Reports of Cases

OPINION OF ADVOCATE GENERAL
CAMPOS SÁNCHEZ-BORDONA
delivered on 5 July 2018 [1]

Case C-328/17

Amt Azienda Trasporti e Mobilità SpA,
Atc Esercizio SpA,
Atp Esercizio Srl,
Riviera Trasporti SpA,
Tpl Linea Srl
v
Atpl Liguria — Agenzia regionale per il trasporto pubblico locale SpA,
Regione Liguria

(Request for a preliminary ruling from the Tribunale Amministrativo Regionale della Liguria (Regional Administrative Court, Liguria, Italy))

(Reference for a preliminary ruling — Public procurement — Admissibility — Dispute having become devoid of purpose — Directive 89/665/EEC — Review procedures — Need to have participated in the call for tenders in order to be able to seek review — Tenderer's standing in the event of absolute certainty as to ineligibility)

1. In a case which no longer needs to be settled by way of judgment because it has become (legally) devoid of purpose in the absence of any further substantive dispute between the parties, may the judge who was to adjudicate in that case make a reference for a preliminary ruling confined exclusively to determining who should pay the costs of the proceedings?

2. The Court of Justice has two options:

– On the one hand, it can adhere to the precedent which it established in *Reinke* [2] and find that, in those circumstances, there is no longer any need to answer the question referred for a preliminary ruling, which is inadmissible.

– On the other hand, it can overcome that obstacle, in which case its reply to the referring court will have to provide an interpretation of the directives on review procedures in the award of public contracts. [3] That interpretation is sought from the Court of Justice so that the referring court can compare it with that supported by the highest courts in Italy (the Council of State and the Constitutional Court) in connection with the standing of an undertaking to challenge the

1 Original language: Spanish.

2 Order of 14 October 2010 (C-336/08, not published, 'order in *Reinke*', EU:C:2010:604).

3 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) 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 (OJ 1992 L 76, p. 14).

documents relating to a tendering procedure in which it did not participate. According to the referring court, the award of costs in the dispute in the main proceedings will depend on the answer given to this question.

I. Legal framework

A. EU law

1. Directive 89/665 and Directive 92/13[4]

3. Article 1 ('Scope and availability of review procedures') provides:

'1. This Directive applies to contracts referred to in 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)], unless such contracts are excluded in accordance with Articles 10 to 18 of that Directive [Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ 2004 L 134, p. 1), unless such contracts are excluded in accordance with Article 5(2), Articles 18 to 26, Articles 29 and 30 or Article 62 of that Directive].

Contracts within the meaning of this Directive include public contracts [supply, works and service contracts], framework agreements, public works concessions and dynamic purchasing systems.

Member States shall take the measures necessary to ensure that, as regards contracts falling within the scope of Directive 2004/18/EC [Directive 2004/17/EC], 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 Community law in the field of public procurement or national rules transposing that law.

2. Member States shall ensure that there is no discrimination between undertakings claiming harm in the context of a procedure for the award of a contract as a result of the distinction made by this Directive between national rules implementing Community law and other national rules.

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 ('Requirements for review procedures') states:

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

…

4 Wording taken from 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). I have inserted between square brackets the differences between the text of Directive 92/13 and the corresponding wording of Directive 89/665.

(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 [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].

…'

2. Regulation No 1370/2007[5]

5. Article 5 ('Award of public service contracts') provides:

'1. Public service contracts shall be awarded in accordance with the rules laid down in this Regulation. However, service contracts or public service contracts as defined in Directives 2004/17/EC or 2004/18/EC for public passenger transport services by bus or tram shall be awarded in accordance with the procedures provided for under those Directives where such contracts do not take the form of service concessions contracts as defined in those Directives. Where contracts are to be awarded in accordance with Directives 2004/17/EC or 2004/18/EC, the provisions of paragraphs 2 to 6 of this Article shall not apply.

…

7. Member States shall take the necessary measures to ensure that decisions taken in accordance with paragraphs 2 to 6 may be reviewed effectively and rapidly, at the request of 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, on the grounds that such decisions have infringed Community law or national rules implementing that law.

…'

B. Italian law

1. Decree Law No 138 of 13 August 2011[6]

6. Article 3a thereof provides that, as a general rule, the province is the territorial unit of reference for the provision of local public services.

2. Liguria Regional Law No 33 of 7 November 2103[7]

7. According to Articles 9(1) and 14(1), service contracts are to be awarded by determining a single lot covering the entirety of the regional territory.[8]

5 Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations 1191/69 and 1107/70) (OJ 2007 L 315, p. 1).

