



Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

11 September 2014*

(Reference for a preliminary ruling — Public procurement — Directive 89/665/EEC — Article 2d(4) — Interpretation and validity — Procedures for review of the award of public supply and public works contracts — Ineffectiveness of the contract — Exception)

In Case C-19/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Consiglio di Stato (Italy), made by decision of 14 December 2012, received at the Court on 15 January 2013, in the proceedings

Ministero dell'Interno

v

Fastweb SpA,

Intervening party:

Telecom Italia SpA,

THE COURT (Fifth Chamber),

composed of T. von Danwitz, President of the Chamber, E. Juhász, A. Rosas, D. Šváby and C. Vajda (Rapporteur), Judges,

Advocate General: Y. Bot,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 20 March 2014,

after considering the observations submitted on behalf of:

- Fastweb SpA, by P. Stella Richter and G.-L. Tosato, avvocati,
- Telecom Italia SpA, by F. Cardarelli, F. Lattanzi and F.S. Cantella, avvocati,
- the Italian Government, by G. Palmieri, acting as Agent, and by G. Fiengo, avvocato dello Stato,
- the Austrian Government, by M. Fruhmann, acting as Agent,
- the Polish Government, by B. Majczyna and by M. Szwarc and E. Gromnicka, acting as Agents,

* Language of the case: Italian.

— the European Parliament, by J. Rodrigues and L. Visaggio, acting as Agents,
— the Council of the European Union, by P. Mahnič Bruni and A. Vitro, acting as Agents,
— the European Commission, by L. Pignataro-Nolin and A. Tokár, acting as Agents,
after hearing the Opinion of the Advocate General at the sitting on 10 April 2014,
gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 2d(4) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 (OJ 2007 L 335, p. 31) ('Directive 89/665').
- 2 The request has been made in proceedings between the Ministero dell'Interno, Dipartimento di Pubblica Sicurezza (Ministry of the Interior, Department of Public Safety; 'the Ministry of the Interior') and Fastweb SpA, concerning the award to Telecom Italia SpA, under a negotiated procedure without prior publication of a contract notice, of a public contract for the supply of electronic communications services.

Legal context

EU Law

Directive 2007/66

- 3 Recitals 3, 13, 14, 21, 26 and 36 in the preamble to Directive 2007/66 state:
'(3) ... the guarantees of transparency and non-discrimination sought by [Directive 89/665 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)] should be strengthened to ensure that the Community as a whole fully benefit from the positive effects of the modernisation and simplification of the rules on public procurement achieved by [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)] and [by 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)]. Directives [89/665] and [92/13] should therefore be amended by adding the essential clarifications which will allow the results intended by the Community legislature to be attained.

...

- (13) In order to combat the illegal direct award of contracts, which the Court of Justice has called the most serious breach of Community law in the field of public procurement on the part of a contracting authority or contracting entity, there should be provision for effective, proportionate and dissuasive sanctions. Therefore a contract resulting from an illegal direct award should in principle be considered ineffective. The ineffectiveness should not be automatic but should be ascertained by or should be the result of a decision of an independent review body.
- (14) Ineffectiveness is the most effective way to restore competition and to create new business opportunities for those economic operators which have been deprived illegally of their opportunity to compete. Direct awards within the meaning of this Directive should include all contract awards made without prior publication of a contract notice in the *Official Journal of the European Union* within the meaning of Directive [2004/18]. This corresponds to a procedure without prior call for competition within the meaning of Directive [2004/17].
- ...
- (21) The objective to be achieved where Member States lay down the rules which ensure that a contract shall be considered ineffective is that the rights and obligations of the parties under the contract should cease to be enforced and performed. The consequences resulting from a contract being considered ineffective should be determined by national law. National law may therefore, for example, provide for the retroactive cancellation of all contractual obligations (*ex tunc*) or conversely limit the scope of the cancellation to those obligations which would still have to be performed (*ex nunc*). This should not lead to the absence of forceful penalties if the obligations deriving from a contract have already been fulfilled either entirely or almost entirely. In such cases Member States should provide for alternative penalties as well, taking into account the extent to which a contract remains in force in accordance with national law. Similarly, the consequences concerning the possible recovery of any sums which may have been paid, as well as all other forms of possible restitution, including restitution in value where restitution in kind is not possible, are to be determined by national law.
- ...
- (26) In order to avoid legal uncertainty which may result from ineffectiveness, Member States should provide for an exemption from any finding of ineffectiveness in cases where the contracting authority or contracting entity considers that the direct award of any contract without prior publication of a contract notice in the [Official Journal] is permissible in accordance with Directives [2004/18] and [2004/17] and has applied a minimum standstill period allowing for effective remedies. The voluntary publication which triggers this standstill period does not imply any extension of obligations deriving from Directive [2004/18] or Directive [2004/17].
- ...
- (36) This Directive respects fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union [(‘the Charter’)]. In particular, this Directive seeks to ensure full respect for the right to an effective remedy and to a fair hearing, in accordance with the first and second subparagraphs of Article 47 of the Charter.’

