Reports of Cases

OPINION OF ADVOCATE GENERAL
WATHELET
delivered on 7 June 2018 [1]

**Case C-300/17**

**Hochtief AG**
**v**
**Budapest Főváros Önkormányzata (Local Government for Budapest, Hungary)**

(Request for a preliminary ruling from the Kúria (Supreme Court, Hungary))

(Reference for a preliminary ruling — Directive 89/665/EEC — Procedures for the award of public supply contracts and public works contracts — Review procedures — Article 2(6) — Claim for damages — Precondition that the decision by the contracting authority be declared unlawful — Exclusion of legal arguments not submitted before an arbitration committee — Article 47 of the Charter of Fundamental Rights of the European Union — Right to effective judicial protection — Principles of effectiveness and equivalence)

## I. Introduction

1. This request for a preliminary ruling concerns the interpretation 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, [2] as amended by Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts. [3]

2. The request has been made in proceedings between Hochtief AG and Budapest Főváros Önkormányzata (Local Government for Budapest, Hungary, 'the BFÖ') concerning a claim for damages for infringement of public procurement rules.

3. By its request for a preliminary ruling the Kúria (Supreme Court, Hungary) enquires what effect a combination of national procedural rules may have on the right to an effective remedy even though those rules do not necessarily present any difficulties when viewed separately.

1 Original language: French.

2 OJ 1989 L 395, p. 33.

3 OJ 2014 L 94, p. 1.

## II. Legal context

### *A. EU law*

4. The fourth paragraph of Article 1(1) of Directive 89/665 provides:

'Member States shall take the measures necessary to ensure that, as regards contracts falling within the scope of Directive 2014/24/EU or Directive 2014/23/EU, 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 Union law in the field of public procurement or national rules transposing that law.'

5. Under Article 2(1), (2), (6) and (9) of Directive 89/665:

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

2. The powers specified in paragraph 1 and Articles 2d and 2e may be conferred on separate bodies responsible for different aspects of the review procedure.

…

6. The Member States may provide that where damages are claimed on the grounds that a decision was taken unlawfully, the contested decision must first be set aside by a body having the necessary powers.

…

9. Where bodies responsible for review procedures are not judicial in character, written reasons for their decisions shall always be given. Furthermore, in such a case, provision must be made to guarantee procedures whereby any allegedly illegal measure taken by the review body or any alleged defect in the exercise of the powers conferred on it can be the subject of judicial review or review by another body which is a court or tribunal within the meaning of Article [267 TFEU] and independent of both the contracting authority and the review body.'

### *B. Hungarian law*

#### *1. Law No CXXIX of 2003 on the award of public contracts*

6. The facts at issue in the main proceedings occurred in 2005. They were at that time governed by the közbeszerzésekről szóló 2003. évi CXXIX. törvény (Law No CXXIX of 2003 on the award of public contracts, 'the Law on public contracts').

7. Under Article 108(3) of the Law on public contracts, 'candidate tenderers may revise their request to participate until the time limit for submitting the request has expired'.

8. Article 350 of the Law on public contracts provides:

'The possibility of asserting any civil claim based on an infringement of provisions relating to public contracts or to the procedure for awarding them shall be subject to the requirement that the public procurement arbitration committee or a court (hearing an appeal against a decision of the public procurement arbitration committee) has made a final declaration that a provision has been infringed.'

9. However, under Article 351 of the same law:

'If a tenderer's claim for damages from the contracting authority is limited to recovering the expenses incurred in connection with the preparation of the tender and with participation in the contract award procedure, it shall be sufficient for the tenderer to prove, for the purposes of asserting the claim for compensation:

(a) that the contracting authority infringed any provision of the law on public contracts or the procedure for awarding them;

(b) that the tenderer had a real chance of being awarded the contract; and

(c) that the infringement reduced its chances of being awarded the contract.'

*2. Law III of 1952 on civil procedure*

10. Article 339/A of the Polgári perrendtartásról szóló 1952. évi III. törvény (Law No III of 1952 on civil procedure, 'the Law on civil procedure') provides:

'Except as otherwise provided for, the court shall review the administrative decision on the basis of the legislation in force and the factual situation existing at the time of its adoption.'

## III. The facts in the main proceedings

11. On 5 February 2005, the BFÖ launched a negotiated procedure with the publication of a contract notice for works with a value exceeding the maximum limit under EU law. Five applications were received within the period laid down for that purpose, one of them submitted by the HOLI consortium ('the consortium'), managed by Hochtief.

12. On 19 July 2005, the BFÖ informed the consortium that its application could not be accepted as there was a conflict of interest and that it had been excluded from the procedure. The BFÖ justified that decision on the ground that the consortium had appointed as head of the project one of the experts who had participated in preparing the call for tenders alongside the contracting authority.

13. The consortium challenged that decision before the Közbeszerzési Döntőbizottság (Public procurement arbitration committee, Hungary; 'the arbitration committee'). The committee dismissed the application by an award of 12 September 2005. The committee found that the appointment of the expert in the request to participate could not be regarded as an administrative error, as Hochtief asserted, since not taking that expert into account would have meant changing the request to participate, which was not permissible under Article 108(3) of the Law on public contracts. The

committee also held that the contracting authority had not acted unlawfully by continuing the procedure with only two candidates, in so far as Article 130(7) of the Law on public contracts provided that, if there were a number within the prescribed range of candidates who had correctly submitted an application, they must be invited to submit a tender.

