OPINION OF ADVOCATE GENERAL STIX-HACKL

delivered on 11 July 2002 [1]

I — Introductory remarks

1. These proceedings concern the interpretation of a works coordination directive as well as of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts [2] (hereinafter 'the legal remedies directive'). In particular, the question in issue is whether a change in the composition of a consortium is permissible during procedures for award of a contract, and the effects of such a change on the legal protection available.

II — Legal framework

A — *Community law*

2. Of the directives material to the award process, Directive 71/305/EEC concerning coordination of procedures for the award of public works contracts, [3] as amended by Directive 89/440/EEC, [4] is relevant, and essentially corresponds to Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts [5] (hereinafter 'the works procurement coordination directive') to which reference will also be made below.

1 — Original language: German.
2 — OJ 1989 L 395, p. 33.
3 — OJ 1971 L 185, p. 5.
4 — OJ 1989 L 210, p. 1.
5 — OJ 1993 L 199, p. 54, since amended.

3. Article 1 of the latter provides, *inter alia*:

'For the purpose of this Directive

(a) "public works contracts" are contracts for pecuniary interest concluded in writing between a contractor and a contracting authority as defined in (b), which have as their object either the execution, or both the execution and design, of works related to one of the activities referred to in Annex II or a work defined in (c) below, or the execution, by whatever means, of a work corresponding to the requirements specified by the contracting authority;

...

(d) "public works concession" is a contract of the same type as that indicated in (a) except for the fact that the consideration for the works to be carried out consists either solely of the right to exploit the construction or in this right together with payment;

...'

4. Article 21 states:

'Tenders may be submitted by groups of contractors. These groups may not be required to assume a specific legal form in order to submit the tender; however, the group selected may be required to do so when it has been awarded the contract.'

5. As regards legal protection, the provisions of the legal remedies directive are decisive.

6. Article 1(1) of the legal remedies directive, in the form applicable at the relevant time, provided:

'The Member States shall take the measures necessary to ensure that, as regards contract award procedures falling within the scope of Directives 71/305/EEC and 77/62/EEC, decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in the following Articles, and, in particular, Article 2(7) on the grounds that such decisions have infringed Community law in the field of public procurement or national rules implementing that law.'

7. Article 2(1) of the said directive provides, *inter alia*,

'The Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for the powers to:

...

(b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure;

(c) award damages to persons harmed by an infringement.'

B — *National law*

8. The award procedure at issue is governed principally by the provisions of Law No 1418/1984 entitled 'Public Works and related matters' (23A) and of Presidential Decree No 609/1985 (223A).

9. In the present case, the contracting authority opted for a contract award procedure pursuant to Article 4(2)(b) of Law No 1418/1984. This type of procedure provides for the following stages:

10. Pre-selection of candidates, submission of tenders, assessment of tenders from a technical point of view, assessment of tenders from an economic and financial point of view and negotiations with the so-called provisional contractor or contractors.

11. Article 5(6) of Law No 1418/1984 states:

'The substitution of a third party in the construction of part or all of the work (assignment of the work) is prohibited unless authorised by the developer. Whenever there is substitution, the contractor shall be fully liable together with the subcontractor to the contracting authority, the works personnel and any third party. By way of exception, substitution, together with exemption of the contractor from

liability to the contracting authority, may be authorised if required in the interests of the work and the contractor is manifestly unable to complete the work. A presidential decree shall determine the qualifications of the substitute, the consequences for the contractor, the procedure for authorising substitution, issues arising on substitution of a member of a contracting group and particulars in connection therewith.'

12. Article 51(1) of Presidential Decree No 609/1985, which was adopted on the basis, *inter alia*, of the foregoing provision, provides as follows:

'1. The substitution of another contracting undertaking in the construction of the work in accordance with Article 5(6) of Law No 1418/1984 shall be proposed by the department managing the project and shall be authorised by the responsible authority. In order that substitution may be authorised, the contracting undertaking which seeks to replace the contractor must have the same qualifications as those which were required for the award of the works to the contractor and must satisfy the responsible authority that it offers the appropriate guarantees for completion of the works.'

