JUDGMENT OF THE COURT (Grand Chamber)

16 December 2008 *

In Case C-213/07,

REFERENCE for a preliminary ruling under Article 234 EC from the Simvoulio tis Epikratias (Greece), made by decision of 8 December 2006, received at the Court on 23 April 2007, in the proceedings

Michaniki AE

v

Ethniko Simvoulio Radiotileorasis,

Ipourgos Epikratias,

interveners:

Elliniki Technodomiki Techniki Ependitiki Viomichaniki AE, successor in law to Pantechniki AE,

Sindesmos Epikhiriseon Periodikou Tipou,

* Language of the case: Greek.

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas and K. Lenaerts (Rapporteur), Presidents of Chambers, A. Tizzano, J.N. Cunha Rodrigues, R. Silva de Lapuerta, K. Schiemann, J. Klučka, A. Arabadjiev, C. Toader and J.-J. Kasel, Judges,

Advocate General: M. Poiares Maduro,
Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 4 March 2008,

after considering the observations submitted on behalf of:

— Elliniki Technodomiki Techniki Ependitiki Viomichaniki AE, successor in law to Pantechniki AE, by K. Giannakopoulos, dikigoros,

— the Sindesmos Epikhiriseon Periodikou Tipou, by K. Drougas, dikigoros,

— the Greek Government, by A. Samoni-Rantou, E.-M. Mamouna, A. Manitakis and I. Dionisopoulos, acting as Agents,

— the Council of the European Union, by A. Lo Monaco, M.-M. Joséphidès and A. Vitro, acting as Agents,

— the Commission of the European Communities, by M. Patakia, D. Kukovec and X. Lewis, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 8 October 2008,

gives the following

Judgment

1 This reference for a preliminary ruling relates to the interpretation of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54), as amended by European Parliament and Council Directive 97/52/EC of 13 October 1997 (OJ 1997 L 328, p. 1) ('Directive 93/37').

2 The reference was made in proceedings brought by Michaniki AE ('Michaniki'), a company governed by Greek law, against the Ethniko Simvoulio Radiotileorasis (National Radio and Television Council; 'the ESR') and the Ipourgos Epikratias (Minister of State) concerning the decision by which the ESR issued to Pantechniki AE ('Pantechniki'), also a company governed by Greek law, a certificate of conformity, in the context of a procedure for the award of a public works contract.

Legal context

Community provisions

3 Article 6(6) of Directive 93/37, which appears in Title I ('General provisions'), states:

'Contracting authorities shall ensure that there is no discrimination between the various contractors.'

4 In Chapter 2 ('Criteria for qualitative selection') of Title IV ('Common rules on participation') of that directive, the first paragraph of Article 24 provides:

'Any contractor may be excluded from participation in the contract who:

(a) is bankrupt or is being wound up, whose affairs are being administered by the court, who has entered into an arrangement with creditors, who has suspended business activities or who is in any analogous situation arising from a similar procedure under national laws and regulations;

(b) is the subject of proceedings for a declaration of bankruptcy, for an order for compulsory winding up or administration by the court or for an arrangement with creditors or of any other similar proceedings under national laws or regulations;

(c) has been convicted of an offence concerning his professional conduct by a judgment which has the force of *res judicata*;

(d) has been guilty of grave professional misconduct proved by any means which the contracting authorities can justify;

(e) has not fulfilled obligations relating to the payment of social security contributions in accordance with the legal provisions of the country in which he is established or with those of the country of the contracting authority;

(f) has not fulfilled obligations relating to the payment of taxes in accordance with the legal provisions of the country in which he is established or those of the country of the contracting authority;

(g) is guilty of serious misrepresentation in supplying the information required under this Chapter.'

National provisions

5 Article 14(9) of the Greek Constitution, which was added by the vote on 6 April 2001 of the seventh revising assembly of the Greek Parliament, provides:

'The ownership, financial standing and means of financing of the media must be disclosed, as stipulated by law.

The measures and restrictions necessary to ensure full media transparency and pluralism shall be specified by law.

It is prohibited to concentrate control of several media of the same or different form.

In particular, it is prohibited to concentrate control of more than one electronic medium of the same form, as specified by law.

