JUDGMENT OF THE COURT (Sixth Chamber)

23 January 2003 *

In Case C-57/01,

REFERENCE to the Court under Article 234 EC by the Diikitiko Efetio Athinon (Greece) for a preliminary ruling in the proceedings pending before that court between

Makedoniko Metro,

Mikhaniki AE

and

Elliniko Dimosio,

on the interpretation 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 (OJ 1989 L 395, p. 33), as amended by Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the

* Language of the case: Greek.

award of public service contracts (OJ 1992 L 209, p. 1), and 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),

THE COURT (Sixth Chamber),

composed of: C. Gulmann, acting for the President of the Sixth Chamber, V. Skouris, F. Macken, N. Colneric and J.N. Cunha Rodrigues (Rapporteur), Judges,

Advocate General: C. Stix-Hackl,
Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— Makedoniko Metro and Mikhaniki AE, by G. Karydis, A. Pliakos and N.I. Kampas, Dikigori,

— the Greek Government, by V. Kyriazopoulos, C. Georgiadis and D. Tsangarakis, acting as Agents,

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

— the Commission of the European Communities, by M. Nolin and P. Panayotopoulos, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Makedoniko Metro and Mikhaniki AE, represented by G. Karydis and A. Pliakos, of the Greek Government, represented by V. Kyriazopoulos, and of the Commission, represented by M. Nolin and M. Konstantinidis, acting as Agents, at the hearing on 6 June 2002,

after hearing the Opinion of the Advocate General at the sitting on 11 July 2002,

gives the following

Judgment

1 By order of 26 October 2000, received at the Court on 9 February 2001, the Diikitiko Efetio Athinon (Administrative Court of Appeal, Athens) referred to the Court for a preliminary ruling under Article 234 EC a question on the interpretation 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 (OJ 1989 L 395, p. 33), as amended by 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), and 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).

2 That question has arisen in proceedings between (i) the consortium Makedoniko Metro ('Makedoniko Metro') and the company Mikhaniki AE ('Mikhaniki') and (ii) the Greek State concerning a contract for the construction of an underground railway in Thessaloniki.

Legal framework

Community law

3 Article 1 of Directive 89/665 provides:

'1. 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, 77/62/EE, and 92/50/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.

2. Member States shall ensure that there is no discrimination between undertakings claiming injury in the context of a procedure for the award of a contract as a result of the distinction made by this Directive between national rules implementing Community law and other national rules.

3. The Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular public supply or public works contract and who has been or risks being harmed by an alleged infringement. In particular, the Member States may require that the person seeking the review must have previously notified the contracting authority of the alleged infringement and of his intention to seek review.'

4 Article 2(1) of Directive 89/665 provides:

'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.'

5 Under Article 5 of Directive 89/665, Member States were to bring into force, before 21 December 1991, the measures necessary to comply with the directive.

6 Council Directive 71/305/EEC of 26 July 1971 concerning the co-ordination of procedures for the award of public works contracts (OJ, English Special Edition 1971 (II), p. 682), which was amended on several occasions, has been repealed and replaced by Directive 93/37.

7 Article 1(a) and (d) of Directive 93/37 provides:

'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 in the right to exploit the construction or in this right together with payment.'

8 Article 3(1) of Directive 93/37 provides:

'Should contracting authorities conclude a public works concession contract, the advertising rules as described in Article 11(3), (6), (7) and (9) to (13), and in Article 15, shall apply to that contract when its value is not less than [a specified amount].'

9 Pursuant to Articles 4 to 6 of Directive 93/37, the directive applies, subject to certain exceptions, to public works contracts whose value is not less than a specific amount.

10 Article 21 of Directive 93/37 provides:

'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.'

11 That provision is in essence identical to Article 21 of Directive 71/305, which it replaces.

12 Article 36(1) of Directive 93/37 repeals Directive 71/305 'without prejudice to the obligations of the Member States concerning the deadlines for transposition into national law and for application indicated in Annex VII'. According to that annex, the deadline for transposing Article 21 of Directive 71/305 was, as regards the Hellenic Republic, 1 January 1981.

13 Article 36(2) of Directive 93/37 provides that references to the repealed directive (71/305) are to be construed as references to Directive 93/37.

