

OPINION OF ADVOCATE GENERAL
MAZÁK

delivered on 10 February 2009¹

I — Introduction

1. The Tribunale Amministrativo Regionale per la Lombardia asks the Court to determine whether Article 29 of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts² ('Directive 92/50') which lays down seven grounds for exclusion from participation in service contracts, is an exhaustive list and therefore precludes national legislation from imposing a prohibition on the simultaneous participation in a tendering procedure of undertakings which are linked by a relationship of control as defined by Article 2359 of the Italian Civil Code ('Civil Code').

for qualitative selection', Article 29 provides:

'Any service provider may be excluded from participation in a 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;

II — Legal framework

A — Community legislation

2. As part of Chapter 2 of Title VI of Directive 92/50, entitled 'Criteria

- (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

¹ — Original language: English.

² — OJ 1992 L 209, p. 1.

with creditors or of any other similar proceedings under national laws or regulations;

(f) has not fulfilled obligations relating to the payment of taxes in accordance with the legal provisions of the country of the contracting authority;

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

(g) is guilty of serious misrepresentation in supplying or failing to supply the information that may be required under this Chapter.

...'

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

B — *Italian legislation*

(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;

3. Legislative Decree No 157 of 17 March 1995 implementing Directive 92/50/EEC on public service contracts (attuazione della direttiva 92/50/CEE in materia di appalti pubblici di servizi) ('Legislative Decree No 157/1995'),³ does not impose any prohibition on the participation of undertakings linked by a relationship of control.

3 — *GIURI* No 104 of 6 May 1995, ordinary supplement.

4. Article 10(1bis) of Law No 109, Framework Law on public works (Legge Quadro in materia di lavori pubblici) of 11 February 1994⁴ ('Article 10(1bis) of Law No 109/94'), provides:

'Undertakings between which there exists one of the control relationships specified in Article 2359 of the Civil Code may not participate in the same tendering procedure.'

5. Article 2359 of the Civil Code, entitled 'Controlled Companies and Linked Companies', provides:

'The following shall be regarded as controlled companies:

- (1) companies in which another company holds the majority of the voting rights that may be exercised in ordinary shareholders' meetings;

- (2) companies in which another company holds sufficient voting rights to exercise a dominant influence in ordinary shareholders' meetings;

- (3) companies which are under the dominant influence of another company by virtue of particular contractual provisions entered into with the latter.

For the purposes of applying points (1) and (2) of the first paragraph, account shall also be taken of votes available to controlled companies, trust companies and intermediaries; no account shall be taken of votes available on behalf of third parties.

Companies over which another company exercises significant influence shall be regarded as linked. Such influence shall be presumed on the part of another company where, in ordinary general meetings, it can exercise at least one fifth of the votes, or one tenth if the company shares are quoted on regulated markets.'

6. The last paragraph of Article 34 of the new public contracts code, approved by Legislative Decree No 163/06 of 12 April 2006 (Codice dei contratti pubblici relativi a lavori, servizi e forniture in attuazione delle direttive

4 — *GIURI* No 41 of 19 February 1994, ordinary supplement.

2004/17/CE e 2004/18/CE)⁵ ('Legislative Decree No 163/06') (not applicable to the present case *ratione temporis*), provides in relation to all contract procedures, that 'tenderers between which there exists a relationship of control, of the kind envisaged in Article 2359 of the Civil Code, may not take part in the same tendering procedure. Contracting authorities shall also exclude from such procedures tenderers whose respective tenders are found, on the basis of unambiguous evidence, to be attributable to one and the same decision-making centre'.

Poste Italiane Spa ('Poste Italiane') and Assitur Srl ('Assitur') were admitted to the procedure.

9. On 12 November 2003, Assitur requested that, in accordance with the tendering conditions, which prohibited individual undertakings from also participating as part of a group, SDA and Poste Italiane should be excluded because of their close association.

III — The main proceedings and the question referred for a preliminary ruling

7. By notice of 30 September 2003, the Camera di Commercio, Industria, Artigianato e Agricoltura di Milano ('CCIAAM') announced a public invitation to tender for the award, on a lowest-price basis, of a courier-service contract for the three-year period 2004 to 2006 for, *inter alia*, the CCIAAM, the basic bid price being EUR 530 000, excluding VAT.