6 Gazzetta Ufficiale No 188 of 13 August 2011, ratified, with amendments, by Law No 148 of 14 September 2011.

7 Bollettino Ufficiale No 17 of 8 November 2013; 'Liguria Regional Law No 33/2013'.

8 These articles were revoked by Regional Law No 19 of 9 August 2016 introducing 'amendments to Regional Law No 33 of 7 November 2013 (Reform of the regional and local public transport system) and other legislative amendments in matters of local public transport' (*Gazzetta Ufficiale* No 11 of 18 March 2017; 'Liguria Regional Law No 19/2016').

3. Codice del processo amministrativo (Code of Administrative Procedure)[9]

8. Article 26 ('Court costs') provides:

'1. When giving judgment, the judge shall also make a decision on procedural costs, in accordance with Articles 91, 92, 93, 94, 96 and 97 of the Code of Civil Procedure, taking into account also respect for the principles of clarity and concision referred to in Article 2(3). In any event, the court may also, of its own motion, order the unsuccessful party to pay the other party a sum determined in accordance with the principle of equity, up to a maximum of twice the amount of the costs paid, where the grounds therefor are manifestly unfounded.

…'

9. Article 39(1) provides:

'Any matters not regulated in this Code shall be subject to the provisions of the Code of Civil Procedure, in so far as these are compatible or give expression to general principles.'

4. Codice di procedura civile (Code of Civil Procedure)[10]

10. Article 91 establishes the principle that the payment of costs is to be subject to the objective success or otherwise of the parties to the proceedings.

11. Article 92 states:

'In a judgment given in accordance with the foregoing article, the court may rule out recovery of the costs which the successful party has incurred if it considers them to be excessive or unnecessary; …

Should the action be partially upheld, should the matter in issue be entirely new or should there be a change of case-law in relation to the matters forming the subject of the proceedings, the court may order that all or some of the costs be shared between the parties.

…'

12. Article 100 reads:

'A party bringing or opposing a claim must have an interest in that claim.'

II. Facts of the dispute and question referred

13. Regione Liguria (Region of Liguria), acting through the Agenzia regionale per il transporto pubblico locale (Regional Agency for Local Public Transport) published in the *Official Journal of the European Union* of 3 June 2015[11] a 'notice for the identification of economic operators' to provide a public passenger transport services by land within its territory, in accordance with Liguria Regional Law No 33/2013 and Regulation No 1370/2007.

9 Legislative Decree No 104 of 2 July 2010 (Gazzetta Ufficiale No 156 of 7 July 2010).

10 Regio Decreto No 1443 of 28 October 1940 (Gazzetta Ufficiale No 253 of 28 October 1940).

11 OJ 2015/S 105-191825. That notice was preceded by another 'indicative notice' of 18 February 2014 (2014/S 038-063550), which made reference to Directive 2004/17.

14. A number of undertakings (referred to collectively as 'AMT') that provided public passenger transport services by land in the region at provincial or sub-provincial level challenged the documents relating to the procurement procedure before the Tribunale Amministrativo Regionale della Liguria (Regional Administrative Court, Liguria, Italy).[12] In support of their claim, they argued that, since the region had been established as the sole territorial unit for the provision of such services, they stood practically no chance of being awarded the contract.

15. The applicants having called into question the compatibility of Liguria Regional Law No 33/2013 with the Italian Constitution, the TAR, Liguria, raised a 'question of constitutional legitimacy' before the Corte Costituzionale (Constitutional Court, Italy) on 21 January 2016.

16. While the constitutional legitimacy proceedings were pending, Regione Liguria adopted a new law[13] abolishing the definition of the region as the geographical unit for the provision of transport services by land. In the light of that abolition, the competent authority elected not to take forward the tendering procedure and cancelled it.

17. Notwithstanding the foregoing, the Corte Costituzionale (Constitutional Court) delivered judgment No 245/2016 of 22 November 2016, in which it declared inadmissible the question raised by the TAR, Liguria, because AMT lacked standing to seek review of the documents relating to the tendering procedure, in which it had not taken part.

18. The Corte Costituzionale (Constitutional Court) gave the following as the grounds for its ruling:

'According to the submissions of the referring court, the applicants, undertakings which already held contracts for public transport services at provincial level, did not participate in the informal call for tenders issued by the regional administration in accordance with Article 30 of Legislative Decree No 163 of 2006, [[14]] but simply challenged the notice for the identification of economic operators inviting expressions of interest inasmuch as it states that the contract is to be awarded at regional level and in a single lot.

According to the settled case-law of the administrative courts, an undertaking which does not participate in a tendering procedure cannot challenge that procedure or the award of the contract to other undertakings, because its substantive legal position is not sufficiently differentiated, but is attributable only to a factual interest (judgment No 2507 of the Council of State, Third Section, of 10 June 2016; judgment No 491 of the Council of State, Third Section, of 2 February 2015; judgment No 6048 of the Council of State, Sixth Section, of 10 December 2014; judgment No 9 of the Council of State, sitting in Plenary, of 25 February 2014; and judgment No 4 of the Council of State, sitting in Plenary, of 7 April 2011).

