Reports of Cases

OPINION OF ADVOCATE GENERAL
SHARPSTON
delivered on 28 April 2016[1]

Joined Cases C-439/14 and C-488/14

SC Star Storage SA
v
Institutul Național de Cercetare-Dezvoltare în Informatică (ICI)
(Request for a preliminary ruling from the Curtea de Apel București (Court of Appeal, Bucharest, Romania))
and
SC Max Boegl România SRLSC UTI Grup SA,Astaldi SpA,
SC Construcții Napoca SA
v
RA Aeroportul Oradea
SC Porr Construct SRL
Teerag-Asdag Aktiengesellschaft
SC Col-Air Trading SRL
AVZI SA
Trameco SA
Iamsat Muntenia SA

(Request for a preliminary ruling from the Curtea de Apel Oradea (Court of Appeal, Oradea, Romania))

(Public procurement — Directives 89/665/EEC and 92/13/EEC –National law requiring a 'good conduct guarantee' to access review procedures — Procedural autonomy of the Member States — Principles of equivalence and effectiveness — Articles 47 and 52 of the Charter — Right to an effective remedy — Limitation — Proportionality)

1. In the present cases the Curtea de Apel București (Court of Appeal, Bucharest, Romania) and the Curtea de Apel Oradea (Court of Appeal, Oradea, Romania) essentially seek guidance from the Court as to whether EU law precludes a Member State from requiring an applicant to lodge a 'good conduct guarantee' in order to access review procedures for public procurement decisions by contracting authorities. Under the national legislation at issue in the main proceedings, contracting authorities retain the good conduct guarantee where the body competent to review their decisions rejects the challenge or where the applicant abandons it.

1 — Original language: English.

2. The references therefore concern the scope of the right of access to an effective remedy in the context of public procurement, a right which is not only guaranteed under Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter') but also finds specific expression in EU directives governing public contract award procedures. How far can the Member States set up financial requirements for challenging contracting authorities' decisions in order to reduce the risk of frivolous challenges, that is to say, challenges that are inherently likely to be unsuccessful and whose purpose is merely to impede the public contract award procedure?

Legal background

EU law

3. The first subparagraph of Article 47 of the Charter provides 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. Under Article 52(1) of the Charter, any limitation on the exercise of a Charter right must be provided for by law and respect the essence of the right in question. Subject to the principle of proportionality, such limitation is possible only if it is necessary and genuinely meets objectives of general interest recognised by the EU or the need to protect the rights and freedoms of others.

4. According to the third recital of Council Directive 89/665/EEC,[2] opening up public procurement to EU competition necessitates a substantial increase in the guarantees of transparency and non-discrimination. Effective and rapid remedies should therefore be available in the case of infringements of EU law on public procurement or national rules implementing that law.

5. Article 1 of Directive 89/665, entitled 'Scope and availability of review procedures', provides:

'1. This Directive applies to contracts referred to in Directive 2004/18/EC …, [3] unless such contracts are excluded in accordance with Articles 10 to 18 of that Directive.

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

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

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

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

2 — 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).

3 — 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).

…’

6. The fifth recital of Council Directive 92/13/EEC [4] states that opening up procurement in the water, energy, transport and postal services sectors to EU competition implies that appropriate review procedures are available to suppliers or contractors in the event of infringement of the relevant EU law or national rules implementing that law.

7. The first three paragraphs of Article 1 of Directive 92/13, entitled ‘Scope and availability of review procedures’, correspond in essence to the first three paragraphs of Article 1 of Directive 89/665. [5]

Romanian law

8. Pursuant to Article 43a of Emergency Ordinance No 34/2006 concerning the award of public supply contracts, public works contracts and public services contracts (Ordonanța de urgență a Guvernului nr. 34/2006; ‘the OUG No 34/2006’), any would-be tenderer must lodge a guarantee (‘the tendering guarantee’) in order to participate in the procedure in all cases in which the OUG No 34/2006 requires the contracting authority to publish an invitation to tender or a call for proposals. The tendering guarantee, which can represent up to 2% of the public contract’s estimated value, is intended to protect the contracting authority against the risk of improper conduct by the tenderer throughout the entire period preceding the conclusion of the contract.

9. Under Article 256(1) of the OUG No 34/2006, a party who considers that he has been adversely affected shall have the right to refer the matter to the National Council for Dispute Resolution (Consiliului Național de Soluționare a Contestațiilor, ‘the CNSC’). Pursuant to Article 281(1), decisions of the CNSC may be subject to an appeal before a judicial authority.

10. Article 278(1) of the OUG No 34/2006 states that the CNSC or the competent court is to adjudicate as a preliminary matter on any procedural or substantive objections. If it decides that these are well founded, it will not examine the substance of the dispute.

11. Article 278a of the OUG No 34/2006 provided that the contracting authority had to retain part of the tendering guarantee if the CNSC or the competent court dismissed a challenge initiated by the tenderer or the tenderer abandoned his challenge.

12. Emergency Ordinance No 51/2014 (Ordonanța de urgență a Guvernului nr. 51/2014; ‘the OUG No 51/2014’) repealed Article 278a of the OUG No 34/2006 and introduced the following provisions into that legislation: [6]

‘Article 271a

1. For the purpose of protecting the contracting authority against the risk of any improper conduct, the applicant shall be required to provide a good conduct guarantee covering the entire period from the date on which the appeal/application/complaint is lodged to the date on which the decision of the [CNSC]/the judgment of the competent judicial authority has become final.

2. The [challenge] shall be [rejected] if the applicant fails to furnish proof that the guarantee referred to in paragraph 1 has been deposited.

4 — 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).