13. The other provisions of this Article concern authorisation of substitution with exemption from liability for the original contractor (paragraph 2), substitution of a member of a contracting consortium, where substitution is sought by the said member (paragraph 3), termination of the contract if the contractor becomes insolvent (paragraph 5), and termination of the contract if the contractor is a sole operator and dies (paragraph 6).

14. Finally, Article 35 of the abovementioned presidential decree contains provisions concerning the obligations of the members of a contracting consortium as regards completion of the work which are borne by the consortium; paragraphs 6 and 7 of that article determine what happens to the consortium and the obligations of its members in the event of the death of the natural persons who, with their individual undertakings, participated in it, and in the event of the insolvency of a member of the consortium.

15. It is apparent from the combination of these provisions that the legislation relating to the tendering procedure for public works contracts provides, under certain conditions, for the substitution of a member of a consortium where such a contract has been awarded to the consortium in question. Such substitution, always after approval by the developer, is provided for only at the stage of execution of the works, that is to say the stage which follows signature of the contract between the contractor and the

developer, and not prior to the award of the contract. [6]

16. In the supplementary notice in respect of the invitation to tender which is in issue in these proceedings (notice concerning the second stage of the award procedure), it was stated that those entitled to take part in that stage were the eight groups which declared their interest in the first stage of the award procedure and had been pre-selected. It was also stated that those groups were entitled to take part in the form that they had taken during the first stage of the award procedure, that the creation of groupings or other forms of cooperation between them was strictly precluded and, finally, that it was possible for a group to be enlarged by the addition of new members provided that the new members had not been included in any other groups pre-selected to take part in the second stage of the procedure.

17. In addition, Article 12 of that notice provided that each tenderer's file should include all the documents showing that the tenderer constituted, from a legal perspective, a consortium. Such documents included a certificate from a notary that a consortium had been formed by all the members of the pre-selected group, including any new members, in accordance with Article 6 of the supplementary notice. Each consortium had also to include certified minutes of the meetings of the boards of directors of all the members of the consortium, authorising their participation in the consortium in cooperation with the other members, which were to be mentioned by name, as well as copies of the articles of association of any new members of the consortium. Finally, it was provided that the file had to include all the items referred to in paragraphs 7.1, 7.2, 7.3 and 7.4 of the notice relating to the first stage of the tendering procedure.

18. Moreover, it was stated in the said notice that the consortia would be required to set out their intentions regarding the extent of their involvement in the financing of the project, and to submit a statement attesting to their willingness to invest the capital sums which were essential, in addition to any subsidies, to ensure completion, maintenance and operation of the work. Furthermore, any construction undertaking or consultancy was required to submit a certificate of registration in the commercial register of the country in which it was established and to submit evidence of its financial and economic resources and its technical capabilities. Finally, undertakings within the consortium which would have more specific responsibility for running the project, were required to submit appropriate certificates and to demonstrate their capability and their experience in the running of transportation projects and, in particular, of underground railways.

6 — Council of State 971/1998, plenary.

19. It is apparent from the abovementioned terms of the notice that provision is made during the second stage of the tendering procedure in question for a consortium which was pre-selected during the first stage to be enlarged by the addition of new members. However, such enlargement is permitted only within the time-frame set for submission of candidates' tenders. As the files show, that restriction was clearly dictated by the need for the competent adjudicating bodies under the award procedure to have available to them, initially on evaluating the technical bids, and subsequently when evaluating the financial studies and in calculating the corresponding public expenditure, all requisite information concerning each separate individual member's financial and economic resources, technical qualifications and capabilities, and aptitude for and experience in carrying out the works in question, for the purposes of appointing the provisional contractor. [7]