The status of owner, partner, main shareholder or management executive of a media undertaking shall be incompatible with the status of owner, partner, main shareholder or management executive of an undertaking which undertakes with the State or a legal person in the public sector in the broad sense to perform works or provide supplies or services.

The prohibition in the previous subparagraph shall also extend to any form of intermediary, such as spouses, relatives or financially dependent persons or companies.

A law shall set out the specific regulations, the sanctions (which may go as far as revocation of a radio or television station's licence and an order prohibiting the

signature of, or cancelling, the contract in question), the system of supervision and the guarantees to prevent circumvention of the foregoing subparagraphs.'

6 Law 3021/2002 relating to the restrictions applicable to the conclusion of public contracts with persons who are active in or have interests in media undertakings (FEK A' 143) governs the aspects referred to in the last subparagraph of Article 14(9) of the Constitution.

7 Undertakings 'whose operation is subject to the jurisdiction of the Greek State' fall within the concept of 'media undertaking' within the meaning of Article 1 of that law. Article 1 also sets out the definitions of 'public sector in the broad sense', 'public contracts','main shareholder','management executives','financially dependent persons' and 'intermediaries'.

8 In particular, 'main shareholder' and 'intermediaries' are defined as follows, in Article 1(4) and (7) of Law 3021/2002:

'4. "Main shareholder": a shareholder who, on the basis of the number of shares that he owns, calculated independently or by comparison with the number of shares owned by the other shareholders of the company, on the basis of the voting rights that he holds or other special rights conferred by law or by the statutes of the company or on the basis of general or specific agreements that he has concluded with the company, other shareholders or third parties who are financially dependent on him or act on his behalf, is able to exert a material influence on the decisions taken by the competent bodies or

executives of the company as regards the method of management and of general operation of the undertaking concerned.

More specifically, the following shall be deemed to be a main shareholder:

A. A natural or legal person who, regardless of the percentage of the total share capital that he or it owns:

(a) owns a larger number of shares than any other shareholder or a number of shares equal to that held by another shareholder in that case, or

(b) holds, either pursuant to the company statutes or following the transfer of a right of other shareholders in that regard, the majority of voting rights at the general meeting of shareholders, or

(c) has the right, by virtue of law or the statutes of the company or following the transfer of a right of other shareholders in that regard, to appoint or dismiss at least two members of the board of directors or one member where the latter

performs the functions of chairman or vice-chairman, of managing, executive or joint director or of general director with executive duties, or

(d) holds a percentage of the total share capital or voting rights equal to at least half the share capital which was represented and voted when the decision of the general meeting of shareholders relating to the election or dismissal of the last board of directors of the company or of the majority of the board members was adopted, or

(e) enters, directly or indirectly, into contracts and into agreements generally with the company which generate revenue or other financial benefits for the company equal to at least one fifth of its gross revenue during the previous year.

B. A natural or legal person who:

(a) owns shares representing at least 5% of the total share capital or

(b) holds voting rights corresponding to at least 5% of the voting rights at the company's general meeting of shareholders.

For the calculation of the percentage of the share capital or voting rights referred to in points A and B of this paragraph, the number of shares or voting rights which belong to or are held by the following shall also be taken into account:

— intermediaries,

— undertakings controlled by the same shareholder,

— another shareholder with whom he has entered into an agreement for the purpose of achieving, by the coordinated exercise of his voting rights, a lasting common company management policy.

Voting rights which are held under a pledge agreement, under an agreement conferring beneficial enjoyment or as a result of a protective measure against the holder of the corresponding shares and the number of shares which he does not own but in respect of which he has a right to receive dividends shall also be taken into account. The number of shares or voting rights which are acquired by inheritance shall be taken into account on expiry of a period of three months from their acquisition.

…

7. “Intermediaries”: natural or legal persons who are financially dependent on or who act, under the terms of a general or specific agreement, on behalf or on the recommendation or instruction of another natural or legal person.’

