



Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

10 July 2014*

(Reference for a preliminary ruling — Public works contracts — Directive 93/37/EEC — ‘Undertaking to let’ buildings which have not yet been constructed — Decision of a national court having the authority of *res judicata* — Scope of the principle of *res judicata* in the event of a situation which is incompatible with EU law)

In Case C-213/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Consiglio di Stato (Italy), made by decision of 11 January 2013, received at the Court on 23 April 2013, in the proceedings

Impresa Pizzarotti & C. SpA

v

Comune di Bari,

Giunta comunale di Bari,

Consiglio comunale di Bari,

intervening parties:

Complesso Residenziale Bari 2 Srl,

Commissione di manutenzione della Corte d'appello di Bari,

Giuseppe Albenzio, acting as *Commissario ad acta*,

Ministero della Giustizia,

Regione Puglia,

THE COURT (Second Chamber),

composed of R. Silva de Lapuerta, President of the Chamber, K. Lenaerts (Rapporteur), Vice-President of the Court, J.L. da Cruz Vilaça, G. Arestis and J.-C. Bonichot, Judges,

Advocate General: N. Wahl,

Registrar: A. Impellizzeri, Administrator,

* Language of the case: Italian.

having regard to the written procedure and further to the hearing on 27 February 2014,

after considering the observations submitted on behalf of:

- Impresa Pizzarotti & C. SpA, by R. Mastroianni, D. Vaiano and F. Lorusso, avvocati,
- the Comune di Bari, by A. Loiodice, I. Loiodice and R. Lanza, avvocati,
- the Italian Government, by G. Palmieri, acting as Agent, assisted by P. Gentili, avvocato dello Stato,
- the German Government, by T. Henze and J. Möller, acting as Agents,
- the European Commission, by L. Pignataro-Nolin, A. Tokár and A. Aresu, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 15 May 2014,

gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114) and the scope of the principle of *res judicata* in the event of a situation which is incompatible with EU law.
- 2 The request has been made in proceedings between Impresa Pizzarotti & C. SpA ('Pizzarotti') and the Comune di Bari, the Giunta comunale di Bari and the Consiglio comunale di Bari following the publication of a market investigation notice with a view to providing the Italian judicial authorities with a new single headquarters bringing together all the courts of Bari (Italy).

Legal context

Directive 92/50/EEC

- 3 Article 1(a) 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) provided:

'For the purposes of this Directive:

- (a) *public service contracts* shall mean contracts for pecuniary interest concluded in writing between a service provider and a contracting authority, to the exclusion of:

...

- (iii) contracts for the acquisition or rental, by whatever financial means, of land, existing buildings, or other immovable property or concerning rights thereon ...

...'

Directive 93/37/EEC

- 4 Article 1(a) 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) defined ‘public works contracts’, for the purposes of that directive, as ‘contracts for pecuniary interest concluded in writing between a contractor and a contracting authority as defined in [Article 1(b)], which have as their object either the execution, or both the execution and design, of works related to one of the activities referred to in Annex II or a work defined in [Article 1(c)], or the execution, by whatever means, of a work corresponding to the requirements specified by the contracting authority’.
- 5 The activities referred to in Annex II to that directive include the following activities in Class 50 (‘Building and civil engineering’): ‘[g]eneral building and civil engineering work (without any particular specification)’ (sub-group 500.1) and ‘[c]onstruction of flats, office blocks, hospitals and other buildings, both residential and non-residential’ (group 501).

Directive 2004/18

- 6 Article 1(2) of Directive 2004/18 provides:
- ‘(a) “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.
- (b) “Public works contracts” are public contracts having as their object either the execution, or both the design and execution, of works related to one of the activities within the meaning of Annex I or a work, or the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority. ...

...’

- 7 Article 16 of that directive, entitled ‘Specific exclusions’, provides:

‘This Directive shall not apply to public service contracts for:

- (a) the acquisition or rental, by whatever financial means, of land, existing buildings or other immovable property or concerning rights thereon; ...

...’

