OPINION OF ADVOCATE GENERAL MAZÁK

delivered on 3 September 2009 [1]

1. The present reference for a preliminary ruling from the Consiglio di Stato (Council of State) (Italy) concerns the interpretation of the concept of 'economic operator', set out in particular in the second paragraph of Article 1(8) of Directive 2004/18/EC. [2] The referring court seeks to know whether non-profit-making entities which are not necessarily present on the market on a regular basis, in particular universities and research institutes as well as groups (consortia) of those universities and research institutes and State bodies, are allowed to participate in a public service tendering procedure in relation to the acquisition of geophysical data and marine samples. In addition, the referring court asks whether a restrictive interpretation of the national legislation, which provides that the above entities are excluded from such participation, is contrary to the Directive.

I — Legal framework

A — *Community law*

2. Article 1(2)(a) of the Directive provides that '"Public contracts" are contracts for pecuniary interest concluded in writing between one or more *economic operators* and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services within the meaning of this Directive'. [3]

3. According to Article 1(8) of the Directive:

'the terms "contractor", "supplier" and "service provider" mean any natural or legal person or public entity or group of such persons and/or bodies which offers on the

1 — Original language: English.

2 — Directive 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) ('the Directive').

3 — Emphasis added.

market, respectively, the execution of works and/or a work, products or services.

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

…' [4]

4. Article 4 of the Directive is entitled '*Economic operators*' and states:

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

…

2. Groups of *economic operators* may submit tenders or put themselves forward as candidates. In order to submit a tender or a request to participate, these groups may not be required by the contracting authorities to assume a specific legal form; however, the group selected may be required to do so when it has been awarded the contract, to the extent that this change is necessary for the satisfactory performance of the contract.' [5]

5. Finally, Article 44(1) of the Directive provides under the heading 'verification of the suitability and choice of participants and award of contracts' that 'contracts shall be awarded on the basis of the criteria laid down in Articles 53 and 55, taking into account Article 24, after the suitability of the *economic operators* not excluded under Articles 45 and 46 has been checked by contracting authorities in accordance with the criteria of economic and financial standing, of professional and technical knowledge or ability referred to in Articles 47 to 52, and, where appropriate, with the non-discriminatory rules and criteria referred to in paragraph 3'. [6]

4 — Idem.

5 — Idem.

6 — Idem.

B — *National law*

6. Article 3(19) and (22) of the Public Contracts Code, enacted by Legislative Decree No 163 of 12 April 2006, [7] provides, respectively that 'the terms "contractor", "supplier" and "service provider" shall mean any natural or legal person, or body without legal personality, including a European Economic Interest Group (EEIG) formed pursuant to Legislative Decree No 240 of 23 July 1991, which "offers on the market", respectively, the execution of works or a work, the supply of products, or the provision of services' and that 'the term "*economic operator*" shall include a contractor, supplier, service provider or a group or consortium of these'. [8]

7. Article 34 of Legislative Decree No 163/2006 provides, under the heading 'Entities to which public contracts may be awarded …':

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

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

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

(c) permanent consortia, constituted inter alia as joint venture companies..., between individual contractors (including artisans), commercial companies or partnerships or production- and labour-cooperatives, …;

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

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

(f) entities who have entered into an [EEIG] …;

7 — GURI No 100 of 2 May 2006, ordinary supplement, ('Legislative Decree No 163/2006'). Procedures for the award of public works contracts, public supply contracts and public service contracts are currently governed, in their entirety, by this decree.

8 — Emphasis added.

…'

8. It was only after the material events of the main proceedings had occurred, and therefore also after the adoption of the order of the referring court on 23 April 2008, that Legislative Decree No 152 of 11 September 2008 [9] added the following subparagraph to the above list: '(f bis) economic operators within the meaning of Article 3(22), established in other Member States and constituted according to the applicable legislation of the Member State concerned'.

II — Factual and procedural background and the questions referred

9. The Regione Marche (the Marche Region), in its capacity as a contracting authority, organised a public service tendering procedure in relation to the acquisition of geophysical data and marine samples. The Consorzio Nazionale Interuniversitario per le Scienze del Mare (National Inter-University Marine Sciences Consortium, 'CoNISMa') applied to participate, but was ultimately excluded from that procedure.

