

# After *Spezzino* (Case-C-113/13): A Major Loophole Allowing Direct Awards in the Social Sector

Roberto Caranta\*

*In Spezzino the Court of Justice green lighted direct award of social service contracts to not-for-profit organisations. It is submitted that in allowing direct award the judgment is unnecessarily stretching the thin EU internal market law, since social considerations would have been met by simply setting off contracts for those specific market operators. The judgment also imposes a line of reasoning which is inconsistent with the one followed in the meantime in Directive 2014/24/EU and will have an impact on the implementation of the new directive making it more difficult.*

## Introduction

The facts and the background to the *ASL 5 Spezzino* case have been analysed in depth in another contribution in this issue of the EPPPL.<sup>1</sup> The present paper aims at assessing the judgment of the Court of Justice against EU law, as it was believed to be before the judgment itself was handed down. This will be done in the light of the conclusions of the Advocate general and against the new Public Sector Directive 2014/24/EU.<sup>2</sup>

The whole point is that the referring court – the Italian *Consiglio di Stato* – had problems with the participation in award procedures of economic operators enjoying forms of competitive advantage, be them public sector entities or, as in this case, NGOs.<sup>3</sup> This was labelled as ‘competition between entities that cannot be placed on the same footing.’<sup>4</sup>

The Court of Justice instead saw no evil. And it apparently widened the possibility beyond the participation of those entities in competitive procedures to the direct award of public contracts in their favour.

## I. On the Classification of Ambulance Services

“Three hundred years ago biological taxonomy was a chaotic discipline marked by miscommunication and misunderstanding. Biologists disagreed on the categories of classification, how to

assign taxa to those categories, and even how to name taxa. Fortunately for biology, Linnaeus saw it as his divinely inspired mission to bring order to taxonomy. The system he introduced offered clear and simple rules for constructing classifications. It also contained rules of nomenclature that greatly enhanced the ability of biologists to communicate. Linnaeus’s system of classification was widely accepted by the end of the eighteenth century. That acceptance brought order to a previously disorganized discipline.”<sup>5</sup>

Obviously service procurements are still waiting for their Linnaeus, and ambulance services even more so. As the Court of Justice recalls, Directive 2004/18/EC applies to public service contracts de-

\* Turin University.

1 See A Aschieri ‘Legal and factual background of the *Spezzino* judgment (C113/13): inconsistencies and advantages of the special role played by voluntary associations in the working of the Italian social protection system’ Above in this same issue of the EPPPL.

2 In depth analysis of the main novelties in the new directive in F Lichère, R Caranta and S Treumer (eds), *Modernising Public Procurement: The New Directive* (Copenhagen: DJØF 2014).

3 The companion to the judgment discussed in these pages is Case C-568/13 *Data Medical Service* [2014] ECLI-2466.

4 See the analysis by A Aschieri ‘Italian Requests for Preliminary Rulings: a Difficult Dialogue between National Courts and the CJEU’ (2015) 3 EPPPL, 1-15.

5 M Ereshefsky, *The Poverty of the Linnaean Hierarchy. A Philosophical Study of Biological Taxonomy* (Cambridge: CUP 2001), 1.

defined as public contracts other than public works or supply contracts having as their object the provision of services referred to in Annex II thereto. That annex is divided into two parts, A and B.<sup>6</sup> The distinction is usually couched in the opposition between priority and non-priority services. The full rigour of the directive is applicable to the former while only minimal rules on technical specifications and transparency apply to the latter.<sup>7</sup>

The first problem is therefore to classify a service as priority or not. According to the Court of Justice in *Spezzino* “Urgent and emergency ambulance services are covered by Category 2 in Annex II A to Directive 2004/18 as regards the transport aspects of those services, and Category 25 in Annex II B to that directive as regards the medical aspects thereof.”<sup>8</sup>

That is already somewhat confusing, since the case law so far distinguished between urgent and emergency ambulance services on the one hand and ‘ordinary’ ambulance transport services.<sup>9</sup> The Court seems to subdivide a species where the precedents were distinguishing two genera. True, the difference is of limited theoretical relevance once we are addressing complex and, as in this case, mixed emergency and transport contracts or framework agreements. In practice, however, the end result of the cal-

culuation of the values of the different components will be affected most of the times.<sup>10</sup>

This new distinction might have created some uncertainty for the future, were it not for the clearer provisions now found in Directive 2014/24/EU which will be discussed below.

