



Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

28 November 2018*

(Reference for a preliminary ruling — Public procurement — Review procedures — Directive 89/665/EEC — Article 1(3) — Directive 92/13/EEC — Article 1(3) — Right to bring proceedings subject to the condition that a tender was submitted in a procurement procedure)

In Case C-328/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunale amministrativo regionale per la Liguria (Regional Administrative Court, Liguria, Italy), made by decision of 8 February 2017, received at the Court on 31 May 2017, in the proceedings

Amt Azienda Trasporti e Mobilità SpA,

Atc Esercizio SpA,

Atp Esercizio Srl,

Riviera Trasporti SpA,

Tpl Linea Srl

v

Atpl Liguria — Agenzia regionale per il trasporto pubblico locale SpA,

Regione Liguria,

THE COURT (Third Chamber),

composed of M. Vilaras, President of the Fourth Chamber, acting as President of the Third Chamber, J. Malenovský, L. Bay Larsen, M. Safjan and D. Šváby (Rapporteur), Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: R. Schiano, Administrator,

having regard to the written procedure and further to the hearing on 26 April 2018,

after considering the observations submitted on behalf of:

– the Italian Government, by G. Palmieri, acting as Agent, and C. Colelli, avvocato dello Stato,

* Language of the case: Italian.

– the Czech Government, by M. Smolek, J. Vlášil and T. Müller, acting as Agents,
– the Spanish Government, by M.J. García-Valdecasas Dorrego, acting as Agent,
– the European Commission, by G. Gattinara and P. Ondrůšek, acting as Agents,
after hearing the Opinion of the Advocate General at the sitting on 5 July 2018,
gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 1(1) to (3) and Article 2(1)(b) 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 2007/66/EC of the European Parliament and of the Council of 11 December 2007 (OJ 2007 L 335, p. 31) ('Directive 89/665').
- 2 The request has been made in proceedings between Amt Azienda Trasporti e Mobilità SpA, Atc Esercizio SpA, Atp Esercizio Srl, Riviera Trasporti SpA and Tpl Linea Srl ('Amt and Others') and Atpl Liguria Agenzia regionale per il trasporto pubblico locale SpA (Regional Agency for Local Public Transport, Italy, 'the Agency') concerning the decision of the latter to launch an informal tender procedure for the award of public transport services in the Regione per la Liguria (Region of Liguria, Italy, the 'Region of Liguria').

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 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)], unless such contracts are excluded in accordance with Articles 10 to 18 of that Directive.

...

Member States shall take the measures necessary to ensure that, as regards contracts falling within the scope of Directive [2004/18], 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 Articles 2 to 2f of this Directive, on the grounds that such decisions have infringed [EU] law in the field of public procurement or national rules transposing that law.

2. Member States shall ensure that there is no discrimination between undertakings claiming harm 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 [EU] law and other national rules.

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

...'

- 4 Article 2(1) of that directive which concerns '[r]equirements for review procedures' states:

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

...

(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;

...'

Directive 92/13

- 5 Entitled 'Scope and availability of review procedures', Article 1(3) of Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1992 L 76, p. 14) as amended by Directive 2007/66 ('Directive 92/13'), provides:

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

Directive 2004/17

- 6 Article 1 of Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ 2004 L 134, p. 1), on 'basic terms', provided in paragraph 3(b) thereof:

'A "service concession" is a contract of the same type as a service contract except for the fact that the consideration for the provision of services consists either solely in the right to exploit the service or in that right together with payment.'

- 7 Article 5 of that directive, entitled 'Transport services', provided in paragraph 1 thereof:

'This Directive shall apply to activities relating to the provision or operation of networks providing a service to the public in the field of transport by railway, automated systems, tramway, trolley bus, bus or cable.'

- 8 Article 18 of that directive, entitled 'Works and service concessions', was worded as follows:

'This Directive shall not apply to works and service concessions which are awarded by contracting entities carrying out one or more of the activities referred to in Articles 3 to 7, where those concessions are awarded for carrying out those activities.'

