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Press and Information

PRESS RELEASE No 92/08

16 December 2008

Judgment of the Court of Justice in Case C-213/07

Michaniki AE v. Ethniko Simvoulio Radiotileorasis and Ipourgos Epikratias

**COMMUNITY LAW LISTS EXHAUSTIVELY THE GROUNDS FOR EXCLUSION
FROM PARTICIPATION IN A PUBLIC WORKS CONTRACT BASED ON A
CONTRACTOR'S PROFESSIONAL QUALITIES**

A Member State may none the less provide for further exclusionary measures designed to ensure transparency of the procedure and equal treatment of tenderers

Greek legislation excludes contractors who are also involved in the media sector from the award of public contracts for public works, without affording them any possibility of showing that there is no risk to competition. However, intermediaries in the form of spouses or relatives are not concerned by that exclusion if they demonstrate that their participation in a procedure for the award of a public contract is the result of an autonomous decision which is dictated by their own interest.

In 2001, the Greek company Erga OSE AE announced an invitation to tender for the construction of embankments and technical infrastructure works for the new high-speed, two-track railway line between Corinth and Kiatas.

Michaniki AE and Ki Sarantopoulos AE participated in that procedure and the latter, which was subsequently taken over by Pantechniki, was awarded the contract in 2002.

In order to enter into the contract, Erga OSE asked the Ethniko Simvoulio Radiotileorasis (National Radio and Television Council) to issue a certificate attesting that there was no incompatibility for the award on the part of the main shareholder, Mr K. Sarantopoulos, a member of the board of directors and of the executive board of Pantechniki. Since the latter had shown that he was financially independent of his son, Mr G. Sarantopoulos, a member of the boards of directors of two Greek media undertakings, the certificate was issued.

Michaniki, a competitor of the successful candidate, applied to the Simvoulio tis Epikratias (Council of State) to have the certificate annulled, claiming that the Greek legislative provisions on the system of incompatibility are contrary to the Greek Constitution, which provides that a public contract cannot be awarded to undertakings whose owners, main shareholders, partners etc. are relatives or intermediaries of owners, main shareholders and partners of media undertakings.

The Simvoulio tis Epikratias referred to the Court of Justice various questions on the compatibility of Greek Law with the Directive on the procedures for the award of public works contracts¹.

The Court recalls first of all that the aim of the Directive is to open up public works contracts to competition and to avoid the risk of the public authorities indulging in favouritism. Consequently, that directive provides for various grounds for excluding contractors from participation, based on objective considerations of professional quality (honesty, solvency, economic and financial capacity). However, a Member State is able to provide for further grounds for exclusion, which may not however go beyond what is necessary to achieve the objective of the Directive. Taking account of the historical, legal, economic or social characteristics specific to it, the State is the best placed to identify situations which are liable to jeopardise the transparency of contracts and to distort competition. The Greek law at issue here seeks, in the context of the award of a public contract, to prevent a media undertaking or a public works contractor connected with such an undertaking or with persons owning or running it from using its position in the media sector in order to unlawfully influence the decision awarding the contract.

In view of those considerations, the Court declares that **the Directive** must be interpreted as **listing exhaustively the grounds for exclusion from participation in a public works contract, based on criteria of professional quality**. However, that directive does not preclude a Member State from providing, whilst **observing the principle of proportionality**, for further exclusionary measures designed to ensure transparency and the equal treatment of tenderers.

In those circumstances, Community law precludes a national provision which establishes an irrebuttable presumption of general incompatibility between the sector of the media and that of public contracts. A measure which does not grant contractors exercising an activity in the media sector or connected with a person involved in that sector the possibility of showing that there are no real risks for the transparency of the procedure and for competition between tenderers is incompatible with the principle of proportionality.

Unofficial document for media use, not binding on the Court of Justice.

Languages available: DE, EL, EN, ES, FR, IT

The full text of the judgment may be found on the Court's internet site

<http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=C-213/07>

It can usually be consulted after midday (CET) on the day judgment is delivered.

For further information, please contact Christopher Fretwell

Tel: (00352) 4303 3355 Fax: (00352) 4303 2731

*Pictures of the delivery of the judgment are available on EbS "Europe by Satellite",
a service provided by the European Commission, Directorate-General Press and
Communications,*

L-2920 Luxembourg, Tel: (00352) 4301 35177 Fax: (00352) 4301 35249

or B-1049 Brussels, Tel: (0032) 2 2964106 Fax: (0032) 2 2965956

¹ Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ L 199, p. 54) as amended by European Parliament and Council Directive 97/52/EC of 13 October 1997.