Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

29 July 2019*

(Reference for a preliminary ruling — Public procurement — Review procedures — Directive 89/665/EEC — Directive 92/13/EEC — Right to effective judicial protection — Principles of effectiveness and equivalence — Action for review of judicial decisions in breach of EU law — Liability of the Member States in the event of infringement of EU law by national courts or tribunals — Assessment of damage eligible for compensation)

In Case C–620/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Székesfehérvári Törvényszék (Székesfehérvár High Court, Hungary), made by decision of 24 October 2017, received at the Court on 2 November 2017, in the proceedings

Hochtief Solutions AG Magyarországi Fióktelepe

v

Fővárosi Törvényszék,

THE COURT (Fourth Chamber),

composed of M. Vilaras (Rapporteur), President of the Chamber, K. Jürimäe, D. Šváby, S. Rodin and N. Piçarra, Judges,

Advocate General: M. Bobek,

Registrar: I. Illéssy, Administrator,

having regard to the written procedure and further to the hearing on 21 November 2018,

after considering the observations submitted on behalf of:

– Hochtief Solutions AG Magyarországi Fióktelepe, by G.M. Tóth and I. Varga, ügyvédek,

– Fővárosi Törvényszék, by H. Beerné Vörös and K. Bőke, acting as Agents, and by G. Barabás, bíró,

– the Hungarian Government, by M.Z. Fehér and G. Koós, acting as Agents,

– the Greek Government, by M. Tassopoulou, D. Tsagkaraki and G. Papadaki, acting as Agents,

– the Polish Government, by B. Majczyna, acting as Agent,

* Language of the case: Hungarian.

– the European Commission, by A. Tokár, H. Krämer and P. Ondrůšek, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 30 April 2019,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 4(3) TEU, of the second subparagraph of Article 19(1) TEU, of Article 49 TFEU, of Article 47 of the Charter of Fundamental Rights of the European Union, of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 (OJ 2007 L 335, p. 31) ('Directive 89/665'), of Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1992 L 76, p. 14), as amended by Directive 2007/66 ('Directive 92/13'), of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54) and of the EU-law principles of primacy, equivalence and effectiveness.

2 The request has been made in proceedings between Hochtief Solutions AG Magyarországi Fióktelepe ('Hochtief Solutions') and the Fővárosi Törvényszék (Budapest High Court, Hungary), concerning damage allegedly caused by the latter court, in the exercise of its judicial powers, to Hochtief Solutions.

Legal context

EU law

3 The third subparagraph of Article 1(1) and Article 1(3) of Directive 89/665, drafted in almost identical terms to those of the third subparagraph of Article 1(1) and Article 1(3) of Directive 92/13, provide as follows:

'1. …

Member States shall take the measures necessary to ensure that, as regards contracts falling within the scope 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)], decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in Articles 2 to 2f of this Directive, on the grounds that such decisions have infringed [EU] law in the field of public procurement or national rules transposing that law.

…

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.'

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

‘Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for 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 2(1) of Directive 92/13 provided:

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

either

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

(b) to set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the notice of contract, the periodic indicative notice, the notice on the existence of a system of qualification, the invitation to tender, the contract documents or in any other document relating to the contract award procedure in question;

or

(c) to take, at the earliest opportunity, if possible by way of interlocutory procedures and if necessary by a final procedure on the substance, measures other than those provided for in points (a) and (b) with the aim of correcting any identified infringement and preventing injury to the interests concerned; in particular, making an order for the payment of a particular sum, in cases where the infringement has not been corrected or prevented.

Member States may take this choice either for all contracting entities or for categories of entities defined on the basis of objective criteria, in any event preserving the effectiveness of the measures laid down in order to prevent injury being caused to the interests concerned;

(d) and, in both the above cases, to award damages to persons injured by the infringement.

Where damages are claimed on the grounds that a decision has been taken unlawfully, Member States may, where their system of internal law so requires and provides bodies having the necessary powers for that purpose, provide that the contested decision must first be set aside or declared illegal.’

Hungarian law

6 Article 260 of the polgári perrendtartásról szóló 1952. évi III. törvény (Law No III of 1952 instituting the Code of civil procedure ('the Code of Civil Procedure') provides:

'1. A request for review may be submitted against a final judgment if:

(a) the party presents any fact or evidence, or any final court or administrative decision, that the court did not take into consideration during the previous proceedings, provided that it would have been to its benefit had it been considered originally;

…

2. Under subparagraph (a) of paragraph (1) above, either of the parties shall be able to file a request for review only if it was unable to present the fact, evidence or decision mentioned therein during the previous proceedings through no fault of its own.'

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

7 On 25 July 2006, the Észak-Dunántúli Környezetvédelmi és Vízügyi Igazgatóság (North Transdanubia Environmental Protection and Water Management Directorate, Hungary) ('the contracting authority') published a call for expressions of interest in the *Official Journal of the European Union*, S Series, under number 139-149235, for a public works contract concerning the development of transportation infrastructures in the intermodal centre of the national commercial harbour of Győr-Gönyű (Hungary) pursuant to the accelerated procedure under Chapter IV of the közbeszerzésekről szóló 2003. évi CXXIX. törvény (Law No CXXIX of 2003 on public procurement).