10. CoNISMa challenged its exclusion by way of an extraordinary petition to the President of the Italian Republic. In the framework of that extraordinary petition, the Ministero dell'ambiente e della tutela del territorio (Italian Ministry of the Environment and Protection of the Territory) requested an opinion of the Consiglio di Stato. The referring court needs to establish whether an inter-university group, such as CoNISMa, constitutes an 'economic operator' within the meaning of the Directive and, if so, whether it may take part in a tendering procedure such as the one at issue in the main proceedings. In that regard, the referring court expresses doubts on the basis of the following considerations.

11. The Consiglio di Stato states that CoNISMa is a group (consortium) of 24 universities and three ministries. According to its statute, the consortium is non-profit-making and seeks to promote and coordinate research and other scientific activities and their applications in the field of marine sciences between the member universities. However, its statute provides that it may participate in public tendering procedures. The consortium is financed primarily from funds provided by the Ministry for Universities and Research. In the referring court's view, the tendering procedures in question are open only to public bodies that supply the services which are the subject of the contract

9 — GURI No 231 of 2 October 2008.

in accordance with their official functions and in a manner which is consistent with the profit-making functions they are assigned by the rules governing them.

12. Thus the Consiglio di Stato decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

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

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

III — Assessment

A — *Principal arguments of the parties*

13. According to CoNISMa, the applicant in the main proceedings, the national legislation, which excludes entities that are not 'contractors' according to an exhaustive list contained in Article 34 of Legislative Decree No 163/2006, must be interpreted in the light of the Directive. Article 1(8) of the Directive expressly includes 'public entities' among contractors, suppliers or service providers. Article 4 of the Directive provides that candidates entitled to provide the relevant service are not to be rejected solely on the ground that, under the law of the Member State in which the contract is awarded, they would be required to be either natural or legal persons. A fortiori, a candidate should not be rejected on the ground that he is not a 'contractor'. CoNISMa states that that approach is confirmed by the fact that after

the Commission of the European Communities had taken action in the form of opening administrative procedure No 2007/2309 [10] against the Italian Republic concerning a failure to fulfil obligations, the Italian Government inserted in Article 34(1) of Legislative Decree No 163/2006 the new subparagraph (f bis) referred to above. In CoNISMa's view, this reform expressly abolished the requirement that economic operators established in other Member States be a 'contractor'. Furthermore, that reform replaced the term 'undertakings' used in the Legislative Decree with the term 'economic operators'.

14. The Czech Government argues, in essence, that if the Directive intended to establish a distinction between economic public bodies, which carry out a certain economic activity, and non-economic ones, it would have included a statement to that effect. Therefore, the Czech Government proposes that the first question should be answered in the negative.

15. The Austrian Government contends inter alia that the Community rules on public procurement are applicable where a contracting authority intends to award a contract for pecuniary interest to a legally distinct entity, whether the latter is itself a contracting authority or not. It follows that contracting authorities may take part in public tendering procedures both as tenderers or as candidates, a point which should apply a fortiori to tenderers who are not contracting authorities but whose objects are non-profit-making and which do not act exclusively in accordance with market forces.

16. The Commission submits essentially that according to Article 1(8) of the Directive and the Court's case-law, public bodies and contracting authorities in general may take part in a public tendering procedure as tenderers and may therefore be considered as economic operators within the meaning of the Directive. Furthermore, no provision of the Directive precludes universities and consortia of universities from being considered economic operators and from accessing Community tender procedures.

17. As regards the second question, all the above parties argue, in substance, that it should be answered in the affirmative.

10 — CoNISMa claims that the Commission criticised the list in Article 34 of Legislative Decree No 163/2006, stating that it 'does not appear to allow the participation in tendering procedures of operators with a legal form different to those mentioned in the list. In particular, this article does not appear to allow the participation of other public entities or bodies governed by public law in the sense of the public procurement directives'.

