



Reports of Cases

OPINION OF ADVOCATE GENERAL
BOBEK
delivered on 21 November 2019¹

Joined Cases C-496/18 and C-497/18

**HUNGEOD Közlekedésfejlesztési, Földmérési, Út- és Vasúttervezési Kft.,
SIXENSE Soldata,
Budapesti Közlekedési Zrt. (C-496/18)
Budapesti Közlekedési Zrt. (C-497/18)**

v

Közbeszerzési Hatóság Közbeszerzési Döntőbizottság

(Request for a preliminary ruling from the Fővárosi Törvényszék (Budapest High Court, Hungary))

(Reference for a preliminary ruling — Public procurement — Modifications of public contracts — Remedies Directives — Review initiated *ex officio* by a public authority of an alleged infringement of public procurement rules — Time limits for the initiation of a review — Expiry of time limits under the national legislation in force at the time of the alleged infringement — *Ex officio* review initiated under new legislation — Imposition of fines on the contracting authority and on the tenderers — Principles of legal certainty and non-retroactivity — Article 83 of Directive 2014/24/EU and Article 99 of Directive 2014/25/EU — Protection of the financial interests of the Union)

I. Introduction

1. Budapesti Közlekedési Zrt. ('the contracting authority') concluded two public contracts, in 2006 and in 2009, in relation to the construction of Line 4 of the Budapest Metro. In 2017, the Közbeszerzési Hatóság Elnöke (President of the Public Procurement Authority; 'the President of the PPA') initiated *ex officio* reviews, pursuant to national provisions adopted in 2015, of modifications made to those contracts in 2009 and 2010 respectively. Following those reviews, the Közbeszerzési Döntőbizottság (Public Procurement Arbitration Panel; 'the Arbitration Panel') imposed fines on the contracting authority and on the tenderers.

2. The key question raised by these cases can be summarised as follows: does EU law permit reviews of modifications of public contracts to be initiated *ex officio* by public authorities *after* the expiry of the time limits laid down for that purpose by the national legislation in force at the time of the modifications, when such reviews lead, years after the modifications occurred, to the imposition of sanctions on both parties to the contracts?

3. In my view, EU law neither requires nor prevents *ex officio* reviews of public contracts or modifications to such contracts. However, the EU law principle of legal certainty bars national public authorities from initiating such reviews once the applicable time limits have expired.

¹ Original language: English.

II. Legal framework

A. EU law

1. Directive 89/665 and Directive 92/13, as amended by Directive 2007/66

4. Article 1 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 contracts² and Article 1 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,³ both as amended by Directive 2007/66,⁴ provide that, within their respective scopes of application:

‘1. ...

Member States shall take the measures necessary to ensure that ... decisions taken by contracting [authorities/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 public procurement or national rules transposing that law.

...

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

...’

5. In addition, recital 25 of Directive 2007/66 reads as follows:

‘... the need to ensure over time the legal certainty of decisions taken by contracting authorities and contracting entities requires the establishment of a reasonable minimum period of limitation on reviews seeking to establish that the contract is ineffective.’

6. Furthermore, recital 27 of Directive 2007/66 states that ‘... for reasons of legal certainty the enforceability of the ineffectiveness of a contract is limited to a certain period. The effectiveness of these time limits should be respected’.

² OJ 1989 L 395, p. 33.

³ OJ 1992 L 76, p. 14.

⁴ 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).

2. Directives 2014/24 and 2014/25

7. Recital 122 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/EC⁵ and recital 128 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/EC⁶ state that the review procedures provided for by Directives 89/665 and 92/13 respectively ‘should not be affected by’ those directives. However, ‘citizens, concerned stakeholders, organised or not, and other persons or bodies which do not have access to review procedures pursuant to [either of those directives] do nevertheless have a legitimate interest, as taxpayers, in sound procurement procedures. They should therefore be given a possibility, otherwise than through the review system pursuant to [those directives] and without it necessarily involving them being given standing before courts and tribunals, to indicate possible violations of [those directives] to a competent authority or structure. So as not to duplicate existing authorities or structures, Member States should be able to provide for recourse to general monitoring authorities or structures, sectoral oversight bodies, municipal oversight authorities, competition authorities, the ombudsman or national auditing authorities’.

8. Article 83 of Directive 2014/24 and Article 99 of Directive 2014/25, which are entitled ‘Enforcement’ and which fall within Title IV ‘Governance’ provide that:

‘...

2. Member States shall ensure that the application of public procurement rules is monitored.

Where monitoring authorities or structures identify by their own initiative or upon the receipt of information specific violations or systemic problems, they shall be empowered to indicate those problems to national auditing authorities, courts or tribunals or other appropriate authorities or structures, such as the ombudsman, national parliaments or committees thereof.

...’

B. Hungarian law

1. The 2003 Law on Public Procurement

9. Article 303(1) of the közbeszerzésekről szóló 2003. évi CXXIX. törvény (Law No CXXIX of 2003 on Public Procurement; ‘the 2003 Law on Public Procurement’) reads as follows:

‘The parties may amend the part of the contract established on the basis of the conditions set out in the call for tenders or in the documentation relating thereto, and on the basis of the content of the tender, only where the contract, as a result of a circumstance which has arisen after the contract has been entered into – for a reason which was not foreseeable at the time the contract was entered into – infringes the substantive legitimate expectations of one of the co-contractors.’

10. Article 306/A is worded as follows:

‘(1) Any contract falling within the scope of this law shall be void where

⁵ OJ 2014 L 94, p. 65.

⁶ OJ 2014 L 94, p. 243.

- (a) the public procurement procedure was unlawfully disregarded at the time said contract was entered into ...

...'

11. By virtue of Article 307(3), 'the Közbeszerzések Tanácsának elnöke [(President of the Council on Public Procurement)] shall take the initiative to commence a procedure of his own motion before [the Arbitration Panel] if it is plausible that the amendment of the contract was carried out in breach of Article 303 ...'.

12. Article 327 provides that:

'(1) The following bodies or persons may take the initiative to commence proceedings of their own motion before [the Arbitration Panel] if, in exercising their powers, they become aware of conduct or an omission which is contrary to this law:

- (a) the President of the Council on Public Procurement;

...

- (2) A procedure may be commenced of a body's own motion before [the Arbitration Panel]:

- (a) on the initiative of one of the bodies referred to in paragraph 1(a), (b) and (d) to (i) within 30 days as from the date on which that body becomes aware of the infringement or, in the case where the public procurement procedure has been disregarded, from the date on which the contract was entered into, or — if that date cannot be established — from the date on which that body becomes aware of the start of the execution of the contract by one of the parties, but at the latest within 1 year as from the occurrence of the infringement, or within 3 years in cases where the public procurement procedure has been disregarded,

...'

13. Under Article 328(1):

'The President of the Council on Public Procurement shall take the initiative to commence a procedure of his own motion before [the Arbitration Panel]

...

- (c) in the case referred to in Article 307(3).'

14. Pursuant to Article 379(2):

'The Council [on Public Procurement] ...

(l) shall follow attentively the amendment and execution of contracts entered into following a public procurement procedure (Article 307(4)).'

2. *The 2015 Law on Public Procurement*

15. Article 152 of the közbeszerzésekről szóló 2015. évi CXLI. törvény (Law No CXLI of 2015 on Public Procurement; ‘the 2015 Law on Public Procurement’) provides that:

‘(1) The following bodies or persons may take the initiative to commence proceedings of their own motion before [the Arbitration Panel] if, in exercising their powers, they become aware of conduct or an omission which is contrary to this law:

(a) [the President of the PPA];

...

(2) One of the bodies referred to in paragraph 1 may take the initiative to commence a procedure of its own motion before [the Arbitration Panel] within 60 days as from the date on which that body becomes aware of the infringement, but

(a) at the latest within the time period of 3 years as from the occurrence of the infringement,

(b) by way of derogation from (a) above, where purchases have been made without a public procurement procedure having been organised, within a maximum of 5 years as from the date on which the contract was entered into, or — if that date cannot be established — as from the commencement of the execution of the contract by one of the parties, or

(c) by way of derogation from (a) and (b) above, where acquisitions have been made as a result of aid, for the duration of the conservation of documents laid down specifically by law relating to the payment and use of the aid considered, but as a minimum within a time period of 5 years as from the occurrence of the infringement — where acquisitions have been made without a public procurement procedure having been organised, as from the date the contract was entered into or, if that date cannot be established, as from the commencement of the execution of the contract by one of the parties.