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

- 8 On 14 August 2003, the Comune di Bari (Municipality of Bari) published a ‘market investigation’ notice with the aim of creating, as soon as possible, a new single headquarters which would be suitable and appropriate to host all the courts of Bari. That notice was published in, inter alia, the *Official Journal of the European Union* of 23 August 2003 (OJ S 161).
- 9 The notice required tenderers to commit themselves to commencing construction of the planned work by 31 December 2003. It required clear and exhaustive indications of the costs to be paid by the municipal authorities and the Ministero della Giustizia (Italian Ministry of Justice), and of the arrangements for payment, having regard to the fact that the public resources available amounted to the EUR 43.5 million already allocated to the project, to which the sum of EUR 3 million was to be

added corresponding to the annual rents paid by the Comune di Bari to lease the premises housing the courts concerned. The notice was accompanied by an annex, drawn up by the Corte d'appello di Bari (Court of Appeal, Bari), which was intended to provide an 'official and exhaustive framework of structural, functional, and organisational requirements' ('the framework of requirements') relating to the creation of the planned judicial complex.

- 10 Four proposals were submitted. By Decision No 1045/2003 of 18 December 2003, the Comune di Bari selected Pizzarotti's proposal. That proposal indicated that part of the complex built would be sold to the Comune di Bari for the sum of EUR 43 million and that the remainder would be leased to it for an annual rent of EUR 3 million.
- 11 By a note dated 4 February 2004, the Ministry of Justice informed the Comune di Bari that the public resources available for the project in question had been reduced to EUR 18.5 million and asked it to verify whether, having regard to the proposals received, it was possible to bring the project to fruition within the limits imposed by that new financial framework. By a note dated 11 February 2004, the Comune di Bari asked Pizzarotti to indicate whether it was prepared to go ahead with the already initiated procedure. Pizzarotti replied to that request in the affirmative, reformulating its proposal to take account of the reduced public resources available.
- 12 The expected public funding was cut off completely in September 2004.
- 13 Following the removal of that funding, Pizzarotti submitted a second proposal to the Comune di Bari, setting out the possibility of completing the work intended for letting which was contemplated in its initial proposal.
- 14 As the authorities took no action, Pizzarotti initiated proceedings before the Tribunale amministrativo regionale per la Puglia (Regional Administrative Court, Puglia) seeking an order obliging the Comune di Bari to act.
- 15 After that court dismissed the action, by Judgment No 4267/2007 the Consiglio di Stato (Council of State) upheld the appeal brought by Pizzarotti against the judgment at first instance. Finding that, in the light of the Ministry of Justice's note of 4 February 2004 reacting to the amended financial framework, the procedure had not been brought to an end by the approval of the outcome of the market investigation, the Consiglio di Stato decided that the Comune di Bari, 'in compliance with the principles of reasonableness, good faith and the protection of legitimate expectations, [was obliged], lending cohesion to its actions, [to] bring the procedure to a genuinely appropriate conclusion, examining, in the context of the proposals received, the possibility of the works being accomplished within the constraints of the amended financial framework'.
- 16 The appeal brought by the Comune di Bari against that judgment was rejected by an order of the Corte suprema di cassazione (Supreme Court of Cassation) of 23 December 2008.
- 17 Having, in the meantime, received an application seeking enforcement of its Judgment No 4267/2007, by Judgment No 3817/2008 the Consiglio di Stato found that the Comune di Bari had failed to act and ordered it to give full effect to the operative part of Judgment No 4267/2007 within 30 days. It appointed the Prefect of Bari as *Commissario ad acta* so that, in the event of continued non-compliance, he would take — possibly through a delegate — all measures necessary for enforcement of that judgment.
- 18 On 21 November 2008, the *Commissario ad acta* delegated by the Prefect of Bari acknowledged that Pizzarotti's proposals were valid and, accordingly, found that the procedure initiated by the market investigation notice concerned had achieved a positive outcome.