B — *Appraisal*

18. By its two questions, which should be considered together, the referring court asks essentially whether non-profit-making entities which are not necessarily present on the market on a regular basis, [11] such as CoNISMa — that is to say, universities and research institutes as well as groups (consortia) of those universities and research institutes and State bodies [12] — are entitled to participate in a public service tendering procedure and may be considered to constitute an 'economic operator' within the meaning of the Directive. Should the national legislation be interpreted restrictively as precluding the above entities from participating, the referring court asks whether such interpretation is contrary to the Directive. In that respect, it is sufficient to point out that the Court interprets Community law and not national law. [13]

19. I shall first consider the wording of the relevant provisions.

20. Despite the reference to 'economic operators' in, inter alia, Article 1(2)(a), the Directive does not contain a precise definition of that concept. Article 1(8) of the Directive provides only that that term 'is used merely in the interest of simplification' and means 'any natural or legal person or *public entity* or group of such persons and/or bodies which offers on the market … works[,] products or services'. [14]

21. In that regard, I consider that the fact that Article 1(8) of the Directive refers to those who 'offer services on the market' does not signify an intention to restrict the category of public bodies eligible to conclude contracts with contracting authorities solely to those bodies which are engaged (as an undertaking) in the activity involved in the service to be provided by the selected contractor and whose objects are profit-making. In order to be considered an economic operator it is not essential to offer services on the market on a continuous and systematic basis.

11 — The Consiglio di Stato refers in this respect to CoNISMa's presence on the market as not being on a 'regular' or 'stable' basis. However, CoNISMa's statute expressly provides that it may participate in tendering procedures and that is why I qualify the statement with the inclusion of 'necessarily'. In fact, CoNISMa argues that it regularly participates in public tendering procedures.

12 — I would note here that CoNISMa disputes the fact that it is also composed of State bodies. However, suffice it to say that the questions referred for a preliminary ruling are considered within the factual and legal context as set out by the referring court. The Court does not take account of observations from interested parties within the meaning of Article 23 of the Statute of the Court which take issue with that context. See Case C-153/02 *Neri* [2003] ECR I-13555, paragraphs 33 to 36; see also Case C-145/03 *Keller* [2005] ECR I-2529, paragraphs 32 to 34. In any event, my conclusion in the present opinion applies whether or not the consortium is also composed of State bodies.

13 — As regards the wording of the second question, it is not the task of the Court, in preliminary ruling proceedings, to rule upon the compatibility of national law with Community law or to interpret national law. The Court is, however, competent to give the national court full guidance on the interpretation of Community law in order to enable it to determine the issue of compatibility for the purposes of the case before it (see Case C-213/07 *Michaniki* [2008] ECR I-9999, paragraphs 51 and 52 and the case-law cited).

14 — Emphasis added.

22. In my view, the Directive clearly does not require any particular legal form and it contains no requirement to the effect that an economic operator qualify as an undertaking or needs to have profit-making objects or a stable or regular presence on the market.

23. The Directive merely provides that an 'economic operator' means inter alia any public entity which offers on the market the execution of works, products or services. It says nothing more.

24. In that connection, as the Commission has pointed out, by not providing any indications as to the required characteristics and/or legal form of economic operators allowed to participate in tendering procedures, the Community legislature did not wish to define that concept in a way which would introduce particular conditions and thus limit access to tender procedures in such a way.

25. In addition, it should be pointed out that Article 4(1) of the Directive provides that 'candidates or tenderers who, under the law of the Member State in which they are established, are entitled to provide the relevant service, shall not be rejected solely on the ground that, under the law of the Member State in which the contract is awarded, they would be required to be either natural or legal persons'. Then, as regards groups of economic operators, Article 4(2) of the Directive continues that 'in order to submit a tender or a request to participate, these groups may not be required by the contracting authorities to assume a specific legal form …'.

26. It follows from the foregoing considerations, and not least from the wording of Article 1(8) of the Directive in particular, that public entities, such as the entity involved in the main proceedings, constitute 'economic operators' and may, in principle, participate in public service tendering procedures.

27. The above approach is confirmed by the *travaux préparatoires* to the Directive. [15]

15 — The proposal for the Directive explained, under 'justification' for the wording of what eventually became Article 1(8), that the 'new concept [of an economic operator] has become necessary because of the insertion of the three public sector Directives into a single text'. The *travaux préparatoires* to the Directive also state that 'the only purpose of [that] term is for conciseness' and that it stands for 'opérateur économique' in French or 'ondernemer' in Dutch and that in English it effectively means 'undertaking'. They continue by stating that 'in the event of serious transcription problems, systematic use could be made, despite the ponderous style, of "supplier, provider of services and contractor"'.

