



## Reports of Cases

ORDER OF THE COURT (Fourth Chamber)

14 February 2019\*

(Reference for a preliminary ruling — Public procurement — Review procedures — Directive 89/665/EEC — Articles 1 and 2c — Action brought against decisions to allow tenderers to participate in, or to exclude them from, a tendering procedure — Time limit for applying for review — 30-day time limit — National legislation excluding the possibility to plead the illegality of an admission decision in an action brought against subsequent decisions — Charter of Fundamental Rights of the European Union — Article 47 — Right to effective judicial protection)

In Case C-54/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunale amministrativo regionale per il Piemonte (Regional Administrative Court, Piedmont, Italy), made by decision of 27 September 2017, received at the Court on 29 January 2018, in the proceedings

**Cooperativa Animazione Valdocco Soc. coop. soc. Impresa Sociale Onlus**

v

**Consorzio Intercomunale Servizi Sociali di Pinerolo,**

**Azienda Sanitaria Locale To3 di Collegno e Pinerolo,**

intervening parties:

**Ati Cilte Soc. coop. soc.,**

**Coesa Pinerolo Soc. coop. soc. arl,**

**La Dua Valadda Soc. coop. soc.,**

**Consorzio di Cooperative Sociali il Deltaplano Soc. coop. soc.,**

**La Fonte Soc. coop. soc. Onlus,**

**Società Italiana degli Avvocati Amministrativisti (SIAA),**

**Associazione Amministrativisti.it,**

**Camera degli Avvocati Amministrativisti,**

THE COURT (Fourth Chamber),

\* Language of the case: Italian.

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

Advocate General: M. Campos Sánchez-Bordona,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- Cooperativa Animazione Valdocco Soc. coop. soc. Impresa Sociale Onlus, by A. Sciolla, S. Viale and C. Forneris, avvocati,
- Consorzio Intercomunale Servizi Sociali di Pinerolo, by V. Del Monte, avvocato,
- Ati Cilte Soc. coop. soc., Coesa Pinerolo Soc. coop. soc. arl and La Dua Valadda Soc. coop. soc., by L. Gili and A. Quilico, avvocati,
- the Italian Government, by G. Palmieri, acting as Agent, and by C. Colelli and V. Nunziata, avvocati dello Stato,
- the Netherlands Government, by M. Bulterman and J.M. Hoogveld, acting as Agents,
- the European Commission, by L. Haasbeek and by G. Gattinara and P. Ondrůšek, acting as Agents,

having decided, after hearing the Advocate General, to give a decision by reasoned order, pursuant to Article 99 of the Rules of Procedure of the Court of Justice,

makes the following

### **Order**

- 1 This request for a preliminary ruling concerns the interpretation of Article 1(1) and (2) 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. 3), as amended by Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 (OJ 2014 L 94, p. 1) ('Directive 89/665'), read in the light of Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter') and the principles of equivalence and effectiveness.
- 2 The request has been made in a dispute between Cooperativa Animazione Valdocco Soc. coop. soc. Impresa Sociale Onlus ('Cooperativa Animazione Valdocco'), on one hand, and Consorzio Intercomunale Servizi Sociali di Pinerolo ('CISS di Pinerolo') and Azienda Sanitaria Locale To3 di Collegno e Pinerolo, on the other, concerning the award of a public services contract for home care services to an ad hoc consortium of undertakings constituted by Ati Cilte Soc. coop. soc., Coesa Pinerolo Soc. coop. soc. arl and La Dua Valadda Soc. coop. soc. ('the ad hoc consortium').

## Legal context

### *European Union law*

- 3 The fourth subparagraph of Article 1(1) and Article 1(3) of Directive 89/665 provide as follows:

‘1. ...

‘Member States shall take the measures necessary to ensure that, as regards contract award procedures falling within the scope of Directive 2014/24/EU [of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65)] or Directive [2014/23], 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 Union law in the field of public procurement or national rules transposing that law.

...

