



## Reports of Cases

### JUDGMENT OF THE COURT (Fifth Chamber)

8 May 2014\*

(Public procurement — Water sector — Directive 92/13/EEC — Effective and rapid review procedures — Time-limits for bringing an action — Date from which time begins to run)

In Case C-161/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunale amministrativo regionale per la Puglia (Italy), made by decision of 19 December 2012, received at the Court on 29 March 2013, in the proceedings

**Idrodinamica Spurgo Velox srl,**

**Giovanni Putignano e figli srl,**

**Cogeir srl,**

**Splendor Sud srl,**

**Sceap srl**

v

**Acquedotto Pugliese SpA,**

intervening parties:

**Tundo srl,**

**Giovanni XXIII Soc. coop. arl,**

THE COURT (Fifth Chamber),

composed of T. von Danwitz, President of the Chamber, K. Lenaerts, Vice-President of the Court, acting as a judge of the Fifth Chamber, E. Juhász (Rapporteur), A. Rosas and D. Šváby, Judges,

Advocate General: J. Kokott,

Registrar: A. Impellizzeri, Administrator,

having regard to the written procedure and further to the hearing on 16 January 2014,

\* Language of the case: Italian.

after considering the observations submitted on behalf of:

- Idrodinamica Spurgo Velox srl, by L. Quinto and P. Quinto, avvocati,
- Acquedotto Pugliese SpA, by E. Sticchi Damiani, M. Todino and G. Martellino, avvocati,
- Giovanni XXIII Soc. coop. arl, by C. Rella, and R. Rella, avvocati,
- the Italian Government, by G. Palmieri, acting as Agent, and by C. Colelli, avvocato dello Stato,
- the Austrian Government, by M. Fruhmann, acting as Agent,
- the European Commission, by L. Pignataro-Nolin and A. Tokár, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,  
gives the following

### Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Articles 1, 2a, 2c and 2f of Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1992 L 76, p. 14), as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 (OJ 2007 L 335, p. 31) ('Directive 92/13').
- 2 The request has been made in proceedings between Idrodinamica Spurgo Velox srl ('Idrodinamica') and four other applicants, on the one hand, and Acquedotto Pugliese SpA ('Acquedotto Pugliese'), the contracting authority, on the other, concerning the lawfulness of the procedure for the award of a contract by that authority to the ad hoc tendering consortium led by the undertaking Giovanni XXIII Soc. coop. arl ('Cooperativa Giovanni XXIII').

### Legal context

#### *EU law*

- 3 The contract at issue in the main proceedings, relating to the water sector, is governed 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), commonly referred to as the 'sectoral directive'.
- 4 The third, fifth and sixth recitals in the preamble to Directive 92/13 state:

'... the absence of effective remedies or the inadequacy of existing remedies could deter Community undertakings from submitting tenders; ... therefore, the Member States must remedy this situation;

...

... the opening-up of procurement in the sectors concerned to Community competition implies that provisions must be adopted to ensure that appropriate review procedures are made available to suppliers or contractors in the event of infringement of the relevant Community law or national rules implementing that law;

... it is necessary to provide for a substantial increase in the guarantees of transparency and non-discrimination and ... for it to have tangible effects, effective and rapid remedies must be available.'

- 5 Paragraphs 1 and 3 of Article 1 of that directive, which is entitled 'Scope and availability of review procedures', provides:

'1. This Directive applies to contracts referred to in Directive [2004/17] ...

...

Member States shall take the measures necessary to ensure that, as regards contracts falling within the scope of Directive [2004/17], decisions taken by contracting entities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in Articles 2 to 2f of this Directive, on the grounds that such decisions have infringed Community law in the field of procurement or national rules transposing that law.

...

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

- 6 Article 2(1) of Directive 92/13 provides:

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

either

- (a) to take, at the earliest opportunity and by way of interlocutory procedure, interim measures with the aim of correcting the alleged infringement or preventing further injury to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a contract or the implementation of any decision taken by the contracting entity;

and

- (b) to set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the notice of contract, the periodic indicative notice, the notice on the existence of a system of qualification, the invitation to tender, the contract documents or in any other document relating to the contract award procedure in question;

or

- (c) to take, at the earliest opportunity, if possible by way of interlocutory procedures and if necessary by a final procedure on the substance, measures other than those provided for in points (a) and (b) with the aim of correcting any identified infringement and preventing injury to the interests concerned; in particular, making an order for the payment of a particular sum, in cases where the infringement has not been corrected or prevented.

