



## Reports of Cases

JUDGMENT OF THE COURT (Tenth Chamber)

9 February 2023\*

(Reference for a preliminary ruling – Review procedures in respect of the award of public supply and public works contracts – Directive 89/665/EEC – Article 1(3) – Interest in bringing proceedings – Access to the review procedures – Grave professional misconduct on account of an anticompetitive agreement – Other operator definitively excluded from participating in the procurement procedure concerned due to failure to meet the minimum requirements)

In Case C-53/22,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunale amministrativo regionale per la Lombardia (Regional Administrative Court, Lombardy, Italy), made by decision of 7 January 2022, received at the Court on 25 January 2022, in the proceedings

**VZ**

v

**CA,**

intervening parties:

**RT,**

**BO,**

**Regione Lombardia,**

**Regione Liguria,**

THE COURT (Tenth Chamber),

composed of D. Gratsias (Rapporteur), President of the Chamber, M. Ilešič and I. Jarukaitis, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: A. Calot Escobar,

having regard to the written procedure,

\* Language of the case: Italian.

after considering the observations submitted on behalf of:

- VZ, by J.F.G. Brigandì and C. Mendolia, avvocati,
- CA, by M.L. Tamborino, avvocata,
- RT, by A. Clarizia, L. Pierallini, L. Sperati and P. Ziotti, avvocati,
- BO, by A. Borsero, V. Cannizzaro, C. Merani and S. Ventura, avvocati,
- the French Government, by R. Bénard and A.-L. Desjonquères, acting as Agents,
- the Polish Government, by B. Majczyna, acting as Agent,
- the European Commission, by G. Gattinara, P. Ondrušek and G. Wils, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion, gives the following

### **Judgment**

- 1 This request for a preliminary ruling concerns the interpretation of Article 1(3) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 (OJ 2014 L 94, p. 1) ('Directive 89/665').
- 2 The request has been made in proceedings between a company, VZ, and a contracting authority, CA, concerning the latter's refusal to annul the decision to award to RT and BO a public contract for the service of rescue by helicopter to be carried out in Lombardy (Italy) and Liguria (Italy).

### **Legal context**

#### ***European Union law***

##### *Directive 89/665*

- 3 Article 1 of Directive 89/665, entitled 'Scope and availability of review procedures', provides:

'1. This Directive applies to contracts referred to in Directive 2014/24/EU of the European Parliament and of the Council [of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65)] ...

...

Contracts within the meaning of this Directive include public contracts, framework agreements, works and services concessions and dynamic purchasing systems.

Member States shall take the measures necessary to ensure that, as regards contracts falling within the scope of Directive 2014/24/EU ..., decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible ..., on the grounds that such decisions have infringed Union law in the field of public procurement or national rules transposing that law.

...

3. Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement.

...'

- 4 Article 2a of that directive, entitled 'Standstill period', provides, in the first and second subparagraphs of paragraph 2:

'A contract may not be concluded following the decision to award a contract falling within the scope of Directive 2014/24/EU ... before the expiry of a period of at least 10 calendar days with effect from the day following the date on which the contract award decision is sent to the tenderers and candidates concerned if fax or electronic means are used or, if other means of communication are used, before the expiry of a period of either at least 15 calendar days with effect from the day following the date on which the contract award decision is sent to the tenderers and candidates concerned or at least 10 calendar days with effect from the day following the date of the receipt of the contract award decision.

Tenderers shall be deemed to be concerned if they have not yet been definitively excluded. An exclusion is definitive if it has been notified to the tenderers concerned and has either been considered lawful by an independent review body or can no longer be subject to a review procedure.'

#### *Directive 2014/24*

- 5 Under Article 2(1)(2) and (3) of Directive 2014/24, as amended by Commission Delegated Regulation (EU) 2017/2365 of 18 December 2017 (OJ 2017 L 337, p. 19) ('Directive 2014/24'), the following definitions apply for the purposes of Directive 2014/24: 'central government authorities' means the contracting authorities listed in Annex I to the latter directive and, in so far as corrections or amendments have been made at national level, their successor entities, and 'sub-central contracting authorities' means all contracting authorities which are not central government authorities.
- 6 Article 4 of Directive 2014/24, entitled 'Threshold amounts', provides:

'This Directive shall apply to procurements with a value net of value-added tax (VAT) estimated to be equal to or greater than the following thresholds:

...

