contracts for works performance and purchase and lease of land and in obtaining the necessary administrative authorizations.

## CONTACTS

STUDIO LEGALE PADOVAN  
Foro Buonaparte, 54 - Milano 20121  
Via Firenze 32 – Roma 00184  
Phone: +39 024814994  
Fax: +39 0243981694  
e-mail: [info@studiopadovan.com](mailto:info@studiopadovan.com)  
[www.studiopadovan.com](http://www.studiopadovan.com)