Member States may take this choice either for all contracting entities or for categories of entities defined on the basis of objective criteria, in any event preserving the effectiveness of the measures laid down in order to prevent injury being caused to the interests concerned;

- (d) and, in both the above cases, to award damages to persons injured by the infringement. Where damages are claimed on the grounds that a decision has been taken unlawfully, Member States may, where their system of internal law so requires and provides bodies having the necessary powers for that purpose, provide that the contested decision must first be set aside or declared illegal.'

7 Under the last subparagraph of Article 2a(2) of Directive 92/13:

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

- a summary of the relevant reasons as set out in Article 49(2) of Directive [2004/17], and,
- a precise statement of the exact standstill period applicable pursuant to the provisions of national law transposing this paragraph.'

8 Paragraphs 1 and 2 of Article 49 of Directive 2004/17, which is entitled 'Information to applicants for qualification, candidates and tenderers', provides:

'1. Contracting entities shall as soon as possible inform the economic operators involved of decisions reached concerning the conclusion of a framework agreement, the award of the contract, or admission to a dynamic purchasing system, including the grounds for any decision not to conclude a framework agreement or award a contract for which there has been a call for competition or to recommence the procedure, or not to implement a dynamic purchasing system; this information shall be provided in writing if the contracting entities are requested to do so.

2. On request from the party concerned, contracting entities shall, as soon as possible, inform:

- any unsuccessful candidate of the reasons for the rejection of his application,
- any unsuccessful tenderer of the reasons for the rejection of his tender, including, for the cases referred to in Article 34(4) and (5), the reasons for their decision of non-equivalence or their decision that the works, supplies or services do not meet the performance or functional requirements,
- any tenderer who has made an admissible tender of the characteristics and relative advantages of the tender selected, as well as the name of the successful tenderer or the parties to the framework agreement.

The time taken to do so may under no circumstances exceed 15 days from receipt of the written enquiry.

However, contracting entities may decide that certain information on the contract award or the conclusion of the framework agreement or on admission to a dynamic purchasing system, referred to in the paragraph 1, is to be withheld where release of such information would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of a particular economic operator, public or private, including the interests of the economic operator to whom the contract has been awarded, or might prejudice fair competition between economic operators.’

*Italian law*

- 9 Legislative Decree No 163/2006 of 12 April 2006 (Ordinary Supplement to GURI No 100 of 2 May 2006) codifies the rules on public procurement.
- 10 Article 11 of that decree, which is entitled ‘Phases of the procedures for the award of public contracts’, provides:
- ‘1. The procedures for the award of public contracts shall be carried out in compliance with the programming measures of the contracting entities, where they are provided for by this Code or by the legislation in force.
- ...
4. The award procedures shall select the best tender, according to one of the criteria provided for in this Code. On conclusion of the procedure, the contract is to be provisionally awarded to the “best” tenderer.
5. Once the provisional award within the meaning of Article 12(1) has been confirmed, the final award shall be made by the contracting entity.
- ...
8. The final award shall take effect once it has been established that the requirements have been satisfied.
9. Once the final award has taken effect and subject to the exercise of any powers of self-regulation in the cases provided for by the law [that is to say, the administration’s power to withdraw, suspend or modify its own measures], the public contract or concession contract must be concluded within 60 days, unless a different deadline is laid down in the invitation to tender or agreed with the contracting authority. ...
10. The contract shall not, in any event, be concluded within 35 days of the dispatch of the last communication of the final award within the meaning of Article 79.
- ...’
- 11 The relevant provisions of Article 79 of Legislative Decree No 163/2006 are summarised by the referring court as follows:
- Under paragraph 5, the contracting authority is automatically to inform all competitors admitted to the procedure, within a period of no more than five days, of the final award of the contract and of the conclusion of the contract with the successful contractor.