...

16. Article 153(1) is worded as follows:

‘[The President of the PPA] shall take the initiative to commence the procedure of his own motion before [the Arbitration Panel],

...

(c) if it is plausible, in the light of the result of the monitoring carried out by the Public Procurement Authority in accordance with Article 187(2)(j), or even without administrative monitoring having been carried out, that the amendment or execution of the contract has been carried out in infringement of this law, in particular if an infringement of the type referred to in Article 142(2) has been committed ...

...

17. Article 187 provides that:

‘...

(2) The [Public Procurement] Authority ...

- (j) shall follow attentively the amendment of contracts entered into following a public procurement procedure and, in the context of the administrative review pursuant to the [közigazgatási hatósági eljárás és szolgáltatás általános szabályairól 2004. évi CXL. törvény (Law No CXL of 2004 laying down general provisions on administrative services and procedure)] execution shall also be monitored — in accordance with the detailed rules provided for specifically by law — and, inter alia, adopt the measures referred to in Article 153(1)(c) and Article 175;

...'

18. By virtue of Article 197(1):

'The provisions of this law shall apply to contracts entered into following procedures for the award [of concessions] or public procurement procedures which commenced after its entry into force, to competition procedures commenced after that date, as well as to review procedures relating thereto which have been requested, commenced or brought of an authority's own motion, including dispute settlement procedures preceding an action. Articles 139, 141, 142, 153(1)(c) and 175 shall apply to the possibility of amending, without carrying out a new public procurement procedure, contracts entered into following public procurement procedures which commenced before the entry into force of this law, and to the monitoring of amendments and the execution of contracts. Moreover, the provisions of Chapter XXI shall apply to review procedures relating to such contracts.'

3. Decree No 4/2011

19. Under Article 80(3) of 2007-2013 programozási időszakban az Európai Regionális Fejlesztési Alapból, az Európai Szociális Alapból és a Kohéziós Alapból származó támogatások felhasználásának rendjéről szóló 4/2011. (I. 28.) Korm. rendelet (Decree No 4/2011 of 28 January 2011 on the use of aid from the European Regional Development Fund, the European Social Fund and the Cohesion Fund for the 2007-2013 programming period):

'The beneficiary and the bodies involved in the payment of aid shall keep separate accounts for each project, register all the documents related to the project separately and retain them until at least 31 December 2020.'

III. Facts, procedure and the questions referred

A. Case C-496/18

20. On 30 September 2005, the contracting authority published a call for tenders in the *Official Journal of the European Union* for the purposes of the 'acquisition of a monitoring system for the surveillance of movements of the structures and the control of noise and vibrations during the first stage of construction of Line 4 of the Budapest Metro'. The estimated value of the contract exceeded the Community (EU) thresholds. The project received EU funding (under the Operational Programme for Transport).

21. The contract was awarded to a consortium of service providers consisting of Sol-Data SA (which later changed its name to SIXENSE Soldata) and HUNGEOOD Kft. On 1 March 2006, the contracting authority concluded a public contract with the members of the Sol-Data — Hungeod Konzorcium.

22. On 5 October 2009, the parties modified the contract, claiming that unforeseeable circumstances had arisen. On 18 November 2009, a notice of the modification of the contract was published in the *Közbeszerzési Értesítő* (Public Procurement Journal).

23. According to the order for reference, a review procedure concerning the modification of the contract with Sol-Data SA and HUNGEOD Kft. was initiated *ex officio* by Az Európai Támogatásokat Auditáló Főigazgatóság (the Directorate-General for the Audit of European Aid). However, on 9 November 2010, the Arbitration Panel rejected that review application as being out of time.

24. On 29 May 2017, the President of the PPA, the intervener in support of the Arbitration Panel, commenced a procedure of his own motion, pursuant to Article 153(1)(c) of the 2015 Law on Public Procurement, against HUNGEOD Kft., Sol-Data and the contracting authority ('the applicants'). In its view, by modifying the contract at issue, the applicants infringed Article 303(1) of the 2003 Law on Public Procurement since the conditions for modifications laid down in that provision were not satisfied. The President of the PPA identified the date of the modification of the contract, namely 5 October 2009, as the date of the infringement. However, he gave 30 March 2017 as the date on which he became aware of the infringement.

25. On 3 August 2017, in the decision at issue in the main proceedings, the Arbitration Panel found that the applicants had infringed Article 303 of the 2003 Law on Public Procurement.

26. In its decision, prior to its finding on the merits, the Arbitration Panel dismissed a procedural objection regarding the issue of whether the President of the PPA had initiated the procedure in due time. According to the Arbitration Panel, while the 2003 Law on Public Procurement was applicable to the substance of the case, the 2015 Law on Public Procurement applied as far as the procedure was concerned. The second sentence of Article 197(1) of the 2015 Law on Public Procurement provides, as a transitional provision, that it is necessary to apply, *inter alia*, the 2015 Law on Public Procurement to the monitoring of modifications of contracts entered into following public procurement procedures launched before the entry into force of that law, and to apply the chapter of that law concerning the rules governing review procedures to review procedures related to the monitoring of such modifications. Consequently, the Arbitration Panel did not consider that the applicants were entitled to rely on the principles of non-retroactivity and legal certainty. Thus, the President of the PPA was correct in initiating a review within the time limits laid down in Article 152(2) of the 2015 Law on Public Procurement.

27. The Arbitration Panel also found that a significant part of the project at issue, and of the modification of the contract under examination, had been carried out with EU financing, therefore falling under Decree No 4/2001. The Arbitration Panel found that it was necessary to apply Article 80(3) of that decree to the modification of the contract at issue. Accordingly, the time period within which a body can commence a procedure of its own motion was due to expire on 31 December 2020. It follows that the President of the PPA acted within that time frame in commencing the procedure of his own motion on 29 May 2017.

28. As a consequence of the finding of an infringement, the Arbitration Panel imposed a fine on the contracting authority in the amount of 25 000 000 Hungarian forint (HUF). It also imposed a fine in the amount of HUF 5 000 000 on HUNGEOD Kft. and SIXENSE Soldata jointly and severally.

29. The applicants challenged the Arbitration Panel's decision before the referring court, the Fővárosi Törvényszék (Budapest High Court, Hungary). Harboursing doubts as to the correct interpretation of EU law, the referring court decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

- '1. Must Article 41(1) and Article 47 of the Charter of Fundamental Rights of the European Union, recitals 2, 25, 27 and 36 of [Directive 2007/66], Article 1(1) and (3) of [Directive 92/13], and, in this context, the principle of legal certainty, as a general principle of EU law, and the requirement for effective and rapid remedies against decisions by contracting authorities in public procurement cases, be interpreted as precluding legislation of a Member State which, in relation to public procurement contracts entered into before that legislation came into force, provides a general

authorisation that enables the competent (monitoring) authority created by that legislation, after the periods established in the Member State's previous legislation for bringing an action for review of public procurement infringements committed prior to the entry into force of the new legislation have expired but within the time period established in the new legislation, to commence proceedings to investigate a specific public procurement infringement and to rule on the substance, leading to a ruling that the infringement did take place, the imposition of a public procurement penalty, and the application of the consequences of the voiding of the contract?