Regulation No 1370/2007

- 9 Article 5 of Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70 (OJ 2007 L 315, p. 1), entitled ‘Award of public service contracts’, is worded as follows:

‘1. Public service contracts shall be awarded in accordance with the rules laid down in this Regulation. However, service contracts or public service contracts as defined in Directives [2004/17] or [2004/18] for public passenger transport services by bus or tram shall be awarded in accordance with the procedures provided for under those Directives where such contracts do not take the form of service concessions contracts as defined in those Directives. Where contracts are to be awarded in accordance with Directives 2004/17/EC or 2004/18/EC, the provisions of paragraphs 2 to 6 of this Article shall not apply.

...

7. Member States shall take the necessary measures to ensure that decisions taken in accordance with paragraphs 2 to 6 may be reviewed effectively and rapidly, at the request of 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, on the grounds that such decisions have infringed [EU] law or national rules implementing that law.

...’

Italian law

- 10 Article 100 of the codice di procedura civile (Italian Code of Civil Procedure), in the version applicable at the material time, provides that ‘in order to bring or oppose a claim, a party must have sufficient legal interest in that claim’.
- 11 Article 39(1) of Annex 1 to decreto legge n. 104/2010 — Codice del processo amministrativo (Decree Law No 104 on the Administrative Procedure Code) of 2 July 2010 (Ordinary Supplement to GURI No 156 of 7 July 2010) provides: ‘For any matter that is not regulated by this Code the provisions of the Italian Code of Civil Procedure should be applied as far as they are compatible or express general principles.’
- 12 Article 3a of decreto legge n. 138 (Decree Law No 138) of 13 August 2011 (GURI No 188 of 13 August 2011) amended and converted into law by Law No 148 of 14 September 2011 (‘Decree Law No 138/2011’) states that, in principle, local public services must be operated at provincial level.
- 13 Under Article 9(1) and Article 14(1) of the Legge regionale n. 33 (Riforma del Sistema del trasporto pubblico regionale e locale) (Regional law No 33 (Reform of the system of regional and local public transport) of 7 November 2013 (‘Regional law No 33/2013’), public transport services in the Region of Liguria had to be awarded in one single lot relating to the entire region with the possibility of extension also to rail transport.
- 14 Taking effect on 12 August 2016, the legge regionale n. 19 Modifiche alla [legge regionale n. 33] (Regional Law No 19 amending Regional Law No 33) of 9 August 2016 (‘Regional Law No 19/2016’) amended Articles 9 and 14 of Regional law No 33/2013. That law provides that henceforward land and sea transport services are no longer required to be awarded in a single lot covering all the territory of the Region of Liguria, but may be awarded in four lots concerning four homogenous territorial areas.

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

- 15 Amt and Others brought an action before the Tribunale Amministrativo Regionale per la Liguria (Regional Administrative Court, Liguria, Italy) seeking the annulment of various acts by which the Agency launched the informal tender procedure for public transport services in the Region of Liguria.
- 16 Those companies, which were until then operators of local public transport services at provincial or sub-provincial levels, challenge, as a matter of principle, the detailed rules for the launch and conduct of the tendering procedure. Their action is aimed specifically at the notice for the selection of economic operators. The Agency specified therein that regional public transport services would from then on be awarded in one single lot covering the whole territory of the Region of Liguria.
- 17 Taking the view that it would be impossible for any of the plaintiffs to provide public transport services individually at regional level, Amt and Others did not submit tenders. However, they brought an action before the referring court challenging the decision of the Agency, in its capacity of contracting authority, to award the contract at issue in the main proceedings as one single lot covering the whole territory of the Region of Liguria. In their view, that decision is contrary to Article 3a of Decree-Law No 138/2011, under which local public services must, in principle, be operated at provincial level, but also various articles of the Italian Constitution and Articles 49 and 56 TFEU.
- 18 In support of their action, Amt and Others argue that an economic operator which challenges, as a matter of principle, the terms of a tendering procedure in which it has not participated has a right to a remedy under Article 1(3) and Article 2(1)(b) of Directive 89/665 if, in the light of the legislation relating to the tendering procedure, it is certain or highly likely that it will be impossible for that operator to be awarded the contract.
- 19 According to the referring court, if the territorial framework had been set at provincial level, Amt and Others would have had a good chance of winning the contract at issue, as they provided regional public transport services when, prior to the launch of the tendering procedure at issue in the main proceedings, it was organised at provincial level. However, by specifying that that procedure was to consist of one single lot covering the whole of the territory of the region, the tender notice reduced the chances that one of the plaintiffs in the main proceedings would be awarded the contract to almost zero.
- 20 Therefore, taking the view that they should be granted a right to bring an action, the referring court, by Order No 95 of 21 January 2016, asked the Corte costituzionale (Constitutional Court, Italy) about the constitutionality of Article 9(1) and Article 14(1) of Regional Law No 33/2013.
- 21 However, before the Corte costituzionale (Constitutional Court) gave judgment, the Region of Liguria adopted Regional Law No 19/2016. That law amended the provisions whose constitutionality was challenged and provides that land and sea transport services are no longer required to be awarded in one single lot covering the whole of the territory of the Region of Liguria, but in four lots corresponding to four homogenous territorial areas. Furthermore, the lots to be awarded must be defined so as to ensure the widest possible participation in the call for tenders. According to the referring court, by the adoption of Law No 19/2016, the regional legislature has responded to the complaints expressed by Amt and Others.
- 22 In spite of the amendment to Articles 9 and 14 of Regional Law No 33/2013, the Corte costituzionale (Constitutional Court) examined the constitutionality of those articles in accordance with the principle *tempus regit actum*.