- Under paragraph 5a, the contract award decision and the statement of the reasons for it, setting out at least the characteristics and advantages of the selected tender and the name of the successful undertaking, must be appended to the communication, it being also possible for the contracting authority to satisfy that requirement by sending the minutes of the public opening of the tender.
  - Under paragraph 5c, competitors are to be allowed, without needing to submit a written request, immediate access to the documentation relating to the tendering procedure, by consulting it and taking copies, within 10 days of the dispatch of the communication of the result of the tender, subject to the exercise by the authorities of the power to deny or delay access in those cases for which the law provides.
- 12 Article 120 of Legislative Decree No 104/2010 of 2 July 2010 establishing the Code of Administrative Procedure (Ordinary Supplement to GURI No 156 of 7 July 2010) provides that actions challenging the documents in procedures for the award of public contracts are to be brought within the shorter period of 30 days, as from receipt of the communication referred to in Article 79 of Legislative Decree No 163/2006.
- 13 Article 43 of Legislative Decree No 104/2010 provides that decisions of the contracting entity adopted after a candidate has submitted an application for review of the final award of the contract may be contested, in the context of that procedure, by bringing an ‘action adducing additional grounds’ within the deadline of 30 days laid down in Article 120 of that decree.
- 14 According to settled case-law, the Italian administrative courts consider that the communication of the award decision, provided for under Article 79(5) of Legislative Decree No 163/2006, is the sufficient condition for full knowledge of the harmful decision and is appropriate for triggering the time-limit, whether or not the undertaking concerned is entirely or to some extent unfamiliar with the internal procedural documents. That communication requires the undertaking concerned to apply immediately for a review of the tender within 30 days, without prejudice to the introduction of additional grounds concerning any irregularities which may emerge subsequently. The case-law has arrived at the same position as regards circumstances in which the contracting authority makes a definitive decision that is conditional, in terms of its effectiveness, on actively establishing that the undertaking to which the contract has been awarded satisfies the general and special conditions of the notice of contract, bearing in mind that additional grounds may be adduced within 30 days in that case also.

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

- 15 Acquedotto Pugliese is a public undertaking wholly controlled by the Regione Puglia (Puglia Region), its sole shareholder. It manages the integrated water and sewerage system for Puglia and for a number of municipalities in neighbouring regions. Pursuant to Annex VI-C to Legislative Decree No 163/2006, Acquedotto Pugliese is a contracting authority in the sector of the production, transport and distribution of drinking water, required to comply with the domestic legislation transposing into Italian law Directive 2004/17.
- 16 By notice published in the *Official Journal of the European Union* on 15 March 2011, Acquedotto Pugliese launched an open tendering procedure for the award of a four-year contract for cleaning and disinfecting the sewerage system, for ordinary and extraordinary maintenance work on the water and sewerage systems and for the construction of water connections and pipe infrastructure, in dwellings in the district in question, with a basic contract value of EUR 17 615 739.07, to be awarded to the tenderer with the lowest price.
- 17 On conclusion of the public sittings of 17 and 30 May 2011, the preferred tenderer and first on the list was deemed to be the ad hoc tendering consortium led by Cooperativa Giovanni XXIII. Second on the list was the ad hoc tendering consortium led by Tundo srl (‘Tundo’) and third on the list was the ad

hoc tendering consortium led by Idrodinamica. Consequently, by decision of 7 June 2011, the contracting authority decided to make a definitive award of the contract to the ad hoc tendering consortium led by Cooperativa Giovanni XXIII. That decision was communicated on 6 July 2011.

