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# The impact of the *Spezzino* judgment for third sector organisations

Dr. Pedro Telles<sup>1</sup>

## 1. Introduction

This paper analyses the potential implications that the *Spezzino* case<sup>2</sup> may have for third sector organisations wishing to take part in the public procurement of certain service contracts. The Court of Justice of the EU (CJEU) held as admissible in *Spezzino* to award directly and on a preferential basis some service contracts to not-for profit organisations compliant with certain requirements. This decision by the CJEU constitutes a major derogation of the principles of Articles 49 (freedom of establishment) and 56 (freedom of services) of the TFEU.<sup>3</sup>

The paper is structured around the requirements established by CJEU in *Spezzino*, the impact it may have on third sector organisations across the EU and its relationship going forward with Directive 2014/24/EU, particularly the new “light touch regime” for specific categories of contracts. This paper argues that the scope for impact on third sector organisations is smaller than anticipated at first glance. The exception created by *Spezzino* only applies to contracts subject to primary EU law, that is contracts with a cross-border interest but not covered by either Directive 2004/18/EC or Directive 2014/24/EU. Furthermore, the grounds for the exception need to be interpreted restrictively. In consequence, going forward it is arguable that it only applies to all emergency ambulance service contracts, as these are explicitly excluded from Directive 2014/24/EU, and urgent ambulance service contracts with a value under €750,000 and a cross-border interest.

## 2. Scope of *Spezzino* ruling for third sector organisations

The details of the *Spezzino* case have been explored elsewhere,<sup>4</sup> but it is relevant for the purposes of this paper to mention that the *Spezzino* case dealt with the acquisition of emergency and urgent ambulance services. In more detail, in *Spezzino* it was held that directly awarding urgent and emergency ambulance services to voluntary organisations, as allowed for by the Italian Constitution, is within the exception granted to Member States on the grounds of public health, in accordance with *Sodemare*<sup>5</sup>, *Stamatelaki*<sup>6</sup> and *Commission v Germany*.<sup>7</sup>

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<sup>1</sup> Senior Lecturer in Law, Swansea University College of Law (p.telles@swansea.ac.uk).

<sup>2</sup> Azienda sanitaria locale n.5 “Spezzino” and Others, C-113/13, EU:C:2014:2240

<sup>3</sup> Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326/308.

<sup>4</sup> A Aschieri, “Legal and factual background of the Spezzino Judgment (C-113/13): inconsistencies and advantages of the special role played by voluntary associations in the working of the Italian social protection systems”, on this EPPPL and D McGowan, “Does the Reservation of Ambulance Services to Voluntary Organisations on a Cost Reimbursement Basis Give Rise to a Public Service Contract? Case C-113/13, *Azienda Sanitaria Locale No. 5 ‘Spezzino’ v San Lorenzo Società Cooperativa Sociale*” (2015) 24(3) *Public Procurement Law Review* NA61-NA66.

<sup>5</sup> Case C-70/95, EU:C:1997:301.

<sup>6</sup> Case C-444/05, EU:C:2007:231.

<sup>7</sup> Case C-141/07, EU:C:2008:492.

The *Spezzino* case constitutes a clear and visible exception to at least two well understood EU freedoms: freedom of establishment and freedom of service, contained respectively in Articles 49 and 56 TFEU.<sup>8</sup> As an exception to general principles, a restrictive interpretation is the correct way to interpret it,<sup>9</sup> thus meaning that any violation of EU treaty principles needs to be kept to the bare minimum to achieve the aim set forth by the Court. A restrictive interpretation limits the scope of scenarios where this exception could be applicable and the potential implications it can have for third sector organisations.<sup>10</sup>

The *Spezzino* decision was specifically about how third sector organisations should be treated in the “acquisition” of some service contracts, provided they complied with certain requirements. The Court held that it was lawful to effectively exclude the procurement of those service contracts from the TFEU treaty principles if certain conditions were met. The conditions set in the ruling are:

I) that services are for urgent and emergency ambulance services,

II) to be awarded to voluntary associations whose legal and contractual framework contributes to the social purpose, and the pursuit of the objectives of the good of the community,

III) in compliance with budgetary efficiency.

