Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

18 December 2014*

(Reference for a preliminary ruling — Public service contracts — Directive 92/50/EEC — Articles 1(c) and 37 — Directive 2004/18/EC — First subparagraph of Article 1(8) and Article 55 — Concepts of 'service provider' and 'economic operator' — Public university hospital — Entity with legal personality and business and organisational autonomy — Principally non-profit-making activity — Institutional purpose of offering health services — Possibility of offering similar services on the market — Admission to participate in a tendering procedure for the award of a public contract)

In Case C-568/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Consiglio di Stato (Italy), made by decision of 28 June 2013, received at the Court on 6 November 2013, in the proceedings

Azienda Ospedaliero-Universitaria di Careggi-Firenze

v

Data Medical Service Srl,

intervening parties:

Regione Lombardia,

Bio-Development Srl,

THE COURT (Fifth Chamber),

composed of T. von Danwitz, President of the Chamber, C. Vajda, A. Rosas, E. Juhász (Rapporteur) and D. Šváby, Judges,

Advocate General: J. Kokott,

Registrar: V. Tourrès, Administrator,

having regard to the written procedure and further to the hearing on 15 October 2014,

after considering the observations submitted on behalf of:

— Azienda Ospedaliero-Universitaria di Careggi-Firenze, by P. Stolzi, avvocato,

— Data Medical Service Srl, by T. Ugoccioni, avvocato,

* Language of the case: Italian.

— Bio-Development Srl, by E. D'Amico and T. Ugoccioni, avvocati,

— the Italian Government, by G. Palmieri, acting as Agent, and by S. Varone, avvocato dello Stato,

— the European Commission, by G. Conte and A. Tokár, acting as Agents,

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

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 1(c) and 37 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 of the first subparagraph of Article 1(8) and Article 55 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).

2 The request has been made in proceedings between the Azienda Ospedaliero-Universitaria di Careggi-Firenze (university hospital, Careggi) ('the Azienda') and Data Medical Service Srl ('Data Medical Service'), concerning the lawfulness of exclusion of the first entity from a tendering procedure for the award of a public service contract.

Legal context

EU law

3 Article 1(c) of Directive 92/50 provided:

'[*S*]*ervice provider* shall mean any natural or legal person, including a public body, which offers services. …'

4 According to Article 37 of that directive:

'If, for a given contract, tenders appear to be abnormally low in relation to the service to be provided, the contracting authority shall, before it may reject those tenders, request in writing details of the constituent elements of the tender which it considers relevant and shall verify those constituent elements taking account of the explanations received.

The contracting authority may take into consideration explanations which are justified on objective grounds including the economy of the method by which the service is provided, or the technical solutions chosen, or the exceptionally favourable conditions available to the tenderer for the provision of the service, or the originality of the service proposed by the tenderer.

If the documents relating to the contract provide for its award at the lowest price tendered, the contracting authority must communicate to the Commission the rejection of tenders which it considers to be too low.'

5 Recital 1 in the preamble to Directive 2004/18 states that that directive, in the interests of clarity, recasts, in a single text, the previous directives applicable to public service, public supply and public works contracts, and is based on the Court's case-law.

6 Recital 4 in the preamble to that directive states:

‘Member States should ensure that the participation of a body governed by public law as a tenderer in a procedure for the award of a public contract does not cause any distortion of competition in relation to private tenderers.’

7 The first and second subparagraphs of Article 1(8) of that regulation provide:

‘The terms “contractor”, “supplier” and “service provider” mean any natural or legal person or public entity or group of such persons and/or bodies which offers on the market, respectively, the execution of works and/or a work, products or services.

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

8 Article 55 of Directive 2004/18, entitled ‘Abnormally low tenders’, is worded as follows:

‘1. If, for a given contract, tenders appear to be abnormally low in relation to the goods, works or services, the contracting authority shall, before it may reject those tenders, request in writing details of the constituent elements of the tender which it considers relevant.

Those details may relate in particular to:

(a) the economics of the construction method, manufacturing process or services provided;

(b) the technical solutions chosen and/or any exceptionally favourable conditions available to the tenderer for the execution of the work, for the supply of the goods or services;

(c) the originality of the work, supplies or services proposed by the tenderer;

(d) compliance with the provisions relating to employment protection and working conditions in force at the place where the work, service or supply is to be performed;

(e) the possibility of the tenderer obtaining State aid.