In the case at hand, the distinction is of limited relevance since the *Consiglio di Stato* simply failed to provide the Court of Justice with information as to which component was prevailing in the contract at issue. This should indeed have been clarified by the referring court given the rich case law on the issue.<sup>11</sup> Not only this, the referring court utterly omitted to tell the Court of Justice whether the value of the contract was above or below the threshold and, if below, whether the contract was anyway of cross-border interest.<sup>12</sup>

This led the Court of Justice to give an articulated and under many aspects speculative answer to the questions raised by the Italian court.

Were the transport component both prevalent and having a value exceeding the threshold, Directive 2004/18/EC would preclude legislation – such as the one at stake in the extant case – which provides that “the local authorities are to entrust the provision of urgent and emergency ambulance services on a preferential basis and by direct award, without any advertising, to the voluntary bodies mentioned in the agreements.”<sup>13</sup>

By contrast, according to the Court of Justice “if the referring court were to find that either the threshold has not been reached or that the value of the medical services exceeds the value of the transport services, only the general principles of transparency and equal treatment flowing from Articles 49 TFEU and 56 TFEU would be applicable in addition to Articles 23 and 35(4) of Directive 2004/18.”<sup>14</sup>

This is wrong in relation to the first part of the last proposition, to the extent that obviously no provision of the directive applies to the award of below the threshold contracts.<sup>15</sup> Concerning the case being litigated, it is however safe to assume that the thresholds were met.<sup>16</sup> It is instead true that the general principles of transparency and equal treatment apply to the award of both below the threshold and non-priority services only provided that the relevant contract are “of certain cross-border interest.”<sup>17</sup>

This is very much a factual decision and once more the *Consiglio di Stato* failed to address this topic. The Court of Justice might have cut short its judgement

6 Case-C-113/13 *Azienda sanitaria locale n. 5 «Spezzino» and Others v San Lorenzo Soc. coop. sociale and Croce Verde Cogema cooperativa sociale Onlus* [2014] ECLI-2440, [33] f.

7 E.g. R Noguellou, ‘Scope and Coverage of the EU Procurement Directives’ in M Trybus, R Caranta, G Edelstam (eds) *EU Public Contract Law. Public Procurement and Beyond* (Bruxelles: Bruylant 2014), 33 f, and in more depth, C Risvig Hansen, *Contracts not covered or not fully covered by the Public Sector Directive* (Copenhagen: DJØF 2012), 109 ff.

8 *Spezzino* (n6), [34]; the Court of Justice refers to Case C-76/97 *Tögel* [1998] ECLI-432, [39]; see also [40] f.

9 See the conclusions by AG Wahl, Case-C-113/13 *Azienda sanitaria locale n. 5 «Spezzino» and Others v San Lorenzo Soc. coop. sociale and Croce Verde Cogema cooperativa sociale Onlus* [2014] ECLI-291, [30] f.

10 See *Spezzino* (n6), [41].

11 C Risvig Hansen (n7) and the works collected in D Dragos – R Caranta (eds), *Outside the EU Procurement Directives - Inside the Treaty?* (Copenhagen: DJØF 2013).

12 See references and discussion in C. Risvig Hansen (n7), 121 ff.

13 *Spezzino* (n6), [44].

14 *Spezzino* (n6), [45].

15 E.g. Joined Cases C-147/06 and C-148/06 *SECAP* [2008] ECR I-3565, [21].

16 See also paragraph 41 of the conclusions.

17 *Spezzino* (n6), [46]; see also [44] ff.

here, most probably warranting itself a second preliminary reference. It wisely decided to articulate an answer in case the contract at hand were indeed to be found to present a cross-border interest.<sup>18</sup>

## II. The Provision of Social Services in the Internal Market

Assuming that the contract at issue was indeed of cross-border interest, the direct award on a preferential basis to voluntary associations covered by the agreements to satisfy needs in that area amounts to indirect discrimination on the basis of nationality, prohibited under Articles 49 TFEU and 56 TFEU. Direct award indeed excludes for-profit entities – but also non-for-profit entities established in other Member States<sup>19</sup> – from an essential part of the market concerned.<sup>20</sup>

The next question is whether this discrimination may be justified by objective circumstances. Here the conclusions of Advocate General Wahl and the judgment of the Court of Justice could hardly diverge more.