National law

14 It is apparent from the order for reference that the tender procedure at issue in the main proceedings is governed principally by Law No 1418/1984 (23 A) on public works and related matters and by Presidential Decree 609/1985 (223 A). That legislation provides, on certain conditions, for the substitution of a member of a consortium which has been awarded a particular contract. Such substitution, which is always subject to approval by the awarding authority, is provided for only at the stage when the works are being carried out, that is to say the phase which follows signature of the contract between the contractor and the awarding authority and not at a stage prior to award of the contract.

The main proceedings and the question referred for a preliminary ruling

15 The Greek State decided to issue an international invitation to tender in respect of the planning, construction, self-financing and operation of an underground railway for Thessaloniki, with a budget of GRD 65 000 000 000. It opted, in relation to the award of that contract, for a restricted procedure comprising six stages: preselection of candidates who would be invited to tender, submission of tenders by the preselected candidates, evaluation of their technical proposals, evaluation of their economic and financial proposals, negotiations between the contracting authority and the tenderer provisionally selected and signature of the contract.

16 By decision of 18 June 1992, the Greek Minister for the Environment, Regional Development and Public Works ('the Minister') approved the contract notice initiating the first stage of the procedure (preselection of candidates). On conclusion of that stage, eight consortia which had put themselves forward as candidates, including Makedoniko Metro and the Thessaloniki Metro consortium, were authorised to submit tenders.

17 By decision of 1 February 1993, the Minister approved the tender documentation for the second stage of the procedure (submission of tenders by preselected candidates), including, in particular, the supplementary contract notice ('the supplementary notice') and the specific contract documents.

18 Article 6(2) of the supplementary notice specified that the preselected consortia were authorised to take part in the form that they had taken during the first stage of the procedure, that the creation of groupings or other forms of cooperation between them was strictly precluded and, finally, that it was possible for a consortium to be enlarged by the addition of a new member, provided that the new member had not been included in any other consortium preselected to take part in the second stage of the procedure.

19 Article 12(2) of the supplementary notice provided that each tenderer's file should include all the documents showing that the tenderer constituted, from a legal perspective, a consortium and, in particular, a certificate from a notary that a consortium had been formed by all the members of the preselected group, including any new members, in accordance with Article 6 of the supplementary notice. Under Article 12(3) and (4) of the supplementary notice, the tenderers' files were also to contain certified minutes of the meetings of the boards of directors of the members of the consortium, authorising their participation therein, and copies, certified by the competent authorities, of the Articles of

Association of any new members of the consortium. Finally, Article 12(6) of the supplementary notice required that the file contain all the items referred to in Article 7(1) to (4) of the notice relating to the first stage of the contract concerning any new members of a consortium.

20 Article 7(2) of the supplementary notice provided that the consortia concerned were 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 underground railway.

21 Article 7(3) of that notice stated that 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 and skills. Article 7(4) of the notice provided that undertakings within the consortium which would have more specific responsibility for operating the underground railway were required to submit appropriate certificates demonstrating their capabilities and experience in operating transport facilities and in particular underground railways.

22 If the contract notices are read together, it is apparent that a consortium preselected during the first stage of the procedure could be enlarged during the second stage by the addition of new members but that such enlargement was possible only until the deadline for submission of tenders.

23 During the second stage of the procedure, technical proposals, economic studies and financial proposals were submitted by, amongst others, Makedoniko Metro and Thessaloniki Metro.

24 When the preselection took place, Makedoniko Metro's members were the companies Mikhaniki, Edi-Stra-Edilizia Stradale SpA, Fidel SpA and Teknocenter-Centro Servizi Administrativi Srl, which held respectively 70%, 20%, 5% and 5% interests.

25 During the second stage of the procedure, the Makedoniko Metro group was extended to include AEG Westinghouse Transport Systems GmbH. The interests of the four abovementioned companies then amounted to, respectively, 63%, 17%, 5% and 5%, while AEG Westinghouse Transport Systems GmbH had a 10% stake. That was the composition of Makedoniko Metro when it was provisionally designated as the successful tenderer on 14 June 1994. That composition is not at issue between the parties to the main proceedings.

26 Following the formation, by decision of 24 June 1994, of the negotiating committee and following the commencement of negotiations between the Greek State and Makedoniko Metro as the provisionally designated successful tenderer, Makedoniko Metro gave notice to the Minister, by letter of 29 March 1996, of its new composition, which included as members Mikhaniki, ABB Daimler-Benz Transportation Deutschland GmbH ('Adtranz') and the Fidel Group, which comprised Edi-Stra-Edilizia Stradale SpA, Fidel SpA and Teknocenter-Centro Servizi Administrativi Srl, whose respective stakes were 80% (Mikhaniki), 19% (Adtranz) and 1% (Fidel Group).