2. The contracting authority shall verify those constituent elements by consulting the tenderer, taking account of the evidence supplied.

3. Where a contracting authority establishes that a tender is abnormally low because the tenderer has obtained State aid, the tender can be rejected on that ground alone only after consultation with the tenderer where the latter is unable to prove, within a sufficient time-limit fixed by the contracting authority, that the aid in question was granted legally. Where the contracting authority rejects a tender in these circumstances, it shall inform the Commission of that fact.’

Italian law

9 It follows from Article 3 of Legislative Decree No 502 relating to reforms in the area of health (decreto legislativo n. 502 Riordino della disciplina in materia sanitaria) of 30 December 1992 (ordinary supplement to *GURI* No 305 of 30 December 1992), as interpreted by the Corte costituzionale (Italian Constitutional Court), that health care establishments are public economic entities which ‘perform their essentially technical functions under the legal form of public entities with commercial autonomy, on the basis of general instructions contained in regional health plans and implementation instructions which are communicated to them by the Giunte regionali [(regional councils)]’.

10 Under Article 3(1a) of that decree:

‘For the purpose of the pursuit of their institutional objectives, local health units shall be constituted as public-law establishments with legal personality and commercial autonomy; their organisation and functioning shall be governed by an atto aziendale [act defining the responsibilities relating to the management of the entity, in particular concerning the budget] under private law, in compliance with the principles and criteria provided for by regional provisions. The atto aziendale shall define the operational structures which have management and technical-professional autonomy, and which shall be required to submit detailed accounts.’

11 Directive 92/50 was transposed into Italian law by Legislative Decree No 157 of 17 March 1995 (ordinary supplement to *GURI* No 104 of 6 May 1995).

12 Under Article 2(1) of that decree:

‘The administrative bodies of the State, the regions, the autonomous provinces of Trentino and Bolzano, public territorial entities, other non-profit-making public entities, and entities governed by public law, irrespective of their designation, shall be considered to be contracting authorities.’

13 Article 5(2)(h) of that decree provides that it does not apply to: ‘public service contracts awarded to a public entity which is itself a contracting authority within the meaning of Article 2, on the basis of an exclusive right which it enjoys pursuant to legislative, regulatory or administrative provisions, on condition that those provisions are compatible with the Treaty.’

14 Directive 2004/18 was transposed into Italian law by Legislative Decree No 163/2006 of 12 April 2006 (ordinary supplement to *GURI* No 100 of 2 May 2006), which codifies the rules on public contracts.

15 Article 19(2) of that decree provides:

‘The present Code shall not apply to public service contracts awarded by a contracting authority or a contracting public entity to another contracting authority or to an association of contracting authorities on the basis of an exclusive right which they enjoy pursuant to published legislative, regulatory or administrative provisions, on condition that those provisions are compatible with the Treaty.’

16 Article 34(1) of that decree designates the persons authorised to take part in tendering procedures for the award of public contracts and is worded as follows:

‘The following persons shall be entitled to take part in tendering procedures for the award of public contracts, without prejudice to the restrictions expressly provided for:

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

(b) consortia of producers’ and workers’ cooperatives … and consortia of artisanal/handicraft businesses …;

(c) consortia, constituted as, inter alia, joint venture companies within the meaning of Article 2615b of the Civil Code, between individual contractors (including artisans), commercial companies or partnerships or production and labour cooperatives, in accordance with the provisions of Article 36;

(d) special-purpose groupings of competitors, consisting of the persons referred to in subparagraphs (a), (b) and (c) …;

(e) ordinary consortia of competitors referred to in Article 2602 of the Civil Code, between persons referred to in subparagraphs (a), (b) and (c) of the present paragraph, including in the form of a company within the meaning of Article 2615b of the Civil Code … ;

(e a) the groups of undertakings which are party to a network contract within the meaning of Article 3(4b) of Decree Law No 5 of 10 February 2009 … ;

(f) persons who have concluded a contract for the establishment of a European Economic Interest Grouping (EEIG) within the meaning of Legislative Decree No 240 of 23 July 1991 … ;

(f a) economic operators within the meaning of Article 3(22), established in other Member States and constituted in accordance with the legislation in force in their respective countries.'