Directive 89/665

4 The third recital in the preamble to Directive 89/665 is worded as follows:

‘... the opening-up of public procurement to Community competition necessitates a substantial increase in the guarantees of transparency and non-discrimination; ... for it to have tangible effects, effective and rapid remedies must be available in the case of infringements of Community law in the field of public procurement or national rules implementing that law.’

5 Under the third subparagraph of Article 1(1) of Directive 89/665:

‘Member States shall take the measures necessary to ensure that, as regards contracts falling within the scope of Directive [2004/18], 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.’

6 Paragraph 1 of Article 2 of Directive 89/665, which is entitled ‘Requirements for review procedures’, provides:

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

...

(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;

(c) award damages to persons harmed by an infringement.’

7 The first subparagraph of Article 2(7) of Directive 89/665 provides:

‘Except where provided for in Articles 2d to 2f, the effects of the exercise of the powers referred to in paragraph 1 of this Article on a contract concluded subsequent to its award shall be determined by national law.’

8 Article 2d of Directive 89/665, entitled ‘Ineffectiveness’, provides:

‘1. Member States shall ensure that a contract is considered ineffective by a review body independent of the contracting authority or that its ineffectiveness is the result of a decision of such a review body in any of the following cases:

(a) if the contracting authority has awarded a contract without prior publication of a contract notice in the [Official Journal] without this being permissible in accordance with Directive [2004/18];

...

2. The consequences of a contract being considered ineffective shall be provided for by national law.

National law may provide for the retroactive cancellation of all contractual obligations or limit the scope of the cancellation to those obligations which still have to be performed. In the latter case, Member States shall provide for the application of other penalties within the meaning of Article 2e(2).

...

4. The Member States shall provide that paragraph 1(a) of this Article does not apply where:

- the contracting authority considers that the award of a contract without prior publication of a contract notice in the [Official Journal] is permissible in accordance with Directive [2004/18],
- the contracting authority has published in the [Official Journal] a notice as described in Article 3a of this Directive expressing its intention to conclude the contract, and
- the contract has not been concluded before the expiry of a period of at least 10 calendar days with effect from the day following the date of the publication of this notice.

— ...’.

- 9 Under Article 3a of Directive 89/665, which is entitled ‘Content of a notice for voluntary *ex ante* transparency’, the notice referred to in the second indent of Article 2d(4) is to state the name and contact details of the contracting authority; a description of the object of the contract; the justification for the contracting authority’s decision to award the contract without prior publication of a contract notice; the name and contact details of the economic operator in favour of whom a contract award decision has been taken; and, where appropriate, any other information deemed useful by the contracting authority.

Directive 2004/18

- 10 Article 2 of Directive 2004/18, entitled ‘Principles of awarding contracts’, provides:

‘Contracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way.’

- 11 Under Article 31 of Directive 2004/18, entitled ‘Cases justifying use of the negotiated procedure without publication of a contract notice’:

‘Contracting authorities may award public contracts by a negotiated procedure without prior publication of a contract notice in the following cases:

- (1) for public works contracts, public supply contracts and public service contracts:

...

- (b) when, for technical or artistic reasons, or for reasons connected with the protection of exclusive rights, the contract may be awarded only to a particular economic operator;

...’

Directive 2009/81/EC

- 12 Under Article 28 of Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC (OJ 2009 L 18, p. 216), entitled ‘Cases justifying use of the negotiated procedure without publication of a contract notice’:

‘In the following cases, contracting authorities/entities may award contracts by a negotiated procedure without prior publication of a contract notice and shall justify the use of this procedure in the contract award notice as required in Article 30(3):

1. for works contracts, supply contracts and service contracts:

...