27 Subsequently, by letter of 14 June 1996, Makedoniko Metro informed the commission for major works, in response to questions concerning reports that members of the Fidel Group were insolvent and had gone into liquidation, that the companies within that group were no longer part of Makedoniko Metro and that, as of that date, the latter's members were Mikhaniki, Adtranz and Belgian Transport and Urban Infrastructure Consult (Transurb Consult), whose respective interests amounted to 80.65%, 19% and 0.35%. The document establishing Makedoniko Metro with that membership was not submitted to the authorities. That document was signed on 27 November 1996. It was as thus constituted that Makedoniko Metro brought the main action.

28 Finding that Makedoniko Metro had substantially departed from the requirements laid down for the contract, the Minister took the view that the negotiations had failed and, by decision of 29 November 1996, terminated negotiations between the Greek State and Makedoniko Metro and called on Thessaloniki Metro to enter into negotiations as the first candidate for provisional contractor.

29 On 10 December 1996 Makedoniko Metro brought an action for annulment of the Minister's decision of 29 November 1996 before the Simvoulio tis Epikratias (Council of State, Greece). By judgment No 971/1998 of 6 March 1998, the Council of State dismissed the action on the ground that Makedoniko Metro could not lawfully change its composition after tenders had been submitted and after having been chosen as provisional contractor, whilst also continuing to take part in the procedure at issue, and that, consequently, it was not entitled, with its new membership, to apply for annulment of the contested decision.

30 In addition, Makedoniko Metro and Mikhaniki brought an action before the Diikitiko Protodikio Athinon (Administrative Court of First Instance, Athens) for a declaration that the Greek State was liable to pay certain sums by way of compensation and financial satisfaction for non-material damage suffered by them in the wake of the unlawful decision and the administration's breach of duty. By judgment No 3794/1999 of 30 April 1999, the Administrative Court dismissed the action on the ground that Makedoniko Metro, as composed at the time when it commenced proceedings, was not entitled to claim compensation.

31 Makedoniko Metro and Mikhaniki appealed against that judgment to the Diikitiko Efetio Athinon, which decided to stay proceedings and refer the following question to the Court for a preliminary ruling:

'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 contracting authority be interpreted in such a way as to result in the loss of that consortium's right to participate in the tender 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?'

Request that the oral procedure be reopened

32 By letter of 15 July 2002, Makedoniko Metro requested that the oral procedure be reopened 'so that further information about the subject-matter of the national procedure giving rise to the questions referred for a preliminary ruling could be given to the Court'.

33 Makedoniko Metro supports its request by disputing, *inter alia*, point 35 of the Advocate General's Opinion, in which she reformulates the question referred for a preliminary ruling, and point 79 of the Opinion, which explains the subject-matter of the question. In Makedoniko Metro's submission, the Advocate General was wrong to conclude that the national authorities took a decision excluding Makedoniko Metro from the procedure for the award of the contract at issue on the grounds of the change in its composition. The contracting authority at no time took a decision to exclude Makedoniko Metro from the procedure on the grounds of the change in its composition and, consequently, such a decision could not form the subject-matter of the main proceedings.

34 It is appropriate to bear in mind that the Court may of its own motion, on a proposal from the Advocate General or at the request of the parties, order that

the oral procedure be reopened, in accordance with Article 61 of its Rules of Procedure, if it considers that it lacks sufficient information, or that the case must be dealt with on the basis of an argument which has not been debated between the parties (see Joined Cases C-270/97 and C-271/97 *Deutsche Post* [2000] ECR I-929, paragraph 30, and Case C-299/99 *Philips* [2002] ECR I-5475, paragraph 20).

35 As regards Makedoniko Metro's arguments, it must nevertheless be observed, first, that, in accordance with settled case-law, the Court may, where appropriate, reformulate a question referred for a preliminary ruling in order to avoid exceeding its jurisdiction and to provide the referring court with an answer that will be of assistance to it (see, to that effect, Case C-17/92 *Distribuidores Cinematográficos* [1993] ECR I-2239, paragraph 8, and Case C-107/98 *Teckal* [1999] ECR I-8121, paragraph 33) and, second, that it is for the national court to decide what forms the subject-matter of the main proceedings.

