



Reports of Cases

JUDGMENT OF THE COURT (Ninth Chamber)

24 February 2022*

(Reference for a preliminary ruling – Directive 92/13/EEC – Procurement procedures of entities operating in the water, energy, transport and telecommunications sectors – Article 1(1) and (3) – Access to review procedures – Article 2c – Time limits for applying for review – Calculation – Review of a decision allowing a tenderer to participate)

In Case C-532/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Curtea de Apel București (Court of Appeal, Bucharest, Romania), made by decision of 12 June 2020, received at the Court on 20 October 2020, in the proceedings

Alstom Transport SA

v

Compania Națională de Căi Ferate CFR SA,

Strabag AG – Sucursala București,

Swietelsky AG Linz – Sucursala București,

THE COURT (Ninth Chamber),

composed of K. Jürimäe, President of the Third Chamber, acting as President of the Ninth Chamber, S. Rodin (Rapporteur) 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:

- Alstom Transport SA, by O. Gavrilă, C. Ciolan and I. Nedelcu, avocați,
- Compania Națională de Căi Ferate CFR SA, by I. Pinteș,

* Language of the case: Romanian.

– Strabag AG – Sucursala București, by S. Neagu, A. Viespe, Ș. Dinu and L. Savin, avocați,
– the European Commission, by G. Wils and P. Ondrůšek and by L. Nicolae, acting as Agents,
having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,
gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 1(1) and (3) and Article 2a 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 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (OJ 2014 L 94, p. 1) ('Directive 92/13').
- 2 The request was made in the course of proceedings between Alstom Transport SA and Compania Națională de Căi Ferate CFR SA ('the CFR'), and Strabag AG – Sucursala București ('Strabag') and Swietelsky AG Linz – Sucursala București concerning the calculation of the period for bringing an action against a decision adopted in the context of a procurement procedure relating to a public works contract.

Legal framework

European Union law

- 3 Article 1(1), fourth subparagraph and (3) of Directive 92/13 provide:

'1. ...

Member States shall take the measures necessary to ensure that, as regards contracts falling within the scope of Directive 2014/25/EU [of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ 2014 L 94, p. 243)] or Directive 2014/23/EU [of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts], decisions taken by contracting entities 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 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 Under Article 2a(2) of Directive 92/13:

‘...

The communication of the award decision to each tenderer and candidate concerned shall be accompanied by the following:

- a summary of the relevant reasons as set out in Article 75(2) of Directive 2014/25/EU, subject to the provisions of Article 75(3) of that Directive or in the second subparagraph of Article 40(1) of Directive 2014/23/EU, subject to the provisions of Article 40(2) of that Directive,

...’

5 Article 2c of Directive 92/13 provides:

‘Where a Member State provides that any application for review of a contracting entity’s decision taken in the context of, or in relation to, a contract award procedure falling within the scope of Directive 2014/25/EU or Directive 2014/23/EU 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 entity’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 entity’s decision is sent to the tenderer or candidate or at least 10 calendar days with effect from the day following the date of receipt of the contracting entity’s decision. The communication of the contracting entity’s decision to each tenderer or candidate shall be accompanied by a summary of the relevant reasons. In the case of an application for a 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.’

Romanian law

6 Article 2(1) of Legea nr. 101/2016 privind remediile și căile de atac în materie de atribuire a contractelor de achiziție publică, a contractelor sectoriale și a contractelor de concesiune de lucrări și concesiune de servicii, precum și pentru organizarea și funcționarea Consiliului Național de Soluționare a Contestațiilor (Law No 101/2016 on remedies and review procedures relating to the award of public procurement contracts, sector-specific contracts and works and services concession contracts and on the organisation and operation of the National Council for the Resolution of Complaints) is worded as follows:

‘Any person who considers that his rights or legitimate interests have been infringed by an act of a contracting authority or by a failure to take a decision on an application within the period prescribed by law may seek the annulment of that act, the obligation of the contracting authority to issue an act or to take corrective measures or to recognise the alleged right or legitimate interest, [before the Consiliu Național de Soluționare a Contestațiilor (National Council for the Resolution of Complaints) or a judicial body,] in accordance with the provisions of this Law.’

7 Article 3 of that law provides:

‘1. For the purposes of this law:

...

(f) persons who consider themselves wronged means any economic operator that satisfies the following cumulative conditions:

- (i) they have or have had an interest in a procurement procedure;
- (ii) they have suffered, are suffering or risk suffering harm as a result of an act of a contracting authority capable of producing legal effects or a failure to respond to a request relating to a procurement procedure within the period prescribed by law.