14. The consortium brought proceedings against the decision of the arbitration committee. The Fővárosi Bíróság (former name of the Fővárosi Törvényszék, Budapest Municipal Court, Hungary) dismissed its application by a judgment of 28 April 2006. Hearing an appeal against that judgment, the Fővárosi Ítélőtábla (Budapest Regional Court of Appeal, Hungary), stayed the proceedings and requested a preliminary ruling, giving rise to the judgment of 15 October 2009, *Hochtief and Linde-Kca-Dresden* (C-138/08, EU:C:2009:627).

15. As a result of that judgment, the Fővárosi Ítélőtábla (Budapest Regional Court of Appeal) confirmed the judgment of 28 April 2006 by a judgment of 20 January 2010.

16. Before that court, the appellant had claimed, inter alia, relying on the judgment of 3 March 2005, *Fabricom* (C-21/03 and C-34/03, EU:C:2005:127), that it had been unable to make any observations on the circumstances of the case or to prove that having recourse to the expert could not distort fair and transparent competition.

17. That judgment, which predated the BFÖ's decision, was therefore in existence when Hochtief made its application to the arbitration committee. However, it was 'made available' in the Hungarian version only after that date.[4] In its judgment, the Fővárosi Ítélőtábla (Budapest Regional Court of Appeal) nevertheless stated that it did not examine that plea because it was not included in the application at first instance. According to the referring court, the issue of whether the contracting authority had committed an infringement by declaring the existence of a conflict of interest without affording the appellant in the main proceedings an opportunity to defend itself was not included in the application. The referring court added that it was only on appeal that the appellant, for the first time, claimed that the prohibition to which it was subject was a disproportionate limitation of its right to submit an application or to submit a tender, contrary to Article 220 EC, Article 6 of Directive 93/37/EEC[5] and the case-law of the Court of Justice.

18. By judgment of 7 February 2011, the Legfelsőbb Bíróság (former name of the Kúria (Supreme Court)) confirmed the judgment of 20 January 2010 of the Fővárosi Ítélőtábla (Budapest Regional Court of Appeal).

19. At the same time as those proceedings, during 2008, the European Commission Directorate-General responsible for regional policy carried out an audit of the contested procurement procedure. It found that the contracting authority had infringed the public procurement rules by, on the one hand, launching a negotiated procedure and, on the other, excluding one of the candidates at the pre-selection stage without giving it an opportunity, in accordance with the judgment of 3 March 2005, *Fabricom* (C-21/03 and C-34/03, EU:C:2005:127), to submit evidence to the contrary, that is to say, to prove that the involvement of the expert appointed as head of the project was not such as to distort competition.

4 According to a letter that the Registry of the Court of Justice sent to Hochtief on 22 September 2010, the Court Registry received the Hungarian translation of the judgment of 3 March 2005, *Fabricom* (C-21/03 and C-34/03, EU:C:2005:127), on 2 October 2006. The Court Registry stated, however, that it was impossible to determine exactly the date it went online on the Court's website.

5 Council Directive 93/37/EEC of 14 June 1993 on the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54).

20. On 11 August 2011, on the basis of the Commission's findings, Hochtief brought an appeal on a point of law against the judgment of the Fővárosi Ítélőtábla (Budapest Regional Court of Appeal). By order of 6 June 2013, the Fővárosi Közigazgatási és Munkaügyi Bíróság (Budapest Administrative and Labour Court, Hungary) delivered a decision dismissing the appeal on a point of law, and that decision was confirmed by order of the Fővárosi Törvényszék (Budapest Municipal Court), ruling at final resort.

21. Relying on the Commission's findings, Hochtief brought fresh proceedings seeking an award of compensation from the contracting authority, corresponding to the expenses it incurred in connection with its participation in the public procurement procedure.

22. Those proceedings having been dismissed at first instance and on appeal, Hochtief brought an appeal on a point of law to the referring court, claiming, inter alia, infringement of Article 2(1) of Directive 89/665.

23. The referring court states, in essence, that it is clear from Directive 89/665 that the bringing of actions for damages may be subject to the prior setting aside of the contested decision by an administrative authority or court (judgment of 26 November 2015, *MedEval*, C-166/14, EU:C:2015:779, paragraph 35), and therefore Article 2 of that directive does not, in principle, appear to preclude a national legislative provision such as Article 350 of the Law on public contracts. However, application of that provision, in conjunction with other provisions of the Law on public contracts and the Law on civil procedure, may prevent an unsuccessful tenderer in a negotiated public procurement procedure, such as the appellant in the main proceedings, from bringing an action for damages because it is unable to adduce a final declaration that the public procurement rules were infringed. In those circumstances, it may be justified either to allow other means of proving such an infringement, to disregard the national provision in the interests of the principle of effectiveness, or to interpret that provision in the light of EU law.

24. The Kúria (Supreme Court) accordingly decided to stay the proceedings and to make a reference to the Court of Justice for a preliminary ruling.