- (c) EUR 221 000 for public supply and service contracts awarded by sub-central contracting authorities and design contests organised by such authorities; ...
- (d) EUR 750 000 for public service contracts for social and other specific services listed in Annex XIV.'

7 Article 57 of that directive, entitled 'Exclusion grounds', provides in paragraph 4:

'Contracting authorities may exclude or may be required by Member States to exclude from participation in a procurement procedure any economic operator in any of the following situations:

...

- (c) where the contracting authority can demonstrate by appropriate means that the economic operator is guilty of grave professional misconduct, which renders its integrity questionable;
- (d) where the contracting authority has sufficiently plausible indications to conclude that the economic operator has entered into agreements with other economic operators aimed at distorting competition;

...'

8 Neither Regione Lombardia (Lombardy Region, Italy) nor Regione Liguria (Liguria Region, Italy) are among the authorities listed in Annex I to that directive.

### *Italian law*

9 Article 80(5)(c) of decreto legislativo n. 50 – Codice dei contratti pubblici (Legislative Decree No 50 establishing the Public Procurement Code) of 18 April 2016 (GURI No 91 of 19 April 2016, Ordinary Supplement to GURI No 10), as amended by decreto-legge n. 135 – Disposizioni urgenti in materia di sostegno e semplificazione per le imprese e per la pubblica amministrazione (Decree-Law No 135 on urgent provisions on support and simplification for businesses and public administration) of 14 December 2018 (GURI No 290 of 14 December 2018, p. 1), provides:

'The contracting authorities shall exclude an economic operator from participation in a tendering procedure in any of the following situations ... where:

...

- (c) the contracting authorities demonstrate, by appropriate means, that the economic operator has committed grave professional misconduct such as to render its integrity or reliability questionable;

...'

- 10 Under Article 35(1)(b) of the codice del processo amministrativo (Code of Administrative Procedure) (GURI No 156 of 7 July 2010, Ordinary Supplement to GURI No 148), ‘the court shall declare, even of its own motion, that the action is inadmissible on account of a lack of legal interest in bringing proceedings on the part of the applicant or on any other ground precluding a decision on the merits’.

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

- 11 By decision of 18 December 2018, CA organised a procedure for the award of a public contract for the provision of a helicopter rescue service to the regional health service entities in the Lombardy Region and the Liguria Region (‘the procedure at issue’), for a basic contract value of EUR 205 581 900 excluding VAT. The tender notice published by CA required tenderers to possess a specific certification as proof of their technical and professional capacity.
- 12 VZ, which did not possess that certification and therefore did not satisfy the conditions for participation in the procedure at issue, brought an action on 16 January 2019 before the Tribunale amministrativo regionale per la Lombardia (Regional Administrative Court, Lombardy, Italy), the referring court, challenging that tender notice, in so far as it required possession of that certification. By judgment of 6 May 2019, that court dismissed the action. That judgment was upheld by a judgment of the Consiglio di Stato (Council of State, Italy) of 26 February 2020 and thus became final.
- 13 By decision of 13 February 2019, the Autorità garante della concorrenza e del mercato (Authority responsible for compliance with competition and market rules, Italy; ‘the AGCM’) found that certain undertakings, including BO, JF and RT, the only tenderers in the procedure at issue, had committed a serious infringement of Article 101 TFEU between 2001 and August 2017, in the form, inter alia, of a horizontal agreement contrary to the competition rules which was aimed at fixing the prices of helicopter services and intended to influence the contracting authorities as regards the fixing of the prices for services relating to work and passenger transport by air as a whole, including the determination of the basic contract value for the services with overestimated values. The AGCM imposed penalties on BO, JF and RT. However, it took the view that the evidence gathered in the course of the investigation was not sufficient to establish the existence of an agreement restricting competition in the context of participation in procedures for the award of a service contract.
- 14 CA considered that the AGCM’s decision was not relevant for the purposes of its assessment. By decision of 2 March 2020, CA awarded two lots of the contract covered by the procedure at issue to RT and one lot of that contract to BO.
- 15 By actions brought before the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio, Italy), BO, RT and JF challenged the penalties imposed on them by the AGCM. Those actions were all dismissed as unfounded. BO, RT and JF brought an appeal against the judgments of that court before the Consiglio di Stato (Council of State). The Consiglio di Stato (Council of State) upheld the judgment of the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio) dismissing JF’s action, as it did the judgment dismissing RT’s action, except as regards the amount of the penalty. The case relating to the examination of the appeal brought before the Consiglio di Stato (Council of State) by BO is still pending.