There is also settled case-law to the effect that "calls for tender and competition and notices inviting expressions of interest are normally challenged together with the documents that give effect to them, since it is these documents which specifically identify the persons harmed by the procedure and which give actual and concrete form to the harm caused to the subjective position of the person concerned" (judgment No 1 of the Plenary of the Council of State of 29 January 2003).

12 'TAR, Liguria'.

13 See footnote 8.

14 Decreto legislativo 12 aprile 2006, n. 163. Codice dei contratti pubblici relativi a lavori, servizi e forniture in attuazione delle direttive 2004/17/CE e 2004/18/CE (Legislative Decree No 163 of 12 April 2006 (*Gazzetta Ufficiale* No 100 of 2 May 2006; 'Legislative Decree No 2006' or 'Public Procurement Code').

Constituting an exception to those rules, which derive from the straightforward application to tendering procedures of the general principles of standing and the need to have an interest in bringing proceedings, are situations in which the challenge is directed against the fact that no call for tenders has been issued or its scheduling, or the specifications in the contract notice that are immediately exclusive or, finally, against specifications which impose burdens that are manifestly incomprehensible or totally disproportionate or that make it impossible to submit a bid (judgment No 2507 of the Council of State, Third Section, of 10 June 2016; judgment No 5862 of the Council of State, Fifth Section, of 30 December 2015; judgment No 5181 of the Council of State, Fifth Section, of 12 November 2015; judgment No 9 of the Council of State, sitting in Plenary, of 25 February 2014; and judgment No 4 of the Council of State, sitting in Plenary, of 7 April 2011).

In such cases, the request to participate in the procedure is irrelevant for the purposes of the challenge, either because no call for tenders has actually been issued or because the challenge to the call for tenders in principle or the impossibility of participating in it make apparent in and of themselves a differentiated legal position (on the part of an undertaking whose legal relationship is incompatible with the launch of the new procedure and a sectoral undertaking which has been prevented from participating, respectively) and the actual and concrete harm occasioned to such an undertaking (judgment No 4 of the Council of State, sitting in Plenary, of 7 April 2011).

The fact that the case before the national court does not fall within the scope of one of the aforementioned exceptional situations follows from the reasoning set out in the order for reference itself, which states that the contested specifications would affect the applicants' chances of being awarded the contract, which "would virtually be reduced to zero", whereas, in a call for tenders issued at provincial level and divided into lots, the applicants "would stand a very good chance of being awarded the contract for the service, if only because of the advantage of having managed that service previously".

That reasoning points not towards a real and present impediment to participation in the call for tenders but towards the prospect of only potential harm, which those who have participated in the procedure may challenge, only at the end thereof, if the contract has not been awarded to them.'

19. The TAR, Liguria, is uncertain whether that interpretation of the Corte Costituzionale (Constitutional Court) is consistent with Directive 89/665. For that reason, notwithstanding that the call for tenders was cancelled, it considers it useful to obtain a preliminary ruling from the Court of Justice for the purposes of making a decision on the costs of the proceedings.

20. The referring court envisages two potential situations:

– 'if it is concluded that the action for annulment aimed at obtaining a review of the entirety of the tendering procedure is one of the exceptional situations in which an economic operator which has not participated in the procedure is considered to have standing to bring the action, the proceedings should culminate in a judgment declaring the dispute to have become devoid of purpose as a result of the adoption of Liguria Regional Law No 19/2016 … The costs of the proceedings and the standard fee … would be payable … by the defendant and, therefore, reimbursed to the applicants …';

– 'if, on the other hand, the proper interpretation were that given in judgment No 245/2016 of the Corte Costituzionale and the view were therefore taken that the applicant companies do not have standing to challenge the documents relating to the tendering procedure, the proceedings would have to conclude with a declaration that the claim is inadmissible because the applicants have no interest in bringing the action, and the costs would therefore be shared between the applicants.'

21. It was in the foregoing circumstances that the TAR, Liguria, referred the following question for a preliminary ruling:

'Do Article 1(1), (2) and (3) and Article 2(1)(b) of Directive 89/665/EEC 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, preclude a national law which recognises only economic operators that applied to take part in a tendering procedure as being able to challenge the documents relating to a tendering procedure, even where the action criticises the tendering procedure as a matter of principle because the rules of the tendering procedure make it highly unlikely that the economic operator would be awarded the contract?'

III. Summary of the observations of the parties

22. The Italian Government refutes the admissibility of the question referred for a preliminary ruling on the basis of the following arguments:

– First, because Article 1(1) of Directive 89/665 defines its scope of application by reference to Directive 2004/18. Given that the tendering procedure at issue had as its purpose to award a concession for public transport services by land, Directive 2004/18 is not applicable, and neither is Directive 89/665.