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

- 4 Article 2c of that directive, relating to ‘time limits for applying for review’, provides:

‘Where a Member State provides that any application for review of a contracting authority’s decision taken in the context of, or in relation to, a contract award procedure falling within the scope of Directive [2014/24] or [Directive 2014/23] must be made before the expiry of a specified period, this period shall be at least 10 calendar days with effect from the day following the date on which the contracting authority’s decision is sent to the tenderer or candidate if fax or electronic means are used or, if other means of communication are used, this period shall be either at least 15 calendar days with effect from the day following the date on which the contracting authority’s decision is sent to the tenderer or candidate or at least 10 calendar days with effect from the day following the date of the receipt of the contracting authority’s decision. The communication of the contracting authority’s decision to each tenderer or candidate shall be accompanied by a summary of the relevant reasons. In the case of an application for review concerning decisions referred to in Article 2(1)(b) of this Directive that are not subject to a specific notification, the time period shall be at least 10 calendar days from the date of the publication of the decision concerned.’

### *Italian law*

- 5 Article 120(2-bis) of Annex I to decreto legislativo n. 104 — Codice del processo amministrativo (Legislative Decree No 104 establishing the Administrative Procedure Code) of 2 July 2010 (Ordinary Supplement to the GURI No 156 of 7 July 2010), as amended by Article 204 of decreto legislativo n. 50 — Codice dei contratti pubblici (Legislative Decree No 50 establishing the Public Procurement Code) of 18 April 2016 (Ordinary Supplement to the GURI No 91 of 19 April 2016) (‘the Administrative Procedure Code’), provides:

‘The decision determining exclusions from a tendering procedure and admissions to it on the outcome of the evaluation of the subjective economic-financial and technical-professional requirements must be challenged within 30 days from its publication on the contracting authority’s website, in accordance with Article 29(1) of the [Public Procurement Code]. Failure to mount a challenge excludes the possibility of pleading illegality in respect of subsequent decisions in the tendering procedure,

including by cross-appeal. Any challenge to the proposal for award of the contract, when it is made, and of other intermediate decisions made during the procedure which do not cause immediate harm shall also be inadmissible.’

- 6 Article 29 of Legislative Decree No 50 establishing the Public Procurement Code of 18 April 2016, as amended by decreto legislativo n. 56 (Legislative Decree No 56) of 19 April 2017 (Ordinary Supplement to the GURI No 103 of 5 May 2017) (‘the Public Procurement Code’) provides:

‘... In order to allow an action to be brought pursuant to Article 120(2-bis) of the Administrative Procedure Code, the decision determining exclusions from a tendering procedure and admissions to it following verification of the documents establishing a lack of grounds for exclusion as set out in Article 80, as well as the fulfilment of the economic-financial and technical-professional requirements, shall also be published within the two days following the adoption of the relevant decisions. Within that same period of two days, the candidates and tenderers shall be given notice ... of that decision, stipulating the office or restricted-access computer links at which the relevant documents are available. The period for the challenge referred to in the aforementioned Article 120(2-bis) starts to run from the moment the documents referred to in the second sentence are made effectively available, together with the reasoning adopted by the contracting authority.’

- 7 Article 53(2) and (3) of the Public Procurement Code provides:

‘2. Without prejudice to the provisions laid down by the present code concerning the contracts awarded on condition of confidentiality or the implementation of which requires specific security measures, the right of access shall be postponed:

- (a) until the expiry of the time limit for submission of the tender in open procedures, as regards the list of persons having submitted tenders;
- (b) until the expiry of the time limit for the submission of tenders in the restricted and negotiated procedures and in informal calls for tender, as regards the list of persons having requested an invitation to participate or who have expressed their interest, and the list of persons who have been invited to submit tenders and the list of persons who have submitted those tenders; the persons whose request for an invitation was rejected may have access to the list of persons who have requested an invitation to participate or who have expressed their interest, after the official notification by the contracting authorities of the name of candidates to be invited;
- (c) as regards tender, until the contract is awarded;
- (d) as regards the procedure for checking anomalies in the tender, until the contract is awarded;

3. The decisions indicated in paragraph 2, until the expiry of the time limits set out therein, cannot be communicated to third parties or disseminated in any manner whatsoever.’