2. Can the legal rules and principles referred to in question 1 — and also the effective exercise of the (subjective and personal) right of review enjoyed by parties with an interest in the award of a public contract — be applied to the right to commence and conduct review proceedings conferred on the (monitoring) authorities created by the law of the Member State, which have the power to identify and investigate public procurement infringements of their own motion, and which are under a duty to defend the public interest?
3. Does Article 99(1) and (2) of [Directive 2014/25] mean that in order to defend EU financial interests in the field of public procurement, the law of the Member State may, through the adoption of new legislation, confer on the (monitoring) authorities which have power under the law of the Member State to identify and investigate public procurement infringements of their own motion, and which are under a duty to defend the public interest, a general power to investigate public procurement infringements committed before the entry into force of the legislation in question and to commence and conduct proceedings, even where the time periods established under the previous legislation have expired?
4. If — having regard to the legal rules and principles referred to in question 1 — the (monitoring) authorities' power of investigation described in questions 1 and 3 is held to be compatible with EU law, is any relevance to be ascribed to the legal, regulatory, technical or organisational deficiencies or other obstacles that prevented the public procurement infringement from being investigated at the time when the infringement took place?
5. Even if, in the light of the above principles, the (monitoring) authorities which are authorised by the law of the Member State to identify and investigate public procurement infringements of their own motion, and which are under a duty to defend the public interest may be granted the power referred to in questions 1 to 4, must Article 41(1) and Article 47 of the Charter of Fundamental Rights of the European Union, recitals 2, 25, 27 and 36 of [Directive 2007/66], Article 1(1) and (3) of [Directive 92/13] and, in this context, the principle of legal certainty, as a general principle of EU law, and the requirement for effective and rapid remedies against decisions by contracting authorities in public procurement cases, and the proportionality principle, be interpreted as meaning that the national courts may assess whether the period of time that has elapsed between the occurrence of the infringement, the expiry of the period previously established for bringing an action for review, and the commencement of the proceedings to investigate the infringement, is reasonable and proportionate, and may use this as a basis for determining the legal consequences of the nullity of the contested decision or other consequences established by the law of the Member State?

B. Case C-497/18

30. On 3 July 2009, the contracting authority published a call for tenders in the *Official Journal of the European Union* for the purposes of 'the provision of services requiring expertise in relation to the management of the DBR project during the first stage of construction of metro Line 4'. The estimated value of the contract (HUF 90 000 000 over a period of 3 years) exceeded the Community (EU) thresholds. The project received EU funding (under the Operational Programme for Transport).

31. The public contract was awarded to Matrics Consult Ltd. The contracting authority concluded the contract on 14 May 2009. It terminated the contract on 16 November 2011, with effect from 31 December 2011.

32. On 30 May 2017, the President of the PPA commenced a procedure *ex officio*, pursuant to Article 153(1)(c) of the 2015 Law on Public Procurement, against the contracting authority and Matrics Consult Ltd, seeking a declaration that the public procurement rules had been infringed and the imposition of a fine. Although the parties had not amended the contract at issue in writing, they had, as a result of their conduct when paying invoices and issuing certificates of performance, departed to a great extent from the payment conditions defined at the time of the tender submission and inserted into the contract. Those changes were regarded as a modification to the contract amounting to an infringement of Article 303(1) of the 2003 Law on Public Procurement since the conditions for contractual modifications laid down in that article were not satisfied. In his review application, the President of the PPA gave 8 February 2010 as the date of the infringement, namely the date on which the invoice was paid, the payment of which led to the parties exceeding the amount of the consideration agreed in the contract. The date given for when the President of the PPA became aware of the infringement was 31 March 2017.

33. On 18 August 2017, the Arbitration Panel found that the contracting authority and Matrics Consult Ltd had infringed Article 303 of the 2003 Law on Public Procurement by unlawfully modifying the contract relating to a public procurement procedure that they had entered into. The Arbitration Panel imposed a fine on the contracting authority in the amount of HUF 27 000 000 and a fine in the amount of HUF 13 000 000 on Matrics Consult Ltd.

34. Before making that finding on merits, the Arbitration Panel dismissed a procedural objection regarding whether the initiation of the review procedure by the President of the PPA had taken place within the applicable time limit. The Arbitration Panel considered that the provisions regarding time limits laid down in the 2015 Law on Public Procurement were applicable to the *de facto* modification of the contract that occurred before the entry into force of that law, meaning that the parties to the contract were not entitled to rely on the principles of non-retroactivity and legal certainty.

35. The contracting authority challenged the Arbitration Panel's decision before the referring court, the Fővárosi Törvényszék (Budapest High Court). That court decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

- '1. Must Article 41(1) and Article 47 of the Charter of Fundamental Rights of the European Union, recitals 2, 25, 27 and 36 of [Directive 2007/66], Article 1(1) and (3) of [Directive 89/665] and, in this context, the principle of legal certainty, as a general principle of EU law, and the requirement for effective and rapid remedies against decisions by contracting authorities in public procurement cases, be interpreted as precluding legislation by a Member State which, in relation to public procurement contracts entered into before that legislation came into force, provides a general authorisation that enables the competent (monitoring) authority created by that legislation, after the periods established in the Member State's previous legislation for bringing an action for review of public procurement infringements committed prior to the entry into force of the new legislation have expired but within the time period established in the new legislation, to commence proceedings to investigate a specific public procurement infringement, leading to a ruling that the infringement did take place, the imposition of a public procurement penalty, and the application of the consequences of the voiding of the public contract?
2. Can the legal rules and principles referred to in question 1 — and also the effective exercise of the (subjective and personal) right of review enjoyed by parties with an interest in the award of a public contract — be applied to the right to commence and conduct review proceedings conferred on the

(monitoring) authorities created by the law of the Member State, which have the power to identify and investigate public procurement infringements of their own motion, and which are under a duty to defend the public interest?

3. Does Article 83(1) and (2) of [Directive 2014/24] mean that in order to defend EU financial interests in the field of public procurement, the law of the Member State may, through the adoption of new legislation, confer on the (monitoring) authorities which have power under the law of the Member State to identify and investigate public procurement infringements of their own motion, and which are under a duty to defend the public interest, a general power to investigate public procurement infringements committed before the entry into force of the legislation in question and to commence and conduct proceedings, even where the time periods established under the previous legislation have expired?
4. If — having regard to the legal rules and principles referred to in question 1 — the (monitoring) authorities' power of investigation described in questions 1 and 3 is held to be compatible with EU law, is any relevance to be ascribed to the legal, regulatory, technical or organisational deficiencies or other obstacles that prevented the public procurement infringement from being investigated at the time when the infringement took place?
5. Even if, in the light of the above principles, the (monitoring) authorities which are authorised by the law of the Member State to identify and investigate public procurement infringements of their own motion, and which are under a duty to defend the public interest may be granted the power referred to in questions 1 to 4, must Article 41(1) and Article 47 of the Charter of Fundamental Rights of the European Union, recitals 2, 25, 27 and 36 of [Directive 2007/66], Article 1(1) and (3) of [Directive 89/665] and, in this context, the principle of legal certainty, as a general principle of EU law, and the requirement for effective and rapid remedies against decisions by contracting authorities in public procurement cases, and the proportionality principle, be interpreted as meaning that the national courts may assess whether the period of time that has elapsed between the occurrence of the infringement, the expiry of the period previously established for bringing an action for review, and the commencement of the proceedings to investigate the infringement, is reasonable and proportionate, and may use this as a basis for determining the legal consequences of the nullity of the contested decision or other consequences established by the law of the Member State?
36. By decision of 18 September 2018, the President of the Court joined the two cases.
37. Written submissions were lodged by the contracting authority, the Arbitration Panel, the President of the PPA, the Hungarian Government and the European Commission. All of them presented oral argument at the hearing held on 4 September 2019.

IV. Analysis

38. This Opinion is structured as follows. I will start with several introductory remarks concerning the specificities of the Hungarian system of *ex officio* review of public contracts by public authorities. It will also be necessary to determine, at the outset, the rules of EU law applicable to the present case and to rephrase the questions posed by the referring court (A). Next, I will address Question 2 regarding the scope of application of Directives 89/665 and 92/13 ('the Remedies Directives'), as amended by Directive 2007/66, and of Directives 2014/24 and 2014/25: do *ex officio* reviews of public contracts initiated by public authorities fall within the scope of those directives (B)? I will subsequently turn to Questions 1, 3 and 4, which I shall assess together, since they all deal essentially with the same issue: does EU law, in particular the principle of legal certainty, preclude the *ex officio* initiation of such

reviews *after* the expiry of the time limits for review, laid down by the national legislation in force at the time of the allegedly illegal modifications of the contracts (C)? Finally, I will conclude with Question 5 on national courts' powers with regard to the examination of potential infringements raised *ex officio* by national public authorities (D).

A. Preliminary considerations

1. The Hungarian system of review in public procurement matters and the cases at hand

39. Hungarian law provides for two types of review of public contracts, depending on the identity of the person initiating the review.