– Secondly, even if Directive 89/665 were considered to be applicable, its application rests on an infringement of the substantive rules of Directive 2004/18. The national court has not indicated which provisions have been infringed, but refers vaguely to a possible excessive restriction of competition, without specifying the provisions of EU law breached.

23. As regards the merits of the case, the Italian Government submits that the general rule is that anyone who has freely and voluntarily refrained from taking part in a procurement procedure does not have standing to seek the annulment of that procedure. Exceptions do apply, however, in the case of challenges to: i) the issue of the call for tenders as a matter of principle; ii) the failure to issue a call for tenders, because the administration has awarded the contract directly; and iii) one or more of the specifications of the contract notice, on the ground that they are immediately exclusive. It considers this regime to be perfectly compatible with the case-law principles established in the judgment in *Grossmann Air Service*.[15]

24. The Italian Government concludes that, in this particular case, the Corte Costituzionale (Constitutional Court) took the view that, since ATM's chances were not non-existent but only reduced, its eligibility could be determined only on conclusion of the procurement procedure, in which it should have taken part.

25. The Government of the Czech Republic, also relying on the judgment in *Grossmann*, argues that, if potential tenderers are in a discriminatory situation, they must be recognised as having standing to challenge the specifications giving rise to discrimination. A finding upholding their action would enable them to take part in the procedure for the award of the contract and to have the tender documents revised at the initial stage of the procedure, without having to wait for the latter to be definitively completed.

15 Judgment of 12 February 2004 (C-230/02, 'judgment in *Grossmann*', EU:C:2004:93).

26. For the Spanish Government, Directive 89/665 establishes various minimum levels of access to review procedures, it being for the national legal systems to define these within the limits of the principles of equivalence and effectiveness. It focuses its analysis on the principle of effectiveness and rejects the proposition that this has been infringed, since Article 1(3) of Directive 89/665 requires that the person concerned should have been harmed or be at risk of being harmed by an alleged infringement of Community law. This is not true of the applicant in relation to the documents concerning a tendering procedure in which it did not participate.

27. The Spanish Government points up the fact that the Italian legislation and the case-law interpreting it provide means of challenging a call for tenders without needing to take part in the tendering procedure, and that the applicant passed up the opportunity to seek review of the contract notice. There is therefore no reason why it should now take action against the documents relating to a tendering procedure in which it was not involved.

28. The Commission considers that the question referred for a preliminary ruling is inadmissible because hypothetical, inasmuch as the dispute in the main proceedings has become devoid of purpose.

29. As regards the substance of the case, the Commission analyses the judgment in *Grossmann* and reasons that the national rules governing the bringing of actions must respect the principle of effectiveness and must not run counter to the practical effect of Directive 89/665, which is strengthened by Article 47 of the Charter of Fundamental Rights of the European Union.

30. According to the Commission, the position of the Corte Costituzionale (Constitutional Court) is contrary to that principle inasmuch as it requires absolute certainty of being excluded from the tendering procedure as a condition of invoking the exceptions to the standing of an applicant which has not taken part in that procedure. The Court of Justice did not require proof of absolute certainty of exclusion, but only of a likelihood thereof.

IV. Procedure before the Court of Justice

31. The reference for a preliminary ruling was received at the Court Registry on 31 May 2017.

32. Written observations have been lodged by the Italian, Spanish and Czech Governments and by the European Commission. Only the Italian Government and the Commission attended the hearing held on 26 April 2018.

V. Assessment

A. Admissibility of the question referred

33. The main focus of the question referred is the standing to bring proceedings by persons who, like AMT, did not submit a bid in a public call for tenders because they considered it highly likely that they would be unsuccessful.

34. As I have already explained, the dispute before the national court became devoid of purpose as a result of a legislative reform following which the contracting authority cancelled the call for tenders. The national court submits, however, that it still requires a preliminary ruling from the Court of Justice in order to be able to make a decision on the costs of the proceedings.

35. According to the scheme of Article 267 TFEU, the purpose of the reference for a preliminary ruling is to provide the national court with the guidance it needs in order to be able to settle a dispute in which there is some uncertainty as to the interpretation of EU law.

36. I recalled at the outset of this Opinion that the Court of Justice has had occasion to adjudicate in a similar case in which the dispute in the main proceedings had become devoid of purpose and the preliminary ruling was useful only for the purposes of the decision as to costs.

