JUDGMENT OF THE COURT (fourth chamber)

6 May 2010 *

In Joined Cases C-145/08 and C-149/08,

REFERENCES for a preliminary ruling under Article 234 EC from the Simvoulio tis Epikratias (Greece), made by decision of 15 February 2008, received at the Court on 9 April 2008, in the proceedings

Club Hotel Loutraki AE,

Athinaïki Techniki AE,

Evangelos Marinakis

v

Ethniko Simvoulio Radiotileorasis,

* Language of the case: Greek.

Ipourgos Epikratias,

intervening parties:

Athens Resort Casino AE Simmetokhon,

Ellaktor AE, formerly Elliniki Tekhnodomiki TEV AE,

Regency Entertainment Psikhagogiki kai Touristiki AE, formerly Hyatt Regency Xenodokhiaki kai Touristiki (Ellas) AE,

Leonidas Bompolas (C-145/08)

and

Aktor Anonimi Tekhniki Etairia (Aktor ATE)

v

Ethniko Simvoulio Radiotileorasis,

intervening party:

Mikhaniki AE (C-149/08)**,**

THE COURT (Fourth Chamber),

composed of K. Lenaerts, President of the Third Chamber, acting as President of the Fourth Chamber, R. Silva de Lapuerta, E. Juhász (Rapporteur), G. Arestis and J. Malenovský, Judges,

Advocate General: E. Sharpston,
Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 11 June 2009,

after considering the observations submitted on behalf of:

— Club Hotel Loutraki AE, by I.K. Theodoropoulos and S.A. Pappas, dikigoroi,

— Athens Resort Casino AE Simmetokhon and Regency Entertainment Psikhagogiki kai Touristiki AE, formerly Hyatt Regency Xenodokhiaki kai Touristiki (Ellas) AE, by P. Spiropoulos, K. Spiropoulos and I. Drillerakis, dikigoroi,

— Ellaktor AE, formerly Elliniki Tekhnodomiki TEV AE by V. Niatsou, dikigoros,

— Aktor ATE, by K. Giannakopoulos, dikigoros,

— the Greek Government, by A. Samoni-Rantou, E.-M. Mamouna and I. Dionisopoulos, acting as Agents,

— the Commission of the European Communities, by M. Patakia and D. Kukovec, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 29 October 2009,

gives the following

Judgment

1 These references for a preliminary ruling concern the interpretation of the relevant provisions, in the light of the facts of the disputes in the main proceedings, of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1) and 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 92/50 ('Directive 89/665'), and general principles of European Union law on public contracts and, in particular, the principle of effective judicial protection.

2 The references have been made in proceedings between private undertakings and natural persons and Ethniko Simvoulio Radiotileorasis (National Radio and Television Council; 'ESR'), an authority which, in accordance with national legislation, has the power and the obligation to check whether persons having the status of owner, partner, main shareholder, member of an administrative organ or management executive of an undertaking tendering in a public procurement procedure present certain aspects of incompatibility as provided for in that legislation and, therefore, must automatically be excluded from the procedure.

Legal context

European Union legislation

3 Pursuant to Article 1(a) of Directive 92/50:

'[P]ublic service contracts shall mean contracts for pecuniary interest concluded in writing between a service provider and a contracting authority …

…'

4 Article 2 thereof provides:

'If a public contract is intended to cover both products within the meaning of [Council] Directive 77/62/EEC [of 21 December 1976 coordinating procedures for the award of public supply contracts (OJ 1977 L 13, p. 1)] and services within the meaning of Annexes I A and I B to this Directive, it shall fall within the scope of this Directive if the value of the services in question exceeds that of the products covered by the contract.'

5 Article 3 of that directive provides:

‘1. In awarding public service contracts or in organising design contests, contracting authorities shall apply procedures adapted to the provisions of this Directive.

2. Contracting authorities shall ensure that there is no discrimination between different service providers.

…’

6 Under Article 8 of Directive 92/50:

‘Contracts which have as their object services listed in Annex I A shall be awarded in accordance with the provisions of Titles III to VI.’

7 Article 9 of that directive provides:

‘Contracts which have as their object services listed in Annex I B shall be awarded in accordance with Articles 14 and 16.’

8 Article 14 forms part of Title IV of that directive, which concerns the common rules in the technical field and deals with the technical specifications which are to be given in the general documents or the contractual documents relating to each contract, and Article 16 forms part of Title V, which governs the common advertising rules.