- 18 In that decision, it was also provided that, pending conclusion of the contract, early performance of the contract was permitted, that the definitive award of the contract would not take effect until it had been positively established that each of the member undertakings of the consortium to which the contract had been awarded and of the consortium awarded second place on the list satisfied the general and special requirements, and that all tenderers would be notified of the award of the contract.
- 19 Pending conclusion of the contract, the consortium to which the contract had been awarded, set up meantime by notarial act of 4 October 2011, informed the contracting authority by letter of 28 February 2012 that one of the associate undertakings had withdrawn from the consortium, but that it nevertheless intended to take on the contract and, even with its reduced membership (the leading undertaking and two associates), it was able to satisfy the technical and economic requirements under the notice of tender.
- 20 By decision of 28 March 2012, Acquedotto Pugliese authorised the withdrawal of the associate undertaking in question. The contract was concluded on 17 April 2012 with the ad hoc tendering consortium led by Cooperativa Giovanni XXIII in its new reduced composition.
- 21 Idrodinamica brought an action, notified on 17 May 2012, challenging the tender documentation of the contract award procedure in question and requesting specifically: (i) the annulment of the decision of 28 March 2012 by which Acquedotto Pugliese authorised the change in composition of the consortium to which the contract had been awarded; (ii) the annulment of the contract concluded on 17 April 2012; and (iii) the annulment of the decision of 7 June 2011 by which the contract was definitively awarded. Idrodinamica maintains that that procedure was unlawful on the ground that the contracting authority authorised the change in composition of the ad hoc consortium to which the contract had been awarded and, moreover, that that authority should have excluded the ad hoc tendering consortium led by Tundo srl, placed second on the list, in so far as the legal representative of one of the member undertakings of that consortium falsely declared that he had never been convicted of a criminal offence.
- 22 The referring court observes that, in accordance with national rules and case-law, the action brought by Idrodinamica should be declared inadmissible, since it was initiated well after the 30-day time-limit starting from the communication that the contract at issue in the main proceedings had been definitively awarded. However, the Court held in paragraph 40 of the judgment in Case C-406/08 *Uniplex (UK)* EU:C:2010:45, that the objective of rapidity pursued by legislation relating to review procedures to the award of public contracts does not permit Member States to disregard the principle of effective judicial protection, under which the detailed methods for the application of national limitation periods must not render impossible or excessively difficult the exercise of any rights which the person concerned derives from Union law.
- 23 The referring court asks whether the national legislation in question is compatible with that principle of effective judicial protection, in so far as the information accompanying the communication of the definitive decision awarding the contract is not always sufficient to provide the unsuccessful candidates and tenderers with knowledge of the documentation and facts that are material to the decision on whether to apply for a review, inter alia, where an alleged breach of procedural rules occurs after the definitive decision awarding the contract has been adopted.
- 24 Moreover, the procedural rule which requires the persons concerned to apply for a review of the decision awarding the contract within the deadline of 30 days, without prejudice to the possibility of introducing additional grounds on the basis of acts or facts which occur subsequently, appears to be incompatible with the principle of effective judicial protection, since the applicant must settle the fees

of counsel and other experts appointed by the parties, and the fee in connection with the costs of the proceedings, in relation both to the application initiating proceedings and to the introduction of new grounds.

- 25 The referring court asks, therefore, whether on a proper construction of the relevant provisions of Union law the time allowed for submitting an application for review laid down by national legislation runs from the date on which the person concerned became aware — or, though the exercise of ordinary diligence, ought to have become aware — of the existence of an irregularity, rather than from the date of communication of the definitive decision awarding the contract.
- 26 In the light of those considerations, the Tribunale amministrativo regionale per la Puglia (Regional Administrative Court, Puglia) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:
- ‘(1) Must Articles 1, 2a, 2c and 2f of Directive [92/13] be interpreted as meaning that time for the purposes of bringing proceedings for a declaration that there has been an infringement of the rules governing the award of public procurements contracts runs from the date on which the applicant became aware — or, through the exercise of ordinary diligence, ought to have become aware — of the existence of that infringement?
- (2) Do Articles 1, 2a, 2c and 2f of Directive [92/13] preclude provisions of national procedural law, or interpretative practices, such as those described in the main proceedings, which allow the court to declare inadmissible an action for a declaration that there has been an infringement of the rules governing the award of public contracts, where, as a result of the conduct of the contracting authority, the applicant became aware of the infringement after the formal communication of the essential elements of the decision definitively awarding the contract?’