## IV. The request for a preliminary ruling and the procedure before the Court of Justice

25. By decision of 11 May 2017, received at the Court of Justice on 24 May 2017, the Kúria (Supreme Court) therefore decided to refer the following questions to the Court for a preliminary ruling:

'(1) Does EU law preclude a procedural provision of a Member State which makes the possibility of asserting any civil right of action resulting from an infringement of a public procurement provision conditional on a final declaration by a public procurement arbitration committee or a court (hearing an appeal against a decision of the public procurement arbitration committee) that the provision has been infringed?

(2) Can a provision of national law providing, as a precondition for being able to assert a claim for compensation, that a public procurement arbitration committee or a court (hearing an appeal against a decision of the public procurement arbitration committee) must have made a final declaration that a provision has been infringed be replaced by another provision taking account of EU law or, in other words, can the injured party prove the infringement of the provision by other means?

(3) In an action seeking compensation, is a procedural provision of a Member State which allows judicial proceedings to be brought against an administrative decision only on the basis of the legal arguments submitted in proceedings before the public procurement arbitration committee — and the injured party can rely, as a ground for the alleged infringement, on the

unlawfulness, in accordance with the case-law of the Court of Justice, of his exclusion on the basis of a conflict of interest only in a manner which, in accordance with the actual rules of the negotiated procedure, would result in his exclusion from the contract award procedure for another reason, as there has been a change in his application — contrary to EU law and, in particular, to the principles of effectiveness and equivalence, or capable of having an effect which runs counter to that law or those principles?'

26. The appellant in the main proceedings, the Hungarian, Greek, Austrian and Polish Governments and the Commission submitted written observations. The appellant in the main proceedings, the Hungarian Government and the Commission also made submissions at the hearing on 30 April 2018.

## V. Analysis

### *A. Preliminary remarks on methodology*

27. The request for a preliminary ruling made by the Kúria (Supreme Court) in the main proceedings raises two preliminary methodological issues: on the one hand, how the referring court's question should be approached and, on the other, under which provision the issues should be examined.

#### *1. How the questions referred for a preliminary ruling are to be understood*

28. The request for a preliminary ruling comprises three separate questions. However, it soon emerges that examining each of those questions individually does not necessarily reveal any difficulties in terms of the right to an effective remedy. The combination of the procedural rules in question, however, is more problematic.

29. It therefore seems appropriate, even necessary, to look at the three questions referred together even if, ultimately, they can be answered separately.

30. At the outset, I would also clarify that to my mind the clarification made in the second part of the third question referred is irrelevant. The fact that the party which suffered damage can only advance a plea alleging unlawfulness which would, in any event, lead to it being excluded from the procurement procedure does not affect the legal reasoning which needs to be conducted in order to answer that third question. How a ground for exclusion affects the outcome of the main proceedings is a matter that can arise only at a later stage and is for the referring court alone to determine.[6] I will therefore disregard that issue.

31. My analysis will therefore be in three stages. First of all, I will examine whether proceedings for damages can be conditional on the allegedly unlawful decision having first been set aside (and therefore, a fortiori, on a declaration that it is unlawful). I will then address the issue that the review of lawfulness was limited to the legal and factual framework defined by the appellant in its application instigating proceedings. Lastly, I will analyse the consequences of importing those two procedural limitations from the action to set aside into the action for damages in terms of effective judicial protection.

6 With all the more reason in so far as Hochtief (paragraph 34 of its written observations) and the Hungarian Government (paragraphs 13 to 15 of its written observations) dispute the thesis that the appellant in the main proceedings can rely on the 'new' plea only by amending its application, which would supposedly be a ground for excluding it from the procedure.

*2. The provisions governing the review*

32. It is also necessary to determine the provision under which the issues should be examined. In its third question, the referring court mentions the principles of equivalence and effectiveness which traditionally circumscribe the Member States' procedural autonomy. However, as the grounds for its reference for a preliminary ruling, it relies on Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter') which enshrines in EU law the right to an effective remedy and to a fair trial. [7]

33. To my mind, that latter approach is preferable. Indeed, it is now established that, on the one hand, the obligation on Member States in Article 19(1) TEU to provide remedies sufficient to ensure effective legal protection in the fields covered by EU law corresponds to Article 47 of the Charter [8] and, on the other, it follows that, when the Member States set out the procedural rules governing the remedies intended to protect rights conferred by a provision of EU law such as Directive 89/665, they must ensure compliance with the right to an effective remedy and to a fair hearing, enshrined in Article 47 of the Charter. The characteristics of a remedy such as that under Article 1(1) of Directive 89/665 must therefore be determined in a manner consistent with Article 47 of the Charter. [9]

34. That is moreover the approach that the Court of Justice has already followed in interpreting Directive 89/665, Article 1 of which, the Court has on several occasions held, '*must* be interpreted in the light of the fundamental rights set out in [the] Charter, in particular the right to an effective remedy before a court or tribunal, laid down in Article 47 thereof'. [10] That means in practice that, when the Member States lay down detailed procedural rules for legal actions intended to ensure that rights conferred by Directive 89/665 on candidates and tenderers harmed by decisions of contracting authorities are protected, the Member States must ensure compliance with the right to an effective remedy and to a fair hearing, enshrined in Article 47 of the Charter. [11]

35. I will therefore examine the referring court's questions referred for a preliminary ruling in the light of the requirements of Article 47 of the Charter.

