Reports of Cases

OPINION OF ADVOCATE GENERAL
BOBEK
delivered on 8 September 2016[1]

Case C-391/15

Marina del Mediterráneo, SL,
Marina del Mediterráneo Duquesa, SL,
Marina del Mediterráneo Estepona, SL,
Marina del Mediterráneo Este, SL,
Marinas del Mediterráneo Torre, SL,
Marina del Mediterráneo Marbella, SL,
Gómez Palma, SC,
Enrique Alemán, SA,
Cyes Infraestructuras, SA,
Cysur Obras y Medioambiente, SA
v
Consejería de Obras Públicas y Vivienda de la Junta de Andalucía,
Agencia Pública de Puertos de Andalucía,
Nassir Bin Abdullah and Sons, SL,
Puerto Deportivo de Marbella, SA,
Ayuntamiento de Marbella

(Request for a preliminary ruling from the Tribunal Superior de Justicia de Andalucía (High Court of Justice of Andalusia, Spain))

(Reference for a preliminary ruling — Public procurement — Award procedure — Decision of admission of a candidate — Alleged illegality — Preparatory act — Immediate or deferred review — Direct effect)

I – Introduction

1. Marina del Mediterráneo, SL and others (the applicants) applied for a public works concession contract for the expansion of a port in Spain. A second group of undertakings also applied for the contract. The applicants considered that the second group did not fulfil the conditions for submitting a bid. They therefore challenged the admission of the second group of undertakings to the tendering procedure by way of a special application in public procurement proceedings. However, the referring court informed the applicants that a contentious administrative appeal such as that of the applicants might be inadmissible on the grounds that its subject matter was a mere preparatory act, namely, the admission of a candidate.

1 — Original language: English.

2. In the present case, the Court is called upon to determine the standard set by EU law for the review of preparatory acts, such as a decision to admit an undertaking to submit a bid in a public procurement procedure. More particularly, does Directive 89/665/EEC[2] ('the Remedies Directive') require Member States to provide for *immediate* and *autonomous* review of *any* decision of the contracting authority or is it possible to *defer* review until a later stage of the award procedure?

II – Legal background

A – *EU law*

3. The Remedies Directive, as amended by Directive 2007/66/EC,[3] aims at ensuring the application of EU directives on public procurement by imposing obligations on Member States to provide for effective and speedy remedies in the case of infringement of EU law or of national rules implementing EU law.

4. Recital 2 of that directive states that 'the existing arrangements at both national and Community levels for ensuring their application are not always adequate to ensure compliance with the relevant Community provisions particularly at a stage when infringements can be corrected'.

5. Article 1 of the Remedies Directive reads as follows:

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

Contracts within the meaning of this Directive include public contracts, framework agreements, public works concessions and dynamic purchasing systems.

Member States shall take the measures necessary to ensure that, as regards contracts falling within the scope of Directive 2004/18/EC, 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 Community law in the field of public procurement or national rules transposing that law.

…

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

2 — Council Directive of 21 December 1989 on the coordination of 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).

3 — Directive of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665 and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts (OJ 2007 L 335, p. 31).

4 — OJ 2004 L 134, p. 114.

6. Article 2(1) requires Member States to:

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

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

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

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

7. Council Directive 92/13/EEC of 25 February 1992, as amended by Directive 2007/66, coordinates 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 telecommunication sectors.[5]

8. Article 1 of Directive 92/13 corresponds to Article 1 of Directive 89/665 but entails two differences: first, it applies to the sectors regulated by Directive 2004/17/EC[6] (instead of Directive 2004/18); second, it does not explicitly concern public works concessions.

9. Article 2(1) of Directive 92/13 also corresponds to a large extent to Article 2(1) of the Remedies Directive, but the former explicitly includes, under (b), the possibility to set aside discriminatory technical, economic and financial specifications that are to be found in the notice of contract, the periodic indicative notice and the notice on the existence of a system of qualification, whereas the latter does not.

B – *National law*

10. The administrative activity which is open to challenge is defined in Section 25(1) of Ley 29/1998 reguladora de la Jurisdicción Contencioso-administrativa (Law governing Administrative Courts), of 13 July 1998, which provides that: 'administrative appeal proceedings are admissible in respect of provisions of a general nature and express and implicit measures, whether definitive or preparatory, adopted by the public authority which bring an end to the administrative procedure, if they decide, directly or indirectly, the substantive issues, render it impossible to continue the procedure, render it impossible to conduct a defence or cause irreparable harm to legitimate rights or interests'.

5 — OJ 1992 L 76, p. 14.

6 — Directive 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).