## 2.1 Urgent and emergency ambulance services

The first element of the *Spezzino* ruling extends its coverage only to urgent and emergency ambulance services as they are considered to be “Part B”<sup>11</sup> services and, consequently, excluded from the application of the bulk of Part A rules of Directive 2004/18/EC. Under Directive 2004/18/EC most public contracts are subject to Part A rules, whereas a few are subject to Part B only, including some medical transport ones. As the situation at hand involved mixed contracts, the Court concluded<sup>12</sup> that if the transport

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<sup>8</sup> Advocate General Wahl on its conclusion adopted an opposing view, considering that national law provisions need to comply with Articles 49 and 56 TFEU as well as Directive 2004/18/EC, cfr Opinion of Advocate General Wahl of 30 April 2014 in *Azienda sanitaria locale n. 5 «Spezzino» and Others*, C-113/13, EU:C:2014:291, para 76.

<sup>9</sup> On a similar note, Recital 28 of Directive 2014/24/EU which is cited explicitly by the CJEU in paragraph 8, appears to exclude the application of the Directive to “certain emergency services where they are performed by non-profit organisations” states that “the exclusion should not be extended beyond that strictly necessary.”

<sup>10</sup> It has long been established in CJEU case law that third sector organisations are considered economic operators for the purposes of applying EU public procurement rules. For all, *Commission v Italy* Case C-119/06 EU:C:2007:729 and *CoNISMa* Case C-305/98 EU:C:2009:807, para 52. As for the impact of the third sector in the economy in general, in the UK it is estimated that it adds £11.8 billion in Gross Value Added to the economy and the total yearly output of volunteers is estimated at £23.9 billion, according to Data from the National Council for Voluntary Organisations: <http://data.ncvo.org.uk/a/almanac14/what-is-the-sectors-contribution-to-the-economy/>, accessed July,12th 2015 and Cabinet Office, (2013)Community Life Survey Report.

<sup>11</sup> The correct distinction is between Annex II A and Annex II B services, although they are colloquially known as “Part A” and “Part B” services respectively.

<sup>12</sup> In accordance with prior case law such as *Commission v Ireland* case C-507/03, EU:C:2007:676 and *Commission v Ireland* case C-226/09, EU:C:2010:697.

element value exceeded the value of the medical services,<sup>13</sup> then the contract would have been subject to Part A rules<sup>14</sup> and the exception would not apply. In consequence, under Directive 2014/18/EC only Part B services could give rise to the application of exception.<sup>15</sup> The Court considered as well that “contracts for the services referred to in Annex II B are, in principle, in the light of their specific nature, not of sufficient cross-border interest to justify their award being subject to the conclusion of a tendering procedure intended to enable undertakings from other Member States to examine the contract notice and submit a tender.”<sup>16</sup> The Court added, correctly, that Part B contracts are subject to primary law, particularly Articles 49 and 56 of TFEU, building from then onwards the argument that would justify setting aside those EU principles.<sup>17</sup>

What the Court did not do on its decision, was setting aside Part A rules in Directive 2004/18/EC, nor did it made any reference which would allow us to conclude that the Directive 2004/18/EC could be set aside if it clashed with national provisions. It is interesting to notice that while the Court had no qualms in setting aside the primary law, it refrained from doing the same for the secondary source. And here lies a crucial finding about *Spezzino*: it only applies to contracts covered by primary law only.<sup>18</sup>

The scope question remains valid however for other analogous contracts related to public health and social security systems that are not covered by Directive 2004/18/EC or Directive 2014/24/EU,<sup>19</sup> that is contracts below-thresholds but with a cross-border interest.<sup>20</sup> These contracts would be subject to primary law, thus liable for being set aside due to national considerations. However, as mentioned in Section 2 above, restrictions to EU principles should be interpreted restrictively therefore raising the question if it is possible to extend the exception at all to analogous services with a value below that of the financial thresholds.<sup>21</sup>

## 2.2 Specific requirements for voluntary organisations

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<sup>13</sup> Following the previous decisions of *Walter Tögel v Niederösterreichische Gebietskrankenkasse*, Case C-76/97 ECLI:EU:C:1998:432 and *Felix Swoboda GmbH v Österreichische Nationalbank* Case C-411/00

ECLI:EU:C:2002:660

<sup>14</sup> *Spezzino*, para 34 and more specifically 41-45, particularly the latter.

<sup>15</sup> *Spezzino*, para 45.

<sup>16</sup> *Spezzino*, para 42. With a similar view, A Semple, (2014) *A practical guide to public procurement*, paras 1.36-1.41 and R Caranta, (2014) Mapping the margins of EU public contracts law: covered, mixed, excluded and special contracts in, F Lichere, R Caranta and S Treumer (eds) *Modernising public procurement: the new Directive*, p. 88 – 95.

<sup>17</sup> Under Article 267 TFEU, the CJEU could have interpreted the Directive 2004/18/EC and restricted its field of application, however it did not do so.