## *B. Whether proceedings for damages can be conditional on the allegedly unlawful decision having first been set aside*

36. Under the fourth subparagraph of Article 1(1) of Directive 89/665, Member States must take the measures necessary to ensure that the decisions taken by the contracting authorities in contract award procedures falling within the scope of Directive 2014/24/EU [12] or Directive 2014/23 may be reviewed effectively and, in particular, as rapidly as possible.

37. Under Article 2(1) of Directive 89/665, it must be possible for three kinds of measure to be taken concerning those review procedures: firstly, interim measures with the aim of correcting the alleged infringement or preventing further damage to the interests concerned; secondly, the setting aside of unlawful decisions and, thirdly, the award of damages to persons harmed by an infringement of the applicable rules.

7 Paragraph 22 of the order for reference.

8 See, to that effect, the judgments of 16 May 2017, *Berlioz Investment Fund* (C-682/15, EU:C:2017:373, paragraph 44); of 26 July 2017, *Sacko* (C-348/16, EU:C:2017:591, paragraph 30), and of 27 September 2017, *Puškár* (C-73/16, EU:C:2017:725, paragraph 58).

9 See, to that effect, in relation to Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (OJ 2013 L 180, p. 60), the judgment of 26 July 2017, *Sacko* (C-348/16, EU:C:2017:591, paragraph 31) and, in relation to Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L 281, p. 31), the judgment of 27 September 2017, *Puškár* (C-73/16, EU:C:2017:725, paragraphs 59 and 60).

10 Judgment of 6 October 2015, *Orizzonte Salute* (C-61/14, EU:C:2015:655, paragraph 49); emphasis added.

11 See, to that effect, judgment of 15 September 2016, *Star Storage and Others* (C-439/14 and C-488/14, EU:C:2016:688, paragraph 46).

12 Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement (OJ 2014 L 94, p. 65).

38. In relation to that last kind of measure, Article 2(6) of Directive 89/665 states that the Member States may require that in order for a claim for damages to be made, the allegedly unlawful decision be first set aside. However, that article does not specify the conditions for such actions to be admissible. The Court of Justice inferred from this that '*in principle*, … Article 2(6) of Directive 89/665 [did] not preclude a provision of national law … under which a claim for damages is admissible only if there has been a prior finding of an infringement of procurement law'.[13] I will call that the principle that actions concerning lawfulness have precedence over actions for reparation.

39. Since it is merely an option — in so far as Article 2(6) of Directive 89/665 uses the word 'may' instead of 'must' — Member States who avail themselves of that possibility are free to alter it.[14] They can therefore establish situations in which the fact that no decision has first been set aside does not render the action for damages inadmissible.[15]

40. In any event, application of the principle that actions concerning lawfulness have precedence over actions for reparation cannot have the effect, in conjunction with another procedural rule, of depriving the person harmed not only of the possibility of having the contracting authority's decision set aside, but also of the other remedies provided for in Article 2(1) of Directive 89/665. Such a 'regime' would indeed be contrary to the principle of effectiveness.[16] That principle is seen as one of the 'requirements [that] *embody* the general obligation on the Member States to ensure judicial protection of an individual's rights under EU law',[17] enshrined in Article 47 of the Charter.

41. In the present case, it is the combined application of Article 350 of the Law on public contracts and Article 339/A of the Law on civil procedure which may be likely to pose a problem in relation to Article 47 of the Charter.

### *C. The fact that the review of lawfulness was confined to the legal and factual framework defined by the appellant*

42. Article 339/A of the Law on civil procedure provides that a court can review an administrative decision only on the basis of the legislation in force and the factual situation existing at the time of its adoption.

43. Specifically, in relation to disputes concerning public procurement decisions, that means that the national courts called upon to review decisions of the arbitration committee are supposedly not entitled to examine any new plea that was not raised before that committee.

44. Article 1(1) of Directive 89/665 requires the Member States to take the measures necessary to ensure that decisions of the contracting authorities that are incompatible with EU law are reviewed effectively and as rapidly as possible.

13 Judgment of 26 November 2015, *MedEval* (C-166/14, EU:C:2015:779, paragraph 36); emphasis added.

14 See, to that effect, judgment of 26 November 2015, *MedEval* (C-166/14, EU:C:2015:779, paragraph 35).

15 Conversely, that option to derogate from the general rule cannot, in my view, be turned into an obligation since it would otherwise render the principle that actions concerning lawfulness have precedence over actions for reparation authorised by Article 2(6) of Directive 89/665 substantially less meaningful.

16 The Court of Justice accordingly held that 'EU law, in particular the principle of effectiveness, precludes national legislation which makes bringing an action for damages in respect of the infringement of a rule of public procurement law subject to a prior finding that the public procurement procedure for the contract in question was unlawful because of the lack of prior publication of a contract notice, where the action for a declaration of unlawfulness is subject to a six-month limitation period which starts to run on the day after the date of the award of the public contract in question, irrespective of whether or not the applicant in that action was in a position to know of the unlawfulness affecting the decision of the awarding authority' (judgment of 26 November 2015, *MedEval*, C-166/14, EU:C:2015:779, paragraph 46 and operative part).

