Request for a preliminary ruling from the Székesfehérvári Törvényszék (Hungary) lodged on 5 June 2018 — Hochtief AG v Fővárosi Törvényszék

(Case C-362/18)

(2018/C 311/06)

Language of the case: Hungarian

Referring court

Székesfehérvári Törvényszék

Parties to the main proceedings

Applicant: Hochtief AG

Defendant: Fővárosi Törvényszék

Questions referred

1. Are the basic principles and rules of EU law (in particular Article 4(3) TEU, and the requirement for uniform interpretation), as interpreted by the Court of Justice, especially in the judgment in *Köbler*, to be interpreted as meaning that the declaration of liability of the court of the Member State ruling at final instance for 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 *Köbler* for declaring the liability of the 'State', to be interpreted as meaning that whether the conditions for liability of the Member State 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 for effective judicial protection), particularly the judgments of the Court of Justice concerning the liability of the Member State delivered, inter alia, in *Francovich and Others*, *Brasserie du pêcheur and Factortame* and *Köbler*, to be interpreted as meaning that the force of *res judicata* attaching to judgments that infringe EU law delivered by courts of the Member State ruling at final instance precludes a declaration that the Member State is liable for damages?

3. Are the principles of 'effectiveness' and equivalence established by Directives 89/665/EC, ([1]) 92/13/EC ([2]) and 2007/66/EC ([3]) and the judgments of the Court of Justice in *Kühne & Heitz*, *Kapferer*, *Impresa Pizzarotti* and *Transportes Urbanos y Servicios Generales* to be interpreted as meaning that, in review proceedings, a party may no longer rely on the assessments contained in a judgment of the Court of Justice delivered in conclusion to preliminary ruling proceedings initiated by the court of second instance in the dispute in the main proceedings, given that those assessments were not taken into consideration in the dispute in the main proceedings, in particular in the case where the Member State court adjudicating at the highest instance dismissed the appeal in cassation brought against the judgment delivered in the dispute in the main proceedings on the ground that the party did not rely in due time on the assessments contained in the judgment of the Court of Justice?

4. Are the directives cited in the third question referred for a preliminary ruling, the case-law of the Court of Justice arising in particular from the judgments in *Impresa Pizzarotti* (C-213/13), *Kapferer* (C-234/04), *Kühne & Heitz* (C-453/00) and *Transportes Urbanos y Servicios Generales* (C-118/08), concerning the admissibility of an action for review, and the basic principles established by the Court of Justice in Cases C-470/99, C-327/00 and C-241/06, concerning the time-limits laid down by national law for review procedures relating to public procurement, to be interpreted as meaning that national courts act properly in not taking into consideration — because relied on out of time by the party in the proceedings at second instance — the judgment of the Court of Justice delivered at the request of the court of second instance in the proceedings pending before it or a judgment of the Court of Justice which was not available in the official language of the Member State in question until the second instance, and in nonetheless dismissing as inadmissible the action for review brought by that party on the basis of judgments of the Court of Justice on which the party had relied but which were not taken into consideration, and facts relevant for the purposes of such judgments?

5. Are the directives cited in the third question referred for a preliminary ruling and the case-law of the Court of Justice arising in particular from the judgments in *Impresa Pizzarottoi* (C-213/13), *Kapferer* (C-234/04), *Kühne & Heitz* (C-453/00) and *Transportes Urbanos y Servicios Generales* (C-118/08) to be interpreted as meaning that, in a case where a party to a dispute refers to the judgment of the Court of Justice in *Kempter* (C-2/06) — to the effect that it does not need to rely on the judgments of the Court of Justice, the court being required to apply them of its own motion — the national courts act properly in not taking into consideration judgments of the Court of Justice, in accordance with national rules of procedure and contrary to the ruling given in the judgment [in *Kempter*], in such a way as not even to mention this fact in the decision terminating the proceedings or in the grounds thereof, and in nonetheless dismissing as inadmissible the action for review brought by that party on the basis of judgments of the Court of Justice on which the party had relied but which were not taken into consideration, and facts relevant for the purposes of such judgments?

6. Is the requirement of a sufficiently serious infringement laid down in the judgments in *Köbler* and *Traghetti del Mediterraneo* to be interpreted as meaning that such an infringement does not exist if the court ruling at final instance dismisses an action for review as inadmissible, in clear contravention of the established case-law, cited with maximum detail, of the Court of Justice (which is also supported by various legal opinions), without making any reference to that case-law or giving any reasons for that decision in the light of EU law, and, conspicuously, without examining or even alluding to the need to refer the case to the Court of Justice, notwithstanding the fact that, in order to justify that need, reference has also been made with maximum detail to the relevant case-law of the Court of Justice? In the light of the judgment of the Court of Justice in *CILFIT* (C-283/81), must the national court justify its decision in the case where, departing from the binding legal interpretation established by the Court of Justice, it dismisses an action for review as inadmissible and, in that regard, refuses to make a reference for a preliminary ruling without giving any reasons for doing so?

7. Are the principles of effective judicial protection and 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 Council Directive 93/37/EEC concerning the coordination of procedures for the award of public works contracts, as well as Directives 89/665/EEC, 92/13/EEC and 2007/66/EC, 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 applicant because it has been excluded from 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, while, 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 applicant claiming from the court compensation for harm suffered as a consequence of the unlawful measures?

8. Are the principles laid down in the judgments in *Köbler, Traghetti del Mediterraneo* and *San Giorgio* to be interpreted as meaning that compensation cannot be paid for damage caused by the fact that, in breach of the established case-law of the Court of Justice, a Member State court ruling at final instance has dismissed as inadmissible a review, requested by the party concerned in due time, in the course of which the latter would have been able to claim compensation for the costs incurred?

9. Where, in accordance with national law, review proceedings must be declared admissible by reason of the existence of a new decision of the Constitutional Court and in the interests of restoring constitutionality, is it not also necessary, in the light of the principle of equivalence and the content of the judgment of the Court of Justice in *Transportes Urbanos y Servicios Generales* (C-118/08), to declare review proceedings admissible in the case where, in the dispute in the main proceedings, account was not taken, pursuant to the provisions of national law relating to procedural time-limits, of a judgment previously delivered by the Court of Justice in another case, of a judgment of the Court of Justice delivered at the request of the court in the dispute in the main proceedings or of facts relevant for the purposes of such judgments?

([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 (OJ 1989 L 395, p. 33).

([2]) 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).

([3]) Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts (OJ 2007 L 335, p. 31).