- 16 On 1 June 2020, VZ informed CA of the delivery of the judgment of the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio) which dismissed RT's action against the AGCM's decision. VZ claimed that that judgment was capable of affecting the assessment of RT's integrity and its reliability in the performance of the helicopter rescue service and of establishing the existence of grave professional misconduct, within the meaning of Article 80(5) of the Public Procurement Code, justifying the exclusion of RT's participation in the procedure at issue. Thus, in essence, VZ sought annulment of the decision to award the contract concerned. By decision of 3 July 2020, CA took the view that the judgment notified by VZ did not provide any additional information compared to that contained in the AGCM's decision, which was already known to and had been analysed by CA. VZ brought an action before the referring court against CA's decision.
- 17 The referring court notes that, since VZ was definitively excluded from participation in the procedure at issue following the definitive rejection of its action for review of the tender notice concerned, it must, in principle, in accordance with the case-law of the Italian courts, be regarded as not having an interest in challenging the award of the contract concerned.
- 18 However, following the delivery of the judgments of 4 July 2013, *Fastweb* (C-100/12, EU:C:2013:448); of 5 April 2016, *PFE* (C-689/13, EU:C:2016:199); and of 11 May 2017, *Archus and Gama* (C-131/16, EU:C:2017:358), that case-law of the Italian courts allegedly evolved, in the sense that, in the context of a procurement procedure in which only two tenderers participated, the examination of an action seeking the opening of a new procedure, brought by the tenderer which was eliminated for failure to comply with the minimum requirements laid down in the tender notice concerned, is admissible. Nevertheless, in the light of the judgment of 21 December 2016, *Bietergemeinschaft Technische Gebäudebetreuung und Caverion Österreich* (C-355/15, EU:C:2016:988), the Italian courts are said to apply that 'innovative case-law' only in the case of 'cross-claims', examined in the context of the same, single set of review proceedings relating to the decision to award the contract concerned. In the present case, VZ's exclusion from participation in the procedure at issue was confirmed by a court decision which had acquired the force of *res judicata* before VZ brought an action for review of the award of that contract.
- 19 Nevertheless, the referring court also observes that, in the present case, VZ challenges CA's refusal to annul the decision awarding the contract concerned on the ground of grave professional misconduct on the part of all the tenderers, which, as the judgment referred to in paragraph 16 above is said to have confirmed, participated in an agreement contrary to the competition rules, which constitutes grave professional misconduct on the part of an economic operator.
- 20 Finally, the referring court recalls that, in the judgment of 5 September 2019, *Lombardi* (C-333/18, EU:C:2019:675, paragraphs 27 and 28), the Court noted that it must be recognised that a tenderer ranked in third place, which brought an action for review of the award of the contract concerned, has a legitimate interest in seeking the exclusion of the bid submitted by the successful tenderer and the second-placed tenderer even if its own bid might also be declared invalid, since it cannot be ruled out that the contracting authority concerned, in such a situation, would find that it could not select another valid bid, and would therefore organise a new procedure. The referring court takes the view that VZ's situation, for the purposes of assessing its interest in bringing proceedings, appears comparable to that of the applicant at issue in the case which gave rise to the judgment of 5 September 2019, *Lombardi* (C-333/18, EU:C:2019:675). It

notes, in that regard, that VZ submits and provides evidence that, as early as October 2019, it was in possession of the specific certification required by the call for tenders relating to the procedure at issue.

21 In that context, the Tribunale amministrativo regionale per la Lombardia (Regional Administrative Court, Lombardy) decided to stay its proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Does Article 1(3) of Directive 89/665 preclude a competitor who is definitively excluded from a contractor selection procedure from being denied the possibility of a review of the refusal to annul the award, when it is intended to show that the successful tenderer, and all other shortlisted competitors, are guilty of grave professional misconduct, consisting of having entered into anticompetitive agreements which were determined by a court only after the competitor had been excluded, in order to have the opportunity to participate in a rerun of the procedure?’