8 Section III.2.2 of the call for expressions of interest, relating to economic and financial capacity, provided that 'a candidate or sub-contractor whose balance sheet shows a negative result for more than one of the last three financial years does not fulfil the conditions for capacity'.

9 It is apparent from the order for reference that Hochtief Solutions, which did not fulfil that criterion, challenged its lawfulness before the Közbeszerzési Döntőbizottság (Public Procurement Arbitration Committee, Hungary) ('the Arbitration Committee'), arguing (i) that that criterion was discriminatory and (ii) that it was not by itself capable of providing information on the financial capacity of a tenderer.

10 The Arbitration Committee upheld Hochtief Solutions' action in part, ordering the contracting authority to pay a fine of 8 000 000 Hungarian forint (HUF) (approximately EUR 24 500), but did not find that that criterion was unlawful.

11 On 2 October 2006, Hochtief Solutions brought an action against the decision of the Arbitration Committee before the Fővárosi Bíróság (Budapest High Court, Hungary), which took the view that the results of the balance sheet constituted a suitable criterion for providing information about economic and financial capacity and, accordingly, dismissed the action.

12 On 4 June 2010, Hochtief Solutions appealed against the judgment at first instance to the Fővárosi Ítélőtábla (Budapest Regional Court of Appeal, Hungary), which decided to stay the proceedings and to submit a request for a preliminary ruling to the Court of Justice.

13 By judgment of 18 October 2012, *Édukövízig and Hochtief Construction* (C-218/11, EU:C:2012:643), the Court held, inter alia, that Article 44(2) and Article 47(1)(b) of Directive 2004/18 must be interpreted as meaning that a contracting authority may require a minimum level of economic and financial

standing by reference to one or more particular aspects of the balance sheet, provided that those aspects are such as to provide information on such standing of an economic operator and that that level is adapted to the size of the contract concerned in that it constitutes objectively a positive indication of the existence of a sufficient economic and financial basis for the performance of that contract, without, however, going beyond what is reasonably necessary for that purpose. The requirement of a minimum level of economic and financial standing cannot, in principle, be disregarded solely because that level relates to an aspect of the balance sheet regarding which there may be differences between the legislation of the different Member States.

14 The Fővárosi Törvényszék (Budapest High Court), which had meanwhile succeeded the Fővárosi Ítélőtábla (Budapest Regional Court of Appeal), having taken account of that judgment of the Court, upheld the judgment delivered at first instance, holding that the criterion used by the contracting authority to assess economic and financial capacity was not discriminatory.

15 On 13 September 2013, Hochtief Solutions lodged an appeal on a point of law before the Kúria (Supreme Court, Hungary) against the judgment of the Fővárosi Törvényszék (Budapest High Court), in which it claimed that the results of the balance sheet were not an appropriate basis for providing the contracting authority with a genuine and objective view of a tenderer's economic and financial situation. Hochtief Solutions also requested the Kúria (Supreme Court) to make another reference to the Court of Justice for a preliminary ruling.

16 By judgment of 19 March 2014, the Kúria (Supreme Court), however, dismissed the appeal on the ground that that complaint had not been raised within the prescribed period, since Hochtief Solutions had raised that issue, not in its initial administrative action before the Arbitration Committee, but solely in its subsequent submissions.

17 On 25 July 2014, Hochtief Solutions lodged a constitutional appeal against the judgment of the Kúria (Supreme Court) before the Alkotmánybíróság (Constitutional Court, Hungary) by which it sought a declaration that that judgment was unconstitutional and requested that it be set aside. That appeal was dismissed as inadmissible by order of 9 February 2015.

18 In the meantime, on 26 November 2014, Hochtief Solutions filed an application before the Fővárosi Közigazgatási és Munkaügyi Bíróság (Budapest Administrative and Labour Court, Hungary) for review of the judgment of the Fővárosi Törvényszék (Budapest High Court), referred to in paragraph 14 of the present judgment.

19 According to the information provided by the referring court, Hochtief Solutions, in support of its application for review, claimed that the question whether the results of the balance sheet were an appropriate indicator for assessing the economic and financial capacity of a tenderer, and the judgment of 18 October 2012, *Éduközvízig and Hochtief Construction* (C-218/11, EU:C:2012:643), had not, in fact, been subject to any examination. According to Hochtief Solutions, that omission constitutes a 'fact', within the meaning of Article 260(1)(a) of the Code of Civil Procedure, capable of justifying the opening of the judgment of the Fővárosi Törvényszék (Budapest High Court) to review. Relying, in particular, on the judgment of 13 January 2004, *Kühne & Heitz* (C-453/00, EU:C:2004:17, paragraphs 26 and 27), Hochtief Solutions argued that, where a judgment of the Court of Justice could not be taken into account in the main proceedings on the ground that it was out of time, it may and must be examined in the context of a review.

20 Although Hochtief Solutions requested the Fővárosi Közigazgatási és Munkaügyi Bíróság (Budapest Administrative and Labour Court) to make a reference to the Court for a preliminary ruling on the questions raised in the course of the review proceedings, that court did not accede to that request and dismissed the application for review, finding that the facts and evidence relied on by Hochtief Solutions were not new.