28. Here, one may perhaps draw a parallel with the well-established concept of an undertaking under Community competition law.

29. This may also be opportune due to the fact that the Directive stresses that the concept of 'economic operator' is used merely in the interest of simplification. In addition, it is obvious that competition law and rules guaranteeing fair competition in tendering procedures are related.

30. Therefore it is instructive to recall the *Höfner and Elser* [16] line of case-law on the concept of 'undertaking', in the context of competition law, which 'encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed'. Furthermore, the Court has held that 'any activity consisting in offering goods or services on a given market is an economic activity'. [17] Here, the remark of Advocate General Jacobs that 'an activity does not necessarily cease to be economic simply because there is no aim to make a profit' is particularly apt. [18]

31. My interpretation of the concept of 'economic operator' is also confirmed by the Court's case-law relating to public procurement.

32. First of all, there is case-law [19] where the Court has stated that the Community rules on public contracts apply to 'an economic

16 — Case C-41/90 [1991] ECR I-1979, paragraph 21. See, inter alia, also Case C-205/03 P *FENIN* v *Commission* [2006] ECR I-6295, paragraph 25; and, more recently, Case C-280/06 *ETI and Others* [2007] ECR I-10893, paragraph 38 and the case-law cited.

17 — See Case C-113/07 P *Selex Sistemi Integrati* v *Commission and Eurocontrol* [2009] ECR I-2207, paragraph 69. See also Case 118/85 *Commission* v *Italy* [1987] ECR 2599, paragraph 7; Case C-35/96 *Commission* v *Italy* [1998] ECR I-3851, paragraph 36; C-309/99 *Wouters and Others* [2002] ECR I-1577, paragraph 47; Case C-222/04 *Cassa di Risparmio di Firenze and Others* [2006] ECR I-289, paragraph 108; Case C-237/04 *Enirisorse* [2006] ECR I-2843, paragraph 29; and *FENIN* v *Commission*, cited in footnote 16, paragraph 25.

18 — Case C-5/05 *Joustra* [2006] ECR I-11075, point 84. See also the Opinion of Advocate General Poiares Maduro in *FENIN* v *Commission*, cited in footnote 16, 'even if no profit-making activity is carried on, there may be participation in the market capable of undermining the objectives of competition law' (point 14). Concerning the relevance of the fact that an organisation is non-profit-making in assessing the economic nature of an activity, see Joined Cases C-159/91 and C-160/91 *Poucet and Pistre* [1993] ECR I-637, paragraph 10; Case C-35/96 *Commission* v *Italy*, cited in footnote 17, paragraph 37; and Joined Cases C-180/98 to C-184/98 *Pavlov and Others* [2000] ECR I-6451, paragraphs 76 and 77.

19 — See Case C-220/05 *Auroux and Others* [2007] ECR I-385, paragraph 44.

operator [who is] active on the market'. However, I consider that one should not infer from that statement that an economic operator must have a stable or regular presence on the market.

33. On the contrary, in my view, the concept of 'economic operator' must be interpreted broadly in order to include any person who offers services on the market, whether he does so for the first time or merely on an isolated or occasional basis.

34. Indeed, as the Commission has pointed out, the above is not prejudicial to the quality of the service provided since Article 44 of the Directive provides that contracts are to be awarded only after the contracting authorities have checked the economic operators' economic and financial standing as well as their professional and technical knowledge or ability.

35. A broad interpretation of the concept of 'economic operator' is also in line with the Court's case-law to the effect that it is the concern of Community law to ensure the widest possible participation by tenderers in a call for tenders. [20]

36. Regard should also be had in this context to the judgments in *Teckal*, [21] *ARGE*, [22] *Stadt Halle and RPL Lochau*, [23] and *Auroux and Others*, [24] where the Court ruled, inter alia, that Community legislation on public procurement is applicable even in cases where the contractor is itself a contracting authority. [25] Therefore, a contracting authority may also be considered to constitute an 'economic operator' within the meaning of the Directive. This also supports my broad interpretation of that concept in the present case.

