



25.1.2024

## NOTICE TO MEMBERS

**Subject: Petition No 0351/2023 by Chiara Isola (Italian) on the alleged lack of open tenders for public works in Italy and the non-compliance of Legislative Decree No 36/2023 with EU law**

### 1. Summary of petition

In respect of the new Italian Procurement Code, the petitioner is concerned that, as pointed out by ANAC, Italy's anti-corruption authority, under the new Legislative Decree No 36/2023 approximately 98.7% of public works could potentially be awarded in Italy without an open public call for tender (i.e. 98.7% of direct tenders and calls for tenders). The petitioner considers that setting the European thresholds for contracts at EUR 5.3 million could be abusive and constitute a potential breach of European legislation that was not enacted for the purpose of reducing the number of public tenders in a Member State to practically none. She is concerned about the enormous power that would be placed in the hands of public officials at local and national level who could legally decide, without any oversight, where to allocate public works and public funds, including European funds. The petitioner is concerned about a possible increase in corruption and bribery and a reduction in transparency in the granting of tenders as well as the establishment of barriers to entry, preventing European companies and professionals from participating in a large proportion of Italian public tenders, which would thus be uncompetitive. She emphasises that the new procurement code would not guarantee participation on the basis of gender equality and equal opportunities and would also entail risks for the health and safety of EU workers, as it allows for seven levels of subcontracting posing a serious risk of reducing the quantity of inspections and compromising the effectiveness of oversight. The petitioner therefore calls on the European institutions to intervene to assess the full compliance of the newly approved decree with EU rules.

### 2. Admissibility

Declared admissible on 3 July 2023. Information requested from Commission under Rule

227(6).

### 3. Commission reply, received on 25 January 2024

The issues raised in the present petition are quite similar to those addressed by written question E-001083/2023 to which the Commission has answered on 27 June 2023<sup>1</sup>. The Commission therefore refers to the entire content of this answer.

The Commission would like, however, to underline that, as stated in its answer to the above-mentioned written question, the figure of 98,7% of public works contracts being potentially awarded without an open tender corresponds to the number contracts whose value is below the thresholds set by the EU Public Procurement Directives<sup>2</sup>.

First, it should be noted that this percentage is likely to be substantially lower if the contracts were quantified by their value.

Moreover, these contracts are outside the scope of the EU Public Procurement Directives. The Court of Justice of the European Union has ruled in multiple occasions that when a public contract below the EU thresholds features a certain cross-border interest, the fundamental principles of transparency and non-discrimination enshrined in the Treaties must still be applied to its award<sup>3</sup>. The basic standards required by the Court in these instances include, *inter alia*, an adequate level of advertising through appropriate means, a non-discriminatory, transparent, impartial selection, and the possibility for unsuccessful bidders to ask for review.

The new Italian Public Procurement Code<sup>4</sup> states that the award and performance of below-threshold contracts are subject to the principles indicated in the code<sup>5</sup>.

Moreover, Article 48(2) of the new code establishes that if the contracting authority finds that a below-threshold contract features a certain cross-border interest, it is bound to award it based on the ordinary rules of the code, thereby setting an even higher transparency standard than that required by EU law.

Without prejudice to the Commission's powers as guardian of the Treaties, it is up to the competent national authorities (including administrative courts, in case of litigation) to verify whether the fundamental principles are applied in compliance with the code and the EU rules.

#### Conclusion

Should a problem of compatibility with the applicable EU legal framework (i.e., the EU Public Procurement Directives and the relevant provisions of the Treaties) be identified in the new Italian Public Procurement Code, the Commission will take the appropriate steps in accordance with its powers.

Furthermore, it is worth to note that the possibility to present a complaint to the Commission

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<sup>1</sup> [https://www.europarl.europa.eu/doceo/document/E-9-2023-001083\\_EN.html](https://www.europarl.europa.eu/doceo/document/E-9-2023-001083_EN.html)

<sup>2</sup> Namely, Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ L 94, 28.3.2014, p. 65)

<sup>3</sup> Commission interpretative Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives, OJ C 179, 1.8.2006, p. 2–7, 2006/C 179/02

<sup>4</sup> Article 48 of the new Public Procurement Code is available at:  
<https://www.gazzettaufficiale.it/eli/id/2023/04/13/23A02179/sg>

<sup>5</sup> Article 3 of the Code requires contracting authorities to promote market access for economic operators in accordance with the principles of competition, impartiality, non-discrimination, publicity and transparency, and proportionality.

is open to any citizen who considers that an incompatibility exists between the national regulations and the EU legal framework<sup>6</sup>.

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<sup>6</sup> To lodge a complaint to the European Commission: [https://commission.europa.eu/about-european-commission/contact/problems-and-complaints/complaints-about-breaches-eu-law-member-states/how-make-complaint-eu-level\\_en#:~:text=and%20228%20TFEU\).-Submitting%20a%20complaint%20to%20the%20European%20Commission,in%20any%20official%20EU%20language](https://commission.europa.eu/about-european-commission/contact/problems-and-complaints/complaints-about-breaches-eu-law-member-states/how-make-complaint-eu-level_en#:~:text=and%20228%20TFEU).-Submitting%20a%20complaint%20to%20the%20European%20Commission,in%20any%20official%20EU%20language).