9 Annex IB to Directive 92/50, entitled 'Services within the meaning of Article 9', includes:

'…

17 Hotel and restaurant services

…

26 Recreational, cultural and sporting services

27 Other services.'

10 Finally, Article 26(1) of that directive provides:

'Tenders may be submitted by groups of service providers. These groups may not be required to assume a specific legal form in order to submit the tender; however, the group selected may be required to do so when it has been awarded the contract.'

11 Article 1 of Directive 89/665 provides:

'1. The Member States shall take the measures necessary to ensure that, as regards contract award procedures falling within the scope of [Council] Directives 71/305/EEC [of 26 July 1971 concerning the co-ordination of procedures for the award of public works contracts (OJ, English Special Edition 1971 (II), p. 682)], 77/62 … and 92/50 …, decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in the following Articles and, in particular, Article 2(7) on the grounds that such decisions have infringed Community law in the field of public procurement or nation rules implementing that law.

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

3. The Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular public supply or public works contract

and who has been or risks being harmed by an alleged infringement. In particular, the Member States may require that the person seeking the review must have previously notified the contracting authority of the alleged infringement and of his intention to seek review.'

12 Under Article 2 of that directive:

'1. The Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for the powers to:

(a) take, at the earliest opportunity and by way of interlocutory procedures, interim measures with the aim of correcting the alleged infringement or preventing further damage to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a public contract or the implementation of any decision taken by the contracting authority;

(b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure;

(c) award damages to persons harmed by an infringement.

...

5. The Member States may provide that where damages are claimed on the grounds that a decision was taken unlawfully, the contested decision must first be set aside by a body having the necessary powers.

6. The effects of the exercise of the powers referred to in paragraph 1 on a contract concluded subsequent to its award shall be determined by national law.

Furthermore, except where a decision must be set aside prior to the award of damages, a Member State may provide that, after the conclusion of a contract following its award, the powers of the body responsible for the review procedures shall be limited to awarding damages to any person harmed by an infringement.

…'

National legislation

13 Directive 89/665 was transposed into Greek law by Law 2522/1997 providing judicial protection during the phase preceding the award of public supply, public works and public services contracts (FEK A' 178).

14 Article 2 of that Law, entitled 'Extent of judicial protection', provides:

'1. Every person concerned who has or had an interest in being awarded a particular public works, supply or services contract and has suffered or may suffer damage through the infringement of Community or domestic legislation shall be entitled to seek, as more specifically laid down in the following articles, interim judicial protection, the annulment, or a finding of invalidity, of the unlawful act of the contracting authority and the award of damages.

…'

15 Article 4 of that Law, entitled 'Annulment or a finding of invalidity', provides:

'1. The person concerned shall be entitled to seek the annulment, or a finding of invalidity, of every act or omission of the contracting authority which infringes a rule of Community or domestic law on the procedure that precedes the award of the contract. …

2. If the court declares an act or omission of the contracting authority void after the contract is awarded, and unless the award procedure has been suspended as a measure of interim relief, the contract itself is not affected. In that case the applicant may seek damages in accordance with the provisions of the following article.'

16 Article 5 of Law 2522/1997, entitled 'Claim for damages', provides:

'1. A person concerned who has been excluded from participation or from the award of public works, supplies or services, in breach of a rule of Community or domestic law, shall be entitled to claim damages from the contracting authority, pursuant to Articles 197 and 198 of the Civil Code. Any provision that excludes or restricts that claim shall be inapplicable.

2. In order for damages to be awarded, it is necessary that the unlawful act or omission first be annulled, or found invalid, by the court having jurisdiction. An action for a finding of invalidity and an action for damages may be combined in accordance with the generally applicable rules.'

17 Articles 197 and 198 of the Civil Code, to which the abovementioned provision refers, provide for liability 'arising from negotiations', that is to say the obligation to pay damages in the event that the parties incur unwarranted expense in the course of a procedure with a view to conclusion of a contract.

18 Presidential Decree 18/1989 codifies the laws relating to the Simvoulio tis Epikratias (FEK A' 8). Article 47 thereof, entitled 'Legitimate interest', provides:

'1. An individual or a legal person who is affected by an administrative act, or whose legitimate interests, including non-financial interests, are affected by that act, has the right to bring an action for annulment.

…'

19 Law 2206/1994 governs the 'Creation, organisation, operation, control of casinos, etc.' (FEK A' 62). Under Article 1(7) of that Law, entitled 'Grant of casino licences':

'Casino licences are to be granted by decision of the Minister for Tourism following a public international tendering procedure organised by a seven-member commission.'

20 Article 3 of that Law, entitled 'Operation of casinos', provides:

'Casinos are subject to State control.