9 Article 2 of Law 3021/2002, entitled ‘Prohibition on the award of public contracts to media undertakings’, provides:

‘1. It is prohibited to award public contracts to media undertakings or to the partners, main shareholders, members of the administrative organs or management executives of such undertakings. It is also prohibited to award public contracts to undertakings whose partners, main shareholders, members of the administrative organs or management executives are media undertakings or partners, main shareholders, members of the administrative organs or management executives of media undertakings.

2. The prohibition on the award of public contracts shall also encompass:

(a) the spouses and relatives in a direct line to an unlimited degree and collaterally up to and including the fourth degree of the natural persons falling within paragraph 1, unless they can prove that they are financially independent of such persons;

(b) any other intermediary;

(c) the partners and main shareholders owning the partners and the main shareholders who fall within paragraph 1;

(d) any natural or legal person who, whilst not a shareholder, controls, directly or indirectly, one or more media undertakings or exerts, directly or indirectly, a material influence on the adoption of the decisions taken by the administrative organs or management executives in relation to the management or general operation of those undertakings.

…'

10 Article 3 of Law 3021/2002, relating to '[i]ncompatibilities', provides:

'1. The status of owner, partner, main shareholder, member of an administrative organ or management executive of a media undertaking shall be incompatible with the status of owner, partner, main shareholder, member of an administrative organ or manage-

ment executive of an undertaking which enters into public contracts the award of which is prohibited under Article 2, and with the status of partner or main shareholder owning the partners or the main shareholders of that undertaking.

2. The incompatibility provided for in this article shall also apply where the owner, main shareholder, partner, member of an administrative organ or management executive of an undertaking which enters into public contracts is a spouse or relative, in a direct line to an unlimited degree and collaterally up to and including the fourth degree, who is unable to show that he is financially independent of the owner, partner, main shareholder, member of an administrative organ or management executive of a media undertaking; the same shall also apply in any other case in which the abovementioned incompatibilities relate to an intermediary.

…'

11 Article 4 of Law 3021/2002 provides, in essence, that, before issuing acceptance of a tender for or awarding a public contract and, in any event, before the public contract is signed, the contracting authority must apply to the ESR for a certificate attesting that the conditions of incompatibility laid down in Article 3 of that law are not fulfilled, failing which the public contract is void.

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

12 By Decision No 844 of 13 December 2001, the board of directors of Erga OSE AE ('Erga OSE'), a company governed by Greek law, announced an invitation to tender by open procedure for the construction of embankments and technical infrastructure works for the new high-speed, two-track railway line between Corinth and Kiato (Greece), with a budget of EUR 51 700 000.

13 Michaniki and KI Sarantopoulos AE ('Sarantopoulos'), which is also a company governed by Greek law, were among the participants in that procedure.

14 By Decision No 959 of 22 May 2002, the board of directors of Erga OSE awarded the contract relating to those embankment and technical infrastructure works to Sarantopoulos. The latter was subsequently taken over by Pantechniki.

15 Before entering into the contract, Erga OSE, which at the time fell within the 'public sector in the broad sense' within the meaning of Article 1(2) of Law 3021/2002, disclosed to the ESR by letter of 9 October 2002 the information on the identity of the main shareholders, the members of the board of directors and the members of the executive board of Pantechniki, in order to obtain a certificate stating that those persons were not concerned by the incompatibilities laid down in Article 3 of that law.

16 On the basis of Article 4 of Law 3021/2002, the ESR drew up certificate No 8117 of 30 October 2002 attesting that there was no incompatibility in respect of the persons identified in Erga OSE's letter of 9 October 2002 ('the certificate').

17 According to the information in the order for reference, the ESR was of the view that Mr K. Sarantopoulos, a main shareholder and vice-chairman of the board of directors of Pantechniki, was not, despite his status as parent of Mr G. Sarantopoulos, a member of the board of directors of two Greek companies active in the media field, affected by the system of incompatibility established by Articles 2 and 3 of Law 3021/2002, finding that Mr K. Sarantopoulos was financially independent of Mr G. Sarantopoulos.

18 Michaniki applied to the Simvoulio tis Epikratias (Council of State) to have the certificate annulled on the basis of an infringement of Article 14(9) of the Constitution. It submits in particular that Articles 2(2) and 3(2) of Law 3021/2002, on the basis of which the certificate was issued, have the effect of reducing the scope of Article 14(9) of the Constitution and that they are not therefore consistent with that constitutional provision.