- (e) when, for technical reasons or reasons connected with the protection of exclusive rights, the contract may be awarded only to a particular economic operator;

...’

- 13 Article 60 of that directive, entitled ‘Ineffectiveness’, provides:

‘1. Member States shall ensure that a contract is considered ineffective by a review body independent of the contracting authority/entity or that its ineffectiveness is the result of a decision of such a review body in any of the following cases:

- (a) where the contracting authority/entity has awarded a contract without prior publication of a contract notice in the [Official Journal] without this being permissible in accordance with this Directive;

...

4. Member States shall provide that paragraph 1(a) does not apply where:

- the contracting authority/entity considers that the award of a contract without prior publication of a contract notice in the [Official Journal] is permissible in accordance with this Directive;
- the contracting authority/entity has published in the [Official Journal] a notice as described in Article 64 expressing its intention to conclude the contract, and,
- the contract has not been concluded before the expiry of a period of at least 10 calendar days with effect from the day following the date of the publication of this notice.

– ...’

Italian law

- 14 Directive 2007/66 was transposed into Italian law by Legislative Decree No 53 of 20 March 2010, the content of which was subsequently incorporated into Articles 120 to 125 of Legislative Decree No 104/2010 of 2 July 2010 laying down the Code of Administrative Procedure (decreto legislativo n. 104 — Codice di procedura amministrativa; ordinary supplement to GURI No 158 of 7 July 2010, ‘the Code of Administrative Procedure’).

- 15 Under Article 121 of the Code of Administrative Procedure, in the event of serious infringements, such as the unauthorised award of a contract by means of a negotiated procedure without prior publication of a notice, it is necessary — save where otherwise provided and notwithstanding the discretion reserved to the administrative courts — to render ineffective the contract subsequently concluded.
- 16 Among the exceptions to that rule, Article 121(5) of the Code of Administrative Procedure, which transposes Article 2d(4) of Directive 89/665 into national law, provides that a contract is nevertheless to retain its effects if, by a reasoned decision adopted before the award procedure was initiated, the contracting authority had declared that it considered the award of a contract by negotiated procedure without prior publication of a contract notice to be permissible under the Code of Administrative Procedure, if it had published a notice for voluntary *ex ante* transparency and if it did not conclude the contract concerned before the expiry of a period of at least 10 calendar days with effect from the day following the date on which that notice was published.
- 17 Under Article 122 of the Code of Administrative Procedure, concerning the other cases of infringement, the national courts are to establish, within the limits laid down in that provision, whether to declare the contract ineffective.

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

- 18 The order for reference relates that, in 2003, the Ministero dell'Interno entered into an agreement with Telecom Italia for the management and development of telecommunications services.
- 19 As that agreement was due to expire on 31 December 2011, the Ministero dell'Interno appointed Telecom Italia, by decision of 15 December 2011, as its supplier and technological partner for the management and development of those services.
- 20 The Ministero dell'Interno considered it possible, for the purposes of awarding the electronic communications contract, to use the negotiated procedure without prior publication of a contract notice, provided for in Article 28(1)(e) of Directive 2009/81 and in Article 57(2)(b) of Legislative Decree No 163 of 12 April 2006 laying down the Code of public works, services and supply contracts in implementation of Directives 2004/17/EC and 2004/18/EC (decreto legislativo n. 163 — Codice dei contratti pubblici relativi a lavori, servizi e forniture in attuazione delle direttive 2004/17/CE e 2004/18/CE; ordinary supplement to GURI No 100 of 2 May 2006), as amended by Legislative Decree No 152 of 11 September 2008 (ordinary supplement to GURI No 231 of 2 October 2008) ('Legislative Decree No 163/2006').
- 21 Under Article 57(2)(b) of Legislative Decree No 163/2006, the contracting authority may award a contract by a negotiated procedure without prior publication of a contract notice, 'if, for technical reasons or reasons connected with the protection of exclusive rights, the contract may be awarded only to a particular economic operator'.
- 22 In the circumstances, the Ministero dell'Interno formed the view that, for technical reasons and in order to protect certain exclusive rights, Telecom Italia was the only economic operator in a position to perform the contract at issue.
- 23 After the Avvocatura Generale (State Legal Advisory Service) had given a favourable opinion regarding the intended procedure on 20 December 2011, the Ministero dell'Interno published a notice in the Official Journal on the same day, announcing its intention of awarding the contract to Telecom Italia.
- 24 On 22 December 2011, the Ministero dell'Interno invited Telecom Italia to take part in the negotiations.