The Advocate General was ready to concede that EU law does not “detract from the power of the Member States to organise their social security systems and to adopt, in particular, provisions intended to govern the organisation and supply of health services and medical care”.<sup>21</sup> However, when exercising their powers in the field of health and medical care, the Member States “must none the less comply with EU law, and in particular with the provisions on the internal market. Those provisions, amongst other things, prohibit the Member States from introducing or maintaining unjustified restrictions on the exercise of those freedoms in the health and medical care sector.”<sup>22</sup>

This is true in general<sup>23</sup> and truer with reference to EU public procurement rules, since ‘health and social services’ are referred to among those which are covered by Directive 2004/18/EC while the same directive is expressly listing exceptions to its application.<sup>24</sup>

Specifically as to the existence of an objective justification for the discrimination entailed by the Italian legislation at issue, the Advocate General accepted that “measures which are genuinely designed to ensure that medical services (such as, for example, medical transport services) provided on behalf of the

public authorities to all citizens are reliable and of good quality, while at the same time minimising the cost to the public purse, are in principle capable of justifying a restriction of those fundamental freedoms.”<sup>25</sup>

However, in his opinion, the Italian provisions are not capable of contributing significantly towards the attainment of those objectives. It was not argued in the case that businesses located in other Member States would not be capable of ensuring adequate provision of medical transport services and, possibly more importantly, “the absence of any form of public procurement procedure or of previous publicity would seem usually to work to the detriment of public finances.”<sup>26</sup> Quite to the contrary, “[o]pening up award procedures to other potential tenderers may provide contracting authorities with more offers (and thus with more choice in terms of both quality and price), and should encourage operators which are interested in the award to be more economical and efficient.”<sup>27</sup>

The Advocate General finally did away with the ‘constitutional’ argument deduced from the principle of solidarity, under which a preferential treatment of non-for-profit organisation is “not only aimed at limiting public expenditure for the medical services concerned, but also at encouraging citizens to engage in charitable activities and to provide voluntary work for the benefit of society as a whole.”<sup>28</sup>

While accepting the relevance of the principle under EU law, the Advocate General concluded that “the important function attributed to those organisations cannot be pursued, I would say, by acting *outside* the scope of the common rules, but by operating *within*

18 *Spezzino* (n6), [48-49]; see also paragraphs 45 f of the conclusions as to the criteria to be used when investigating whether a contract is of cross-border interest.

19 *Spezzino* (n6), [51].

20 *Spezzino* (n6), [52].

21 *Spezzino* (n6), [33-34].

22 *P. Spezzino* (n6), [35].

23 See the analysis by V Hatzopoulos, ‘Health law and Policy: The Impact of the EU’ in G de Búrca (ed) *EU Law and the Welfare State. In Search of Solidarity* (Oxford: OUP 2005), 111 ff.

24 *Spezzino* (n6), [36] f.

25 *Spezzino* (n6), [54].

26 *Spezzino* (n6), [56].

27 *Spezzino* (n6), [57].

28 *Spezzino* (n6), [62].

the boundaries of those rules, taking advantage of the specific rules enacted by the legislature with a view to supporting their activities.”<sup>29</sup>

According to the Advocate General, both Directive 2004/18/EC and the case law of the Court make sufficient room for social considerations in the award of procurement contracts, so that there is no reason to bend the rules of the TFEU.<sup>30</sup>

As already anticipated, the approach by the Court of Justice could not have been more diverging, starting with the provisions it referred to as a basis for its ruling. The Court of Justice listed with plenty of detail the applicable Italian legislation, beginning from Article 118 of the Constitution on citizens’ and associations’ participation in public interest activities.<sup>31</sup>

According to the Court, in so far as the relevant Italian provisions envisage the participation of voluntary associations in a public service and refer to the principle of the good of the community,<sup>32</sup> they are part of the constitutional and legal provisions relating to the voluntary activities of citizens.<sup>33</sup> These objectives are taken into consideration by EU law, which allows the Member States the power to organise their public health and social security systems.<sup>34</sup> True, as the Advocate General had remarked, in the

exercise of that power the Member States may not introduce or maintain unjustified restrictions of the exercise of fundamental freedoms in the area of health care. However, and here the difference becomes most pronounced, “in the assessment of compliance with that prohibition, account must be taken of the fact that the health and life of humans rank foremost among the assets or interests protected by the Treaty and it is for the Member States, which have a discretion in the matter, to decide on the degree of protection which they wish to afford to public health and on the way in which that degree of protection is to be achieved.”<sup>35</sup>