- 19 For its part, the Giunta comunale di Bari (Bari Municipal Council) terminated that procedure, claiming that Pizzarotti's second proposal did not comply with the requirements of the notice.
- 20 Pizzarotti and the Comune di Bari each appealed to the Consiglio di Stato. Pizzarotti claimed that, in the absence of any contractual commitment from the Comune di Bari for the purposes of completion of the new planned judicial complex, the latter had not correctly complied with the Consiglio di Stato's Judgment No 3817/2008. The Comune di Bari criticised the lack of any finding that the conditions for completing the project had worsened, affecting the progress of the procedure.
- 21 By Enforcement Decision No 2153/2010 of 15 April 2010, the Consiglio di Stato upheld Pizzarotti's appeal and dismissed that of the Comune di Bari. It considered that the action of the *Commissario ad acta* was incomplete, given the absence of any 'genuinely appropriate conclusion' within the meaning of its Judgment No 4267/2007. It ruled that the measures necessary for the specific implementation of Pizzarotti's second proposal had to be adopted, and set a time-limit of 180 days for bringing the procedure to an end.
- 22 By a document dated 27 May 2010, the *Commissario ad acta* concluded that 'the market investigation notice of August 2003 [had] not had a positive outcome'. He supported that conclusion by arguing, with regard to Pizzarotti's first proposal, as reformulated in 2004, that the loss of part of the public funding made it impossible to achieve the objective pursued by the Comune di Bari. He stated that Pizzarotti's second proposal, concerning the lease of buildings to be created using private funding, was totally inappropriate in the light of that objective.
- 23 An appeal brought by Pizzarotti against that document was upheld by the Consiglio di Stato by Enforcement Decision No 8420/2010 of 3 December 2010. Emphasising the inconsistent nature of the conclusions concerning the notice which were set out in the documents of 21 November 2008 and 27 May 2010, it took the view that the only valid conclusion was the one contained in the first of those documents. It reaffirmed the need for the *Commissario ad acta* to initiate the procedures necessary for the adoption of Pizzarotti's second proposal and annulled the second of those documents on the ground that it infringed the principle of *res judicata*.
- 24 Subsequently, the new *Commissario ad acta* appointed by the Prefect of Bari took all the measures necessary for the adoption on 23 April 2012 of a 'town planning modification' in relation to the Comune di Bari's general development plan, with regard to the land affected by the construction of the planned judicial complex.
- 25 Pizzarotti contested that decision before the Consiglio di Stato on the ground that it was in breach of the principle of *res judicata*.
- 26 In that context, the Consiglio di Stato asks, first, whether a contract for the lease of a property for future completion, taking the form of an undertaking to let that property, is equivalent, despite the presence of elements characteristic of a lease, to a works contract falling outside the scope of the specific exclusion clause set out in Article 16(1)(a) of Directive 2004/18.
- 27 Second, if it is assumed that that contract constitutes a public works contract, that court asks whether it may hold that a judgment having the authority of *res judicata* — in the present case its Judgment No 4267/2007 — is ineffective in so far as it has led, by reason of subsequent enforcement decisions and measures by the *Commissario ad acta*, to a situation which is incompatible with EU law on public procurement. It points out in that regard that, by virtue of its own case-law, it may, under certain conditions, supplement the original operative part of one of its judgments by an implementation decision, that possibility giving rise to what it terms 'progressively formed *res judicata*'.

28 In those circumstances, the Consiglio di Stato decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

- ‘1. Is a contract to be concluded for the lease of something in the future — even in the form, suggested most recently, of an undertaking to let — equivalent to a public works contract, albeit with certain elements characteristic of a lease, with the result that such a contract cannot be included among the contracts which are excluded, under Article 16 of [Directive 2004/18], from the scope of the rules on public procedures?
2. If the answer to Question 1 is in the affirmative, may a national court — specifically, this referring court — hold that the ruling made regarding the events under consideration (as described in [this order for reference]) is ineffective in that it has enabled a situation which is contrary to [EU] law on public procurement to persist and, therefore, is it possible to enforce a final judgment which is contrary to [EU] law?’

Admissibility of the questions referred

29 Pizzarotti gives two reasons for its serious doubts as to the admissibility of the questions referred.

30 First, it submits that the request for a preliminary ruling fails to identify the correct EU legislation to be applied in the main proceedings: it seeks an interpretation of Directive 2004/18, whereas that directive was adopted after the date on which the Comune di Bari decided to publish the market investigation notice concerned, namely 14 August 2003, and is thus not applicable to the main proceedings.

31 In that regard, it should be borne in mind that the applicable directive is, as a rule, the one in force when the contracting authority chooses the type of procedure to be followed and decides definitively whether it is necessary for a prior call for competition to be issued for the award of a public contract (judgment in *Commission v Netherlands*, C-576/10, EU:C:2013:510, paragraph 52 and the case-law cited). Conversely, a directive is not applicable if the period prescribed for its transposition expired after that point in time (see, to that effect, the judgment in *Commission v France*, C-337/98, EU:C:2000:543, paragraphs 41 and 42).

32 In the present case, Directives 92/50 and 93/37 were applicable on 14 August 2003, the date on which the Comune di Bari published a ‘market investigation’ notice with the aim of creating a judicial complex in Bari. Those directives were also applicable when, in September 2004, following the amendment to the financial framework in connection with the complete removal of public funding, the Comune di Bari decided, according to the information which it has submitted to the Court, that it was necessary to initiate a new selection procedure rather than negotiate the conclusion of a contract ‘for the lease of something in the future’ directly with Pizzarotti without first issuing a new call for competition.