10. After noting that SDA and Poste Italiane had taken part in the tendering procedure separately, the adjudication committee proceeded to open the bids. The adjudication committee then instructed the person conducting the procedure to check whether there were any links between SDA and Poste Italiane which might constitute an impediment to their participation in the tendering procedure.

8. Following examination of the administrative documentation submitted by the tenderers, SDA Express Courier Spa ('SDA'),

11. As a result of the inquiry, it appeared that all the shares in SDA were held by Attività

⁵ — *GIURI* No 100 of 2 May 2006, ordinary supplement No 107.

Mobiliari Spa, which in turn was wholly owned by Poste Italiane. The adjudication committee however pointed out that Legislative Decree No 157/1995, which implemented Directive 92/50 in Italy, does not impose any prohibition on the participation of undertakings linked by a relationship of control. The adjudication committee also observed that no solid and consistent evidence had emerged such as to raise any suspicion that the principles of competition and secrecy of tenders had been infringed. The adjudication committee proposed, therefore, that the service contract be awarded to SDA, which had submitted the lowest bid.

12. By Decision No 712 of 2 December 2003, the CCIAAM awarded the contract in question to SDA.

13. In its action before the referring court, Assitur seeks, *inter alia*, the annulment of the decision of 2 December 2003, as well as a declaration that it is entitled to be the successful tenderer. Assitur claims, *inter alia*, that the adjudication procedure infringed

Article 10(1bis) of Law No 109/94 and the tendering conditions. In particular, Assitur claims that by virtue of Article 10(1bis) of Law No 109/94, which it considers also applies to service contracts, the contracting authority should have excluded from the procedure those companies in a relationship of control as envisaged by Article 2359 of the Civil Code.

14. The referring court considers that Article 10(1bis) of Law No 109/94 provides in clear terms for the exclusion of companies between which there exists a relationship of control as envisaged by Article 2359 of the Civil Code. There is an irrebuttable presumption that the tender of the controlled company is known to the controlling party. Moreover, the referring court considers that in accordance with the national case-law on the matter, Article 10(1bis) of Law No 109/94 is a rule which protects a vital interest of society ('*norma di ordine pubblico*') and thus applies not only to public work contracts but also to service and supply contracts. According to the referring court, it would appear therefore that the adjudication committee should have immediately ordered the exclusion of both SDA and Poste Italiane which are manifestly in a relationship of control as envisaged by Article 2359 of the Civil Code.

15. The referring court considers that the national legislative framework outlined above nevertheless raises interpretative problems

regarding the compatibility of those rules with Community law, in particular with Article 29 of Directive 92/50 as interpreted by the Court in *La Cascina and Others*.⁶ In that case the Court, after stating that Article 29 of Directive 92/50 lays down seven grounds for excluding candidates from participation in a contract, found that the Member States cannot provide for grounds of exclusion other than those mentioned in that provision.

5 December 2006, to stay proceedings and to refer the following question to the Court for a preliminary ruling:

‘Does Article 29 of Directive 92/50/EEC, in laying down seven grounds for exclusion from participation in procedures for the award of public service contracts, give an exhaustive list of grounds for exclusion and therefore preclude Article 10(1bis) of Law No 109/94 (now replaced by Article 34, last paragraph, of Legislative Decree No 163/06) from imposing a prohibition to the effect that undertakings linked by a relationship of control may not participate in the same tendering procedure?’

16. The referring court notes however that the rule laid down by Article 10(1bis) of Law No 109/94, the scope of which has been extended by Legislative Decree No 163/06, is intended to penalise the collusive conduct of closely linked undertakings in a tendering procedure. That rule thus enhances the application of the principle of freedom of competition and does not in reality conflict with Article 29 of Directive 92/50.

IV — The proceedings before the Court of Justice

17. On the basis of those considerations, the Tribunale Amministrativo Regionale per la Lombardia decided, by decision of

18. Written and oral observations were submitted by the CCIAAM, SDA, Poste Italiane, the Italian Republic and the Commission. In addition, Assitur presented oral observations at the hearing of 4 December 2008.

⁶ — Joined Cases C-226/04 and C-228/04 [2006] ECR I-1347.