17 Judgment of 15 April 2008, *Impact* (C-268/06, EU:C:2008:223, paragraph 47), emphasis added. See, also, judgments of 18 March 2010, *Alassini and Others* (C-317/08 to C-320/08, EU:C:2010:146, paragraph 49), and of 14 September 2016, *Martínez Andrés and Castrejana López* (C-184/15 and C-197/15, EU:C:2016:680, paragraph 59).

45. So that they can do so, Article 2(2) of Directive 89/665 authorises the Member States to confer powers to set aside decisions and grant reparation to separate bodies that are not necessarily courts.[18] In other respects, Directive 89/665 contains no provisions specifically governing the conditions on which those remedies can be sought.[19] Directive 89/665 therefore leaves Member States a discretion in the choice of the procedural guarantees for which it provides, and the formalities relating thereto.[20]

46. Consistent case-law has held that it is for each Member State, in accordance with the principle of procedural autonomy, to lay down the detailed rules of administrative and judicial procedures to ensure that rights which individuals derive from EU law are safeguarded. However, those detailed procedural rules must not compromise the effectiveness of Directive 89/665.[21]

47. Against that background, it does not seem to me that a rule such as Article 339/A of the Law on civil procedure, of itself, is contrary to EU law when it is applied in the context of the review by the arbitration committee and, subsequently, the courts, of the lawfulness of the decision.

48. Indeed, it can be seen from the third recital of Directive 89/665 that one of its priority objectives is to make 'effective and *rapid* remedies' available.[22] The legislature itself emphasised the importance of that latter quality in so far as, in the fourth paragraph of Article 1(1) of that directive, it expressly requires Member States to take 'measures to ensure that decisions taken by contracting authorities may be reviewed effectively and, *in particular*, as rapidly as possible'.[23]

49. Confining the judicial review to the pleas raised before the arbitration committee on the basis of the legislation in force and the factual situation existing at the time the decision was adopted contributes to the achievement of that objective of speed without thereby substantially compromising the right to an effective remedy.[24]

50. On the one hand, that rule prevents the procedure from being delayed by ensuring that no new exchange of arguments — which would necessarily have to be *inter partes* and disposed of on conclusion of a reasoned decision — is commenced before the reviewing court. It thereby contributes to the proper administration of justice for the benefit of individuals[25] and consolidates the requirement for legal certainty which must prevail in an action seeking to have a contract declared ineffective.[26] On the other hand, that rule does not deprive the individual of access to justice. It confines that access within the limits that the individual itself has established, for which it is solely responsible.

18 In such a case, Article 2(9) of Directive 89/665 nevertheless requires that any illegal measure taken by those non-judicial 'review bodies' or any alleged defect in the exercise of their powers can be the subject of judicial review (or review by another body which is a court or tribunal within the meaning of Article 267 TFEU and independent of the contracting authority and the review body in question).

19 See, to that effect, judgment of 15 September 2016, *Star Storage and Others* (C-439/14 and C-488/14, EU:C:2016:688, paragraph 42).

20 See, to that effect, judgment of 6 October 2015, *Orizzonte Salute* (C-61/14, EU:C:2015:655, paragraph 44).

21 See, to that effect, judgments of 12 March 2015, *eVigilo* (C-538/13, EU:C:2015:166, paragraph 40); of 6 October 2015, *Orizzonte Salute* (C-61/14, EU:C:2015:655, paragraph 47); of 15 September 2016, *Star Storage and Others* (C-439/14 and C-488/14, EU:C:2016:688, paragraph 43); and of 5 April 2017, *Marina del Mediterráneo and Others* (C-391/15, EU:C:2017:268, paragraph 33).

22 Emphasis added.

23 Emphasis added.

24 See, to that effect, point 90 of the Opinion of Advocate General Mengozzi in *Texdata Software* (C-418/11, EU:C:2013:50) according to which 'the barring of new arguments on appeal … is a prohibition common to the legal systems of various Member States, and … does not compromise the effectiveness of the appeal either'. The Court of Justice confirmed that view and that such a rule is theoretically lawful. Indeed, in paragraph 87 of its judgment of 26 September 2013, *Texdata Software* (C-418/11, EU:C:2013:588), the Court held, in response to the allegation relating to the barring of new pleas at the appeal stage, that there was 'no evidence before the Court that raises any doubts as to the conformity of the system of penalties at issue with the principles of effective judicial protection and respect for the rights of the defence'.

25 The Court of Justice thus held that a financial condition could be 'a measure liable to discourage frivolous challenges and ensure that all individuals have their actions dealt with as rapidly as possible, in the interest of the proper administration of justice, in accordance with Article 47, first and second paragraphs, of the Charter' (judgment of 15 September 2016, *Star Storage and Others*, C-439/14 and C-488/14, EU:C:2016:688, paragraph 54).

