

who are linked to an operator which was excluded, in breach of European Union law, from an earlier tendering procedure, even following the new tendering procedure intended to remedy that breach of European Union law, in so far as that tendering procedure and the subsequent award of new licences have not in fact remedied the exclusion of that operator from the earlier tendering procedure.

3. It follows from Articles 43 EC and 49 EC, the principle of equal treatment, the obligation of transparency and the principle of legal certainty that the conditions and detailed rules of a tendering procedure such as that at issue in the case before the referring court and, in particular, the provisions concerning the withdrawal of licences granted under that tendering procedure, such as those laid down in Article 23(2)(a) and (3) of the model contract between the Independent Authority for the Administration of State Monopolies and the successful tenderer for the licence for betting on events other than horse races, must be drawn up in a clear, precise and unequivocal manner, a matter which it is for the referring court to verify.

(¹) OJ C 65, 03.03.2012.

Reference for a preliminary ruling from the Tribunale Amministrativo Regionale per le Marche (Italy) lodged on 20 February 2012 — Swm Costruzioni 2 SpA, D. I. Mannocchi Luigino v Provincia di Fermo

(Case C-94/12)

(2012/C 151/24)

Language of the case: Italian

Referring court

Tribunale Amministrativo Regionale per le Marche

Parties to the main proceedings

Applicants: Swm Costruzioni 2 SpA, D. I. Mannocchi Luigino

Defendant: Provincia di Fermo

Question referred

Must Article 47(2) of Directive 18/2004/EC (¹) be interpreted as precluding, in principle, the legislation of a Member State, such as the Italian legislation set out in Article 49(6) of Legislative Decree No 163/2006, which prohibits, except in special circumstances, reliance on the capacities of more than one auxiliary undertaking, and provides that '[f]or works contracts, the tenderer may rely on the capacities of only one auxiliary undertaking for each qualification category. The invitation to tender may permit reliance on the capacities of more than one auxiliary undertaking on account of the value of the contract or the special nature of the services to be provided ...'?

(¹) OJ 2004 L 134, p. 114.

Reference for a preliminary ruling from the Tribunale Amministrativo Regionale per il Piemonte (Italy) lodged on 24 February 2012 — Fastweb SpA v Azienda Sanitaria Locale di Alessandria

(Case C-100/12)

(2012/C 151/25)

Language of the case: Italian

Referring court

Tribunale Amministrativo Regionale per il Piemonte

Parties to the main proceedings

Applicant: Fastweb SpA

Defendant: Azienda Sanitaria Locale di Alessandria

Other parties: Telecom Italia SpA, Path-net SpA

Question referred

Do the principles of equality of the parties, of non-discrimination and of protection of competition in public tendering procedures referred to in Directive 89/665/EEC, (¹) as ... amended by Directive 2007/66/EC, (²) preclude the most recent case-law (the '*diritto vivente*') as laid down in Decision No 4 of [7 April] 2011 of the Plenary Assembly of the Consiglio di Stato, according to which the cross action, which seeks to challenge recognition of the legitimacy of the applicant in the main action by contesting its admission to the tendering procedure, must of necessity be heard before the main action and carry compelling implications for examination of the main action, even in cases where the applicant in the main action has an interest in the recommencement of the entire selection procedure (*interesse strumentale*) and irrespective of the number of competitors which took part in the procedure, with specific reference to cases where only two participants remained in play in that procedure (namely, the applicant in the main action and the applicant in the cross-action, the latter being also the successful tenderer), each seeking to have the other excluded on the grounds that its tender failed to meet the minimum requirements for the tender to be considered suitable?

(¹) OJ 1989 L 395, p. 33.

(²) OJ 2007 L 335, p. 31.

Reference for a preliminary ruling from the Hoge Raad der Nederlanden (Netherlands), lodged on 29 February 2012 — Staat der Nederlanden v Essent NV and Essent Nederland BV

(Case C-105/12)

(2012/C 151/26)

Language of the case: Dutch

Referring court

Hoge Raad der Nederlanden