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

- 8 By decision of 19 May 2017, the CISS di Pinerolo awarded the public services contract for home assistance services within its territorial remit to the ad hoc consortium for the period from 1 June 2017 to 31 May 2020, applying the criterion of the most economically advantageous offer.
- 9 Once the award was made, the Cooperativa Animazione Valdocco, which was ranked second, brought an action for annulment before the referring court, namely the Tribunale amministrativo regionale per il Piemonte (Regional Administrative Court, Piedmont, Italy), against the decision awarding the public contract concerned and various decisions in the course of the tendering procedure, including the

decision not to exclude the ad hoc consortium, arguing, inter alia, that due to the failure to lodge a provisional deposit of the required amount or to satisfy the conditions for participation, that group should not have been allowed to participate in the tendering procedure.

- 10 The referring court states that the contracting authority and the ad hoc consortium pleaded the inadmissibility of the action, on the ground that it was brought against the final decision of the contracting authority. In accordance with the accelerated procedure established by the combined provisions of Article 29 of the Public Procurement Code and Article 120(2-bis) of the Administrative Procedure Code, the action brought by Cooperativa Animazione Valdocco should have been brought within 30 days from the notification of the act authorising the tenderers to participate in the bidding procedure.
- 11 The referring court states, in that regard, that the introduction of the accelerated procedure for challenging decisions to exclude or admit tenderers, laid down in Article 120(2-bis) of the Administrative Procedure Code, responds to the need to enable disputes to be resolved before the award decision, by determining, in an exhaustive manner, the persons eligible to participate in the tendering procedure before the examination of the tenders and, therefore, the designation of the successful tenderer.
- 12 It states, however, that that accelerated procedure is just as open to criticism with regard to certain aspects, in particular, with regard to EU law.
- 13 In that connection, it observes, first of all, that that procedure obliges the tenderer who is not eligible to participate in the tendering procedure to seek a review of the decision relating to admission or non-exclusion of all the tenderers so that, on one hand, it does not know at that time who will be the successful tenderer and, on the other hand, it does not itself have any advantage in challenging the award decision without a ranking in the final classification. That tenderer is therefore obliged to bring legal proceedings without any guarantee that that initiative will yield real benefits, while obliging it to bear the costs related to the initial costs of bringing those procedures.
- 14 The referring court then points out that a tenderer required to bring proceedings in that way in accordance the accelerated procedure not only has no actual and current interest but, under Article 120(2-bis) of the Administrative Procedure Code, also suffers various types of damage. The first results from the substantial financial costs related to bringing multiple actions. The second relates to the possible compromise of its position in the eyes of the adjudicating authority. The third relates to the negative consequences of its ranking, as Article 83 of the Public Procurement Code provides that the influence of proceedings brought by the tenderer is a negative criterion.
- 15 Lastly, the referring court points out that the excessively difficult access to administrative justice is made worse by Article 53 of the Public Procurement Code, paragraph 3 of which prohibits public officials or persons responsible for public services from communicating or, in any event making public, subject to criminal penalties, the decisions in the tendering procedure, access to which is deferred until the award decision. Having regard to the mandatory nature of that prohibition, the persons responsible for the procedure are reluctant to disclose the administrative documents relating to tenderers, apart from the admission decision, which forces economic operators to bring proceedings 'blindfolded'.
- 16 In those circumstances, the Tribunale amministrativo regionale per il Piemonte (Regional Administrative Court, Piedmont) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:
  - (1) Do the European rules on the rights of defence, due process and effective substantive operation of the protection afforded, in particular, by Articles 6 and 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, Article 47 of

[the Charter] and Article 1(1) and (2) of [Directive 89/665] preclude a provision of national law, such as Article 120(2-bis) of [the Administrative Procedure Code], which requires an operator taking part in a tendering procedure to challenge the admission of/failure to exclude another entity, within a period of 30 days of the communication of the decision to admit/exclude participants?

- (2) Do the European rules on the rights of defence, due process and effective substantive operation of the protection afforded, in particular, by Articles 6 and 13 ECHR, Article 47 of [the Charter] and Article 1(1) and (2) of [Directive 89/665], preclude a provision of national law, such as Article 120(2-bis) of [the Administrative Procedure Code], which prevents an economic operator from claiming, upon conclusion of the procedure, even by cross-appeal, that the decision to admit other operators is unlawful, in particular the one awarded the contract or the applicant in the main action, if they had not previously challenged the decision to admit in the manner set out in the preceding question?

