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The EU Court of Justice states that the *project financing* pre-emption right in favour of the promoter is incompatible with EU law; still, private initiative can be crucial

The Court of Justice of the European Union (CJEU), in its judgment of 5 February 2026, case C-810/24 (the "Judgment"), deemed the pre-emption right (*diritto di prelazione*) - which allows the promoter to adjust and match its initial bid to the successful competitor's better one during the tender phase - to be incompatible with EU law as it constitutes a violation of the equal treatment principle between competing operators, since it grants the promoter the right to modify its bid beyond the deadline for the submission of bids in the tender. The pre-emption right has been fundamental in encouraging *project financing* private initiatives for the development of public works and infrastructure, which is why it will now be essential to assess how this institution will evolve, also considering the new measures that the legislator will reasonably adopt.

Although the Judgement concerns a case falling within the scope of the previous Public Contracts Code (Legislative Decree 50/2016), its essential statements should be relevant also under the current Public Contracts Code (Legislative Decree 36/2023), even though already been subject to corrective measures (Legislative Decree 209/2024). Indeed, the new measures also maintain the promoter's pre-emption right, since they amended only the initial phase preceding the tender, *i.e.* the phase aimed at identifying the promoter.

It should also be noted that the European Commission, during the infringement proceeding INFR (2018)2273 against the Italian Government, examined the promoter's pre-emption right, also in light of the mentioned corrective measures, and concluded that it violates the equal treatment and non-discrimination principles provided under Articles 3 and 30 of Directive 2014/23/EU. Similar concerns have been raised in relation to the other provision that gave the non-successful promoter the right to receive payment, by the actual successful bidder, of the costs sustained for the submission of the proposal without any impartial mechanism for quantifying those costs. The CJEU rulings are immediately applicable in Member States legal systems, constituting an additional EU law provision (see, *inter alia*, Civil Cassation No. 23922/2023 and No. 13425/2019). Therefore, although the infringement proceeding in relation to *project financing* has not been defined (and pending the outcome of such proceeding), the pre-emption right might be immediately disapplied, even in relation to procedures governed by the new Public Contracts Code.

In any case, the Judgment focused only on the exercise of the pre-emption right, without censuring the structural framework of the *project financing* private initiative procedure and the related additional provisions, including those supporting the private initiative, such as the payment to the promoter (who was not awarded the contract) by the successful bidder of the costs incurred in submitting the proposal.

In this case too, it should be noted that, during the infringement procedure mentioned above, the European Commission also raised some additional concerns to the structure of the *project financing* procedure as outlined by the Italian legislator, despite the attempt to eliminate these critical issues through the adoption of the mentioned corrective decree.

Consequently, it is desirable that the Government, in coordination with the European Commission, supports the centrality of the *project financing* private initiative trough new incentive mechanisms for the promoter (different from the pre-emption right and in compliance with the equal treatment and impartiality principles), such as, for example - and in addition to the aforementioned payment for the proposal submission costs - , the provision of specific and proportional technical bonus points in favour of the promoter. This in order not to miss the opportunity for Public Administrations to benefit from the technical knowledge and economic resources of private operators, which are essential in contributing to the infrastructural development of the country through privately-led initiatives, especially in view of the forthcoming end of PNRR contributions.

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