5 — Save that Article 1 of Directive 92/13 cross-refers to 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) rather than to Directive 2004/18.

6 — In what follows, I shall refer to those provisions as the ‘original regime’.

3. The good conduct guarantee shall be provided by means of bank transfer or a guarantee instrument issued in compliance with legal requirements by a banking institution or an insurance company; the original guarantee shall be lodged at the offices of the contracting authority and a copy with the [CNSC] or the judicial authorities at the same time as the [challenge] is lodged.

4. The total amount of the good conduct guarantee shall be determined by reference to the estimated value of the contract to be awarded, in accordance with the following rules:

(a) 1% of the estimated value, if this is lower than the threshold amounts provided for in Article 55(2)(a) and (b); [7]

(b) 1% of the estimated value, if this is lower than the threshold amounts provided for in Article 55(2)(c), [8] but not greater than the equivalent in RON of EUR 10 000, according to the exchange rate … applicable at the date on which the guarantee is provided;

(c) 1% of the estimated value, if this is equal to or greater than the threshold amounts set out in Article 55(2)(a) and (b), but not greater than the equivalent in RON of EUR 25 000 according to the exchange rate … applicable at the date on which the guarantee is provided;

(d) 1% of the estimated value, if this is equal to or greater than the threshold amounts set out in Article 55(2)(c), but not greater than the equivalent in RON of EUR 100 000 according to the exchange rate … applicable at the date on which the guarantee is provided.

5. The good conduct guarantee must be valid for a period of at least 90 days, be irrevocable and provide for unconditional payment upon first request of the contracting authority where the [challenge] is [rejected].

6. If, on the day on which the good conduct guarantee is due to expire, the decision of the [CNSC] or the judgment of the judicial authority has not become final and the party challenging the decision has failed to extend the validity of the good conduct guarantee in accordance with the requirements laid down in paragraphs 1 to 5, the contracting authority shall retain the guarantee. The provisions set out in Article 271b(3) to (5) shall apply mutatis mutandis.

…

Article 271b

1. If the challenge is dismissed by the [CNSC] or by the judicial authority, where the party challenging the decision has brought proceedings directly before the latter, the contracting authority shall be required to retain the good conduct guarantee as from the time at which the decision of the [CNSC]/the judgment of the judicial authority becomes final. The requirement to retain the guarantee shall apply to the parts of the contract in respect of which the challenge has been dismissed.

2. Paragraph 1 shall also apply where the party challenging the decision withdraws the [challenge].

3. The measure referred to in paragraph 1 shall not apply where the [CNSC]/judicial authority dismisses the challenge as devoid of purpose or where the [challenge] is withdrawn following the adoption, by the contracting authority, of corrective measures necessary under Article 256c(1).

7 — Article 55(2)(a) and (b) of the OUG No 34/2006 concerns public supply and public service contracts.

8 — Article 55(2)(c) of the OUG No 34/2006 concerns public works contracts.

4. Where the [CNSC] upholds the challenge, or the competent judicial authority upholds the action brought against the [CNSC's] decision to dismiss the challenge, the contracting authority shall be required to return the good conduct guarantee to the party challenging the decision no later than five days following the date on which the decision/judgment has become final.

5. Where the party challenging the decision has brought proceedings directly before the judicial authority and the latter upholds the action, paragraph 4 shall apply mutatis mutandis.

6. The amounts received by the contracting authority under the good conduct guarantee shall be classified as income of that contracting authority.'

13. In answer to a request for clarification from the Court, the referring courts confirmed that, in a judgment delivered on 15 January 2015, the Curtea Constituțională (Constitutional Court, Romania) had declared unconstitutional Article 271b(1) and (2) of the OUG No 34/2006. The Constitutional Court reached that conclusion essentially on the ground that those provisions required the contracting authority to retain the good conduct guarantee where the challenge was rejected or withdrawn, without giving the CNSC or the court deciding on the challenge any flexibility to take the applicant's behaviour into account. Only inappropriate behaviour would justify losing the good conduct guarantee. On 4 November 2015, the Constitutional Court declared unconstitutional, on essentially similar grounds, Article 271a(5) of the OUG No 34/2006 to the extent that that provision required the good conduct guarantee to provide for unconditional payment, if the challenge was rejected, upon the first request of the contracting authority.

14. At the hearing, the Romanian Government explained that Articles 271a and 271b of the OUG No 34/2006 are still in force to the extent that they were not declared unconstitutional. It confirmed that the remaining provisions[9] still require the applicant to lodge a good conduct guarantee, but that there is no longer a legal basis for the contracting authority to retain it. As a result, the contracting authority must now return the good conduct guarantee to the applicant at the end of the procedure, regardless of the challenge's outcome and, *a fortiori*, whether the application was frivolous or not.

Factual background, procedure and questions referred

Case C-439/14

15. The Institutul Național de Cercetare-Dezvoltare în Informatică (National Institute for Research and Development in Informatics, 'the INCDI') organised a procedure to award a public supply and services contract for the development and completion of a cloud computing platform. The estimated value of the contract, net of Value Added Tax (VAT), was RON 61287713.71 (approximately EUR 13 700 000). The INCDI prepared the relevant tender documents and published a call for tenders, on 1 April 2014, in the Sistemul Electronic de Achiziții Publice (Electronic Public Procurement System). The award criterion was that of 'the lowest price'.

16. Several economic operators asked the INCDI to clarify the rules set out in the tender documents. The INCDI responded by publishing several explanatory notes in the Electronic Public Procurement System.