11. Section 107(1) of Ley 30/1992 de Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo común (Law No 30/1992 on the legal provisions governing public authorities and ordinary administrative procedure) of 26 November 1992, as amended by Ley 4/1999 of 13 January 1999, limits access to administrative appeals in the following terms:

'The parties concerned may seek review of decisions and administrative acts which decide, directly or indirectly, the substance of the case, make it impossible to continue the procedure or to put up a defence, or cause irreparable harm to legitimate rights or interests, which may be based on any of the grounds of invalidity or annulment provided for in Sections 62 and 63 of this Law.

The parties concerned may challenge the remaining preparatory acts for consideration in the decision bringing the procedure to an end.'

12. Ley 30/2007 de Contratos del Sector Público (Law on Public Procurement) of 30 October 2007, as amended by Ley 34/2010 of 5 August 2010, establishes the rules relating to special applications which may be made in public procurement proceedings. Section 310(2) is the expression, in the context of public procurement, of the general rule laid down in Section 107(1) of the aforementioned Ley 30/1992. It provides that 'the following acts may be the subject of the application:

(a) Contract notices, specifications and contractual documents laying down the conditions which will govern the procurement procedure;

(b) Preparatory acts adopted in the tendering procedure, provided that they decide, directly or indirectly, the award of the contract, make it impossible to continue the procedure or to put up a defence, or cause irreparable harm to legitimate rights or interests. Acts of the procurement board which decide to exclude tenderers will be considered preparatory acts which make it impossible to continue the procedure;

(c) Award decisions adopted by the contracting authorities

III – The dispute in the main proceedings and the questions referred to the Court

13. The Agencia Pública de Puertos de Andalucía (Ports Agency of Andalusia) is a special purpose (ad hoc) entity with operational autonomy and its own legal personality. It forms part of the Consejería de Obras Públicas y Vivienda de la Junta de Andalucía (Department of Public Works and Housing of Andalusia).

14. The Ports Agency of Andalusia launched a tendering procedure for the award of a public works concession contract for the expansion of the port of La Bajadilla, in Marbella. In the course of the tendering procedure, the procurement board admitted the participation of two groups of undertakings: (i) Marina del Mediterráneo, SL and others, which is a 'union temporal de empresas' (temporary business association) operating under the name Marina internacional de Marbella and (ii) another temporary business association made up of the Ayuntamiento de Marbella (Marbella City Council), the municipal company Puerto Deportivo de Marbella, SA and the commercial company Nasir Bin Abdullah and Sons, SL

15. The decision of the procurement board to admit the second temporary business association to submit a bid was contested by the applicants before the Director Gerente de la Agencia Pública de Puertos de Andalucía (Head of the Ports Agency of Andalusia) by way of a special application in procurement proceedings (*recurso especial en materia de contratación*), lodged on 12 April 2011.

16. The applicants considered that there had been an infringement of EU and national legislation. In their view, the second temporary business association should not have been admitted as a tenderer, because (a) the Marbella City Council is a public authority that does not have the status of 'undertaking' to which national law refers when defining the term 'tenderer'; (b) the second temporary business association does not fulfil the requirements of economic and financial solvency; and (c) the Marbella City Council cannot be considered as an economic operator because that would distort the rules of free competition and equality of tenderers.

17. On 3 May 2011, the Head of the Ports Agency of Andalusia issued the contested decision dismissing the applicants' claims, holding that, first, public authorities may participate in a tendering procedure without undermining the principle of free competition and second, the solvency of the second temporary business association had been established.

18. Marina del Mediterráneo, SL and others then brought a contentious administrative appeal before the referring court on 5 July 2011. They seek annulment of the contested decision and of the measures that followed it, particularly the decision to award the contract to the second temporary business association. They also request to be declared as the sole tenderer and awarded compensation for the harm suffered.

19. By order of 19 February 2015, the referring court informed the parties that there might be grounds for inadmissibility of their contentious administrative appeal because national legislation precludes the review of merely preparatory acts. According to that national legislation, a decision of a procurement board which does not exclude a tenderer but which admits a tenderer to participate in the procurement procedure is not an act that may be challenged judicially.

20. By order of 9 July 2015, the Tribunal Superior de Justicia de Andalucía (High Court of Justice of Andalusia, Spain) stayed its proceedings and referred the following questions to the Court:

'(1) In the light of the principles of sincere cooperation and the effectiveness of directives, are Articles 1(1) and 2(1)(a) and (b) of Directive 89/665 to be interpreted as precluding national legislation such as Section 310(2) of Ley 30/2007, de 30 de octubre, de Contratos del Sector Público (now Section 40(2) RDLeg 3/2011, que aprueba el texto refundido de la Ley de Contratos del Sector Público), in so far as it prevents access to the special application in procurement proceedings in respect of the preparatory acts of the procurement board, such as the decision to admit a tender from a tenderer which, it is alleged, fails to comply with the provisions concerning proof of technical and economic solvency laid down in the national and EU legislation?

