

JUDGMENT OF THE COURT (Third Chamber)

28 January 2010*

In Case C-406/08,

REFERENCE for a preliminary ruling under Article 234 EC from the High Court of Justice (England and Wales), Queen's Bench Division (United Kingdom), made by decision of 30 July 2008, received at the Court on 18 September 2008, in the proceedings

Uniplex (UK) Ltd

v

NHS Business Services Authority,

THE COURT (Third Chamber),

composed of J.N. Cunha Rodrigues (Rapporteur), President of the Second Chamber, acting for the President of the Third Chamber, P. Lindh, A. Rosas, U. Lõhmus and A. Ó Caoimh, Judges,

* Language of the case: English.

Advocate General: J. Kokott,
Registrar: R. Şereş, Administrator,

having regard to the written procedure and further to the hearing on 24 September 2009,

after considering the observations submitted on behalf of:

- Uniplex (UK) Ltd, by M. Sheridan, Barrister, and A. Stanic, Solicitor,

- NHS Business Services Authority, by R. Williams, Barrister,

- the United Kingdom Government, by I. Rao, acting as Agent, and K. Smith, Barrister,

- the German Government, by M. Lumma and J. Möller, acting as Agents,

- Ireland, by D. O'Hagan, acting as Agent, and A. Collins SC,

— the Commission of the European Communities, by E. White and M. Konstantinidis, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 29 October 2009,

gives the following

Judgment

- ¹ This reference for a preliminary ruling concerns the interpretation 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 Council Directive 92/50/EEC of 18 June 1992 (OJ 1992 L 209, p. 1) ('Directive 89/665'), with regard to the date from which the period for bringing proceedings starts to run in public procurement cases.
- ² The reference has been made in the context of a dispute between Uniplex (UK) Ltd ('Uniplex') and NHS Business Services Authority ('NHS') concerning the conclusion of a framework agreement.

Legal context

Community legislation

- 3 Article 1(1) of Directive 89/665 provides:

‘The Member States shall take the measures necessary to ensure that, as regards contract award procedures falling within the scope of [Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (OJ, English Special Edition 1971 (II), p. 682)], [Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts (OJ 1977 L 13, p. 1)], and [Directive] 92/50/EEC, 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 the following Articles and, in particular, Article 2(7), on the grounds that such decisions have infringed Community law in the field of public procurement or national rules implementing that law.’

- 4 Under Article 2(1) of Directive 89/665:

‘The Member States shall 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.’

5 Article 41(1) and (2) 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) provides:

‘1. Contracting authorities shall as soon as possible inform candidates and tenderers of decisions reached concerning the conclusion of a framework agreement, the award of the contract or admittance to a dynamic purchasing system, including the grounds for any decision not to conclude a framework agreement or award a contract for which there has been a call for competition or to recommence the procedure or implement a dynamic purchasing system; that information shall be given in writing upon request to the contracting authorities.

National legislation

- 6 Regulation 47(7)(b) of the Public Contracts Regulations 2006 ('the 2006 Regulations'), adopted in order to implement Directive 89/665 into domestic law, provides:

'Proceedings under this regulation must not be brought unless —

...

- (b) those proceedings are brought promptly and in any event within three months from the date when grounds for the bringing of the proceedings first arose unless the Court considers that there is good reason for extending the period within which proceedings may be brought.'

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

- 7 Uniplex, a company established in the United Kingdom, is the sole distributor in that Member State of haemostats manufactured by Gelita Medical BV, a company established in the Netherlands.
- 8 NHS is part of the National Health Service, the State-owned and -operated public health service in the United Kingdom. It is a contracting authority for the purposes of Directive 2004/18.

- 9 On 26 March 2007 NHS launched a restricted tendering procedure for the conclusion of a framework agreement for the supply of haemostats. A notice to that effect was published in the *Official Journal of the European Union* on 28 March 2007.
- 10 On 13 June 2007, NHS issued an invitation to tender to five suppliers, including Uniplex, which had expressed interest in that framework agreement. Tenders were to be submitted by 19 July 2007.
- 11 The award criteria, with the relevant weighting to be given to each, set out in the tendering documentation sent to the tenderers, were as follows: price and other cost effectiveness factors (30%); quality and clinical acceptability (30%); product support and training (20%); delivery performance and capability (10%); product range/development (5%); and environmental/sustainability (5%).
- 12 Uniplex submitted its tender on 18 July 2007.
- 13 On 22 November 2007, NHS sent to Uniplex a letter indicating that it had decided to conclude a framework agreement with three tenderers. Uniplex was notified that it would not be awarded a framework agreement, as it had obtained the lowest marks of the five tenderers which had been invited to submit, and which had submitted, bids. That letter set out the award criteria, with the corresponding weighting, and indicated the names of the successful tenderers, the range of the successful scores and Uniplex's evaluated score.
- 14 According to that letter, the range of the successful scores was between 905.5 and 971.5, whereas Uniplex had obtained a score of 568.