36 The submissions which Makedoniko Metro seeks to put forward in the course of a reopened oral procedure relate solely to questions falling within the jurisdiction of the referring court.

37 Having regard to those considerations, the Court, after hearing the Advocate General, concludes that there is nothing in Makedoniko Metro's request to indicate that it is necessary to reopen the oral procedure or that it would serve any useful purpose to do so.

38 Makedoniko Metro's request must therefore be rejected.

The question referred for a preliminary ruling

Observations submitted to the Court

39 Makedoniko Metro and Mikhaniki argue that the decision of 29 November 1996 terminating negotiations between the Greek State and Makedoniko Metro was not based on the change in composition of the consortium. On the contrary, the decision treated Makedoniko Metro as though it were still a tenderer, that is as though, despite the changes in its composition, it retained the specific right to take part in the tender procedure at issue. Consequently, in its final composition, Makedoniko Metro remained entitled to engage in the legal relationships attendant upon the tender procedure at issue and could therefore rely on a capacity to bring legal proceedings and a legitimate interest in seeking compensation for infringement of the provisions of Directive 93/37 and for breach of the principle that tenderers should be treated equally which, as a general principle of Community law, also applies to the public contract at issue before the national court (even if it were to be classified as a public works concession). According to Makedoniko Metro and Mikhaniki, the present case concerns a typical public works contract but, even if the contract at issue in the main proceedings were to be classified as a public works concession, Directive 89/665 would none the less apply, since it is merely a specific expression of the general principle that the rights of persons adversely affected by breaches of Community law on public procurement must be protected.

40 Makedoniko Metro and Mikhaniki submit that the answer to the question referred should be that a change in the composition of a consortium which has responded to an invitation to tender for a public works contract or a public works concession — where the change has been tacitly accepted by the contracting authority and occurred after submission of tenders and after the consortium has been selected as provisional contractor and where, in addition, the change does not feature in the reasons given in support of the decision to terminate negotiations and exclude the consortium from the remainder of the procedure — cannot result in the consortium being deprived of its status as a tenderer, or in it

or its members losing their interest in being awarded the public contract or their right to be awarded it or, by extension, in the loss of its legitimate interest in, or its capacity to bring proceedings to protect, the rights conferred on it by Community law, which form the subject-matter of the procedure at issue. Any other interpretation of the national provisions at issue would be at variance with the letter and the spirit of Directives 93/37 and 89/665 and especially with the general principle that the rights of persons subject to Community law must be effectively protected.

41 The Greek Government observes that Directives 93/37 and 89/665 do not address the question of change in the composition of a consortium.

42 Since the question of the lawfulness or unlawfulness of a change in the composition of a consortium participating in a public works contract is not governed by Community law, the relevant provisions of national law apply, and these do not permit the substitution of a member of the group of contractors at the stage of the procedure preceding award of the contract.

43 The Greek Government concludes that the question referred for a preliminary ruling should be answered affirmatively.

44 The Austrian Government submits that the question should be reformulated in such a way that it seeks to ascertain whether Directive 93/37 precludes a change in the composition of a consortium after submission of tenders, thus depriving the consortium of the right to take part in the tender procedure and, by extension, of its rights and interest as regards the award of the contract to carry out the works.

45 It maintains that Directive 93/37 includes only rudimentary provisions on consortia. It seeks to protect the interests of economic operators established in one Member State who wish to offer goods or services to the contracting authorities established in another Member State. The information given in the order for reference contains no suggestion that the principles of Community law have been infringed.

46 In the light of those considerations, the Austrian Government concludes that the question, as reformulated, should be answered as follows: Directive 93/37 does not preclude a change in the composition of a consortium following submission of tenders; regard being had to that directive, the group does not lose its right to take part in the tender procedure and, by extension, does not lose its rights or interest as regards the award of the contract to carry out the works.

47 The Commission draws attention to the fact that the first part of the question could be construed as inviting the Court to rule on the interpretation of national law, which falls outside its jurisdiction. With a view to resolving that difficulty and providing an answer which will assist the national court, the Commission suggests that the question should be reformulated and addressed as three distinct questions, namely:

1. Does Directive 93/37 include rules permitting or prohibiting a change in the composition of a group which has already submitted a tender? More specifically, may a Member State provide in its national law, and may a contracting authority provide in the tender documentation, for rules providing that tenderers are not to alter their composition during the tender procedure and are to be excluded if they do?