### **Consideration of the questions referred**

- 17 Pursuant to Article 99 of its Rules of Procedure, where the answer to a question referred to the Court for a preliminary ruling may be clearly deduced from existing case-law, the Court may at any time, on a proposal from the Judge-Rapporteur and after hearing the Advocate General, give its decision by reasoned order.
- 18 It is appropriate to apply that article in the present case.

### ***Admissibility of the request for a preliminary ruling***

- 19 As a preliminary point, it must be observed, as is clear from the observations presented to the Court, that the value of the public contract at issue in the main proceedings is EUR 5 684 000, which largely exceeds the thresholds laid down in Article 4 of Directive 2014/24.
- 20 Directive 89/665 is therefore applicable to that contract in accordance with Article 46 of Directive 2014/23 and, therefore, the request for a preliminary ruling cannot be declared inadmissible simply on the ground that there was no mention of the value of that contract in the order for reference, contrary to the Italian Government's submissions.
- 21 Neither can the request for a preliminary ruling be declared inadmissible on the ground that it asks the Court to review the discretionary choice of the Italian legislature in transposing Directive 89/665, as the CISS di Pinerolo argues. The questions referred are clearly directed towards the interpretation of a number of provisions of that directive.
- 22 The reference for a preliminary ruling is therefore admissible.

### ***The first question***

- 23 By its first question, the referring court asks essentially whether Article 1(1) and (2) of Directive 89/665, read in the light of Article 47 of the Charter, must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which provides that actions against the decisions by contracting authorities to admit or exclude tenderers from participation in public procurement procedures must be brought within 30 days of their notification to the parties concerned, failing which they will be time-barred.

- 24 It must be recalled, first of all, that in accordance with Article 2c of Directive 89/665, Member States may lay down time limits within which an action may be brought against a decision of a contracting authority taken in the context of an award procedure for a contract falling within the scope of Directive 2014/24.
- 25 That provision states that that time limit is to be at least 10 calendar days with effect from the day following the date on which the contracting authority's decision is sent to the tenderer or candidate if fax or electronic means are used or, if other means of communication are used, this period shall be either at least 15 calendar days with effect from the day following the date on which the contracting authority's decision is sent to the tenderer or candidate or at least 10 calendar days with effect from the day following the date of the receipt of the contracting authority's decision. The same provision also states that the contracting authority's decision is to be sent to each tenderer or candidate, accompanied by a summary of the relevant reasons.
- 26 Thus it is clear from the very wording of Article 2c of Directive 89/665 that a time limit, such as that at issue in the main proceedings, within which actions against decisions of contracting authorities to admit or exclude tenderers from participation in public procurement procedures falling within the scope of Directive 2014/24 must be brought within 30 days from the time that the decisions are sent to the parties concerned, failing which those actions will be time-barred is, in principle, compatible with EU law, provided that those decisions contain a summary of the relevant reasons.
- 27 Furthermore, Article 1(1) of Directive 89/665 requires the Member States to ensure that decisions taken by contracting authorities may be reviewed as effectively and as rapidly as possible. The Court has already had occasion to point out that the imposition of time limits for bringing actions which will be time-barred if those time limits are not complied with, enables the objective of rapidity pursued by Directive 89/665, which requires operators to challenge promptly preliminary measures or interim decisions taken in public procurement procedures, to be attained (see, to that effect, judgment of 28 January 2010, *Commission v Ireland*, C-456/08, EU:C:2010:46, paragraph 60 and the case-law cited).
- 28 The Court also held that setting reasonable time limits for bringing proceedings must be regarded, in principle, as satisfying the requirement of effectiveness under Directive 89/665, since it is an application of the fundamental principle of legal certainty (judgments of 12 December 2002, *Universale-Bau and Others*, C-470/99, EU:C:2002:746, paragraph 76, and of 21 January 2010, *Commission v Germany*, C-17/09, not published, EU:C:2010:33, paragraph 22), and is compatible with the fundamental right to effective legal protection (see, to that effect, judgment of 11 September 2014, *Fastweb*, C-19/13, EU:C:2014:2194, paragraph 58).
- 29 The objective of rapidity pursued by Directive 89/665 must, however, be achieved in national law in compliance with the requirements of legal certainty. Thus, Member States have the obligation to put in place rules on time limits which are sufficiently precise, clear and transparent so as to enable individuals to ascertain their rights and obligations (see, to that effect, judgments of 30 May 1991, *Commission v Germany*, C-361/88, EU:C:1991:224, paragraph 24, and of 7 November 1996, *Commission v Luxembourg*, C-221/94, EU:C:1996:424, paragraph 22).
- 30 In that connection, when defining the detailed procedural rules governing the remedies intended to protect rights conferred by EU law on candidates and tenderers harmed by decisions of contracting authorities, the Member States must not compromise the effectiveness of Directive 89/665 or the rights conferred on individuals by EU law, in particular, the right to an effective remedy and to a fair hearing enshrined in Article 47 of the Charter (see, to that effect, judgment of 15 September 2016, *Star Storage and Others*, C-439/14 and C-488/14, EU:C:2016:688, paragraphs 43 to 45).