21 Hochtief Solutions then appealed against the order dismissing its application for review before the Fővárosi Törvényszék (Budapest High Court), requesting that court (i) to lay the case open to review and order examination of it on the merits and (ii) to submit a request for a preliminary ruling to the Court of Justice.

22 On 18 November 2015, the Fővárosi Törvényszék (Budapest High Court) made an order confirming the order at first instance of the Fővárosi Közigazgatási és Munkaügyi Bíróság (Budapest Administrative and Labour Court).

23 Hochtief Solutions then brought an action before the referring court, the Székesfehérvári Törvényszék (Székesfehérvár High Court, Hungary), seeking compensation for the damage which, it argued, the Fővárosi Törvényszék (Budapest High Court) had caused it in exercising its jurisdiction. It claims, in this regard, that it has not been given the opportunity, in accordance with EU law, to have account taken of the facts or circumstances that it had put forward before the Arbitration Committee and in the main proceedings, but on which neither that Committee nor the national courts seised of the case had given a ruling. In so doing, it contends, the Hungarian authorities responsible for the implementation of the law deprived of their substance the rights guaranteed by the relevant rules of EU law.

24 In those circumstances, the Székesfehérvári Törvényszék (Székesfehérvár High Court) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Are the basic principles and rules of EU law (in particular Article 4(3) TEU, and the requirement of uniform interpretation), as interpreted by the Court of Justice of the European Union, especially in the judgment [of 30 September 2003, *Köbler* (C-224/01, EU:C:2003:513)] to be interpreted as meaning that the declaration of the liability of the court of the Member State ruling at final instance in a judgment infringing EU law may be based exclusively on national law or on the criteria laid down by national law? If not, are the basic principles and rules of EU law, particularly the three criteria laid down by the Court of Justice in [the judgment of 30 September 2003, *Köbler* (C-224/01, EU:C:2003:513)] for declaring the liability of the “State” to be interpreted as meaning that whether the conditions for the Member State to incur liability for infringement of EU law by the courts of that State are met is to be assessed on the basis of national law?

(2) Are the basic principles and rules of EU law (in particular Article 4(3) TEU and the requirement of effective judicial protection), particularly the judgments of the Court of Justice concerning the liability of the Member State …, inter alia, [of 19 November 1991, *Francovich and Others* (C-6/90 and C-9/90, EU:C:1991:428); of 5 March 1996, *Brasserie du pêcheur and Factortame* (C-46/93 and C-48/93, EU:C:1996:79), and of 30 September 2003, *Köbler* (C-224/01, EU:C:2003:513)], to be interpreted as meaning that the force of *res judicata* attaching to judgments that infringe EU law delivered by courts of the Member States ruling at final instance precludes a declaration that the Member State is liable for damages?

(3) In the light of Directive [89/665] and of Directive [92/13], are the review procedure concerning the award of public contracts of a value greater than the [EU] thresholds and the judicial review of the administrative decision adopted in that procedure relevant for the purposes of EU law? If so, are EU law and the case-law of the Court of Justice [in particular, the judgments of 13 January 2004, *Kühne & Heitz* (C-453/00, EU:C:2004:17) and of 16 March 2006, *Kapferer* (C-234/04, EU:C:2006:178), and especially the judgment of 10 July 2014, *Impresa Pizzarotti* (C-213/13, EU:C:2014:2067)] regarding the necessity of granting review, as an extraordinary appeal, which is derived from national law on judicial review of the administrative decision adopted in the abovementioned review procedure concerning the award of public contracts, relevant for the purposes of EU law?

(4) Are the directives on review procedures concerning the award of public contracts (namely, Directive [89/665] and Directive [92/13]) to be interpreted as meaning that national legislation, under which the national courts before which the dispute in the main proceedings is brought may disregard a fact that has to be examined in accordance with a judgment of the Court of Justice, delivered in a preliminary ruling procedure in connection with a review procedure concerning the award of public contracts, a fact that is not taken into account either by the national courts ruling in proceedings instituted as a result of the review procedure brought against the decision adopted in the main proceedings, is compatible with those directives?

(5) Are Directive [89/665], in particular Article 1(1) and (3) thereof, and Directive [92/13], in particular Articles 1 and 2 thereof (especially in the light of [the judgments of 13 January 2004, *Kühne & Heitz* (C-453/00, EU:C:2004:17); of 16 March 2006, *Kapferer* (C-234/04, EU:C:2006:178); of 12 February 2008, *Willy Kempter* (C-2/06, EU:C:2008:78); of 4 June 2009, *Pannon GSM* (C-243/08, EU:C:2009:350); and of 10 July 2014, *Impresa Pizzarotti* (C-213/13, EU:C:2014:2067)], to be interpreted as meaning that national legislation, or an application thereof, in accordance with which, although a judgment of the Court of Justice delivered in a preliminary ruling procedure before judgment in the proceedings at second instance establishes a relevant interpretation of the rules of EU law, the court hearing the case rejects it on the grounds that it is out of time and subsequently the court hearing the application for review does not consider the review admissible, is compatible with the abovementioned directives and with the requirements of effective judicial protection and with the principles of equivalence and effectiveness?