40. On the one hand, a review can be sought by persons that have a *subjective interest* (in the sense of a real and individual interest) in the public contract at issue, such as the successful tenderer, the unsuccessful (actual or potential) tenderers or even the relevant contracting authority. That type of review facilitates the *private* enforcement of public procurement rules.

41. On the other hand, Hungarian law also provides for reviews that may be initiated *ex officio* by a number of public authorities charged with protecting the *general interest*, including, for example, the upholding of the principle of legality and/or monitoring the use of public funds. That type of review represents the *public* enforcement of public procurement rules.

42. The President of the PPA is one of those public authorities. He has the right to commence a procedure of his own motion under Article 153(1) of the 2015 Law on Public Procurement. Once such an *ex officio* review has been initiated, it is subsequently for the Arbitration Panel to carry out the review as regards both admissibility and the merits. When an infringement of public procurement rules is found, the Arbitration Panel may impose a fine on the persons responsible for the infringement. The imposition of a fine appears to be compulsory when the finding of an infringement arises from an *ex officio* review initiated by the President of the PPA under Article 153 of the 2015 Law on Public Procurement. In addition, it was explained at the hearing that a finding of an infringement may also lead to the annulment of the contract, but only following a decision of a court of law.

43. In the cases at hand, the President of the PPA initiated *ex officio* reviews of the modifications of the two public contracts at issue. The modifications occurred in 2009 and 2010 respectively. At the time of the modifications, the applicable national legislation was the 2003 Law on Public Procurement. However, the transitional provisions of the 2015 Law on Public Procurement (in Article 197) have been interpreted in such a way that the *procedural* provisions of that law apply to modifications of public contracts that occurred *before* that law entered into force.

44. In line with this reasoning, the President of the PPA launched *ex officio* reviews before the Arbitration Panel in 2017, that is, 7 and 8 years respectively after the alleged infringements had occurred. At that time, the time limits for review laid down by the 2003 Law on Public Procurement had already lapsed. The President of the PPA justified such apparently belated reviews by the fact that he only became aware of the infringements at issue in 2017. The Arbitration Panel subsequently assessed whether the reviews had been initiated in due time with reference to the 2015 Law on Public Procurement and concluded that they had. In both cases, the Arbitration Panel ultimately imposed the contested fines on both the contracting authority and the tenderers. However, neither the contracts nor the allegedly unlawful modifications were declared null and void.

45. It is against this factual and procedural background that the referring court has posed a set of questions to the Court. It is not for this Court to interpret the rather complex national legislative landscape and procedural background. However, I wish to stress two points that appear to be uncontested and that this Opinion takes as points of departure.

46. First, both the 2003 Law on Public Procurement and the 2015 Law on Public Procurement contain deadlines by which an authority entitled to launch an *ex officio* review must act. I understand those rules to be contained in Article 327(2) of the 2003 Law on Public Procurement and Article 152(2) of the 2015 Law on Public Procurement.⁷ The structure of both provisions is similar. Each contains a combination of subjective and objective limitation periods. What changed, however, between the 2003 and 2015 iterations of those provisions was the length of the limitation periods, which were more than doubled by the 2015 Law on Public Procurement.

47. Second, and rather importantly to my mind, the referring court states, without being contradicted on this point by any party to these proceedings,⁸ that the time limits for review that were in force and applicable at the time of the modifications had already lapsed before the 2015 Law on Public Procurement entered into force.⁹

2. Relevant provisions of EU law and rephrasing of the questions

48. In each of the joined cases, the referring court poses five near identical questions.¹⁰ The wording of those questions is, unfortunately, not very clear. Their content also overlaps to some extent. Thus, some rephrasing is called for in order to provide the referring court with a useful answer in the light of the factual and legal context of the present cases.

49. Before doing so, a note on the relevant rules of EU law is warranted. The referring court cites in its questions a number of provisions of the Charter of Fundamental Rights of the European Union ('the Charter') and of several public procurement directives, together with some general principles of EU law. However, only some appear to be fully relevant to the cases at hand. Conversely, other rules of EU law not referred to might in fact be relevant.

50. First, I do not think that Article 41 and Article 47 of the Charter are relevant to the present cases. Article 41, regarding the right to good administration, is addressed only to the institutions, bodies, offices and agencies of the European Union.¹¹ Likewise, Article 47 of the Charter is not applicable to the cases at hand. In mentioning that article, the referring court wonders whether the initiation of a review 7 or 8 years after the commission of the alleged infringements is compatible with the requirement to conduct legal proceedings within a reasonable time. However, on the facts of the cases at hand, the right to an effective remedy *before a tribunal* in the sense of Article 47 does not appear to be at issue. The real issue appears to be respect for limitation periods by an administrative authority.

⁷ Reproduced above, in points 12 and 15 of this Opinion.

⁸ The argument advanced by the President of the PPA and the Arbitration Panel, restated above in points 26, 34 and 44, appears to be of a different nature, namely that for reviews launched after 2015, the time limits of the 2015 Law on Public Procurement became applicable, including for modifications of public contracts carried out before 2015.

⁹ As noted above in point 23 of this Opinion, in Case C-496/18, a review procedure concerning the amendment of the contract with Sol-Data SA and HUNGEOD Kft. was initiated *ex officio* by another Hungarian public authority, namely the Directorate-General for the Audit of European Aid. However, on 9 November 2010, the Arbitration Panel rejected that application as being out of time. I can only assume that this was done while applying the then (in 2010) applicable time limit stemming from the 2003 Law on Public Procurement.

¹⁰ The only difference between them lies in the fact that different public procurement directives are applicable. In Case C-496/18, Directive 92/13 and Article 99 of Directive 2014/25 apply, while in Case C-497/18, it is Directive 89/665 and Directive 2014/24.

¹¹ See judgments of 21 December 2011, *Cicala* (C-482/10, EU:C:2011:868, paragraph 28); of 17 July 2014, *YS and Others* (C-141/12 and C-372/12, EU:C:2014:2081, paragraph 67); of 5 November 2014, *Mukarubega* (C-166/13, EU:C:2014:2336, paragraph 44); of 17 December 2015, *WebMindLicenses* (C-419/14, EU:C:2015:832, paragraph 83); and of 9 March 2017, *Doux* (C-141/15, EU:C:2017:188, paragraph 60).

51. Second, as regards the general principles of EU law that were raised by the referring court, the principle of legal certainty is key to the resolution of Questions 1, 3 and 4, while the principle of proportionality has some relevance for Question 5. The requirement to have swift and effective remedies against the decisions of contracting authorities is specifically enshrined in Article 1(1) of the Remedies Directives.

52. Third, since the referring court has invoked in general the protection of the financial interests of the Union, I will examine that aspect of the case with regard to provisions of EU law that have not been raised by the referring court, but were discussed at the hearing, namely Regulation No 2988/95¹² and Regulation No 1083/2006.¹³

53. Turning now to the specific questions posed by the referring court, they can, in my view, be regrouped as follows.

54. By Question 2, the referring court seeks, in essence, to determine whether EU law — in particular the Remedies Directives, as notably amended by Directive 2007/66, and Directives 2014/24 and 2014/25 — governs or in any way limits the possibility for public authorities to conduct reviews in the public interest. More precisely, I understand this question as asking the Court whether reviews such as those at issue in the main proceedings fall within the scope of any of those directives.

55. By Question 1, the Court is called on to determine whether EU law, in particular the general principle of legal certainty, allows public authorities to initiate reviews of modifications to public contracts — and, as the case may be, to impose sanctions — even though the time limits for such reviews under the national legislation in force at the time of the modifications have already lapsed. Questions 3 and 4 concern the possible impact of the need to protect the financial interests of the Union on the answer to Question 1. Questions 1, 3 and 4 will therefore be addressed together.

56. Question 5 is, for its part, relevant only if it is assumed that EU law does not preclude *ex officio* review in the circumstances of the cases at hand. In that case, does EU law, in particular the principle of proportionality, empower national courts to review the sanctions that were imposed?

B. Question 2

57. By Question 2, the referring court seeks to determine whether EU law governs or limits the possibility for public authorities acting in the general interest to initiate *ex officio* reviews of modifications of public contracts. In particular, do such reviews fall within the scope of the Remedies Directives, as amended by Directive 2007/66, or Directives 2014/24 and 2014/25?