### Consideration of the questions referred

#### *Admissibility*

- 27 Cooperativa Giovanni XXIII and the Italian Government express concerns relating to the admissibility of the questions referred on the ground, inter alia, that Idrodinamica’s complaints put forward in the main proceedings are directed against the measure taken by the contracting authority authorising the change in composition of the consortium to which the contract had been awarded and that no complaint has been raised against the decision definitively awarding the contract.
- 28 Consequently, they submit that the possible annulment of that measure would merely result in the invalidity of the contract concluded with the consortium — in its reduced composition — to which the contract had been awarded, without its losing its status of successful tenderer. The questions referred by the referring court therefore have no direct link with the purpose of the case before it.
- 29 It should be borne in mind that, according to settled case-law, questions on the interpretation of EU law referred by a national court in the factual and legislative context which that court is responsible for defining and the accuracy of which is not a matter for the Court to determine enjoy a presumption of relevance. The Court may refuse to rule on a question referred for a preliminary ruling from a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (Case C-279/12 *Fish Legal and Shirley* EU:C:2013:853, paragraph 30 and the case-law cited).

- 30 That is not the case here and the concerns expressed by Cooperativa Giovanni XXIII and the Italian Government as to the admissibility of the questions are unfounded. The referring court seeks an interpretation of the relevant provisions of Directive 92/13 in order to assess whether Idrodinamica's application for review is admissible. As is apparent from the file before the Court, that application concerns, in essence, first, the annulment of the decision of the contracting authority by which it authorised the change in composition of the consortium to which the contract had been awarded and, second, the fact that that authority failed to exclude from the tender procedure a competing undertaking placed ahead of Idrodinamica on the list.
- 31 It must be found that, if the first complaint put forward by Idrodinamica in the context of the case before the referring court alleging, in essence, that the contracting authority unlawfully authorised the reduction in the number of undertakings belonging to the ad hoc tendering consortium, were upheld, the decision definitively awarding the contract could be annulled. If the second complaint, that the contracting authority should have excluded the ad hoc tendering consortium Tundo srl, placed second on the list, because the legal representative of one of the member undertakings of that consortium produced a false declaration, were also upheld, the chances of Idrodinamica's being awarded the contract in issue in the main proceedings would be significantly increased. Accordingly, Idrodinamica may rightly be considered to be a person 'having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement' within the meaning of Article 1(3) of Directive 92/13.
- 32 Consequently, the questions referred are admissible.

### *Substance*

- 33 By its questions, which it is appropriate to examine together, the referring court asks, in essence, whether the time allowed for bringing an action for the annulment of the award decision starts to run again where the contracting authority adopts, after the expiry of that period, a decision which may affect the lawfulness of the award decision in question. It also asks whether, in the same situation, a tenderer may bring an action for the annulment of the award decision where it became aware of circumstances underlying that decision which may affect the lawfulness of the contract award procedure in question.
- 34 The amendment to Directive 92/13 by Directive 2007/66 and Article 49 of Directive 2004/17 has given rise to the requirement that an unsuccessful tenderer be informed of the outcome of the tender award procedure and the reasons therefor. On the basis of Article 49(2) of Directive 2004/17, the tenderer may request that it be provided with detailed information.
- 35 The principle of legal certainty requires that information thus obtained, and information that could have been obtained, can no longer serve as a basis for an action brought by the tenderer after the expiry of the period of time laid down by national law.
- 36 However, in the dispute in the main proceedings, the decision authorising the change in composition of the consortium to which the contract had been awarded concerns events which happened after the contract had been awarded and after the expiry of the 30-day period for bringing an action laid down by national law. It was not therefore possible to be aware of those events on the basis of either the communication of the award decision and the reasons underlying that decision, or the reply given to a potential request for detailed information submitted by the tenderer to the contracting authority.