According to the Court of Justice, the objective of maintaining, on grounds of public health, a balanced medical and hospital service open to all may be considered as a legitimate derogation to free movement on grounds of public health, in so far as it contributes to the attainment of a high level of health protection.<sup>36</sup>

The Court of Justice only takes on board the concerns raised by the *Consiglio di Stato* to a very limited extent.<sup>37</sup> According to the Court, the organisation chosen in the Member State “must actually contribute to the social purpose and the pursuit of the objectives of the good of the community and budgetary efficiency on which that system is based.”<sup>38</sup> To this end, the Court of Justice sets limits to the voluntary associations, which shall not pursue public objectives other than those mentioned above, shall not make any profit as a result of their services, apart from the reimbursement of the variable, fixed and on-going expenditure necessary to provide them, and finally shall not procure any profit for their members.<sup>39</sup> Furthermore, “the activities of voluntary associations may be carried out by the workforce only within the limits necessary for their proper functioning. As regards the reimbursement of costs, it must be ensured that profit making, even indirect, cannot be pursued under the cover of a voluntary activity and that volunteers may be reimbursed only for expenditure actually incurred for the activity performed, within the limits laid down in advance by the associations themselves.”<sup>40</sup>

The ‘good of the community’ – or solidarity for what matters – is too generic a standard to provide, alone and without qualification, a justification to limitations imposed on the Treaty fundamental freedoms. The requirements laid down by the Court of Justice are detailed enough. Only they are not per-

29 *Spezzino* (n6), [65].

30 See *Spezzino* (n6), [67] ff.: this itself might be challenged: see the analysis by D C Dragos and B Neamtu, ‘Sustainable public procurement in the EU: experiences and prospects’ in F Lichère, R Caranta and S. Treumer (eds), *Modernising Public Procurement*, (n2) 308 ff and A Semple, *A Practical Guide to Public Procurement* (Oxford: OUP 2015) in part. Chapter 7.

31 *Spezzino* (n6), [9-18].

32 The Italian text has ‘solidarietà’, the French ‘solidarité’ (solidarity) which is suggested to be a more current and therefore useful language choice: see *G de Búrca* (n23) and *V Hatzopoulos* (n23), 137 ff.

33 *Spezzino* (n6), [53].

34 *Spezzino* (n6), [54] f.

35 *Spezzino* (n6), [56]; C-147/07 *Commission v Germany* [2008], ECLI-492, [46, 51] and C-570/07 *Blanco Pérez and Chao Gómez*, [2010] ECLI-300, [43- 44, 68, 90] are referred to also for more references.

36 *Spezzino* (n6), [58].

37 See critically A Sanchez Graells, ‘Competition and State aid implications of the *Spezzino* Judgment (C-113/13): the scope for inconsistency in assessing support for public services voluntary organisations’ Below in this same issue of the EPPPL.

38 *Spezzino* (n6), [60].

39 *Spezzino* (n6), [61].

40 *Spezzino* (n6), [62].

factly in line with the checklist provided in Directive 2014/24/EU, which will be discussed later.

### III. A Footnote on *Sodemare*

Before discussing the issues raised in view of the new Directive, a small footnote is required on what is probably the most relevant precedent to *Spezzino*. *Sodemare* concerned a statute of the Lombardy Region (again in Italy) only allowing NGOs to be part of contracts concerning the provision of services in the framework of the social welfare system.<sup>41</sup> Rejecting the arguments raised by a federation of Belgian commercial companies, the Court of Justice held that “a Member State may, in the exercise of the powers it retains to organize its social security system, consider that a social welfare system of the kind at issue in this case necessarily implies, with a view to attaining its objectives, that the admission of private operators to that system as providers of social welfare services is to be made subject to the condition that they are non-profit making.”<sup>42</sup>

The judgment was referred to in the “Guide to the application of the European Union rules on State aid, public procurement and the internal market to services of general economic interest and, in particular, to social services of general interest,” a Commission staff working document, as acknowledging that some margins for preferential treatment are left open in EU law.<sup>43</sup> The 2011 Green Paper ‘on the modernisation of EU public procurement policy’ having opened the way for what has been the 2014 reform quoted from the Staff working document and addresses a question to potential respondents on whether the Directives should allow the possibility of reserving contracts involving social services to NGOs, or whether or not there should be other privileges for such organisations in the context of the award of social services contracts.<sup>44</sup>