9 — The 'remaining provisions' (as I understand it) are in essence Article 271a except the requirement of unconditional payment in paragraph 5 thereof, and Article 271b(3) to (5) of the OUG No 34/2006. In this Opinion, I shall refer to these provisions as the 'transitional regime' and distinguish it from both the 'original regime' and the new regime which, as the Romanian Government indicated at the hearing, the Romanian legislature envisages adopting at some point in the future.

17. On 30 June 2014, SC Star Storage SA ('Star Storage') challenged three of those explanatory notes before the CNSC. On 18 July 2014, the CNSC dismissed that application as inadmissible as Star Storage had not provided a good conduct guarantee.[10] Star Storage appealed against that decision to the Curtea de Apel București (Court of Appeal, Bucharest), which has stayed the proceedings and requested a preliminary ruling on the following question:

'Are the provisions in the third subparagraph of Article 1(1) and Article 1(3) of [Directive 89/665] to be interpreted as precluding a rule under which a "good conduct guarantee" must be lodged as a prerequisite for being granted access to procedures for reviewing the decisions of contracting authorities, such as the rule laid down in Article 271a and 271b of [the OUG No 34/2006]?'

Case C-488/14

18. On 21 January 2014, RA Aeroportul Oradea ('Oradea Airport') published a contract notice in the Electronic Public Procurement System for the award of a public contract to extend and modernise that airport. The estimated value of the contract, net of VAT, was RON 101 232 054 (approximately EUR 22 800 000). The award criterion was that of 'the most economically advantageous tender'.

19. Four economic operators submitted tenders. According to the tender assessment report of 28 March 2014, the tender submitted by the consortium of SC Max Boegl România SRL ('Max Boegl'), SC UTI Grup SA and Astaldi SpA was declared ineligible. The same report indicated that the tender submitted by the consortium of SC Construcții Napoca SA ('Construcții Napoca'), SC Aici Cluj SA and CS Icco Energ SRL was ranked second.

20. On 10 July 2014, the CNSC rejected as unfounded the challenges which those two consortia lodged against the tender assessment report.

21. The consortium of which Max Boegl is a member and Construcții Napoca appealed against those decisions to the Curtea de Apel Oradea (Court of Appeal, Oradea). At the hearing on 10 September 2014, the Curtea de Apel Oradea (Court of Appeal, Oradea) drew the appellants' attention to the requirement to lodge a good conduct guarantee following the entry into force, on 30 June 2014, of Articles 271a and 271b of the OUG No 34/2006.[11] The Curtea de Apel Oradea (Court of Appeal, Oradea) stayed those proceedings and requested a preliminary ruling on the following question:

'Must Article 1(1), (2) and (3) of [Directive 89/665] and Article 1(1), (2) and (3) of [Directive 92/13] be interpreted as precluding legislation which makes access to review procedures of decisions of contracting authorities subject to an obligation to deposit beforehand a "good conduct guarantee" such as that governed by Articles 271a and 271b of [the OUG No 34/2006]?'

22. On 13 November 2014, the President of the Court joined the two cases for the purposes of both the written and oral proceedings and the judgment. Star Storage, the Greek and Romanian Governments and the European Commission have submitted written observations. Max Boegl, the Romanian Government and the European Commission presented oral argument at the hearing on 14 January 2016.

10 — The amount of the guarantee due was the equivalent in RON of EUR 25 000.

11 — It appears from the information before the Court that the amount of each good conduct guarantee required in the proceedings before the national court was the equivalent in RON of EUR 100 000.

Analysis

Preliminary remarks

23. The value of the public contract in issue in Case C-439/14 is higher than the relevant threshold amount set out in Article 7(b) of Directive 2004/18 for public supply and service contracts. Directive 89/665 therefore applies to those proceedings.[12] Likewise, the value of the public contract in issue in Case C-488/14 reaches the thresholds for public works contracts in both Article 7(c) of Directive 2004/18 and Article 16(b) of Directive 2004/17.

24. However, the Romanian Government and the Commission disagree on the legal background relevant to the main proceedings in Case C-488/14. The Romanian Government submits that they are governed only by Directive 2004/18 and, by extension, Directive 89/665. The Commission argues that because the contract award procedure at issue concerned extending and improving airport facilities, it falls within the scope of Directive 2004/17[13] and is therefore governed by Directive 92/13.[14]

25. In my view, the Court lacks sufficient information about that contract to determine whether Directive 89/665 or Directive 92/13 applies to the procedure for its award. That creates no difficulty here, however. On the one hand, it is clear from the facts in the main proceedings in Case C-488/14 that the question which the Curtea de Apel Oradea (Court of Appeal, Oradea) submits to the Court is not hypothetical in so far as it concerns Directive 92/13. On the other hand, the first three paragraphs of Article 1 of that directive essentially correspond to the first three paragraphs of Article 1 of Directive 89/665. The two questions raised by the referring courts are therefore in essence the same and should be addressed jointly.

26. Next, the impact on the main proceedings of the judgments of the Curtea Constituțională (Constitutional Court) delivered on 15 January and 4 November 2015 is unclear. At the hearing, the Romanian Government submitted that the referring courts will now have to apply the transitional regime. The Commission, on the other hand, sought to draw a distinction between the two cases. In Case C-488/14, the requirement for the good conduct guarantee arose for the first time before the referring court. That court will thus have to apply the *transitional* regime. By contrast, in Case C-439/14, the requirement initially arose in the proceedings before the CNSC — that is, prior to the Constitutional Court's judgments. The Commission therefore submits that the referring court in that case will have to apply the *original* regime after receiving the Court's answer.