…'

21 Article 14(9) of the Greek Constitution and Implementing Law 3021/2002 (FEK A' 143) institute a system of restrictions applicable to the conclusion of public contracts

with persons who are active or who have holdings in the media sector. That system establishes a presumption that the status of owner, partner, main shareholder or management executive of an undertaking active in the media sector is incompatible with that of owner, partner, main shareholder or management executive of an undertaking which contracts with the State or a legal person in the public sector in the broad sense to perform a works, supply or services contract. That incompatibility also extends to natural persons who are related to a certain degree.

22 Law 3021/2002 provides, in essence, that, before issuing acceptance of a tender for or awarding a public contract and, in any event, before the public contract is signed, the contracting authority must apply to ESR for a certificate attesting that the conditions of incompatibility laid down in that law are not fulfilled. The decision of ESR is binding on the contracting authority, but may be subject to an action for annulment by persons having *locus standi*, including public authorities.

23 In its judgment in Case C-213/07 *Michaniki* [2008] ECR I-9999, paragraphs 1 and 2 of the operative part, the Court held that, although European Union law does not preclude legislation which pursues the legitimate objectives of equal treatment of tenderers and of transparency in procedures for the award of public contracts, it does preclude, from the point of view of the principle of proportionality, the setting up of an irrebuttable presumption of incompatibility such as that laid down in the national legislation at issue.

The actions in the main proceedings and the questions referred for a preliminary ruling

Case C-145/08

24 It is apparent from the order for reference that, by decision of 10 October 2001, the competent interministerial committee decided to privatise Elliniko Kazino Parnithas AE ('EKP'), a subsidiary of Ellinika Touristika Akinita AE ('ETA'), an undertaking wholly owned by the Greek State. The contract notice published in October 2001 provided for an initial preselection stage to determine which tenderers met the conditions set out in that notice. The highest bidder, which would be invited to sign the contract, was to be selected at a subsequent stage. In the course of the first stage, the Koinopraxia Kazino Attikis consortium and the Hyatt Regency Xenodokhiaki kai Touristiki (Ellas) AE – Elliniki Tekhnodomiki AE consortium were preselected.

25 Following an additional notice published in April 2002, the terms of the contract to be signed were settled as follows:

The contract is a mixed contract and includes:

— an agreement under which ETA would sell 49 % of the shares in EKP to a 'single purpose limited company' ('AEAS'), to be set up by the successful tenderer;

— an agreement under which AEAS would undertake to implement a development plan, to be completed within 750 days of obtaining the necessary planning permission. That development plan was to comprise refurbishing the casino and enhancing the facilities offered by its operating licence, refurbishing and improving two adjoining hotel units and developing stretches of surrounding land of a surface area of approximately 280 hectares. Performance of that work constitutes part of the price payable for the acquisition of 49 % of the shares in EKP;

— an agreement between ETA and AEAS under which the latter would acquire the right to appoint the majority of EKP's board of directors and thus to administer the company in accordance with the terms of the contract;

— an agreement under which AEAS would take over management of the casino business, in return for payment, which will be paid by ETA. As that remuneration, AEAS would receive a sum no greater than a scaled percentage of the annual operating profits (decreasing from 20 % of profits up to EUR 30 million to 5 % of profits over EUR 90 million) and 2 % of turnover;

— as manager, AEAS would manage the casino business in such a way as constantly to maintain a luxurious environment offering high-level services and in a manner profitable for EKP. In concrete terms, the management profit before tax should not be less than a total of EUR 105 million for the first five financial years following entry into force of the contract. The net profit was to be shared between ETA and AEAS according to the percentage of the capital in EKP they each hold;

— Since EKP is the only casino business currently operating in the province of Attica, the contract provides that, in the event that another casino were lawfully established within that geographical area within 10 years from the date of entry into force of the contract, it would have to compensate AEAS by paying, as damages, a sum equal to 70 % of the price of the transaction. The amount of the compensation would be reduced by one tenth each year with effect from the entry into force of the contract;

— with regard to management of the casino business, the contract would terminate at the end of the 10th year from taking effect.

26 Since the Hyatt Regency Xenodokhiaki kai Touristiki (Ellas) AE – Elliniki Tekhnodomiki AE consortium was the highest bidder in the procedure in question, it was designated the successful tenderer. Before signature of the contract, ETA informed ESR of the identity of the owners, partners, major shareholders and management executives of the successful tenderer in order to obtain a certificate that none of them fell within one of the cases of incompatibility as provided for in Article 3 of Law 3021/2002. By certificate issued on 27 September 2002, ESR confirmed that none of those persons fell within such a case of incompatibility.