...

3. For the purposes of paragraph 1(f)(i), persons shall be deemed to have or to have had an interest in a procurement procedure if they have not yet been definitively excluded from that procedure. Exclusion shall be definitive if it has been communicated to the candidate/tenderer in question and if it has been found lawful by the Consiliu [Național de Soluționare a Contestațiilor (National Council for the Resolution of Complaints)] or a court, or if it can no longer be the subject of a review procedure.’

8 In accordance with Article 8 of that law:

‘1. Persons who consider that their rights or legitimate interests have been infringed as a result of an act of a contracting authority may apply to the Consiliu [Național de Soluționare a Contestațiilor (National Council for the Resolution of Complaints)] for the annulment of that act, to impose on the contracting authority the obligation to adopt an act or corrective measures and for the recognition of the alleged right or legitimate interest within the following time limits:

- (a) ten days, with effect from the day following the date on which the existence of the act of the contracting authority considered to be unlawful became known, where the estimated value of the public/sectoral contract or concession is equal to or greater than the value thresholds above which the transmission of public procurement notices for the purpose of publication in the *Official Journal of the European Union* is mandatory, in accordance with public procurement legislation, the legislation on sectoral contracts or the legislation on works and services concessions; ...’

9 Article 49(1) of that law provides:

‘In order for the action to be resolved in judicial proceedings, persons who consider that their rights or legitimate interests have been infringed may apply to the competent court, in accordance with the provisions of this law.’

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

10 The CFR published a call for tenders in the context of a sector-specific, public procurement procedure for the award of a works contract for the renovation of a railway line.

- 11 On 13 March 2018, the tender submitted by the consortium RailWorks, the leader of which is Alstom Transport, was declared admissible, however on 5 July 2018 it was excluded by the CFR on account of considerations relating to RailWorks' ability to perform the subject matter of the contract.
- 12 By judgment of 19 October 2018, the Tribunalul București (Regional Court, Bucharest, Romania) dismissed the action brought by Alstom Transport against the CFR's decision excluding RailWorks' tender and designating the BraSig consortium as the successful tenderer. By judgment of 20 December 2018, the Curtea de Apel București (Court of Appeal, Bucharest, Romania) upheld the appeal lodged by Alstom Transport against that judgment and annulled that decision. It also found that RailWorks' tender was admissible and that the CFR was obliged to reassess BraSig's tender taking into account the criticisms levelled against it by RailWorks.
- 13 On 12 February 2019, following the reassessment ordered by the Curtea de Apel București (Court of Appeal, Bucharest), RailWorks' tender was declared admissible and, by letter of 19 June 2019, Alstom Transport was named as the successful tenderer for the contract in question.
- 14 On 5 July 2019, Alstom Transport brought a new action before the Tribunalul București (Regional Court, Bucharest) seeking, inter alia, the annulment of the CFR's decision declaring BraSig's tender as admissible and compliant, and of the report on the procurement procedure and all the documents relating to the procedures for evaluating that tender. Moreover, Alstom Transport asked that court to require the CFR to exclude that tender on the ground that BraSig had repeatedly attempted to influence the members of the CFR evaluation committee in order to place RailWorks' tender at a disadvantage.
- 15 By judgment of 8 August 2019, the Tribunalul București (Regional Court, Bucharest) dismissed that action as being out of time. In that regard, that court considered that the time limit of 10 days laid down in Article 8(1)(a) of Law No 101/2016 started to run not from the date on which Alstom Transport became aware of the report on the procurement procedure, but from the date on which the outcome of that procedure had been communicated to it.
- 16 Alstom Transport brought an appeal before the Curtea de Apel București (Court of Appeal, Bucharest), the referring court, against that judgment. In support of its appeal, it stated that, by the letter of 19 June 2019 concerning the outcome of the procurement procedure, referred to in paragraph 13 of this judgment, it had been informed only of the assessment of its own tender and that no information concerning the procedures for evaluating the tender submitted by BraSig was apparent from that letter. Alstom Transport submitted that it was not until 25 June 2019, the date on which it had access to the procurement file after having requested it on 20 June 2019, that it became aware of the report on the procurement procedure and, implicitly, of those evaluation procedures. Consequently, in its view, the time limit of 10 days referred to in the preceding paragraph of this judgment started to run from 25 June 2019.
- 17 In those circumstances, the Curtea de Apel București (Court of Appeal, Bucharest) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Are the third subparagraph of Article 1(1), Article 1(3) and Article 2c of [Directive 92/13] to be interpreted as meaning that the period within which the successful tenderer in an award procedure may apply for review of the decision of the contracting authority declaring admissible

the bid submitted by a tenderer placed lower in the ranking must be calculated by reference to the date on which the interest of the successful tenderer arose, that is, upon the lodging by the unsuccessful tenderer of an action against the outcome of the award procedure?’