- 15 The letter of 22 November 2007 also informed Uniplex of its right to challenge the decision to conclude the framework agreement in question, of the mandatory 10-day standstill period that would apply from the date of notification of that decision to conclusion of the framework agreement, and of Uniplex's entitlement to seek an additional debriefing.
- 16 Uniplex requested a debriefing by e-mail dated 23 November 2007.
- 17 NHS replied on 13 December 2007 by providing details of its approach to the evaluation of the award criteria as to characteristics and relative advantages of the successful tenders in relation to Uniplex's tender.
- 18 That letter stated, *inter alia*, first, that Uniplex had been given a score of zero for price and other cost effectiveness factors because it had submitted its list prices. All the other tenderers had offered discounts on their list prices. Secondly, with respect to the delivery performance and capability criterion, all tenderers which were new to the haemostats market in the United Kingdom received a score of zero for the sub-criterion relating to customer base in the United Kingdom.
- 19 On 28 January 2008, Uniplex sent NHS a letter before action alleging a number of breaches of the 2006 Regulations. Uniplex claimed in that letter that time did not start

to run for the bringing of proceedings until 13 December 2007. Uniplex requested a reply from NHS by 13 February 2008, but added that if NHS took the view that time did not run from that date, it should reply by 6 February 2008.

- 20 By letter dated 11 February 2008, NHS notified Uniplex that there had been a change of circumstances. It had been discovered that the bid of Assut (UK) Ltd was non-compliant and that B. Braun UK Ltd, which had been placed fourth under the evaluation of tenders, had been awarded a position on the framework agreement in place of Assut (UK) Ltd.
- 21 NHS responded to Uniplex's letter before action by letter dated 13 February 2008, denying the various allegations made by Uniplex. In that letter, NHS also asserted, as a preliminary point, that the events giving rise to Uniplex's complaints had occurred no later than 22 November 2007, which was the date on which the decision not to include Uniplex in the framework agreement had been communicated to it. NHS asserted that 22 November 2007 was the latest date from which time began to run for the purposes of Regulation 47(7)(b) of the 2006 Regulations.
- 22 Uniplex responded by letter on 26 February 2008. In that letter, it continued to maintain that the period for bringing proceedings under the 2006 Regulations did not begin to run until 13 December 2007.
- 23 On 12 March 2008, Uniplex brought proceedings before the High Court of Justice (England and Wales), Queen's Bench Division, inter alia seeking, first, a declaration that NHS had breached the applicable public procurement rules and, second, damages.

The High Court of Justice (England and Wales), Queen's Bench Division, decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'Where an economic operator is challenging in national proceedings the award of a framework agreement by a contracting authority following a public procurement exercise in which he was a tenderer and which was required to be conducted in accordance with Directive 2004/18/EC (and applicable implementing national provisions), and is in those proceedings seeking declarations and damages for breach of applicable public procurement provisions as regards that exercise and award:

- (a) is a national provision such as Regulation 47(7)(b) of the Public Contracts Regulations 2006 which states that those proceedings are to be brought promptly and in any event within three months from the date when grounds for the bringing of the proceedings first arose, unless the Court considers that there is good reason for extending the period, to be interpreted, in light of Directive 89/665/EEC, Articles 1 and 2, and the Community-law principle of equivalence and the Community-law requirement for effective legal protection, and/or the principle of effectiveness, and having regard to any other relevant principles of EC law, as conferring an individual and unconditional right upon the tenderer against the contracting authority such that the time for the bringing of proceedings challenging such a tender exercise and award starts running as from the date when the tenderer knew or ought to have known that the procurement procedure and award infringed EC public procurement law or as from the date of breach of the applicable public procurement provisions; and

- (b) in either event how is a national court then to apply (i) any requirement for proceedings to be brought promptly and (ii) any discretion as to extending the national limitation period for the bringing of such proceedings?

The questions referred

The first question

- 25 By its first question, the national court asks, in essence, whether Article 1 of Directive 89/665 requires that the period for bringing proceedings seeking to have an infringement of the public procurement rules established or to obtain damages for the infringement of those rules starts to run from the date of the infringement of those rules or from the date on which the claimant knew, or ought to have known, of that infringement.
- 26 The objective of Directive 89/665 is to guarantee the existence of effective remedies for infringements of Community law in the field of public procurement or of the national rules implementing that law, so as to ensure the effective application of the directives on the coordination of public procurement procedures. However, Directive 89/665 contains no provision specifically covering time-limits for the applications for review which it seeks to establish. It is therefore for the internal legal order of each Member State to establish such time-limits (Case C-470/99 *Universale-Bau and Others* [2002] ECR I-11617, paragraph 71).
- 27 The detailed procedural rules governing the remedies intended to protect rights conferred by Community law on candidates and tenderers harmed by decisions of contracting authorities must not compromise the effectiveness of Directive 89/665 (*Universale-Bau and Others*, paragraph 72).
- 28 It is for that reason appropriate to determine whether, in the light of the purpose of Directive 89/665, national legislation such as that at issue in the main proceedings does not adversely affect rights conferred on individuals by Community law (*Universale-Bau and Others*, paragraph 73).