<sup>18</sup> It is almost as if the Court is recognising some sort of “indirect effect” or an obligation of interpreting national law in accordance with Directive 2004/18/EC, similar to *Von Coulson*, Case 14/83 [1984] ECR 1891 and *Marleasing* Case C-106/89 [1991] ECR 4135.

<sup>19</sup> On the specific issues raised by Directive 2014/24/EU, please see section 3 below.

<sup>20</sup> On cross-border interest, please see sub-section 4.3 below.

<sup>21</sup> On a related note, Portugal apparently awarded without competition up to €125 million worth of health service contracts to various third-sector organisations for a five-year period, leading to a complaint by the Portuguese Association of Private Hospitals on the illegality of the decision and the “cartelisation of the Portuguese Health Service”. Looking at the values referred to in the national press it appears the contracts should have prima facie been covered by Directive 2014/24/EU, although a firmer conclusion depends on the analysis of the contracts themselves.

The second compliance element of *Spezzino* is the need for economic operators benefiting from the contract to comply with a number of requirements on its organisation and objectives. First, only voluntary organisations are eligible to be awarded contracts under the *Spezzino* exception. Profit-making economic operators need not apply as the whole legal argument created by the CJEU is based on the premise of their ineligibility.<sup>22</sup> But not all and every voluntary organisation will be an eligible economic operator under *Spezzino*, only those whose legal and contractual framework contributes to (a) the social purpose and (b) the pursuit of the objectives of the good of the community are allowed to benefit. As suggested before, all the requirements for the exception to be applicable should be interpreted restrictively and this is no exception.

#### The social purpose and the pursuit of the objectives of the good of the community

The first sub-element of this requirement is that the legal and contractual framework of the voluntary organisation needs to have a social purpose which pursues the objectives of the good of the community. How should this requirement be interpreted?

First, even though its exact scope may be difficult to determine across the board and for all Member States, it appears safe to argue that it has to be more than simply a not-for profit objective.<sup>23</sup> Had the court wanted to be liberal with the scope of entities that could benefit from this treatment, then it would have simply referred to not-for profit entities instead of requiring a social purpose connected with the good of the community. In fact, the Court was adamant that a measure of social purpose was required<sup>24</sup> but did not provide any further indication of what would constitute said “social purpose”. The question, therefore remains: how do we interpret the social purpose element? This will probably depend from country to country and how each jurisdiction recognises and organises the third sector. The author does only know the experience in two Member States (UK and Portugal) and these are the ones he will refer to.

In the UK, we would have to distinguish generic not-for profit entities from charities. Anyone can create a not-for profit company without share capital for example,<sup>25</sup> but that does not imply an automatic compliance with the social purpose requirement. There is, however, a specific type of not-for profit entity that would fit the social purpose requirement: charities. All charities have to be registered with the Charity Commission and need to have “charitable purposes for the public benefit”.<sup>26</sup> Registration cannot be accepted without those charitable purposes and effectively without registration there is no charity. The Charity Act 2011 includes a detailed list of what constitutes a charitable purpose and it includes two that may be relevant for the topic of this paper: “the advancement of health or the saving of lives” and “the promotion of the efficiency [...] ambulance services”.<sup>27</sup> Consequently, in theory it would be possible for charity ambulance services to operate in the country and for contracting authorities to award contracts directly to them under

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<sup>22</sup> In fact, the Court makes specific reference to *Sodemare* in para 58.

<sup>23</sup> With a similar view, R Caranta, “After *Spezzino* (Case C-113/13): A major loophole allowing direct awards in the social sector”, in this issue of the EPPPL.

<sup>24</sup> *Spezzino*, paras. 59 and 60

<sup>25</sup> There is at least a not-for profit electricity company in the country, for instance. While it does pursue social and environmental goals it does not go further than this, thus being questionable if it would have the social purpose required by *Spezzino* (even though it operates on a completely different field).

<sup>26</sup> Charity Act 2011, section 1. All public universities in the UK are charities for example.

<sup>27</sup> Charity Act 2011, section 2 (d) and (l)

*Spezzino*. As an example, the Air Ambulance Service and the Welsh Air Ambulance Charitable Trust, both doing emergency medical transport, are registered as charities<sup>28</sup> and could, in theory, benefit from the *Spezzino* exception.