37. Thus, the order in *Reinke* states that, in such circumstances, the decision on costs is subordinate to the resolution of the dispute in the main proceedings in the course of which the questions referred were raised. That dispute having been resolved, there was no longer any need to answer the questions raised solely in connection with the costs. [16]

38. In my view, the reasoning in the order in *Reinke* is flawless [17] and is consistent with other expressions of the same principle (Article 58 of the Statute of the Court of Justice, for example, provides that an appeal on points of law may not relate only to the amount of costs or the party ordered to pay them). If the proceedings in which the provision of EU law was to be applied later becomes devoid of purpose, the dispute between the parties is extinguished and the interpretation of a provision of EU law by the Court of Justice is simply no longer needed because it can have no bearing on the (non-existent) dispute.

39. The TAR, Liguria, nonetheless states that an assessment by the Court of Justice with respect to an applicant's standing to challenge a call for tenders in which it has not participated would be relevant inasmuch as it would enable it to determine which party should be ordered to pay the costs of the proceedings which have been extinguished, and in what amount.

40. To my mind, however, that indirect link is not sufficient to support the view that there is an adequate connection with EU law. Technically, the matter at issue now falls within the sphere not of public procurement but of the rules governing the costs of judicial proceedings. Unless costs are subject to a particular provision of EU law (as is the case in certain subject areas, to which I shall refer immediately hereafter), the decision on costs will be based exclusively on national law, not EU law.

41. The idea underpinning the order in *Reinke* is linked to the function of the reference for a preliminary ruling: since the interpretation of EU law must be essential to enable the national court to resolve the dispute before it (paragraph 13 of the order), the disappearance of that dispute renders the answer to the question referred unnecessary (paragraph 16).

42. EU law does not contain harmonised rules on procedural costs, the management of which is exclusively within the competence of the Member States. It is only in certain spheres that the EU legislature has made clear its wish to intervene in such matters, be it in order to avoid excessively onerous costs that might impede access to justice in a particular area of EU law, [18] or in order to ensure, once again in certain specific subject areas, that anyone whose rights have been infringed receives payment for proportionate and reasonable procedural costs from the other party. [19]

16 Paragraph 16.

17 It could of course be argued that the circumstances in *Reinke* were not identical to those in this case. I take the view, however, that, notwithstanding a number of incidental differences, the analogy between the two is indisputable.

18 Article 10a of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40) and Article 15a of Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control (OJ 1996 L 257, p. 26).

19 Article 14 of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (OJ 2004 L 157, p. 45); and Article 6(3) of Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions (OJ 2011 L 48, p. 1).

43. Even in cases where EU law lays down rules governing the costs of the proceedings, the Court of Justice has held that, 'where EU law lacks precision, it is for the Member States, when they transpose a directive, to ensure that it is fully effective and they retain a broad discretion as to the choice of methods'. In relation to the situation at issue in those proceedings, which concerned environmental law, it stated that 'account must be taken of all the relevant provisions of national law and, in particular, of a national legal aid scheme as well as of a costs protection regime', as well as of 'significant differences between national laws in that area'. [20]

44. If that broad discretion, combined with recognition of the fact that each national scheme has its own unique features, exists in cases where EU law intervenes in the regulation of procedural costs, the freedom enjoyed by the Member States will be more extensive still in an area not governed by Community rules.

45. In this case, any dispute over costs [21] would be strictly confined to an interpretation of the domestic rules governing the distribution of costs between the parties, as well as of the court's powers to adjust those rules. In such a dispute relating only to the costs of the proceedings, the guidance necessary to settle the dispute will have to come from national law, not EU law, which, I would reiterate, does not lay down such guidance in this subject area.

46. It could be that, notwithstanding the absence of any Community harmonisation in relation to the costs applicable to disputes of this kind, the features of the dispute in the main proceedings are such as to jeopardise respect for the fundamental rules and fundamental principles of the FEU Treaty. For this to be the case, however, one of the basic freedoms would have to be under threat, and of this there is not so much as an intimation in the order for reference.

47. In short, without wishing to usurp the assessments that fall to be made by the national court or to interfere in its freedom to choose from the options available to it under its national law, I would make the point that the aforementioned rules of the Italian codes of civil and administrative procedure provide sufficient support to enable the national court, irrespective of any adjudication that might be made in respect of the applicant's standing, to settle the matter of the award of costs on a basis separate from that issue.

48. It is sufficient to recall here that Italian domestic law provides that, where 'the matter at issue in a dispute is completely new' or where 'there is a change in the case-law relating to the matters at issue', [22] the national court may order that the costs be shared in full or in part between the parties. It thus has full freedom of choice in this regard, irrespective of whether, in accordance with the judgment of the Corte Costituzionale (Constitutional Court), it finds that AMT does not have standing to seek review or finds that it does.

49. I therefore take the view that the question referred for a preliminary ruling is inadmissible, since an answer from the Court of Justice is not necessary and the latter lacks jurisdiction to rule on the application of the Italian system for the award of procedural costs, which is a purely domestic matter.