26 See, to that effect, judgment of 26 November 2015, *MedEval* (C-166/14, EU:C:2015:779, paragraph 40).

51. In that regard, asked about the consequences of a procedural rule that limits a court's action to the arguments relied upon by the parties, the Court of Justice has held that the principle of effectiveness did not impose a duty on national courts to raise, of their own motion, a plea based on a provision of EU law, irrespective of the importance of that provision to the EU legal order, where the parties were given a genuine opportunity to raise a plea based on EU law before a national court.[27]

52. That being so, whilst it is true that a procedural rule which has the effect of confining the dispute solely to the pleas advanced before the arbitration committee limits the right to an effective remedy before a court or tribunal within the meaning of Article 47 of the Charter, it is justified within the meaning of Article 52(1) of the Charter, provided it is established by legislation, respects the essence of the right to an effective remedy and complies with the objective of Directive 89/665 of a swift remedy, which contributes to the proper administration of justice and the requirement for legal certainty.

### *D. Importing the procedural limits relating to the action concerning lawfulness into the action for reparation*

53. It is clear from the foregoing considerations that the right to an effective remedy precludes neither a provision establishing that actions concerning lawfulness have precedence over actions for reparation, nor a provision which prevents a new plea in law from being raised after proceedings have been brought, where those provisions are considered separately.

54. However, the application of Article 350 of the Law on public contracts in conjunction with Article 339/A of the Law on civil procedure has the effect of making an action for damages inadmissible unless a decision has first been obtained declaring the contract in question to be unlawful, independently of whether, in practice, the applicant for damages had a genuine opportunity to raise the relevant plea of unlawfulness in the proceedings relating to lawfulness.

55. Such a consequence is, in my view, contrary to Article 47 of the Charter, in so far as it infringes the right to an effective remedy which that article guarantees, by making an action for damages impossible in practice, but it is not justified by an objective in the general interest, contrary to the requirements of Article 52(1) of the Charter.

#### *1. Infringement of the right to an effective remedy*

56. The requirement for judicial protection implies that it must be possible to obtain reparation for loss suffered where EU law is infringed. Indeed, where a measure whose validity is in dispute has been applied, annulment of that measure cannot always ensure full reparation of the damage suffered.[28] Whilst rendering the measure inapplicable paralyses its effects in the situation brought before the court, awarding damages compensates for any loss it may have caused. Fully protecting the individual therefore requires both.[29]

27 See, to that effect, judgment of 7 June 2007, *van der Weerd and Others* (C-222/05 to C-225/05, EU:C:2007:318, paragraph 41).

28 See, to that effect, judgment of 30 May 2017, *Safa Nicu Sepahan* v *Council* (C-45/15 P, EU:C:2017:402, paragraph 49).

29 See, to that effect, in relation to legislative provisions, Dubouis, L., 'La responsabilité de l'État législateur pour les dommages causés aux particuliers par la violation du droit communautaire and son incidence sur la responsabilité de la Communauté', *Revue française de droit administratif*, No 3, 1996, pp. 583 to 601.

57. Under those circumstances, although the principle, authorised by Article 2(6) of Directive 89/665, that actions concerning lawfulness have precedence over actions for reparation can be explained and justified by reasons of economy of procedure and, ultimately, legal certainty,[30] the rule embodying that principle must be precluded where it is shown that it was not possible to have the contested decision declared unlawful on a legitimate ground unrelated to the appellant's behaviour.

58. The individual would otherwise be deprived of any judicial protection whatsoever because, in those particular circumstances, an action in damages is 'the last line of defence for individuals when … other legal remedies have not provided them with effective protection'.[31]

59. That peculiar feature of actions for reparation informs all the Court of Justice's case-law on the interrelation between remedies and their impact on effective judicial protection, whether in response to the strict admissibility requirements for actions to set aside in proceedings concerning the legality of EU acts,[32] to mitigate the fact that directives do not have direct horizontal effect[33] or when redress is no longer available where a final judicial decision has infringed rights under EU law.

60. In the latter situation, although EU law does not require a judicial body automatically to go back on a judgment having the force of *res judicata* in order to take into account the interpretation of a relevant provision of EU law adopted by the Court after that judgment was delivered, 'individuals cannot be deprived of the possibility of rendering the State liable in order to obtain legal protection of their rights'.[34]

61. That logic was applied to find that courts of last instance are liable where EU law is infringed. Accordingly, 'in the light of the essential role played by the judiciary in the protection of the rights derived by individuals from rules [of EU law], the full effectiveness of those rules would be called in question and the protection of those rights would be weakened if individuals were precluded from being able, under certain conditions, to obtain reparation when their rights are affected by an infringement of [EU] law attributable to a decision of a court of a Member State adjudicating at last instance'.[35]

62. In order to achieve full effectiveness of EU law and protection of the rights under that law, which underpin that case-law, that approach must also be adopted where a combination of procedural rules has the effect of 'immunising' a contracting authority against any liability notwithstanding an infringement of EU law committed by it. The intention of the EU legislature to ensure adequate procedures to permit the compensation of persons harmed by an infringement of public procurement rules[36] corroborates that interpretation.