III — Facts, main proceedings and questions referred for preliminary ruling

20. The Ministry for the Environment, Planning and Public Works issued a notice of an invitation to tender, approved by Decision D1d/2/207 of 18 June 1992 of the Minister, announcing the first stage (pre-selection stage) of an international tendering procedure for the appointment of a contractor for the 'planning/construction, self-financing and operation of an underground railway for Thessaloniki' budgeted at GRD 65 000 000 000. At that stage, the awarding body selected eight groups of companies which had declared an interest, including the appellant consortium. Subsequently, by Decision D1/4/37 of the Minister for the Environment, Planning and Public Works on 1 February 1993, the bid documentation for the second stage of the tendering procedure was approved, including the supplementary notice and the contract specifications. At that stage technical proposals, financial studies and economic and financial proposals were submitted by, among others, the consortium Makedoniko Metro (hereinafter 'Makedoniko') in its original form, and the consortium Thessaloniki Metro (Bouygues).

21. At the pre-selection stage, the members of the initial Makedoniko consortium were the undertakings Mikhaniki AE, Fidel SpA, Edi-Sta-Edilizia Stradale SpA and Teknocenter-Centro Servizi Administrativi-SRL.

22. In the second stage of the tendering procedure in question, that is, after the pre-selection stage and invitation to tender, the consortium was enlarged by the addition of the undertaking AEG Westinghouse

7 — Council of State 97/1998, plenary.

Transport Systems GmbH (hereinafter 'AEG'). Thus composed, the consortium submitted a bid.

23. As is apparent from the file, and not disputed by the parties, that was the composition of the consortium when it was nominated as provisional contractor (on 14 June 1994) and thus after the assessment of the bids.

24. After the negotiating committee had convened and negotiations commenced between the Hellenic Republic and the consortium as provisional contractor, the consortium, in a letter dated 29 March 1996, informed the Minister for the Environment, Planning and Public Works of the new composition of the consortium (the undertakings Mikhaniki AE, ABB Daimler-Benz Transportation (Deutschland) GmbH [Adtranz] and the Fidel Group, comprising the three Italian undertakings referred to above).

25. Responding to queries relating to rumours that the members of the abovementioned group of Italian companies had become insolvent and gone into liquidation, the consortium informed the Commission for Major Works, in a letter dated 14 June 1996, that the companies in the abovementioned group were no longer part of the consortium, and that the members of the consortium were, as at that time, the undertakings Mikhaniki AE, Adtranz and Transurb Consult. As the file shows, the agreement for the formation of the consortium in that composition was not submitted to the authorities. That notarial act was signed on 27 November 1996, barely two days before the decision of the Minister for the Environment, Planning and Public Works concerning the failure of negotiations, and almost two and a half years after the nomination of the appellant as the provisional contractor. It was also in that composition that the consortium later brought the action.

26. The Minister for the Environment, Planning and Public Works, acting for the awarding authority, found that the appellant had substantially departed from the provisions of the tender documentation, and considered that the negotiations had failed; further, he announced the termination of negotiations between the Greek State and the appellant, and called for negotiations with the second consortium, which was the next candidate for provisional contractor.

27. As a result, the consortium appealed to the Greek Council of State and applied for the awarding authority's decision to break off negotiations to be set aside. The Coun-

cil of State considered that a change in the composition of a consortium was only permissible prior to submission of bids. Thus, the consortium was not entitled, in its altered composition, to apply for the decision to be set aside.

28. In its action before the Administrative Court of First Instance, Athens, Makedoniko, together with the other undertakings in the consortium, sought a declaration that the State was liable to pay the sums specified in the statement of claim by way of damages and financial compensation for the non-material losses suffered by them as a result of the above unlawful act and omission.

29. That claim was dismissed by the Administrative Court of First Instance, Athens, on the ground that, in the new composition in which the consortium had brought the action, it was not entitled to claim compensation.