- 31 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 (judgments of 28 January 2010, *Uniplex (UK)*, C-406/08, EU:C:2010:45, paragraph 32; of 12 March 2015, *eVigilo*, C-538/13, EU:C:2015:166, paragraph 52; and of 8 May 2014, *Idrodinamica Spurgo Velox and Others*, C-161/13, EU:C:2014:307 paragraph 37).
- 32 It follows that a national law, such as that at issue in the main proceedings, which provides that actions against the decisions of contracting authorities admitting or excluding tenderers from participating in public procurement procedures must be brought within 30 days from their communication to the parties concerned, failing which they will be time-barred, is compatible with Directive 89/665 only if the decisions sent contain a summary of the relevant reasons ensuring that the parties concerned knew or ought to have known of the infringements of EU law alleged.
- 33 According to the Court's settled case-law, the effectiveness of the judicial review guaranteed by Article 47 of the Charter requires that the person concerned must be able to ascertain the reasons upon which the decision taken in relation to him is based, either by reading the decision itself or by requesting and obtaining notification of those reasons, so as to make it possible for him to defend his rights in the best possible conditions and to decide, with full knowledge of the relevant facts, whether there is any point in his applying to the court with jurisdiction, and in order to put the latter fully in a position in which it may carry out the review of the lawfulness of the national decision in question (see, to that effect, judgments of 15 October 1987, *Heylens and Others*, 222/86, EU:C:1987:442, paragraph 15, and of 4 June 2013, *ZZ*, C-300/11, EU:C:2013:363, paragraph 53).
- 34 However, the referring court points out that the tenderer who wishes to challenge a decision to admit a competitor must bring its action within 30 days of its notification, that is at a time when it is often unable to determine whether there is really an interest, as it does not know whether that competitor will ultimately be awarded the contract or whether it will be in a position to win the contract itself.
- 35 It should be recalled, in that connection, that Article 1(3) of Directive 89/665 provides that Member States must ensure that review procedures are available, under detailed rules which they themselves may establish, at least to any person having or having had an interest in obtaining a particular contract who has been or risks being harmed by an alleged infringement.
- 36 The latter provision is intended to apply, inter alia, to the situation of any tenderer which considers that a decision allowing a competitor to participate in a tender procedure is unlawful and is likely to cause it harm, that likelihood of harm being sufficient to justify an immediate interest in bringing an action against that decision, leaving aside harm which may also result from the award of the contract to another candidate.
- 37 In any event, the Court has ruled that a decision allowing a tenderer to participate in an award procedure is a decision which may, under Article 1(1) and Article 2(1)(b) of Directive 89/665, be subject to an independent judicial review (see, to that effect, judgment of 5 April 2017, *Marina del Mediterraneo and Others*, C-391/15, EU:C:2017:268, paragraphs 26 to 29 and 34).
- 38 Therefore, the answer to the first question is that Directive 89/665 and, in particular, Articles 1 and 2c, read in the light of Article 47 of the Charter, must be interpreted as meaning that it does not preclude a national law, such as that at issue in the main proceedings, which provides that actions against the decisions of contracting authorities to allow or exclude tenderers from participation in public procurement award procedures must be brought within 30 days from their communication to the parties concerned, failing which they will be time-barred, provided that decisions communicated contain a summary of the relevant reasons, ensuring that the persons concerned knew or could have known of the infringement of EU law alleged.