In Portugal, emergency ambulance services are traditionally provided by voluntary fire service associations,<sup>29</sup> in a structure analogous to what is done in Italy albeit without similar constitutional underpinnings or protection.<sup>30</sup> In fact, the Patient Transport Regulation (*Portaria* no 1147/2001) explicitly reserves emergency patient transport to the National Medical Emergency Institute, police, Portuguese Red Cross and voluntary firefighter associations.<sup>31</sup> All other potential providers, for profit or not-for-profit, national or foreign, are barred from the market. Additionally, both the Red Cross and the voluntary firefighter association are not required to obtain a license for patient transport, contrary to any other operator.<sup>32</sup>

In consequence, the true subjective scope of *Spezzino*, ie the entities that are positively affected by the decision, will depend on how each Member State organises its third sector and the characteristics of each voluntary organisation.

### 2.3 Budgetary efficiency

The third *Spezzino* requirement is budgetary efficiency. Out of all the requirements, this appears to be most confusing, although a similar argument was made in *Sodemare* before. From the decision, and the lack of argumentation presented by the Court, one must infer that the Court equates the fact that the voluntary association will only obtain a cost reimbursement with budgetary efficiency. In other words, the Court appears to be convinced that an entity with a profit motive cannot be as budgetary efficient (cheaper) than a not-for profit entity that it is only asking for its costs to be covered. Sanchez-Graells deals with this matter in detail,<sup>33</sup> but some further thoughts are appropriate here.

First, the Court appears to ignore that competition, in general, forces providers to become more efficient, irrespective of the underlying nature of the entity (profit or not-for-profit). Actually, the Court may be tacitly admitting this fact by mentioning “budgetary efficiency” instead of “economic efficiency” or any other similar expression commonly used

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<sup>28</sup> Registration numbers 1098874 and 1083645 respectively. In addition to the Air Ambulance Service, The Air Ambulance Foundation UK is also registered as a charity with activities are “the relief of sickness and injury and protection of life by providing financial support to air ambulance services [...]”, emphasis by the author. Charity Commission Website search, conducted July 28th. This split structure between the entity providing the services and a funding body appears to be relatively common in the country. Other examples are the NHS trusts which themselves are not registered as charities, but have set up associated charities for funding purposes.

<sup>29</sup> Although the National Medical Emergency Institute has a 67% market share, the remaining 33% are undertaken exclusively by voluntary associations, under specific circumstances, voluntary associations market share reaches 81% of the total, Entidade Reguladora da Saude, *Estudo e Avaliacao do Sector do Transporte Terrestre de Doentes*, 2007 p.58-61, particularly graphs 22 and 23.

<sup>30</sup> Neither patient nor ambulance transport services are mentioned in Article 64 of the Constitution, dedicated to the health sector.

<sup>31</sup> Although there is no distinction based on type of transport service or explicit set aside under Decree-Law 38/92, which regulates patient transport.

<sup>32</sup> Law 12/97 Article 1. However, they are under obligation by Article 2 to provide the National Medical Emergency Institute with detailed information about their organisation.

<sup>33</sup> 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”, in this EPPPL issue.

in public procurement, such as the most economically advantageous tender. Furthermore, this lack of competition may encourage not-for-profit entities to become non-competitive cost wise, *ie* the costs (particularly overheads) may rise over time and end up being significantly higher in comparison with a for-profit provider. A modicum of competition may be enough to keep them running more efficiently. Without competition on the long run it becomes impossible for the contracting to benchmark a price against any efficiency metric, irrespective once more of the economic operator's business structure. Ironically, in Portugal the Health Regulator Authority produced a report in 2007 suggesting that allowing for profit operators or even new not-for-profit operators to participate in the market of emergency patient transport could improve the quality of service,<sup>34</sup> and one would expect with improved "budgetary efficiency". Eight years on, no economic operator eligibility rules were changed so far.

Second, do not-for profit economic operators need this kind of protection from the Court in the first place to win contracts? By definition voluntary associations are staffed at least partly by voluntaries which do not draw a salary and as such gives the not-for-profit economic operator an immediate cost advantage.<sup>35</sup> At least in the UK this advantage is compounded by various tax benefits available for charities.<sup>36</sup> It may be that indeed, voluntary associations may be the most "budgetary efficient" way of delivering urgent and emergency medical ambulance services. But without proper competition it is impossible to be certain and this author remains sceptical.<sup>37</sup>

### **3. The scope of *Spezzino* for third sector organisations under Directive 2014/24/EU**

The CJEU mentions Directive 2014/24/EU explicitly in the *Spezzino* decision to recognise that emergency transport services are excluded from its application due to Article 10(h) and Recital 28.<sup>38</sup> It is not clear why the Court stopped its analysis of Directive 2014/24/EU there and did not look into the new "light touch regime" chapter applicable to social and other services<sup>39</sup> of Articles 74 to 77. This is an important point to make as Directive 2014/24/EU makes do with the Part A/B distinction, replacing it with this "light touch regime" which is an integral part of the Directive. In consequence, contracts covered by the "light touch regime" are bona fide regulated by Directive 2014/24/EU albeit with a

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<sup>34</sup> Entidade Reguladora da Saude, *Estudo e Avaliacao do Sector do Transporte Terrestre de Doentes*, p. 21 and 56-57.