(6) If, under national law, review must be granted in order to re-establish constitutionality by means of a new decision of the Constitutional Court, should review not be granted, in accordance with the principle of equivalence and the principle laid down in [the judgment of 26 January 2010, *Transportes Urbanos y Servicios Generales* (C-118/08, EU:C:2010:39)], if it has not been possible to take into account a judgment of the Court of Justice in the main proceedings owing to the provisions of national law concerning procedural time limits?

(7) Are Directive [89/665], in particular Article 1(1) and (3) thereof, and Directive [92/13], in particular Articles 1 and 2 thereof, in the light of the judgment of the Court of Justice [of 12 February 2008, *Willy Kempter* (C-2/06, EU:C:2008:78)], according to which an individual need not rely specifically upon the case-law of the Court of Justice, to be interpreted as meaning that the review procedures concerning the award of public contracts governed by the abovementioned directives may be initiated only by an action containing an express description of the infringement concerning the award of public contracts invoked and, furthermore, clearly indicates the procurement rule infringed (the specific article and paragraph), that is to say, that in a review procedure concerning the award of public contracts only those infringements that the appellant has indicated by reference to the procurement provision infringed (the specific article and paragraph), whereas in any other administrative and civil procedure it is sufficient for the individual to present the facts and the evidence supporting them, and for the competent authority or court to give a ruling in accordance with their content?

(8) Is the requirement of a sufficiently serious infringement laid down in the judgments [of 30 September 2003, *Köbler* (C-224/01, EU:C:2003:513), and of 13 June 2006, *Traghetti del Mediterraneo* (C-173/03, EU:C:2006:391)] to be interpreted as meaning that there is no such infringement if the court ruling at final instance, in clear contravention of the established case-law, cited in the greatest detail, of the Court of Justice, supported by various legal opinions as well, refuses an individual's request for a question to be referred for a preliminary ruling as to whether review ought to be granted, on the absurd grounds that EU law, in this case, in particular, [Directives 89/665 and 92/13], contains no rules governing review, in spite of the fact that, for that purpose, reference has also been made in the greatest detail to the relevant case-law of the Court of Justice, including also [the judgment of 10 July 2014, *Impresa Pizzarotti*

(C-213/13, EU:C:2014:2067)], which specifically states the need of review in relation to the public procurement procedure? In the light of the judgment of the Court of Justice in [the judgment of 6 October 1982, *Cilfit and Others* (283/81, EU:C:1982:335)], with what degree of detail must the national court that does not grant review justify its decision to depart from the authoritative legal interpretation given by the Court of Justice?

(9) Are the principles of effective judicial protection and of equivalence in Article 19 TEU and Article 4(3) TEU, freedom of establishment and freedom to provide services laid down in Article 49 TFEU, and [Directive 93/37] and also [Directives 89/665, 92/13 and 2007/66], to be interpreted as not precluding the competent authorities and courts from dismissing one after another, in manifest disregard of the applicable EU law, the appeals brought by the appellant because it was unable to participate in a public procurement procedure, appeals for which it is necessary to prepare, depending on the circumstances, numerous documents with considerable investment of time and money or to participate at hearings, and, although it is true that, in theory, liability may be declared for damage caused in the exercise of judicial functions, the relevant legislation prevents the appellant claiming from the court compensation for harm suffered as a consequence of the unlawful measures?

(10) Are the principles laid down in the judgments [of 9 November 1983, *San Giorgio* (199/82, EU:C:1983:318); of 30 September 2003, *Köbler* (C-224/01, EU:C:2003:513), and of 13 June 2006, *Traghetti del Mediterraneo* (C-173/03, EU:C:2006:391)] to be interpreted as meaning that compensation may not be paid for damage caused by the fact that, in infringement of the established case-law of the Court of Justice, the court of the Member State ruling at final instance has not granted the review requested in good time by the individual, in which he could have claimed compensation for the costs incurred?'

Consideration of the questions referred

Preliminary observations

25 As is apparent from the order for reference, the main proceedings concern compensation for the harm allegedly suffered by Hochtief Solutions as a result of the order, mentioned in paragraph 22 of the present judgment, by which the Fővárosi Törvényszék (Budapest High Court), adjudicating at final instance, upheld the order of the Fővárosi Közigazgatási és Munkaügyi Bíróság (Budapest Administrative and Labour Court), mentioned in paragraph 20 of the present judgment, by which it (i) refused to submit a request to the Court of Justice for a preliminary ruling and (ii) dismissed the application for review brought by Hochtief Solutions against the judgment of the Fővárosi Törvényszék (Budapest High Court), mentioned in paragraph 14 of the present judgment.

26 It follows that the case in the main proceedings concerns the question whether, in so proceeding, the Fővárosi Törvényszék (Budapest High Court) committed a breach of EU law which is capable of forming the basis of an obligation to compensate Hochtief Solutions for the harm which it claims to have suffered as a result of that breach.

27 In this context, the referring court seeks, in particular, to ascertain whether EU law must be interpreted as meaning that, in circumstances such as those of the main proceedings, a national court dealing with an application for review of a judgment which acquired the force of *res judicata* after a judgment delivered by the Court on the basis of Article 267 TFEU in the proceedings which led to that national judgment is required to uphold that application.