17 Paragraph (f a) was included in Article 34(1) of Legislative Decree No 163/2006 by the adoption of Legislative Decree No 152 of 11 September 2008 (ordinary supplement to *GURI* No 231 of 2 October 2008), following infringement proceedings brought against the Italian Republic by the Commission, which had stated that the directives on public contracts do not allow the possibility of participation in invitations to tender to be restricted to certain categories of economic operators.

18 Articles 86 to 88 of Legislative Decree No 163/2006 provide for mechanisms to check for irregularities in tenders, on the basis of which the contracting authority may decide to exclude a tenderer from the procedure for the award of the contract at issue.

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

19 By a notice published on 5 October 2005, the Regione Lombardia (the Region of Lombardy) issued an invitation to tender for the award, on the basis of the best-value-for-money tender, of the three-year service contract for processing data for external quality control in relation to medicinal products. The Azienda, which is established and carries out its activities in the Region of Tuscany, participated in that invitation to tender and was classified in first place, principally as a result of the price at which it offered its services, equivalent to 59% lower than that of the second placed tenderer, Data Medical Service. Following an investigation into the potentially abnormal character of that tender, the contract was awarded to the Azienda by decision of the Regione Lombardia of 26 May 2006.

20 Data Medical Service contested the decision to award the contract before the Tribunale amministrativo regionale per la Lombardia (Regional Administrative Court of Lombardy), claiming that the successful tenderer should have been excluded on the ground that, in accordance with the applicable legislation, a public entity could not participate in an invitation to tender and that, in any event, its tender was abnormally low in view of the size of the discount offered.

21 By judgment of 24 November 2006, the Tribunale amministrativo regionale per la Lombardia upheld the first ground pleaded. On the basis of a combined reading of Article 5(2)(h) of Legislative Decree No 157/1995 and of Articles 19 and 34 of Legislative Decree No 163/2006, that court held that, even if those latter two provisions were, *ratione temporis*, not applicable to the present case, public entities such as the Azienda were formally prohibited from participating in tendering procedures for the award of public contracts, those entities being entitled only, under specified conditions, to be awarded contracts directly. As a public entity which has as its exclusive purpose the management of the public hospital in Florence, the Azienda could not operate under conditions of free competition with private persons.

22 The Azienda appealed against that judgment to the Consiglio di Stato (Council of State), the supreme administrative court in Italy.

23 The Consiglio di Stato points out first of all that, notwithstanding the fact that the contract at issue has in the meantime been performed in full, the Azienda retains an interest in securing recognition of its right to participate in tendering procedures for public contracts.

24 The Consiglio di Stato then goes on to point out that the first question raised in the present case concerns the precise definition of the concept of 'economic operator' for the purposes of EU law, and the possibility that this might include a public university hospital. Regarding the nature of those entities within the context of the 'aziendalizzazione' process, that is to say, the transition to a commercial model, the Consiglio di Stato points out that that process has resulted in the transformation of existing 'local health units', which were originally administrative authorities operating at municipal level, into entities with legal personality and commercial autonomy, namely organisational, financial, accounting and managerial autonomy, which has led some legal writers and national case-law to classify public health entities, including hospitals, as 'public economic entities'. However, the public nature of those entities is not in question. Their activity is not carried out principally with a view to making a profit and they have administrative powers, in the strict sense, particularly in matters relating to inspections and penalties.

25 The Consiglio di Stato questions, in those circumstances, whether it may always be asserted, as the Tribunal amministrativo regionale per la Lombardia has done, that there exists in Italian law an absolute prohibition on participation by such entities, as public economic entities, in invitations to tender as a 'straightforward competitor'. In this regard, it refers to the case-law of the Court, in particular to the judgments in *ARGE*, C-94/99, EU:C:2000:677; *CoNISMa*, C-305/08, EU:C:2009:807; and *Ordine degli Ingegneri della Provincia di Lecce and Others*, C-159/11, EU:C:2012:817, from which it follows that any entity which considers itself capable of performing a public contract has the right to participate, regardless of its status, whether governed by private law or by public law.

26 That case-law, the Consiglio di Stato states, is followed by a majority of Italian courts, which also have stressed that the list set out in Article 34 of Legislative Decree No 163/2006 cannot be regarded as exhaustive. The Consiglio di Stato takes the view that that case-law, both European Union and national, means that Article 5(2)(b) of Legislative Decree No 157/1995 and Article 34 of Legislative Decree No 163/2006 cannot be interpreted as precluding, a priori, the participation of hospitals in tendering procedures. Such a prohibition in principle would no longer serve any purpose.