(2) Does Article 1(3) of Directive 89/665 and the principles [of EU law] on the safeguarding of competition preclude an administrative court from the scrutiny of a review, requested by a competitor definitively excluded from a contractor selection procedure, of the contracting authority’s refusal to review measures which it adopted itself, with regard to the admission of and award to competitors who have entered into anticompetitive agreements, determined by a court, in the same sector as the tender procedure?’

## Consideration of the questions referred

### *Admissibility*

22 In its observations lodged before the Court, CA argues that the request for a preliminary ruling is inadmissible on the ground that the questions referred are general and hypothetical and that, in any event, it is clear from the case-law what the answer to be given is.

23 In that regard, it should be borne in mind that it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent court 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 referred concern the interpretation or the validity of a rule of EU law, the Court is in principle bound to give a ruling. It follows that questions referred by national courts enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court only where it appears that the interpretation sought bears no relation to the actual facts of the main action or its object, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (judgment of 20 October 2022, *Centre public d’action sociale de Liège (Withdrawal or suspension of a return decision)*, C-825/21, EU:C:2022:810, paragraph 34 and the case-law cited).

24 The referring court has made it clear that, in accordance with the procedural provisions of Italian law, as interpreted by the case-law of the Italian courts, it might be required to dismiss VZ’s action for lack of legal interest in bringing proceedings, unless Article 1(3) of Directive 89/665 must, in

the light of the EU competition rules, as appropriate, be interpreted as precluding such a dismissal. It follows that the questions referred have a direct link with the subject matter of the main proceedings and cannot be regarded as purely hypothetical.

- 25 Furthermore, a request for a preliminary ruling cannot be dismissed as inadmissible merely because the answer to the questions referred, in the submission of one of the parties to the main proceedings, is already apparent from the Court's case-law (see, to that effect, judgment of 24 February 2022, *Viva Telecom Bulgaria*, C-257/20, EU:C:2022:125, paragraph 42 and the case-law cited).
- 26 The French Government, for its part, submits in its observations before the Court that the second question must be regarded as inadmissible in part, in that the referring court failed to specify the 'principles of EU law ... on the safeguarding of competition' to which that question relates. It is clear that the principles to which the questions relate are those which may be inferred from the rules of EU competition law, including in particular Article 101 TFEU, which is also clear from the grounds of the order for reference.
- 27 It follows that the request for a preliminary ruling is admissible.

### ***Substance***

- 28 By its questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 1(3) of Directive 89/665 must, in the light of the EU competition rules, be interpreted as precluding legislation of a Member State which does not allow an operator which is prevented from participating in a procedure for the award of a public contract on the ground that it did not satisfy one of the conditions for participation laid down in the call for tenders concerned, and whose action against the inclusion of that condition in that call for tenders was rejected by a decision which acquired the force of *res judicata*, to challenge the refusal of the contracting authority concerned to annul the decision awarding that public contract following confirmation by a court decision that the successful tenderer and all the other tenderers had participated in an agreement constituting an infringement of the competition rules in the same sector as that concerned by the procedure for the award of that public contract.
- 29 In accordance with Article 1(3) of Directive 89/665, the Member States are required to ensure that the review procedures provided for are available, under detailed rules which they may establish, at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement of the EU law on public procurement or national rules transposing that law (judgment of 28 November 2018, *Amt Azienda Trasporti e Mobilità and Others*, C-328/17, EU:C:2018:958, paragraph 44 and the case-law cited).
- 30 Therefore, Member States are not obliged to make those review procedures available to any person wishing to obtain a public contract, but they may require that the person concerned has been or risks being harmed by the infringement he or she alleges (judgment of 28 November 2018, *Amt Azienda Trasporti e Mobilità and Others*, C-328/17, EU:C:2018:958, paragraph 45 and the case-law cited).
- 31 According to the Court's case-law, participation in a contract award procedure may, in principle, with regard to Article 1(3) of Directive 89/665, validly constitute a condition which must be fulfilled before the person concerned can show an interest in obtaining the contract at issue or that he or she risks suffering harm as a result of the allegedly unlawful nature of the decision to



award that contract. If that person has not submitted a tender it will be difficult for such a person to show that he or she has an interest in challenging that decision or that he or she has been harmed or risks being harmed as a result of that award decision (judgments of 12 February 2004, *Grossmann Air Service*, C-230/02, EU:C:2004:93, paragraph 27, and of 28 November 2018, *Amt Azienda Trasporti e Mobilità and Others*, C-328/17, EU:C:2018:958, paragraph 46).

