



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 24 April 2013

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INFORMATION NOTE

from: Council Legal Service

to: COREPER (1st part)

Subject: **Case before the Court of Justice of the European Union**
– Reference for a preliminary ruling C-19/13, Ministero dell'Interno against
Fastweb S.p.a.
(referring court: Consiglio di Stato - Italy)

1. By an order of 15 January 2013, notified to the Council on 19 January 2013, the *Consiglio di Stato* (Italy) has made, pursuant to Article 267 TFEU, a reference for a preliminary ruling to the Court of Justice of the European Union, concerning the interpretation and, as the case may be, the validity of Article 2d(4) of Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007¹ amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts ("the Remedies Directive").

¹ OJ L 335 of 20.12.2007, p. 31.

2. The preliminary questions arose from an appeal lodged by the Ministry of the Interior (*Ministero dell'Interno*) against the judgement of the Regional Administrative Court (*Tribunale Amministrativo Regionale*) Lazio-Roma, which declares ineffective the agreement for the provision of electronic communication services to the Department of Public Security ("the framework agreement") between the Ministry of the Interior and Telecom Italia, on the ground that the framework agreement was not demonstrated to satisfy the conditions to be awarded on the basis of a negotiated procedure without prior publication of the contract notice.

3. The Ministry of the Interior contends that, even if the conditions for a negotiated procedure without prior publication of the contract notice were not met, the fact that the Ministry of the Interior satisfied the provisions in Article 2d(4) of the Remedies Directive, by publishing a notice as described in Article 3a of the Remedies Directive in the Official Journal of the European Union 12 days before the framework agreement was concluded, meant that the framework agreement could not be declared ineffective. The Ministry of the Interior submits that the fulfilment of conditions prescribed in Article 2d(4) of the Remedies Directive always precludes a declaration of ineffectiveness.

4. Unsure about the interpretation of Article 2d(4) of the Remedies Directive, in particular whether it can be construed to mean that contracts are not necessarily rendered ineffective pursuant to Article 2d(1)(a) if they fulfil the conditions in Article 2d(4) but may be recognised as such, depending on national law, the *Consiglio di Stato* suspended its proceedings and referred the following questions to the Court of Justice:

- a) Must Article 2d(4) of the Remedies Directive be always and in any event construed to preclude a declaration of ineffectiveness with regard to contracts that fulfil the conditions listed in this Article, even if such contract would otherwise be ineffective under Article 2d(1)(a) of the Remedies Directive?
 - b) If the answer to the first question is yes, is Article 2d(4) of the Remedies Directive compatible with the principles of equality of parties, of non-discrimination, of protecting competition and of guaranteeing the right to an effective remedy?
5. The Council is entitled to submit statements of case or written observations to the Court within two months of the notification of the order for reference, in conformity with Article 23 of the Statute of the Court. As the validity of a Directive of the Council is potentially challenged in this case, the Council should exercise this right.
 6. The Director-General of the Council Legal Service has appointed Mrs. Petra Mahnič Bruni and Mr. Alessandro Vitro, members of the Legal Service, as the Council's agents in this case.