- 23 In its judgment No 245 of 22 November 2016, it judged the questions on constitutionality to be inadmissible after stating, *inter alia*, that ‘according to settled case-law on administrative law, an undertaking which does not take part in a call for tenders cannot challenge a tender procedure nor the award of the contract to a third company, because its legal position is not sufficiently distinct and concerns a purely factual interest ...’.
- 24 However, that rule may be derogated from if the plaintiff company challenges, *inter alia*, the clauses of the tender notice which directly exclude it or clauses imposing obligations which are clearly unreasonable, totally disproportionate, or which make it impossible to submit a tender.
- 25 In its judgment No 245, the Corte costituzionale (Constitutional Court) held that ‘it is clear from the grounds of the order for reference that the case before this court is not one of those exceptional cases, as it is stated therein that the provisions challenged affect the plaintiffs’ chances of being awarded the tender which “were reduced to almost zero” whereas if the contract was organised on a provincial basis and divided into lots, those companies “would have a very good chance of being awarded the contract, if only because of the advantage of having being the previous operators of that service”. Such reasoning does not disclose any certain and present obstacle to participation in the procedure, but only a possibility of damage which may be relied on only by a party which has taken part in the procedure and only at the end of that procedure, as a result of the failure to award that contract to the applicant’.
- 26 The referring court points out that, according to the interpretation of the procedural requirement to have an interest in bringing proceedings, adopted in the judgment of the Corte costituzionale (Constitutional Court), an action brought by a company which has not taken part in a tender procedure is inadmissible if it is very likely, but not absolutely certain that, because of the way in which the contracting authority has presented and organised the tendering procedure, in particular by dividing the tender into lots or the rules which are applicable to it, that company cannot be awarded the contract concerned. It infers that access to legal protection would therefore be almost systematically subject to participation in the tender procedure, which would in itself generate significant expenses, even if the company intended to challenge the legality of the tender procedure itself on the ground that it excessively restricted competition.
- 27 Notwithstanding the Agency’s decision not to proceed with the tender procedure after the adoption of Law No 19/2016, the referring court asks the Court whether Article 1(3) and Article 2(1)(b) of Directive 89/665 must be interpreted, in the circumstances of the case in the main proceedings, as conferring a right to bring proceedings on an economic operator who did not submit a tender on the ground that it was certain or very likely that it could not win the contract at issue.
- 28 The answer of the Court will be decisive for the determination of the admissibility of the original action and, therefore, the allocation of costs in the main proceedings.
- 29 In that context, the Tribunale amministrativo regionale per la Liguria (Regional Administrative Court, Liguria) decided to stay its proceedings and to refer the following question to the Court of Justice for a preliminary ruling:
- ‘Do Article 1(1), (2) and (3) and Article 2(1)(b) of Directive 89/665 ... preclude a national law which recognises only economic operators that applied to take part in a tendering procedure as being able to challenge the documents relating to a tendering procedure, even when the action challenges the tendering procedure as a matter of principle because the rules of the tendering procedure make it highly unlikely that the economic operator would be awarded the contract?’