37. The referring court expressed concerns specifically with regard to CoNISMa's non-

20 — See, to that effect, *Michaniki*, cited in footnote 13, paragraph 39; and Case C-538/07 *Assitur* [2009] ECR I-4219, paragraph 26. See also Case C-26/03 *Stadt Halle and RPL Lochau* [2005] ECR I-1, paragraph 47.

21 — Case C-107/98 [1999] ECR I-8121, paragraph 50 et seq.

22 — Case C-94/99 [2000] ECR I-11037, paragraph 40.

23 — Cited in footnote 20, paragraph 47.

24 — Cited in footnote 19.

25 — Concerning a case where a university is potentially a contracting authority, see Case C-380/98 *The University of Cambridge* [2000] ECR I-8035. With regard to the concept of a contracting authority, see Tizzano, A., 'La notion de "pouvoir adjudicateur" dans la jurisprudence communautaire', in Monti, M., Prinz Nikolaus von und zu Liechtenstein, Vesterdorf, B., Westbrook, J., Wildhaber, L. (Eds.), *Economic Law and Justice in Times of Globalisation*, Nomos, Baden-Baden, 2007, pp. 659-669.

profit-making objects. In that connection, in *Commission* v *Italy*, [26] the Court ruled, first, that the fact that an association is non-profit-making does not exclude it from carrying out an activity of an economic nature and from constituting an undertaking under the Treaty provisions relating to competition.

38. Next, the Court recalled the ruling in *ARGE* [27] and held that the fact that, as their employees work on a voluntary basis, such bodies tend to be able to submit tenders at prices appreciably lower than those of other tenderers does not preclude them from participating in an award procedure for a public service contract covered by Directive 92/50. Therefore, the Court concluded that the contract at issue in that case was not excluded from the concept of public service contracts within the meaning of Article 1(a) of Directive 92/50, by reason of the fact that the associations at issue were of a non-profit-making nature. [28]

39. Furthermore, in order to address the referring court's concerns that the consortium would allegedly not be able to offer the professionalism and capability of a typical business as well as the sophisticated machinery and highly-skilled operators required for the service concerned, it is sufficient to recall the case-law where the Court held that it makes no difference if the tenderer himself cannot or does not intend to carry out the contract itself provided that it can demonstrate that it actually has available to it the resources, of subsidiaries or third parties and whatever the nature of its legal link with those companies, [29] which are necessary for carrying out the contract.

40. In that connection, the Directive does not allow a contracting authority to exclude a public body, such as CoNISMa, from taking part in a tendering procedure, the reason being that the question whether an economic operator is entitled to take part in such a procedure is to be examined in the framework of Articles 44 to 52 of the Directive. In other words, as the Czech Government has argued, the possibility of taking part in a tendering

26 — Judgment of 29 November 2007 in Case C-119/06, paragraphs 37 to 41 and the case-law cited. The judgment concerned 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).

27 — Cited in footnote 22, paragraphs 32 and 38.

28 — Concerning the non-profit-making argument, see also Case C-126/03 *Commission* v *Germany* [2004] ECR I-11197, paragraphs 18 and 19; and Case C-84/03 *Commission* v *Spain* [2005] ECR I-139, paragraphs 38 to 40; as well as the Opinion of Advocate General Kokott in *Auroux and Others*, cited in footnote 19, point 54.

29 — See Case C-389/92 *Ballast Nedam Groep* [1994] ECR I-1289 ('*Ballast Nedam Groep I*'), paragraph 11 et seq.; Case C-176/98 *Holst Italia* [1999] ECR I-8607, paragraph 25 et seq.; and Case C-399/98 *Ordine degli Architetti and Others* [2001] ECR I-5409 ('*La Scala*'), paragraphs 88 to 96.

procedure by way of submitting a bid should be distinguished from the assessment of that bid in the framework of a subsequent qualification phase of the procedure.