33 By contrast, Directive 2004/18 was not applicable on those dates, as — pursuant to Article 80(1) thereof — the period prescribed for transposition of that directive did not expire until 31 January 2006.

34 That said, the concept of ‘public works contracts’, which is referred to in the first question, is defined in similar terms in Article 1(a) of Directive 93/37 and Article 1(2)(a) and (b) of Directive 2004/18. In addition, Article 1(a)(iii) of Directive 92/50 and Article 16(a) of Directive 2004/18 use identical wording to define the scope of the exclusion which is also referred to in the first question.

- 35 In those circumstances, the fact that the referring court erred in identifying the provisions of EU law to be applied to the present case cannot affect the admissibility of the questions referred (see, to that effect, the judgment in *Zurita García and Choque Cabrera*, C-261/08 and C-348/08, EU:C:2009:648, paragraph 39).
- 36 Second, Pizzarotti submits that the main proceedings are characterised by the presence of judicial decisions of — in particular — the Consiglio di Stato which have the authority of *res judicata*, which makes the request for a preliminary ruling — particularly the first question — manifestly inadmissible. It claims that an answer from the Court to that question can have no effect on the outcome of the main proceedings in view of (i) the significance attributed to the principle of *res judicata* by EU law, at the expense, as the case may be, of remedying a breach of that law, and (ii) the lack of any obligation for an administrative authority to go back on a final decision which proves to be inconsistent with EU law.
- 37 However, an argument of that kind concerns the substance of the main proceedings and, more specifically, the subject-matter of the second question referred by the Consiglio di Stato.
- 38 In the light of the foregoing, the questions referred are admissible.

Consideration of the questions referred

Question 1

- 39 By its first question, which must be rephrased to reflect the provisions of EU law which were applicable to the main proceedings at the material time, the referring court asks, in essence, whether, on a proper construction of Article 1(a) of Directive 93/37, a contract containing an undertaking to let buildings which have not yet been constructed constitutes a public works contract despite having elements characteristic of a lease, and is not, therefore, covered by the exclusion referred to in Article 1(a)(iii) of Directive 92/50.
- 40 In that regard, it should be borne in mind from the outset, first, that the question whether a transaction constitutes a public works contract for the purposes of EU legislation is one of EU law. The classification of the proposed contract as a 'lease', highlighted by Pizzarotti and the Italian Government, is not decisive in that regard (see, to that effect, the judgment in *Commission v Germany*, C-536/07, EU:C:2009:664, paragraph 54 and the case-law cited).
- 41 Second, where a contract contains both elements relating to a public works contract and elements relating to another type of contract, it is necessary to refer to the main object of that contract in order to determine its legal classification and the EU rules applicable (see, to that effect, the judgments in *Auroux and Others*, C-220/05, EU:C:2007:31, paragraph 37; *Commission v Italy*, C-412/04, EU:C:2008:102, paragraph 47; and *Commission v Germany*, EU:C:2009:664, paragraph 57).
- 42 In the main proceedings, it can be seen from the case-file before the Court that, at the time when the conclusion of the contract in question was proposed to the Comune di Bari by Pizzarotti, the works for creating the complex referred to in that contract had not yet begun. In those circumstances, the main object of the contract is the creation of that complex, which the subsequent letting of the complex necessarily presupposes (see, to that effect, the judgment in *Commission v Germany*, EU:C:2009:664, paragraph 56).

