1. Can a Member State add a ground for exclusion from participation in procedures for the award of public works contracts to those listed in Article 24 of Directive 93/37/EEC? What conditions and limits apply? Those questions, which are, in essence, the subject of the present reference for a preliminary ruling, raise the issue of the existence and, if it exists, of the extent of the legislative competence of Member States in the event of Community harmonisation. This issue is not novel and has already been considered in plenty of case-law. What makes the present case unusual, however, is the fact that the national legislative measure in question is a constitutional provision. Should this fact affect the response to be given? These are the issues which lie at the heart of the present dispute.

I — Legal background

A — Community legislation

2. Article 24 of Directive 93/37 sets out the grounds for exclusion from participation in public works contracts. It is worded as follows:

‘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;

(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;

(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;

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

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

B — National law

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

3. The fifth, sixth and seventh subparagraphs of Article 14(9) of the Greek Constitution of 1975, as revised by the constitutional amendment of 6 April 2001, provide:

(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;

‘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.

4. Pursuant to the seventh subparagraph of Article 14(9) of the Greek Constitution, Law No 3021/2002 relating to the restrictions applicable to the conclusion of public contracts with persons active in media undertakings essentially prohibits the award of public works contracts to:

— media undertakings or businessmen in the media sector (owners, partners, main shareholders or directors of media undertakings);

— 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;

— businessmen (owners, partners, main shareholders or directors of works undertakings) who are the spouse or a relative of the owner, partner, main shareholder or management executive of a media undertaking, unless the former can show that they are financially independent of the latter.

5. Law No 3021/2002 adds, in essence, that before awarding a public contract, the relevant contracting authority must apply to the
National Radio and Television Council (Ethniko Simvoulio Radiotileorasis; ‘the ESR’) for a certificate attesting conformity with that law, failing which the public contract is void.

II — The main proceedings and the reference for a preliminary ruling

6. By decision of 13 December 2001, Erga, a public undertaking, issued a call for tenders for the construction of embankments and technical infrastructure works for the new high-speed, two-track railway line between Corinth and Kiato, with a budget of EUR 51 700 000. The companies Michaniki and Sarantopoulos, amongst others, participated in the tender procedure.

7. On 22 May 2002, the contracting authority awarded the contract to Sarantopoulos, which was subsequently taken over by the company Pantechni. Prior to that, the contracting authority had requested and obtained from the ESR a certificate of conformity with respect to Pantechni, as required by Law No 3021/2002. The ESR was of the view that, although Mr K. Sarantopoulos, a main shareholder and vice-chairman of the board of directors of Pantechni, was a relative (more precisely, the father) of Mr G. Sarantopoulos, a member of the board of directors of several Greek media companies, he did not have an incompatible status for the purposes of the Greek legislation as he was financially independent of Mr G. Sarantopoulos.

8. Michaniki, an unsuccessful competitor of the successful tenderer, applied to the Greek Council of State (Simvoulio tis Epikratias) to have the certificate of conformity issued by the ESR annulled, on the ground that the provisions of Law No 3021/2002 pursuant to which the certificate was issued infringed Article 14(9) of the Greek Constitution.

9. The referring court agrees with the applicant in the main proceedings that the contested legislative provisions, in so far as they allow a public works contractor to escape the system of incompatibility provided for therein by demonstrating his financial independence vis-à-vis his relative who is owner, partner, shareholder or director of a media undertaking, infringe Article 14(9) of the Constitution, pursuant to which that contractor, even if financially independent of the relative, is nevertheless required to prove he has not acted as an intermediary but has acted independently, on his own account and in his own interest.

10. The referring court questions, however, the compatibility with Community law of that
constitutional provision, which allows a public works undertaking to be excluded from a contract on the ground that its main shareholder could not rebut the presumption, applicable to him as a relative of the owner, of a partner, of the main shareholder or of a director of a media undertaking, that he acted on behalf of that undertaking and not on his own account. According to the referring court, it seems that the list of grounds for exclusion in Article 24 of Directive 93/37 is exhaustive and, therefore, does not allow the addition of grounds for exclusion such as the ground provided for by Article 14(9) of the Greek Constitution. Even if Directive 93/37 effected only partial harmonisation in that regard, the compatibility with Community law of additional exclusions provided for by a Member State would depend on their pursuing an objective of general interest compatible with Community law and on compliance with the principle of proportionality. Finally, if the Court were to consider the list of grounds for exclusion in Article 24 of the directive to be exhaustive, the referring court questions whether the resulting prohibition of the establishment of a system of incompatibility between the media sector and the public contracts sector infringes principles concerning the protection of the normal working of the democratic system, the requirement for transparency of public procurement procedures, the principle of free and fair competition and the principle of subsidiarity.