30. Makedoniko appealed against the judgment to the Administrative Court of Appeal, Athens, claiming misinterpretation and misapplication of the relevant provisions in the judgment under appeal and, in the alternative, it asked that a reference for a preliminary ruling be made to the Court of Justice of the European Communities on the interpretation of the relevant Community provisions.

31. By order of 14 June 2000, the Administrative Court of Appeal, Athens, referred the following question to the Court of Justice:

'Must a change in the composition of a consortium participating in procedures for the award of a public-works contract which occurs after submission of tenders and selection of the group as the provisional contractor, and is tacitly accepted by the awarding authority be interpreted in such a way as to result in the loss of that consortium's right to participate in the procedure and, by extension, also of its right to, or interest in, the award of the contract for execution of the works? Is such an interpretation consistent with the provisions and spirit of Directives 93/37/EEC and 89/665/EEC?'

IV — On the preliminary question

32. In order for the Court of Justice to provide the national court with an answer

that is relevant to the main proceedings, both preliminary questions must, as the Commission and the Austrian Government rightly argue, be rephrased. [8]

33. Thus, in the context of Article 234 EC, the Court has no jurisdiction to rule either on the interpretation of the provisions of national law or regulations or on their conformity with Community law. It may, however, supply the national court with an interpretation of Community law that will enable that court to resolve the legal problem before it. [9]

34. 'Finally, according to settled case-law,... where questions are formulated imprecisely, [the Court may extrapolate] from all the information provided by the national court and from the documents in the main proceedings, the points of Community law which require interpretation, having regard to the subject matter of those proceedings.' [10]

35. On the basis of the information supplied in the order for reference, having regard in particular to the fact that the national court has made this reference in the light of the relevant specific procurement directive, namely the works procurement coordination directive, as well as the corresponding legal remedies directive, it seems appropriate to split up the question as follows.

Should the provisions of the works procurement coordination directive be interpreted as precluding rules which prohibit a change in the composition of a consortium after submission of tenders?

Does the legal remedies directive apply to decisions concerning a change in the composition of a consortium, such as that which is in issue in the main proceedings?

A — *Submissions of the parties*

36. *Makedoniko* argues that the enlargement of the consortium by the addition of AEG before submission of tenders was consistent with the supplementary notice of invitation to tender. As regards the subsequent change in the composition of the consortium, namely the withdrawal of AEG and addition of Adtranz, Makedoniko points out that this company was created by the merger of AEG, which, in the meantime, had changed its name to

8 — Compare regarding public procurement, Case C-107/98 *Teckal* [1999] ECR I-8121.

9 — Case C-107/98, cited in footnote 8, paragraph 33; and Case 17/92 *Distribuidores Cinematográficos* [1993] ECR I-2239, paragraph 8.

10 — Case 107/98, cited in footnote 8, paragraph 34; Case 251/83 *Haug-Adrion* [1984] ECR 4277, paragraph 9; and Case C-168/95 *Arcaro* [1996] ECR I-4705, paragraph 21.

AEG Schienenfahrzeuge GmbH, with AEG Nahverkehr und Wagen GmbH. As legal successor, this new company had assumed the rights and liabilities of AEG. It follows that there was no substantive change in the composition of the consortium.

37. The last alteration in the composition of the consortium was attributable to the fact that the companies in the Fidel group had been obliged, due to changes in their legal status, to leave the consortium. The companies in the Fidel group went into liquidation in 1995. This last alteration had led to the addition of the Transurb Consult company, which in any event held only a very small interest.

38. Makedoniko makes the point that such events are typical for a public works contract. Even if this were a case of a public works concession, the legal remedies directive would apply, because it is only a particular manifestation of the general principle of effective legal protection.