- 43 As the German Government has pointed out, it is also necessary, in order for it to be possible to conclude that there is a ‘public works contract’ for the purposes of Directive 93/37, that the execution of the planned work corresponds to the requirements specified by the contracting authority (judgment in *Commission v Germany*, EU:C:2009:664, paragraph 55).
- 44 Such is the case where that authority has taken measures to define the characteristics of the work or, at the very least, has had a decisive influence on its design (see, to that effect, the judgment in *Helmut Müller*, C-451/08, EU:C:2010:168, paragraph 67).
- 45 In the main proceedings, recital 10 of the draft ‘undertaking to let’ — which is mentioned by the referring court as being the latest suggested form of the contract proposed to the Comune di Bari by Pizzarotti — refers to the framework of requirements which had been drawn up by the Corte d’appello di Bari for the purposes of publishing the market investigation notice in question. Article 7 of that draft reserves the right for the authorities to verify, prior to accepting the work, whether it complies with the framework of requirements.
- 46 That framework specifies the various technical and technological characteristics of the planned work and, on the basis of a set of statistical data relating to judicial activity in the district of Bari (number of civil and criminal cases, number of hearings per week per court, number of judges or prosecutors, number of members of administrative staff, criminal investigation staff or security service staff, number of lawyers admitted to the Bari Bar, and so on), lists the specific requirements of each of the courts coming within that judicial district (number of offices and of courtrooms, conference rooms, meeting rooms and archive rooms required, surface area of rooms, methods of internal communication), along with certain common requirements, such as car park capacity.
- 47 Contrary to the assertions of Pizzarotti and the Italian Government, that framework of requirements puts the Comune di Bari in a position to have a decisive influence on the design of the work to be constructed.
- 48 It follows that the main object of the proposed contract in the main proceedings is the execution of a work corresponding to the requirements specified by the contracting authority.
- 49 It is true that, as the referring court notes, the draft ‘undertaking to let’ also includes certain elements characteristic of a lease. Before this Court, emphasis has been placed on the fact that the financial consideration to be paid by the authorities corresponds, under Article 5 of that draft, to an ‘annual rent’ of EUR 3.5 million, to be paid over the 18 years of the contractual term. According to the information provided by Pizzarotti and the Italian Government, this overall consideration, amounting to EUR 63 million, is far lower than the total estimated cost of the work, which is almost EUR 330 million.
- 50 However, it should be borne in mind in that regard that the decisive element for the purposes of the classification of the contract concerned is the main object of that contract, not the amount paid to the contractor or the arrangements for payment (judgment in *Commission v Germany*, EU:C:2009:664, paragraph 61).
- 51 Moreover, as the discussion at the hearing has shown, neither Article 4 of the draft ‘undertaking to let’, under which the contract automatically terminates after 18 years, nor the provision of the Italian legislation relating to the General State Accounts Department, highlighted by the Italian Government, which requires contracts concluded by public authorities to have a specific term and duration and which prohibits such contracts from being a continuous burden on the State, are hindrances to the conclusion, upon expiry of the first proposed contract, of one or more subsequent contracts which would guarantee payment to Pizzarotti for all, or a substantial proportion, of the works carried out in creating the complex concerned.

- 52 In the light of the foregoing, the answer to the first question is that, on a proper construction of Article 1(a) of Directive 93/37, where the main object of a contract is the execution of a work corresponding to the requirements expressed by the contracting authority, that contract constitutes a public works contract and is not, therefore, covered by the exclusion referred to in Article 1(a)(iii) of Directive 92/50, even if it contains an undertaking to let the work in question.

Question 2

- 53 By its second question, the referring court asks, in essence, whether it may decide that a ruling which it has made which has led to a situation which is incompatible with the EU legislation on public works contracts is ineffective.
- 54 In that regard, it should be borne in mind that, in the absence of EU legislation in this area, the rules implementing the principle of *res judicata* are a matter for the national legal order, in accordance with the principle of the procedural autonomy of the Member States, but must be consistent with the principles of equivalence and effectiveness (see, to that effect, the judgment in *Fallimento Olimpiclub*, C-2/08, EU:C:2009:506, paragraph 24 and the case-law cited).
- 55 In its request for a preliminary ruling, the referring court indicates that, according to its case-law, it may, under certain conditions, supplement the original operative part of one of its judgments by implementation decisions, that possibility giving rise to what it terms ‘progressively formed *res judicata*’.
- 56 If — and it is for the referring court to ascertain whether this is the case — the conditions for applying that procedure are met in respect of the decision in Judgment No 4267/2007, a decision which is mentioned in paragraph 15 of this judgment and which — according to the order for reference — alone has the force of *res judicata* in the present case, it is for that court, having regard to the principle of equivalence, to make use of that procedure, favouring, from among ‘the numerous different possibilities of implementation’ which it states may be used in respect of that decision, the solution which, in accordance with the principle of effectiveness, ensures compliance with the EU legislation on public works contracts.
- 57 As has been stated by the Comune di Bari, that solution could consist of an order, supplementing that decision, to terminate the market investigation procedure without accepting any of the proposals, which would then permit the launch of a new procedure, in compliance with the EU legislation on public works contracts.
- 58 On the other hand, if the referring court is led to the view that the correct application of that legislation conflicts, having regard to the applicable domestic rules of procedure, with its Judgment No 4267/2007 or with its decisions of 15 April and 3 December 2010 implementing that judgment, attention should be drawn to the importance, both in the legal order of the European Union and in national legal systems, of the principle of *res judicata*. In order to ensure both stability of the law and legal relations and the sound administration of justice, it is important that judicial decisions which have become definitive after all rights of appeal have been exhausted or after expiry of the time-limits provided for in that connection can no longer be called into question (judgments in *Kapferer*, C-234/04, EU:C:2006:178, paragraph 20; *Commission v Luxembourg*, C-526/08, EU:C:2010:379, paragraph 26; and *ThyssenKrupp Nirosta v Commission*, C-352/09 P, EU:C:2011:191, paragraph 123).
- 59 Therefore, EU law does not require a national court to disapply domestic rules of procedure conferring finality on a judgment, even if to do so would make it possible to remedy a domestic situation which is incompatible with EU law (see, to that effect, the judgments in *Eco Swiss*, C-126/97, EU:C:1999:269,