Consideration of the question referred

Admissibility

- 30 In their written submissions both the Italian and Spanish Governments and the European Commission argued that the request for a preliminary ruling is inadmissible on the ground that the question referred is hypothetical, as the dispute in the main proceedings has become devoid of purpose after the contracting authority indicated that the tender procedure would be discontinued. The Italian Government also submitted that the request for a preliminary ruling is inadmissible on the ground that doubts remain as to the nature of the contract that the Agency wished to conclude with the contracting party following the tender procedure.

The hypothetical nature of the question referred for a preliminary ruling

- 31 It must be recalled that, according to settled case-law, in the context of cooperation between the Court and national courts as provided for by Article 267 TFEU, it is solely for the national court, which alone has direct knowledge of the facts of the case and of the arguments put forward by the parties, and which must bear the responsibility for the subsequent decision, is in the best position to determine, in the light of the special features of each case and with full knowledge of the matter before it, 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 (see, in particular, to that effect, judgments of 22 June 2000, *Marca Mode*, C-425/98, EU:C:2000:339, paragraph 21, and of 1 April 2008, *Gouvernement de la Communauté française and Gouvernement wallon*, C-212/06, EU:C:2008:178, paragraph 28).
- 32 Consequently, where the questions concern the interpretation of EU law, the Court of Justice is, in principle, bound to give a ruling (judgment of 17 April 2007, *AGM-COS.MET*, C-470/03, EU:C:2007:213, paragraph 44).
- 33 It follows that the presumption that questions referred by national courts for a preliminary ruling are relevant may be rebutted only in exceptional cases, where it is quite obvious that the interpretation which is sought of the provisions of EU law referred to in the questions bears no relation to the actual facts of the main action or to its purpose (see, in particular, judgments of 15 December 1995, *Bosman*, C-415/93, EU:C:1995:463, paragraph 61; of 7 September 1999, *Beck and Bergdorf*, Case C-355/97, EU:C:1999:391, paragraph 22, and of 1 April 2008, *Gouvernement de la Communauté française and Gouvernement wallon*, C-212/06, EU:C:2008:178, paragraph 29).
- 34 A reference by a national court can be rejected only if it appears that the procedure laid down by Article 267 TFEU has been misused and a ruling from the Court elicited by means of a contrived dispute, or it is obvious that EU law cannot apply, either directly or indirectly, to the circumstances of the case referred to the Court (see, to that effect, judgments of 18 October 1990, *Dzodzi*, C-297/88 and C-197/89, EU:C:1990:360, paragraph 40, and of 17 July 1997, *Leur-Bloem*, C-28/95, EU:C:1997:369, paragraph 26).
- 35 In the present case, there is no argument that the question whether the plaintiffs in the main proceedings had the right to bring an action against the call for tenders published by the Agency on the basis of EU law would be the condition for the admissibility of the action before the referring court. It is true, by reason of the Agency's decision not to pursue the call for tenders after the adoption of Law No 19/2016, that the main subject matter of the dispute has disappeared.
- 36 However, unlike the circumstances of the case which gave rise to the order of the Court of 14 October 2010, *Reinke* (C-336/08, not published, EU:C:2010:604), the merits of the dispute in the main proceedings have not been adjudicated on.

- 37 Finally, although the examination of the question whether, in the circumstances of the dispute in the main proceedings, economic operators which consciously decided not to take part in a tender procedure had a right to bring proceedings under Article 1(3) of Directive 89/665 or Article 1(3) of Directive 92/13, is only intended to enable the referring court to adjudicate on the allocation of costs in the dispute in the main proceedings, it is undeniably a question relating to the interpretation of EU law to which the Court must respond in order to maintain the uniformity of application of that law.
- 38 To that extent, it must be held that the request for a preliminary ruling is admissible.