11. As a result, the national court in the main proceedings referred three questions to the Court for a preliminary ruling. The first concerns whether the list of grounds for exclusion in Article 24 of Directive 93/37 is exhaustive. The second relates (i) to the compatibility with the general principles of Community law of the aim pursued by the establishment of an incompatibility between the status of owner, partner, main shareholder or management executive of a media undertaking and that of owner, partner, main shareholder or management executive of an undertaking awarded a public works, supply or services contract and (ii) to the compatibility with the Community principle of proportionality of the resulting complete prohibition on the award of public contracts to the undertakings affected. The third relates to the validity of Directive 93/37 in the light of general principles of the protection of competition and transparency and the principle of subsidiarity, if the directive should be understood as preventing the inclusion, as a ground for excluding contractors from public works procurement procedures, of the case in which the contractor, its executives (whether the owner of the undertaking or its main shareholder, partner or management executive) or intermediaries acting for those 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.

12. Before attempting to answer those questions referred for a preliminary ruling, it is appropriate to express a view on the objections which have been raised concerning their admissibility.
III — The admissibility of the questions referred for a preliminary ruling

13. The Greek Government has disputed the Court’s jurisdiction to rule on the present action, on the ground that in the main proceedings the dispute concerns only two Greek companies and the award of a contract by a Greek contracting authority. As the main proceedings relate only to a situation that is purely internal to the Greek State, Community law does not apply and, therefore, the questions referred for a preliminary ruling seeking an interpretation of Community law are not relevant. The Greek Government also doubts the relevance of the questions asked on the ground that they do not relate to an interpretation of Community law which is objectively required for the decision in the main proceedings, as the latter concern only the compatibility of the Greek law with the Constitution.

14. In order to set aside those two objections concerning the admissibility of the present reference, it could from the outset be stated in response to the Greek Government that, pursuant to established case-law, in the context of the cooperation between the Court of Justice and the national courts provided for by Article 177 of the Treaty 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 and that consequently, where the questions submitted by the national court concern the interpretation of Community law, the Court of Justice is, in principle, bound to give a ruling. Nevertheless, it is also clear from the case-law that, in exceptional circumstances, the Court can examine the conditions in which the case was referred to it by the national court in order to assess whether it has jurisdiction and that it may rule that a question referred is inadmissible, in particular 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 or that it does not reflect an objective need on the part of the national court enabling it to rule on the case pending before it, and also where the problem is hypothetical.

15. With regard to the first objection, based on the lack of a Community dimension in the main proceedings, it is true that the Court does not have jurisdiction to rule on questions referred for a preliminary ruling concerning Community provisions in situations in which

---


the facts of the main proceedings are beyond the scope of Community law. The Court has on several occasions noted the inapplicability of Community law, and in particular of the provisions of the Treaty relating to the freedom to provide services and of the rules adopted for their implementation, to situations entirely limited to a single Member State which, as a result, have no link with any of the situations envisaged by Community law. In such instances, the requested interpretation of Community law bears no relation to the actual facts of the main action or its purpose and the answer given cannot be of use to the national court, unless national law requires the State's own nationals to enjoy the same rights as those which a national of another Member State would derive from Community law in the same situation or refers to the content of a Community provision in order to establish the rules applicable to a purely internal situation.

16. Nevertheless, the Court has always answered references for preliminary rulings arising from cases concerning public procurement or, more broadly, public contracts, even if the facts of the case tended to attest to a purely internal situation. This has been so — except for one case — when the interpretation requested has concerned provisions of primary law, in particular those relating to the freedom to provide services. It has always been so when the interpretation has concerned provisions of public procurement directives. In a general way, the reason is connected with the very aims of Community law on public contracts, which seeks to ensure as wide an access as possible, without discrimination based on nationality, to those contracts and to stimulate effective and fair competition in the field. It is, therefore, of little importance that all the participants in a given public procurement procedure come from the same Member State as the contracting authority, since undertakings established in other Member States could also have been interested. Moreover, for this reason all contracts exceeding the amount fixed by the public procurement directives are subject to their provisions, regardless of the nationality or the place of establishment of the tenderers. As with other directives based on Article 95 EC (previously Article 100a EC), their applicability cannot depend on whether the specific situations at issue in the main proceedings have a sufficient connection with

5 — See the recent order of 16 April 2008 in Case C-186/07 Club Náutico de Gran Canaria, paragraph 19.