paragraphs 46 and 47; *Kapferer*, EU:C:2006:178, paragraphs 20 and 21; *Fallimento Olimpiclub*, EU:C:2009:506, paragraphs 22 and 23; *Asturcom Telecomunicaciones*, C-40/08, EU:C:2009:615, paragraphs 35 to 37; and *Commission v Slovakia*, C-507/08, EU:C:2010:802, paragraphs 59 and 60).

- 60 Accordingly, EU law does not require a judicial body automatically to go back on a judgment having the authority of *res judicata* in order to take into account the interpretation of a relevant provision of EU law adopted by the Court after delivery of that judgment.
- 61 That analysis cannot be undermined by the judgment in *Lucchini* (C-199/05, EU:C:2007:434), cited by the referring court: it was in a highly specific situation, in which the matters at issue were principles governing the division of powers between the Member States and the European Union in the area of State aid, that the Court found, in essence, that EU law precludes the application of a provision of national law, such as Article 2909 of the Italian Civil Code, which seeks to lay down the principle of *res judicata*, in so far as the application of that provision would prevent the recovery of State aid which was granted in breach of EU law and which has been found to be incompatible with the common market in a decision of the European Commission which has become final (see, to that effect, the judgment in *Fallimento Olimpiclub*, EU:C:2009:506, paragraph 25). However, issues of that nature, relating to the division of powers, do not arise in the present case.
- 62 That said, if the applicable domestic rules of procedure provide the possibility, under certain conditions, for a national court to go back on a decision having the authority of *res judicata* in order to render the situation compatible with national law, that possibility must prevail if those conditions are met, in accordance with the principles of equivalence and effectiveness, so that the situation at issue in the main proceedings is brought back into line with the EU legislation on public works contracts.
- 63 In that regard, it should be emphasised that that legislation contains fundamental rules of EU law in that it is intended to ensure the application of the principles of equal treatment of tenderers and of transparency in order to open up undistorted competition in all the Member States (see, to that effect, the judgments in *Commission v Portugal*, C-70/06, EU:C:2008:3, paragraph 40; *Michaniki*, C-213/07, EU:C:2008:731, paragraph 55; *Commission v Cyprus*, C-251/09, EU:C:2011:84, paragraphs 37 to 39; and *Manova*, C-336/12, EU:C:2013:647, paragraph 28).
- 64 In the light of the foregoing, the answer to the second question is that, to the extent that it is authorised to do so by the applicable domestic rules of procedure, a national court — such as the referring court — which has given a ruling at last instance, without a reference having first been made to the Court of Justice under Article 267 TFEU, that has led to a situation which is incompatible with the EU legislation on public works contracts must either supplement or go back on that definitive ruling so as to take into account any interpretation of that legislation provided by the Court subsequently.

Costs

- 65 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 (Second Chamber) hereby rules:

1. **On a proper construction of Article 1(a) of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts, where the main object of a contract is the execution of a work corresponding to the requirements expressed by the contracting authority, that contract constitutes a public works contract**

and is not, therefore, covered by the exclusion referred to in Article 1(a)(iii) of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, even if it contains an undertaking to let the work in question.

2. To the extent that it is authorised to do so by the applicable domestic rules of procedure, a national court — such as the referring court — which has given a ruling at last instance, without a reference having first been made to the Court of Justice of the European Union under Article 267 TFEU, that has led to a situation which is incompatible with the EU legislation on public works contracts must either supplement or go back on that definitive ruling so as to take into account any interpretation of that legislation provided by the Court subsequently.

[Signatures]