<sup>35</sup> Though in the past the Court has not seen this as detrimental to competition, Case C-94/99 *Arge Gewässerschutz vs Bundesministerium für Land- und Forstwirtschaft* ECLI:EU:C:2000:677.

<sup>36</sup> A report in Wales found that charities were pricing out for profit retailers from Welsh high streets due to a combination of tax benefits such as not paying business rates, voluntary workforce and "free" stock. In consequence, this led to a reduced shop diversity on high streets in Wales, Welsh Government, *Business Rate Relief for Charities Social Enterprises and Credit Unions*, 2013, Recommendation 18. Furthermore, an earlier report by the Business Rates Task and Finish Group recommended tighter qualifying criteria such as philanthropic, providing social or community benefit, rather than simply being a charity, for the purposes of business rates benefits, *Business Rates Review (2012)*, Recommendation 15.

<sup>37</sup> With similar concerns, R Caranta, "After *Spezzino* (Case C-113/13): A major loophole allowing direct awards in the social sector", in this issue of the EPPPL.

<sup>38</sup> *Spezzino*, para 8.

<sup>39</sup> Directive 2014/24/EU Articles 74 through 77.

reduced set of obligations.<sup>40</sup> Therefore, the argument presented by the CJEU that urgent and emergency services are only subject to primary law, is no longer entirely true as at least the urgent ambulance services are covered by secondary law for the reasons put forward in this section.

### 3.1 Article 10(h) and Recital 28

Article 10 of Directive 2014/24/EU deals with various exclusions to the scope of the Directive. It does also restrict the exclusions that would otherwise be applicable to some contracts. Under Article 10(h) patient transport ambulance services covered by the Common Procurement Vocabulary (CPV)<sup>41</sup> code 85143000-3 are considered to be included within the scope of application of the Directive. As such, we can safely establish that general patient transport ambulance services are indeed subject to Directive 2014/24/EU. In consequence, contracting authorities wishing to award contracts covered by the CPV code 85143000-3 must comply with the Directive obligations, namely the “light touch regime” of Articles 74 to 77.

There may be, however, an exception to the rule above: Recital 28 of the new Directive establishes that “emergency services where they are performed by non-profit organisations or associations” are not subject to the rules of the Directive. The extent of this exclusion will depend on how we value the Recital. Usually, Directive Recitals are to be used to interpret Articles in case there are doubts about their scope. However, looking at Article 10(h) there is no doubt whatsoever that all services covered by the CPV code 85143000-3 are within the scope of the Directive. It follows from the argument that if the lawmaker wanted to exclude emergency services from Directive’s 2014/24/EU scope, it should have included said exclusion within Article 10 and not on Recital 28. As such, Recital 28 is inconsistent with Article 10 and the normative nature of the latter takes precedence. The consequence of this line of thought is that the CJEU was wrong on its joint interpretation of Article 10(h) and Recital 28 and that the *Spezzino* exception only applies to urgent and emergency ambulance service contracts with a value below-thresholds and cross-border interest. This represents a significant reduction in the scope of application of the ruling in comparison with Directive 2004/18/EC.

Even if we admit as the CJEU did that Recital 28 is relevant for the interpretation of Article 10(h) it does refer only to emergency services, thus meaning that urgent services are still covered by Directive 2014/24/EU. In fact, under this argumentation the *Spezzino* exception would apply always to emergency services, as all contracts are only subject to primary law, but for urgent services it would apply only to contracts valued below-thresholds.

It has been argued that perhaps the scope of the judgement may be wider than simply for emergency ambulance services as the Court considered the Italian legal arrangements as compatible with the principles of equal treatment and non-discrimination.<sup>42</sup> However, as mentioned at the start of this subsection, the first element of

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<sup>40</sup> With a similar view, R Caranta, (2014) Mapping the margins of EU public contracts law: covered, mixed, excluded and special contracts in, F Lichere, R Caranta and S Treumer (eds) Modernising public procurement: the new Directive, p. 88 – 95.

<sup>41</sup> Regulation EC No 2195/2002 as amended by Commission Regulation EC no 213/2008.