(2) If the reply to the first question is in the affirmative, do Articles 1(1) and 2(1)(a) and (b) of Directive 89/665 have direct effect?'

21. Marina del Mediterráneo, SL and others, the Department of Public Works and Housing of Andalusia, the Ports Agency of Andalusia, the Austrian, Italian and Spanish Governments and the European Commission submitted written observations. All of the participants to the written procedure except the Italian Government presented oral arguments at the hearing held on 29 June 2016.

IV – Assessment

22. Two preliminary issues have to be addressed at the outset. First, as stated at the hearing, the value of the public contract in this case is EUR 77 000 000. Therefore it appears that the contract value thresholds laid down in Article 7 of Directive 2004/18 and Article 16 of Directive 2004/17 have been met.

23. Second, the Spanish Government submits that the present request for a preliminary ruling should nevertheless be declared inadmissible because the Remedies Directive is only applicable to the contracts referred to in Directive 2004/18, which governs classic public sector procurement. It argues that the situation at hand instead falls within the scope of Directive 2004/17 (and is therefore governed by Directive 92/13) since Article 7(b) of Directive 2004/17 provides that it shall apply to activities relating to the exploitation of a geographical area for the purpose of the provision of airports and maritime or inland ports or other terminal facilities to carriers by air, sea or inland waterway.

24. It is up to the national court to determine, in full knowledge of the facts of the case, the details of the public contract at issue and the precise nature of the activity envisaged by that contract, which of the two directives — the Remedies Directive or Directive 92/13 — is applicable in the present case. In this Opinion, given that the referring court asked its questions expressly on the basis of the Remedies Directive, I will confine myself to the interpretation of that directive. However, it should also be kept in mind that the relevant provisions of both directives are, to a great extent, similar.

A – *Question 1*

25. The first question referred by the national court asks, in essence, whether the Remedies Directive requires the *immediate* review of *any* decision of the contracting authority, including preparatory acts such as the admission of a candidate to submit a bid in a tendering procedure.

26. In answering that question, this part proceeds as follows: after setting out some general observations (Section 1), I will explain why, in my opinion, the Remedies Directive generally permits the deferral of the review of mere preparatory acts of a contracting authority (Section 2). The decision to admit another competitor to an open competition would qualify as such a preparatory act (Section 3).

1. General considerations

27. First, the Spanish Government claims that the Court has already decided in *Commission* v *Spain*[7] that Section 310(2) of the Law on Public Procurement (or rather its legislative predecessor, worded in similar terms) is not contrary to the Remedies Directive.

28. In that case, the Commission argued that Spain had infringed the Remedies Directive by, inter alia, failing to 'allow review to be sought of all decisions adopted by the contracting authorities, including *all procedural measures, during the procedure for the award of public contracts*'. In rejecting that particular claim, the Court stated: 'the Commission has not established that that legislation does not provide adequate judicial protection for individuals harmed by infringements of the relevant rules of Community law or of the national rules transposing that law'.[8]

29. It is my understanding of *Commission* v *Spain* that the Court, without passing any judgment on the merits of the Commission's claim, simply dismissed it because the Commission had failed to adduce satisfactory evidence to prove the existence of a breach of EU law. Thus, that decision cannot be read, in my view, as a declaration of the compliance of Spanish law with EU law. That question was left open.

7 — See judgment of 15 May 2003, *Commission* v *Spain* (C-214/00, EU:C:2003:276).

8 — Judgment of 15 May 2003, *Commission* v *Spain* (C-214/00, EU:C:2003:276, paragraph 80).

30. Second, it should be stressed that the question asked in the present request for a preliminary ruling is not about the *exclusion* of review of preparatory acts. It concerns the possibility of *deferral* of review until a later stage. Under the relevant Spanish legislation, mere preparatory acts cannot be challenged autonomously by making the special (judicial) application in public procurement proceedings. As stated by the Spanish Government, this exclusion is meant to serve the objective of procedural economy. It is intended to avoid undue delays in the award procedure. However, it has also been pointed out that this exclusion does not prevent the assessment of preparatory acts at a later stage, when the final award decision is being reviewed.

