Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

7 August 2018*

(Reference for a preliminary ruling — Public procurement — Review procedures — Directive 89/665/EC — Action for damages — Article 2(6) — National rules making the admissibility of any action for damages subject to a prior and definitive determination of the illegality of the decision of the contracting authority giving rise to the damage alleged — Actions for annulment — Prior action before an arbitration committee — Judicial review of arbitral decisions — National rules excluding pleas not raised before the arbitration committee — Charter of Fundamental Rights of the European Union — Article 47 — Right to effective judicial protection — Principles of effectiveness and equivalence)

In Case C-300/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Kúria (Supreme Court, Hungary), made by decision of 11 May 2017, received at the Court on 24 May 2017, in the proceedings

Hochtief AG

v

Budapest Főváros Önkormányzata,

THE COURT (Third Chamber),

composed of L. Bay Larsen, President of the Chamber, J. Malenovský, M. Safjan, D. Šváby and M. Vilaras (Rapporteur), Judges,

Advocate General: M. Wathelet,

Registrar: R. Șereș, Administrator,

having regard to the written procedure and further to the hearing of 30 April 2018,

after considering the observations submitted on behalf of

– Hochtief AG, by A. László, ügyvéd, and I. Varga, konzulens,

– the Hungarian Government, by M.Z. Fehér and G. Koós, acting as Agents,

– the Greek Government, by M. Tassopoulou, D. Tsagkaraki, E. Tsaousi and K. Georgiadis, acting as Agents,

– the Austrian Government, by M. Fruhmann, acting as Agent,

* Language of the case: Hungarian.

– the Polish Government, by B. Majczyna, acting as Agent,

– the European Commission, by P. Ondrůšek and A. Tokár, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 7 June 2018,

gives the following

Judgment

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 (OJ 1989 L 395, p. 33), 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 (OJ 2014 L 94, p. 1; 'Directive 89/665').

2 The request has been made in the course of proceedings between Hochtief AG and Budapest Főváros Önkormányzata (Local Government for Budapest, Hungary; 'the contracting authority') in the context of a claim for compensation for damage which Hochtief suffered as a result of an infringement of public procurement rules.

Legal context

European Union law

3 The fourth subparagraph 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 [of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65)] or Directive [2014/23], 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.'

4 Article 1(3) of that directive provides:

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

5 Article 2(1), (2) and (6) of Directive 89/665 provides:

'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.'

Hungarian law

6 Article 108(3) of the közbeszerzésekről szóló 2003. évi CXXIX. törvény (Law No CXXIX of 2003 on public procurement, *Magyar Közlöny* 2003/157; 'the Law on public contracts') provides:

'Candidate tenderers may revise their request to participate until the time limit for submitting the request has expired.'

7 Article 350 of that Law 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.'

8 Article 351 of that Law is worded as follows:

'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.'

9 Article 339/A of the Polgári perrendtartásról szóló 1952. évi III. törvény (Law No III of 1952 instituting the Code of civil procedure; 'the Code of civil procedure') provides:

'Except as otherwise provided for by law, 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.'

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

10 On 5 February 2005 the contracting authority published an invitation to participate in a procedure for the award of a public works contract for an amount exceeding the threshold laid down by EU law, following the negotiated procedure with prior publication of a contract notice. Five applications were received by the deadline, including that of the 'HOLI' consortium ('the consortium'), led by Hochtief.

11 On 19 July 2005, the contracting authority informed the consortium that its application was invalid owing to a conflict of interest and that it had been rejected. The reason for that decision was the fact that the consortium had designated as project leader an expert who had participated in the preparation of the call for tenders with the contracting authority.