20 Judgment of 11 April 2013, *Edwards*, (C-260/11, EU:C:2013:221, paragraphs 37 and 38).

21 The referring court does not provide any insight into the disagreement between the parties with respect to the award and amount of the (future) costs of the proceedings. What is more, the parties to those proceedings all declined to take part in the preliminary ruling proceedings, a fact which, to my mind, does not indicate much of an interest in their outcome.

22 The order for reference states that the legislation and the previous case-law of the Consiglio di Stato (Council of State) on the standing to seek review enjoyed by a person who has not participated in the call for tenders used to be 'in line with Community case-law'. That situation changed, according to the referring court, as a result of constitutional judgment No 245/2016, a 'supremely binding' precedent which has been followed by subsequent judgments of the Consiglio di Stato (Council of State).

B. Substance

50. In the event that the Court agrees to dispose of the substance of the question referred for a preliminary ruling, I shall set out my view in the alternative. In so doing, I shall begin by attempting to define the legal regime applicable and then go on to propose a response to the issue raised.

1. Legal regime applicable

51. The purpose of the call for tenders at issue was to award a contract for the provision of public passenger transport services by land. This type of service falls within the specific scope of Regulation No 1370/2007, Article 5 of which governs the 'award of public service contracts' in the transport sector.

52. From the information contained in the order for reference, it is not possible to infer with any certainty whether the contract in question was a 'service concession contract' or a 'public service contract'. The two types of contract share similar features,[23] the difference between them lying in the consideration, which, in the case of concessions, consists in the right (either as such, or in conjunction with payment) to exploit the service and, in the case of service contracts, is paid by the contracting authority to the service provider.[24]

53. The decision as to which of those two categories the contract at issue falls into is a matter for the national court, which, unlike the Court of Justice, has at its disposal all the facts necessary to enable it to make that decision. The classification of that contract will be relevant in determining the legal regime applicable to it, given the wording of Article 5(1) of Regulation No 1370/2007.[25]

54. I shall therefore turn to the issue of standing to seek review in those two scenarios.

(a) Public transport service concession

55. The first scenario is that the contract at issue was for a service concession, as some of the written observations argue and as might be inferred from the contract notice, inasmuch as it makes reference to Article 30 of the Public Procurement Code, which specifically governs 'service concessions'.[26]

56. The Italian Government cites the existence of a concession as grounds for calling into question the reliance on Directive 89/665. It argues that, since Article 1(1) thereof defines its scope by reference to Directive 2004/18, Directive 89/665 is not applicable to such concessions.

23 See the Opinion of Advocate General Sharspton in *Hörmann Reisen* (C-292/15, EU:C:2016:480, point 26); and the Opinion of Advocate General Cruz Villalón in *Norma-A and Dekom* (C-348/10, EU:C:2011:468, point 39 et seq.).

24 The service provider must also take on the risk of operating the service. See the judgment of 10 November 2011, *Norma-A and Dekom* (C-348/10, EU:C:2011:721, paragraph 44).

25 'Public service contracts shall be awarded in accordance with the rules laid down in this Regulation. However, service contracts or public service contracts as defined in Directives 2004/17/EC or 2004/18/EC for public passenger transport services by bus or tram shall be awarded in accordance with the procedures provided for under those Directives where such contracts do not take the form of service concessions contracts as defined in those Directives.'

26 According to that article, 'the provisions of the Public Procurement Code shall not apply to service concessions other than in the circumstances provided for in this article'. Paragraph 3 of that article provides for the possibility of employing an 'informal procedure whereby tenders are invited from at least five competitors' as a means of procuring a supplier for the service, which is the procedure that the contracting authority planned to use in this case.

57. The Commission, on the other hand, submits that, in Italy, Article 30(7) of the Public Procurement Code extends the application of Directive 89/665 to public service concessions. There is, therefore, in its contention, a Community link between the national legislation and EU law such as to sustain the jurisdiction of the Court of Justice to give a preliminary ruling, in accordance with settled case-law. [27]

58. This might open the way for the applicability of Directive 89/665. However, 'consideration of the limits which the national legislature may have placed on the application of Community law to purely internal situations, to which it is applicable only through the operation of the national legislation, is a matter for domestic law and hence falls within the exclusive jurisdiction of the courts of the Member State'. [28]

59. Furthermore, the specific provisions on public passenger transport services by land which are laid down in Regulation No 1370/2007 make the award of the corresponding concessions subject to the rules contained in Article 5(2) to (6) of that regulation, which goes on to say, in paragraph 7, that decisions taken in accordance with those paragraphs must be capable of being 'reviewed effectively and rapidly, at the request of 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, on the grounds that such decisions have infringed Community law or national rules implementing that law'.