28 It is in the light of the context, as thus defined, of the dispute in the main proceedings that the questions referred for a preliminary ruling should be examined.

The admissibility of the seventh and ninth questions

29 By its seventh question, the referring court asks the Court, in essence, to rule on the conformity with EU law of national procedural rules, relating to the mandatory content of an action in the field of public procurement, while by its ninth question it asks, in essence, whether the act of systematically dismissing, in breach of EU law, actions brought by an unsuccessful tenderer in a public procurement procedure, such as Hochtief Solutions, is compatible with EU law.

30 In that regard, it should be borne in mind that, according to settled case-law of the Court, the procedure laid down in Article 267 TFEU is an instrument for cooperation between the Court of Justice and the national courts. It follows that it is for the national courts alone which are seised of the case and which are responsible for the judgment to be delivered to determine, in view of the special features of each case, both the need for a preliminary ruling in order to enable them to deliver judgment and the relevance of the questions which they put to the Court. Consequently, where questions submitted by national courts concern the interpretation of a provision of EU law, the Court is, in principle, obliged to give a ruling (judgment of 28 March 2019, *Verlezza and Others*, C-487/17 to C-489/17, EU:C:2019:270, paragraphs 27 and 28 and the case-law cited).

31 However, the Court may refuse to rule on a question referred for a preliminary ruling by a national court, inter alia, where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose or where the problem is hypothetical (judgment of 28 March 2019, *Verlezza and Others*, C-487/17 to C-489/17, EU:C:2019:270, paragraph 29 and the case-law cited).

32 The seventh and ninth questions specifically come within the latter situation. It is quite obvious that those questions bear no relation to the subject matter of the main proceedings, as summarised in paragraph 26 of the present judgment and are, therefore, hypothetical.

33 It follows that the seventh and ninth questions are inadmissible.

The first, second, eight and 10th questions

34 By these questions, which it is appropriate to examine together, the referring court seeks guidance on, in particular, the principles laid down by the Court concerning the liability of a Member State for damage caused to individuals as a result of an infringement of EU law by a national court adjudicating at final instance. The referring court asks, in essence, whether those principles must be interpreted as meaning (i) that the liability of the Member State concerned must be assessed on the basis of national law; (ii) that the principle of *res judicata* precludes a declaration of the liability of that Member State from being made; (iii) that there is a sufficiently serious infringement of EU law where the court adjudicating at final instance refuses to refer to the Court of Justice a question concerning the interpretation of EU law which has been raised before it; and (iv) that they preclude a rule of national law which excludes the costs incurred by a party as a result of the judicial decision in question from the damage which may be the subject of compensation.

35 In the first place, it should be noted that, with regard to the conditions under which a Member State may be rendered liable to make reparation for loss and damage caused to individuals as a result of breaches of EU law for which it is responsible, the Court has repeatedly held that individuals who have been harmed have a right to reparation if three conditions are met: the rule of EU law infringed must be intended to confer rights on them; the breach of that rule must be sufficiently serious; and there must be a direct causal link between that breach and the loss or damage sustained by those individuals (see, to that effect, in particular, judgments of 5 March 1996, *Brasserie du pêcheur and*

Factortame, C-46/93 and C-48/93, EU:C:1996:79, paragraph 51; of 30 September 2003, *Köbler*, C-224/01, EU:C:2003:513, paragraph 51; and of 28 July 2016, *Tomášová*, C-168/15, EU:C:2016:602, paragraph 22).

36 It should also be borne in mind that the liability of a Member State for damage caused by a decision of a court adjudicating at final instance which breaches a rule of EU law is governed by the same conditions (see, to that effect, judgments of 30 September 2003, *Köbler*, C-224/01, EU:C:2003:513, paragraph 52, and of 28 July 2016, *Tomášová*, C-168/15, EU:C:2016:602, paragraph 23).

37 Furthermore, the three conditions mentioned in paragraph 35 of the present judgment are necessary and sufficient to found a right in favour of individuals to obtain redress, although this does not mean that a Member State cannot incur liability under less strict conditions on the basis of national law (see, to that effect, inter alia, judgments of 5 March 1996, *Brasserie du pêcheur and Factortame*, C-46/93 and C-48/93, EU:C:1996:79, paragraph 66, and of 30 September 2003, *Köbler*, C-224/01, EU:C:2003:513, paragraph 57).

38 It follows that EU law does not preclude a rule of national law which –– in order for a Member State to incur liability for harm caused to individuals as a result of infringements of EU law for which it can be held responsible –– provides for less strict conditions than those laid down by the case-law of the Court mentioned in paragraph 35 of the present judgment.

39 In the second place, as is apparent from the case-law of the Court, the principle of *res judicata* does not preclude recognition of the principle of liability of a Member State for the decision of a national court or tribunal adjudicating at final instance which infringes a rule of EU law. Given, inter alia, that an infringement, by such a decision, of rights deriving from EU law cannot normally be corrected thereafter, individuals cannot be deprived of the possibility of holding the State liable in order to secure legal protection of their rights (see, to that effect, judgments of 30 September 2003, *Köbler*, C-224/01, EU:C:2003:513, paragraph 34, and of 24 October 2018, *XC and Others*, C-234/17, EU:C:2018:853, paragraph 58 and the case-law cited).