27. According to settled case-law, it is not for the Court to rule on the applicability of provisions of national law which are relevant to the outcome of the main proceedings. Rather, the Court must take account, under the division of jurisdiction between the EU Courts and the national courts, of the legislative context, as described in the order for reference, in which the question put to it is set.[15] The Court is, however, competent to give the national court full guidance on how to interpret EU law in order to enable that court to determine the issue of compatibility of national law with EU law in the case before it.[16] Since it is uncertain whether the original regime or the transitional regime applies to the main proceedings in Case C-439/14, I shall examine both in this Opinion.

12 — Article 1(1) of Directive 89/665.

13 — Article 7(b) of Directive 2004/17.

14 — Article 1(1) of Directive 92/13.

15 — See, inter alia, judgment of 17 July 2008 in *Corporación Dermoestética*, C-500/06, EU:C:2008:421, paragraph 20 and the case-law cited.

16 — Judgment of 16 December 2008 in *Michaniki*, C-213/07, EU:C:2008:731, paragraph 51 and the case-law cited.

28. Last, the information available to the Court indicates that, pursuant to the OUG No 34/2006, a challenge can be initiated either before the CNSC (whose decisions can then be appealed before a court of appeal) or directly before a court. Since a good conduct guarantee is required in every case, that does not affect the reasoning which follows. [17]

Methodology of the analysis

29. The first and second recitals of Directive 89/665 and the first, second and third recitals of Directive 92/13 make it clear that those directives are intended to strengthen the existing mechanisms, both at national and EU levels, in order to ensure that directives relating to public procurement apply effectively, in particular at a stage when it is still possible to remedy infringements. [18] To that effect, Article 1(1) of each directive requires Member States to guarantee that unlawful decisions of contracting authorities can be subjected to effective review which is as swift as possible. [19] They must ensure that such review is widely available to any person who has or has had an interest in obtaining a particular contract and who has been or risks being harmed by the alleged infringement. [20]

30. However, those directives lay down only the minimum conditions which the review procedures under domestic law must satisfy in order to comply with EU public procurement law. [21] If no specific provision governs the matter, it is for each Member State to lay down the detailed rules of administrative and judicial procedures governing actions for safeguarding rights which individuals derive from EU public procurement law. Those detailed rules must not be less favourable than those governing similar domestic actions (principle of equivalence) and must not render practically impossible or excessively difficult the exercise of those rights (principle of effectiveness). [22] The latter requirement is essential to achieving EU public procurement law's main objective of opening up public procurement to undistorted competition in all the Member States. [23]

31. As the Commission points out, neither Directive 89/665 nor Directive 92/13 contains rules on financial requirements which economic operators may have to fulfil in order to obtain access to review procedures against decisions of contracting authorities. National provisions such as those at issue in the main proceedings therefore fall within the procedural autonomy of the Member States, subject to the principles of equivalence and effectiveness. I shall examine the questions referred in the light of those principles. [24]

32. Each of those directives nonetheless gives specific expression, in the particular sphere of public procurement, to the general principle of EU law enshrining the right to an effective remedy. [25] This raises two closely related issues concerning the scope of the principle of effectiveness.

17 — See in particular Articles 271a(1) and 271b(1) and (5) of the OUG No 34/2006.

18 — See, inter alia, judgments of 28 October 1999 in *Alcatel Austria and Others*, C-81/98, EU:C:1999:534, paragraph 33; 19 June 2003 in *GAT*, C-315/01, EU:C:2003:360, paragraph 44 and the case-law cited; and 28 January 2010 in *Uniplex* (*UK*), C-406/08, EU:C:2010:45, paragraph 26.

19 — See, inter alia, judgments of 19 June 2003 in *Hackermüller*, C-249/01, EU:C:2003:359, paragraph 22 and the case-law cited, and 19 June 2003 in *GAT*, C-315/01, EU:C:2003:360, paragraph 44 and the case-law cited.

20 — Judgment of 26 November 2015 in *MedEval*, C-166/14, EU:C:2015:779, paragraph 28 and the case-law cited.

21 — Judgment of 30 September 2010 in *Strabag and Others*, C-314/09, EU:C:2010:567, paragraph 33 and the case-law cited. See also, to that effect, judgment of 24 September 1998 in *EvoBus Austria*, C-111/97, EU:C:1998:434, paragraph 16.

22 — See, inter alia, judgments of 11 September 2003 in *Safalero*, C-13/01, EU:C:2003:447, paragraph 49, and 6 October 2015 in *Orizzonte Salute*, C-61/14, EU:C:2015:655, paragraph 46 and the case-law cited.

23 — See, to that effect, judgment of 14 February 2008 in *Varec*, C-450/06, EU:C:2008:91, paragraphs 33 and 34.

24 — See points 40 to 58 of this Opinion.

25 — See, to that effect, order of 23 April 2015 in *Commission* v *Vanbreda Risk & Benefits*, C-35/15 P(R), EU:C:2015:275, paragraph 28. The origins of that reasoning can be traced back to judgment of 15 May 1986 in *Johnston*, 222/84, EU:C:1986:206, paragraphs 18 and 19.

33. First, can that principle be limited to verifying that a national procedural requirement such as that at issue in the main proceedings renders *practically impossible or excessively difficult* the exercise of the right to review procedures set out in Articles 1 of Directive 89/665 and Directive 92/13? Or is it broader in that it requires *any national rule which undermines* those provisions to be set aside?