27 That act of the ESR constitutes the subject-matter of an action for annulment brought by only three of the seven members comprising the consortium 'Koinopraxia Kazino Attikis', which was not awarded the contract. The applicants have submitted that a member of the consortium to which the contract was awarded fell within one of the cases of incompatibility laid down in the national legislation and that, accordingly, the award of the contract should be annulled.

28 The national court points out that the contract at issue is a mixed contract, containing, on the one hand, one aspect relating to the sale of shares by ETA to the highest bidding tenderer, which aspect, as such, is not covered by the European Union rules on public contracts, and, on the other, one aspect relating to a service contract to

be concluded with the highest bidding tenderer, which assumes the obligations of managing the casino business. The aspect which concerns the transfer of shares is, according to the national court, the most important of the mixed contract. In addition, that contract also includes an aspect relating to a works contract, since the successful tenderer assumes the obligation of performing the works referred to in the order for reference, for the transferred shares as part payment. The national court notes that that aspect is entirely ancillary to the 'services' aspect of the contract.

29 In that context, the national court asks whether the view can be taken that the 'services' aspect of the contract at issue constitutes a public service concession contract, which is not subject to the European Union rules. In that regard, it is necessary to ascertain to what extent the successful tenderer bears the risks of organising and operating the services in question, having regard also to the fact that those services relate to activities which, in accordance with the national rules by which they are governed, can be subject to exclusive and special rights.

30 In the event that the Court were to hold that the part of the disputed contract concerning the management of the casino constitutes a public service contract, the national court asks whether an action for annulment brought at national level is covered by the guarantees provided for in Directive 89/665, having regard to the fact that the main object of the contract, that is to say, the sale of shares in EKP, does not fall within the scope of Community rules on public contracts and that contracts having such services as their objects, which fall within Annex I B to Directive 92/50, must be awarded in accordance with Articles 14 and 16 of that directive, which solely include obligations of a procedural nature. Nevertheless, the national court asks whether, despite that restricted aspect of the obligations, the principle of equal treatment of participants in a contract award procedure, the safeguarding of which is the objective of Directive 89/665, also applies in such cases.

31 If the Court were to consider that an action for annulment such as that in the main proceedings does fall within the scope of Directive 89/665, the national court asks whether European Union law precludes a national procedural rule, such as that in Article 47(1) of Presidential Decree 18/1989, as interpreted by that court, under which

those who participate in a public procurement procedure as a consortium can bring an action for annulment against acts in the context of that procedure only together and jointly, failing which the action is dismissed as inadmissible.

32 The national court refers in that regard to the judgment of the Court in Case C-129/04 *Espace Trianon and Sofibail* [2005] ECR I-7805, paragraph 22, pursuant to which a national procedural rule which requires an action for annulment of a contracting authority's decision awarding a public contract to be brought by all the members of a tendering consortium does not limit the availability of such an action in a way contrary to Article 1(3) of Directive 89/665.

33 The national court asks, however, whether that conclusion which, in that judgment, concerned an action for annulment against the decision of a contracting authority to award a public contract, is also valid in respect of all forms of judicial protection guaranteed by the directive, in particular of claims for damages. That issue is connected with the fact that, in the present case, the national legislature, exercising the power conferred on the Member States by Article 5(2) of Directive 89/665, by adopting Article 5(2) of Law 2522/1997, made the award of damages subject to the prior annulment of the allegedly unlawful act.

34 The combination of that provision with the procedural rule in Article 47(1) of Presidential Decree 18/1989, as interpreted by the national court, makes it impossible for any individual member of a consortium which unsuccessfully participated in a contract award procedure not only to seek annulment of the act adversely affecting them jointly but also to apply to the competent court to obtain compensation for any damage they have suffered individually. In the present case, the competent court in respect of actions for annulment is the Simvoulio tis Epikratias (Council of State), while in respect of damages, a different court has jurisdiction.

35 In that context, the national court points out that whether each member of a consortium can apply to the competent court for damages therefore depends on whether all other members of the consortium wish to bring an action for annulment, when the loss suffered by the members of the consortium individually as a result of its failure to win the contract may differ in accordance with the degree to which the members incurred expenses for the purposes of participating in that contract. Consequently, the interest of each member of the consortium in seeking annulment of a decision can also be different. Thus, it is permissible to ask whether, in such a procedural context, the principle of effective judicial protection laid down by Directive 89/665 is upheld.