V — Admissibility

19. CCIAAM and SDA consider that the question referred to the Court for a preliminary ruling is inadmissible. CCIAAM considers that it is clear from the order for reference that the referring court considers that there is a lacuna in Article 29 of Directive 92/50 as that provision does not provide for the exclusion of linked companies. The referring court is therefore not seeking an interpretation of Article 29 of Directive 92/50 but rather to add elements to that provision. SDA considers that given that the referring court has not established a link between SDA and Poste Italiane which would lead to a distortion of the tendering procedure, the referring court may not request the Court to rule on the matter. In effect, the question referred seeks solely to establish facts, a competence which lies exclusively with the national court.

20. In accordance with settled case-law, in the context of the cooperation between the Court and the national courts provided for by Article 234 EC, 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. Consequently, where the questions submitted for a preliminary ruling concern the interpretation of Community law, the Court is, in principle, bound to give a ruling.⁷

21. However, the Court has also stated that, in exceptional circumstances, it must examine the conditions in which the case was referred to it by the national court, in order to assess whether it has jurisdiction. It is settled case-law that a reference from a national court may be refused only if it is quite obvious that the interpretation of Community law sought bears no relation to the actual facts of the main action or to its purpose, or where the problem is hypothetical or the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it.⁸

22. That is not the case here.

⁷ — Case C-145/03 *Keller* [2005] ECR I-2529, paragraph 33, and Case C-119/05 *Lucchini* [2007] ECR I-6199, paragraph 43.

⁸ — Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paragraph 39; Case C-390/99 *Canal Satélite Digital* [2002] ECR I-607, paragraph 19; and Case C-11/07 *Eckelkamp and Others* [2008] ECR I-6845, paragraph 28.

23. In my view, it is clear from the order for reference that the Court is being called upon to clarify whether the referring court is required under Community law, and in particular in the light of Article 29 of Directive 92/50 and the case-law thereon, not to apply national legislation which provides for the exclusion from tendering procedures of companies linked by a relationship of control.

enhances the due application of the principle of freedom of competition and is therefore in compliance with, *inter alia*, Article 81 EC *et seq.*

24. In the proceedings before the referring court, Assitur claims that, in accordance with Article 10(1bis) of Law No 109/94, the CCIAAM should have excluded from the tendering procedure those companies which formed part of a relationship of control as envisaged in Article 2359 of the Civil Code. The CCIAAM, SDA and Poste Italiane on the other hand claim that pursuant to the judgment of the Court in *La Cascina and Others*,⁹ Member States cannot provide for grounds of exclusion of candidates from tendering procedures other than those mentioned in Article 29 of Directive 92/50. The CCIAAM, SDA and Poste Italiane note that Article 29 of Directive 92/50 does not include in its exhaustive list of grounds of exclusion companies linked by a relationship of control. The referring court considers, however, that given that Article 10(1bis) of Law No 109/94 is a provision intended to penalise collusive conduct by companies it

25. Clearly, therefore, the question submitted relates to the subject-matter of the main proceedings, as defined by the referring court, and the answer to that question may be useful to that court in enabling it to decide whether the exclusion of companies from the tendering procedure in question pursuant to Article 10(1bis) of Law No 109/94 is in conformity with Community law.

26. Moreover, contrary to the assertion made by SDA, the question referred does not, in my view, seek to establish whether and to what extent SDA and Poste Italiane are in fact related. As SDA has rightly pointed out that is a matter which lies exclusively with the national court.

27. In those circumstances, I consider that the reference for a preliminary ruling should be held by the Court to be admissible.

⁹ — Cited in footnote 6.

VI — Substance

company's mere participation in the capital of another is not sufficient pursuant to Community law for exclusion from a tender where an operational link has not been established.

A — *Observations submitted to the Court*

28. At the hearing on 4 December 2008, Assitur stated that the list contained in Article 29 of Directive 92/50 is not exhaustive. In a case such as the present where two companies participate in a tender and one of them is 100% controlled by another, their participation must be considered unlawful as it undoubtedly infringes the principle of competition which must be protected.

