JUDGMENT OF THE COURT (Fourth Chamber)

23 December 2009 *

In Case C-305/08,

REFERENCE for a preliminary ruling under Article 234 EC from the Consiglio di Stato (Italy), made by decision of 23 June 2008, received at the Court on 4 July 2008, in the proceedings

Consorzio Nazionale Interuniversitario per le Scienze del Mare (CoNISMa)

v

Regione Marche,

THE COURT (Fourth Chamber),

composed of K. Lenaerts, President of the Third Chamber, acting for the President of the Fourth Chamber, R. Silva de Lapuerta, E. Juhász (Rapporteur), G. Arestis and J. Malenovský, Judges,

* Language of the case: Italian.

Advocate General: J. Mazák,
Registrar: R. Grass,

after considering the observations submitted on behalf of:

— the Consorzio Nazionale Interuniversitario per le Scienze del Mare (CoNISMa), by I. Deluigi, avvocato,

— the Czech Government, by M. Smolek, acting as Agent,

— the Austrian Government, by M. Fruhmann, acting as Agent,

— the Commission of the European Communities, by C. Zadra and D. Recchia, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 3 September 2009,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 1(2)(a) and (8), first and second subparagraphs, of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).

2 The reference was made in proceedings between the Consorzio Nazionale Interuniversitario per le Scienze del Mare (National Inter-University Marine Sciences Consortium, 'CoNISMa') and the Regione Marche (the Marche Region) relating to the latter's decision not to admit the consortium to a procedure for the award of a public services contract.

Legal context

Community legislation

3 Recital 4 in the preamble to Directive 2004/18 states as follows:

'Member States should ensure that the participation of a body governed by public law as a tenderer in a procedure for the award of a public contract does not cause any distortion of competition in relation to private tenderers.'

4 Article 1(2)(a) of Directive 2004/18 is worded as follows:

'"Public contracts" are contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services within the meaning of this Directive.'

5 Article 1(8) of Directive 2004/18 provides as follows:

'The terms "contractor", "supplier" and "service provider" mean any natural or legal person or public entity or group of such persons and/or bodies which offers on the market, respectively, the execution of works and/or a work, products or services.

The term "economic operator" shall cover equally the concepts of contractor, supplier and service provider. It is used merely in the interest of simplification.

…'

6 Article 1(9) of Directive 2004/18 is worded as follows:

'"Contracting authorities" means the State, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or one or several of such bodies governed by public law.

A "body governed by public law" means any body:

(a) established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character;

(b) having legal personality; and

(c) financed, for the most part, by the State, regional or local authorities, or other bodies governed by public law; or subject to management supervision by those

bodies; or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law.

…'

7 Article 4 of Directive 2004/18, entitled 'Economic Operators', provides as follows:

'1. Candidates or tenderers who, under the law of the Member State in which they are established, are entitled to provide the relevant service, shall not be rejected solely on the ground that, under the law of the Member State in which the contract is awarded, they would be required to be either natural or legal persons.

…

2. Groups of economic operators may submit tenders or put themselves forward as candidates. In order to submit a tender or a request to participate, these groups may not be required by the contracting authorities to assume a specific legal form; however, the group selected may be required to do so when it has been awarded the contract, to the extent that this change is necessary for the satisfactory performance of the contract.'

8 Article 44 of Directive 2004/18, entitled 'Verification of the suitability and choice of participants and award of contracts', provides in the first paragraph thereof as follows:

'Contracts shall be awarded on the basis of the criteria laid down in Articles 53 and 55, taking into account Article 24, after the suitability of the economic operators not excluded under Articles 45 and 46 has been checked by contracting authorities in accordance with the criteria of economic and financial standing, of professional and technical knowledge or ability referred to in Articles 47 to 52, and, where appropriate, with the non-discriminatory rules and criteria referred to in paragraph 3.'

9 Article 55 of Directive 2004/18, entitled 'Abnormally low tenders', is worded as follows:

'1. If, for a given contract, tenders appear to be abnormally low in relation to the goods, works or services, the contracting authority shall, before it may reject those tenders, request in writing details of the constituent elements of the tender which it considers relevant.