36 The national court notes finally that, in accordance with the national procedural rules concerning the general right to compensation for losses caused by unlawful acts of the State or public legal persons, it is the court having jurisdiction for the award of damages which also reviews, as an incidental matter, the legality of the administrative act, and not a different court as is the case of actions for annulment brought in respect of public procurement procedures. It therefore asks whether the procedures intended to ensure that rights derived from European Union law are upheld are less favourable than those which ensure that similar or analogous rights derived from national law are upheld.

37 Lastly, the national court states that its current interpretation of Article 47(1) of Presidential Decree 18/1989, that only all members of a consortium, acting jointly, have *locus standi* to seek annulment of an act forming part of a procedure for the award of a public contract, constitutes a reversal of its settled case-law, in accordance with which the members could bring individual actions.

38 In parallel, it points out the particular context of the main proceedings, that is to say that, initially, the action at issue was brought by the consortium as a whole and by its seven members before the Fourth Chamber of the Simvoulio tis Epikratias. That Chamber declared the action inadmissible with regard to the consortium and four of its members on the ground that they had not properly authorised their lawyer to act

and, with regard to the three remaining members of the consortium, it referred the case, in the light of its importance, to the full court. Thus, the Fourth Chamber applied the case-law still valid at that time, in accordance with which an action brought by some members of a consortium was also admissible.

39 Nevertheless, the decision on inadmissibility made by the Fourth Chamber with regard to the action brought by the consortium as a whole and by four of its members was definitive, such that there is no remedy available from the proceedings pending before the full court of the national court. That court therefore asks whether that reversal of its case-law is compatible with the principle of a right to a fair hearing, which is a general principle of European Union law and also set out in Article 6 of the European Convention on Human Rights, signed in Rome on 4 November 1950 ('ECHR'), and with the principle of protection of legitimate expectations.

40 Having regard to the foregoing considerations, the Simvoulio tis Epikratias, sitting as a full court, decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Does a contract by which the contracting authority entrusts to the contracting undertaking the management of a casino business and the execution of a development plan consisting in the upgrading of the casino premises and the commercial exploitation of the possibilities offered by the casino's licence, and which contains a term under which the contracting authority is obliged to pay the contracting undertaking compensation should another casino lawfully operate in the wider area in which the casino in question operates, constitute a concession, not governed by … Directive 92/50 …?

2. If the first question is answered in the negative, does a legal action which is brought by persons who have participated in the procedure for the award of a public contract of mixed form providing inter alia for the supply of services

subject to Annex I B to … [Directive 92/50] …, and in which they plead breach of the principle of equal treatment of participants in tender procedures (a principle affirmed by Article 3(2) of that directive), fall within the field of application of … [Directive 89/665] …, or is its application precluded inasmuch as, in accordance with Article 9 of … [Directive 92/50], only Articles 14 and 16 of the latter apply to the procedure for the award of the abovementioned contract for the supply of services?

3. If the second question is answered in the affirmative, accepting that a national provision in accordance with which only all the members of a consortium without legal personality which has participated unsuccessfully in a public procurement procedure can bring a legal action against the act awarding the contract, and not consortium members individually, is not in principle contrary to Community law and specifically to … [Directive 89/665] …, and that that still applies where the legal action has initially been brought by all the members of the consortium jointly but ultimately proves, as regards some of them, to be inadmissible, is it in addition necessary, from the viewpoint of application of that directive, to examine, in order to make a declaration of inadmissibility, whether those individual members thereafter retain the right to claim before another national court any damages which may be envisaged by a provision of national law?

4. When it has been held by settled case-law of a national court that an individual member of a consortium may also bring an admissible legal action against an act falling within a public procurement procedure, is it compatible with … [Directive 89/665] …, interpreted in the light of Article 6 of the [ECHR] as a general principle of Community law, to dismiss a legal action as inadmissible, because of a change to that settled case-law, without the person who has brought that legal action first being given either the opportunity to cure the inadmissibility or, in any event, the opportunity to set out, pursuant to the adversarial principle, his views relating to that issue?'

Case C-149/08

41 The city of Thessaloniki decided to organise a public procurement procedure for the award of a contract entitled 'Construction of Thessaloniki town hall and an underground car park'. By decision of the municipal committee of 1 July 2004, the contract was awarded to the consortium of Aktor ATE, Themeliodomi AE and Domotekhniki AE. With a view to conclusion of the contract, the contracting authority informed ESR, in accordance with the national legislation in force, of the identity of the persons having the status of owner, partner, main shareholder or management executive of the companies forming the abovementioned consortium to obtain a certificate that none of them fell within any case of incompatibility as provided for in Article 3 of Law 3021/2002.