- 32 However, it is also apparent from the case-law of the Court that, where an operator has not submitted a tender in a procurement procedure which it has no chance of obtaining, because there were, in the documents relating to the call for tenders or in the contract documents concerned, certain specifications which it could not meet, it would be too much to require it, before being able to avail itself of the review procedures provided for by Directive 89/665 against such specifications, to submit a tender in the award procedure for the contract in question (see, to that effect, judgment of 28 November 2018, *Amt Azienda Trasporti e Mobilità and Others*, C-328/17, EU:C:2018:958, paragraph 47 and the case-law cited).
- 33 The questions referred for a preliminary ruling concern the situation of an operator which has not submitted a bid in the context of a procurement procedure on the ground that it did not satisfy a condition for participation laid down in the call for tenders concerned and which was able to challenge the inclusion of that condition in that call for tenders by bringing an action for review of that call for tenders, which was rejected by a decision which had acquired the force of *res judicata* before the decision awarding the contract concerned was adopted.
- 34 In the light of the case-law cited in paragraphs 30 and 31 above, such an operator cannot be regarded as falling within the concept of a ‘person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement’ within the meaning of Article 1(3) of Directive 89/665.
- 35 It is irrelevant, in that regard, that, in the meantime, that operator has taken the necessary steps to satisfy the condition laid down in the call for tenders concerned, with the result that, if the procurement procedure in which it was unable to participate were to be cancelled and a new procedure were to be organised on the basis of the same requirements, it would be able to submit a bid and obtain the contract concerned.
- 36 It is true that, when called upon to interpret Article 1(3) of Directive 89/665, the Court has held that, in the context of a procedure for the award of a public contract, each tenderer has a legitimate interest in the exclusion of the bids submitted by the other tenderers with a view to obtaining the contract concerned (see, to that effect, judgments of 4 July 2013, *Fastweb*, C-100/12, EU:C:2013:448, paragraph 33, and of 5 April 2016, *PFE*, C-689/13, EU:C:2016:199, paragraph 27), regardless of the number of participants in the procedure and of the number of participants which instigated review procedures (see, to that effect, judgments of 4 July 2013, *Fastweb*, C-100/12, EU:C:2013:448, paragraph 33, and of 5 April 2016, *PFE*, C-689/13, EU:C:2016:199, paragraphs 28 and 29).
- 37 However, as the Court stated in the judgment of 21 December 2016, *Bietergemeinschaft Technische Gebäudebetreuung und Caverion Österreich* (C-355/15, EU:C:2016:988, paragraphs 30 to 32), the situations at issue in the cases which gave rise to the judgments of 4 July 2013, *Fastweb* (C-100/12, EU:C:2013:448), and of 5 April 2016, *PFE* (C-689/13, EU:C:2016:199), were characterised by the fact that, first, the bids of the tenderers concerned had not been the subject of an exclusion decision by the contracting authority concerned and, secondly, it was in the course of the same, single set of review proceedings relating to the

decision awarding the contract concerned that each tenderer challenged the validity of the other tenderer's bid, each competitor having a legitimate interest in the exclusion of the bid submitted by the other, which may lead to a finding that the contracting authority is unable to select a lawful bid.