29. According to CCIAAM, in the absence of any legal provision prohibiting controlled companies from participating in the procurement procedure for the award of public service contracts or any indication to that effect in the tender notice, Poste Italiane and SDA could not be automatically excluded from the procedure for the award of the contract in question. Moreover, the adjudicating authority verified that the relationship between SDA and Poste Italiane was not such as to affect the transparency and correct conduct of the adjudication procedure. A

30. SDA, Poste Italiane and the Italian Republic consider that in accordance with the *La Cascina and Others*¹⁰ case, Article 29 of Directive 92/50, which lays down seven grounds for excluding candidates from participating in a contract, ensures that Member States cannot provide for grounds of exclusion other than those mentioned therein. According to SDA, Article 29 of Directive 92/50 therefore precludes the adoption of national rules such as Article 10(1bis) of Law No 109/94.

31. Poste Italiane also considers that Article 10(1bis) of Law No 109/94 by introducing an absolute presumption of collusion where companies are linked by a relationship of control hinders rather than enhances the principles of competition. That provision prevents the simultaneous participation in a tender of companies where the relationship of control has not in fact resulted in collusion, thereby limiting the number of tenderers.

¹⁰ — Cited in footnote 6.

32. The Italian Republic considers that while Article 29 of Directive 92/50 provides for the exclusion of companies on the basis of their personal (and general) situation, Article 10(1bis) of Law No 109/94 objectively regulates the different tenders by excluding those which are in reality the product of a single decision-making centre and which thus lack the necessary degree of independence, soundness and reliability. The purpose of the provision is to enable the adjudicating authority to ensure that the competitive nature of a tender procedure is effectively guaranteed and that all potential collusion is suppressed. The Italian Republic therefore considers that Article 29 of Directive 92/50 does not preclude the Member States from adopting exclusion clauses in order to deal with other objective situations where a multiplicity of tenders does not guarantee effective competition between those tenders.

from adopting other grounds of exclusion which are not based on the candidate's professional honesty, solvency and reliability but rather on the need to ensure the correct functioning of the tender procedure and in particular respect for the principle of equality. Given that the offer of a company which is controlled by another will certainly be known and may even be 'controlled' by the latter, Article 10(1bis) of Law No 109/94 is aimed at ensuring effective competition and equal treatment between tenderers. The Commission also highlights the fact that a group of companies may by means of concerted tenders influence the fixing of the threshold for abnormally low tenders thereby leading to the exclusion of tenderers who are not part of the group.

33. The Commission considers that pursuant to the judgment in *La Cascina and Others*, Article 29 of Directive 92/50 lays down an exhaustive list of seven grounds for excluding candidates from participation in a contract, which relate to their professional honesty, solvency and reliability. Thus the Member States cannot provide for other grounds of exclusion based on a candidate's professional honesty, solvency and reliability. Article 29 does not however preclude Member States

34. While Article 10(1bis) of Law No 109/94 pursues a legitimate aim of ensuring equal treatment, the Commission considers that it is disproportionate in nature as it does not allow tenderers who are linked by a relationship of control to prove that their offers were in fact drawn up autonomously and without the contents of their offers being known by the controlling company. The Commission therefore considers that the irrebutable presumption contained in Article 10(1bis) of Law No 109/94 may not in fact promote competition.

B — Assessment

for additional grounds of exclusion based on a candidate's professional honesty, solvency and reliability.¹³

35. In my view, it is clear from the judgment in *La Cascina and Others* that Article 29 of Directive 92/50 lays down in an exhaustive manner the seven grounds which a Member State may¹¹ invoke for excluding candidates from participation in a public service contract on the basis of criteria relating to their professional quality, namely, their professional honesty, solvency and reliability.¹²

37. This approach has in fact been very recently confirmed by the Court in the *Michaniki* case¹⁴ in relation to Article 24 of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts.¹⁵ Article 24 of Directive 93/37 also lays down seven grounds for excluding candidates from participation in a contract on the basis of their professional honesty, solvency and reliability which mirror the grounds contained in Article 29 of Directive 92/50.