19 Pantechniki, whose successor in law is Elliniki Technodomiki Techniki Ependitiki Viomichaniki AE, and the Sindesmos Epikhiriseon Periodikou Tipou (Association of Magazine Undertakings) were granted leave to intervene in the main proceedings in support of the ESR.

20 The referring court takes the view that in so far as Articles 2(2) and 3(2) of Law 3021/2002 allow a public works contractor to escape the system of incompatibility by demonstrating his financial independence from a relative who is an owner, major shareholder, partner or director of a media undertaking, they infringe Article 14(9) of the Constitution, pursuant to which that contractor, even if financially independent of that relative, is nevertheless required to prove that he has acted independently, on his own account and in his own interest.

21 However, the referring court takes the view that, although that analysis may at this stage be sufficient to decide the case in the main proceedings, reasons of procedural economy justify that, with a view to the possible annulment of the certificate based on the infringement of Article 14(9) of the Constitution by Articles 2 and 3 of Law 3021/2002, it reviews now the compatibility with Community law of that constitutional provision, which allows a public works undertaking to be excluded from a public contract on the ground that its main shareholder has been unable to rebut the presumption applicable to him, as a relative of the owner, partner, main shareholder or director of a media company, that he acted on behalf of that company and not on his own account.

22 In this respect, the referring court states, first, that a majority of its members takes the view that the list of grounds for exclusion set out in Article 24 of Directive 93/37 is exhaustive and, therefore, does not allow the addition of grounds for exclusion such as those flowing from Article 14(9) of the Constitution. It adds that some of its members take the view, by contrast, that, in view of the partial nature of the harmonisation effected by that directive, Article 24 thereof does not prohibit Member States from providing for additional grounds for exclusion concerned in particular, as in the present case, with objectives of public interest connected with the operation of democracy and ensuring pluralism of the press.

23 Second, if Article 24 of Directive 93/37 is not exhaustive, the referring court takes the view that the Member States' discretion to provide for additional grounds for exclusion is subject, in accordance with Community case-law, to conditions relating, first, to there being an objective which is compatible with the general principles of Community law and, second, to observance of the principle of proportionality. It states in this respect that one of its members considers that Article 14(9) of the Constitution does not infringe that principle in view of the fact that the presumption relating to intermediaries is rebuttable and that there is no alternative solution enabling the objectives pursued to be achieved.

24 Third, if Article 24 of Directive 93/37 is exhaustive, or if Article 14(9) of the Constitution cannot be considered to pursue an aim which is compatible with Community law or to be consistent with the principle of proportionality, the referring court doubts that the prohibition imposed on the Member States by that directive on enacting provisions, such as those at issue in the main proceedings, which, for reasons of public interest, establish a system of incompatibility between the field of the media and that of public contracts is consistent with the principles linked to the protection of the normal operation of democracy in the Member States and to ensuring transparency in public procurement procedures, the principle of free and fair competition and the principle of subsidiarity.

25 It states however that a minority of its members has a contrary view, considering that Directive 93/37 contains sufficient safeguards to ensure the transparency of public procurement procedures and to protect those procedures from unlawful influences or corruption.

26 In these circumstances the Simvoulio tis Epikratias decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Is the list of grounds for excluding public works contractors contained in Article 24 of … Directive 93/37 … exhaustive?

(2) If that list is not exhaustive, does a provision which lays down (in order to protect transparency in the economic functioning of the State) that the status of owner, partner, main shareholder or management executive of a media undertaking is incompatible with the status of owner, partner, main shareholder or management executive of an undertaking contracting to perform a works, supply or services

contract for the State, or for a legal person in the public sector in the broad sense, serve purposes which are compatible with the general principles of Community law and is that total prohibition on the award of public contracts to such undertakings compatible with the Community principle of proportionality?