### *The second question*

- 39 By its second question, the referring court asks essentially whether Article 1(1) and (2) of Directive 89/665, read in the light of Article 47 of the Charter, must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which provides that, in the absence of remedies against the decisions of the contracting authorities to allow tenderers to participate in public procurement procedures within 30 days of their communication, it is no longer possible for the parties concerned to rely on the illegality of those decisions in the context of an appeal against subsequent acts and, in particular, against award decisions.
- 40 In that connection, the Court has repeatedly held that Directive 89/665 must be interpreted as not, in principle, precluding national legislation which provides that any application for review of a contracting authority's decision must be commenced within a time limit laid down to that effect and that any irregularity in the award procedure relied upon in support of such application must be raised within the same period, if it is not to be out of time, with the result that, when that period has passed, it is no longer possible to challenge such a decision or to raise such an irregularity, provided that the time limit in question is reasonable (judgments of 12 December 2002, *Universale-Bau and Others*, C-470/99, EU:C:2002:746, paragraph 79; of 27 February 2003, *Santex*, C-327/00, EU:C:2003:109, paragraph 50; and of 11 October 2007, *Lämmerzahl*, C-241/06, EU:C:2007:597, paragraph 50).
- 41 That case-law is based on the consideration that full implementation of the objective sought by Directive 89/665 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 (judgments of 12 December 2002, *Universale-Bau and Others*, C-470/99, EU:C:2002:746, paragraph 75; of 11 October 2007, *Lämmerzahl*, C-241/06, EU:C:2007:597, paragraph 51; and of 28 January 2010, *Commission v Ireland*, C-456/08, EU:C:2010:46, paragraph 52). Such conduct, in so far as it may delay, without any objective reason, the commencement of the review procedures which Member States were required to institute by Directive 89/665 impairs the effective implementation of the EU directives on the award of public contracts (judgment of 12 February 2004, *Grossmann Air Service*, C-230/02, EU:C:2004:93, paragraph 38).
- 42 In the present case, it follows from the case-law of the Court that Directive 89/665, in particular, Article 2c thereof, must be interpreted as meaning that, in principle, it does not preclude the provisions of Italian law under which there is no possibility for a tenderer to rely on the unlawfulness of the decision in the context of an action brought against a subsequent act where no action is brought against the decision of a contracting authority within 30 days.
- 43 However, although national rules on limitation periods are not in themselves contrary to the requirements of Article 2c of Directive 89/665, it cannot be excluded that, in the context of the particular circumstances, or having regard to some of their rules, their application may entail a breach of the rights conferred on individuals by EU law, in particular, the right to an effective remedy and the right to a fair trial, enshrined in Article 47 of the Charter (see, to that effect, judgments of 27 February 2003, *Santex*, C-327/00, EU:C:2003:109, paragraph 57, and of 11 October 2007, *Lämmerzahl*, C-241/06, EU:C:2007:597, paragraphs 55 and 56).
- 44 Thus, the Court has already had the occasion to rule that Directive 89/665 was to be interpreted as precluding rules on limitation periods laid down by national law from being applied in such a way that a tenderer is refused access to a review of an unlawful decision even though he became aware of that illegality only after the expiry of the time limit (see, to that effect, judgments of 27 February 2003, *Santex*, C-327/00, EU:C:2003:109, paragraph 60, and of 11 October 2007, *Lämmerzahl*, C-241/06, EU:C:2007:597, paragraphs 59 to 61 and 64).