Those details may relate in particular to:

(a) the economics of the construction method, the manufacturing process or the services provided;

(b) the technical solutions chosen and/or any exceptionally favourable conditions available to the tenderer for the execution of the work, for the supply of the goods or services;

(c) the originality of the work, supplies or services proposed by the tenderer;

(d) compliance with the provisions relating to employment protection and working conditions in force at the place where the work, service or supply is to be performed;

(e) the possibility of the tenderer obtaining State aid.

2. The contracting authority shall verify those constituent elements by consulting the tenderer, taking account of the evidence supplied.

3. Where a contracting authority establishes that a tender is abnormally low because the tenderer has obtained State aid, the tender can be rejected on that ground alone only after consultation with the tenderer where the latter is unable to prove, within a sufficient time limit fixed by the contracting authority, that the aid in question was granted legally. Where the contracting authority rejects a tender in these circumstances, it shall inform the Commission of that fact.'

National legislation

10 Article 3(19) and (22) of Legislative Decree No 163 of 12 April 2006 establishing the Codice dei contratti pubblici relativi a lavori, servizi e forniture in attuazione delle direttive 2004/17/CE e 2004/18/CE (Public Works Contracts, Public Supply Contracts

and Public Service Contracts Code implementing Directives 2004/17/EC and 2004/18/EC) (GURI No 100 of 2 May 2006, ordinary supplement) ('Legislative Decree No 163/2006') provides as follows:

'19. The terms "contractor", "supplier" and "service provider" mean a natural or legal person, or body without legal personality, including a European Economic Interest Group (EEIG) formed pursuant to Legislative Decree No 240 of 23 July 1991, which offers on the market, respectively, the execution of works or a work, the supply of products or the provision of services.

…

22. The term "economic operator" shall include a contractor, a supplier, a service provider or a group or consortium of these.'

11 Article 34 of Legislative Decree No 163/2006 provides, under the heading 'Entities to which public contracts may be awarded (Articles 4 and 5 of Directive 2004/18)', as follows:

'1. Without prejudice to the restrictions expressly provided for, the following entities are entitled to participate in procedures for the award of public procurement contracts:

(a) individual commercial operators, including artisans, commercial companies and partnerships and cooperatives;

(b) consortia of production- and labour-cooperatives … and … consortia of artisans …;

(c) permanent consortia, constituted inter alia as joint venture companies for the purpose of Article 2615b of the Civil Code, between individual contractors (including artisans), commercial companies or partnerships or production- and labour-cooperatives, in accordance with the provision in Article 36;

(d) special purpose groupings of competitors, whose members include the entities referred to in subparagraphs (a), (b) and (c) …;

(e) ordinary consortia of competitors referred to in Article 2602 of the Civil Code whose members include the entities referred to in subparagraphs (a), (b) and (c) of the present paragraph, including those constituted as companies or partnerships …;

(f) entities who have entered into a European Economic Interest Group (EEIG) contract …;

…'

12 After the material events of the main proceedings had occurred, Legislative Decree No 152 of 11 September 2008 (GURI No 231 of 2 October 2008) added the following subparagraph (f bis) to the above list:

'economic operators within the meaning of Article 3(22), established in other Member States and constituted according to the applicable legislation of the Member State concerned.'

13 Lastly, Article 2082 of the Italian Civil Code provides that a 'commercial operator' (*imprenditore*) is any person who, in a professional capacity, engages in economic activity on an organised basis in order to produce or exchange goods or services.

The dispute in the main proceedings and the questions referred for a preliminary ruling

14 It is apparent from the order for reference that the Regione Marche organised a public tendering procedure for the award of a service contract entailing the acquisition of marine and seismic stratigraphic data and the taking of core borings and samples from the sea along the coastline between Pesaro and Civitanova Marche.

15 CoNISMa applied to participate in that procedure. After expressing reservations as to whether CoNISMa was eligible to participate in the tendering procedure in question, the contracting authority decided to exclude it by Decisions 4, 18 and 23 of 23 April 2007.