- 25 Following those negotiations, the parties signed a framework agreement on 31 December 2011 for the ‘provision of electronic communications services, including voice telephony, mobile telephony and data transmission services, to the Civil Police and to the Armed Service of the Carabinieri’.
- 26 The contract award notice was published in the Official Journal on 16 February 2012.
- 27 Fastweb brought an action before the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court of Lazio; ‘the TAR’) for annulment of the award of the contract, and a declaration that the contract was ineffective, on the ground that the conditions laid down in Article 28 of Directive 2009/81 and in Article 57 of Legislative Decree No 163/2006 for use of a negotiated procedure without prior publication of a contract notice were not satisfied.
- 28 The TAR upheld the action brought by Fastweb. It found that the reasons set out by the Ministero dell’Interno as justification for the use of that procedure did not constitute ‘technical reasons’ for the purposes of Article 57(2)(b) of Legislative Decree No 163/2006, by dint of which the contract could be awarded only to a particular economic operator, but rather reasons of expediency. However, although the TAR annulled the decision awarding the contract, it went on to hold that, pursuant to Article 121(5) of the Code of Administrative Procedure, it was unable to declare that the agreement concluded on 31 December 2011 was ineffective, since the conditions laid down in that provision for a derogation from the general rule were satisfied. Nevertheless, on the basis of Article 122 of the Code of Administrative Procedure, the TAR declared the contract to be ineffective as from 31 December 2013.
- 29 The Ministero dell’Interno and Telecom Italia each lodged an appeal against that judgment before the Consiglio di Stato.
- 30 By order of 8 January 2013, the Consiglio di Stato upheld the annulment of the award of the contract, on the ground that the Ministero dell’Interno had failed to demonstrate that the conditions for using a negotiated procedure without prior publication of a notice were satisfied. In fact, the Consiglio di Stato found that what the information in the file made clear was not the objective impossibility of entrusting the contract to different economic operators, but the inexpediency of such a choice, essentially because, in the Ministry’s view, it involved changes and costs and necessitated a period of adjustment.
- 31 In that connection, although the Consiglio di Stato points out that the rules laid down in Directive 2009/81 concerning reviews are almost identical to those laid down in Directive 89/665, its observations are concentrated on Directive 89/665.
- 32 Being uncertain, however, as to the inferences properly to be drawn from that annulment in terms of the effects of the contract at issue in the light of the wording of Article 2d(4) of Directive 89/665, the Consiglio di Stato decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:
- ‘(1) Must Article 2d(4) of Directive [89/665] be construed as meaning that, if, before awarding the contract directly to a specific economic operator, selected without prior publication of a contract notice, a contracting authority published the notice for voluntary *ex ante* transparency in the [Official Journal] and waited at least 10 days before concluding the contract, the national court is — always and in any event — precluded from declaring the contract to be ineffective, even if it is established that there has been an infringement of the provisions permitting, subject to certain conditions, the award of a contract without a competitive tendering procedure?
- (2) Is Article 2d(4) of Directive [89/665] — if interpreted as making it impossible to declare a contract ineffective, in accordance with national law (Article 122 of the Code [of Administrative Procedure]), even though the national court has established an infringement of the provisions permitting, subject to certain conditions, the award of a contract without a competitive tendering

procedure — compatible with the principles of equality of the parties, of non-discrimination and of protecting competition, and does it guarantee the right to an effective remedy enshrined in Article 47 of the Charter ...?’