<sup>42</sup> D McGowan, “Does the Reservation of Ambulance Services to Voluntary Organisations on a Cost Reimbursement Basis Give Rise to a Public Service Contract? Case C-113/13, *Azienda Sanitaria Locale No. 5*



the *Spezzino* ruling is that it applies to emergency ambulance services, which under the Directive 2014/24/EU have been explicitly excluded from its scope. In the author's view, the exception carved to the EU principles apply to emergency ambulance services and at a maximum analogous services also excluded from the scope of Directive 2014/24/EU.

### 3.2 The "light touch regime"

Directive 2014/24/EU includes in Articles 74 to 77 a "light touch regime" for contracts mentioned in Annex XIV<sup>43</sup> and with a value higher than €750,000. In Annex XIV we can find a "Health, social and related services" category which includes CPV 85143000. Therefore, there is no doubt that general ambulance services with a value above threshold are to be tendered in accordance with the "light touch regime". This regime establishes a set of guiding principles and rules that are applicable to the tendering of the contracts covered. These Articles effectively guarantee a modicum of competition and respect for the principles of equal treatment and non-discrimination.<sup>44</sup>

Within the "light touch regime" Article 77 is particularly relevant in determining the potential impact of *Spezzino* to the third sector organisations. This article lists a series of CPV codes whose contracts can be reserved or "set aside" to organisations compliant with certain conditions. The CPV 85143000 is amongst the ones listed in Article 77, meaning ambulance services are included within the scope of application of the "set aside" rules.

As for the eligibility requirements, paragraph 2 of Article 77 establishes the conditions which are broadly in line with what one would expect from a "modern" third sector organisation, i.e. pursuing a public service mission, reinvesting profits in the organisation objective and having structures of ownership based on employee ownership, participatory principles or require an active participation of employees, users and stakeholders. It is not clear to the author though, if all the organisation covered by the *Spezzino* requirements would fit within the constraints of paragraph 2. Furthermore, this paragraph includes another important limitation to the eligibility of organisations: they cannot have been awarded a contract under this Article by the same contracting authority within the last three years. As such, the contracting can still keep reserving contracts under Article 77 but the previous awardee is not eligible to keep on providing the service. This is an important concession to competition and one compounded with paragraph 3 which limits the contract length to three years.

Had *Spezzino* been conceived instead around this Article, the damage done to the principles of competition, equal treatment and non-discrimination<sup>45</sup> would be smaller than the actual decision. In any event, the "light touch regime" of Articles 74 to 77 and

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*'Spezzino' v San Lorenzo Società Cooperativa Sociale* (2015) 24(3) *Public Procurement Law Review* NA65 and A Aschieri, "Legal and factual background of the Spezzino Judgment (C-113/13): inconsistencies and advantages of the special role played by voluntary associations in the working of the Italian social protection systems", in this issue of the EPPPL.

<sup>43</sup> Directive 2014/24/EU Article 74.

<sup>44</sup> In addition to primary law, the principles of equal treatment and non-discrimination are now explicitly included in Article 18 of Directive 2014/24/EU. In consequence, they cannot be set aside by the *Spezzino* decision as they are now part of secondary law.

<sup>45</sup> This is due to the need to advertise a call for competition (paragraph 4), limiting the maximum duration to 3 years (paragraph 3) and barring organisation which won a similar contract from the same contracting authority under Article 77 within the last 3 years (paragraph 2(d))

particularly the set aside provisions of the latter article limit the scope of application of the *Spezzino* exception.

#### **4. General issues raised by *Spezzino* for third-sector organisations**

The decision taken by the CJEU in *Spezzino* raises a number of issues that are relevant in general for third-sector organisations across the EU. These are both theoretical/conceptual issues as well as practical. They are also relevant irrespective of the exact scope of application of *Spezzino*, although a wider scope will increase their relevance.

##### **4.1 Why allowing direct awards of contracts?**

The first issues that is relevant for third-sector organisations is that in *Spezzino*, the CJEU went further than simply setting aside contracts for a particular class of economic operators. In fact, the Court jumped straight into allowing direct award of contracts to members of a particular class of economic operators.<sup>46</sup> It could be argued that this decision does not pass the test of the principle of proportionality as it was not necessary to achieve the stated aim of the decision: allowing the Member State to organise part of its health sector by excluding for-profit economic operators. In consequence, said objective could have been achieved with reduced impact on principles of equal treatment and non-discrimination if the final outcome was simply the creation of reserved contracts. The same can be said of the impact on the principle of competition: it would be less severely affected in this second scenario. This proposal is consistent with the view expressed in section 2.2 that the requirements for the *Spezzino* test should be interpreted restrictively.