29 In that regard, it should be recalled that Article 1(1) of Directive 89/665 requires Member States to guarantee that unlawful decisions of contracting authorities can be subjected to effective review which is as swift as possible (*Universale-Bau and Others*, paragraph 74).

30 However, the fact that a candidate or tenderer learns that its application or tender has been rejected does not place it in a position effectively to bring proceedings. Such information is insufficient to enable the candidate or tenderer to establish whether there has been any illegality which might form the subject-matter of proceedings.

31 It is only once a concerned candidate or tenderer has been informed of the reasons for its elimination from the public procurement procedure that it may come to an informed view as to whether there has been an infringement of the applicable provisions and as to the appropriateness of bringing proceedings.

32 It follows that the objective laid down in Article 1(1) of Directive 89/665 of guaranteeing effective procedures for review of infringements of the provisions applicable in the field of public procurement can be realised only if the periods laid down for bringing such proceedings start to run only from the date on which the claimant knew, or ought to have known, of the alleged infringement of those provisions (see, to that effect, *Universale-Bau and Others*, paragraph 78).

33 This conclusion is supported by the fact that Article 41(1) and (2) of Directive 2004/18, which was in force at the time of the facts in the main proceedings, requires contracting authorities to notify unsuccessful candidates and tenderers of the reasons for the decision concerning them. Such provisions are consistent with a system of limitation periods under which those periods start to run from the date on which the claimant

knew, or ought to have known, of the alleged infringement of the provisions applicable in the field of public procurement.

³⁴ The same conclusion is also supported by the amendments made to Directive 89/665 by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC 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), even though the period for transposition of that directive did not expire until after the facts in the main proceedings had occurred. Article 2c of Directive 89/665, introduced by Directive 2007/66, provides that the decision of the contracting authority is to be communicated to each candidate or tenderer, accompanied by a summary of the relevant reasons, and that the period for making an application for review expires only after a specified number of days following that communication.

³⁵ The answer to the first question accordingly is that Article 1(1) of Directive 89/665 requires that the period for bringing proceedings seeking to have an infringement of the public procurement rules established or to obtain damages for the infringement of those rules should start to run from the date on which the claimant knew, or ought to have known, of that infringement.

The second question

³⁶ The second question consists of two parts. The first concerns the interpretation of Directive 89/665 in relation to a requirement under national law that proceedings be brought promptly. The second relates to the effects which that directive has on the discretion conferred on the national court to extend periods within which proceedings must be brought.

The first part of the second question

- 37 By the first part of the second question, the national court asks, in essence, whether Directive 89/665 is to be interpreted as precluding a provision, such as Regulation 47(7)(b) of the 2006 Regulations, which requires that proceedings be brought promptly.
- 38 As observed in paragraph 29 of this judgment, Article 1(1) of Directive 89/665 requires Member States to guarantee that decisions of contracting authorities can be subjected to effective review which is as swift as possible. In order to attain the objective of rapidity pursued by that directive, Member States may impose limitation periods for actions in order to require traders to challenge promptly preliminary measures or interim decisions taken in public procurement procedures (see, to that effect, *Universale-Bau and Others*, paragraphs 75 to 79; Case C-230/02 *Grossmann Air Service* [2004] ECR I-1829, paragraphs 30 and 36 to 39; and Case C-241/06 *Lämmerzahl* [2007] ECR I-8415, paragraphs 50 and 51).
- 39 The objective of rapidity pursued by Directive 89/665 must be achieved in national law in compliance with the requirements of legal certainty. To that end, Member States have an obligation to establish a system of limitation periods that is sufficiently precise, clear and foreseeable to enable individuals to ascertain their rights and obligations (see, to that effect, Case C-361/88 *Commission v Germany* [1991] ECR I-2567, paragraph 24, and Case C-221/94 *Commission v Luxembourg* [1996] ECR I-5669, paragraph 22).
- 40 Furthermore, the objective of rapidity pursued by Directive 89/665 does not permit Member States to disregard the principle of effectiveness, under which the detailed methods for the application of national limitation periods must not render impossible or excessively difficult the exercise of any rights which the person concerned derives from Community law, a principle which underlies the objective of effective review proceedings laid down in Article 1(1) of that directive.