42 After having found that a member of the board of directors of Aktor ATE did fall within a case of incompatibility as set out in the national legislation, ESR, by document of 1 November 2004, refused to issue the certificate necessary for signature of the contract. The appeal brought by Aktor ATE against that refusal by ESR was dismissed by decision of that body of 9 November 2004. It is against those two negative decisions that, of the three companies comprising the consortium to which the contract was awarded, only Aktor ATE has brought an action for annulment before the national court, on the basis of the existing case-law of that court which regarded actions brought individually by members of a temporary association as admissible.

43 In those circumstances, the Simvoulio tis Epikratias, sitting as a full court, decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Accepting that a national provision in accordance with which only all the members of a consortium without legal personality which has participated unsuccessfully in a public procurement procedure can bring a legal action against the act

awarding the contract, and not consortium members individually, is not in principle contrary to Community law and specifically to … Directive 89/665 …, and that that still applies where the legal action has initially been brought by all the members of the consortium but ultimately proves, as regards some of them, to be inadmissible, is it in addition necessary, from the viewpoint of application of that directive, to examine, in order to make a declaration of inadmissibility, whether those individual members thereafter retain the right to claim before another national court any damages which may be envisaged by a provision of national law?

2. When it has been held by settled case-law of a national court that an individual member of a consortium may also bring an admissible legal action against an act falling within a public procurement procedure, is it compatible with … Directive 89/665 … , interpreted in the light of Article 6 of the [ECHR] as a general principle of Community law, to dismiss a legal action as inadmissible, because of a change to that settled case-law, without the person who has brought that legal action first being given either the opportunity to cure the inadmissibility or, in any event, the opportunity to set out, pursuant to the adversarial principle, his views relating to that issue?'

44 By order of the President of the Court of 22 May 2008, Cases C-145/08 and C-149/08 were joined for the purposes of the written and oral procedure and the judgment.

The questions referred

The questions referred in Case C-145/08

45 By its questions concerning the application of Directive 92/50 to a contract such as that at issue in the main proceedings, the national court asks whether Directive 89/665 applies to the present case, given that its application presupposes that one of the directives on public contracts referred to in Article 1 of Directive 89/665 is applicable. Thus, it is appropriate to consider those questions together and to ascertain whether such a contract falls within the scope of one of the directives referred to in that article.

46 It is apparent from both the detailed points in the order for reference and the classification of the transaction at issue in the main proceedings by the national court that that transaction is a mixed contract.

47 That contract comprises, essentially, an agreement under which ETA would sell 49 % of the shares in EKP to AEAS ('the "sale of shares" aspect'), an agreement under which AEAS would take over management of the casino business, in return for payment ('the "services" aspect') and an agreement under which AEAS would undertake to implement a development plan, comprising refurbishment of the casino and two adjoining hotel units and development of stretches of surrounding land ('the "works" aspect').

48 It follows from the case-law of the Court that, in the case of a mixed contract, the different aspects of which are, in accordance with the contract notice, inseparably

linked and thus form an indivisible whole, the transaction at issue must be examined as a whole for the purposes of its legal classification and must be assessed on the basis of the rules which govern the aspect which constitutes the main object or predominant feature of the contract (see, to that effect, Case C-3/88 *Commission* v *Italy* [1989] ECR 4035, paragraph 19; Case C-331/92 *Gestión Hotelera Internacional* [1994] ECR I-1329, paragraphs 23 to 26; Case C-220/05 *Auroux and Others* [2007] ECR I-385, paragraphs 36 and 37; Case C-412/04 *Commission* v *Italy* [2008] ECR I-619, paragraph 47; and Case C-536/07 *Commission* v *Germany* [2009] ECR I-10355, paragraphs 28, 29, 57 and 61).

49 That conclusion is valid irrespective of whether or not the aspect constituting the main object of a mixed contract falls within the scope of the directives on public contracts.

50 Consequently, it is appropriate to consider whether the mixed contract at issue in the main proceedings constitutes an indivisible whole and, if so, whether, because of its main object, as a whole it falls within the scope of one of the directives referred to in Article 1 of Directive 89/665 which govern public contracts.

51 Firstly, that contract forms part of a partial privatisation of a public casino business, which was decided upon at a national level by the competent interministerial committee and was launched by a single invitation to tender.

52 It is apparent from the case file, in particular from the conditions in the additional notice published in April 2002, that the mixed contract at issue in the main proceedings is in the form of a single contract relating jointly to the sale of shares in EKP, the acquisition of the right to nominate the majority of the members of the board of directors of EKP, the obligation to assume management of the casino business and to offer high-level services in a profitable manner, and the obligation to refurbish and improve the sites concerned and surrounding land.