12 By decision of 12 September 2005 the Közbeszerzési Döntőbizottság (Public Procurement Arbitration Committee, Hungary) ('the arbitration committee') dismissed the action brought by the consortium against that decision. That committee took the view that the designation of the expert in the application to participate could not be regarded as an administrative error as Hochtief claimed. Although it took the view that, if Hochtief were allowed to correct this error, that would entail an amendment of the application to participate, which is excluded by Article 108(3) of the Law on public contracts. The arbitration committee also took the view that the contracting authority had not acted unlawfully by continuing the procedure with only two candidates, since, under Article 130(7) of that Law, if there were, among the candidates, a sufficient number of participants who had submitted an appropriate application within the range set, they must be invited to submit a tender.

13 By judgment of 28 April 2006, the Fővárosi Bíróság (Budapest Municipal Court, Hungary) dismissed the action brought by the consortium against the decision of 12 September 2005.

14 By decision of 13 February 2008, the Fővárosi Ítélőtábla (Budapest Regional Court of Appeal, Hungary), hearing the appeal proceedings brought by the consortium against the judgment of 28 April 2006, referred to the Court a request for a preliminary ruling which gave rise to the judgment of 15 October 2009, *Hochtief and Linde-Kca-Dresden* (C-138/08, EU:C:2009:627).

15 In the course of 2008, the Commission found, in the examination of the procurement procedure at issue in the main proceedings, that the contracting authority had breached the public procurement rules, on the one hand, by publishing a notice of negotiated procedure and, on the other, by excluding one of the candidates during the pre-selection procedure, without having given 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 show that the participation of the expert designated as project manager was not such as to distort competition.

16 On 20 January 2010, following the judgment of 15 October 2009, *Hochtief and Linde-Kca-Dresden* (C-138/08, EU:C:2009:627), the Fővárosi Ítélőtábla (Budapest Regional Court of Appeal) delivered a judgment confirming the judgment of 28 April 2006. It stated, inter alia, that it was not examining whether the contracting authority, in finding that the consortium's application was vitiated by a conflict of interest, was in breach by failing to give the consortium the opportunity to defend itself, since that complaint was not referred to in the application at first instance. It is only on appeal that Hochtief claimed, for the first time, that the prohibition raised against the consortium constituted a disproportionate restriction on its right to submit an application and tender, contrary to Article 220 EC, Article 6 of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54) and the case-law of the Court.

17 By judgment of 7 February 2011 the Legfelsőbb Bíróság (previous title of the Supreme Court, Hungary) upheld the judgment of the Fővárosi Ítélőtábla (Budapest Regional Court of Appeal) of 20 January 2010.

18 On 11 August 2011, Hochtief, relying on the findings of the Commission, initiated a review procedure against that judgment of the Fővárosi Ítélőtábla (Budapest Regional Court of Appeal).

19 On 6 June 2013, the Fővárosi Közigazgatási és Munkaügyi Bíróság (Administrative and Labour Court, Budapest, Hungary) adopted an order dismissing the appeal, confirmed by order of the Fővárosi Törvényszék (Budapest Municipal Court, Hungary), ruling at final instance.

20 Continuing to rely on the Commission's findings, Hochtief then brought an action seeking an order against the contracting authority to pay compensation of Hungarian Forints (HUF) 24 043 685 (approximately EUR 74 000) corresponding to the expenses which it incurred in respect of its participation in the procedure for the award of the public contract.

21 That action having been dismissed at first instance and on appeal, Hochtief brought an appeal in cassation before the referring court, claiming, inter alia, an infringement of Article 2(1) of Directive 89/665 and Article 2(1) of Council Directive 92/13/EEC of 25 February 1992 on the coordination of 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).

22 The referring court states, in essence, that it follows from Directive 89/665 that actions for damages may be conditional on the prior annulment 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), with the result that Article 2 of that directive does not appear, in principle, to preclude a national legislative provision such as Article 350 of the Law on public contracts. However, the application of that provision, in conjunction with other provisions of the Law on public contracts and the Code of civil procedure, could have the effect of hindering the ability of a tenderer excluded from a negotiated procedure for the award of a public contract, such as Hochtief, to bring an action for damages because it is unable to rely on a decision definitively finding an infringement of the public procurement rules. It would, in those circumstances, be justified either to provide for the possibility of adducing evidence of such an infringement by other means, or to exclude the domestic rule for the sake of the principle of effectiveness, or, further, to interpret that rule in the light of EU law.