31. Third, the first question of the referring court invokes only Article 1(1) and Article 2(1)(a) and (b) of the Remedies Directive. However Article 1(3) of the Remedies Directive is also relevant in the present case. There is a logical connection between the notion of a reviewable decision taken by the contracting authority and the issue of standing. Pursuant to Article 1(3) of the Remedies Directive, Member States shall ensure that review procedures are available at least to 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.

32. The question to be assessed in the following section is thus whether those three provisions, taken together, require *immediate* and *autonomous* review of *any* decision of the contracting authority, including preparatory acts such as the admission of a candidate to submit a bid.

2. The deferral of the review of preparatory acts under the Remedies Directive

33. It is true that, if taken to its literal limit, the second part of Article 1(3) could be interpreted as requiring that *any* decision taken in the course of an award procedure should be reviewable as long as the two conditions relating to standing are fulfilled: the applicant must (i) have an interest in obtaining a particular contract *and* (ii) have been or risk being harmed by an alleged infringement.

34. However, such an interpretation would have far-reaching consequences. Defining standing in such a broad and rather limitless way would mean that every single decision, however marginal and ancillary, could be immediately attacked, and the award procedure effectively halted. Yet, in my view, a reasonable balance must be struck between the different interests at stake in public procurement procedures,[9] namely, the right of access to court and judicial review to challenge aspects of the procedure, on the one hand, and effectiveness of the overall procedure and judicial expediency, on the other.

35. Admittedly, as claimed by the Commission, the Court has adopted a broad interpretation of the notion of 'decisions taken by contracting authorities'. The Court has stated that: Article 1(1) of the Remedies Directive does not lay down any restriction with regard to the nature and content of those decisions;[10] the scope of the judicial review cannot be interpreted restrictively;[11] and any act of the contracting authority adopted in relation to a public service contract within the material scope of public procurement directives and capable of producing legal effects constitutes a decision amenable to review within the meaning of Article 1(1).[12]

9 — See judgment of 11 September 2014, *Fastweb* (C-19/13, EU:C:2014:2194, paragraph 63); and order of 23 April 2015, *Commission* v *Vanbreda Risk & Benefits* (C-35/15 P(R), EU:C:2015:275, paragraphs 31 and 34).

10 — See judgment of 28 October 1999, *Alcatel Austria and Others* (C-81/98, EU:C:1999:534, paragraph 35).

11 — See judgment of 18 June 2002, *HI* (C-92/00, EU:C:2002:379, paragraph 61).

12 — See judgment of 11 January 2005, *Stadt Halle and RPL Lochau* (C-26/03, EU:C:2005:5, paragraph 34).

36. However, 'amenable to review' does not, from my perspective, necessarily amount to 'amenable to an *immediate* and *autonomous* review'. I do not think that the Remedies Directive requires Member States to provide for immediate review of every step of the award procedure, such as the admission of a candidate to tender. This follows from the wording, nature, evolution and purpose of the Remedies Directive.

37. First, it should be borne in mind that the relatively broad definition of standing in Article 1(3) of the Remedies Directive is preceded by an important qualification: 'Member States shall ensure that the review procedures are available, *under detailed rules which the Member States may establish*, at least to …' [13]

38. This wording, containing an explicit referral to the laws of the Member States, confirms the nature of the Remedies Directive as a tool of minimum harmonisation. The aim of the Remedies Directive is, as its title suggests, that of *coordinating* the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts. It does not expressly define the scope of the remedies which Member States must establish for that purpose. [14] It only lays down the minimum conditions to be satisfied by the review procedures established in national legal systems so as to ensure compliance with the requirements of EU law on public contracts. [15]

39. Accordingly, Member States enjoy a wide discretion in the choice of the procedural guarantees mentioned in the Remedies Directive. [16] In the absence of EU rules governing the matter, it is for each Member State, in accordance with Article 1(3) of the Remedies Directive and the principle of procedural autonomy of the Member States, to lay down *detailed* administrative and judicial procedures which safeguard the rights which individuals derive from EU law. However, Member States must exercise their discretion in accordance with the principle of effectiveness. They cannot therefore render the exercise of rights derived from EU law by an individual practically impossible or excessively difficult. [17]

40. In particular, the Court has accepted that domestic law can make the review of public procurement acts subject to certain conditions, such as a time limit beyond which it is no longer possible to challenge decisions of the contracting authority, [18] or other kinds of procedural limitations, including concentration of proceedings. [19]

41. By the same token, Member States may also, while exercising their procedural autonomy, provide for rules preventing applicants from challenging, at any time, certain acts in public procurement procedures, since the Remedies Directive does not impose specific timings for the conduct of review. [20] Far from requiring *immediate* review of *any* type of act during the award procedure, the directive only

13 — Emphasis added.