58. According to the President of the PPA, the Remedies Directives do not govern reviews initiated in the public interest by public authorities. It is for the Member States only to adopt rules to that effect. It follows that the present cases are outside the scope of EU law.

59. The Hungarian Government also considers that the national provisions relating to time limits for initiating *ex officio* reviews in the public interest do not implement the Remedies Directives, nor do they fall within their scope of application. It relies on Article 83 of Directive 2014/24 and Article 99 of Directive 2014/25 to explain that the prerogatives of monitoring authorities are, by their nature, fundamentally different from the review at the disposal of economic operators with an interest in securing a contract.

¹² Council Regulation (EC, EURATOM) No 2988/95 of 18 December 1995 on the protection of the European Communities financial interests (OJ 1995 L 312, p. 1).

¹³ Council Regulation (EC) No 1083/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999 (OJ 2006 L 210, p. 25). That regulation was repealed on 31 December 2013.

60. According to the Commission, in the absence of provisions to that effect, the Remedies Directives do not oblige Member States to establish, or preclude them from establishing, *ex officio* reviews of the decisions of contracting authorities. Nor do Article 83 of Directive 2014/24 and Article 99 of Directive 2014/25 require Member States to establish *ex officio* reviews in the public interest. However, Member States must uphold the general principles of EU law, including the principle of legal certainty.

61. I broadly agree with the Commission. In my opinion, the Remedies Directives, Directive 2014/24 and Directive 2014/25 neither oblige Member States to provide for *ex officio* reviews initiated by public authorities in the public interest, nor prevent them from doing so. However, even if such reviews are not mandated by those directives, if a Member State decides to provide for such mechanisms, they fall within the (material) scope of application of those directives. Therefore, the questions posed by the referring court, and in particular Question 2, are admissible.

62. The Remedies Directives only require Member States to provide for reviews *on the initiative of affected undertakings*. Indeed, Article 1(3) requires Member States to ensure that review procedures are available ‘*at least to any person having or having had an interest in obtaining a particular public supply or public works contract and who has been or risks being harmed by an alleged infringement*’.¹⁴

63. The wording of that provision suggests that the Remedies Directives do not require a comprehensive system of review in public procurement matters. As stated by the Court, ‘Directive 89/665, as is apparent, in particular, from Article 1(3) thereof, does not seek to completely harmonise the relevant national legislation’.¹⁵ It sets a minimum requirement (‘at least’) for the Member States to provide for a review mechanism for undertakings, and not necessarily also for public authorities acting in the public interest.

64. That reading is further confirmed by the context and purpose of Article 1(3) of the Remedies Directives, as amended by Directive 2007/66. First, as regards the overall context of Article 1(3), the EU legislature has introduced mechanisms aimed at strengthening the framework for reviews *initiated by undertakings*.¹⁶ Second, as regards the system and purpose of the Remedies Directives, it is established case-law that they aim at protecting tenderers against arbitrary behaviour on the part of the contracting authority and ensuring the effective application of the EU rules on the award of public contracts, in particular where infringements can still be rectified.¹⁷ It follows that, although upholding legality is certainly also a key aim of the Remedies Directives, the type of review provided for in those directives in order to achieve that aim is clearly one initiated by *economic operators*, as further suggested by recital 27 of Directive 2007/66.¹⁸

65. The fact that Directive 2007/66 also provides for the so-called ‘corrective mechanism’¹⁹ does not alter that conclusion. Under that mechanism, the Commission is empowered to request the correction of serious infringements of EU law that occurred during a contract award procedure. Even if that mechanism could be said to pertain to the *public* enforcement of public procurement rules, it cannot

¹⁴ My emphasis.

¹⁵ Judgment of 21 October 2010, *Symvoulío Apochetefseon Lefkosias* (C-570/08, EU:C:2010:621, paragraph 37).

¹⁶ In particular, Directive 2007/66 introduced minimum time limits and standstill periods *to the benefit of tenderers* in award procedures, especially unsuccessful ones, in order to guarantee the effectiveness of their right of review. See Articles 2a(1) and 2c of the Remedies Directives, as amended by Directive 2007/66.

¹⁷ See, for example, judgments of 11 September 2014, *Fastweb* (C-19/13, EU:C:2014:2194, paragraph 34); of 12 March 2015, *eVigilo* (C-538/13, EU:C:2015:166, paragraph 50); and of 15 September 2016, *Star Storage and Others* (C-439/14 and C-488/14, EU:C:2016:688, paragraph 41).

¹⁸ ‘As this Directive strengthens national review procedures, especially in cases of an illegal direct award, economic operators should be encouraged to make use of these new mechanisms.’

¹⁹ See Article 3 of the Remedies Directives.

be inferred therefrom that the Remedies Directives, as amended by Directive 2007/66, require the establishment by the Member States of reviews in the public interest. That mechanism rather shows, *a contrario*, that the Remedies Directives do not provide for any *other* form of review in the public interest.

66. By the same token, Article 83 of Directive 2014/24 and Article 99 of Directive 2014/25, which are both phrased in an identical manner, cannot be interpreted as *requiring* Member States to establish a mechanism of review in the public interest, such as the one at issue in the main proceedings.

67. Article 83 of Directive 2014/24 and Article 99 of Directive 2014/25 only require that specific infringements or systemic problems regarding the application of public procurement rules may be ‘indicated’ to courts or tribunals or other appropriate authorities or structures. There is therefore no obligation to bring actual proceedings, but merely an option, in cases where *specific* infringements are identified. The main task of public authorities under Article 83 of Directive 2014/24 and Article 99 of Directive 2014/25 appears rather to consist in reporting *structural* problems and suggesting appropriate remedies.²⁰

68. Therefore, although Article 83 of Directive 2014/24 and Article 99 of Directive 2014/25 clearly promote *public* enforcement of public procurement rules,²¹ they do not require Member States to establish review mechanisms such as those at issue in the main proceedings.

69. It follows that the Remedies Directives, Directive 2014/24 and Directive 2014/25 neither require nor preclude Member States from establishing other types of reviews, such as an *ex officio* review initiated by public authorities in the interest of legality and the protection of public funds.

70. However, if such review mechanisms are in fact established by a Member State, those reviews, in particular their impact and outcomes, will still fall within the scope of application of EU law.

71. First, in so far as public contracts fall within the scope *ratione materiae* of the public procurement directives, modifications of them are also governed by EU law.²² Logically, reviews of such modifications fall within the scope of EU law to the extent that they seek to ensure compliance with substantive EU public procurement rules on modifications of public contracts.

72. Second, and as a subsidiary argument, the specific type of review at issue in the cases at hand pertains to Directives 2014/24 and 2014/25. Although Article 83 and Article 99, respectively, of those directives do not *require* the Member States to establish a review such as the one in the main proceedings, such reviews still constitute one of the possible expressions (at the discretion of the Member States) of the new role ascribed to monitoring authorities by Article 83 of Directive 2014/24 and Article 99 of Directive 2014/25.

²⁰ See, to that effect, the Commission draft proposal for Directive 2014/24 (COM(2011) 896 final, p. 12).

²¹ Thus mirroring the trend that is also apparent in some parts of the literature on public procurement, calling for more public enforcement of public procurement rules. See, for example, Sanchez-Graells, A., “‘If it ain’t broke, don’t fix it’? EU requirements of administrative oversight and judicial protection for public contracts’, in Folliot Lalliot, L. and Torricelli, S. (eds.), *Contrôles et contentieux des contrats publics — Oversight and Challenges of public contracts*, Bruylant, Brussels, 2018, p. 495.

²² See, to that effect, judgments of 19 June 2008, *pressetext Nachrichtenagentur* (C-454/06, EU:C:2008:351), and of 7 September 2016, *Finn Frogne* (C-549/14, EU:C:2016:634). See also Article 72 of Directive 2014/24 and Article 89 of Directive 2014/25, being the first comprehensive EU law provisions dealing with modifications of public contracts during their term.

73. Any other conclusion would have the singular consequence that the regulation of the subject matter of the *ex officio* public review procedure (namely the public contract itself and modifications to it) would be harmonised by EU law, while the potentially significant consequences of the review (sanctions imposed on the contracting authority or on the tenderers, or the annulment of the public contract), which could impact upon the entire tendering procedure, would fall completely outside of an otherwise harmonised area only by virtue of being initiated by a public authority. That can hardly be the case.