60. It is therefore apparent that the provisions of Regulation No 1370/2007 and those of Article 1(3) of Directive 89/665 are essentially the same in this regard. Indeed, recital 21 of that regulation states that 'effective legal protection should be guaranteed, not only for awards falling within the scope of [Directives 2004/17 and 2004/18] but also for other contracts awarded under this Regulation. An effective review procedure is needed and should be comparable, where appropriate, to the relevant procedures set out in … Directive 89/665/EEC … and … Directive 92/13/EEC …'.

61. In short, the outcome arrived at, albeit via a different route, is the same, that is to say an obligation to establish effective review procedures. On that basis, the dispute lies in determining to what extent those review procedures must be made available to undertakings which did not take part in the tendering procedure.

(b) Transport service contract

62. The second scenario is that the legal transaction at issue fell within the category of transport service contracts. Indeed, the 'periodic indicative notice' of 22 February 2014 refers exclusively to Directive 2004/17 [29] and lays down as the award criterion the economically most advantageous offer. Similarly, point 2 of the contract notice of 29 May 2015 refers to consideration payable to the successful tenderer that is to be definitively specified in the letters of invitation to submit the financial offer mentioned in point 6 thereof.

63. It could therefore be argued that, in the light of those features, the contract at issue is not a transport service concession as defined in Article 1(3)(b) of Directive 2004/17, [30] but a transport service contract. If that were the case, Article 5(1) of Regulation No 1370/2007 would pave the way for the application of Directive 2004/17 and, therefore, for the review regime provided for in Articles 1 and 2 of Directive 92/13, which is analogous to the corresponding regime under Directive 89/665, with which the referring court's question is concerned.

27 'Thus, an interpretation, by the Court, of provisions of EU law in situations outside its scope is justified where those provisions have been made applicable to such situations by national law directly and unconditionally, in order to ensure that those internal situations and situations governed by national law are treated in the same way' [judgment of 19 October 2017, *Solar Electric Martinique* (C-303/16, EU:C:2017:773, paragraph 27 and case-law cited)].

28 Judgment of 18 October 1990, *Dzodzi* (C-297/88 and C-197/89, EU:C:1990:360, paragraphs 41 and 42).

29 Such notices are dealt with in Article 41 of that directive.

30

2. Answer to the question referred

64. Although the nub of the debate centres on standing to seek review of the tendering procedure and, therefore, on the right of access to the review system, the order for reference extends that debate to other areas by the somewhat generic reference to Article 1(1), (2) and (3) and Article 2(1)(b) of Directive 89/665.

65. The Corte Costituzionale (Constitutional Court) relies on the case-law of the Consiglio di Stato (Council of State) in order, in judgment No 245/2016, to lay down a premiss which I find difficult to refute: anyone who has voluntarily and freely refrained from participating in a procurement procedure has no standing, in principle, to seek the annulment of that procedure. This view is consistent with that expressed by the Court of Justice in the judgment in *Grossmann* when interpreting Article 1(3) of Directive 89/665. [31]

66. The supreme Italian courts accept, however, that review procedures may also be open to persons who did not take part in the tendering procedure, in certain exceptional circumstances. These include, in the words of judgment No 245/2016, situations in which the challenge is directed against the fact that no call for tenders has been issued or its scheduling, or the specifications in the contract notice that are immediately exclusive or, finally, against specifications which impose burdens that are manifestly incomprehensible or totally disproportionate or that make it impossible to submit a bid'.

67. Once again, the recognition of standing to seek review seems to me to be consistent with the standing recognised by the Court of Justice in cases where the specifications in the invitation to tender or in the contract documents were, in and of themselves, discriminatory to such an extent as to preclude the participation of one or more undertakings. [32] If '[the aforementioned undertakings'] chances of being awarded the contract are *non-existent* by reason of the existence of those [discriminatory] specifications', [33] they must be recognised as having standing to seek review without having to have participated in the tendering procedure beforehand. [34]

68. I do not therefore see any discrepancies between the interpretation of Directive 89/665 which has been adopted by the Court of Justice, on the one hand, and the supreme Italian courts' interpretation of their domestic legislation, on the other, so far as concerns the standing of persons who, although not having participated in the tendering procedure, seek to challenge discriminatory specifications that close off all access to that procedure.

69. If the question referred for a preliminary ruling is confined to resolving the hypothetical opposition between Directive 89/665 and the national legislation in the abstract, the foregoing is sufficient to demonstrate that no such incompatibility exists. The referring court frames that question in terms that do not truly reflect all the nuances of the position adopted by the Italian supreme courts, as this emerges from national case-law. [35]

'A "service concession" is a contract of the same type as a service contract except for the fact that the concession for the provision of services consists either solely in the right to exploit the service or in that right together with payment.'