14 — See judgment of 18 June 2002, *HI* (C-92/00, EU:C:2002:379, paragraphs 58 to 59).

15 — See judgments of 27 February 2003, *Santex* (C-327/00, EU:C:2003:109, paragraph 47), and of 6 October 2015, *Orizzonte Salute* (C-61/14, EU:C:2015:655, paragraph 46).

16 — See judgments of 18 June 2002, *HI* (C-92/00, EU:C:2002:379, paragraph 62); of 9 December 2010, *Combinatie Spijker Infrabouw-De Jonge Konstruktie and Others* (C-568/08, EU:C:2010:751, paragraph 57); and of 6 October 2015, *Orizzonte Salute* (C-61/14, EU:C:2015:655, paragraph 44).

17 — See judgment of 6 October 2015, *Orizzonte Salute* (C-61/14, EU:C:2015:655, paragraph 46 and the case-law cited).

18 — See judgment of 12 December 2002, *Universale-Bau and Others* (C-470/99, EU:C:2002:746, paragraph 79).

19 — See judgment of 9 December 2010, *Combinatie Spijker Infrabouw-De Jonge Konstruktie and Others* (C-568/08, EU:C:2010:751).

20 — See judgment of 11 January 2005, *Stadt Halle and RPL Lochau* (C-26/03, EU:C:2005:5, paragraph 38).

states, in the second recital, that compliance with the relevant EU provisions must be ensured 'at a stage when infringements can be corrected'. That statement has been interpreted by the Court, in accordance with other linguistic versions, as meaning 'when infringements can *still* be rectified' or 'corrected'.[21]

42. Thus, if the second part of Article 1(3) of the Remedies Directive is considered in the light of its wording, broader context and the case-law of the Court, it does not appear to require immediate review of any potential illegality at any moment. Review can be carried out at a later stage, provided that the alleged illegality can still be rectified.

43. Second, the genesis and evolution of the directive indicate that the EU legislator did not intend to require immediate review for every single act adopted throughout the course of the award procedure.

44. In its original proposal, the Commission drafted Article 1(1) in the following way: 'Member States shall take the measures necessary to ensure, *at all stages of the contract award procedure*, effective administrative and/or judicial remedies …'[22] Following the Opinion of the European Parliament after its first reading, the Commission kept a similar formulation in its amended proposal.[23] It could be argued that if the original wording had been retained, it would indeed mean that any act adopted during the award procedure should be immediately challengeable. However, as the Council ultimately abandoned the requirement 'at all stages of the contract award procedure', it seems that the final legislative intent was rather the opposite.

45. In addition, this legislative intent has not changed over time, as illustrated by Directive 2007/66, which amended the Remedies Directive. Indeed, Directive 2007/66 did not single out any particular weaknesses in the review mechanisms offered by Member States *before* the award decision. Directive 2007/66 primarily provided for a minimum standstill period starting immediately after the decision to award the contract in order to avoid a rush to sign the contract and to ensure the effective review of the award decision itself.

46. Third, both in written observations as well as at the oral hearing, much was said about the purpose of the Remedies Directive. Would the overall purpose, or the *effet utile*, of the Remedies Directive be impaired if *any* single act adopted during the award procedure could (or could not) be immediately challenged?

47. The answer to that question naturally depends on what *the* purpose of the Remedies Directive is. It will not come as a surprise that the specific purpose of the Remedies Directive is to provide undertakings with effective remedies, so that, as stated in the recitals to the directive, they are not deterred from submitting tenders because of a lack of remedial protection, and to provide for stronger guarantees of transparency and non-discrimination in procurement procedures.

48. However, as in any other area of law, any procedure and procedural rights guaranteed thereby must remain linked to the substance and the overall purpose of the procedure. Procedural rights should not be allowed to mutate into a set of free-floating rights, cut loose from any discernible connection to the legal position of the concrete individual. Put in a metaphorical nutshell: procedure may be a good servant, but a bad master.

21 — See judgments of 28 October 1999, *Alcatel Austria and Others* (C-81/98, EU:C:1999:534, paragraph 33); of 12 December 2002, *Universale-Bau and Others* (C-470/99, EU:C:2002:746, paragraph 74); and of 11 January 2005, *Stadt Halle and RPL Lochau* (C-26/03, EU:C:2005:5, paragraph 39). Emphasis added.

22 — COM(87) 134 final (OJ 1987 C 230, p. 6). Emphasis added.