In his plight for the integrity of internal market principles, Advocate General Wahl tried hard to distinguish the extant case from *Sodemare*. In his opinion, that judgment did not deal with the application of public procurement rules but was rather concerned with the structuring of a welfare system “in which only non-profit-making entities were permitted to provide certain services to the public when the cost of those services was either covered by the patients, in whole or in part, or by the Region.”<sup>45</sup> Ac-

ording to his opinion, there was no award of a service contract “to one or more specific entities among those which were potentially interested. Rather, the system was open and non-discriminatory to the extent that all entities which met certain objective requirements as laid down in the applicable laws could be admitted to the welfare system as providers of social welfare services.”<sup>46</sup>

This is a distinction without very much of a relevant difference. True under the new Public Sector Directive situations in which all operators fulfilling certain conditions are entitled to perform a given task, without any selectivity, should be understood as being simple authorisation schemes, and may indeed not be classed as procurement contracts.<sup>47</sup>

From an internal market viewpoint, however, in both cases a Member State is limiting access to a market to the benefit of one – and the same – category of undertakings. It is therefore submitted that *Sodemare* was more sensibly treated in the *Spezzino* judgment than in the conclusions of the Advocate general. In *Spezzino* the Court referred to *Sodemare* both to ground the power of the Member States to organise their public health and social security systems<sup>48</sup> and to hold that a Member State may “consider that a social welfare system for elderly people necessarily implies, with a view to attaining its objectives, that the admission of private operators to that system as providers of social welfare services is to be made subject to the condition that they are non-profit-making.”<sup>49</sup>

It logically follows on this that “a Member State, in the context of its discretion to decide the level of protection of public health and to organise its social security system, may take the view that recourse to voluntary associations is consistent with the social

41 Case C-70/95 *Sodemare* [1997] ECR I-3395; see also the analysis by *V Hatzopoulos* (n23), 137 ff.

42 *Spezzino* (n6), [32].

43 (SEC(2010) 1545), at paragraph 4.2.10.

44 COM(2011) 15 final, question 97.1.2.

45 *Spezzino* (n6), [71].

46 *Spezzino* (n6), [72].

47 See now Recital 4 to Directive 2014/24/EU; one might wonder if this is still the case where the operators are not paid by customers or users but directly by a contracting authority (as it was the case in Case C-70/95 *Sodemare* [1997] ECR I-3395, [2]).

48 *Spezzino* (n6), [57].

49 *Spezzino* (n6), [58].

purpose of the emergency ambulance services and may help to control costs relating to those services.”<sup>50</sup>

#### IV. Reserved Contract, But Why Direct Award?

The maddening thing about the judgement in *Spezzino* is that all the discussion on possible justifications for national measures derogating from fundamental freedoms in no way sustains the conclusion that “Articles 49 TFEU and 56 TFEU must be interpreted as meaning that they do not preclude national legislation under which the provision of urgent and emergency ambulance services must ‘be entrusted on a preferential basis and awarded directly,’ without any advertising, to (genuine) voluntary associations.”<sup>51</sup>

Arguably the objective of ‘the good of the community’ might, as in *Sodemare*, require that a health welfare system is organised excluding for-profit market operators.<sup>52</sup> This is not unheard of – and it is expanding – and somewhat corresponds to reserved contracts (albeit with the view to protect users rather

than those working with the tenderer as it has been so far the case in EU law).<sup>53</sup>

But why to authorise their direct award? As remarked by the Advocate General, the existence of competitors would normally encourage a non-profit-making entity to be even more cost-conscious, thus using its resources more effectively.<sup>54</sup> The same fact that the respondents in the main proceedings were non-profit-making organisations which would have been interested in providing the services concerned is rightly taken as evidence “that there is clearly scope for opening the award of such services to a higher degree of competition, even among non-profit-making entities.”<sup>55</sup>