23 It is in those circumstances that the Kúria (Supreme Court, Hungary) decided to stay the proceedings and 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 [an arbitration committee] or a court (hearing an appeal against a decision of the [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 [an arbitration committee] or a court (hearing an appeal against a decision of the [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 for the award of a public contract, 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?'

The application to reopen the oral part of the procedure

24 By letters lodged at the Court Registry on 12 and 27 July 2018, Hochtief applied for an order that the oral part of the procedure be reopened, by application of Article 83 of the Rules of Procedure of the Court.

25 In support of its application, Hochtief relies first of all on the request for a preliminary ruling made by the Székesfehérvári Törvényszék (Székesfehérvár Local Court, Hungary), by decision of 6 December 2017, received by the Court on 5 June 2018 and registered under case number C-362/18. It argues, in essence, that the answer to the questions referred in the present case depends on the answer to the questions referred in Case C-362/18 and that, in order to guarantee uniformity of the case-law, it is appropriate to give the parties the opportunity of presenting their viewpoint on the latter case.

26 Next, Hochtief submits that, in order for the Court to be in a position to rule on the present request for a preliminary ruling, it is appropriate to take account of elements which were not debated between the parties. In particular, it wishes to submit observations on a statement, made by the agent of the Hungarian Government at the hearing, that the judgment of 15 October 2009, *Hochtief and Linde-Kca-Dresden* (C-138/08, EU:C:2009:627), delivered while the proceedings before the Hungarian courts were ongoing, was the subject of a decision by those courts. It is of the opinion that it is of decisive importance, in order to answer the first two questions referred in the present reference for a preliminary ruling, to ascertain the assessment made by those courts of that judgment.

27 In that regard, it must be borne in mind that, in accordance with Article 83 of the Rules of Procedure, the Court may at any time, after hearing the Advocate General, order the reopening of the oral part of the procedure, in particular if it considers that it lacks sufficient information or where a party has, after the close of that part of the procedure, submitted a new fact which is of such a nature as to be a decisive factor for the decision of the Court, or where the case must be decided on the basis of an argument which has not been debated between the parties or the interested persons referred to in Article 23 of the Statute of the Court of Justice of the European Union.

28 In the present case, the Court considers, after hearing the Advocate General, that it has all the information necessary to rule on the request for a preliminary ruling and that there is no need to respond to that request on the basis of an argument which was not debated before it.

29 Firstly, contrary to Hochtief's submissions, the answer to be given to the questions referred in the present case do not depend on that to be given to the questions referred in Case C-362/18. In fact, although the disputes in the main proceedings in the present case and in Case C-362/18 arise in a similar context, the fact remains that the questions referred in Case C-362/18 which, as Hochtief itself notes in its application, relate principally to the liability of a Member State for a breach of EU law committed by a national court ruling at last instance, differ from those referred in the present case, which concern the conditions for admissibility of an action for damages against a contracting authority.

30 Secondly, it does not appear that the present request for a preliminary ruling must be examined in the light of an element which was not debated between the parties. In particular, the judgment of 15 October 2009, *Hochtief and Linde-Kca-Dresden* (C-138/08, EU:C:2009:627), relied on by Hochtief in support of its application for the reopening of the oral part of the procedure, was referred to by the referring court in its request for a preliminary ruling and the parties to the main proceedings, like the interested parties referred to in Article 23 of the Statute of the Court of Justice of the European Union, had the opportunity of presenting both written and oral observations in that regard.

31 Having regard to the foregoing conclusions, the Court considers that there is no need to order the reopening of the oral part of the procedure.