23 — COM(88) 733 final (OJ 1989 C 15, p. 8): 'Member States shall take the measures necessary to ensure, *at all stages of the procedure for the award of public contracts*, that any contractor … taking part in a procedure for the award of a public … contract, or any third person entitled to tender for such an award, can seek effective and rapid administrative and judicial remedies in respect of any decision by a contracting authority … which infringes Community or national rules on public procurement' (emphasis added).

49. In my opinion, the Remedies Directive and the rights it sets out are not ends in themselves. They are a means to an end: an advised, fair, competitive, transparent and non-discriminatory decision on the award of a public contract, delivered, if possible, in a reasonably speedy manner. Restated in such general terms, it is apparent that in order to achieve that end, a balance must be struck between, on the one hand, access to effective judicial review and, on the other, conclusion of a contract within a reasonable time frame.

50. If, as suggested by the Commission, it ought to be possible to judicially challenge any act at any time, the speed of public procurement procedures (which arguably in a number of Member States is not currently among the fastest administrative procedures [24]) would hardly improve. Furthermore, the possibility of attacking any preparatory act individually would not actually lead to increased effective judicial protection but rather congestion of the system. [25] As the Court itself made clear, the full implementation of the objective sought by the Remedies Directive would be undermined if candidates and tenderers were allowed to invoke, *at any stage of the award procedure*, infringements of the rules of public procurement, thus obliging the contracting authority to restart the entire procedure in order to correct such infringements. [26]

51. Lastly, when seeking a reasonable balance between the conflicting interests of unfettered access to judicial review, on the one hand, and judicial economy and overall effectiveness of the procedure, on the other, it might be useful to recall that neither EU law, nor Member States' legal systems in general, [27] require immediate review of preparatory acts.

52. As far as preparatory acts adopted by the European Union are concerned, whilst measures of a purely preparatory character may not themselves be the subject of an application for a declaration that they are void, any legal defects therein may be relied upon in an action directed against the definitive act for which they represent a preparatory step. [28]

53. Equally, as far as Member States are concerned, the Court has held, in the context of domestic acts that have been taken during an award procedure, that national law should safeguard the possibility of raising pleas in law alleging a breach of EU law by a prior decision of the contracting authority in support of applications for review of other decisions of the contracting authority. [29]

54. In conclusion, I do not think that national rules that defer the judicial review of preparatory acts until a later stage should be per se considered incompatible with the Remedies Directive, subject to the condition that effective review of those acts is made available at a later stage and at the very least when the award decision — 'the most important decision of the contracting authority' [30] — is made.

24 — For a general comparative overview, see, for example, the individual country reports and the general report in Neergaard, U., et al. (eds), *Public Procurement Law: Limitations, Opportunities and Paradoxes: The XXVI FIDE Congress in Copenhagen 2014, Congress Publications Vol. 3*, DJØF Publishing, Copenhagen, 2014; also, Delvolvé, P., (ed.), 'Le contentieux des contrats publics en Europe', *Revue française de droit administratif*, 2011, No 1, p. 1 et seq.

25 — Thus not really limiting propositions that complex procedures 'make building a bungalow in the 20th century slower than building a cathedral in the 12th century' to the realm of political satire ('Yes Minister', Series 1, Episode 1: Open Government, first aired on BBC on 25 February 1980).

26 — See judgment of 12 December 2002, *Universale-Bau and Others* (C-470/99, EU:C:2002:746, paragraph 75).

27 — See, for instance, for France: Guyomar, M., and Seiller, B., *Contentieux administratif*, 3rd ed., Dalloz, 2014, p. 295 et seq.; for Germany: Maurer, H., *Allgemeines Verwaltungsrecht*, 12th ed., Verlag C.H. Beck, Munich, 1999, p. 181 et seq. and p. 480 et seq.; for Italy: Gallo, C.E., *Manuale di Giusitizia Amministrativa*, 6th ed., G. Giappichelli Editore, Turin, 2012, p. 143 et seq.; for Spain, García de Enterría, E., and Fernández, T.R., *Curso de Derecho Administrativo I*, 15th ed., Civitas, 2011, p. 595 et seq.

28 — See judgments of 11 November 1981, *IBM* v *Commission* (60/81, EU:C:1981:264, paragraph 12), and of 18 March 1997, *Guérin automobiles* v *Commission* (C-282/95 P, EU:C:1997:159, paragraph 34).

29 — See judgment of 27 February 2003, *Santex* (C-327/00, EU:C:2003:109, paragraphs 64 to 65).

30 — See judgment of 28 October 1999, *Alcatel Austria and Others* (C-81/98, EU:C:1999:534, paragraph 38). Also, pursuant to recital 13 of Directive 2007/66, an illegal direct award of contracts amounts to the 'most serious breach of Community law in the field of public procurement'.