34. The Court has on several occasions examined whether national procedural rules governing remedies intended to protect rights conferred by EU law on candidates and tenderers harmed by decisions of contracting authorities compromised the effectiveness of Directive 89/665.[26] However, there is no uniform approach in the case-law on how that test of effectiveness relates to the procedural autonomy of the Member States and the principle of effectiveness which limits it.[27] In some cases, the analysis was focused exclusively on the effectiveness of Directive 89/665, without referring to procedural autonomy and the limits to it.[28] Other cases suggest that the effectiveness test supplements the procedural autonomy test where there is no specific provision governing the matter in Directive 89/665.[29] Sometimes, the wording used indicates that the effectiveness test forms part of (and gives special content to) the procedural autonomy test.[30]

35. In my view, what matters ultimately is to ensure that the rights which EU law confers on individuals receive more, rather than less, protection. Article 1 of Directive 89/665 and Article 1 of Directive 92/13 give specific expression to the right to an *effective* remedy. It is therefore not possible to limit the analysis of the principle of effectiveness to whether a procedural requirement such as that in issue in the main proceedings is liable to render practically impossible or excessively difficult the exercise of that right. Rather, in that specific context, the effectiveness test must surely involve examining whether such a requirement is liable to *undermine* the right to effective review procedures which those provisions guarantee.

36. Second, what impact does the fundamental right to an effective remedy under Article 47 of the Charter have on the principle of effectiveness as a limit to the procedural autonomy of the Member States?

37. Procedural rules such as those at issue in the main proceedings clearly come within the scope of Article 1 of Directive 89/665 and Article 1 of Directive 92/13. Moreover, the fundamental right to an effective remedy to which those provisions give specific expression covers such rules.[31] Consequently, Article 47 of the Charter applies in the main proceedings.[32] Providing the good conduct guarantee is a pre-condition for getting any challenge examined.[33] That requirement therefore constitutes a limitation

26 — See, inter alia, judgments of 12 December 2002 in *Universale-Bau and Others*, C-470/99, EU:C:2002:746, paragraphs 71 and 72; 28 January 2010 in *Uniplex (UK)*, C-406/08, EU:C:2010:45, paragraph 27; and 30 September 2010 in *Strabag and Others*, C-314/09, EU:C:2010:567, paragraph 34.

27 — That lack of uniformity makes it difficult to predict which methodology the Court will follow in any particular case. See Prechal, S., Widdershoven, R., 'Redefining the Relationship between "Rewe-effectiveness" and Effective Judicial Protection', 4 *Review of European Administrative Law* (2011), p. 39.

28 — See, for example, judgments of 12 December 2002 in *Universale-Bau and Others*, C-470/99, EU:C:2002:746, paragraph 71, and 28 January 2010 in *Uniplex (UK)*, C-406/08, paragraphs 26 to 28.

29 — Judgments of 30 September 2010 in *Strabag and Others*, C-314/09, EU:C:2010:567, paragraph 34, and 6 October 2015 in *Orizzonte Salute*, C-61/14, EU:C:2015:655, paragraphs 47, 50 and 72.

30 — Judgment of 12 March 2015 in *eVigilo*, C-538/13, EU:C:2015:166, paragraphs 40 (see especially the introductory words 'in particular …') and 41. In judgment of 15 April 2008 in *Impact* (C-268/06, EU:C:2008:223, paragraphs 47 and 48), the Court held that the requirements of equivalence and effectiveness *embodied* the general obligation on the Member States to ensure judicial protection of an individual's rights under EU law. The same formula was repeated in the order of 24 April 2009 in *Koukou* (C-519/08, EU:C:2009:269, paragraph 98). The Court similarly merged the principle of effectiveness as a limit to procedural autonomy and the right to an effective remedy under Article 47 of the Charter in judgment of 6 October 2015 in *East Sussex County Council* (C-71/14, EU:C:2015:656, paragraph 52 and the case-law cited).

31 — See, inter alia, judgments of 15 April 2008 in *Impact*, C-268/06, EU:C:2008:223, paragraph 44 and the case-law cited, and 17 July 2014 in *Sánchez Morcillo and Abril García*, C-169/14, EU:C:2014:2099, paragraph 35 and the case-law cited.

32 — See, to that effect, judgment of 6 October 2015 in *Orizzonte Salute*, C-61/14, EU:C:2015:655, paragraph 49. See also, by analogy, judgment of 17 December 2015 in *Tall*, C-239/14, EU:C:2015:824, paragraph 51. To the extent that it applies to the Member States, Article 47 of the Charter echoes the second subparagraph of Article 19(1) TEU and gives specific expression to the principle of sincere cooperation laid down in Article 4(3) TEU. On the latter point, see judgment of 13 March 2007 in *Unibet*, C-432/05, EU:C:2007:163, paragraph 37.

33 — Article 271a(2) of the OUG No 34/2006.

on the right to an effective remedy before a tribunal within the meaning of Article 47.[34] Such a limitation can therefore be justified only if it is provided for by law, if it respects the essence of that right and, subject to the principle of proportionality, if it is necessary and genuinely meets objectives of general interest recognised by the EU or the need to protect the rights and freedoms of others.[35] That test is similar to the test that the Strasbourg Court applies when it examines whether financial restrictions on access to courts are compatible with Article 6(1) of the ECHR.[36]

38. Again, this Court's case-law does not offer clear guidance in that regard.[37] As I see it, in cases such as the present, the assessment set out in Article 52(1) of the Charter is required in order to satisfy the level of protection which Article 47 of the Charter confers on individuals. Applying a different methodology would have the surprising (and in my view unacceptable) effect that Member States would be able to escape that test solely because they were acting, within the scope of their procedural autonomy, in a domain where the EU legislature has given specific expression to the right to an effective remedy.