6 — See, for example, Case C-60/91 Batista Morais [1992] ECR I-2085, paragraphs 6 to 9; Joined Cases C-225/95 to C-227/95 Kapasakalis and Others [1998] ECR I-4239, paragraphs 17 to 24; and Joined Cases C-95/99 to C-98/99 and C-180/99 Khalil and Others [2001] ECR I-7413, paragraphs 70 to 71.


13 — See, to this effect, Commission v Belgium, paragraph 33; Coname, paragraph 17; and Parking Brixen, paragraph 55.

14 — See Commission v Belgium, paragraphs 31 to 33, from which it is clear that the relevant public procurement directive cannot be inapplicable to situations which might be regarded as purely internal.
the exercise of the fundamental freedoms of movement. The first objection of the Greek Government to the admissibility of the present reference for a preliminary ruling, based on the existence of a purely internal situation, can therefore only be rejected.

17. The second ground for disputing the relevance of the questions referred, based on the assertion that the requested interpretation of Community law is not objectively required for a decision in the main proceedings, which concern only the compatibility of the Greek law with the Constitution, cannot be any more successful. It is true that in the present case demonstration of the incompatibility of the provisions of Law No 3021/2002 with Article 14(9) of the Constitution would suffice for the action brought by the applicant in the main proceedings to be upheld.

18. Nevertheless, as the referring court has emphasised, interests of procedural economy favour the view that the question of the compatibility of the constitutional provision at issue with Community law is relevant at this stage. If the Court were to consider itself unable to answer the reference for a preliminary ruling on interpretation and were to leave it, first, to the referring court to resolve the question whether the provisions of Law No 3021/2002 are compatible with Article 14(9) of the Constitution, there would be good reason to believe that, if that court were to annul the certificate because of an infringement of the Constitution by that law, the question of the compatibility of the contested constitutional provision with Community law would very likely come before the Court again sooner or later, since the ESR would, in all probability, find it necessary to refuse the grant of the certificate necessary for the award of the public procurement contract in question on the ground that the public works contractor concerned (Mr K. Sarantopoulos) will not have been able to prove that he is not caught by the incompatibility set out in the Constitution. The final outcome of the main proceedings depends, therefore, on whether the specific system providing for incompatibility between the public works sector and the media sector complies with Community law. It is, therefore, in the interests of procedural economy that the referring court be provided right now with an interpretation of Community law enabling it to decide the issue because, if it were to conclude that Community law is infringed by that system, as laid down in the Constitution and implemented by Law No 3021/2002, it would, as the referring court acknowledges,
have no choice but to refrain from applying the system and, consequently, to reject the application of Michaniki and to confirm the award of the contract to Pantechniki.

IV — Answers to the questions referred for a preliminary ruling

A — Exhaustiveness of the grounds of exclusion laid down in Article 24 of Directive 93/37

19. In the first question referred for a preliminary ruling, the Court is in essence asked whether the Member States may prescribe grounds for exclusion from participation in a tendering procedure for the conclusion of a public works contract other than those provided for in Article 24 of Directive 93/37.