16 CoNISMa challenged its exclusion by way of an extraordinary petition to the President of the Italian Republic, a special procedure provided for by the Italian legal system, arguing that if Article 34 of Legislative Decree 163/2006 were interpreted as meaning that it contains an exhaustive list, not including universities and research institutes, and that such bodies are therefore not eligible to participate in a procedure for the award of a public contract, such an interpretation would be incompatible with Directive 2004/18. In the framework of that extraordinary petition, the Ministero dell'ambiente e della tutela del territorio (Italian Ministry of the Environment and Protection of the Territory) requested an opinion of the Consiglio di Stato (Council of State), for which provision is made under the relevant national legislation.

17 The Consiglio di Stato observes that, in order to deliver its opinion, it must establish whether an inter-university group, such as CoNISMa, can be regarded as an 'economic operator' within the meaning of Directive 2004/18 and, accordingly, whether it may take part in a tendering procedure for the award of a public service contract such as that at issue in the main proceedings. The referring court expresses reservations in that connection, on the basis of the following considerations.

18 The Consiglio di Stato states, as a preliminary point, that CoNISMa is a group ('consorzio') of 24 Italian universities and three ministries. According to its statute, it is non-profit-making and its object is to promote and coordinate research and other scientific activities and their applications in the field of marine sciences among the member universities. It can take part in tendering procedures and other procedures for competitive tendering organised by public authorities and by companies operating in the public and private sphere. Its activities are financed primarily by grants awarded by the Ministry for Universities and Research and other public authorities as well as by Italian or foreign public and private bodies.

19 The Consiglio di Stato refers, first, to Article 1(c) of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1) — to which Directive 2004/18 was the successor — which provides that 'service provider shall mean any natural or legal person, including a public body, which offers services' and observes that that wording appears to indicate an intention to restrict the possibility of concluding contracts with contracting authorities

to entities which are engaged 'in an institutional capacity' in the activity corresponding to the service to be provided under the contract in question. If that approach is adopted, with the exception of private economic operators, tendering procedures are open only to public bodies which provide, for pecuniary gain, the services covered by that contract, in accordance with the function ascribed to them by the legal system, university bodies thus being excluded. That approach would appear to have been confirmed by the Court in Case C-220/05 *Auroux and Others* [2007] ECR I-385, paragraph 44, which held that Community legislation on public contracts applied to the person concerned 'as an economic operator active on the market'. That approach also appears to have been followed in Article 3(19) of Legislative Decree No 163/2006, which provides that a service provider is an economic operator 'which offers' services 'on the market'.

20 Second, the Consiglio di Stato points out that the position adopted on this question in Italian case-law is not without ambiguity. Certain courts have taken the view that public tendering procedures are open to natural and legal persons operating as a business and to public bodies which offer, in accordance with their institutional organisation, services similar to those covered by the tendering procedure. From that perspective, universities cannot be included in such categories of private and public undertakings, since their institutional remit is to develop teaching and research activities. Following a different approach, it has been held that public universities and consortia of such universities can take part in procedures for the award of public service contracts, provided that the provision of services in question is compatible with their institutional objectives and the provisions laid down in their statutes.

21 The Consiglio di Stato refers, thirdly, to the position adopted by the regulatory authority for public contracts, which distinguishes between economic operators and entities, such as non-economic public bodies, universities and university departments, which do not fall into the former category because their purpose is not to carry out economic activity, which is characterised by the creation of wealth. Such entities cannot therefore take part in public tendering procedures unless they set up companies expressly for that purpose by exercising the autonomy granted to universities under national legislation. That view is confirmed by Article 34 of Legislative Decree No 163/2006, which contains an exhaustive list of the entities authorised to take part in public tendering procedures.

22 By way of justification of its reservations, the Consiglio di Stato refers, lastly, to the Court's case-law, according to which Community public procurement rules must be interpreted by reference to a criterion of a functional nature, so that the fundamental principle of effective competition is not circumvented (Case C-337/06 *Bayerischer Rundfunk and Others* [2007] ECR I-11173). With regard in particular to public service contracts, the Court has drawn attention to the principal objective of the Community rules in this field, namely the free movement of services and the opening-up to the widest possible undistorted competition in all the Member States (Case C-26/03 *Stadt Halle and RPL Lochau* [2005] ECR I-1, paragraphs 44 and 47).