Holding that direct awards contribute towards ‘budgetary efficiency’ simply defies belief (and anyway no argument to this end was developed by the Court of Justice).<sup>56</sup> Also the Court of Justice totally failed in assessing the proportionality of the measure. This is at odds with the case law which is – or was?<sup>57</sup> – firm in holding that, while national legislation or a national practice that constitutes a measure having equivalent effect to quantitative restrictions may be justified on public interest grounds, it must, in accordance with the principle of proportionality, be appropriate for ensuring attainment of the objective pursued and must not go beyond what is necessary in order to attain that objective.<sup>58</sup>

#### V. The New Public Sector Directive

Ambulance services feature prominently and in a number of recitals and provisions of Directive 2014/24/EU. One might have expected more references to its provisions even if it was not applicable to the facts of the case *ratione temporis*.<sup>59</sup>

Somewhat surprisingly, the new Public Sector Directive is simply mentioned in passing in the conclusions. The Advocate General recalls that the new directive both widens even further the Member States’ discretion in that field and contains some specific rules for services provided by non-profit-making organisations. However, reference to the new directive is made only to support the conclusion that ambulance services are caught by Directive 2004/18/EU.<sup>60</sup>

Understanding the new rules is not an easy task,<sup>61</sup> but basically: a) under Article 10(h) of Directive 2014/24/EU emergency ambulance services are excluded from the coverage of the directive in so far as

50 *Spezzino* (n6), [59].

51 *Spezzino* (n6), [65].

52 However see critically A. Sanchez Graells, (n 37).

53 On reserved contracts as traditionally understood in EU law R Caranta ‘Sustainable Procurement’ in M. Trybus, R. Caranta, G. Edelstam (eds) *EU Public Contract Law* above (n7), 175 f.

54 *Spezzino* (n6), [58].

55 *Spezzino* (n6), [59].

56 Another question is whether budgetary efficiency provides a legal base for EU rules on public procurement: see M Comba, ‘Variations in the scope of the new EU public procurement Directives of 2014’, F Lichère, R Caranta and S Treumer (eds), *Modernising Public Procurement* above (n2), 30ff. Here, however, efficiency acts as a legal yardstick against which the legality of national measures is assessed.

57 According to S Arrowsmith ‘Rethinking the approach to economic justifications under the EU’s free movement rules’ the Court of Justice may actually see often enough limiting its proportionality review of national measures. Available at <<http://www.nottingham.ac.uk/pprg/publications/index.aspx>> Last accessed on 17 February 2016.

58 Case C-573/12 *Ålands Vindkraft* [2014] ECLI-2037, [76]; C-524/07 *Commission v Austria* [2008] ECLI-717, [54]; see also the analysis by B Pirker, *Proportionality Analysis and Models of Judicial Review* (Groningen: Europa Law Publishing 2013), 255 ff.

59 It is however submitted they might help in interpreting the old provisions: see R Caranta, ‘The changes to the public contract directives and the story they tell about how EU law works’ in *CMLRev* 2015, 420 ff.

60 *Spezzino* (n6), [40].

61 See also A Sanchez Graells, (n37).

they are provided by non-profit organisations; *Spezzino* will apparently stay as an authority to the contentious proposition that emergency ambulance services can be awarded directly to these organisations: b) all other ambulance services will be awarded under the 'light regime' foreseen in Articles 74 ff of the new Public Sector Directive provided their value is above € 750 000;<sup>62</sup> if the threshold is not met, *Spezzino* will stand as an authority for the proposition that the general principles of transparency and equal treatment will apply in case the contract is of cross-border interest;<sup>63</sup> c) under Article 77, contracting authorities may however decide to award those contracts (and others) following a procedure opened by a call for competition but where participation is reserved to non-profit organisations whose management structures or ownership are based on employee ownership or participatory principles, or require the active participation of employees, users or stakeholders; additionally the organisation eventually selected for the direct award shall not have been awarded another contract for the services concerned by the same contracting authority following a reserved award procedure within the past three years. These requirements are not fully aligned with those spelt out in *Spezzino*. But neither are Article 10(h) and 77 of Directive 2014/24/EU.<sup>64</sup>

It is assumed that the option under c) will be used for simple transport ambulance services, but nothing will stop contracting authority to test (a section of) the market by way of a call for competition. In the end the new directive, quite on the footsteps of *Sodemare*, very much widens the scope of reserved contracts in this area.