3. A decision to admit a participant to the tendering procedure

55. If the deferral of review of certain types of preparatory acts is deemed compatible with the Remedies Directive, the next key question is determining what types of acts may be deferred.

56. In my opinion, the dividing line between acts which have to be immediately reviewable and those which do not, should be between acts which have *adverse legal effects* on undertakings and those that do not produce such effects. Immediate review must be provided for the former but does not necessarily have to be provided for the latter.

57. In *Stadt Halle*, the Court already distinguished between mere preparatory acts that are not amenable to review — such as preliminary studies of the market or acts which are purely preparatory and form part of the internal reflections of the contracting authority [31] — and decisions by the contracting authority that must be challengeable. It held in particular that the latter kinds of decisions are those that are *capable of producing legal effects*. The Court did not provide further details of that holding in the context of that case. [32]

58. Developing the approach of the Court in *Stadt Halle* further, I would suggest that, under the Remedies Directive, Member States are obliged to provide for immediate review of unlawful acts that adversely affect the legal position of a would-be tenderer in such a way that it makes it excessively difficult or impossible for that tenderer to meaningfully further participate in a tendering procedure, thus compromising the transparency of, and fair competition within, the tendering procedure.

59. That would notably be the case when an undertaking can no longer effectively take part in the competition or, if it still can, where the competition will be significantly distorted as a result of the disputed act. [33] In *Grossmann Air Service*, the Court held that a person should immediately seek review of an allegedly discriminatory decision of the contracting authority determining the specifications of an invitation to tender in so far as it effectively disqualifies him from participating in the award procedure. Making a person wait until the notification of the decision awarding the contract before being able to challenge the legality of the specifications was found not to be in keeping with the objectives of speed and effectiveness of the Remedies Directive. Such a delay in the commencement of review procedures was held to impair the effective implementation of the directives on the award of public contracts. [34]

60. When specifically applied to the decision to admit a candidate to submit a bid, it appears that such a decision does not adversely affect the legal situation of the other candidates, especially in an open procedure where competition must be as broad as possible.

61. In this regard, adverse *legal* effects that have immediate repercussions on the legal position of an undertaking are to be distinguished from mere *factual* implications for an undertaking partaking in a tender. I readily acknowledge that the decision to admit another competitor to an open competition may have some factual repercussions on the position of other competitors. They might be obliged to react in some ways and possibly to adapt their strategy. But, unless all public procurement rules are construed as maxims of objective, abstract legality, that may be enforced by any would-be competitor as their subjective right, the decision to admit a candidate does not (yet) adversely affect their legal position.

31 — See judgment of 11 January 2005, *Stadt Halle and RPL Lochau* (C-26/03, EU:C:2005:5, paragraph 35).

32 — See judgment of 11 January 2005, *Stadt Halle and RPL Lochau* (C-26/03, EU:C:2005:5, paragraph 34).

33 — See judgment of 12 February 2004, *Grossmann Air Service* (C-230/02, EU:C:2004:93).

34 — See judgment of 12 February 2004, *Grossmann Air Service* (C-230/02, EU:C:2004:93, paragraphs 37 to 38).

62. Finally, the deferral of the review of a decision to admit a candidate finds further support in the fact that the distinction between selection criteria and award criteria seems to be gradually vanishing. In open procedures, the new public procurement directives explicitly allow the examination of the tenders before verifying the absence of grounds for exclusion and the fulfilment of the selection criteria.[35] Also, certain elements that are usually part of the selection procedure of candidates, such as the organisation, qualification and experience of staff, can now be assessed at the award stage.[36]

63. It would therefore go also against the more recent approach of the EU legislator to hold that autonomous review of the decision to admit a candidate, separate from the review of the decision to award a contract, should follow from the existence of a separate, autonomous step in the award procedure if the two steps are actually getting closer.[37]

64. For these reasons, I am of the opinion that the Remedies Directive does not oblige a Member State to provide for immediate and autonomous review of a decision to admit another competitor to an open public procurement procedure. However, the Member State's rules must guarantee that a plea of illegality relating to that decision can be made in support of an action against the final decision awarding the contract taken on the basis of prior decisions to admit candidates.

65. As for Section 310(2) of the Spanish Law on Public Procurement, I note that it makes a distinction between two types of preparatory acts adopted in tendering procedures: (i) those that decide, directly or indirectly, the award of the contract, make it impossible to continue the procedure or to put up a defence, or cause irreparable harm to legitimate rights or interests; and (ii) others that do not fulfil any of those three criteria. The former may be subject to immediate review through the special application in procurement proceedings. The latter may not.