- 38 By contrast, where, prior to the adoption of the decision to award a public contract, a tenderer has been definitively excluded from participating in the procedure for the award of the contract concerned by a decision of the contracting authority confirmed by a court decision which has acquired the force of *res judicata*, it is apparent from the Court's case-law that Article 1(3) of Directive 89/665 does not preclude that tenderer from being refused access to a review of the decision awarding the public contract concerned and of the conclusion of the corresponding contract (see, to that effect, judgments of 21 December 2016, *Bietergemeinschaft Technische Gebäudebetreuung und Caverion Österreich*, C-355/15, EU:C:2016:988, paragraphs 35 and 36; of 11 May 2017, *Archus and Gama*, C-131/16, EU:C:2017:358, paragraphs 57 to 59; and of 24 March 2021, *NAMA and Others*, C-771/19, EU:C:2021:232, paragraph 42).
- 39 As the Court has held, it is the fact that the exclusion decision is not yet definitive which determines a tenderer's standing to challenge a contract award decision (judgment of 21 December 2021, *Randstad Italia*, C-497/20, EU:C:2021:1037, paragraphs 73 and 74, and order of 17 May 2022, *Estaleiros Navais de Peniche*, C-787/21, not published, EU:C:2022:414, paragraph 25). In accordance with Article 2a(2) of Directive 89/665, a tenderer's exclusion from participation in a procurement procedure is definitive if it has been notified to that tenderer and has been 'considered lawful' by an 'independent review body' or can no longer be subject to a review procedure.
- 40 The considerations set out in paragraph 38 above are, moreover, also applicable to an operator which has submitted no bid in the context of a procedure for the award of a public contract, on the ground that it did not satisfy one of the conditions required by the call for tenders concerned and could not be awarded that public contract, and whose action for review of that call for tenders, calling into question the lawfulness of the inclusion of that condition, was rejected by a decision which had acquired the force of *res judicata* before the decision awarding that public contract was adopted. The situation of such an operator is not substantially different, as regards its definitive exclusion from such an award procedure, from that of a tenderer as referred to in paragraph 38 above.
- 41 The judgment of 5 September 2019, *Lombardi* (C-333/18, EU:C:2019:675), mentioned by the referring court, cannot lead to a different conclusion.
- 42 As is apparent from paragraphs 8 to 10 of that judgment, that case does not concern the situation of a tenderer whose exclusion from participation in a procurement procedure has been ruled to be lawful by a court decision having the force of *res judicata*, but concerns the same situation as that referred to in the case-law cited in paragraph 36 above, namely that of a tenderer which challenges the lawfulness of the admission of the bid of one or more other tenderers and the admissibility of whose own bid has been challenged, without having been definitively resolved.
- 43 It is in those circumstances that the considerations set out in paragraph 28 of that judgment were made, according to which, if the action of the unsuccessful tenderer were held to be well founded, the contracting authority could decide to cancel the procurement procedure concerned and open a new one on the ground that the remaining valid bids do not sufficiently meet the expectations of that contracting authority. Those circumstances, which led the Court to hold, in paragraph 29 of

that judgment, that, under those circumstances, the admissibility of the main action cannot, without depriving Directive 89/665 of its effectiveness, be contingent on a prior finding that all the bids ranked lower than that of the tenderer bringing that action are also invalid, do not apply in the case in the main proceedings.

- 44 Finally, the fact that an operator definitively excluded from participation in a procurement procedure relies, in support of its action for review of the decision awarding the contract concerned or of the contracting authority's refusal to reverse that decision, on the participation of all the tenderers for that contract in an agreement constituting an infringement of the competition rules cannot justify a different interpretation of Article 1(3) of Directive 89/665.
- 45 Indeed, an operator in such a situation, ultimately, is not distinguishable from any other operator which might have been able to submit a bid. It is clear from the case-law cited in paragraph 31 above that the latter circumstance is not sufficient to justify such an operator falling within the concept of a 'person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement' within the meaning of Article 1(3) of Directive 89/665.
- 46 In the light of all the foregoing considerations, the answer to the questions referred is that Article 1(3) of Directive 89/665 must be interpreted as not precluding legislation of a Member State which does not allow an operator which is prevented from participating in a procedure for the award of a public contract on the ground that it did not satisfy one of the conditions for participation laid down in the call for tenders concerned, and whose action against the inclusion of that condition in that call for tenders was rejected by a decision which acquired the force of *res judicata*, to challenge the refusal of the contracting authority concerned to annul the decision awarding that public contract following confirmation by a court decision that the successful tenderer and all the other tenderers had participated in an agreement constituting an infringement of the competition rules in the same sector as that concerned by the procedure for the award of that public contract.

### Costs

- 47 Since these proceedings are, for the parties to the main proceedings, a step in the action before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Tenth Chamber) hereby rules:

**Article 1(3) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended by Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014,**

**must be interpreted as not precluding legislation of a Member State which does not allow an operator which is prevented from participating in a procedure for the award of a public contract on the ground that it did not satisfy one of the conditions for participation laid down in the call for tenders concerned, and whose action against the inclusion of that condition in that call for tenders was rejected by a decision which acquired the force of *res judicata*, to challenge the refusal of the contracting authority concerned to annul the**

**decision awarding that public contract following confirmation by a court decision that the successful tenderer and all the other tenderers had participated in an agreement constituting an infringement of the competition rules in the same sector as that concerned by the procedure for the award of that public contract.**

[Signatures]