## VI. Conclusions

In *Spezzino*, as well as in *Careggi*, the *Consiglio di Stato* raised the problem of 'competition between entities that cannot be placed on the same footing.' The *Consiglio di Stato* might have been looking for a reversal of the case law widely allowing participation to public procurement procedures.<sup>65</sup>

This was never to happen because, unlike Italian courts, the Court of Justice is not in favour of blanket exclusions from procurement procedures which are seen as unnecessarily limiting the potential competition.<sup>66</sup> Therefore the Court was scrambling for some measure to counterbalance a real issue of po-

tential market distortion. In *Careggi* the answer given by the Court was rather obscure, basically amounting at telling the referring court to think again about the provisions in Directive 2004/18/EC on the exclusion of abnormally low tenders and this after the *Consiglio di Stato* had already judged those rules as being unhelpful.<sup>67</sup> In *Spezzino* instead the Court devised safeguards of its own making.<sup>68</sup>

It is doubtful whether this will be sufficient to dispose of the issue raised by the Italian highest administrative court. The issue is serious enough. It is telling, as remarked by the Advocate General, that the award had not been challenged by commercial for-profit undertakings but rather by some non-for-profit organisations which were not part to what the referring court classed as a 'framework agreement.'<sup>69</sup> Hearsay evidence, requiring all sorts of disclaimers, has it that in Italy certain procurements are in fact the hunting preserve of social cooperatives because commercial operators cannot compete with the favourable cost structure allowed to social cooperatives by *ad hoc* labour and tax law rules.<sup>70</sup>

True, the *Consiglio di Stato* was probably not very forthcoming in laying out the problem, drafting its orders for reference in 'abstract doctrinal style' which, while preferred in some Civil Law countries like Italy, it is not very helpful when addressing a wider audience. The competition concerns should indeed have

62 See generally S Smith, 'Articles 74 to 76 of the Public Procurement Directive: the new "light" regime for social, health and other services and a new category of reserved contracts for certain social, health and cultural services contracts' in *Public Procurement L. Rev.* 2014, 159.

63 *Spezzino* (n6), [45].

64 Please refer to R Caranta 'Mapping the margins of EU public contracts law: covered, mixed, excluded and special contracts' in F Lichère, R Caranta and S Treumer (eds), *Modernising Public Procurement* above (n2), 84 f

65 Case C-305/08 *CoNISMa* [2009] ECR I-12129; Case C-159/11 *ASL Lecce* [2012] ECLI-817.

66 Beside the judgments referred to in the previous footnote see also Case C-213/07 *Michaniki* [2008] ECR I-349; see more generally M Steinicke, 'Qualification and Shortlisting' in M Trybus, R Caranta, G Edelstam (eds) *EU Public Contract Law* above (n2), 110 f.

67 *A Aschieri*, (n4).

68 *Spezzino* (n6), [60] ff.

69 *Spezzino* (n6), [59].

70 See also R Caranta – S Richetto, 'Sustainable Procurements in Italy: Of Light and Some Shadows' in R Caranta and M Trybus (eds) *The Law of Green and Social Procurements in Europe* (Copenhagen: DJØF 2010); This is itself debatable: A Bernardi, 'The Co-operative Difference: economic, organisational and policy issues' in *Int. Journ. Co-operative Management* (2007) 2, 14 f.

been substantiated with hard economic data.<sup>71</sup> The State aid aspects were not really articulated in the order for reference and this is partly to blame for a judgment which is unsatisfactory under this respect.<sup>72</sup>

Be it as it may, coming as it does at the heels of a major recodification of public procurement rules, a

judgment devising new requirements for direct legal awards can hardly be seen as contributing to legal certainty.<sup>73</sup>

It is however submitted that the Court of Justice did worse than that in *Spezzino*. In green-lighting direct awards, it is drilling a big hole in the fabric of EU public procurement law. Recital 13 to Directive 2007/66/EC, the second Remedies Directive, pointed out that illegal direct award of contracts had been called by the Court of Justice “the most serious breach of Community law in the field of public procurement on the part of a contracting authority or contracting entity.” Apparently the Court of Justice is now making (plenty of) direct awards legal.<sup>74</sup>

---

71 *A Aschieri*, (n4) .

72 To put it mildly, but see *A Sanchez Graells*, (n37).

73 For a discussion about the interplay of the different institutional actors in the regulation of public contracts please refer to *R. Caranta*, (n59), 409 ff.

74 *Spezzino* has now been affirmed in Case C-50/14 *Casta* [2016] ECLI-56.