41 A national provision such as Regulation 47(7)(b) of the 2006 Regulations, under which proceedings must not be brought ‘unless ... those proceedings are brought promptly and in any event within three months’, gives rise to uncertainty. The possibility cannot be ruled out that such a provision empowers national courts to dismiss an action as being out of time even before the expiry of the three-month period if those courts take the view that the application was not made ‘promptly’ within the terms of that provision.

42 As the Advocate General observed in point 69 of her Opinion, a limitation period, the duration of which is placed at the discretion of the competent court, is not predictable in its effects. Consequently, a national provision providing for such a period does not ensure effective transposition of Directive 89/665.

43 It follows that the answer to the first part of the second question is that Article 1(1) of Directive 89/665 precludes a national provision, such as that at issue in the main proceedings, which allows a national court to dismiss, as being out of time, proceedings seeking to have an infringement of the public procurement rules established or to obtain damages for the infringement of those rules on the basis of the criterion, appraised in a discretionary manner, that such proceedings must be brought promptly.

The second part of the second question

44 By the second part of the second question, the national court asks, in essence, which effects follow from Directive 89/665 in respect of the discretion conferred on the national court to extend periods within which proceedings must be brought.

- 45 In the case of national provisions transposing a directive, national courts are bound to interpret national law, so far as possible, in the light of the wording and purpose of the directive concerned in order to achieve the result sought by that directive (see Case 14/83 *Von Colson and Kamann* [1984] ECR 1891, paragraph 26, and Joined Cases C-397/01 to C-403/01 *Pfeiffer and Others* [2004] ECR I-8835, paragraph 113).
- 46 In the present case, it is for the national court, as far as is at all possible, to interpret the domestic provisions establishing the limitation period in a manner which accords with the objective of Directive 89/665 (see, to that effect, Case C-327/00 *Santex* [2003] ECR I-1877, paragraph 63, and *Lämmerzahl*, paragraph 62).
- 47 In order to satisfy the requirements in the answer given to the first question, the national court dealing with the case must, as far as is at all possible, interpret the national provisions governing the limitation period in such a way as to ensure that that period begins to run only from the date on which the claimant knew, or ought to have known, of the infringement of the rules applicable to the public procurement procedure in question.
- 48 If the national provisions at issue do not lend themselves to such an interpretation, that court is bound, in exercise of the discretion conferred on it, to extend the period for bringing proceedings in such a manner as to ensure that the claimant has a period equivalent to that which it would have had if the period provided for by the applicable national legislation had run from the date on which the claimant knew, or ought to have known, of the infringement of the public procurement rules.
- 49 In any event, if the national provisions do not lend themselves to an interpretation which accords with Directive 89/665, the national court must refrain from applying

those provisions, in order to apply Community law fully and to protect the rights conferred thereby on individuals (see, to that effect, *Santex*, paragraph 64, and *Lämmerzahl*, paragraph 63).

- 50 The answer to the second part of the second question is accordingly that Directive 89/665 requires the national court, by virtue of the discretion conferred on it, to extend the limitation period in such a manner as to ensure that the claimant has a period equivalent to that which it would have had if the period provided for by the applicable national legislation had run from the date on which the claimant knew, or ought to have known, of the infringement of the public procurement rules. If the national provisions do not lend themselves to an interpretation which accords with Directive 89/665, the national court must refrain from applying them, in order to apply Community law fully and to protect the rights conferred thereby on individuals.

Costs

- 51 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:

- 1. Article 1(1) 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 Council Directive 92/50/EEC of 18 June 1992,**

requires that the period for bringing proceedings seeking to have an infringement of the public procurement rules established or to obtain damages for the infringement of those rules should start to run from the date on which the claimant knew, or ought to have known, of that infringement.

2. Article 1(1) of Directive 89/665, as amended by Directive 92/50, precludes a national provision, such as that at issue in the main proceedings, which allows a national court to dismiss, as being out of time, proceedings seeking to have an infringement of the public procurement rules established or to obtain damages for the infringement of those rules on the basis of the criterion, appraised in a discretionary manner, that such proceedings must be brought promptly.
3. Directive 89/665, as amended by Directive 92/50, requires the national court, by virtue of the discretion conferred on it, to extend the limitation period in such a manner as to ensure that the claimant has a period equivalent to that which it would have had if the period provided for by the applicable national legislation had run from the date on which the claimant knew, or ought to have known, of the infringement of the public procurement rules. If the national provisions do not lend themselves to an interpretation which accords with Directive 89/665, as amended by Directive 92/50, the national court must refrain from applying them, in order to apply Community law fully and to protect the rights conferred thereby on individuals.

[Signatures]