20. In order to contest that the grounds for exclusion listed in Article 24 of Directive 93/37 are exhaustive, the Greek Govern-
21. However, the fact that Directive 93/37 has not brought about a complete harmonisation of the rules governing the award of public works contracts does not mean that some of its provisions cannot be understood as having exhaustively regulated certain matters. Indeed, certain factors strongly suggest that the grounds, referred to in Article 24 of that directive, for exclusion of contractors from procurement procedures in respect of public works contracts are exhaustive. The very aims of the directive support this conclusion. While the directive seeks to develop competition in the field of public works contracts by encouraging as wide a participation as possible in procurement procedures, 22 the addition of new grounds for exclusion of tenderers necessarily reduces the access of candidates to those procurement procedures and, therefore, restricts competition. Furthermore, this seems to me to be the approach of the case-law. The prohibition preventing Member States from requiring tenderers to prove their technical, economic and financial credentials and their fitness by means other than those listed in Articles 23 to 26 of the previous public works directive (71/305) already moved in this direction; in other words, in particular, the verification of the existence of one of the grounds for incompatibility mentioned in Article 24 of that directive affecting a candidate for a public works contract could only be based on the exhaustively prescribed means of proof. 23 Even more pertinently, it has already been ruled that Articles 17 to 25 of the former public supply contracts directive (77/62) contained a ‘binding and exhaustive’ list of the criteria for qualitative selection — which included, in Article 20 thereof, criteria connected with the professional fitness of the candidate — and for the award of the contract and, therefore, excluded the possibility of restricting participation in a supply contract to businesses the majority of whose capital was publicly owned. 24 Finally, and above all, in interpreting Article 29 of Directive 92/50 on public supply contracts, which is, in essence, identical to Article 24 of Directive 93/37, the Court has held that that provision, which lays down seven grounds for excluding candidates from participation in a contract, relating to their professional honesty, solvency and reliability, ‘itself lays down the only limits to the power of the Member States in the sense that they cannot provide for grounds of exclusion other than those mentioned therein’. 25

22. The Greek Government nevertheless responds to this case-law by citing the Court’s decision in Fabricom. 26 The proceedings concerned the conformity with the public procurement directives of national rules which prohibited any person who had been instructed to carry out research, experiments, studies or development in connection with works, supplies or services relating to a public contract from submitting a tender in the procedure for the award of that contract. Far from examining the incompatibility established between participation in the prepara-

22 — As is clear from its preamble, in particular the second and tenth recitals, the directive seeks to abolish restrictions on the freedom of establishment and on the freedom to provide services in respect of public works contracts in order to open up such contracts to effective competition between businesses in the Member States (see, for example, 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).


26 — Joined Cases C-21/03 and Case C-34/03 Fabricom [2005] ECR I-1559.
tory stage of a public procurement procedure and tendering for the contract in the light of the provisions of those directives listing the grounds of exclusion from participation in tendering procedures, in particular under Article 24 of Directive 93/37, the Court limited itself to verifying whether the contested measure was designed to ensure equal treatment between all the tenderers and whether the difference in treatment established was not disproportionate in the light of that objective.

23. Such a decision at first seems to be incompatible with those maintaining the exhaustive nature of the grounds of exclusion listed in the relevant provisions of the directives concerning the coordination of public procurement procedures. This is, however, only an apparent contradiction. It is true that the Community directives seek in principle to fix exhaustively the grounds for exclusion from participation in procedures for the award of public contracts. This is, in particular, the aim of Article 24 of Directive 93/37. However, compliance with other rules and principles contained in, or derived from, that directive may also require the establishment of cases of exclusion. This is particularly the case with regard to the principle of equal treatment of the candidates for a public contract. That principle — necessarily implying an obligation of transparency — which stems from the fundamental freedoms of establishment and provision of services and underlies all the Community rules concerning public procurement can justify the exclusion of competitors from participation in a contract inasmuch as competition between service providers, which the public procurement directives seek to encourage and which involves the widest possible participation in procurement procedures, is genuine only if it respects the principle of equal treatment of candidates. Therefore, and as an illustration, it seems to me to be difficult to contemplate that Community law prevents the very principle of the establishment by a Member State of an incompatibility between the exercise of certain public duties and candidature for a public contract. It is therefore necessary to accept that the Member States may provide for cases of exclusion other than those appearing in the list in Article 24 of Directive 93/37, if that proves necessary in order to prevent potential conflicts of interest and, thus, to ensure transparency and equal treatment. That is, besides, the meaning of the requirement in Article 6(6) of Directive 93/37, according to which ‘contracting authorities shall ensure that there is no discrimination between the various contractors’. This is the message of Fabricom. The incompatibility between participation in the preparatory stage