40 In the third place, it is clear from the settled case-law of the Court that it is, in principle, for the national courts to apply the conditions mentioned in paragraph 35 of the present judgment for establishing the liability of a Member State for damage caused to individuals by breaches of EU law, for which the State can be held responsible, in accordance with the guidelines laid down by the Court for the application of those conditions (see, to that effect, judgments of 30 September 2003, *Köbler*, C-224/01, EU:C:2003:513, paragraph 100, and of 4 October 2018, *Kantarev*, C-571/16, EU:C:2018:807, paragraph 95).

41 In that connection, as regards, in particular, the second of those conditions, it should be borne in mind that, according to the Court's case-law, the liability of a Member State for damage caused to individuals by reason of an infringement of EU law attributable to a national court adjudicating at final instance can be incurred only in the exceptional case where the national court adjudicating at final instance has manifestly infringed the applicable law (judgments of 30 September 2003, *Köbler*, C-224/01, EU:C:2003:513, paragraph 53, and of 13 June 2006, *Traghetti del Mediterraneo*, C-173/03, EU:C:2006:391, paragraphs 32 and 42).

42 In order to determine whether a sufficiently serious infringement of EU law has occurred, the national court before which a claim for compensation has been brought must take account of all the factors which characterise the situation brought before it. The factors which may be taken into consideration in that regard include, in particular, the degree of clarity and precision of the rule breached, the scope of the room for assessment that the infringed rule confers on national authorities, whether the infringement and the damage caused were intentional or involuntary, whether any error of law was excusable or inexcusable, and the issue, where applicable, of whether the position taken by an EU institution may have contributed to the adoption or maintenance of national measures or practices

contrary to EU law, and non-compliance by the national court in question with its obligation to make a reference for a preliminary ruling under the third paragraph of Article 267 TFEU (see, to that effect, judgments of 5 March 1996, *Brasserie du pêcheur and Factortame*, C-46/93 and C-48/93, EU:C:1996:79, paragraph 56; of 30 September 2003, *Köbler*, C-224/01, EU:C:2003:513, paragraphs 54 and 55; and of 28 July 2016, *Tomášová*, C-168/15, EU:C:2016:602, paragraph 25).

43 In any event, an infringement of EU law is sufficiently serious if it was made in manifest breach of the relevant case-law of the Court (judgments of 30 September 2003, *Köbler*, C-224/01, EU:C:2003:513, paragraph 56; of 25 November 2010, *Fuß*, C-429/09, EU:C:2010:717, paragraph 52; and of 28 July 2016, *Tomášová*, C-168/15, EU:C:2016:602, paragraph 26).

44 With regard to the dispute in the main proceedings, it is for the referring court to assess, taking into account all the factors which characterise the situation at issue in the main proceedings, whether the Fővárosi Törvényszék (Budapest High Court), by the order mentioned in paragraph 22 of the present judgment, committed a sufficiently serious infringement of EU law by manifestly disregarding the applicable EU law, including the relevant case-law of the Court, in particular the judgment of 18 October 2012, *Édukövízig and Hochtief Construction* (C-218/11, EU:C:2012:643).

45 In the fourth place, where the conditions referred to in paragraph 35 of the present judgment are satisfied, the Member State must make reparation for the consequences of the loss and damage occasioned in accordance with the domestic rules on liability, provided that the conditions for reparation of loss and damage laid down by national law are not less favourable than those relating to similar domestic claims (principle of equivalence) and are not such as in practice to make it impossible or excessively difficult to obtain reparation (principle of effectiveness) (see, to that effect, judgments of 5 March 1996, *Brasserie du pêcheur and Factortame*, C-46/93 and C-48/93, EU:C:1996:79, paragraph 67; of 30 September 2003, *Köbler*, C-224/01, EU:C:2003:513, paragraph 58; and of 28 July 2016, *Tomášová*, C-168/15, EU:C:2016:602, paragraph 38).

46 In that regard, it follows from the case-law of the Court that reparation for loss or damage caused to individuals as a result of breaches of EU law must be commensurate with the loss or damage sustained so as to ensure the effective protection for their rights (see, to that effect, judgments of 5 March 1996, *Brasserie du pêcheur and Factortame*, C-46/93 and C-48/93, EU:C:1996:79, paragraph 82, and of 25 November 2010, *Fuß*, C-429/09, EU:C:2010:717, paragraph 92).

47 A rule of national law under which –– in a case where the liability of a Member State is incurred in respect of damage caused by an infringement of a rule of EU law by a decision of a court or tribunal of that State adjudicating at final instance — the costs incurred by one party as a result of that decision are generally excluded from the damage which may be the subject of compensation may render it, in practice, excessively difficult or even impossible to obtain adequate compensation for the harm suffered by that party.