In any case, the exclusion of application of the EU principles “cuts both ways.” It is beneficial for the third sector economic operators getting the contracts directly as they do so with reduced transaction costs (in comparison with a full blown tendering procedure) and without competition. But there is a downside for third sector economic operators to this protection from competition. Looking at the identity of the applicants in the Italian court case which led to *Spezzino* highlights it: both the San Lorenzo Societa Cooperativa Sociale and the Croce Verde Cogema are also national third sector economic operators. As such, it can be argued that the ruling protects third sector economic operations where they have inside access to key decision makers at the expense of all other national third sector organisations which could, in theory, be interested in competing for those contracts. With *Spezzino* some not-for profit organisations will benefit from the reduced competition that direct awarding of contracts brings, particularly the ones with insider access to the entity awarding the contract.

In effect, the author would have preferred a more conservative approach by the CJEU which upheld the principles of equal treatment and non-discrimination at least for all eligible third sector organisations national or otherwise. Having said that, if the Court really wanted to reduce the transaction costs of national third sector organisations and protect the discretion of Member States to organise certain features of its health systems, it might have been preferable if it had gone even further and consider the repayment of emergency ambulance service on a cost basis as grants instead of contracts being procured.

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<sup>46</sup> As suggested by R Caranta, “After *Spezzino* (Case C-113/13): A major loophole allowing direct awards in the social sector”, in this issue of the EPPPL.

## 4.2 What about third sector organisations based on other Member States?

Connected with the first problem highlighted above is the specific impact on third sector organisations based in other Member States. As highlighted by Aschieri<sup>47</sup> and Sanchez-Graells,<sup>48</sup> the Court went to great lengths<sup>49</sup> as to consider what would be the implications if cross-border interest existed as it was unclear from the referral by the *Consiglio di Stato* if indeed certain cross-border interest it was present or not.<sup>50</sup>

The Court held in para 50 and subsequently in the ruling, that if cross-border interest existed in the situation at hand, Italy was still free to regulate its health sector as it saw fit. Caranta considers this conclusion by the Court as “drilling a big hole through the fabric of public procurement rules.”<sup>51</sup> The consequence for third sector economic operators from other Member States is that they will not be entitled to the protection offered by primary EU law, particularly equal treatment and non-discrimination. This approach is (partially) consistent with *Sodemare*<sup>52</sup> where it was held that not-profit making economic operators were entitled to healthcare contracts whereby they were only being reimbursed of their expenses.<sup>53</sup> In *Sodemare*, however the Court held that an undertaking established on the territory of another Member State could not avail itself to EU law principles “cannot be applied to activities which are confined in all respects within a single Member State”<sup>54</sup> *Sodemare*, of course, predates *Telaustria*<sup>55</sup> and the subsequent body of case law created around cross-border interest, but it may be assumed that its ruling was meant to be applicable in situations with limited connection to another Member State. Furthermore, as argued by Advocate General Wahl, *Sodemare* did not address specifically public procurement rules but the welfare system adopted by Lombardia,<sup>56</sup> a conclusion that could be understood in case that cost reimbursements were not considered to be public procurement contracts, which does not appear to have been the case in *Sodemare*.

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<sup>47</sup> A Aschieri, “Legal and factual background of the Spezzino Judgment (C-113/13): inconsistencies and advantages of the special role played by voluntary associations in the working of the Italian social protection systems”, on this EPPPL.

<sup>48</sup> 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”, in this EPPPL issue.

<sup>49</sup> *Spezzino*, paras 45-49

<sup>50</sup> Such as *Commission v Ireland*, EU:C:2007: 676, para 29; *Commission v Italy*, C-412/04, EU:C:2008:102 para 66 and 81, joined cases C-147/06 and C-148/06 *SECAP* and *Santorso* EU:C:2008:277 para 21; C-376/08 EU:C:2009:808, para 24 or C-226/09 *Commission v Ireland*, EU:C:2010:697. Although what constitutes certain cross-border interest is not entirely settled and still follows a casuistic approach, see, C-221/12 *Belgacom* EU:C:2013:736 and C-388/12 *Commune di Ancona* OJ C 295. With this view, P Telles, “The good, the bad and the ugly”, *Public Contract Law Journal* 43 (2013) p. 3-29 and P Bogdanowicz, “Cross-border Interest and Concession Contracts: a Critical Approach”, *EPPL* 2 (2015) p.83 - 91.