36. Article 29 of Directive 92/50 therefore entails that the Member States cannot provide

38. The exhaustive list of seven grounds set out in Article 29 of Directive 92/50 does not however preclude Member States from maintaining or adopting other rules which are designed, in particular, to ensure, in the field of public contracts, observance of the principle of equal treatment and the principle of transparency. Those principles, which lie at the heart of the directives on procedures for the award of public contracts must be observed by contracting authorities in any procedure for the award of such a contract and 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

11 — Member States are not in fact obliged to adopt such grounds of exclusion as the use of the term 'may' (rather than 'shall') in Article 29 of Directive 92/50 renders their adoption merely facultative. While it may be difficult to reconcile the fact that the adoption of such grounds of exclusion by Member States is facultative with the exhaustive nature of those grounds, the Court confirmed in *La Cascina and Others* that '... Article 29 of Directive 92/50 does not provide in this field for uniform application of the grounds of exclusion mentioned therein at Community level, since the Member States may choose not to apply those grounds of exclusion at all and opt for the widest possible participation in procedures for the award of public contracts or to incorporate them into national law with varying degrees of rigour according to legal, economic or social considerations prevailing at national level. In that context the Member States have the power to make the criteria laid down in Article 29 of Directive 92/50 less onerous or more flexible' (see paragraph 23).

12 — See by analogy paragraph 21 of *La Cascina and Others*, cited in footnote 6.

13 — See by analogy paragraph 22 of *La Cascina and Others*, cited in footnote 6.

14 — Case C-213/07 [2008] ECR I-9999, paragraphs 41 to 43.

15 — 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').

authority. A Member State is thus entitled to provide, for exclusionary measures designed to ensure observance of the principles of equal treatment of all tenderers and of transparency in procedures for the award of public contracts aside from the seven grounds for exclusion based on objective considerations of professional quality, which are listed exhaustively in Article 29 of Directive 92/50.¹⁶

39. As the Member States are best placed to identify, in the light of historical, economic or social considerations specific to them, situations likely to bring about breaches of the principles of equal treatment of all tenderers and of transparency in procedures for the award of public contracts, the Court confirmed in the *Michaniki* case that the Member States are thus granted a certain margin of discretion for the purpose of adopting measures intended to ensure respect for those principles. However, in accordance with the principle of proportionality, which constitutes a general principle of Community law, such measures must not go beyond what is necessary to achieve that objective.¹⁷

16 — See to that effect paragraphs 44 to 47 of *Michaniki* and the case-law cited therein. In paragraph 47 of the judgment in *Michaniki*, the Court stated that '[i]t 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' (emphasis added). In my view the use of the terms 'in addition' in the paragraph in question may give the impression that additional grounds may be added to the seven grounds of exclusion contained in Article 24 of Directive 93/37 and by analogy to those contained in Article 29 of Directive 92/50. This was clearly not the intention of the Court. I have used the terms '*aside from*' in the text above, in order to stress that exclusionary measures designed to ensure observance of the principles of equal treatment of all tenderers and of transparency in procedures for the award of public contracts are of a different specie or nature to the exclusionary grounds contained in Article 24 of Directive 93/37 and Article 29 of Directive 92/50. The fact that Article 24 of Directive 93/37 and Article 29 of Directive 92/50 contain an exhaustive list of grounds for excluding candidates on the basis of their professional quality is, in my view confirmed by Article 45 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114). Article 45(2) of Directive 2004/18 replicates the seven grounds concerning professional quality contained in both Article 24 of Directive 93/37 and Article 29 of Directive 92/50. However, an entirely new and distinct category of compulsory grounds for exclusion of candidates is added in Article 45(1) of Directive 2004/18 based, *inter alia*, on candidates' convictions for participation in organised crime, corruption and fraud.

17 — See to that effect paragraphs 55, 56 and 48 of *Michaniki* (cited in footnote 14) and the case-law cited therein. While the *Michaniki* case concerns a national provision which establishes a general system of incompatibility between the sector of public works and that of the media and results in the exclusion from the award of public works contracts contractors who are also involved in the media sector, the *ratio* or principles of law underlining that ruling are, in my view, of general application in the field of procedures for the award of public contracts and are by no means specific or limited to the media sector. Thus national provisions which seek to give effect to the principles of equal treatment and transparency and which are proportionate in nature, do not, in principle, contravene the Community rules governing the procedures for the award of public contracts.