(3) If, within the meaning of Article 24 of Directive 93/37 …, the list of grounds for excluding contractors contained therein is an exhaustive list or if the national provision at issue cannot be construed as serving purposes which are compatible with the general principles of Community law or if, finally, the prohibition introduced in it is not compatible with the Community principle of proportionality, does the above directive, in preventing the inclusion, as grounds for excluding contractors from public works procurement procedures, of cases where the contractor, its executives (such as the owner of the undertaking or its main shareholder, partner or management executive), or intermediaries acting for the said executives, work in media undertakings which are able to exercise an undue influence on the public works procurement procedure, because of the influence which they are able to exert in general, infringe the general principles of the protection of competition and transparency and the second paragraph of Article 5 [EC] which enacts the principle of subsidiarity?'

The Court's jurisdiction and the admissibility of the questions referred for a preliminary ruling

27 The Greek Government disputes the relevance of the questions submitted by the referring court.

28 First, it asserts that the dispute in the main proceedings relates to a purely domestic situation, which concerns Greek operators exclusively. It is therefore doubtful that that case falls within the scope of Directive 93/37 and, consequently, is covered by the Court's jurisdiction to interpret Community law.

29 In this respect, it must however be observed that there is nothing in Directive 93/37 to permit the inference that the applicability of its provisions, in particular the common rules on participation laid down, inter alia, in Article 24 thereof, depends on the existence of an actual link with free movement between Member States. As the Advocate General stated at point 16 of his Opinion, that directive does not make the applicability of its provisions to procedures for the award of public works contracts contingent on any condition relating to the nationality or the place of establishment of the tenderers (see, by analogy, Case C-87/94 *Commission* v *Belgium* [1996] ECR I-2043, paragraph 33).

30 Consequently, and in the light of the fact that the amount of the contract at issue in the main proceedings exceeds the threshold for the application of Directive 93/37, the Court does have jurisdiction in this case to interpret that directive.

31 Second, the Greek Government submits that the dispute pending before the referring court relates solely to the issue of whether provisions of Law 3021/2002 are compatible with Article 14(9) of the Constitution. The interpretation of Community law sought by that court does not therefore satisfy an objective need for the resolution of the dispute.

32 In this respect, it must be recalled that, according to settled case-law, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to

enable it to deliver judgment and the relevance of the questions which it submits to the Court (Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 59; Case C-466/04 *Acereda Herrera* [2006] ECR I-5341, paragraph 47; and Case C-380/05 *Centro Europa 7* [2008] ECR I-349, paragraph 52).

33 Consequently, where the questions submitted concern the interpretation of Community law, the Court is in principle bound to give a ruling (see, inter alia, Case C-326/00 *IKA* [2003] ECR I-1703, paragraph 27; Case C-145/03 *Keller* [2005] ECR I-2529, paragraph 33; and Case C-13/05 *Chacón Navas* [2006] ECR I-6467, paragraph 32).

34 The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of Community law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, inter alia, Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paragraph 39; Case C-35/99 *Arduino* [2002] ECR I-1529, paragraph 25; and *Chacón Navas*, paragraph 33).

35 That is not so here. In this case, an answer from the Court in response to the reference for a preliminary ruling will provide the referring court with the interpretation necessary for it to resolve the question, which affects the final outcome of the main proceedings, of whether the system of incompatibility between the public works contracts sector and the media sector, established by Article 14(9) of the Constitution and implemented by Law 3021/2002, complies with Community law.

36 Consequently, the reference for a preliminary ruling must be held admissible.

The questions referred

The first question

37 By its first question, the referring court is essentially asking whether the grounds laid down in the first paragraph of Article 24 of Directive 93/37 for excluding participation in a public works contract are exhaustive.

38 The Community directives on public contracts aim to coordinate national procedures in that field (Joined Cases C-226/04 and C-228/04 *La Cascina and Others* [2006] ECR I-1347, paragraph 20). In the case of public works contracts, the second recital in the preamble to Directive 93/37 explicitly emphasises that objective.

39 It is apparent from the second and tenth recitals in the preamble to Directive 93/37 that that coordination seeks the simultaneous attainment of freedom of establishment and freedom to provide services in respect of public works contracts and the development, at the Community level, of effective competition in that field, by promoting the widest

possible expression of interest among contractors in the Member States (see, to that effect, Case C-225/98 *Commission* v *France* [2000] ECR I-7445, paragraph 34; Case C-399/98 *Ordine degli Architetti and Others* [2001] ECR I-5409, paragraph 52; Joined Cases C-285/99 and C-286/99 *Lombardini and Mantovani* [2001] ECR I-9233, paragraph 34; and Case C-470/99 *Universale-Bau and Others* [2002] ECR I-11617, paragraph 89).