53 Those findings demonstrate the need to conclude that mixed contract with a single partner which has both the financial capacity necessary to purchase the shares in question and professional experience in operating a casino.

54 It follows that the various aspects of that contract must be understood as constituting an indivisible whole.

55 Secondly, it is apparent from the findings made by the national court that the main object of the mixed contract was the sale, to the highest bidder, of 49 % of the shares in EKP and that the 'works' aspect of that transaction and the 'services' aspect, irrespective of whether the latter constitutes a public service contract or a service concession, were ancillary to the main object of the contract. The national court has also pointed out that the 'works' aspect was entirely ancillary to the 'services' aspect.

56 That assessment is confirmed by the documents submitted to the Court.

57 There can be no doubt that, where there is a purchase of 49 % of the shares of a public undertaking such as EKP, that operation constitutes the main object of the contract. The point must be made that the income which AEAS would obtain as a shareholder appears to be significantly greater than the remuneration which it would obtain as a service provider. In addition, AEAS would receive that income for an unlimited time, while the management activity would cease after 10 years.

58 It follows from the foregoing considerations that the different aspects of the mixed contract at issue in the main proceedings constitute an indivisible whole, of which the aspect relating to the transfer of shares constitutes the main object.

59 The transfer of shares to a tenderer in the context of a privatisation of a public undertaking does not fall within the scope of the directives on public contracts.

60 Moreover, that is rightly pointed out in point 66 of the Green Paper on public-private partnerships and Community law on public contracts and concessions (COM(2004) 327 final).

61 In point 69 of its abovementioned Green Paper on public-private partnerships, the Commission points out that it is necessary to ensure that such a capital transaction does not in reality conceal the award to a private partner of contracts which might be termed public contracts or concessions. Nevertheless, in the present case, there is nothing in the documents to cast doubt on the nature of the transaction at issue in the main proceedings, as categorised by the national court.

62 Having regard to the foregoing considerations, the conclusion must be that a mixed contract of which the main object is the acquisition by an undertaking of 49 % of the capital of a public undertaking and the ancillary object, indivisibly linked with that main object, is the supply of services and the performance of works does not, as a whole, fall within the scope of the directives on public contracts.

63 That conclusion does not preclude the fact that such a contract must observe the basic rules and general principles of the Treaty, in particular those on the freedom of establishment and the free movement of capital. However, there is no reason in the present case to consider the question of observance of those rules and principles, given that the result of such an examination could in no way lead to a finding that Directive 89/665 applies.

64 In the light of the foregoing, there is no need to answer the other questions referred in Case C-145/08.

The first question referred in Case C-149/08

65 By this question, the national court wishes to know, in essence, whether Directive 89/665 precludes a national rule, as interpreted by that court, under which only all members of a tendering consortium may bring an action against a decision of a contracting authority to award a contract, such that the members of that consortium, individually, are deprived not only of the possibility of having a decision of the contracting authority annulled, but also of the possibility of seeking compensation for individual damage suffered as a result of irregularities in the contract award procedure in question.

66 In order to answer that question, it must be noted that the act of which annulment is sought before the national court emanates from ESR, that is to say, an authority other than the contracting authority which organised the public procurement procedure at issue in the main proceedings.

67 It is apparent from the terms of Directive 89/665, commonly referred to as the 'Remedies Directive', that the protection granted by that directive covers the acts or omissions of contracting authorities.

68 Thus, it is clear from the wording of the fifth recital in the preamble to the directive and Article 1(1) thereof that they refer to measures to be taken in respect of decisions

of contracting authorities. Similarly, under Article 1(3), Member States may require that a person seeking a review must have previously notified the contracting authority of the alleged infringement, so that that authority may remedy it. Furthermore, Article 3(2) of that directive gives the Commission the power to notify the contracting authority concerned of the reasons which have led it to conclude that, in a public procurement procedure, an infringement has been committed and to request its correction.

69 Accordingly, the conclusion must be that disputes relating to decisions of an authority such as ESR are not governed by the review system laid down by Directive 89/665.

70 However, the decisions of ESR are liable to have a certain effect on the conduct, or even the outcome, of a public procurement procedure, since they can lead to the exclusion of a tenderer, even a successful tenderer, who individually is characterised by one or another of the incompatibilities as laid down in the relevant national rules. Thus, those decisions are not devoid of interest in respect of the proper application of European Union law in that area.

71 In the present case, it is apparent from the information supplied by the national court that ESR's decision, which led to the applicant in the main proceedings being deprived of the award of the public contract at issue when it had been designated as the successful tenderer, was, in that applicant's opinion, adopted in breach of the provisions of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54) and of the principles arising under the primary legislation of the European Union.