23 In the light of that case-law, the Consiglio di Stato states that the admission of universities, research institutes and consortia of those bodies to public tendering procedures may infringe the principle of free competition in two respects. First, it could potentially remove from the open market a number of public contracts, to which ease of access would in practice be hampered for a not inconsiderable proportion of ordinary undertakings. Second, it would place the contractor in a position of unfair advantage, guaranteeing it economic security provided by the constant and predictable flow of public finance, which is not available to other economic operators. However, the Consiglio di Stato takes the view that a restrictive interpretation of the concept of 'economic operator', which is dependent on the stable presence of such an operator 'on the market', thus precluding universities, research institutes and consortia of such bodies from taking part in public tendering procedures, would seriously undermine cooperation between public and private entities and between researchers and commercial operators and ultimately constitute a restriction on free competition.

24 In the light of the foregoing, the Consiglio decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Must the provisions of Directive 2004/18/EC... be interpreted as precluding a consortium made up solely of Italian universities and State bodies … from taking part in a tendering procedure for the award of a service contract such as that for the acquisition of geophysical data and marine samples?

(2) Are the provisions of Italian law contained in Article 3(22) and (19) and Article 34 of Legislative Decree No 163/2006, which provide, respectively: that "the term 'economic operator' shall include a contractor, supplier, service provider or a group or consortium of these" and "the terms 'contractor', 'supplier' and 'service provider' shall mean any natural or legal person, or body without legal personality, including a European Economic Interest Group (EEIG)..., which 'offers on the market', respectively, the execution of works or a work, the supply of products or the provision of services", contrary to Directive 2004/18/EC … if interpreted as restricting participation in tendering procedures to professional providers of such services and excluding entities whose primary objects are non-profit-making, such as research?'

The questions referred

25 It should be noted, first, that, according to the Court's case-law, when it issues an opinion in the context of an extraordinary petition, such as that in the main proceedings, the Consiglio di Stato constitutes a court or tribunal for the purposes of Article 234 EC (Joined Cases C-69/96 to C-79/96 *Garofalo and Others* [1997] ECR I-5603, paragraph 27).

Question 1

26 By this question, the Consiglio di Stato asks, in essence, whether Directive 2004/18 must be interpreted as precluding a consortium made up solely of universities and public authorities from taking part in a public tendering procedure for the award of a service contract.

27 As is apparent from the order for reference, the provisions of Directive 2004/18 considered to be relevant by the national court are, in particular, those in Article 1(2)(a) and (8), first and second subparagraphs, because those provisions refer to the concept of 'economic operator'. Moreover, according to the order, the consortium in question is, for the most part, non-profit-making and does not have the organisational structure of an undertaking or a regular presence on the market.

28 For the purposes of answering that question, it should be pointed out, first, that the provisions of Directive 2004/18 do not contain a definition of 'economic operator' and, second, do not distinguish between tenderers on the basis of whether they are primarily profit-making and nor do they expressly preclude entities such as that in question in the main proceedings. However, considered in the light of the Court's case-law, those provisions contain sufficient indications for it to be possible to give a useful answer to the referring court.

29 For instance, recital 4 in the preamble to Directive 2004/18 makes it clear that 'a body governed by public law' can participate as a tenderer in a procedure for the award of a public contract.

30 Similarly, the first and second subparagraphs of Article 1(8) of the directive grant the status of 'economic operator' not only to any natural or legal person but also, expressly, to any 'public entity' or group consisting of such entities offering services on the market. The concept of 'public entity' may also, therefore, include bodies which are not primarily profit-making, are not structured as an undertaking and do not have a continuous presence on the market.

31 Moreover, paragraph 1 of Article 4 of Directive 2004/18, which is entitled 'Economic operators', prohibits Member States from providing that candidates or tenderers who,

under the rules of the Member State in which they are established, are entitled to provide the services covered by the contract notice, are to be rejected solely on the ground that, under the law of the Member State in which the contract is awarded, they are required to be either natural or legal persons. Nor does that provision distinguish between candidates and tenderers on the basis of whether they are governed by public or private law.