27 However, according to the Consiglio di Stato, that does not amount to unconditionally authorising such entities to participate in tendering procedures for the award of public contracts. According to that court, that case-law has identified two limitations in that regard, the first being that the activity to which the tendering procedure relates must further the attainment of the institutional objectives of the public entity concerned, and the second being that there must be no specific provision of national law which prohibits that activity, in particular on the ground that competition might thereby be distorted.

28 With regard to the first limitation, the Consiglio di Stato takes the view that public hospitals, *a fortiori* in the case where they are university hospitals, also play a significant role in teaching and research, institutional objectives which it may be claimed correspond to the service concerned by the invitation to tender at issue in the case brought before it, namely data processing. Regarding the second limitation, the Consiglio di Stato considers that the right of an entity in receipt of public funds to participate freely in an invitation to tender raises the issue of equal treatment between disparate competitors, on the one hand those which must be active on the market and, on the other hand, those which can also rely on public funding and are thereby able to submit tenders that no persons governed by private law would ever have been in a position to submit. Consequently, it is necessary to identify corrective mechanisms designed to even out the disparities existing between the various economic operators at the outset, mechanisms which must go further than procedures to check the potentially abnormal character of the tenders.

29 In the light of those considerations, the Consiglio di Stato decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Does Article 1 of Directive [92/50], read also in the light of the later Article 1(8) of Directive [2004/18], preclude national legislation which was interpreted as excluding [the Azienda], by dint of the fact that it is a commercially-run hospital characterisable as a public economic entity, from participating in tendering procedures?

(2) Does EU law on public procurement — in particular, the general principles of freedom of competition, non-discrimination and proportionality — preclude national legislation under which a body such as [the Azienda], which receives public funding on a permanent basis and is directly contracted to provide a public service, is able to derive from that situation a decisive competitive advantage over rival economic operators, as demonstrated by the size of the discount offered, in circumstances in which corrective measures have not been put in place at the same time in order to prevent that kind of distortion of competition?'

The questions referred for a preliminary ruling

The first question

30 This question originates in the doubts expressed by the referring court as to whether the applicable Italian legislation, interpreted as containing a general prohibition precluding all public bodies, including, consequently, university hospitals such as the Azienda, from participating in tendering procedures for the award of public contracts, may be considered to be compatible with the relevant case-law of the Court in the field of public procurement.

31 By its first question, the referring court asks, in essence, whether Article 1(c) of Directive 92/50 precludes national legislation which excludes a public hospital, such as that at issue in the main proceedings, from participating in tendering procedures for the award of public contracts as a result of its status as a public economic entity.

32 It should be pointed out first of all, that, although the question posed by the referring court refers both to Article 1(c) of Directive 92/50 and to the first subparagraph of Article 1(8) of Directive 2004/18, the contract at issue in the main proceedings is, however, governed, *ratione temporis*, by Directive 92/50. It is apparent from paragraph 19 of the present judgment that the Regione Lombardia launched the tendering procedure at issue in the main proceedings by means of a notice published on 5 October 2005. Under Articles 80 and 82 of Directive 2004/18, however, that directive repealed Directive 92/50 only with effect from 31 January 2006. Thus, the public procurement procedure at issue in the main proceedings is governed by the legal rules which were in force on the date on which the notice of the invitation to tender was published.

33 Next, it should be noted that the possibility for public entities to participate in tendering procedures for public contracts, in parallel to the participation of private economic entities, is already evident from the wording of Article 1(c) of Directive 92/50, according to which 'service provider' is to mean any natural or legal person, including a public body, which offers services. Furthermore, such a possibility to participate was recognised by the Court in the judgment in *Teckal*, C-107/98, EU:C:1999:562, paragraph 51, and was repeated in the subsequent judgments in *ARGE*, EU:C:2000:677, paragraph 40; *CoNISMa*, EU:C:2009:807, paragraph 38; and *Ordine degli Ingegneri della Provincia di Lecce and Others*, EU:C:2012:817, paragraph 26.