72 The applicant in the main proceedings submits that, by the application of the contested national rules, it was prevented not only from seeking annulment of ESR's allegedly unlawful decision, which led to its exclusion from the procedure at issue in the

main proceedings, but also from seeking damages for the loss caused by that decision. Thus it was deprived of its right to effective judicial protection.

73 In that regard, it is important to note that the principle of effective judicial protection is a general principle of European Union law (see, to that effect, Case C-432/05 *Unibet* [2007] ECR I-2271, paragraph 37 and the case-law cited).

74 The Court has consistently held that, in the absence of Community rules governing the matter, it is for each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from European Union law. Those detailed procedural rules must, however, be no less favourable than those governing similar domestic actions (principle of equivalence) and must not render practically impossible or excessively difficult the exercise of rights conferred by European Union law (principle of effectiveness) (see, to that effect, Case C-268/06 *Impact* [2008] ECR I-2483, paragraphs 44 and 46 and the case-law cited).

75 With regard to the principle of equivalence, it is apparent from the information supplied by the national court that, in accordance with the domestic law governing in general compensation for losses caused by unlawful acts of the State or public legal persons, it is the court having jurisdiction for the award of damages which also reviews, as an incidental matter, the legality of the administrative act complained of, which can lead, from an action brought individually by a natural person, to an award of compensation if the basic conditions laid down to that effect are met.

76 However, so far as concerns public contracts, an area covered by European Union law, those two types of jurisdiction, that is to say, on the one hand, the jurisdiction to annul or find the invalidity of an administrative act and, on the other, the jurisdiction to

award compensation for the loss suffered, are, in the national law at issue in the main proceedings, held by two different courts.

77 Thus, in the area of public contracts, the combination of Article 5(2) of Law 2522/1997, which makes the award of damages subject to the prior annulment of the allegedly unlawful act, and Article 47(1) of Presidential Decree 18/1989, in accordance with which only all members of a consortium have *locus standi* to seek annulment of an act forming part of a procedure for the award of a public contract, means, as the national court points out, that it is impossible for any member of a consortium, acting individually, not only to seek annulment of the act adversely affecting it but also to apply to the competent court to obtain compensation for any damage it has suffered individually, whereas that does not appear to be impossible in other areas, by virtue of the rules of domestic law applicable to applications for compensation for loss caused by an unlawful act of a public authority.

78 With regard to the principle of effectiveness, it must be held that, by the application of the contested national rules, a tenderer such as the applicant in the main proceedings is deprived of any opportunity to claim, before the competent court, compensation for any damage it has suffered by reason of a breach of European Union law by an administrative act likely to have influenced the conduct and even the outcome of a public procurement procedure. Such a tenderer is thus deprived of effective judicial protection of the rights in that area of the law which it has under European Union law.

79 As the Advocate General observed in points 107 to 116 of her Opinion, it is important to note, in that regard, that the present situation differs from that which gave rise to the judgment in *Espace Trianon and Sofibail*. While that case concerned an action for annulment against a contract award decision which deprived the tendering consortium as a whole of the contract, the present case concerns an application for compensation for loss allegedly caused by an unlawful decision of an administrative authority which found that such an incompatibility existed, under the relevant national rules, in the case of the only applicant tenderer.

80 Having regard to the foregoing, the answer to the first question referred in Case C-149/08 is that European Union law, in particular the right to effective judicial protection, precludes a national rule, such as that at issue in the main proceedings, interpreted as meaning that the members of a temporary association, tenderer in a public procurement procedure, are deprived of the possibility of seeking, individually, compensation for the loss which they suffered individually as a result of a decision adopted by an authority, other than the contracting authority, involved in that procedure in accordance with the applicable national rules, which is such as to influence the conduct of that procedure.

81 In the light of that answer, there is no need to answer the second question referred in Case C-149/08.

Costs

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

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

1. A mixed contract of which the main object is the acquisition by an undertaking of 49 % of the capital of a public undertaking and the ancillary object, indivisibly linked with that main object, is the supply of services and

the performance of works does not, as a whole, fall within the scope of the directives on public contracts.

2. European Union law, in particular the right to effective judicial protection, precludes a national rule, such as that at issue in the main proceedings, interpreted as meaning that the members of a temporary association, tenderer in a public procurement procedure, are deprived of the possibility of seeking, individually, compensation for the loss which they suffered individually as a result of a decision adopted by an authority, other than the contracting authority, involved in that procedure in accordance with the applicable national rules, which is such as to influence the conduct of that procedure.

[Signatures]