- 45 It must also be pointed out, as set out in paragraph 31 of the present order, that the Court also held that effective procedures for review of infringements of the provisions applicable in the field of public procurement can be realised only if the time limits within which to bring proceedings start to run from the date on which the claimant knew, or ought to have known, of the alleged infringement of those provisions (see, to that effect, judgment of 12 March 2015, *eVigilo*, C-538/13, EU:C:2015:166, paragraph 52 and the case-law cited).
- 46 Therefore, it is for the referring court to determine whether, in the circumstances of the case in the main proceedings, the Cooperativa Animazione Valdocco did in fact know or ought to have known from the notification by the contracting authority of the decision to allow the ad hoc consortium to participate in the tender procedure, in accordance with Article 29 of the Public Procurement Code, of the grounds for the unlawfulness of that decision that it alleges, based on the failure to lodge a provisional security in the amount required or to prove that the conditions for participation were satisfied and, therefore, whether it was in fact in a position to bring an action within the time limit of 30 days laid down in Article 120(2-bis) of the Administrative Procedure Code.
- 47 In particular, it is for the referring court to ensure that, in the circumstances of the case in the main proceedings, the combined application of the provisions of Article 29 and Article 53(2) and (3) of the Public Procurement Code, which regulate access to the tender documents and their dissemination, did not exclude all possibilities for the Cooperativa Animazione Valdocco to learn of the illegality of the decision to allow the ad hoc consortium to participate that it alleges or to bring an action from the time at which it knew of that decision, within the time limit laid down in Article 120(2-bis) of the Administrative Procedure Code.
- 48 It must be added that it is for the referring court to interpret the national law in a way which accords with the objective of Directive 89/665. Where an interpretation in accordance with the objective of Directive 89/665 is not possible, the national court must refrain from applying provisions of national law which are at variance with that directive (see, to that effect, judgment of 11 October 2007, *Lämmerzahl*, C-241/06, EU:C:2007:597, paragraphs 62 and 63), since Article 1(1) thereof is unconditional and sufficiently precise to be relied on against the contracting authority (judgments of 2 June 2005, *Koppensteiner*, C-15/04, EU:C:2005:345, paragraph 38, and of 11 October 2007, *Lämmerzahl*, C-241/06, EU:C:2007:597, paragraph 63).
- 49 Having regard to the foregoing, the answer to the second question is that Directive 89/665, and in particular Articles 1 and 2c thereof, read in the light of Article 47 of the Charter, must be interpreted as meaning that it does not preclude national legislation, such as that at issue in the main proceedings, which provides that, in the absence of an action against the decisions of contracting authorities allowing tenderers to participate in public procurement procedures within 30 days from the communication of those decisions, it is no longer possible for the persons concerned to plead the illegality of the decisions in an action against subsequent decisions and, in particular, against award decisions, subject to the proviso that such a time limit may be relied on only if the persons concerned knew or ought to have known from that notification of the illegality they allege.

### Costs

- 50 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.

On those grounds, the Court (Fourth Chamber) hereby rules:

- 1. 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 2014/23/EU**

of the European Parliament and of the Council of 26 February 2014, and in particular Articles 1 and 2c thereof, read in the light of Article 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as meaning that it does not preclude a national law, such as that at issue in the main proceedings, which provides that actions against the decisions of contracting authorities to allow or exclude tenderers from participation in public procurement award procedures must be brought within 30 days from their communication to the parties concerned, failing which they will be time-barred, provided that decisions communicated contain a summary of the relevant reasons, ensuring that the persons concerned knew or ought to have known of the infringement of EU law alleged.

2. Directive 89/665, as amended by Directive 2014/23, and in particular Articles 1 and 2c thereof, read in the light of Article 47 of the Charter of Fundamental Rights, must be interpreted as meaning that it does not preclude national legislation, such as that at issue in the main proceedings, which provides that, in the absence of an action against the decisions of contracting authorities allowing tenderers to participate in public procurement procedures within 30 days from the communication of those decisions, it is no longer possible for the persons concerned to plead the illegality of the decisions in an action against subsequent decisions and, in particular, against award decisions, subject to the proviso that such a time limit may be relied on only if the persons concerned knew or ought to have known from that notification of the illegality they allege.

[Signatures]