Failure to identify the nature of the contract at issue in the main proceedings

- 39 It is true, as the Italian Government submits in its written observations, that it is unclear from the order for reference whether the call for tenders issued by the Agency covered the award of a concession for transport services or a public services contract. In the first case, whether the plaintiffs in the main proceedings had an interest in bringing proceedings would be determined with regard to Article 5(7) of Regulation No 1370/2007, whereas in the second case, it would be examined in the light of Article 1(3) of Directive 92/13.
- 40 However, without there being any need to try to determine the nature of that contract, which is a matter for the referring court, it suffices to state, as the Advocate General observed in point 63 of his Opinion, that Article 1(3) of Directive 92/13 and Article 5(7) of Regulation No 1370/2007 establish systems of remedies analogous to the system in Directive 89/665, to which the question from the referring court relates.
- 41 In those circumstances, the right to legal protection which is equivalent protection in the three texts of secondary law in question in the preceding paragraph, the answer of the Court to the question referred cannot vary according to the classification of the contract at issue in the main proceedings.
- 42 Therefore, the request for a preliminary ruling must also be declared admissible to that extent.

Substance

- 43 By its question, the referring court asks essentially whether both Article 1(3) of Directive 89/665 and Article 1(3) of Directive 92/13 preclude national legislation, such as that at issue in the main proceedings, which does not allow economic operators to bring an action against decisions of the contracting authority relating to a tender procedure in which they have decided not to participate on the ground that the legislation applicable to that procedure made it very unlikely that they would be awarded the public contract concerned.
- 44 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 'at least' to any person having or having had an interest in obtaining a particular public 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 (see, to that effect, judgments of 12 February 2004, *Grossmann Air Service*, C-230/02, EU:C:2004:93, paragraph 25, and of 5 April 2016, *PFE*, C-689/13, EU:C:2016:199, paragraph 23).
- 45 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 alleges (see, to that effect, judgments of 19 June 2003, *Hackermüller*, C-249/01, EU:C:2003:359, paragraph 18, and of 12 February 2004, *Grossmann Air Service*, C-230/02, EU:C:2004:93, paragraph 26).

- 46 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 risks suffering harm as a result of the allegedly unlawful nature of the decision to award that contract. If he has not submitted a tender it will be difficult for such a person to show that he has an interest in challenging that decision or that he has been harmed or risks being harmed as a result of that award decision (judgment of 12 February 2004, *Grossmann Air Service*, C-230/02, EU:C:2004:93, paragraph 27).
- 47 However, where an undertaking has not submitted a tender because there were allegedly discriminatory specifications in the documents relating to the invitation to tender, or in the contract documents, which have specifically prevented it from being in a position to provide all the services requested, it would be too much to require an undertaking allegedly harmed by discriminatory clauses in the documents relating to the invitation to tender to submit a tender, before being able to avail itself of the review procedures provided for by Directive 89/665 against such specifications, in the award procedure for the contract at issue, even though its chances of being awarded the contract are non-existent by reason of the existence of those specifications (judgment of 12 February 2004, *Grossmann Air Service*, C-230/02, EU:C:2004:93, paragraphs 28 and 29).
- 48 In the judgment of 12 February 2004, *Grossmann Air Service* (C-230/02, EU:C:2004:93), the finding that the chances of Grossman Air Service being awarded the contract were non-existent was related to the fact, set out in paragraph 17 of that judgment, that it did not have large aircraft available to it, so that it was not in a position to provide all the services requested by the contracting authority.
- 49 The findings derived from the judgment of 12 February 2004, *Grossmann Air Service* (C-230/02, EU:C:2004:93), are applicable *mutatis mutandis* in the present case.
- 50 It is clear both from the case-law of the Consiglio di Stato (Council of State, Italy) and judgment No 245/2016 of the Corte costituzionale (Constitutional Court) that exceptionally an economic operator which has not submitted a tender may be held to have an interest in bringing proceedings ‘in the case in which the complaints of the plaintiff company concern the absence of a call for tender, its scheduling, or clauses which were immediately exclusive or imposing obligations which are manifestly unreasonable to totally disproportionate or which make the submission of such a tender impossible’.
- 51 Therefore, it must be held that the requirements laid down in Article 1(3) of Directive 89/665 and Article 1(3) of Directive 92/13 are satisfied if an operator which has not submitted a tender has a right to bring proceedings, inter alia, where it considers that the specifications contained in the documents relating to the call for tenders makes it impossible to submit a tender.
- 52 It must be pointed out that, so as not to undermine the objectives of speed and effectiveness laid down by Directive 89/665 and Directive 92/13, such an action cannot be brought after notification of the decision awarding the contract has been adopted by the contracting authority (see, to that effect, judgment of 12 February 2004, *Grossmann Air Service*, C-230/02, EU:C:2004:93, paragraph 37).
- 53 Furthermore, since it is only in exceptional cases that a right to bring proceedings is given to an operator which has not submitted a tender, it cannot be regarded as excessive to require that operator to demonstrate that the clauses in the call for tenders make it impossible to submit a tender.
- 54 However, although the stringency of the evidential requirements is not in itself contrary to EU law on public procurement, it is possible that, having regard to the specific circumstances of the case in the main proceedings, its application may lead to an infringement of the right to bring proceedings that the plaintiffs in the main proceedings derive from Article 1(3) of Directive 89/665 and Article 1(3) of Directive 92/13.