- 37 In accordance with the case-law of the Court, effective procedures for review of infringements of the provisions applicable in the field of public procurement can be realised only if the periods laid down for bringing such proceedings start to run only from the date on which the claimant knew, or ought to have known, of the alleged infringement of those provisions (see, to that effect, *Uniplex (UK)* EU:C:2010:45, paragraph 32 and the case-law cited).
- 38 In addition, it is apparent from the decision making the reference that the decision authorising the change in composition of the consortium to which the contract had been awarded, which may affect the lawfulness of the decision awarding the contract, was adopted before the contract had been concluded between the contracting authority and that consortium. In such circumstances, it cannot be found that the principle of legal certainty precludes, as regards an action brought for the annulment of the award decision, the 30-day period from starting to run again.
- 39 In that regard, it must be held that the decision authorising the change in composition of the consortium to which the contract had been awarded necessitates an amendment of the award decision which may be regarded as substantial if, in the light of the particular features of the tender award procedure in question, it alters one of the essential elements that were decisive in the adoption of the award decision. In that situation, all relevant measures provided for by national law would have to be taken to remedy that irregularity, which might extend to a new award procedure (see, by analogy, Case C-91/08 *Wall* EU:C:2010:182, paragraphs 38, 39, 42 and 43).
- 40 Moreover, the Court points out that the possibility, such as that provided for in Article 43 of Legislative Decree No 104/2010, of adducing ‘new grounds’ in the context of an initial action against the award decision brought within the time-limit is not always a viable alternative of effective judicial protection. In a situation such as that in the main proceedings, the tenderers would be required to challenge *in abstracto* the decision awarding the contract, without knowing, at that stage, the grounds justifying that action.
- 41 Consequently, the 30-day period for bringing an action against the award decision laid down by national legislation must start to run again so as to permit the examination of the lawfulness of the contract authority’s decision authorising the change in the composition of the consortium to which the contract had been awarded, which may affect the lawfulness of the decision awarding the contract. That period must start to run from the date on which the tenderer receives communication of the decision authorising the change in composition of the consortium or the date on which it became aware of that decision.
- 42 So far as concerns Idrodinamica’s complaint alleging that the consortium placed second on the list should have been excluded because the legal representative of one of the member undertakings of that consortium produced a false declaration, it must be found that that alleged irregularity must have happened before the decision awarding the contract was adopted.
- 43 In those circumstances, the Court finds that the tenderer, on the basis of the information communicated to it pursuant to Article 2a of Directive 92/13 and Article 49 of Directive 2004/17, and on the basis of the information it could have obtained through the exercise of ordinary diligence, was in a position to submit an application for review of the possible infringements of Union law on public procurement and that, consequently, there is no reason for the period for bringing an action laid down by national legislation to start to run again.
- 44 The Court points out that, in the situation in the main proceedings, in the event of the annulment of the decision awarding the contract to the consortium placed first on the list adopted during the tender award procedure, a new action for the annulment of the new decision awarding the contract to another tenderer may be brought within the time-limit laid down by national legislation.

- 45 Consequently, it must be held that, pursuant to the principle of legal certainty, in the event of irregularities allegedly committed before the decision awarding the contract was adopted, a tenderer may bring an action for the annulment of the award decision only within the specific time-limit laid down in that regard by national law, unless such a right of action is explicitly provided for by national law in accordance with Union law.
- 46 On the other hand, a tenderer may bring an action for damages within the general limitation period provided for in that regard by national law.
- 47 In the light of the foregoing considerations, the answer to the questions referred is that Article 1(1) and (3) and the last subparagraph of Article 2a(2) of Directive 92/13 must be interpreted as meaning that the time allowed for bringing an action for the annulment of the decision awarding a contract starts to run again where the contracting authority adopts a new decision, after the award decision has been adopted but before that contract is signed, which may affect the lawfulness of that award decision. That period starts to run from the communication of the earlier decision to the tenderers or, in the absence thereof, from when they became aware of that decision.
- 48 When a tenderer becomes aware, after the expiry of the period for bringing an action laid down by national legislation, of an irregularity allegedly committed before the award decision was adopted, an action for the annulment of that decision may be brought only within that period, unless such a right of action is explicitly provided for by national law in accordance with Union law.

### **Costs**

- 49 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:

**Article 1(1) and (3) and the last subparagraph of Article 2a(2) of Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007, must be interpreted as meaning that the time allowed for bringing an action for the annulment of the decision awarding a contract starts to run again where the contracting authority adopts a new decision, after the award decision has been adopted but before that contract is signed, which may affect the lawfulness of that award decision. That period starts to run from the communication of the earlier decision to the tenderers or, in the absence thereof, from when they became aware of that decision.**

**Where a tenderer becomes aware, after the expiry of the period for bringing an action laid down by national legislation, of an irregularity allegedly committed before the award decision was adopted, an action for the annulment of that decision may be brought only within that period, unless such a right is explicitly provided for by national law in accordance with Union law.**

[Signatures]