63. That interpretation also helps guarantee the primacy of EU law, in so far as the Court of Justice has held that, if the findings made by a national court appear to be contrary to EU law, EU law requires that a different national court, even if it is, according to domestic law, unconditionally bound by the first court's interpretation of EU law, must, of its own motion, refuse to apply the domestic law rule under which it is required to comply with the interpretation of EU law made by that first court.[37]

30 Indeed, that principle is intended to ensure that it is specialised review bodies that review public procurement rules. It is a matter of ensuring that any question of law concerning the infringement of public procurement law arising in other proceedings has been finally decided by the specialised body designated for that purpose.

31 On actions for non-contractual liability, Berrod, Fr., *La systématique des voies de droit communautaire*, Paris, Dalloz, 2003, no 946.

32 See, to that effect, judgment of 12 September 2006, *Reynolds Tobacco and Others* v *Commission* (C-131/03 P, EU:C:2006:541, paragraph 82).

33 See, to that effect, amongst others, judgments of 24 January 2012, *Dominguez* (C-282/10, EU:C:2012:33, paragraphs 42 and 43), and of 26 March 2015, *Fenoll* (C-316/13, EU:C:2015:200, paragraph 48).

34 Judgment of 6 October 2015, *Târşia* (C-69/14, EU:C:2015:662, paragraph 40).

35 Judgment of 30 September 2003, *Köbler* (C-224/01, EU:C:2003:513, paragraph 33). See, also, judgment of 13 June 2006, *Traghetti del Mediterraneo* (C-173/03, EU:C:2006:391, paragraph 31).

36 See, to that effect, sixth recital of Directive 89/665.

37 See, to that effect, order of 15 October 2015, *Naderhirn* (C-581/14, not published, EU:C:2015:707, paragraph 35).

64. In the problematic relationship between procedural rules that concerns us, it seems that if the applicant for reparation did not have a genuine opportunity, in the proceedings relating to lawfulness, to raise the plea that it wished to rely upon in support of its action for damages, it will not be possible to remedy the incorrect application of EU law. In order to ensure the primacy of EU law, the national court must, within the limits of its jurisdiction, take all measures necessary to ensure that it is possible to do so.[38] It follows from the foregoing that, where it has been shown that it was not possible to have the contracting authority's decision declared unlawful on a ground unrelated to the applicant's behaviour, the national court having jurisdiction must disapply the rule embodying the principle that actions concerning lawfulness have precedence over actions for reparation.

*2. The lack of justification*

65. When I examined whether a rule, which prevents a plea in law from being relied upon unless it was raised in the application instigating proceedings, was compliant with EU law, I found that the objective of speed pursued by Directive 89/665 did justify that rule being applicable in proceedings to review the lawfulness of public procurement decisions, because it is in the interests of the proper administration of justice and consolidates the requirement for legal certainty which must prevail in an action seeking to have a contract declared ineffective.

66. That said, as the Court of Justice observed, 'the degree of necessity for legal certainty concerning the conditions for the admissibility of actions is not identical for actions for damages and actions seeking to have a contract declared ineffective. Rendering a contract concluded following a public procurement procedure ineffective puts an end to the existence and possibly the performance of that contract, which constitutes a significant intervention by the administrative or judicial authority in the contractual relations between individuals and State bodies. Such a decision can thus cause considerable upset and financial losses not only to the successful tenderer for the public contract in question, but also to the awarding authority and, consequently, to the public, the end beneficiary of the supply of work or services under the public contract in question. As is apparent from recitals 25 and 27 in the preamble to Directive [2007/66/EC][39] the EU legislature placed greater importance on the requirement for legal certainty as regards actions for a declaration that a contract is ineffective than as regards actions for damages.'[40]

67. Moreover, a combination of procedures such as that at issue in the main proceedings is not such as to delay conclusion of the contract award procedure or undermine legal certainty. Indeed, the exclusion decision whose unlawfulness gave rise to the damage claimed became final following the final dismissals of appeals against the arbitration committee's decision and of the appeal on a point of law against the judgment of the Fővárosi Ítélőtábla (Budapest Regional Court of Appeal) delivered in the same proceedings.

68. Authorising the court that is hearing the claim for damages to declare the decision causing the alleged damage to be unlawful, on the basis of a plea which was not examined in the proceedings to set aside, cannot, to my mind, have the effect of depriving the contested decision of effect.

38 See, to that effect, order of 15 October 2015, *Naderhirn* (C-581/14, not published, EU:C:2015:707, paragraph 37).

39 Directive of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts (OJ 2007 L 335, p. 31).

40 Judgment of 26 November 2015, *MedEval* (C-166/14, EU:C:2015:779, paragraphs 39 and 40).

69. Furthermore, the fact that it can do so does not equate to the court hearing the action for damages questioning *res judicata*, since the action for damages does not have the same subject matter as the proceedings to set aside and because those latter proceedings did not concern the same question of law. On the contrary, the Court of Justice has already held in similar circumstances that the principle of legal certainty could not justify a national rule which prevented the national court from drawing all the consequences of a breach of a provision of the Treaty because of a decision of a national court, which was *res judicata*.[41]

*3. Application to this case*

70. Awarding damages to persons harmed by an infringement of the public procurement rules constitutes one of the remedies guaranteed under EU law[42]. To paraphrase the wording used by the Court in paragraph 43 of its judgment of 26 November 2015, *MedEval* (C-166/14, EU:C:2015:779), the combination of procedural rules applicable to the dispute in the main proceedings could cause the person harmed to be deprived not only of the possibility of having the awarding authority's decision annulled, but also of all the remedies provided for in Article 2(1) of Directive 89/665.