Consideration of the questions referred

Question 1

- 33 By its first question, the referring court asks in essence whether, on a proper construction of Article 2d(4) of Directive 89/665, where a public contract is awarded without prior publication of a contract notice, but the conditions laid down in Directive 2004/18 for use of that procedure are not satisfied, the contract is not to be declared ineffective if the contracting authority had published in the Official Journal a notice to ensure *ex ante* transparency and, before concluding the contract, had allowed the 10-day minimum standstill period to elapse from the day following the date on which that notice was published.
- 34 At the outset, it should be borne in mind that the provisions of Directive 89/665, which are intended to protect tenderers against arbitrary behaviour on the part of the contracting authority, are designed to reinforce existing arrangements for ensuring the effective application of the EU rules on the award of public contracts, in particular where infringements can still be rectified (judgment in *Commission v Austria*, C-212/02, EU:C:2004:386, paragraph 20 and the case-law cited).
- 35 In addition, as can be seen from recitals 3 and 4 to Directive 2007/66, the aim of the directive is to strengthen the guarantees of transparency and non-discrimination that Directive 89/665 seeks to establish, in order to enhance the effectiveness of review proceedings brought in the Member States by persons with an interest in obtaining a public contract.
- 36 The third subparagraph of Article 1(1) of Directive 89/665 requires Member States to take measures to ensure that 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 that directive.
- 37 To that end, paragraph 1(b) of Article 2 of Directive 89/665, which is entitled ‘Requirements for review procedures’, provides that Member States are to ensure that bodies responsible for review procedures have the power to set aside or to ensure the setting aside of decisions taken unlawfully.
- 38 Article 2d(1)(a) of Directive 89/665 provides in that respect that the body responsible for review procedures is to declare the contract ineffective if the contracting authority has awarded the contract without prior publication of a contract notice in the Official Journal, if it was not permissible to do so under Directive 2004/18.
- 39 In Article 2d(4) of Directive 89/665, however, the EU legislature has laid down an exception to that rule regarding the ineffectiveness of a contract. Under that provision, the general rule does not apply if: (i) the contracting authority considers that the award of a contract without prior publication of a contract notice in the Official Journal is permissible in accordance with Directive 2004/18; (ii) the contracting authority has published in the Official Journal a notice as described in Article 3a of Directive 89/665 announcing that it intends to conclude the contract; and (iii) the contract was not concluded before the expiry of a period of at least 10 calendar days with effect from the day following the date of the publication of that notice.

- 40 Since Article 2d(4) of Directive 89/665 constitutes an exception to the rule regarding the ineffectiveness of contracts, laid down in Article 2d(1) of that directive, it must be interpreted strictly (see, by analogy, the judgment in *Commission v Germany*, C-275/08, EU:C:2009:632, paragraph 55 and the case-law cited). Nevertheless, the exception must be construed in a manner consistent with the objectives that it pursues. Thus, the principle of strict interpretation does not mean that the terms in which the exception is framed in Article 2d(4) of Directive 89/665 must be construed in such a way as to deprive that exception of its intended effect (see, by analogy, *Future Health Technologies*, C-86/09, EU:C:2010:334, paragraph 30 and the case-law cited).
- 41 Fastweb contends that, in accordance with the objectives of Directive 89/665 and the rules on the freedom of establishment and the competitive conditions to which EU public procurement law is intended to give effect, that exception is merely optional. In that regard, Fastweb contends that recitals 20 to 22 to Directive 2007/66 make it clear that Article 2d(4) of Directive 89/665 does not preclude the application of more severe penalties under national law or, therefore, the possibility for the national court to decide, after weighing the general and the individual interests involved, whether the contract must be declared ineffective.
- 42 In that regard, it should be noted that, under Article 2(7) of Directive 89/665, the effects of the exercise of the powers referred to in Article 2(1) of that directive on a contract concluded subsequent to its award are to be determined, save in the situations contemplated in Articles 2d, 2e and 2f of that directive, by national law. It follows that, in the situations contemplated, in particular, in Article 2d of Directive 89/665, the measures that may be taken for the purposes of actions brought against the contracting authorities are to be determined solely by the rules laid down in that directive. In that regard, it should be noted that, under Article 2(7) of Directive 89/665, the cases contemplated in Articles 2d, 2e and 2f of that directive do not fall under the general rule that the effects of an infringement of EU public procurement law are to be determined by national law. Consequently, it is not permissible for Member States to lay down in their national law provisions regarding the effects of infringements of EU public procurement law in circumstances such as those contemplated in Article 2d(4) of Directive 86/665.
- 43 Even though, according to recitals 13 and 14 to Directive 2007/66, the unlawful direct award of contracts is the most serious breach of EU law in the field of public procurement, which it is necessary to penalise, in principle, by a declaration that the contract is ineffective, recital 26 to that directive emphasises the need to avoid the legal uncertainty that could arise as a result of the contract being deprived of effects in the specific case contemplated in Article 2d(4) of Directive 89/665.
- 44 As the Advocate General noted in point 57 of his Opinion, the intention of the EU legislature in introducing, in Article 2d(4) of Directive 89/665, that exception to the general rule regarding the ineffectiveness of a contract, is to reconcile the various interests in play, that is to say, the interests of the undertaking that has been adversely affected, to which it is important to make available the remedies of pre-contractual interim relief and of annulment of the contract unlawfully concluded, and the interests of the contracting authority and the undertaking selected, which entails the need to prevent the legal uncertainty that might be engendered by the ineffectiveness of the contract.
- 45 Having regard to the foregoing, it should be noted that it would be contrary both to the wording and to the purpose of Article 2d(4) of Directive 89/665 to allow the national courts to declare that the contract is ineffective where the three conditions laid down in that provision are satisfied.
- 46 However, in order to attain the objectives referred to in the third subparagraph of Article 1(1) of Directive 89/665, including the availability of effective remedies against decisions taken by contracting authorities in breach of public procurement law, it is important that the body responsible for the review procedure should, when verifying whether the conditions laid down in Article 2d(4) of Directive 89/665 have been fulfilled, carry out an effective review.