2. Does Community law allow a contracting authority to continue to negotiate with a tenderer which has altered its composition in breach of rules laid down by national law and by the contract documentation?

3. Does a change in the composition of a group, in breach of rules laid down by national law and by the contract documentation, affect the exercise by that group of its rights under Directive 89/665 and, more specifically, the right to claim damages?

48 As regards the first of those questions, the Commission submits that Directive 93/37 contains no express provisions dealing with a change in the composition of a consortium. The only provision on groups is found in Article 21 of the directive, which allows them to submit tenders without being required to assume a specific legal form before the contract has been awarded. In the Commission's submission, no provision of Directive 93/37 requires contracting authorities to adopt a specific course of conduct as regards that aspect of the procedure. Consequently, the approach to be taken is a matter for national legislation or a specific decision by the contracting authority.

49 Those observations, which refer to the general scheme of Directive 93/37, are also relevant to a contract for a public works concession. The specific arrangements provided for by Directive 93/37 for public works concessions are restricted to advertising rules and leave the awarding authority free to set the conditions on which candidates are selected and concessions awarded in accordance with rules of its national law.

50 Therefore, the Commission suggests that the answer to the first reformulated question is that Directive 93/37 contains no rules preventing national legislation

or the contract documentation from providing that a change in the composition of a consortium will not be permissible after a certain stage in the tender procedure, and more specifically after submission of a tender.

51 As regards the second reformulated question, the Commission submits that there would be a breach of the principle of equal treatment as between tenderers if a contracting authority unilaterally departed, in favour of one tenderer, from the requirements and conditions laid down in the contract documents, where the conditions are stated to be unalterable, without reopening the whole procedure, thus enabling the other tenderers, including potential tenderers, to take advantage of that departure.

52 Thus, in response to that question, the Commission submits that Community law does not allow a contracting authority to continue to negotiate with a tenderer which has changed its composition in breach of rules laid down by national law and by the contract documents.

53 As to the third reformulated question, the Commission observes that under Article 1(1) of Directive 89/665, only decisions which are alleged to have infringed Community law or national rules implementing that law may be reviewed. It follows that the provision does not require Member States to provide for review procedures in respect of decisions taken in the course of an award procedure which infringe rules of national law which are not implementing Community directives on public procurement.

54 In those circumstances, the answer to the third reformulated question must be that a change in the composition of a group, in breach of rules laid down by national law and in the contract documents, does not affect the exercise by that group of its rights under Directive 89/665 and, more specifically, the right to

claim damages, provided that the grounds for excluding the group are contrary to Community law on public procurement or to the rules of national law implementing Community law.

Findings of the Court

55 In the context of Article 234 EC the Court has no jurisdiction to rule either on the interpretation of provisions of national laws 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 (*Distribuidores Cinematográficos*, paragraph 8, and *Teckal*, paragraph 33).

56 Furthermore, according to settled case-law, it is for the Court alone, where questions are formulated imprecisely, to extract 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 (Case C-168/95 *Arcaro* [1996] ECR I-4705, paragraph 21, and *Teckal,* paragraph 34).

57 Having regard to the information included in the order for reference and given that the national court is posing its question from the point of view of both Directive 93/37 and Directive 89/665, the Court concludes that the national court is essentially asking:

1. whether Directive 93/37 precludes national rules prohibiting a change in the composition of a group of contractors taking part in a procedure for the

award of a public-works contract which occurs after submission of tenders, and

2. whether and to what extent Directive 89/665 confers rights of recourse on such a group of contractors.

58 As regards the first part of the question, the order for reference does not indicate whether the contract at issue in the main proceedings is a 'public works contract' or a 'public works concession' within the meaning of Directive 93/37. It is not for the Court, on a reference for a preliminary ruling, to resolve that question. In such circumstances, the question must be addressed by examining each of those hypotheses in turn.

59 If the contract at issue were a 'public works contract' within the meaning of Directive 93/37, the directive would apply as provided in Articles 4 to 6.

60 The only provision of Directive 93/37 dealing with groups of contractors is Article 21. That is confined, first, to stating that tenders may be submitted by groups of contractors and, second, to preventing them from being required to assume a specific legal form before the contract has been awarded to the group selected.

61 It must be pointed out that Article 21 makes no provision about the composition of such groups. Rules about their composition are thus a matter for the Member States.