66. It is not up to the Court to interpret national law in order to determine whether the entirety of Section 310(2) and all potential preparatory acts that might fall within or beyond that provision are compatible with EU law. The answer suggested in this Opinion relates only to one type of preparatory act: a decision to admit a competitor to an open public procurement procedure. As for other preparatory acts that can be adopted under Spanish law, it is a matter for the national court to decide *in concreto* whether Section 310(2) hinders the immediate review of preparatory acts that produce adverse legal effects on undertakings.

67. Therefore, I am of the opinion that Article 1(1), Article 1(3) and Article 2(1) of the Remedies Directive do not preclude national legislation, such as that at issue in the main proceedings, provided that:

— the national legislation does not hinder immediate review of preparatory acts that produce adverse legal effects on undertakings;

— a plea of illegality of preparatory acts that do not produce adverse legal effects on undertakings, such as a decision to admit a candidate to a tendering procedure, can be made in support of an action against the final decision awarding the contract taken on the basis of those preparatory acts.

35 — See notably Article 56(2) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2014/18/EC (OJ 2014 L 94, p. 65). See also Article 76(7) of Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2014/17/EC (OJ 2014 L 94, p. 243).

36 — See Article 67(2)(b) of Directive 2014/24 and Article 82(2)(b) of Directive 2014/25.

37 — In its explanatory memorandum on the draft directive, the Commission stated that 'the distinction between selection of tenderers and award of the contract which is often a source of errors and misunderstandings has been made flexible' (Proposal for a directive of the European Parliament and of the Council on public procurement, COM(2011) 896 final, p. 9).

B – *Question 2*

68. In view of my suggested answer to the first question posed by the referring court, there is, at least according to the express formulation of the questions by the referring court, no need to provide an answer to the second question. However, for the sake of completeness and in order to fully assist the Court, my concise answer to the second question, concerning the direct effect of Articles 1(1) and 2(1)(a) and (b) of the Remedies Directive, would be as follows:

69. In *Koppensteiner*, the Court has already held that Articles 1(1) and 2(1)(b) of the Remedies Directive are unconditional and sufficiently clear as to create rights for individuals on which they may rely.[38] Thus, those provisions undoubtedly have direct effect.

70. In view of the clear and precise wording of Article 2(1)(a), as well as its functional proximity to Article 2(1)(b), I see no reason why the same conclusion should also not apply to Article 2(1)(a).

71. Thus, in my view, all three provisions, namely Articles 1(1) and 2(1)(a) and (b) of the Remedies Directive, have direct effect.

C – *A post scriptum*

72. The Remedies Directive requires effective review, but not necessarily uniform review. A balance needs to be struck between unfettered access to courts during the award procedure and procedural and judicial economy in order to guarantee *effective* judicial protection. What ultimately matters is effective and swift review of the award decision itself, in the course of which all prior steps may be called into question to ensure that any illegality can be fixed in due time.

73. The Remedies Directive thus sets a minimal threshold. For the reasons set out above, I do not think that the obligation to make any decision of the contracting authority subject to immediate and autonomous review is necessary to meet that minimum standard.

74. Indeed a number of models are conceivable which would comply with the minimum standards laid down by the Remedies Directive: a Member State may choose to concentrate review as much as possible to one point of time, in one final decision. Conversely, another Member State may decide to allow for review of every individual step of the procedure, but then exclude those issues already dealt with previously from the potential review of the final decision. There is thus some flexibility, providing that there is effective and swift judicial review of all of the steps of the award procedure at some stage.

75. At the same time, the fact that Member States are not obliged to do something under a minimal harmonisation threshold in no way prevents them from doing so. In particular, Member States are certainly not precluded from providing for more extensive remedies, including autonomous and immediate judicial review of preparatory acts that may be adopted in the course of an award procedure, should they choose to do so.

38 — See judgment of 2 June 2005, *Koppensteiner* (C-15/04, EU:C:2005:345, paragraphs 38 to 39).

V – Conclusion

76. In the light of the foregoing considerations, I recommend to the Court to answer Question 1 referred to it by the Tribunal Superior de Justicia de Andalucía (High Court of Justice of Andalusia, Spain) as follows:

Article 1(1), Article 1(3) and Article 2(1) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts do not preclude national legislation, such as that at issue in the main proceedings, provided that:

— the national legislation does not hinder immediate review of preparatory acts that produce adverse legal effects on undertakings;

— a plea of illegality of preparatory acts that do not produce adverse legal effects on undertakings, such as a decision to admit a candidate to a tendering procedure, can be made in support of an action against the final decision awarding the contract taken on the basis of those preparatory acts.