32 As regards the question raised by the referring court concerning a possible distortion of competition due to the participation in a public tendering procedure by entities, such as the applicant in the main proceedings, which enjoy a position of unfair advantage vis-à-vis private economic operators on account of the public finance which they receive, it should be noted that recital 4 in the preamble to Directive 2004/18 imposes an obligation on Member States to ensure that the participation of a body governed by public law in a public tendering procedure does not cause such a distortion. That obligation also applies with regard to entities such as the applicant.

33 Reference should be made in that connection to the obligations upon and options available to contracting authorities under Article 55(3) of Directive 2004/18 in cases involving abnormally low tenders where the tenderer has obtained State aid. The Court has also recognised that, in certain specific circumstances, the contracting authorities are required, or at the very least permitted, to take into account the existence of subsidies, and in particular of aid incompatible with the Treaty, in order, where appropriate, to exclude tenderers in receipt of such aid (see, to that effect, Case C-94/99 *ARGE* [2000] ECR I-11037, paragraph 29).

34 However, the fact that an economic operator may enjoy an unfair advantage because it receives public finance or State aid cannot justify the exclusion of entities, such as the applicant in the main proceedings, from a public tendering procedure a priori and without further consideration.

35 It follows from the above considerations that the Community legislature did not intend to restrict the concept of 'economic operator which offers services on the market' solely to operators which are structured as a business or to impose specific conditions which can restrict access to tendering procedures, from the outset, on the basis of the legal form and internal organisation of the economic operator.

36 That interpretation finds support in the Court's case-law.

37 The Court has thus held that one of the primary objectives of Community rules on public procurement is to attain the widest possible opening-up to competition (see, inter alia, to that effect *Bayerischer Rundfunk and Others*, paragraph 39) and that it is the concern of Community law to ensure the widest possible participation by tenderers in a call for tenders (Case C-538/07 *Assitur* [2009] ECR I-4219, paragraph 26). It should be added that the widest possible opening-up to competition is contemplated not only from the point of view of the Community interest in the free movement of goods and services but also the interest of the contracting authority concerned itself, which will thus have greater choice as to the most advantageous tender which is most suitable for the needs of the public authority in question (see, to that effect, with regard to abnormally low tenders, Joined Cases C-147/06 and C-148/06 *SECAP and Santorso* [2008] ECR I-3565, paragraph 29).

38 In that spirit of opening up public contracts to the widest possible competition, the Court has also held that Community rules governing that field are applicable when the entity with which a contracting authority plans to conclude a contract for pecuniary interest is itself also a contracting authority (see, to that effect, *Stadt Halle and RPL Lochau*, paragraph 47 and the case-law cited). According to Article 1(9) of Directive 2004/18, a contracting authority is an entity not having an industrial or commercial character which performs a task in the general interest. As a general rule, such a body does not pursue gainful activity on the market.

39 Similarly, the Court has held that Community rules preclude any national legislation which excludes candidates or tenderers entitled under the law of the Member State in which they are established to provide the services in question from the award of public service contracts with a value greater than the threshold for the application of the relevant directives, solely on the ground that those candidates or tenderers do not have the legal form corresponding to a specific category of legal persons (see, to that effect, Case C-357/06 *Frigerio Luigi and C.* [2007] ECR I-12311, paragraph 22).

40 Moreover, it should be noted that, according to the Court's case-law, first, the mere fact that contracting authorities allow bodies which receive subsidies enabling them to submit tenders at prices appreciably lower than those of competing, unsubsidised, tenderers to take part in a procedure for the award of a public contract does not amount to a breach of the principle of equal treatment and, second, if the Community legislature had intended to require contracting authorities to exclude such tenderers, it would have stated this explicitly (*ARGE,* paragraphs 25 and 26).

41 Finally, the Court's case-law also provides that Community rules do not require that, in order to be classed as a contractor — that is, an economic operator — a person who enters into a contract with a contracting authority must be capable of direct performance using his own resources. The person in question need only be able to arrange for execution of the works in question and to furnish the necessary guarantees in that connection (see, to that effect, Case C-399/98 *Ordine degli Architetti and Others* [2001] ECR I-5409, paragraph 90).