40 In that context, Article 24 of Directive 93/37, which falls in the title of the directive dealing with the 'common' rules on participation, forms part of a detailed set of criteria for the selection of contractors permitted to submit a tender and for the award of the contract (see, by analogy, Case C-94/99 *ARGE* [2000] ECR I-11037, paragraph 27).

41 In a chapter which deals with the criteria for 'qualitative' selection, Article 24 identifies, in its first paragraph, seven grounds for excluding contractors from participation, relating to the professional qualities of the person concerned, more specifically his professional honesty, his solvency and his economic and financial capacity (see, by analogy, Case 76/81 *Transporoute et travaux* [1982] ECR 417, paragraph 9, and *La Cascina and Others*, paragraph 21).

42 It should be pointed out in this respect, as the Council of the European Union has done, that the approach of the Community legislature was to adopt only grounds for exclusion based on the objective finding of facts or conduct specific to the contractor concerned, such as to cast discredit on his professional reputation or call into question his economic or financial ability to complete the works covered by the public contract for which he is tendering.

43 Accordingly, the first paragraph of Article 24 of Directive 93/37 must be read as listing exhaustively the grounds capable of justifying the exclusion of a contractor from participation in a contract for reasons, based on objective factors, that relate to his professional qualities. That provision therefore precludes Member States or contracting authorities from adding to the list contained in that provision other grounds for exclusion based on criteria relating to professional qualities (see, by analogy, *La Cascina and Others*, paragraph 22).

44 The exhaustive list set out in the first paragraph of Article 24 of Directive 93/37 does not however preclude the option for Member States to maintain or adopt substantive rules designed, in particular, to ensure, in the field of public procurement, observance of the principle of equal treatment and of the principle of transparency entailed by the latter, principles which are binding on contracting authorities in any procedure for the award of a public contract (see, to that effect, *ARGE*, paragraph 24, and Case C-421/01 *Traunfellner* [2003] ECR I-11941, paragraph 29).

45 Those principles, which mean, in particular, that tenderers must be in a position of equality both when they formulate their tenders and when those tenders are being assessed by the contracting authority (see, to that effect, Case C-19/00 *SIAC Construction* [2001] ECR I-7725, paragraph 34, and Case C-448/01 *EVN and Wienstrom* [2003] ECR I-14527, paragraph 47), constitute the basis of the directives on procedures for the award of public contracts (see, inter alia, *Universale-Bau and Others*, paragraph 91, and Case C-315/01 *GAT* [2003] ECR I-6351, paragraph 73), and the duty of contracting authorities to ensure that they are observed lies at the very heart of those directives (see, to that effect, Case C-513/99 *Concordia Bus Finland* [2002] ECR I-7213, paragraph 81, and Joined Cases C-21/03 and C-34/03 *Fabricom* [2005] ECR I-1559, paragraph 26).

46 Article 6(6) of Directive 93/37 states moreover that contracting authorities are to ensure that there is no discrimination between the various contractors.

47 It follows that, in addition to the grounds for exclusion based on objective considerations of professional quality, which are listed exhaustively in the first paragraph of Article 24 of Directive 93/37, a Member State is entitled to provide for exclusionary measures designed to ensure observance, in procedures for the award of public contracts, of the principles of equal treatment of all tenderers and of transparency.

48 However, in accordance with the principle of proportionality, which constitutes a general principle of Community law (see, inter alia, Case C-210/03 *Swedish Match* [2004] ECR I-11893, paragraph 47), such measures must not go beyond what is necessary to achieve that objective (see, to that effect, *Fabricom*, paragraph 34).

49 In view of the foregoing, the answer to the first question must be that the first paragraph of Article 24 of Directive 93/37 must be interpreted as listing exhaustively the grounds based on objective considerations of professional quality which are capable of justifying the exclusion of a contractor from participation in a public works contract. However, that directive does not preclude a Member State from providing for further exclusionary measures designed to ensure observance of the principles of equal treatment of tenderers and of transparency, provided that such measures do not go beyond what is necessary to achieve that objective.