48 In the light of the foregoing, the answer to the first, second, eighth and 10th questions must be that the liability of a Member State for damage caused by a decision of a national court or tribunal adjudicating at final instance which infringes a rule of EU law is governed by the conditions laid down by the Court, in particular in paragraph 51 of the judgment of 30 September 2003, *Köbler* (C-224/01, EU:C:2003:513), without excluding the possibility that that State may incur liability under less strict conditions on the basis of national law. That liability is not precluded by the fact that that decision has acquired the force of *res judicata*. In the context of the enforcement of that liability, it is for the national court or tribunal before which the action for damages has been brought to determine, taking into account all the factors which characterise the situation in question, whether the national court or tribunal adjudicating at final instance committed a sufficiently serious infringement of EU law by manifestly disregarding the applicable EU law, including the relevant case-law of the Court. By

contrast, EU law precludes a rule of national law which, in such a case, generally excludes the costs incurred by a party as a result of the harmful decision of the national court or tribunal from damage which may be the subject of compensation.

The third, fourth, fifth and sixth questions

49 Taking account of the context of the case in the main proceedings, as noted in paragraphs 26 and 27 of the present judgment, it must be understood that, by its third, fourth, fifth and sixth questions, the referring court is asking the Court, in essence, whether EU law, in particular, Directives 89/665 and 92/13 and the principles of equivalence and effectiveness, must be interpreted as not precluding legislation of a Member State which does not allow review of a judgment, which has acquired the force of *res judicata*, of a court or tribunal of that Member State which has ruled on an action for annulment against an act of a contracting authority without addressing a question the examination of which was envisaged in an earlier judgment of the Court in response to a request for a preliminary ruling made in the course of the proceedings relating to that action for annulment.

50 In that connection, it must be recalled that Article 1(1) of Directive 89/665 and Article 1(1) of Directive 92/13 require the Member States to adopt the measures necessary to ensure that the decisions taken by the contracting authorities in public contract award procedures coming within the scope of those directives may be reviewed effectively and, in particular, as rapidly as possible, on the ground that they have infringed EU law on public procurement or the national rules transposing that law (judgment of 15 September 2016, *Star Storage and Others*, C-439/14 and C-488/14, EU:C:2016:688, paragraph 39).

51 Those provisions, which are intended to protect tenderers against arbitrary behaviour on the part of the contracting authority, are thus designed to reinforce the existence, in all Member States, of effective remedies, so as to ensure the effective application of the EU rules on the award of public contracts, in particular where infringements can still be rectified (judgment of 15 September 2016, *Star Storage and Others*, C-439/14 and C-488/14, EU:C:2016:688, paragraph 41 and the case-law cited).

52 Neither Directive 89/665 nor Directive 92/13 contains any provisions specifically governing the conditions under which those review procedures may be used. Those directives lay down only the minimum conditions to be satisfied by the review procedures established in domestic law to ensure compliance with the requirements of EU law concerning public procurement (see, to that effect, judgment of 15 September 2016, *Star Storage and Others*, C-439/14 and C-488/14, EU:C:2016:688, paragraph 42).

53 In the present case, it is apparent from the information provided by the referring court that, under Hungarian procedural law, review, within the meaning of Article 260 of the Code of Civil Procedure, is an extraordinary remedy which, where the conditions laid down by that provision are satisfied, allows the force of *res judicata* attached to a judgment that has become final to be called into question.

54 Attention should be drawn to the importance, both in the legal order of the European Union and in national legal systems, of the principle of *res judicata*. In order to ensure both stability of the law and of legal relations and the sound administration of justice, it is important that judicial decisions which have become definitive after all rights of appeal have been exhausted or after the passing of the time limits provided for in that connection can no longer be called into question (judgments of 10 July 2014, *Impresa Pizzarotti*, C-213/13, EU:C:2014:2067, paragraph 58, and of 6 October 2015, *Târşia*, C-69/14, EU:C:2015:662, paragraph 28).

55 Consequently, EU law does not require a national court to disapply domestic rules of procedure conferring finality on a judgment, even if to do so would make it possible to remedy a domestic situation which is incompatible with EU law (judgments of 10 July 2014, *Impresa Pizzarotti*, C-213/13, EU:C:2014:2067, paragraph 59, and of 6 October 2015, *Târşia*, C-69/14, EU:C:2015:662, paragraph 29).

56 It has been held that EU law does not require a judicial body automatically to reverse a judgment having the authority of *res judicata* in order to take into account the interpretation of a relevant provision of EU law adopted by the Court (see, to that effect, judgments of 10 July 2014, *Impresa Pizzarotti*, C-213/13, EU:C:2014:2067, paragraph 60, and of 6 October 2015, *Târșia*, C-69/14, EU:C:2015:662, paragraph 38).

57 The judgment of 13 January 2004, *Kühne & Heitz* (C-453/00, EU:C:2004:17), relied on by the referring court, cannot call that consideration into question.

58 It is apparent from that judgment that the principle of sincere cooperation, laid down in Article 4(3) TEU, imposes on an administrative body, when so requested, an obligation to review a final administrative decision in order to take account of the interpretation of the relevant provision given in the meantime by the Court, in particular where that administrative body has, under national law, the power to reopen that decision (judgment of 13 January 2004, *Kühne & Heitz*, C-453/00, EU:C:2004:17, paragraph 28).

59 It is common ground, however, that that consideration concerns only the possible review of a final decision of an administrative body and not, as in the present case, a final decision of a court or tribunal.