74. On the other hand, the fact that there is no specific EU harmonising measure governing that type of review means that only the general principles of EU law will apply to such review procedures.

75. It follows that Question 2 must be answered as follows: the Remedies Directives, Directive 2014/24 and Directive 2014/25 neither require Member States to establish, nor prevent them from establishing, *ex officio* reviews by public authorities of alleged infringements of public procurement rules. However, once established and initiated, such reviews fall within the scope of application of EU law.

C. Questions 1, 3 and 4

76. By Questions 1, 3 and 4, the referring court seeks to know, in essence, whether EU law — in particular the general principles of legal certainty and the protection of the financial interests of the Union — allows public authorities, on the basis of newly adopted provisions of national law or of EU law, to initiate a review of modifications of a public contract — and, as the case may be, to impose fines — *even if* the time limits for review under the national legislation in force at the time of the modifications have already lapsed.

77. In my view, the answer is clearly ‘no’.

1. The EU principle of legal certainty

78. The referring court acknowledges that Article 83 of Directive 2014/24 and Article 99 of Directive 2014/25 enhance the role of monitoring authorities. However, it wonders whether EU law, in particular the principle of legal certainty, limits the powers conferred upon them, or whether Article 194 of the 2015 Law on Public Procurement, which transposed those provisions, can be relied on to ‘reopen’ time limits that have already expired in order to allow for the exercise of those new competences.

79. According to the contracting authority, the *ex officio* reviews at issue in the main proceedings breach the principle of legal certainty. Even if the 2015 Law on Public Procurement created new competences for public authorities, that could not, as a result, reopen time limits that had already expired.

80. According to the Arbitration Panel, Hungarian law grants the President of the PPA a period of 60 days from the date on which he became aware of the infringement in order to initiate an *ex officio* review. Such a review may be initiated until 31 December 2020, which corresponds to the end of the duty to keep the relevant documents available.

81. The Hungarian Government acknowledges the relevance of the principle of legal certainty. That principle requires that legal rules be clear, precise and predictable in their effects. However, that government is of the view that the national provisions at issue are predictable.

82. According to the Commission, the principle of legal certainty precludes the *ex officio* review of a decision of a contracting authority, leading to the imposition of a fine, when the time limits to that effect have already lapsed. Time limits may only be reopened in exceptional circumstances, which are not present in the cases at hand.

83. To my mind, save in very exceptional circumstances, the EU principle of legal certainty precludes the ‘reopening’ of time limits that have already expired.

84. According to the settled case-law of the Court, as a matter of principle, new rules apply immediately to the *future effects* of a situation which arose under the old rule. It is otherwise, subject to the principle of the non-retroactivity of legal acts, only if the new rule is accompanied by special provisions which specifically lay down its conditions of temporal application.²³

85. It is also settled case-law that procedural rules are generally held to apply to all proceedings pending at the time when they enter into force, whereas substantive rules are usually interpreted as not applying to situations existing before their entry into force.²⁴ According to the Court, ‘this interpretation ensures respect for the principles of legal certainty and the protection of legitimate expectation, by virtue of which the effect of [EU] legislation must be clear and predictable for those who are subject to it’.²⁵

86. More generally, the principle of legal certainty — which is one of the general principles of European Union law — requires that rules of law be clear and precise and predictable in their effect, especially where they may have negative consequences for individuals and undertakings, so that interested parties can ascertain their position in situations and legal relationships governed by European Union law.²⁶ The same principle must be observed by the national legislature when it adopts legislation within the sphere of EU law.²⁷

87. As far as limitation periods are concerned, they must be fixed in advance to ensure legal certainty²⁸ and in order to be sufficiently foreseeable.²⁹

88. In the cases at hand, what is at issue is not the application of new *procedural* rules to *ongoing* situations. Without wishing to reopen the debate on whether limitation periods are procedural or substantive rules,³⁰ the important point to my mind is rather that, as far as the time limits were concerned, the legal situation was closed (and time-barred).

23 See, for example, judgments of 26 March 2015, *Commission v Moravia Gas Storage* (C-596/13 P, EU:C:2015:203, paragraph 32); of 6 October 2015, *Commission v Andersen* (C-303/13 P, EU:C:2015:647, paragraph 50); and of 15 January 2019, *E.B.* (C-258/17, EU:C:2019:17, paragraph 50).

24 See, for example, judgments of 12 November 1981, *Meridionale Industria Salumi and Others* (212/80 to 217/80, EU:C:1981:270, paragraph 9); of 14 November 2002, *Ilumitrónica* (C-251/00, EU:C:2002:655, paragraph 29 and the case-law cited); and of 9 March 2006, *Beemsterboer Coldstore Services* (C-293/04, EU:C:2006:162, paragraph 19).

25 See, for example, judgments of 12 November 1981, *Meridionale Industria Salumi and Others* (212/80 to 217/80, EU:C:1981:270, paragraph 10), and of 12 May 2005, *Commission v Huhtamaki Dourdan* (C-315/03, not published, EU:C:2005:284, paragraph 51).

26 See, for example, judgments of 8 December 2011, *France Télécom v Commission* (C-81/10 P, EU:C:2011:811, paragraph 100 and the case-law cited); of 11 June 2015, *Berlington Hungary and Others* (C-98/14, EU:C:2015:386, paragraph 77 and the case-law cited); and of 17 October 2018, *Klohn* (C-167/17, EU:C:2018:833, paragraph 50 and the case-law cited).

27 Judgment of 26 April 2005, ‘*Goed Wonen*’ (C-376/02, EU:C:2005:251, paragraph 34).

28 See, for example, judgment of 15 July 1970, *ACF Chemiefarma v Commission* (41/69, EU:C:1970:71, paragraph 19), regarding the Commission’s power to impose fines for infringement of the rules on competition. See also judgments of 11 July 2002, *Marks & Spencer* (C-62/00, EU:C:2002:435, paragraph 39), and of 5 May 2011, *Ze Fu Fleischhandel and Vion Trading* (C-201/10 and C-202/10, EU:C:2011:282, paragraph 52).

29 See, in the context of limitation periods for recovery of export refunds wrongly received, judgments of 5 May 2011, *Ze Fu Fleischhandel and Vion Trading* (C-201/10 and C-202/10, EU:C:2011:282, paragraphs 32 to 34), and of 17 September 2014, *Cruz & Companhia* (C-341/13, EU:C:2014:2230, paragraph 58).

30 See my Opinion in *Scialdone* (C-574/15, EU:C:2017:553, points 145 to 166).

89. It might again be recalled³¹ that under the previously applicable legislation, namely Article 327(2) of the 2003 Law on Public Procurement, the (objective) time limits for review lapsed 3 years after the occurrence of the infringement. Thus, with regard to Case C-496/18, they lapsed in 2012. In Case C-497/18, the initiation of the review became time-barred in 2013. In 2015, the new Article 153(1)(c) of the 2015 Law on Public Procurement entered into force. In 2017, those new time limits were invoked as apparently starting to run from 2015 and allowing for the reopening of the review of the modifications to the public contracts at issue.³²

90. If my understanding of those facts and of national law — both of which are ultimately for the national court to verify — is correct, then there is, to my mind, no ongoing legal situation to which new procedural rules are being applied. This is an instance of *true retroactivity*. What is sought is to reopen already expired time limits by enacting new legislation setting new deadlines.

91. If it were accepted that, in ordinary circumstances, time limits for review that have already expired can be reopened (or, in effect, reset) every time that new national provisions containing general time limits are adopted, that could lead to a situation where contractual modifications could in fact be reviewed without any limitation in time.³³ In this way, the national legislation could endlessly reset the clock, simply by enacting new time limits. Such an outcome is clearly not acceptable in the light of the principle of legal certainty.