71. A similar finding is therefore necessary in this case. The right to an effective remedy, enshrined in Article 47 of the Charter, precludes a regime, such as that in the case in the main proceedings, which infringes that right by making it impossible to bring an action for damages because of a prohibition on taking into account a plea in law of which the individual, without any fault of or negligence by it, could not have been aware before bringing its application to set aside, or, in the words of the judgment of 7 June 2007, *van der Weerd and Others* (C-222/05 to C-225/05, EU:C:2007:318), which the individual had no genuine opportunity to raise before a national court.

72. In the present case, the infringement of EU law which Hochtief adduced for the first time before the Fővárosi Ítélőtábla (Budapest Regional Court of Appeal) is based on the judgment of 3 March 2005, *Fabricom* (C-21/03 and C-34/03, EU:C:2005:127), the Hungarian version of which was apparently only made 'available' after the proceedings before the arbitration committee had been commenced.[43]

73. It remains to be seen whether an undertaking such as Hochtief, a German company having its registered office in Germany, truly was unable to have access to a judgment of the Court of Justice before it was translated into Hungarian. The fact that the Court Registry gave the information about the availability in Hungarian of the judgment of 3 March 2005, *Fabricom* (C-21/03 and C-34/03, EU:C:2005:127), in German, following a request in German from the German head office of Hochtief, is certainly a factor to take into consideration. Nevertheless, since that is a question of fact, it is for

41 See, to that effect, judgment of 11 November 2015, *Klausner Holz Niedersachsen* (C-505/14, EU:C:2015:742, paragraph 45).

42 Judgment of 26 November 2015, *MedEval* (C-166/14, EU:C:2015:779, paragraph 43).

43 Contrary to Hochtief's assertions at the hearing on 30 April, the argument based on the judgment of 3 March 2005, *Fabricom* (C-21/03 and C-34/03, EU:C:2005:127), is, to my mind, very different from that raised initially in the application instigating proceedings. The legal issue raised in that judgment relates not to the issue of a conflict of interest affecting the tender as such, but to the rights of the defence.

the referring court to determine whether Hochtief had a *genuine opportunity* to raise that plea before the arbitration committee (or before the appeal court if the arbitration committee should not be classed as a court or tribunal within the meaning of Article 267 TFEU[44]). If it did not, its action for damages should be admitted even though the contracting authority's decision had not been set aside.

## VI. Conclusion

74. In the light of the foregoing, I propose that the Court should answer the questions referred for a preliminary ruling by the Kúria (Supreme Court, Hungary) as follows:

(1) EU law does not preclude a national procedural provision which makes the bringing of an action for damages conditional on a prior final declaration by a body having the necessary powers within the meaning of Article 2(6) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts that the decision of a contracting authority is unlawful.

(2) Article 2(6) of Directive 89/665 does not preclude the Member States from making provision for situations in which the fact that the decision has not first been set aside is not grounds for the inadmissibility of an action for damages based on the irregularity of a contracting authority's decision.

(3) Article 47 of the Charter of Fundamental Rights of the European Union does preclude national legislation which makes bringing an action for damages based on the infringement of a rule of public procurement law subject to a prior finding that the public procurement procedure for the contract in question was unlawful where the applicant for reparation did not have a genuine opportunity to raise before a national court the plea that it wishes to rely upon in support of its action for damages.

44 Whether a body is a 'court or tribunal' within the meaning of Article 267 TFEU depends on a number of factors, such as whether the body in question is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent (see, inter alia, judgment of 17 September 1997, *Dorsch Consult*, C-54/96, EU:C:1997:413, paragraph 23, and, for a recent application, judgment of 6 October 2015, *Consorci Sanitari del Maresme*, C-203/14, EU:C:2015:664, paragraph 17). The Court of Justice has already had the opportunity on several occasions of finding that bodies such as the arbitration committee should be categorised as 'courts or tribunals' within the meaning of Article 267 TFEU, provided that they satisfy those requirements. In that respect, see, in addition to the two judgments cited above, judgments of 4 February 1999, *Köllensperger and Atzwanger* (C-103/97, EU:C:1999:52); of 18 November 1999, *Unitron Scandinavia and 3-S* (C-275/98, EU:C:1999:567); of 18 June 2002, *HI* (C-92/00, EU:C:2002:379); of 13 December 2012, *Forposta and ABC Direct Contact* (C-465/11, EU:C:2012:801); of 18 September 2014, *Bundesdruckerei* (C-549/13, EU:C:2014:2235); of 24 May 2016, *MT Højgaard and Züblin* (C-396/14, EU:C:2016:347); of 27 October 2016, *Hörmann Reisen* (C-292/15, EU:C:2016:817); and of 8 June 2017, *Medisanus* (C-296/15, EU:C:2017:431).