60 In that regard, it is apparent from the case-law of the Court that, if the applicable domestic rules of procedure provide the possibility, under certain conditions, for a national court to reverse a decision having the authority of *res judicata* in order to render the situation arising from that decision compatible with national law, that possibility must prevail if those conditions are met, in accordance with the principles of equivalence and effectiveness, so that that situation is brought back into line with EU legislation (see, to that effect, judgment of 10 July 2014, *Impresa Pizzarotti*, C-213/13, EU:C:2014:2067, paragraph 62).

61 In the present case, it is apparent from the information provided by the referring court that, under Article 260 of the Code of Civil Procedure, review of a final judgment is allowed where a party may rely on, inter alia, a final judicial decision not taken into account in the course of the proceedings which led to the judgment, the review of which is sought, and only if that party was unable to present, through no fault on its part, that decision during those proceedings.

62 Moreover, it is clear from the wording of the sixth question that Hungarian law authorises the review of a decision having the authority of *res judicata* in order to re-establish constitutionality by means of a new decision of the Alkotmánybíróság (Constitutional Court).

63 It is consequently a matter for the referring court to determine whether Hungarian procedural rules include the possibility of reversing a judgment which has acquired the force of *res judicata*, for the purpose of rendering the situation arising from that judgment compatible with an earlier judicial decision which has become final where both the court which delivered that judgment and the parties to the case leading to that judgment were already aware of that earlier decision. If that were the case, in accordance with the case-law of the Court cited in paragraph 60 above, that possibility should, in accordance with the principles of equivalence and effectiveness, in the same circumstances, prevail in order to render the situation compatible with an earlier judgment of the Court.

64 Nonetheless, it should, in any event, be borne in mind that it is settled case-law that, by reason, inter alia, of the fact that an infringement, by a final decision of a court of tribunal, of rights deriving from EU law cannot normally be corrected thereafter, individuals cannot be deprived of the possibility of holding the State liable in order to obtain legal protection of their rights (judgments of 6 October 2015, *Târşia*, C-69/14, EU:C:2015:662, paragraph 40, and of 24 October 2018, *XC and Others*, C-234/17, EU:C:2018:853, paragraph 58).

65 In the light of all the foregoing considerations, the answer to the third, fourth, fifth and sixth questions is that EU law, in particular, Directives 89/665 and 92/13 and the principles of equivalence and effectiveness, must be interpreted as not precluding legislation of a Member State which does not allow review of a judgment, which has acquired the force of *res judicata*, of a court or tribunal of that Member State which has ruled on an action for annulment against an act of a contracting authority without addressing a question the examination of which was envisaged in an earlier judgment of the Court in response to a request for a preliminary ruling made in the course of the proceedings relating to that action for annulment. However, if the applicable domestic rules of procedure provide the possibility for national courts to reverse a judgment which has acquired the force of *res judicata*, for the purposes of rendering the situation arising from that judgment compatible with an earlier national judicial decision which has become final –– where both the court which delivered that judgment and the parties to the case leading to that judgment were already aware of that earlier decision –– that possibility must, in accordance with the principles of equivalence and effectiveness, in the same circumstances, prevail in order to render the situation compatible with EU law, as interpreted by an earlier judgment of the Court of Justice.

Costs

66 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 (Fourth Chamber) hereby rules:

1. **The liability of a Member State for damage caused by a decision of a national court or tribunal adjudicating at final instance which breaches a rule of European Union law is governed by the conditions laid down by the Court, in particular in paragraph 51 of the judgment of 30 September 2003, *Köbler* (C-224/01, EU:C:2003:513), without excluding the possibility that that State may incur liability under less strict conditions on the basis of national law. That liability is not precluded by the fact that that decision has acquired the force of *res judicata*. In the context of the enforcement of that liability, it is for the national court or tribunal before which the action for damages has been brought to determine, taking into account all the factors which characterise the situation in question, whether the national court or tribunal adjudicating at final instance committed a sufficiently serious infringement of European Union law by manifestly disregarding the relevant European Union law, including the relevant case-law of the Court. By contrast, European Union law precludes a rule of national law which, in such a case, generally excludes the costs incurred by a party as a result of the harmful decision of the national court or tribunal from damage which may be the subject of compensation.**

2. **European Union law, in particular Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007, and Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on**

the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, as amended by Directive 2007/66, as well as the principles of equivalence and effectiveness, must be interpreted as not precluding legislation of a Member State which does not allow review of a judgment, which has acquired the force of *res judicata*, of a court or tribunal of that Member State which has ruled on an action for annulment against an act of a contracting authority without addressing a question the examination of which was envisaged in an earlier judgment of the Court in response to a request for a preliminary ruling made in the course of the proceedings relating to that action for annulment. However, if the applicable domestic rules of procedure include the possibility for national courts to reverse a judgment which has acquired the force of *res judicata*, for the purposes of rendering the situation arising from that judgment compatible with an earlier national judicial decision which has become final –– where both the court which delivered that judgment and the parties to the case leading to that judgment were already aware of that earlier decision –– that possibility must, in accordance with the principles of equivalence and effectiveness, in the same circumstances, prevail in order to render the situation compatible with European Union law, as interpreted by an earlier judgment of the Court of Justice.

[Signatures]