92. No compelling grounds have been put forward (before this Court at least) that could justify such reopening of time limits and, in effect, (true) retroactivity of new rules. Such retroactivity is possible only in exceptional circumstances, only when the purpose to be attained so demands and when the legitimate expectations of the persons concerned are duly respected.³⁴

93. Before I turn to the arguments relating to the purpose behind the construction of the temporality rules advanced by the Arbitration Panel and the Hungarian Government (sections 2, 3, and 4 below), I would note that the laying down of new deadlines in new legislation applicable to past events years after the fact can hardly be labelled as foreseeable or respecting the legitimate expectations of the persons concerned. In addition, I agree with the Commission that Article 197 of the 2015 Law on Public Procurement, which governs the *rationae temporis* applicability of that law, lacks clarity and, therefore, foreseeability for the parties to the contracts. Thus, that provision does not contain anything close to the level of justification that would be required in order to justify such (true) retroactivity.

94. Question 1 must therefore be answered as follows: the principle of legal certainty precludes the application of national provisions allowing for *ex officio* review of infringements of public procurement rules that occurred before their entry into force, in a situation where the time limits laid down under the previously applicable national legislation have already elapsed.

³¹ Above, points 46 to 47 of this Opinion.

³² Since the public procurement projects at issue received EU funds, the Arbitration Panel considers that the time limits for *ex officio* review could potentially extend until 31 December 2020, hence 10 and 11 years, respectively, after the allegedly illegal modifications took place.

³³ Needless to say, in circumstances where all the relevant facts occurred years or even decades previously. In the present cases, all the relevant facts apparently happened while the 2003 Law on Public Procurement was in force. The only event that happened while the 2015 Law on Public Procurement was in force was that the relevant authority declared that it became (subjectively) aware of the infringement.

³⁴ See, for example, judgment of 15 July 2004, *Gereken and Procola* (C-459/02, EU:C:2004:454, paragraph 24).

2. *The new role of monitoring authorities under Article 83 of Directive 2014/24 and Article 99 of Directive 2014/25*

95. The Arbitration Panel argues that the present cases are not about the (re)opening of time limits that have already lapsed under the previous procedural provisions in force at the time of the modifications, but about allowing the exercise, in the context of administrative review, of new monitoring competences laid down in Article 83 of Directive 2014/24 and Article 99 of Directive 2014/25. The predecessor of the Public Procurement Authority did not have such a review competence. Consequently, the 2015 Law on Public Procurement does not allow for the reopening of an expired deadline, but it does allow for the exercise of an *entirely new competence*. The President of the PPA and the Hungarian Government largely share that view, although with some minor variations.

96. I must admit that I am very puzzled by that argument.

97. Subject to verification by the national court, it would appear to me that the 2003 Law on Public Procurement already contained the possibility for certain public authorities to initiate *ex officio* reviews in the public interest.³⁵ Indeed, the 2015 recast of the law brought about some amendments to that competence and, importantly, set new longer time limits for its exercise.³⁶ But the competence to carry out such a type of review can hardly be described as new.

98. In addition, it should be noted that Article 83 of Directive 2014/24 and Article 99 of Directive 2014/25 are not applicable *ratione temporis* to the present cases. Moreover, as confirmed at the hearing, those provisions have been transposed by Article 194 of the 2015 Law on Public Procurement. However, the reviews at issue in the main proceedings were initiated on the basis of Article 153, not of Article 194.

3. *The protection of the financial interests of the Union*

99. By Question 3, the referring court specifically enquires whether the answer to Question 1 may be affected by the fact that the tenders at issue received EU subsidies. In other words, as the referring court puts it: beyond legal certainty, are there other public interests, such as the protection of the financial interests of the Union, that could justify allowing for the review of public contracts after the expiry of the time limits to that effect, potentially until 2020?³⁷

100. In the context of Question 3, the referring court relies on Article 83 of Directive 2014/24 and Article 99 of Directive 2014/25. It also explains that, under the 2015 Law on Public Procurement, the time limit for review in the public interest of public contracts carried out using EU subsidies was linked with the duration of the obligation to keep documents available (in connection with EU subsidies), so that the national legislature could, as a result, prolong those time limits.

101. According to the contracting authority, the protection of the financial interests of the Union can be ensured through other means than *ex officio* review in the public interest, for instance, through financial corrections, which are possible at any time. Financial corrections have already been applied in the present cases, so that the imposition of fines constitutes, in practice, a second penalty for the same alleged infringements.

102. According to the Arbitration Panel, the *ex officio* reviews at issue are primarily aimed at protecting public funds, especially the financial interests of the Union.

³⁵ See Articles 307 and 327 of the 2003 Law on Public Procurement.

³⁶ Above, point 46 of this Opinion.

³⁷ See Article 80(3) of Decree No 4/2001, as interpreted by the Arbitration Panel.

103. According to the Hungarian Government, one of the aims of Article 152(2)(c) of the 2015 Law on Public Procurement is that the *ex officio* procedure could be initiated at any time during the period in which Article 90 of Regulation No 1083/2006 imposes an obligation to keep available all supporting documents regarding expenditure and audits under the operational programme concerned. In addition, Article 83 of Directive 2014/24 and Article 99 of Directive 2014/25 demonstrate the importance, from an EU law perspective, of ensuring that public spending is monitored.

104. According to the Commission, the fact that an infringement of public procurement rules concerns a project partly financed by EU funds does not require Member States to reopen time limits to investigate that infringement. Even if they do so in the name of the protection of the Union's financial interests, Member States must still respect the EU general principle of legal certainty.

105. I agree with the Commission.

106. It should be noted that Article 83 of Directive 2014/24 and Article 99 of Directive 2014/25 are not directly relevant for the protection of the Union's financial interests. Admittedly, the draft proposals for the directives that were initially tabled by the Commission insisted on the EU budget dimension of those proposals.³⁸ However, in the versions currently in force, Article 83 of Directive 2014/24 and Article 99 of Directive 2014/25 do not mention the protection of the financial interests of the Union.

107. The relevant secondary acts of EU law are therefore rather Regulation No 1083/2006 and Regulation No 2988/95.³⁹

108. First, as regards the obligation, laid down by Article 90 of Regulation No 1083/2006, to keep available for a certain duration all the supporting documents regarding expenditure, it does not necessarily entail the possibility of providing for review proceedings — and the imposition of sanctions — for that same duration.

109. As rightly stated by the contracting authority at the hearing, limitation periods for the initiation of reviews are simply different from periods during which documents must be kept. Of course, as a matter of legislative design, a national (or EU) legislature could decide to apply the same time periods to both. But such a choice would have to be clearly and unequivocally provided for in the applicable legislation, since one does not automatically follow from the other. In the same vein, Article 98 of Regulation No 1083/2006 only requires the Member States to investigate irregularities and make the financial corrections required during that period. It does not provide for reviews or, a fortiori, penalties as a means of redress for identified irregularities in the use of EU funds.

110. Second, the protection of the Union's financial interests cannot be construed as simply overriding the EU principle of legal certainty as a matter of course. Rather, the protection of the Union's financial interests must be weighed against the principle of legal certainty. This is normally achieved through the adoption of clear and foreseeable time limits. Thus, while the importance of the protection of financial interests must be acknowledged, at a certain point in time even illegal decisions must become final.

³⁸ See COM(2011) 896 final, in particular Articles 83(3) and 84(2) of draft Directive 2014/24.

³⁹ See above, point 52 of this Opinion.

111. Without taking any position on its applicability to the specific cases at hand, Regulation No 2988/95 serves as *an illustration* of that balancing exercise.⁴⁰ Under Article 3(1) of Regulation No 2988/95, the standard limitation period for proceedings is 4 years from the time when the irregularity was committed. The limitation period expires at the latest on the day on which a period equal to twice the limitation period lapses without the competent authority having imposed a penalty.⁴¹ That is seen as appropriate to pursue the objective of protecting the Union's financial interests.⁴²

112. Those provisions illustrate that, under EU law, the protection of financial interests does not justify either extendable time limits or temporally limitless review. As stated by the Court, even if Member States do retain the option of applying a period longer than 4 years, a longer national limitation period must, *inter alia*, not go clearly beyond what is necessary to achieve the objective of protecting the European Union's financial interests. In assessing whether the limitation periods are reasonable, one must look at 'the legal traditions of those States and the perception in their respective legal systems of what length of time is necessary and sufficient for a diligent public service to bring proceedings in respect of irregularities committed to the detriment of the public authorities and national budgets'.⁴³

113. Thus, as far as national limitation periods are concerned, there is indeed a caveat to the reasonable length of the *initial* time limits. The outer limit is reasonableness. Only if the initial time limits were so short as to fail to guarantee the effectiveness of the review⁴⁴ can the issue of their appropriateness be opened. In any case, that principle certainly does not automatically warrant either true retroactivity or (even less) selective disregard for applicable deadlines because administrative authorities were not, for whatever reason, able to act in time.