- 47 Specifically, the condition laid down in the first indent of Article 2d(4) of Directive 89/665 relates to the need for the contracting authority to consider it permissible under Directive 2004/18 to award the contract without prior publication of a contract notice in the Official Journal. The condition laid down in the second indent of Article 2d(4) of Directive 89/665 relates to the additional need for the contracting authority to publish in the Official Journal a notice, as described in Article 3a of that directive, announcing its intention of concluding the contract. Under Article 3a(c) of Directive 89/665, the notice must state the justification for the contracting authority's decision to award the contract without prior publication of a contract notice.
- 48 On that last point, the 'justification' must disclose clearly and unequivocally the reasons that moved the contracting authority to consider it legitimate to award the contract without prior publication of a contract notice, so that interested persons are able to decide with full knowledge of the relevant facts whether they consider it appropriate to bring an action before the review body and so that the review body is able to undertake an effective review.
- 49 As emerges from the order for reference, the contracting authority in the case before the referring court, acting on the basis of Article 31(1)(b) of Directive 2004/18, used the negotiated procedure without prior publication of a contract notice. In that regard, it should be borne in mind that the negotiated procedure may only be used in the circumstances precisely delimited in Articles 30 and 31 of Directive 2004/18 and that, as compared with open and restricted procedures, that procedure is exceptional (see judgment in *Commission v Belgium*, C-292/07, EU:C:2009:246, paragraph 106 and the case-law cited).
- 50 In its review, the review body is under a duty to determine whether, when the contracting authority took the decision to award a contract by means of a negotiated procedure without prior publication of a contract notice, it acted diligently and whether it could legitimately hold that the conditions laid down in Article 31(1)(b) of Directive 2004/18 were in fact satisfied.
- 51 Among the factors which the review body must take into consideration in that regard are the circumstances and the reasons, mentioned in the notice provided for in the second indent of Article 2d(4) of Directive 89/665, which led the contracting authority to use the negotiated procedure laid down in Article 31 of Directive 2004/18.
- 52 If, at the conclusion of its review, the review body finds that the conditions laid down in Article 2d(4) of Directive 89/665 are not satisfied, it must then declare that the contract is ineffective, in accordance with the rule laid down in Article 2d(1)(a) of that directive. It must determine, on the basis of national law, the consequences of the declaration of ineffectiveness under Article 2d(2) of Directive 89/665.
- 53 On the other hand, if the review body finds that those conditions are satisfied, it must maintain the effects of the contract, pursuant to Article 2d(4) of Directive 89/665.
- 54 Consequently, the answer to Question 1 is that, on a proper construction of Article 2d(4) of Directive 89/665, where a public contract is awarded without prior publication of a contract notice in the Official Journal, but that was not permissible under Directive 2004/18, the contract may not be declared ineffective if the conditions laid down in that provision are satisfied, which it is for the referring court to determine.

Question 2

- 55 By its second question, the referring court essentially asks — in the event that the answer to Question 1 is in the affirmative — whether Article 2d(4) of Directive 89/665 is valid in the light of the principle of non-discrimination and the right to an effective remedy under Article 47 of the Charter.