<sup>51</sup> R Caranta, “After *Spezzino* (Case C-113/13): A major loophole allowing direct awards in the social sector”, in this issue of the EPPPL.

<sup>52</sup> Case C-70./95 *Sodemare* ECLI:EU:C:1997:301

<sup>53</sup> *Sodemare*, para 49.

<sup>54</sup> *Sodemare*, para 38. The general argument can be found in paras 36-40.

<sup>55</sup> Case C-324/98 *Telaustria Verlags GmbH and Telefonadress GmbH v Telekom Austria AG, formerly Post & Telekom Austria AG*, 2000 ECR at I-10770.

<sup>56</sup> Opinion of Advocate General Wahl of 30 April 2014 in *Azienda sanitaria locale n. 5 «Spezzino» and Others*, C-113/13, EU:C:2014:291, para 71.

### 4.3 Separating urgent and emergency ambulance services from regular ambulance services.

In addition to conceptual or theoretical issues, *Spezzino* raises at least two practical issues. The first is how to clearly and reliably identify urgent and emergency ambulance services. Each contract above the EU thresholds is usually identified by the appropriate CPV code.<sup>57</sup> These codes are consistent across the EU, providing a degree of harmonisation on contract identification. By restricting the exception to urgent and emergency ambulance services, *Spezzino* defined the exception to Articles 49 TFEU and 56 TFEU as a subset of CPV code 85143000 Ambulance Services. However, under Articles 23 and 87 of Directive 2014/24/EU, the Commission is empowered to change the nomenclature if appropriate in the future.

This decoupling between the exception and a specific CPV code is problematic as it can be interpreted by contracting authorities as being applicable to *any* 85143000 Ambulance Service contract. This would constitute a large extension to the scope of the decision. In the spirit of cooperation with the referring Court, the CJEU had no trouble in assuming that a cross-border interest existed as a baseline to deliver its judgement. However, it has not done the same exercise to extend the exception to Articles 49 and 56 TFEU to *all* ambulance services. The ruling can be considered to provide a certain caveat to this view, as the interpretation of the TFEU articles is to be applicable national legislation dealing with issues “such as [...] the provision of urgent and emergency ambulance services [...]”

Connected with this issue is the situation that not all urgent and emergency ambulance services are carried out via land transport. Air ambulances may be classified under other codes, for example 85140000 Miscellaneous Health Services and as argued above, at least in the UK there are charities undertaking these services. Although the author is of the opinion that the interpretation of the *Spezzino* exception should be restrictive, it appears clear that in this instance the Court was referring to any urgent and emergency ambulance service irrespective of mode of transport.

## 5. Conclusion

This paper argued that the scope of the *Spezzino* judgment is smaller than could be anticipated. This is due to a cumulative list of factors. First, the exclusion is only applicable to urgent and emergency ambulance services. As the decision set aside the application of Articles 49 and 56 TFEU only and not Directive 2004/18/EC, any contract covered by secondary legislation cannot fall within the scope of the decision. Second, the requirements set in *Spezzino* are to be interpreted restrictively as they impose an exception to the principles of equal treatment and non-discrimination, as well as Articles 49 and 56 TFEU. Third, Directive 2014/24/EU explicitly includes in its coverage ambulance services, subjecting them to the reduced regulation of the light touch regime contained in Articles 74 to 77. This regime only applies to contracts above €750,000, however. There is a degree of uncertainty as to whether this inclusion covers both urgent and emergency medical services (the object of *Spezzino's* decision) or only the former, depending on the normative value

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<sup>57</sup> Regulation EC No 2195/2002 as amended by Commission Regulation EC no 213/2008.

given to Recital 28 of Directive 2014/24/EU. In any case, both urgent and emergency ambulance services with a value below the €750,000 threshold and cross-border interest are subject to the ruling. Consequently, the impact on third sector organisations will depend on the interpretation of Recital 28 in first instance.

Irrespective of the actual scope of the *Spezzino* ruling, it raises a number of theoretical and practical problems which are relevant for third sector organisations wishing to take part in the procurement of ambulance services. First, by allowing contracting authorities to award contracts directly and without competition it makes life difficult for third sector organisations without direct access to the key decision makers and reduces the efficiency of the market. Second, third sector organisations based on other Member States can freely be discriminated against, as can the national ones as well. Finally, urgent and emergency services do not have their own CPV code and are a sub-set of code 85143000 Ambulance Services. Consequently, it may be hard to distinguish ones from the others. It is possible that contracting authorities may misinterpret *Spezzino* as giving them full flexibility to award any ambulance service contracts directly.