- 55 In that connection, it is for the referring court to make a detailed assessment, taking account of all the relevant information characterising the context of the case brought before it, of whether the application of the Italian legislation relating to the capacity to bring proceedings, as interpreted by the Consiglio di Stato (Council of State) and the Corte costituzionale (Constitutional Court) is in practice liable to affect the right of the plaintiffs in the main proceedings to effective judicial protection.
- 56 However, based on the information in the file, the Court may provide the referring court with valuable guidance for the assessment it is to carry out.
- 57 In that connection, first, account must be taken of the fact that Amt and Others provided regional transport services before the contracting authority launched the tendering procedure and then decided to discontinue it. Since, Regional Law No 33/2013 states that regional public transport services would be awarded henceforward in one single lot covering the whole territory of the Region of Liguria, even though Article 3a of Decree-Law No 138/2011 provides that, in principle, local public services must be operated at provincial level, the referring court is to examine whether the regional legislature set out the reasons for which it considered that it was preferable from that time on to organise transport services at regional level and no longer at provincial level. Lastly, taking account of the freedom of the contracting authority in the assessment of its needs, it is possible that the Region of Liguria's decision to organise transport services at regional level was legitimate in that, for example, it was based on economic considerations, such as the commitment to achieving economies of scale.
- 58 Having regard to the foregoing considerations, the answer to the question referred is that both Article 1(3) of Directive 89/665 and Article 1(3) of Directive 92/13 must be interpreted as meaning that they do not preclude national legislation, such as that at issue in the main proceedings, which does not allow economic operators to bring an action against the decisions of a contracting authority relating to a tendering procedure in which they have decided not to participate on the ground that the legislation applicable to that procedure made the award to them of the contract concerned very unlikely.

However, it is for the competent national court to make a detailed assessment, taking account of all the relevant information characterising the context of the case brought before it, as to whether the application of that legislation in practice is liable to affect the right of the economic operators concerned to the right to effective judicial protection.

Costs

- 59 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 (Third Chamber) hereby rules:

Both 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 2007/66/EC of the European Parliament and of the Council of 11 December 2007, and Article 1(3) of Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, as amended by Directive 2007/66, must be interpreted as meaning that they do not preclude national legislation, such as that at issue in the main proceedings, which does not allow economic operators to bring an action against the decisions of a

contracting authority relating to a tendering procedure in which they have decided not to participate on the ground that the legislation applicable to that procedure made the award to them of the contract concerned very unlikely.

However, it is for the competent national court to make a detailed assessment, taking account of all the relevant information characterising the context of the case brought before it, as to whether the application of that legislation in practice is liable to affect the right of the economic operators concerned to the right to effective judicial protection.

[Signatures]