- 56 In that regard, Fastweb contends that the publication in the Official Journal of a notice for voluntary *ex ante* transparency and observance of the 10-day minimum standstill period between that publication and conclusion of the contract does not ensure consistency with the principle of effective judicial protection. Such publication does not guarantee that potential competitors are informed of the award of a contract to a particular economic operator, especially if publication takes place during a period when activities are reduced or suspended.
- 57 As regards the fundamental right to effective judicial protection, the first paragraph of Article 47 of the Charter states that ‘everyone whose rights and freedoms guaranteed by EU law are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in [that] article’.
- 58 It is settled law that the setting of reasonable time-limits for bringing proceedings, in the interests of legal certainty and for the protection of both the individual and the administrative authority concerned, is compatible with the fundamental right to effective judicial protection. Such time-limits must not make it impossible in practice or excessively difficult to exercise the rights conferred by the EU legal order (see, to that effect, the judgment in *Pelati*, C-603/10, EU:C:2012:639, paragraph 30 and the case-law cited).
- 59 Furthermore, the provisions of Directive 89/665, which is intended to protect tenderers against arbitrary behaviour on the part of the contracting authority, are designed to reinforce existing arrangements for ensuring the effective application of the EU rules on the award of public contracts, in particular where infringements can still be rectified. Such protection cannot be effective if the interested party is unable to rely on those rules *vis-à-vis* the contracting authority (see, to that effect, the judgment in *Commission v Austria*, EU:C:2004:386, paragraph 20).
- 60 Accordingly, effective legal protection requires that the interested parties be informed of an award decision a reasonable period before the contract is concluded so that they have a real possibility of bringing proceedings and, in particular, of applying for interim measures pending conclusion of the contract (see, to that effect, judgments in *Commission v Spain*, C-444/06, EU:C:2008:190, paragraphs 38 and 39, and *Commission v Ireland*, C-456/08, EU:C:2010:46, paragraph 33).
- 61 In providing for the publication in the Official Journal of a notice, in accordance with Article 3a of Directive 89/665, announcing the intention of concluding a contract, the second indent of Article 2d(4) of Directive 89/665 guarantees the transparency of the award of a contract. Accordingly, that provision is designed to ensure that all the candidates potentially concerned are in a position to take cognisance of the contracting authority’s decision to award the contract without prior publication of a contract notice. Moreover, in accordance with the third indent of that provision, the contracting authority must observe a 10-day standstill period. The interested parties are thus given an opportunity to challenge the award of a contract before the courts before the contract is concluded.
- 62 In addition, it should also be noted that, even when the standstill period of at least 10 calendar days, provided for in Article 2d(4) of Directive 89/665, has elapsed, operators adversely affected may bring an action for damages under Article 2(1)(c) of Directive 89/665.
- 63 In that regard, as was noted in paragraph 44 above, account must be taken of the fact that, by the exception laid down in Article 2d(4) of Directive 89/665, the EU legislature is seeking to accommodate divergent interests, namely, the interests of the undertaking adversely affected, by conferring upon it the right to bring pre-contractual proceedings for interim relief and the right to obtain annulment of a contract that has been concluded unlawfully, and the interests of the contracting authority and of the undertaking selected, limiting the legal uncertainty that may be engendered by the ineffectiveness of the contract.

- 64 In the light of the foregoing, it must be held that, in providing for the effects of a contract to be maintained, Article 2d(4) of Directive 89/665 is not contrary to the requirements flowing from Article 47 of the Charter.
- 65 The same holds true with regard to the principle of non-discrimination, which, in the field of public procurement, pursues the same objectives, including the free movement of services and the opening up of undistorted competition in all the Member States (see, inter alia, *Wall*, C-91/08, EU:C:2010:182, paragraph 48, and *Manova*, C-336/12, EU:C:2013:647, paragraph 28). As has already been stated in paragraph 61 above, the second indent of Article 2d(4) of Directive 89/665 is designed to ensure that all the candidates potentially concerned are in a position to take cognisance of the contracting authority's decision to award the contract without prior publication of a contract notice and accordingly to bring proceedings for a review of its legality.
- 66 In the light of the foregoing, the answer to Question 2 is that examination of that question has not revealed anything which might affect the validity of Article 2d(4) of Directive 89/665.

Costs

- 67 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

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

1. **On a proper construction of Article 2d(4) 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, as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007, where a public contract is awarded without prior publication of a contract notice in the *Official Journal of the European Union*, but that was not permissible under 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, the contract may not be declared ineffective if the conditions laid down in that provision are in fact satisfied, which it is for the referring court to determine.**
2. **Examination of the second question has not revealed anything which might affect the validity of Article 2d(4) of Directive 89/665, as amended by Directive 2007/66.**

[Signatures]