41. In addition, the referring court considers that participation in tendering procedures by consortia of public bodies, such as CoNISMa, may infringe the principle of free competition in two respects. First, such participation could potentially remove from the open market a number of public contracts, to which ease of access would be at least hampered for a not inconsiderable proportion of ordinary undertakings due to the consortium's widespread network of business-referral points. Secondly, it would place the contractor in a position of unfair advantage because of the economic security provided by the constant and predictable flow of public finance which is not available to other economic operators, who must rely solely on their ability to earn revenue from their offering on the market.

42. First, as regards the alleged widespread network of business-referral points, I do not consider that argument particularly decisive, not least since CoNISMa explained in its observations that its only seat is in Rome and the offices of its various members do not play any role in public tendering procedures.

43. Secondly, with regard to the argument that CoNISMa would be placed in a position of unfair advantage because of the public finance available to it — quite apart from CoNISMa's explanation that its commercial activity is self-funding — I agree with the Czech Government and the Commission that it is sufficient to refer to the Court's case-law to the effect that that element is not an obstacle to participation in tendering procedures. [30] In particular, the Court has held that public bodies, specifically bodies receiving subsidies from the State which might enable them to submit tenders at prices appreciably lower than those of other, unsubsidised, tenderers, are expressly authorised [31] to participate in a procedure for the award of a public procurement contract. Indeed, the Directive which is pertinent in the case in

30 — See *ARGE*, cited in footnote 22, paragraph 24 et seq.
31 — At the time, by Directive 92/50.

the main proceedings also expressly authorises public bodies, funded in some cases out of the public purse, to participate in procedures for the award of public procurement contracts.

44. It may be noted here that Article 55(3) of the Directive concerning 'abnormally low tenders' provides that 'where a contracting authority establishes that a tender is abnormally low because the tenderer has obtained State aid, the tender can be rejected on that ground alone only after consultation with the tenderer where the latter is unable to prove, within a sufficient time-limit fixed by the contracting authority, that the aid in question was granted legally. Where the contracting authority rejects a tender in these circumstances, it shall inform the Commission of that fact'. [32]

45. In that regard, the Directive states, in the fourth recital in the preamble, that 'Member States should ensure that the participation of a body governed by public law as a tenderer in a procedure for the award of a public contract does not cause any distortion of competition in relation to private tenderers'.

46. To conclude, Article 1(8) of the Directive, and in particular the concept of 'economic operator', should be interpreted as not precluding a consortium such as the one in the main proceedings from taking part in a public service tendering procedure. [33] It follows that the Directive precludes national legislation which excludes such entities from participation, provided that they are otherwise entitled under the relevant national legislation to offer products, services or works on the market.

47. In that regard, it is for the national court to determine, taking into account all the relevant circumstances of the case before it, whether the relevant national legislation is compatible with the Directive, disapplying, if necessary, any contrary provision of domestic law. [34]

32 — In this respect, see also *ARGE*, cited in footnote 22.

33 — In that connection, as the Commission has pointed out, a Member State may of course govern the activities of non-profit-making persons whose primary object is research and, if necessary, may limit the possibility for such persons to offer services on the market. None the less, the Member State in question must recognise persons established in other Member States entitled under the law of the Member States concerned to carry out the relevant service activity as constituting 'economic operators', whether they be universities, research institutes or groups made up of these, acting with or without a profit-making purpose. The referring court does not refer to any Italian legislation which would establish the above limitations for entities such as the one in the main proceedings.

34 — See, to that effect, Case C-357/06 *Frigerio Luigi & C.* [2007] ECR I-12311, paragraph 28, which refers to Case 157/86 *Murphy and Others* [1988] ECR 673, paragraph 11, and Case C-208/05 *ITC* [2007] ECR I-181, paragraphs 68 and 69.

IV — Conclusion

48. Therefore, I suggest that the Court answer the questions of the Consiglio di Stato as follows:

(1) Article 1(8) 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, and in particular the concept of 'economic operator', should be interpreted as not precluding a consortium, such as the one in the main proceedings, from taking part in a tendering procedure for the award of a service contract pertaining to services the consortium is entitled to carry out under the relevant national legislation.

(2) Directive 2004/18 precludes national legislation which excludes entities whose primary objects are non-profit-making, such as research, from participating in tendering procedures, provided that those entities are entitled under the relevant national legislation to offer works, products or services on the market.