31 Judgment in *Grossmann*, paragraph 27: 'participation in a contract award procedure may, in principle, … validly constitute a condition which must be fulfilled before the person concerned can show an interest in obtaining the contract at issue or that he risks suffering harm as a result of the allegedly unlawful nature of the decision to award the contract. If he has not submitted a tender, it will be difficult for such a person to show that he has an interest in challenging that decision or that he has been harmed or risks being harmed as a result of that award decision.'

32 *Ibidem*, paragraph 28: 'where an undertaking has not submitted a tender because there were *allegedly discriminatory* specifications in the documentation relating to the invitation to tender or in the contract documents, which have specifically prevented it from being in a position to provide all the services requested', that undertaking 'would be entitled to seek review of those specifications directly, even before the procedure for awarding the contract concerned is terminated' (my emphasis).

33 *Ibidem*, paragraph 29 (my emphasis).

34 *Ibidem*, paragraph 30: '[i]t must, therefore, be possible for an undertaking to seek review of such discriminatory specifications directly, without waiting for the contract award procedure to be terminated.'

35 See the account given of that position in point 18 of this Opinion.

70. If the answer to that question is extended to the specific features of the dispute in the main proceedings, in which the judgment on AMT's lack of standing has become final, it must be noted that it is, to say the least, debatable [36] whether the fact that the land transport services were put out to tender at regional level (instead of being subdivided into lots at a provincial or lower level) was, in and of itself, *discriminatory*. The fact that small undertakings lacked the means to take part in such a tendering procedure, which tends to be an inherent feature of large-scale invitations to tender, is a different matter.

71. In any event, the view taken by the Corte Costituzionale (Constitutional Court) was that, in the material circumstances, the call for tenders made it highly unlikely that AMT would be awarded the contract, but not absolutely impossible. [37] It thus dismissed the proposition that there was 'a real and actual impediment to participation in the call for tenders'. Inasmuch as they constitute a now final adjudication upon the substance of the specifications concerned, those findings cannot but be binding on the referring court and must also be adhered to by the answer to the question referred for a preliminary ruling.

72. The Commission relies on the judgment in *Grossmann* in order to argue that there is no requirement of absolute certainty as to exclusion from a call for tenders, the mere possibility of exclusion being sufficient to enable the undertaking concerned to challenge that call for tenders without needing to have participated in it.

73. My reading of the judgment in *Grossmann* does not in any way tally with the Commission's. I consider it dangerous to make the calculation of probabilities the only decisive factor in the resolution of this dispute. If that *were* the only decisive factor, any undertaking could claim that the specifications in a call for tenders (even if not discriminatory) would *probably* have the effect of excluding it from the procedure, which would open the door for potentially frivolous challenges from operators having elected not to participate in the award procedure.

74. In any event, however, I would reiterate that it is not for the Court of Justice to determine whether the Corte Costituzionale (Constitutional Court) was wrong to find that AMT did not have standing in this *particular* case. What matters — and I would emphasise that the referring court's question is concerned with the compatibility of the national legislation with Directive 89/665 — is whether the *general* position which the supreme Italian courts have adopted on the standing of economic operators which have not participated in a call for tenders to seek review of that procedure (which is that they do not have it in principle but may be afforded it in certain cases) is consistent with EU law, as I think it is.

VI. Conclusion

75. In the light of the foregoing considerations, I propose that the Court of Justice:

(1) Declare the question referred for a preliminary ruling by the Tribunale Amministrativo Regionale della Liguria (Regional Administrative Court, Liguria, Italy) to be inadmissible;

36 Reasons of efficiency or economies of scale may dictate that public road transport services be provided at a certain level (regional, for example), instead of being broken down into lots at lower levels. The choice between those two options falls to the competent authorities, which must also consider whether opting for a single lot would create disproportionate barriers to entry for smaller economic operators. In this case, the Competition and Markets Authority, on 25 June 2015, asked the Liguria Regional Agency for Local Public Transport to set up 'a number of lots so as to ensure the broadest possible participation in the competitive procedure'.

37 In its action before the TAR, Liguria, AMT stated that the contract notice 'significantly restricted the scope for participation … by small and medium-sized operators such as local public transport undertakings, compelling these to look for joint ventures with larger operators at any cost' (page 51 of the application) (my emphasis).

(2) In the alternative, declare that Article 1(1), (2) and (3) and Article 2(1)(b) 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 do not preclude national legislation, as interpreted by the highest courts of the State concerned, under which:

– anyone who has voluntarily and freely refrained from participating in a contract award procedure does not, in principle, have standing to seek the annulment of that procedure;

– situations in which the challenge is directed against the fact that no call for tenders has been issued or that one has been issued, against specifications in the contract notice that are immediately exclusive or, finally, against specifications which impose burdens that are manifestly incomprehensible or totally disproportionate or that make it impossible to submit a bid are exempt from that rule.