The second question

50 By its second question, the referring court is essentially asking whether a national provision which establishes an incompatibility between the media sector and the public procurement sector is compatible with the principles of Community law.

51 As a preliminary point, it must be recalled that it is not the task of the Court, in preliminary ruling proceedings, to rule upon the compatibility of national law with Community law or to interpret national law. The Court is, however, competent to give the national court full guidance on the interpretation of Community law in order to enable it to determine the issue of compatibility for the purposes of the case before it (see, inter alia, Case C-292/92 *Hünermund and Others* [1993] ECR I-6787, paragraph 8; Case C-237/04 *Enirisorse* [2006] ECR I-2843, paragraph 24; and *Centro Europa 7*, paragraphs 49 and 50).

52 It is therefore appropriate for the Court, in the present case, to restrict its analysis by providing an interpretation of Community law which will be of use to the referring court, which will have the task of determining the compatibility of the provisions of national law concerned with Community law, for the purposes of deciding the dispute before it.

53 As was noted in paragraph 39 of this judgment, the primary aim of Directive 93/37 is to open up public works contracts to Community competition. The purpose of that directive is to avoid the risk of the public authorities indulging in favouritism (see, to that effect, *Ordine degli Architetti and Others*, paragraph 75, and *Lombardini and Mantovani*, paragraph 35).

54 The Community coordination of procedures for the award of public contracts is designed in particular to avoid both the risk of preference being given to national tenderers whenever a contract is awarded and the possibility that a contracting authority may choose to be guided by considerations which are unrelated to the contract in question (see, to that effect, Case C-380/98 *University of Cambridge* [2000] ECR I-8035, paragraph 17; Case C-237/99 *Commission* v *France* [2001] ECR I-939, paragraph 42; and *Lombardini and Mantovani*, paragraph 36).

55 Against that background, as the Advocate General observed at point 30 of his Opinion, it is appropriate to grant the Member States a certain discretion for the purpose of adopting measures intended to safeguard the principles of equal treatment of tenderers and of transparency, which, as was noted at paragraph 45 of this judgment, constitute the basis of the Community directives on the award of public contracts.

56 Each Member State is best placed to identify, in the light of historical, legal, economic or social considerations specific to it (see, to that effect, *La Cascina and Others*, paragraph 23), situations propitious to conduct liable to bring about breaches of those principles.

57 Consequently, Community law does not seek to call into question the assessment of a Member State, in the light of the specific context of that Member State, as to the particular risk that such conduct will arise if, amongst the tenderers for a public works contract, there is an undertaking active in the media sector or connected with persons involved in that sector, and as to the need to take measures to reduce that risk.

58 In this case, the Member State concerned took the view that it could not be ruled out that, in the context of their participation in a procedure for the award of a public contract, media undertakings or public works contractors connected with such an undertaking or with persons owning or running it might seek to use in relation to the contracting authority the influence afforded by their position or their connections in the media sector in order to seek to unlawfully influence the decision awarding that contract, by holding out the prospect of a supportive mass information campaign or, on the contrary, a mass information campaign of a critical nature, depending on whether the decision was favourable or unfavourable to the undertaking.

59 A Member State's desire to prevent the risks of interference of the power of the media in procedures for the award of public contracts is consistent with the public interest objective of maintaining the pluralism and the independence of the media (see, in this respect, Case C-368/95 *Familiapress* [1997] ECR I-3689, paragraph 18, and Case C-250/06 *United Pan-Europe Communications Belgium and Others* [2007] ECR I-11135, paragraphs 41 and 42). Moreover, it serves specifically another such objective, namely that of fighting against fraud and corruption (see, in this respect, Case C-275/92 *Schindler* [1994] ECR I-1039, paragraphs 57 to 60, and Joined Cases C-338/04, C-359/04 and C-360/04 *Placanica and Others* [2007] ECR I-1891, paragraph 46).