The question referred for a preliminary ruling

- 18 As a preliminary point, it must be noted that it is apparent from the documents before the Court that the referring court is asking the Court not about the interpretation of the third subparagraph of Article 1(1) of Directive 92/13, but about the interpretation of the fourth subparagraph of Article 1(1) of that directive.
- 19 Thus, it must be held that, by its question, the referring court asks, in essence, whether the fourth subparagraph of Article 1(1), Article 1(3) and Article 2c of Directive 92/13 must be interpreted as meaning that the period within which the successful tenderer for a contract may apply for review of a decision of the contracting entity declaring admissible the bid submitted by an unsuccessful tenderer may be calculated by using as a point of reference the date of receipt of that decision by that successful tenderer even if, at that date, first, the unsuccessful tenderer had not or had not yet applied for review of the outcome of the award procedure for that contract and, secondly, the successful tenderer had not received the relevant information concerning the procedures for evaluating the unsuccessful tenderer’s bid.
- 20 Since Article 1(1), fourth subparagraph, Article 1(3) and Article 2c 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 2014/23, are analogous to, respectively, Article 1(1), fourth subparagraph, Article 1(3) and Article 2c of Directive 92/13, the case-law relating to those provisions of Directive 89/665, as amended by Directive 2014/23, is also relevant to the interpretation of the provisions of Directive 92/13 at issue.
- 21 The fourth subparagraph of Article 1(1) of Directive 92/13 requires the Member States, as regards contracts falling within the scope of Directive 2014/25 or Directive 2014/23, to ensure that decisions taken by contracting entities may be reviewed as effectively and as rapidly as possible. 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 that directive, which requires operators to challenge promptly preliminary measures or interim decisions taken in public procurement procedures, to be attained (see, by analogy, order of 14 February 2019, *Cooperativa Animazione Valdocco*, C-54/18, EU:C:2019:118, paragraph 27 and the case-law cited).
- 22 Setting reasonable time limits for bringing proceedings must be regarded, in principle, as satisfying the requirement of effectiveness under Directive 92/13, since it is an application of the fundamental principle of legal certainty and is compatible with the fundamental right to effective legal protection (see, by analogy, order of 14 February 2019, *Cooperativa Animazione Valdocco*, C-54/18, EU:C:2019:118, paragraph 28 and the case-law cited).

- 23 Therefore, in accordance with Article 2c of Directive 92/13, where a Member State lays down time limits for bringing an application for review of a contracting entity's decision taken in the context of, or in relation to, a contract award procedure falling within the scope of Directive 2014/25 or Directive 2014/23, the time limits for challenging that decision are to be determined according to the manner in which the contracting entity's decision is communicated to the tenderers.
- 24 Thus, the period must be at least 10 calendar days with effect from the day following the date on which that decision is sent to the tenderer or candidate if fax or electronic means are used. If other means of communication are used, that period is either at least 15 calendar days with effect from the day following the date on which that 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 that decision. In the case of an application for a review concerning decisions referred to in Article 2(1)(b) of Directive 92/13 that are not subject to a specific notification, the time period is at least 10 calendar days from the date of the publication of the decision concerned.
- 25 In the present case, the Romanian law provides that the 10-day period begins to run, for all tenderers, including the successful tenderer, from the day following the date on which the existence of the contracting entity's act became known. Thus, a successful tenderer who intends to challenge a decision declaring admissible the bid submitted by an unsuccessful tenderer must make its application for review within that time limit, irrespective, first, of whether or, as the case may be, when, that tenderer applied for review of that decision and, secondly, of the fact that the successful tenderer has no information concerning the procedures for evaluating the unsuccessful tenderer's bid.
- 26 While both the national court, in its request for a preliminary ruling, and the parties to the main proceedings and the European Commission, in their respective written observations, address the condition of having an interest in bringing proceedings, it must be noted that that court chose to limit its question solely to the issue of the starting point of the period for applying for review.
- 27 In that regard, it should be noted that Article 1(3) of Directive 92/13 provides that Member States must 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 who has been or risks being harmed by an alleged infringement.
- 28 That 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 (see, by analogy, order of 14 February 2019, *Cooperativa Animazione Valdocco*, C-54/18, EU:C:2019:118, paragraph 36).
- 29 Thus, Directive 92/13 does not, in principle, preclude 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 (see, by analogy, order of 14 February 2019, *Cooperativa Animazione Valdocco*, C-54/18, EU:C:2019:118, paragraph 40 and the case-law cited).