42 It therefore follows from both Community rules and the Court's case-law that any person or entity which, in the light of the conditions laid down in a contract notice, believes that it is capable of carrying out the contract, either directly or by using subcontractors, is eligible to submit a tender or put itself forward as a candidate, regardless of whether it is governed by public law or private law, whether it is active as a matter of course on the market or only on an occasional basis and whether or not it is subsidised by public funds. As the Czech Government correctly observed, whether such an entity is actually able to satisfy the conditions laid down in the contract notice

must be assessed at a later stage in the procedure, by applying the criteria set out in Articles 44 to 52 of Directive 2004/18.

43 It should be added that the effect of a restrictive interpretation of the concept of 'economic operator' would be that contracts concluded between contracting authorities and bodies which are primarily non-profit-making would not be regarded as 'public contracts', could be awarded by mutual agreement and would thus not be covered by Community rules on equal treatment and transparency, which would be inconsistent with the aim of those rules.

44 Moreover, as the Consiglio di Stato stated, such an interpretation would undermine cooperation between public and private entities and between researchers and commercial operators and constitute a restriction of competition.

45 In the light of the foregoing, the answer to the first question must be that the provisions of Directive 2004/18, in particular those in Article 1(2)(a) and (8), first and second subparagraphs, which refer to the concept of 'economic operator', must be interpreted as permitting entities which are primarily non-profit-making and do not have the organisational structure of an undertaking or a regular presence on the market — such as universities and research institutes and consortia made up of universities and public authorities — to take part in a public tendering procedure for the award of a service contract.

Question 2

46 By this question, the Consiglio di Stato asks, in essence, whether the provisions of Directive 2004/18, in particular those in Article 1(2)(a) and (8), first and second subparagraphs, preclude national legislation transposing that directive into national law where such legislation is interpreted as restricting participation in public

procurement procedures to service providers who offer services on the market on a systematic and commercial basis and excluding entities, such as universities and research institutes, which are primarily non-profit-making.

47 It should be noted, as is apparent from the wording of Article 4(1) of Directive 2004/18, that the Member States have a discretion as to whether or not to allow certain categories of economic operators to provide certain services.

48 Accordingly, as the Commission correctly observed, the Member States can regulate the activities of entities, such as universities and research institutes, which are non-profit-making and whose primary object is teaching and research. They can, inter alia, determine whether or not such entities are authorised to operate on the market, according to whether the activity in question is compatible with their objectives as an institution and those laid down in their statutes.

49 However, if and to the extent that such entities are entitled to offer certain services on the market, the national legislation transposing Directive 2004/18 into domestic law cannot prevent them from taking part in public procedures for the award of contracts for the provision of those services. Such a prohibition would be incompatible with the provisions of Directive 2004/18, as interpreted in connection with the examination of the first question referred.

50 In such a situation, it is for the national court to interpret domestic law, so far as possible, in the light of the wording and the purpose of Directive 2004/18 with a view to achieving the results sought by the latter, favouring the interpretation of the national rules which is the most consistent with that purpose in order thereby to achieve an

outcome compatible with the provisions of the directive, setting aside, if necessary, any contrary provision of national law (see Case C-414/07 *Magoora* [2008] ECR I-10921, paragraph 44).

51 The answer to the second question must therefore be that Directive 2004/18 must be construed as precluding an interpretation of national legislation, such as that at issue in the main proceedings, which prohibits entities, such as universities and research institutes, which are primarily non-profit-making from taking part in a procedure for the award of a public contract, even though such entities are entitled under national law to offer the services covered by the contract in question.

Costs

52 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

1. **The provisions of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, in particular those in Article 1(2)(a) and (8), first and second subparagraphs, which refer to the concept of 'economic operator', must be interpreted as permitting entities which are primarily non-profit-making and do not have the organisational structure of an undertaking or a regular presence on the**

market — such as universities and research institutes and consortia made up of universities and public authorities — to take part in a public tendering procedure for the award of a service contract.

2. **Directive 2004/18 must be construed as precluding an interpretation of national legislation, such as that at issue in the main proceedings, which prohibits entities, such as universities and research institutes, which are primarily non-profit-making from taking part in a procedure for the award of a public contract, even though such entities are entitled under national law to offer the services covered by the contract in question.**

[Signatures]