39. Makedoniko suggests that the answer to the questions referred for preliminary ruling should be that a change in the composition of a consortium which has participated in a public works contract award procedure or the issue of a public works concession, which occurs after submission of tenders and provisional selection of the contractor and which is tacitly accepted by the awarding authority, can neither result in such a consortium losing its status as tenderer as a result, nor in the consortium or its members being deprived of their interest in the award or of the possibility of bringing an action to enforce the rights to which they are entitled under Community law. The latter is all the more relevant as that change is neither referred to as a reason for the decision to terminate negotiations with the consortium, nor the decision to exclude it. Any contrary interpretation of the relevant national provisions would run counter to the spirit and letter of the works procurement coordination directive, the legal remedies directive and the general principle of effective legal protection. At the hearing, Makedoniko argued further that prohibiting a change in composition after submission of tenders would constitute an infringement of the freedom to provide services.

40. The *Greek Government* points out that neither the works procurement coordination directive nor the legal remedies directive refer to a change in the composition of a consortium. A change in composition is not permitted during negotiations with the tenderer which has provisionally been selected as contractor. This

follows from the fact that the only subject of negotiations is the final terms of the contract to be awarded and not the identity of the contractor, which is not negotiable. Therefore the identity of a provisionally selected contractor may not change.

41. In the absence of a rule under Community law, the permissibility of a change in the composition of a consortium arises solely under national law, which does not provide for substitution of a member of a consortium during negotiations. The question referred for preliminary ruling must, therefore, be answered in the affirmative.

42. The *Austrian Government* suggests first of all that the question referred for a preliminary ruling should be rephrased.

43. The Austrian Government concludes from the case-law of the Court, according to which the public procurement directives have not established uniform and exhaustive Community law, that the national legislature may adopt rules in the context of these directives, as Greece has indeed done. Further, the contracting authorities also have a certain amount of flexibility, for example, in establishing rules relating to consortia. The parameters of this flexibility are set by primary legislation.

44. The purpose of the public procurement directives is to prevent preferential treatment being given to domestic tenderers, and to exclude the possibility of contracting authorities being guided by anything other than economic considerations.

45. The rephrased question should therefore be answered as follows.

'The provisions of Directive 93/37/EEC do not preclude a change in the composition of a consortium after submission of tenders. The consortium does not, on the basis of the provisions of Directive 93/37/EEC, lose its right to participate in the tendering process, nor, consequently, does it lose its right to, or interest in, being awarded the contract for execution of the work.'

46. In the opinion of the *Commission*, the first part of the question could be inter-

preted to mean that the Court should comment on national law, over which, however, it has no jurisdiction. Therefore, the Commission proposes that the question be rephrased, and divided into three parts.

47. First, it should be noted that the works procurement coordination directive contains no express provisions concerning a change in the composition of a consortium. Article 21 merely provides that groups of contractors which submit tenders may not be required to assume a specific legal form prior to the award. It is therefore, left to the national legislature or the individual contracting authority, to regulate the details. This applies also to public works concessions.

48. The answer to the first part of the rephrased question should, therefore, be that the works procurement coordination directive contains no provisions which preclude a provision of national legislation or of the contract documentation to the effect that a change in the composition of a consortium ceases to be permissible after a certain stage in the award procedure. This is particularly relevant after the submission of tenders.

49. Further, the Commission presumes that the principle of equal treatment of tenderers would be undermined if a contracting authority could, for the benefit of one tenderer, unilaterally change the terms which are fixed in the tender documentation as not being open to variation, without reopening the whole award procedure. This would otherwise prevent the other — and also potential — tenderers from benefiting from the change. The answer to the second part of the question should, therefore, be that Community law does not allow a public contracting authority to continue to negotiate with a bidder whose composition has changed, contrary to national law or to the terms of the contract documentation.

50. With regard to the third part of the question, the Commission points out that, under Article 1(1) of the legal remedies directive, only infringements of Community law and national rules implementing that law may be reviewed. This provision does not, therefore, require Member States to provide for procedures to allow review of decisions which have been taken in the context of an award procedure and which infringe rules that do not implement procurement directives.