- 30 It follows that a successful tenderer may be required to comply with a time limit for applying for review of a decision by the contracting entity allowing an unsuccessful tenderer to participate in a public procurement procedure, even if that decision forms part of the decision designating the successful tenderer as such and even if, on that date, the tenderer has not or has not yet lodged an action against the latter decision.
- 31 Nevertheless, it cannot be excluded that, in the context of the particular circumstances, or having regard to some of their rules, the application of national rules on limitation periods 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 of Fundamental Rights of the European Union (see, by analogy, order of 14 February 2019, *Cooperativa Animazione Valdocco*, C-54/18, EU:C:2019:118, paragraph 43 and the case-law cited).
- 32 In that regard, it should be recalled that 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, by analogy, order of 14 February 2019, *Cooperativa Animazione Valdocco*, C-54/18, EU:C:2019:118, paragraph 45 and the case-law cited).
- 33 To that end, the contracting entity's decision that is communicated to tenderers must, in accordance with Article 2c of Directive 92/13, be accompanied by a summary of the relevant reasons.
- 34 That summary of the relevant reasons, which must accompany both the decisions of contracting entities which are notified specifically to tenderers and those which are published and which are not subject to a specific notification, is intended to ensure that the tenderers concerned are or may be aware of a possible infringement of the rules applicable to procurement procedures.
- 35 In the present case, subject to verification by the referring court, the relevant reasons for the contracting entity's decision allowing BraSig to participate in the procurement procedure at issue could be inferred from the report on the procurement procedure referred to in paragraphs 14 to 16 of this judgment, which, under Romanian law, must be made available to the tenderers concerned by means of a face-to-face consultation.
- 36 However, such a legal guarantee of access to the reasons for contracting entities' decisions is not equivalent to the communication, when those decisions are published or notified, of the relevant reasons for those decisions to tenderers.
- 37 Thus, in those circumstances where the relevant reasons for a contracting authority's decision have not been brought to the tenderers' attention either by means of a publication or when that decision was notified, the period within which the successful tenderer in an award procedure may apply for review of the decision of the contracting authority declaring admissible the bid submitted by an unsuccessful tenderer starts to run not on the date on which that decision was received, but the date of the communication to that successful tenderer of the relevant reasons for that decision, ensuring that the successful tenderer knew or ought to have known about possible infringements of EU law vitiating that decision.

- 38 In the light of the foregoing considerations, the answer to the question referred must be that Article 1(1), fourth subparagraph, Article 1(3) and Article 2c of Directive 92/13 must be interpreted as meaning that the period within which the successful tenderer for a contract may apply for review of a decision of the contracting entity declaring admissible, in the decision awarding that contract, the bid submitted by an unsuccessful tenderer may be calculated by using as a point of reference the date of receipt of that decision of the contracting authority by that successful tenderer, even if, at that date, that unsuccessful tenderer had not, or had not yet, applied for review of it. On the other hand, if, during the notification or publication of that decision, a summary of the relevant reasons for it, such as the information concerning the procedures for evaluating that tender, was not, in accordance with that Article 2c, brought to the knowledge of that successful tenderer, that time limit must be calculated by using as a point of reference the communication of such a summary to the same successful tenderer.

Costs

- 39 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 (Ninth Chamber) hereby rules:

Article 1(1), fourth subparagraph, Article 1(3) and Article 2c 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, as amended by Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014, must be interpreted as meaning that the period within which the successful tenderer for a contract may apply for review of a decision of the contracting entity declaring admissible, in the decision awarding that contract, the bid submitted by an unsuccessful tenderer may be calculated by using as a point of reference the date of receipt of that decision of the contracting authority by that successful tenderer, even if, at that date, that unsuccessful tenderer had not, or had not yet, applied for review of it. On the other hand, if, during the notification or publication of that decision, a summary of the relevant reasons for it, such as the information concerning the procedures for evaluating that tender, was not, in accordance with that Article 2c, brought to the knowledge of that successful tenderer, that time limit must be calculated by using as a point of reference the communication of such a summary to the same successful tenderer.

[Signatures]