62 The same is true *a fortiori* if the contract at issue in the main proceedings is a 'public works concession' within the meaning of Directive 93/37. It follows from Article 3(1) of the directive that Article 21 does not even apply to public works concessions.

63 Consequently, the answer to the first part of the question must be that Directive 93/37 does not preclude national rules which prohibit a change in the composition of a group of contractors taking part in a procedure for the award of a public works contract or a public works concession which occurs after submission of tenders.

64 As regards the second part of the question, Article 1(1) of Directive 89/665 requires Member States to take the measures necessary to ensure that, as regards contract award procedures falling within the scope of the relevant Community directives, decisions taken by the contracting authorities may be reviewed effectively and as rapidly as possible on the grounds that such decisions have infringed Community law in the field of public procurement or national rules implementing that law.

65 Member States are also required, under Article 1(3), to ensure that the review procedures are available at least to any person having or having had an interest in obtaining a particular public supply or public works contract and who has been or risks being harmed by an alleged infringement.

66 It is thus in the light of those matters that it is necessary to consider whether, in circumstances such as those obtaining in the main proceedings, the review procedures provided for by Directive 89/665 must be available to a consortium such as Makedoniko Metro.

67 In that regard, the Court observes, first, that, as the order for reference shows and as pointed out at paragraph 28 of this judgment, the Minister took the view that Makedoniko Metro had departed substantially from the requirements laid down for the contract and, by decision of 29 November 1996, terminated negotiations with the consortium.

68 For the purpose of ascertaining whether the Minister's decision is covered by the expression 'decisions taken by the contracting authorities' in Article 1(1) of Directive 89/665, it should be borne in mind that the Court has stated that that expression encompasses decisions taken by contracting authorities which are made subject to the Community law rules on public contracts (Case C-92/00 *HI* [2002] ECR I-5553, paragraph 37).

69 As to whether such rules apply to the present case, even if the Community directives on public procurement do not contain specifically applicable provisions, the general principles of Community law, and the principle of equal treatment in particular, also govern procedures for the award of public contracts (see Case C-324/98 *Telaustria and Telefonadress* [2000] ECR I-10745, paragraph 60, and *HI*, paragraph 47).

70 Since such principles have been held to apply to a decision taken in the context of a procedure for the award of a public contract, that decision also falls within the rules laid down by Directive 89/665 in order to ensure compliance with the rules of Community law on public contracts (see *HI*, paragraph 48).

71 Where appropriate, it will be for the referring court to decide, in light of the relevant factors, whether such principles apply in the main proceedings.

72 It will also be for the referring court to establish whether Makedoniko Metro can be regarded, including with its new membership, as having, or having had, an interest in obtaining the contract at issue in the main proceedings and as having been harmed by the Minister's decision of 29 November 1996 for the purposes of Article 1(3) of Directive 89/665.

73 In those circumstances, the answer to the second part of the question must be that, in so far as a decision of a contracting authority adversely affects the rights conferred on a consortium by Community law in the context of a procedure for the award of a public contract, the consortium must be able to avail itself of the review procedures provided for by Directive 89/665.

74 In light of the foregoing considerations, the answer to the question referred must be that:

1. Directive 93/37 does not preclude national rules which prohibit a change in the composition of a consortium taking part in a procedure for the award of a public works contract or a public works concession which occurs after submission of tenders; and

2. in so far as a decision of a contracting authority adversely affects the rights conferred on a consortium by Community law in the context of a procedure

for the award of a public contract, the consortium must be able to avail itself of the review procedures provided for by Directive 89/665.

Costs

75 The costs incurred by the Austrian Government and by the Commission, which have submitted observations to the Court, are not recoverable. 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.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the question referred to it by the Diikitiko Efetio Athinon by order of 26 October 2000, hereby rules:

1. Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts does not preclude national rules which prohibit a change in the composition of a group consortium taking part in a procedure for the award of a public works contract or a public works concession which occurs after submission of tenders.

2. In so far as a decision of a contracting authority adversely affects the rights conferred on a consortium by Community law in the context of a procedure for the award of a public contract, the consortium must be able to avail itself of the review procedures provided for by 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, as amended by Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts.

Gulmann Skouris Macken

Colneric Cunha Rodrigues

Delivered in open court in Luxembourg on 23 January 2003.

R. Grass

Registrar

J.-P. Puissochet

President of the Sixth Chamber