51. In the Commission's view, therefore, the question referred to the Court should be

answered as follows: a change in the composition of a consortium that is in breach of national law or the contract documentation does not affect the exercise of rights which the consortium could claim on the basis of the legal remedies directive, in particular, the right to claim damages.

B — *Assessment*

52. In order to answer the question referred for preliminary ruling, it is first worth pointing out that legal protection in a review procedure under the legal remedies directive is afforded only if the conditions of its applicability are met. Since, however, its applicability is linked to the applicability of the specific procurement directives, and hence of the works procurement coordination directive, it is necessary to examine whether the procurement procedure in issue in this case falls within the scope of its applicability.

53. While that question is being examined, the question of whether the purpose of the procurement procedure in issue was to award a public works concession or a public works contract may remain open for the time being.

1. The applicability of the works procurement coordination directive

54. To begin with, we must consider the argument of the Greek Government according to which, under the case-law of the Court, [11] a contracting authority may refrain from awarding a contract. This aspect does not help us to answer the question referred for a preliminary ruling in so far as the relevant judgment concerned a set of circumstances different from those of the main proceedings. In that case, the award procedure ended without the contract being awarded, because the contracting authority had opted for a material other than that stipulated in the tender notice, which, however, meant a change in the subject-matter of the contract. By contrast with the judgment cited by the Greek Government, the contracting authority in this case did not only opt for another procedure, but had before it several tenders for consideration.

55. The Greek Government's view is also undermined by the fact that there may in principle also be cases in which the contracting authority has to award the contract in accordance with Community law; the question arises, therefore, whether there is

11 — Case C-27/98 *Fracasso and Leitschutz* [1999] ECR I-5697.

such an obligation in the main proceedings as well. This presupposes, however, that Community law governs such a set of circumstances at all, namely the change in the composition of the consortium.

56. It is therefore now necessary to ascertain whether the works procurement coordination directive applies to rules on consortia such as those in the main proceedings, and whether that directive precludes the national rules in issue.

57. The starting point for this is the principle reflected in the case-law of the Court according to which the title of and recitals in the preamble to the works procurement coordination directive show that its aim is simply to coordinate national procedures for the award of public works contracts, so that it does not lay down a complete system of Community rules on the matter. [12]

58. Express rules on consortia are provided only in Article 21 of the works procurement coordination directive. However, that provision deals only with specific legal problems in connection with consortia. It thus affords them the right to submit tenders. Further, whilst it prohibits any requirement that consortia assume a particular legal form for the purpose of tendering, it does permit such requirement in the event of the award of a contract.

59. The view taken by the Austrian Government and the Commission that the public procurement directives do not expressly regulate changes in the composition of a consortium is, therefore, well-founded.

60. In view of these two factors, namely, incomplete harmonisation and the existence of only selective rules on consortia, one could draw the converse conclusion, that other aspects concerning consortia are not covered by the works procurement coordination directive. It could further be concluded that Member States and contracting authorities are free to regulate such matters that are otherwise not covered themselves. This includes rules as to the composition of a consortium, such as the legal consequences of changes in its composition.

61. In the present case, such — national — rules on changes in the composition of a consortium did exist. These

12 — Joined Cases C-285/99 and C-286/99 *Impresa Lombardini and Others* [2001] ECR I-9233, paragraph 33.

became applicable with the change in the composition of the consortium which took place after the evaluation of its suitability. In this respect, the Commission rightly points out that one cannot infer from the public procurement directives any obligation for the contracting authority to check the suitability of the consortium in its new composition. If national legislation provides for a fresh evaluation of the consortium after a change in its composition, and this is not, however, carried out, then that is a legal issue to be determined according to national law.

62. To summarise, therefore: the works procurement coordination directive makes no provision for such circumstances, hence 'only' national law applies. That is not to say that Member States, including their contracting authorities, are entirely free. Rather, they must observe the parameters of Community law, which will be considered in further detail below.