34 The Court has also pointed out in this regard that one of the objectives of the EU rules on public procurement is to attain the widest possible opening-up to competition (see, to that effect, the judgment in *Bayerischer Rundfunk and Others*, C-337/06, EU:C:2007:786, paragraph 39), an opening-up which is also in the interest of the contracting authority concerned itself, which will thus have greater choice as to the tender which is most advantageous and most suited to the needs of the public authority in question. The effect of a restrictive interpretation of the concept of 'economic operator' would be that contracts concluded between contracting authorities and entities which are primarily non-profit-making would not be regarded as 'public contracts', could be awarded by mutual agreement and would not be covered by EU rules on equal treatment and transparency, something which would be at odds with the objective of those rules (see, to that effect, the judgment in *CoNISMa*, EU:C:2009:807, paragraphs 37 and 43).

35 The Court has therefore held that it follows from both the EU rules and the case-law that any person or entity which, in the light of the conditions laid down in a contract notice, believes that it is capable of carrying out the contract is eligible to submit a tender or to put itself forward as a candidate, regardless of whether it is governed by public law or private law, whether it is active as a matter of course on the market or only on an occasional basis (see, to that effect, the judgment in *CoNISMa*, EU:C:2009:807, paragraph 42).

36 Moreover, as is apparent from the wording of Article 26(2) of Directive 92/50, the Member States do, admittedly, have a discretion as to whether or not to allow certain categories of economic operators to provide certain services. They can regulate the activities of entities, such as universities and research institutes, which are non-profit-making and whose primary object is teaching and research. They can, inter alia, determine whether or not such entities are authorised to operate on the market, according to whether the activity in question is compatible with their objectives as an institution and those laid down in their statutes. However, if and to the extent that such entities are entitled to offer certain services in return for remuneration on the market, even occasionally, the Member States may not prevent those entities from participating in tendering procedures for the award of public contracts relating to the provision of those services. Such a prohibition would not be compatible with Article 1(a) and (c) of Directive 92/50 (see, in relation to the corresponding provisions of Directive 2004/18, the judgments in *CoNISMa*, EU:C:2009:807, paragraphs 47 to 49, and *Ordine degli Ingegneri della Provincia di Lecce and Others*, EU:C:2012:817, paragraph 27).

37 As the representative of the Italian Government pointed out during the hearing before the Court, public university hospitals such as that at issue in the main proceedings, being 'public economic entities', as defined at national level, are authorised to operate on the market for profit, in sectors compatible with their statutory and institutional duties. In the main proceedings, it appears, moreover, that the services which are the subject of the public contract at issue are not incompatible with the institutional and statutory objectives of the Azienda. In those circumstances, which it is for the referring court to assess, the Azienda, according to the Court's case-law cited in paragraph 36 of the present judgment, cannot be prevented from participating in the tendering procedure for that contract.

38 Consequently, the answer to the first question is that Article 1(c) of Directive 92/50 precludes national legislation which excludes a public hospital, such as that at issue in the main proceedings, from participation in tendering procedures for the award of public contracts as a result of its status as a public economic entity, if and in so far as that entity is authorised to operate on the market in accordance with its institutional and statutory objectives.

The second question

39 By its second question, the referring court asks, in essence, whether the provisions of Directive 92/50, and in particular the general principles of freedom of competition, non-discrimination and proportionality which underlie that directive, must be interpreted as precluding national legislation which allows a public hospital, such as that at issue in the main proceedings, to participate in a tendering procedure and to submit a tender which cannot be matched by any competitors as a result of the public funding which it receives, in circumstances in which corrective measures have not been put in place in order to prevent possible resulting distortions of competition.

40 In the context of the grounds for that question, the Consiglio di Stato expresses doubts as to whether the procedure for examining abnormally low tenders, referred to in Article 37 of Directive 92/50, may be considered to be an adequate method for preventing such distortions of competition.

41 In that regard, even if the referring court considers that it is desirable to identify corrective mechanisms designed to even out the disparities existing between the various economic operators at the outset and which should go further than procedures to check the potentially abnormal character of the tenders, it must be noted that the EU legislature, while being aware of the differences between competitors participating in a public contract, did not make provision for mechanisms other than those designed to check and possibly reject abnormally low tenders.

42 It must also be borne in mind that contracting authorities must treat economic operators equally and in a non-discriminatory manner and must act in a transparent manner.

43 However, the provisions of Directive 92/50 and the Court's case-law do not allow, a priori and without further consideration, a tenderer to be excluded from participation in a procedure for the award of a public contract on the sole ground that, as a result of public subsidies which it receives, it is able to submit tenders at prices which are significantly lower than those of unsubsidised tenderers (see, to that effect, the judgments in *ARGE*, EU:C:2000:677, paragraphs 25 to 27, and *CoNISMa*, EU:C:2009:807, paragraphs 34 and 40).