39. In what follows, I shall therefore examine whether national rules such as those in issue in the main proceedings, which fall under the procedural autonomy of the Member States, comply with the principles of equivalence and effectiveness. However, given that Article 1(1) and (3) of both Directive 89/665 and Directive 92/13 govern such rules and that those provisions express, in the particular sphere of public procurement, the fundamental right to an effective remedy guaranteed by Article 47 of the Charter, I shall do so on the basis that the principle of effectiveness requires exploring whether those national rules, which limit that right, satisfy the proportionality test set out in Article 52(1) of the Charter. If they do not, they undermine the effectiveness of Article 1(1) and (3) of each directive.

The original regime

40. Article 1(2) of Directive 89/665 and Article 1(2) of Directive 92/13 give specific expression to the principle of equivalence. That principle requires that the national rule in question applies, without distinction, to actions based on infringement of EU law and those based on infringement of national law having a similar purpose and cause of action.[38]

34 — See, by analogy, Opinion of Advocate General Jääskinen in *Orizzonte Salute*, C-61/14, EU:C:2015:307, point 37. The European Court of Human Rights ('the Strasbourg court') regards a court fee or security for costs as interfering in principle with the right of access to a court protected by Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR') if payment is a pre-condition for examining the case. See, inter alia, judgments of the Strasbourg Court of 13 July 1995 in *Tolstoy Miloslavski v. the United Kingdom*, CE:ECHR:1992:0220DEC00181399, §§ 59 to 67; 4 May 2006 in *Weissman and Others v. Romania*, CE:ECHR:2006:0524JUD006394500, §§ 32 to 44; and 12 July 2007 in *Stankov v. Bulgaria*, CE:ECHR:2007:0712JUD006849001, § 53.

35 — See, inter alia, the judgment of 17 September 2014 in *Liivimaa Lihaveis*, C-562/12, EU:C:2014:2229, paragraph 72, and my Opinion in *Ordre des barreaux francophones et germanophone and Others*, C-543/14, EU:C:2016:157, point 80.

36 — The Strasbourg Court has made it clear that, whereas Member States enjoy a certain margin of appreciation permitting them to impose such restrictions, those restrictions must not restrict or reduce access to a court in such a way that the very essence of the right is impaired, they must pursue a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the aim pursued. See, to that effect, judgments of the Strasbourg Court of 13 July 1995 in *Tolstoy Miloslavski v. the United Kingdom*, CE:ECHR:1992:0220DEC00181399, §§ 59 to 67, and 19 June 2001 in *Kreuz v. Poland*, CE:ECHR:2001:0619JUD002824995, §§ 54 and 55 (cited in judgment of 22 December 2010 in *DEB*, C-279/09, EU:C:2010:811, paragraph 47). See also judgment of the Strasbourg Court of 14 December 2006 in *Markovic and Others v. Italy*, CE:ECHR:2006:1214JUD000139803, § 99.

37 — In *Orizzonte Salute*, the Court made clear that Article 1 of Directive 89/665 must be interpreted in the light of Article 47 of the Charter. However, it limited its analysis of the principle of effectiveness to verifying that the court fee system there at issue was not liable to render practically impossible or excessively difficult the exercise of the rights conferred by EU public procurement law (judgment of 6 October 2015 in *Orizzonte Salute*, C-61/14, EU:C:2015:655, paragraphs 49 and 72). The Court did not conduct a proportionality test under Article 52(1) of the Charter. By contrast, in other cases, the Court has applied the proportionality test to assess limitations on the right to an effective remedy before a tribunal under Article 47 of the Charter. See, inter alia, the judgments of 18 March 2010 in *Alassini and Others*, C-317/08 to C-320/08, EU:C:2010:146, paragraphs 61 to 66, and 26 September 2013 in *Texdata Software*, C-418/11, EU:C:2013:588, paragraphs 84 to 88.

38 — See, most recently, judgment of 12 February 2015 in *Surgicare*, C-662/13, EU:C:2015:89, paragraph 30.

41. I do not agree with Star Storage when it contends that national rules such as those in issue in the main proceedings are incompatible with that principle. Whilst it is true that they create a specific financial burden for initiating review procedures relating to public procurement, the principle of equivalence does not require equal treatment of national procedural rules applicable to proceedings of a different nature (such as civil proceedings, on the one hand, and administrative proceedings, on the other), or applicable to proceedings falling within two different branches of law.[39] At the hearing, moreover, the Romanian Government confirmed that the national provisions in issue in the main proceedings apply to all review procedures initiated against decisions of contracting authorities, whether or not EU public procurement rules govern the contract award procedure.

42. What of the principle of effectiveness and the proportionality test set out in Article 52(1) of the Charter?

43. It is not in dispute that the limitation resulting from Articles 271a and 271b of the OUG No 34/2006 is *provided by law*.

44. The second condition of the proportionality test is that the measure has to pursue a *legitimate objective* (that is, an objective of general interest recognised by the EU or the need to protect the rights and freedoms of others). It is common ground that the good conduct guarantee is a source of income for the contracting authority where the latter retains it. That guarantee does not therefore serve to finance the judicial system.[40] Rather, the national provisions establishing the good conduct guarantee are intended in essence to protect contracting authorities, the CNSC and courts from frivolous challenges which economic operators (including those who are not tenderers) might initiate for purposes other than those for which the review procedures were established.[41] Such an objective is undeniably legitimate.[42] In particular, discouraging frivolous challenges enables the bodies in charge of reviewing decisions of contracting authorities to concentrate on 'genuine' challenges. That is likely to contribute to satisfying the requirement that Member States must ensure that decisions of contracting authorities may be reviewed effectively and, in particular, as rapidly as possible where it is claimed that such decisions infringe EU public procurement law or national rules transposing that law.[43]

45. The next question is whether national provisions such as those in issue in the main proceedings are *capable of achieving that objective*.