2. General principles of the public procurement directives

63. Certain principles can be inferred from the public procurement directives. The Greek Government rightly refers to the principles of transparency and competition. In that connection, the Court has declared that it is clear from the preamble to, and the second and tenth recitals of, the works procurement coordination directive, that it's aim is 'to abolish restrictions on the freedom of establishment and the freedom to provide services in respect of public works contracts in order to open up such contracts to genuine competition between entrepreneurs in the Member States'. [13]

64. Added to this, according to the case-law of the Court, is the requirement that contracting authorities observe the principle of non-discrimination of tenderers, in respect of which the Court points to several provisions of the public procurement directives which expressly require equal treatment. [14]

65. The Court also states that the prohibition of discrimination implies an obligation of transparency, in order to allow the contracting authority to ensure that the prohibition has been complied with. [15] Even if the view were to be taken that the procurement directives did not imply an obligation of equal treatment, the principle of equality which is a general principle of law, obtains.

13 — Joined Cases C-285/99 and C-286/99 (cited above in footnote 12, paragraph 34); see also Case C-399/98 *Ordine degli Architetti and Others* [2001] ECR I-5409, paragraph 52.

14 — *Impresa Lombardini and Others*, cited in footnote 12, paragraph 37.

15 — *Impresa Lombardini and Others*, cited above in footnote 12, paragraph 38. Compare Case C-275/98 *Unitron Scandinavia and 3-S* [1999] ECR I-8291, paragraph 31.

66. The equal treatment obligation in the public procurement directives, as well as the principle of equality, would be breached, however, if the contracting authority unilaterally departed from its own rules concerning changes in the composition of consortia, particularly if it were to negotiate with a tenderer whose tender did not match the terms advertised. To that extent, an infringement of Community law can flow from the infringement of a national prohibition.

67. The prohibition on discrimination under Article 1(2) of the legal remedies directive cited by Makedoniko is, on the other hand, not relevant. Whilst that provision contains requirements for establishing legal protection, it does not extend the applicability of the legal remedies directive to infringements of national law.

3. Primary law

68. Further, it must be recalled that the public procurement rules of Member States, as well as the specific public procurement rules of the State's contracting authority, are subject to primary Community law, in particular the fundamental freedoms and the competition provisions addressed to the State, including legislation on State aid. [16]

69. In this context, it must be generally noted that the fundamental freedoms do not prohibit only direct or indirect discrimination, but also rules applicable without distinction which disproportionately inhibit any of the fundamental freedoms. From the information available to the Court, there is no indication that Greek law infringes the freedom to provide services. In any event, interpretation of the freedom to provide services is not the subject of the question referred to the Court for a preliminary ruling, nor, therefore, of these proceedings for a preliminary ruling.

4. The principles of equivalence and effectiveness

70. Since, as expounded above, there are no specific Community provisions governing changes in the composition of consortia, these are, in principle, the responsibility of the Member States. They are subject

16 — Case C-243/89 *Commission* v *Denmark* [1993] ECR I-3353, Case C-328/96 *Commission* v *Austria* [1999] ECR I-7479, and Case C-225/98 *Commission* v *France* [2000] ECR I-7445.

generally to the principles of equivalence and effectiveness which have been developed in case-law. [17]

71. According to the principle of equivalence, the rules of national law, thus also of specific public procurement law, must not be less favourable than those of corresponding, that is to say comparable, domestic provisions.

72. The principle of effectiveness obliges Member States, including the State's contracting authority, not to make the exercise of rights conferred by the system of Community law virtually impossible or excessively difficult.

5. Legal protection in the review procedure

73. As stated at the outset, the legal remedies directive, and thus also the review procedures which it governs, apply only to those awards which also fall within the scope of one of the public procurement directives, such as the works procurement coordination directive.