27 — See, for example, Telaustria and Telefonadress, paragraph 61; Case C-92/00 HI [2002] ECR I-5553, paragraph 45; and Universale-Bau [2002], paragraph 91.
28 — See, expressing precisely that point, Beentjes, paragraph 20, and Commission v France, paragraph 50.
29 — See Universale-Bau and Others, paragraph 91; HI, paragraph 45; and Case C-315/01 GAT [2003] ECR I-6351, paragraph 73.
30 — As I have already had the opportunity to point out (see my Opinion in La Cascina and Others, point 26); see also the Opinion of Advocate General Léger in Fabricom, points 22 and 36.
31 — A case in which, I would like to point out, the interpretation of Article 6(6) of Directive 93/37 was at issue.
of a public contract and candidature for that contract provided for by the national legislation sought to prevent a person participating in certain preparatory work from being able to influence the conditions of a contract in a manner which would then be favourable to his tender or from being at an advantage when formulating his tender on account of the information concerning the public contract in question that he would have been able to obtain when carrying out that work.  

24. It should, therefore, be replied to the first question referred for a preliminary ruling that the list of grounds for exclusion of contractors in Article 24 of Directive 93/37 is not exhaustive.

25. Directive 93/37 thus does not prohibit Member States from adding grounds of exclusion from participation in a public works contract to those listed in Article 24 if the Member States seek to ensure transparency and equal treatment.

26. That is precisely the justification put forward by the Greek Government in support of the incompatibility between the media and the public works sectors laid down in Article 14(9) of the Greek Constitution. It maintains that that incompatibility seeks to ensure transparency and equal treatment in the award of public contracts by precluding any possibility of an undertaking which responds to a call for tenders making use of its media power in order to influence in its favour the final decision awarding a contract. The exclusion of businessmen in the media sector and businessmen connected to a media undertaking therefore takes note of the fact that, given the pressure they are able to exert over contracting authorities because of their media power, they have more chances of obtaining the contract than their competitors and that they therefore do not necessarily find themselves, with respect to the procedure concerning the award of that contract and in light of the goal of opening up competition pursued by Community law in the field, in the same situation as those competitors.

27. It is true that the Greek Government also asserts that the incompatibility provided for by the national constitution is intended in addition to protect the pluralism of the press and media. It is a question of preventing a contracting authority from being able to exert pressure on a media undertaking which is a candidate for the award of a works contract and thus to ensure for itself a favourable presentation of its policies; or, as has been claimed by the Greek Government, it is a question of preventing a media undertaking which is a candidate for the award of a works contract from seeking to influence the final....

B — The conditions placed on additional cases of exclusion

32 — See Fabricom, paragraphs 29 and 30.
decision of the contracting authority by providing, or promising to provide, a favourable presentation of the policies of the public authorities at the expense of the independence and pluralism of the press. However, in reality, in the particular context of the award of public contracts, the stated objective of protecting the pluralism of the press is merely of a subsidiary nature which is not really independent of the aim of ensuring transparency and equal treatment. It is only if and to the extent that the contracting authority did not observe, during the selection of candidates, objective, transparent and non-discriminatory criteria that it could make use of its power to award the contract, either so as to exert an influence over the editorial policy of a media undertaking which is a candidate for the award of a works contract, or to ‘reward’ the editorial policy of that undertaking.

28. In other words, the grounds of exclusion provided for by Greek law seek to prevent conflicts of interest between contracting authorities and media undertakings which could foster active and passive corruption such as to distort the process of selecting the successful tenderer for a works contract. It is thus apparent that provisions such as those at issue in the main proceedings contribute to the observance of equal treatment necessary to achieve the objective of development of effective competition pursued by the Community rules on public procurement. It is also apparent that they respond to a need in that respect, which was not met by the provisions of Directive 93/37. This is demonstrated by the fact that Directive 2004/18, which has replaced Directive 93/37, has added new grounds for exclusion from participation in public procurement procedures, in particular that of corruption, which overlap with the situation referred to in the Greek Constitution.

29. That objective of the general incompatibility under the Greek Constitution between the media sector and the public works sector was not accepted by one of the interveners in the main proceedings in its observations presented during the hearing. In the opinion of the latter, it cannot be concluded as a matter of principle from the outset that the pursuit of an economic activity in its entirety could be a threat to transparency and equal treatment in the context of procedures for the award of public contracts. If one were to accept the legitimacy of the analysis of the Greek authorities that the pursuit of media activities is liable to influence the decision to award a contract, a similar objection could be made concerning numerous other economic activities. In particular, a bank which is also a shareholder of a public works company would be just as much in a position, as a result of its public loan activity, to exert pressure on the contracting authority and to influence its decision awarding the contract.