46. As those proceedings illustrate,[44] such provisions can give rise to substantial costs for an economic operator who either loses his challenge or withdraws it.[45] These costs may reach the equivalent of EUR 25 000 for public supply and public service contracts and EUR 100 000 for public works contracts, in addition to the costs associated with lodging the guarantee.[46] At the hearing, the Romanian Government confirmed that, under the original regime, the applicant lost the whole amount of the good conduct guarantee because the contracting authority is required to retain it. The CNSC or the court deciding on the challenge is not empowered to order the contracting authority to retain only part of the good conduct guarantee, based on the specific circumstances of the case.

39 — Judgment of 6 October 2015 in *Orizzonte Salute*, C-61/14, EU:C:2015:655, paragraph 67 and the case-law cited.

40 — That distinguishes the good conduct guarantee from the court fees in issue in the judgment of 6 October 2015 in *Orizzonte Salute*, C-61/14, EU:C:2015:655.

41 — According to the introduction to the OUG No 51/2014, challenges which are manifestly unfounded or which seek only to delay proceedings have several harmful consequences. Thus, contracting authorities may lose external (including EU) funding due to abnormal delays in contract award procedures and be unable to carry out important projects of public interest. Furthermore, frivolous challenges overburden staff involved in defending contracting authorities before the CNSC or courts and more generally undermine the CNSC's efficiency.

42 — See, by analogy, judgment of 6 October 2015 in *Orizzonte Salute*, C-61/14, EU:C:2015:655, paragraphs 73 and 74. That is also the position of the Strasbourg court. See, inter alia, judgments of the Strasbourg Court of 12 July 2007 in *Stankov v. Bulgaria*, CE:ECHR:2007:0712JUD006849001, § 57, and 3 June 2014, *Harrison McKee v. Hungary*, CE:ECHR:2014:0603JUD002284007, § 27.

43 — Third subparagraph of Article 1(1) of Directive 89/665 and of Directive 92/13.

44 — See footnotes 10 and 11.

45 — Save where the contracting authority must not retain the good conduct guarantee pursuant to Article 271b(3).

46 — See point 55 below.

47. In my view, costs of that magnitude are such as to deter the lodging of frivolous challenges because the latter are, by their very nature, likely to be rejected and, therefore, to result automatically in loss of the entire good conduct guarantee and the associated costs.[47] The fact that, as the Court recalled in *Orizzonte Salute*,[48] undertakings wishing to participate in public contracts governed by EU public procurement rules are required to have an appropriate economic and financial capacity does not call that conclusion into question. First, the national provisions at issue in the main proceedings apply to all economic operators challenging contracting authorities' decisions and thus not only to tenderers. Next, the requirement that tenderers must have economic and financial capacity is not absolute. Article 47(2) of Directive 2004/18 provides that an economic operator may rely on the capacities of other entities, regardless of the nature of the links which it has with them, in order to establish that capacity.[49] Accordingly, a party may not be eliminated from a procedure for the award of a public contract solely because it proposes, in order to carry out the contract, to use resources which are not its own but belong to one or more other entities.[50] Finally, the Court's statement about economic and financial capacity in *Orizzonte Salute* was made in relation to far smaller financial limitations on access to review procedures than those in issue in the present cases.[51]

48. The final part of the proportionality test is that the measures at issue must *not go further than is necessary* to attain their objective.[52] When there is a choice between several appropriate measures, the Member State must have recourse to the least onerous one, and the disadvantages caused must not be disproportionate to the aims pursued.[53]

49. Under the original regime, the applicant automatically loses the good conduct guarantee where his challenge is rejected or where he withdraws it. That is also true where there are no elements present suggesting an abuse of the review procedure (for example because the challenge is manifestly ill founded, or was lodged with the sole purpose of delaying the contract award procedure). For reasons similar to those which I have set out above,[54] the original regime thus significantly impedes access to review procedures against decisions of contracting authorities for persons who (even if their challenge ultimately fails) have 'arguable claims'.[55] It is therefore liable to discourage a substantial proportion of potential litigants from lodging a challenge if they cannot be reasonably certain that it will be successful. Examples of such circumstances would, I suggest, include where there is no settled case-law on the point at issue or where the challenge seeks to call into question an assessment of the contracting authority for which the latter enjoys a wide margin of appreciation.

47 — That is all the more so for tenderers, who are required in addition to lodge a tendering guarantee of up to 2% of the estimated contract value (Article 43a of the OUG No 34/2006). Although the Romanian Government submitted at the hearing that the two guarantees serve different purposes, the fact remains that a tenderer may lose both of them in the course of a single contract award procedure.

48 — Judgment of 6 October 2015 in *Orizzonte Salute*, C-61/14, EU:C:2015:655, paragraph 64.

49 — See also Article 63(1) 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 (OJ 2014 L 94, p. 65).

50 — Judgments of 2 December 1999 in *Holst Italia*, C-176/98, EU:C:1999:593, paragraph 26; 18 March 2004 in *Siemens and ARGE Telekom*, C-314/01, EU:C:2004:159, paragraph 43; and 10 October 2013 in *Swm Costruzioni 2 and Mannocchi Luigino*, C-94/12, EU:C:2013:646, paragraph 32.

51 — The standard court fees examined in that case amounted to EUR 2 000, EUR 4 000 or EUR 6 000 depending on the value of the public contract.

52 — See, to that effect, the judgment of 17 December 2015 in *WebMindLicenses*, C-419/14, EU:C:2015:832, paragraph 74.

53 — See, inter alia, the judgment of 29 April 2015 in *Léger*, C-528/13, EU:C:2015:288, paragraph 58 and the case-law cited.