60 It follows that Community law does not preclude the adoption of national measures designed to avoid, in procedures for the award of public works contracts, the risk of occurrence of practices capable of jeopardising transparency and distorting competition, a risk which could arise from the presence, amongst the tenderers, of a contractor active in the media sector or connected with a person involved in that sector, and thus to prevent or punish fraud and corruption.

61 As was made clear in paragraph 48 of this judgment, it is also necessary for such measures to be compatible with the principle of proportionality.

62 A national provision, such as that at issue in the main proceedings, which establishes a system of general incompatibility between the sector of public works and that of the media, has the consequence of excluding from the award of public contracts public works contractors who are also involved in the media sector on account of a connection as owner, main shareholder, partner or management executive, without affording them any possibility of showing, with regard to any evidence advanced, for instance, by a competitor, that, in their case, there is no real risk of the type referred to in paragraph 60 of this judgment (see, by analogy, *Fabricom*, paragraphs 33 and 35).

63 As the Commission of the European Communities and the Council have asserted, as did Elliniki Technodomiki Techniki Ependitiki Viomichaniki AE at the hearing, such a provision goes beyond what is necessary to achieve the claimed objectives of transparency and equal treatment, by excluding an entire category of public works contractors on the basis of an irrebuttable presumption that the presence amongst the tenderers of a contractor who is also involved in the media sector is necessarily such as to impair competition to the detriment of the other tenderers.

64 The Greek Government drew attention to the possibility stemming from the constitutional provision at issue in the main proceedings of not applying the exclusionary measure to an intermediary — in the form of a spouse, a relative or a financially dependent person or company — of a media undertaking or of a person responsible for such an undertaking if it is demonstrated that the participation of that

intermediary in a procedure for the award of a public contract is the result of an autonomous decision which is dictated by the intermediary's own interest alone.

65 However, that possibility is not capable of reconciling the national provision at issue in the main proceedings with the principle of proportionality.

66 Such a possibility does not alter the automatic and absolute nature of the prohibition affecting any public works contractor who is also active in the media sector or connected with natural or legal persons involved in that sector; such a contractor is not concerned by that qualification to the general exclusionary measure provided for in favour of intermediaries.

67 Moreover, a public works contractor who acts as an intermediary of a media undertaking or of a person owning or running such an undertaking will be excluded from the award of a contract without being afforded the possibility of showing, in the event that it is established that he is acting on behalf of that undertaking or that person, that that action is not liable to influence competition between the tenderers.

68 Lastly, the very broad meaning, in the context of the national provision at issue in the main proceedings, of the concepts of main shareholder and intermediaries, as is clear from paragraph 8 of this judgment, serves to reinforce the disproportionate nature of such a provision.

69 In the light of the above, the answer to the second question must be that Community law must be interpreted as precluding a national provision which, whilst pursuing the legitimate objectives of equal treatment of tenderers and of transparency in procedures for the award of public contracts, establishes an irrebuttable presumption that the status of owner, partner, main shareholder or management executive of an undertaking active in the media sector is incompatible with that of owner, partner, main shareholder or management executive of an undertaking which contracts with the State or a legal person in the public sector in the broad sense to perform a works, supply or services contract.

The third question

70 In the light of the answers to the first two questions, there is no need to reply to the third question.

Costs

71 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 (Grand Chamber) hereby rules:

1. **The first paragraph of Article 24 of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts, as amended by European Parliament and Council Directive 97/52/EC of 13 October 1997, must be interpreted as listing exhaustively the grounds based on objective considerations of professional quality which are capable of justifying the exclusion of a contractor from participation in a public works contract. However, that directive does not preclude a Member State from providing for further exclusionary measures designed to ensure observance of the principles of equal treatment of tenderers and of transparency, provided that such measures do not go beyond what is necessary to achieve that objective.**

2. **Community law must be interpreted as precluding a national provision which, whilst pursuing the legitimate objectives of equal treatment of tenderers and of transparency in procedures for the award of public contracts, establishes an irrebuttable presumption that the status of owner, partner, main shareholder or management executive of an undertaking active in the media sector is incompatible with that of owner, partner, main shareholder or management executive of an undertaking which contracts with the State or a legal person in the public sector in the broad sense to perform a works, supply or services contract.**

[Signatures]