40. It is clear from the order for reference that the Italian legislature sought by the adoption of Article 10(1bis) of Law No 109/94 to ensure the proper and transparent conduct of public procurement procedures.¹⁸ According to the referring court, the Italian legislature considers that the free play of competition and rivalry will be irremediably and adversely affected by the submission of tenders which, although formally deriving from two or more legally distinct companies, can be traced back to a single centre of interests. Pursuant to the order for reference, the Italian legislature considers that this situation arises in those cases where undertakings are controlled or susceptible to significant influence, as envisaged by Article 2359 of the Civil Code. Accordingly, controlled companies cannot be regarded as third parties vis-à-vis the controlling companies and have no standing, therefore, to submit another tender in the same tendering procedure.¹⁹

41. In my view, it is clear from the above that Article 10(1bis) of Law No 109/94 does not relate to candidates' professional honesty, solvency and reliability. Despite certain submissions made by the Commission at the hearing on 4 December 2008, I do not consider that Article 10(1bis) of Law No 109/94 is aimed at excluding candidates which in accordance with Article 29(d) of Directive 92/50 have 'been guilty of grave professional misconduct proven by any means which the contracting authorities can justify'. Article 10(1bis) of Law No 109/94 does not in fact address the behaviour of candidates but seeks to pre-empt situations where the very relationship between certain companies participating in tendering procedures would tend to distort that procedure.²⁰

18 — The referring court clearly stated in the order for reference that Article 10(1bis) of Law No 109/94 is a rule laid down for the protection of a vital interest of society ('norma di ordine pubblico'). According to the referring court Article 10(1bis) of Law No 109/94 applies in general and thus to service and supply contracts, irrespective of whether the contracting authority has specifically imposed that provision (see point 14 above).

19 — The Italian Republic at the hearing referred to the fact that the national measure in question was adopted following a number of scandals which arose in the field of public tenders. In addition, the Commission gave examples in its written and oral pleadings of the manner in which a company which controls another could distort a tendering procedure in which both companies participate.

20 — Subject to verification by the referring court, Article 10(1bis) of Law No 109/94 does not seem to address collusive behaviour in the sense of Article 81 EC. Article 10(1bis) of Law No 109/94 appears rather to address situations where two or more formally distinct companies which in fact constitute one economic unit, simultaneously participate in a tendering procedure thereby impairing the equal treatment of all tenderers and the transparency of procedures for the award of public contracts. In the absence, inter alia, of an agreement or concerted practice between undertakings, Article 81 EC does not apply (see Case C-73/95 P *Vihō v Commission* [1996] ECR I-5457, paragraphs 48 to 51).

42. I therefore consider, on the basis of the information provided by the referring court, that Article 10(1bis) of Law No 109/94 is aimed at ensuring the equal treatment of all tenderers and the transparency of procedures for the award of public contracts and that Community law must be interpreted as not precluding, in principle, the adoption of such national measures. The measure in question must however be compatible with the principle of proportionality.²¹

That presumption is not open to rebuttal and thus cannot be overturned even by proof that the controlled company drew up its tender in an entirely independent manner.

43. According to the referring court, Article 10(1bis) of Law No 109/94 provides for the exclusion of companies from the tendering procedures where there exists a relationship of control. Moreover, the exclusion which is automatic is based on the presumption that the tender of the controlled company is known to the controlling party.

44. In my view, a national measure, such as that at issue in the main proceedings, which leads to the automatic exclusion from tendering procedures of certain tenderers is disproportionate in nature as it does not allow tenderers which are linked by a relationship of control to prove that their tenders were in fact drawn up in a manner which would not in fact impair the equal treatment of tenderers and the transparency of procedures for the award of public contracts.²²

²¹ — See point 39 above.

²² — Indeed, the application of such a national measure may have the consequence that persons may be precluded from tendering procedures even though their participation in the procedure entails no risk whatsoever for the equal treatment of tenderers and the transparency of procedures for the award of public contracts.

VII — Conclusion

45. In the light of the foregoing considerations, I propose that the Court replies to the Tribunale Amministrativo Regionale per la Lombardia in the following manner:

- Article 29 of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, 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 service contract. However, Article 29 of 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.
- 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, leads to the automatic exclusion from tendering procedures of tenderers between which there exists a relationship of control as defined by national law, without giving them an opportunity to prove that, in the circumstances of the case, that relationship had not led to an infringement of the principles of equal treatment of tenderers and of transparency.