44 In certain specific circumstances, however, the contracting authorities are required, or at the very least permitted, to take into account the existence of subsidies, and in particular aid incompatible with the Treaty, in order, where appropriate, to exclude tenderers in receipt of such aid (see, to that effect, the judgments in *ARGE*, EU:C:2000:677, paragraph 29, and *CoNISMa*, EU:C:2009:807, paragraph 33).

45 In that regard, as the Commission stated during the hearing before the Court, the fact that the public entity concerned has separate accounts for its activities on the market and for its other activities may make it possible to establish whether a tender is abnormally low as a result of the effect of an element of State aid. However, the contracting authority may not conclude from the absence of such separate accounts that such a tender was made possible by the grant of a subsidy or State aid which is incompatible with the Treaty.

46 It should be pointed out also that it follows from the wording of the first and third paragraphs of Article 37 of Directive 92/50 that the possibility of rejecting an abnormally low tender is not limited solely to the case in which the low price proposed in that tender is explained by the grant of State aid which is unlawful or incompatible with the internal market. That possibility is more general in character.

47 First, it follows from the wording of that provision that the contracting authority is obliged, when examining tenders which are abnormally low, to request the tenderer to furnish the necessary explanations to prove that those tenders are genuine (see, to that effect, the judgment in *SAG ELV Slovensko and Others*, C-599/10, EU:C:2012:191, paragraph 28).

48 Accordingly, the existence of a proper exchange of views, at an appropriate time in the procedure for examining tenders, between the contracting authority and the tenderer, to enable the latter to demonstrate that its tender is genuine, constitutes a fundamental requirement of Directive 92/50, in order to prevent the contracting authority from acting in an arbitrary manner and to ensure healthy competition between undertakings (see, to that effect, the judgment in *SAG ELV Slovensko and Others*, EU:C:2012:191, paragraph 29).

49 Secondly, it should be noted that Article 37 of Directive 92/50 does not contain a definition of the concept of an 'abnormally low tender'. It is thus for the Member States and, in particular, the contracting authorities to determine the method of calculating an anomaly threshold constituting an 'abnormally low tender' within the meaning of that article (see, to that effect, the judgment in *Lombardini and Mantovani*, C-285/99 and C-286/99, EU:C:2001:640, paragraph 67).

50 That being the case, the EU legislature made clear in that provision that the abnormally low character of a tender must be assessed 'in relation to the service to be provided'. Thus, the contracting authority may, in the course of its examination of the abnormally low character of a tender, take into consideration, for the purpose of ensuring healthy competition, not only the situations set out in the second paragraph of Article 37 of Directive 92/50 but also all the factors that are relevant in the light of the service at issue (see, to that effect, the judgment in *SAG ELV Slovensko and Others*, EU:C:2012:191, paragraphs 29 and 30).

51 Consequently, the answer to the second question is that the provisions of Directive 92/50, and in particular the general principles of freedom of competition, non-discrimination and proportionality which underlie that directive, must be interpreted as not precluding national legislation which allows a public hospital, such as that at issue in the main proceedings, participating in a tendering procedure to submit a tender which cannot be matched by any competitors as a result of the public funding which it receives. However, in the course of the examination of the abnormally low character of a tender on the basis of Article 37 of that directive, the contracting authority may take into consideration the existence of public funding which such an entity receives in the light of the option to reject that tender.

Costs

52 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 (Fifth Chamber) hereby rules:

1. **Article 1(c) of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts precludes national legislation which excludes a public hospital, such as that at issue in the main proceedings, from participation in tendering procedures for the award of public contracts as a result of its status as a public economic entity, if and in so far as that entity is authorised to operate on the market in accordance with its institutional and statutory objectives.**

2. **The provisions of Directive 92/50, and in particular the general principles of freedom of competition, non-discrimination and proportionality which underlie that directive, must be interpreted as not precluding national legislation which allows a public hospital, such as that at issue in the main proceedings, participating in a tendering procedure to submit a tender which cannot be matched by any competitors as a result of the public funding which it receives. However, in the course of the examination of the abnormally low character of a**

tender on the basis of Article 37 of that directive, the contracting authority may take into consideration the existence of public funding which such an entity receives in the light of the option to reject that tender.

[Signatures]