However, it is appropriate to grant each Member State, subject to review by the Court, a certain discretion concerning the definition of the grounds of exclusion suitable to ensure transparency and equal treatment in procedures for the award of public contracts. The Member State concerned is the best placed to assess which are, in the national context, the conflicts of interest most likely to arise and to threaten the principles of transparency and equal treatment which must be observed when public contracts are entered into. The assessment carried out by the Greek authorities led them to fear, in the Greek context, conflicts of interest which could lead to active and passive corruption on the part of contracting authorities, if they did not exclude works undertakings connected to media undertakings from procurement procedures. This resulted in the incompatibility laid down in Article 14(9) of the Greek Constitution. In that specific assessment of what appears to them to be required for observance, in Greece, of the Community principles of transparency and equal treatment in the award of public contracts, the Greek authorities therefore put forward, in a sense, a national constitutional assessment. It is apparent from the grounds of the order for reference that submissions were made as to whether that fact was such as to influence the decision as to the compatibility of that ground of exclusion with Community law.

It is true that the European Union is obliged to respect the constitutional identity of the Member States. That obligation has existed from the outset. It indeed forms part of the very essence of the European project initiated at the beginning of the 1950s, which consists of following the path of integration whilst maintaining the political existence of the States. That is shown by the fact that the obligation was explicitly stated for the first time upon a revision of the treaties, a reminder of the obligation being regarded as necessary by the Member States in view of the further integration provided for. Thus, Article F(1) of the Maastricht Treaty, now Article 6(3) of the Treaty on European Union, provides that ‘the Union shall respect the national identities of its Member States’. The national identity concerned clearly includes the constitutional identity of the Member State. That is confirmed, if such was necessary, by the explanation of the aspects of national identity put forward in Article I-5 of the Treaty establishing a Constitution for Europe and Article 4(2) of the Treaty on European Union as amended by the Treaty of Lisbon. It appears, indeed, from the identical wording of those two instruments that the Union respects the ‘national identities [of Member States], inherent in their fundamental structures, political and constitutional’.

The case-law has already drawn certain conclusions from that obligation imposed on the European Union by the founding instruments to respect the national identity of the Member States, including at the level of their constitutions. It is apparent from a close reading of that case-law that a Member State may, in certain cases and subject, evidently, to
review by the Court, assert the protection of its national identity in order to justify a derogation from the application of the fundamental freedoms of movement. It may, first of all, explicitly rely on it as a legitimate and independent ground of derogation. The Court has, indeed, expressly recognised that the preservation of national identity ‘is a legitimate aim respected by the Community legal order’, even if it ruled that the restriction in the case in point was disproportionate as the interest pleaded could be effectively safeguarded by other means. The preservation of national constitutional identity can also enable a Member State to develop, within certain limits, its own definition of a legitimate interest capable of justifying an obstacle to a fundamental freedom of movement. Thus, the Court has indeed stated, in response to a Member State relying on the protection guaranteed by its national constitution of the principle of human dignity in order to justify a restriction of the freedom to provide services, that human dignity is protected in the Community legal order as a general principle of law. However, it granted the Member State a broad discretion for the purpose of specifying the content and scope of human dignity according to the view the Member State had of the protection appropriate to that fundamental right on its territory, account being had of specific national features. As a result, the fact that the view of the fundamental right held by a Member State is not shared by other Member States does not prevent that Member State from relying on it so as to justify a restriction of the freedom to provide services.

33. If respect for the constitutional identity of the Member States can thus constitute a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, it can all the more be relied upon by a Member State to justify its assessment of constitutional measures which must supplement Community legislation in order to ensure observance, on its territory, of the principles and rules laid down by or underlying that legislation. It is, nevertheless, necessary to point out that that respect owed to the constitutional identity of the Member States cannot be understood as an absolute obligation to defer to all national constitutional rules. Were that the case, national constitutions could become instruments allowing Member States to avoid Community law in given fields. Furthermore, it could lead to discrimination between Member States based on the contents of their respective national constitutions. Just as Community law takes the national constitutional identity of the Member States into consideration, national constitutional law must be adapted to the requirements of the Community legal order. In the present case, the national constitutional rules can be taken into consideration to the extent that they fall within the discretion available to the Member States in order to ensure the observance of the principle of equal treatment required by the directive. The exercise of that discretion must, however, remain within the limits fixed by the principle and by the directive itself. The national constitutional rule is thus relevant, in the present case, when identifying the national context in which the principle of equal treatment between candidates for a public contract must apply, when establishing, in that context, the risks of a conflict of interests and, finally, whenasses-

34 — In the context of a case where the Member State relied on that in order to justify the exclusion of nationals of other Member States from access to posts in the field of public education (see Case C-473/93 Commission v Luxembourg [1996] ECR I-3207, paragraph 35).