54 — Point 46 of this Opinion.

55 — I borrow that expression from the Strasbourg court's case-law, under which the purpose of Article 13 ECHR is to guarantee an effective remedy for 'arguable claims'. See, inter alia, judgment of the Strasbourg Court of, 23 June 2011 in *Diallo v. the Czech Republic*, CE:ECHR:2011:0623JUD002049307, § 56.

50. It seems to me that it would have been possible to avoid that adverse effect (and the significant interference with the right to an effective remedy) without undermining the objective of discouraging frivolous challenges. Where a challenge was rejected or withdrawn, the CNSC or the competent court might for example have been given latitude to ascertain whether that challenge was frivolous or not, taking into account all relevant circumstances,[56] and to decide in consequence whether retaining (all or part of) the good conduct guarantee was justified.

51. I therefore agree with Star Storage, Max Boegl and the Commission that the original regime involves a disproportionate limitation on the right to an effective remedy protected under Article 47 of the Charter and therefore undermines the effectiveness of Article 1(1) and (3) of Directive 89/665 and Article 1(1) and (3) of Directive 92/13. That regime also affects the essence of that right because it is liable in practice to deprive economic operators having or having had an interest in obtaining a particular contract from accessing a remedy against allegedly illegal decisions of contracting authorities.

52. For those reasons, I conclude that Article 1(1) and (3) of Directive 89/665 and Article 1(1) and (3) of Directive 92/13, read in the light of Article 47 of the Charter, preclude national legislation such as that in issue in the main proceedings, which requires an applicant to lodge a 'good conduct guarantee' in order to obtain access to review of a contracting authority's decisions relating to public procurement and under which the contracting authority must retain that guarantee if the challenge is rejected or withdrawn, regardless of whether or not the challenge is frivolous.

The transitional regime

53. I now turn to the transitional regime, which differs from the original regime in that the applicant gets back the good conduct guarantee irrespective of the challenge's outcome.

54. The reasoning on equivalence which I have set out above is equally applicable here.[57]

55. As regards effectiveness, it is clear that a procedural requirement such as that resulting from Article 271a(1) of the OUG No 34/2006 necessarily limits in itself the right of access to review procedures against contracting authorities' decisions. That requirement is a pre-condition for examining the merits of a challenge.[58] Moreover, although the applicant gets back the good conduct guarantee at the end of his challenge, lodging it necessarily involves a financial burden for him. Thus, the first sentence of Article 271a(3) of the OUG No 34/2006 describes two methods for providing the good conduct guarantee. If the applicant makes a bank transfer, he is deprived of the use of a potentially significant sum for the entire period from the date on which the challenge is initiated to the date on which the decision of the CNSC or the judgment of the competent court becomes final. The applicant thus incurs the opportunity cost of not being able to use those funds for other purposes. If the applicant opts instead for a guarantee instrument provided by a bank or an insurance company, he has to bear the costs related to that instrument.[59]

56. It seems clear to me, moreover, that such a procedural requirement does not protect contracting authorities adequately from frivolous challenges. Under the transitional regime, the contracting authority has to return the good conduct guarantee to the applicant within five days following the date on which the decision of the CNSC or the judgment has become final, even where the applicant

56 — Those circumstances might include whether case-law is settled on a particular point of law, whether the challenge merely repeats a previous one or whether it is based on a plainly wrong reading of the challenged measure or on a manifestly wrong factual premiss.

57 — See points 40 and 41 above.

58 — Article 271a(2) of the OUG No 34/2006.

59 — It is unclear whether the applicant would be reimbursed for those costs by the contracting authority where the CNSC or the court upholds the challenge. Even if that is the case, the successful applicant would still have had to incur the costs initially in order to obtain access to the review procedure. Thus, the requirement to provide a guarantee will still have constituted an obstacle to access.

manifestly abused his right to access review procedures. The costs which the transitional regime involves may therefore not be such as to discourage an economic operator from lodging a challenge that pursues an objective other than those for which the review procedures are established — for example, harming a competitor. They may nevertheless prove an obstacle to an economic operator with an arguable claim but limited means.

57. Finally, the transitional regime — like the original regime — draws no distinction between arguable claims and frivolous ones. For that reason, the limitation on access to review procedures which it involves clearly goes beyond what is necessary to achieve the objective of dissuading frivolous challenges.

58. I therefore conclude that Article 1(1) and (3) of Directive 89/665 and Article 1(1) and (3) of Directive 92/13, read in the light of Article 47 of the Charter, preclude national legislation such as the transitional regime, which requires an applicant to lodge a 'good conduct guarantee' in order to obtain access to review of a contracting authority's decisions and under which that applicant automatically gets back the guarantee at the end of the challenge, whatever its outcome.

Conclusion

59. In the light of the foregoing considerations, I suggest that the Court should answer the questions referred by the Curtea de Apel Bucureşti (Court of Appeal, Bucharest, Romania) and the Curtea de Apel Oradea (Court of Appeal, Oradea, Romania) as follows:

— Article 1(1) and (3) of 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 and Article 1(1) and (3) of 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, read in the light of Article 47 of the Charter, preclude national legislation such as that in issue in the main proceedings, which requires an applicant to lodge a 'good conduct guarantee' in order to obtain access to review of a contracting authority's decisions relating to public procurement and under which the contracting authority must retain that guarantee if the challenge is rejected or withdrawn, regardless of whether or not the challenge is frivolous.

— The same provisions of EU law also preclude national legislation which requires an applicant to lodge a 'good conduct guarantee' in order to obtain access to review of a contracting authority's decisions and under which that applicant automatically gets back the guarantee at the end of the challenge, whatever its outcome.