74. The applicability of the legal remedies directive is supported by the argument that the review procedures thereunder, in the submission of the Commission, also cover *decisions* of the contracting authority which interrupt negotiations with tenderers. That follows from the broad terms of Article 1 and Article 2 of the legal remedies directive, which refer to 'decisions' without further qualification. That broad interpretation not only may be inferred from the travaux préparatoires, but also corresponds to the purpose of the legal remedies directive; which is to improve legal protection and to make it effective.

As regards the applicability of the legal remedies directive, one could also point to the fact that Article 1 comprises measures which Member States are to take in relation to 'procedures falling within the scope of [the] Directives...'. However, it is not disputed that the contract award procedure in issue falls, as such, within the scope of one of the public procurement directives.

75. One could argue against the applicability of the legal remedies directive to *decisions* relating to changes in the composition of a consortium, that the decision of the contracting authority concerns national law, thus, in the present case, the rules on changes in the composition of a consortium. Accordingly, the substantive

17 — As to these two principles, see, for instance, Cases C-261/95 *Palmisani* [1997] ECR I-4025, paragraph 27, and C-453/99 *Courage* [2001] ECR I-6297.

legal basis for that decision lies in national law.

76. Such an interpretation is supported by Article 1 of the legal remedies directive. According to that provision, the legal remedies directive applies only to infringements of 'Community law in the field of public procurement or national rules implementing that law'.

77. Given the absence of such (that is to say, Community) legal rules on changes in the composition of a consortium, there cannot, logically, be any infringement of them or the rules implementing them. As rules of that type are purely a matter of national law, one of the preconditions for the applicability of the legal remedies directive has not, in this case, been satisfied.

78. The instruments of legal protection provided for in the legal remedies directive, such as the review procedure, only apply to decisions made by contracting authorities if such a decision infringes the rules referred to in Article 1 of the legal remedies directive. That may be the case where the contracting authority conducts negotiations with a tenderer whose tender does not meet the conditions of the tender, and thereby infringes the principle of equal treatment.

79. Where the decision of a contracting authority infringes both national law and Community law or rules implementing Community law, such a decision is subject to the legal remedies directive in so far as review of the decision according to the principles of Community law, or rules implementing Community law, is concerned. The provisions of the legal remedies directive, the right to a review procedure, apply only in that respect. Whether the contracting authority in the contract award procedure in issue has also taken decisions other than the decision to exclude the consortium because of a change in its composition, or whether the decision to exclude also incorporates other measures, such as the continuation of the contract award procedure with another tenderer, is not the issue in terms of the question which has been referred for preliminary ruling. That question is limited to the applicability of the legal remedies directive in relation to rules on changes in the composition of consortia.

80. The above finding certainly does not preclude Member States from providing, in their implementing rules, that the provisions of the legal remedies directive should also apply to infringements of national law, for example, of rules on changes in the composition of consortia.

6. Concluding remarks

81. Since the aspect in issue in these proceedings, namely the change in composition of a consortium, does not fall within the scope of the works procurement coordination directive, it is not necessary to determine whether the award procedure in issue concerned the award of a works concession or works contract.

82. The reply to the questions referred to the Court in this case should be that the provisions of the works procurement coordination directive are to be interpreted as not precluding rules which prohibit a change in the composition of a consortium after submission of a tender. The legal remedies directive does not apply to decisions concerning a change in the composition of a consortium such as that in issue in the main proceedings.

V — Conclusion

83. Following the above it is proposed that the Court respond to the questions referred to it as follows:

The provisions of Directive 71/305/EEC concerning coordination of procedures for the award of public works contracts, as amended by Directive 89/440/EEC, and of Directive 93/37/EEC concerning the coordination of procedures for the award of public works contracts are to be interpreted as not precluding rules which prohibit a change in the composition of a consortium after submission of a tender.

Directive 89/665/EEC on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts does not apply to decisions concerning a change in the composition of a consortium such as that in issue in the main proceedings.