114. I do not think that it is necessary, in the context of the main proceedings, to engage in a discussion on *Taricco*⁴⁵ and its potential implications for the case at hand. The facts of that case were quite different from those of the cases at hand. *Taricco* concerned criminal penalties for VAT fraud (VAT being an EU own resource), where the limitation periods were *still running* when the new legislation was adopted. Moreover, the main issue was the fact that the limitation periods were *too short*, thereby preventing the application of effective and deterrent penalties to counter fraud affecting the financial interests of the Union.

115. In any case, in view of the clarifications subsequently made in the judgments in *M.A.S.* and *Scialdone*,⁴⁶ I would no longer consider *Taricco* a good precedent on the specific point of whether time limits that normally apply can be disregarded in the name and for the sake of the protection of the financial interests of the Union.

40 That regulation constitutes the general (as opposed to sectoral) legislation on the protection of the Union's financial interests through *administrative* checks, measures and penalties. For the criminal aspect, see Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law (OJ 2017 L 198, p. 29).

41 It should be noted that, under Article 12 of Directive 2017/1371, the standard period for criminal offences affecting the Union's financial interest is 5 years.

42 See, for example, judgment of 5 May 2011, *Ze Fu Fleischhandel and Vion Trading* (C-201/10 and C-202/10, EU:C:2011:282, paragraph 43).

43 Judgment of 5 May 2011, *Ze Fu Fleischhandel and Vion Trading* (C-201/10 and C-202/10, EU:C:2011:282, paragraphs 38 to 39).

44 See, to that effect, judgment of 26 November 2015, *MedEval* (C-166/14, EU:C:2015:779, paragraph 39 to 44). Furthermore, it is established case-law that, under the Remedies Directives, 'the setting of reasonable limitation periods for bringing proceedings must be regarded as satisfying, in principle, the requirement of effectiveness under [the Remedies Directives], since it is an application of the fundamental principle of legal certainty'. See, for example, judgments of 12 December 2002, *Universale-Bau and Others* (C-470/99, EU:C:2002:746, paragraph 76); of 21 January 2010, *Commission v Germany* (C-17/09, not published, EU:C:2010:33, paragraph 22); and of 12 March 2015, *eVigilo* (C-538/13, EU:C:2015:166, paragraph 51).

45 Judgment of 8 September 2015, *Taricco and Others* (C-105/14, EU:C:2015:555).

46 Judgments of 5 December 2017, *M.A.S. and M.B.* (C-42/17, EU:C:2017:936), and of 2 May 2018, *Scialdone* (C-574/15, EU:C:2018:295).

4. Deficiencies in the review procedure

116. By Question 4, the referring court seeks to know whether the answer to Question 1 can be affected by the fact that there was no investigation into the infringement of public procurement rules at the time of the commission of the infringement, and the potential reasons for that lack of investigation.

117. According to the Arbitration Panel and the President of the PPA, it was because of regulatory deficiencies in the 2003 Law on Public Procurement that it had not been possible to detect the unlawful contract modifications. The contracting authority had not submitted an information notice relating to the modification of the contracts and the notices published concerning the execution of the contracts did not suggest an infringement. Consequently, the predecessor of the President of the PPA did not have the information that would have enabled it to check the performance and modification of the contract. In short, the 2003 Law on Public Procurement did not ensure the level of transparency and administrative oversight that was subsequently achieved in the 2015 Law on Public Procurement. As a result, it was necessary to apply the provisions of the latter national legislation.

118. That argument can be dismissed with relative ease.

119. Assuming, as a matter of fact, that there had been any such structural deficiencies, which would have prevented effective *ex officio* monitoring and enforcement of the public procurement rules,⁴⁷ that fact still would not justify resorting to truly retroactive measures in order to remedy such deficiencies *ex post*. The Roman law maxim *nemo auditur propriam turpitudinem allegans* traditionally applies in the realm of civil law. I think that it could also be applied to a state or public authority that has crafted and applied certain rules. Having perhaps later realised that those rules, which it had sole responsibility for developing and applying, did not operate in an optimal way, it cannot be allowed to then seek to reset the clock altogether and have ‘another bite at the apple’, to the detriment of the parties concerned.

120. It is therefore for the Member States to ensure that they monitor infringements of their own laws effectively. Deficiencies in their own laws or their enforcement cannot be turned against third parties by resetting time limits that have already expired.⁴⁸

D. Question 5

121. The wording of Question 5 is not very clear. I understand it as follows. The referring court starts from the assumption that the Court answers Question 2 in the opposite way to that suggested in the present Opinion. Thus, if *ex officio* reviews can be carried out in the circumstances of the cases at hand, does EU law (especially the principle of proportionality) empower national courts evaluating the sanction that was imposed in the context of those reviews to look at the specific aspects of the case in order to determine the appropriateness of the sanction?

⁴⁷ It need only be recalled, as stated above at point 23, that at least in Case C-496/18, an *ex officio* review was actually initiated under the 2003 Law on Public Procurement, albeit unsuccessfully.

⁴⁸ It might be recalled that in both cases at hand, sanctions were imposed not only on the contracting authority, but also on the successful tenderers — see above, points 28 and 33. While there could potentially be greater leeway where a Member State wishes to monitor and impose budgetary sanctions on its own departments or emanations while leaving contracts already entered into untouched, it is a different matter altogether to reopen the procurement procedures, sanction all the participants thereto, and even potentially nullify the contracts in question a number of years later.

122. According to the Arbitration Panel, national courts should not be able to declare invalid the contested administrative decision, or impose any other legal consequence, since the Arbitration Panel has already assessed, within the exercise of its competence, the elements raised by the referring court. In particular, the Arbitration Panel has taken into account, in deciding the amount of the fines, the fact that several years elapsed between the infringement and the initiation of the review. National courts should not make a new assessment in that respect.

123. According to the Hungarian Government, it is for the national legislature to decide what national courts are entitled to do as regards the scope of their assessment of the decision of the Arbitration Panel and the type of legal consequences that can follow.

124. According to the Commission, there is no need to separately address Question 5 since it overlaps with Question 1.

125. Since my suggested answer to Question 1 is a negative one (the EU law principle of legal certainty precludes the *ex officio* review of potential infringements of public procurement rules in cases in which the applicable time limits have already expired), there is indeed no need to address Question 5. It is therefore not necessary, in the circumstances of the present cases, to examine whether national courts hearing such cases can assess the sanction(s) *in concreto*, in the light of factors such as the passage of time, the fact that time limits under the previous legislation have already lapsed or the severity of the infringement.

126. Beyond that, it might only be mentioned in lieu of a conclusion that the specific type of review of administrative decisions falling within the scope of EU law is a matter of choice of a national legislature,⁴⁹ provided that it is guaranteed, at the stage of either administrative review or review by a court, that the proportionality of the sanction, which constitutes a general principle of EU law, will be duly assessed.⁵⁰

V. Conclusion

127. I propose that the Court answer the questions posed by the Fővárosi Törvényszék (Budapest High Court, Hungary) as follows:

- 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, 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, 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, and 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, neither require Member States to establish nor prevent them from establishing *ex officio* reviews by public authorities of alleged infringements of public procurement rules. However, once provided for and initiated, such reviews and their outcomes fall within the scope of application of EU law.

⁴⁹ But see, by analogy, the requirements concerning the effectiveness of any such national institutional choice in judgment of 29 July 2019, *Torubarov* (C-556/17, EU:C:2019:626, paragraphs 64 to 66 and 77).

⁵⁰ See, to that effect, judgment of 9 February 2012, *Urbán* (C-210/10, EU:C:2012:64, paragraph 23), and my Opinion in *Link Logistik N&N* (C-384/17, EU:C:2018:494, points 104 to 112).

- The principle of legal certainty precludes the application of national provisions allowing for *ex officio* review of infringements of public procurement rules that occurred before the entry into force of those new provisions, in circumstances where the time limits laid down for that purpose in the previously applicable national legislation had already expired.