36 — It should be remembered that it follows, in principle, from the case-law of the Court that a Member State cannot rely on its constitutional law in order to oppose the effect of a Community rule in its jurisdiction (Case 11/70 Internationale Handelsgesellschaft [1970] ECR 1125).
OPINION OF MR POIARES MADURO — CASE C-213/07

34. Community law, therefore, does not in principle preclude a Member State from excluding works undertakings connected to media undertakings from public works procurement procedures in order to safeguard the Community principles of transparency and equal treatment between tenderers. It is, nevertheless, still necessary that the incompatibility thus created between the public works and media sectors comply with the principle of proportionality. The incompatibility must, therefore, be necessary and proportionate to the objective of ensuring equal treatment and, therefore, the development of effective competition. If, on the other hand, the ground for exclusion added by national law is defined in such a way as to encompass a number of potential service providers that is excessive in relation to what would be necessary in order to ensure equal treatment between tenderers, it would, in reality, be harmful to the directive’s objective of developing effective competition that it claims to promote. Here also, a certain discretion must be granted to the Member State to establish the extent of the incompatibility which appears to it, in the national context, to satisfy the requirements of the principle of proportionality. The need for and the proportionality of the mechanism chosen cannot, therefore, be excluded on the sole ground that it would not have been adopted by the other Member States. 37

35. The fact remains that that freedom of assessment cannot be unlimited. Its exercise is subject to judicial review. While it is in principle for the national court having jurisdiction in the main proceedings, and not for the Court seised on the basis of Article 234 EC, to carry out such a review, it is apparent that in any event an incompatibility having an extent of the kind provided for by Article 14(9) of the Greek Constitution does not comply with the principle of proportionality. That is so particularly because it encompasses all works undertakings connected to media undertakings, regardless of the extent or their broadcasting or circulation. Such an incompatibility exceeds what is necessary so as to observe equal treatment and, thus, to ensure effective competition, inasmuch as it seems difficult to maintain that a regional media undertaking has media power which would allow it to exert pressure on a contracting authority located in a different region or, conversely, that the latter would be inclined to exert pressure on such a business. That is also so particularly because the

37 — See Omega, paragraphs 37 and 38.
incompatibility affects all works contractors who are in any way related to a businessman in the media sector. It does seem unlikely that a contracting authority could exert pressure on a businessman in the media sector who is distantly related to a works contractor or, conversely, that such a businessman would exert pressure on the contracting authority.

36. The answer to the second question referred for a preliminary ruling should therefore be that the addition by national law of a ground of exclusion to the list in Article 24 of Directive 93/37 is compatible with Community law if the ground is designed to ensure the transparency and equal treatment necessary for the development of effective competition and it complies with the principle of proportionality. A provision which prescribes a general incompatibility between the status of owner, partner, main shareholder or management executive of a media undertaking and that of owner, partner, main shareholder or management executive of an undertaking which the State or a legal person in the public sector in the broad sense entrusts with the performance of works or the provision of supplies or services infringes the principle of proportionality.

37. In view of the answer proposed to the second question, there is no need to answer the third question.

V — Conclusion

38. In the light of the above considerations, I propose that the Court should give the following answers to the questions referred by the Simvoulio tis Epikratias:

— the list of grounds for exclusion of contractors in Article 24 of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts is not exhaustive;
the addition by national law of a ground of exclusion to the list in Article 24 of Directive 93/37 is compatible with Community law if the ground is designed to ensure the transparency and equal treatment necessary for the development of effective competition and it complies with the principle of proportionality. A provision which prescribes a general incompatibility between the status of owner, partner, main shareholder or management executive of a media undertaking and that of owner, partner, main shareholder or management executive of an undertaking which the State or a legal person in the public sector in the broad sense entrusts with the performance of works or the provision of supplies or services infringes the principle of proportionality.