The first and second questions

32 By its first two questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 2(6) of Directive 89/665 must be interpreted as precluding a national procedural rule, such as that at issue in the main proceedings, which makes the possibility of asserting a claim under civil law in the event of an infringement of the rules governing public procurement and the award of public contracts subject to the condition that the infringement be definitively established by the Public Procurement Arbitration committee or, in the context of judicial review of a decision of that arbitration committee, by a court.

33 It is appropriate to recall, first of all, that, under Articles 2d to 2f of Directive 89/665, the Member States may provide that, where damages are claimed on the ground that a decision was taken unlawfully, the contested decision must first be set aside by a body having the necessary powers to that effect.

34 In consequence, it follows from the very wording of that provision that the Member States are, in principle, able to adopt a national procedural provision such as Article 350 of the Law on public contracts, which makes the possibility of asserting a claim under civil law in the event of an infringement of the rules governing public procurement and the award of public contracts subject to the condition that the infringement be definitively established by an arbitration committee, such as that in the main proceedings, or, in the context of judicial review of the decision made by such an arbitration committee, by a court (see, by analogy, judgment of 26 November 2015, *MedEval*, C-166/14, EU:C:2015:779, paragraph 36).

35 Secondly, it must be recalled that, as the Court has repeatedly held, Directive 89/665 lays down only the minimum conditions to be satisfied by the review procedures established in domestic law to ensure compliance with the requirements of EU law concerning public procurement (see, inter alia, judgment of 15 September 2016, *Star Storage and Others*, C-439/14 and C-488/14, EU:C:2016:688, paragraph 42 and the case-law cited).

36 Article 2(6) of Directive 89/665 thus merely provides the Member States with the option to make the introduction of an action for damages subject to the annulment of the contested decision by a body empowered to do so, without giving the slightest indication of any conditions or limits which may, as appropriate, be attached to the transposition and implementation of that provision.

37 It follows that, as the Advocate General has, in essence, observed in point 39 of his Opinion, the Member States remain free to determine the conditions under which the national rules transposing Article 2(6) of Directive 89/665 must be applied in their legal order and the limits, exceptions or derogations that, as necessary, may be connected with that application.

38 Indeed, as the Court has held on many occasions, it is for the Member States, when defining the detailed procedural rules governing the remedies intended to protect rights conferred by EU law on candidates and tenderers harmed by decisions of contracting authorities, to ensure that neither the effectiveness of Directives 89/665 nor the rights conferred on individuals by EU law are undermined (see, to that effect, judgment of 15 September 2016, *Star Storage and Others*, C-439/14 and C-488/14, EU:C:2016:688, paragraphs 43 and 44).

39 In that regard, the Court has held that the faculty granted to the Member States by Article 2(6) of Directive 89/665 was not without limits and remained subject to the condition that the action for annulment prior to any action for damages must be effective (see, to that effect, judgment of 26 November 2015, *MedEval*, C-166/14, EU:C:2015:779, paragraphs 36 to 44). They must, in particular, ensure full compliance with the right to an effective remedy and to a fair hearing, in

accordance with the first and second paragraphs of Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter') (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).

40 In the present case, it must be held that the national procedural rule which makes the possibility of asserting a claim under civil law in the event of an infringement of the rules governing public procurement and the award of public contracts subject to the condition that the infringement be definitively established in advance does not deprive the tenderer concerned of the right to an effective remedy.

41 Consequently, the answer to the first two questions is that Article 2(6) of Directive 89/665 must be interpreted as not precluding a national procedural rule, such as that at issue in the main proceedings, which makes the possibility of asserting a claim under civil law in the event of an infringement of the rules governing public procurement and the award of public contracts subject to the condition that the infringement be definitively established by an arbitration committee or, in the context of judicial review of the decision of that arbitration committee, by a court.

The third question

42 By its third question, the referring court asks, in essence, whether EU law must be interpreted as meaning that, in the context of an action for damages, it precludes a national procedural rule which limits judicial review of arbitral decisions issued by an arbitration committee responsible, at first instance, for the review of decisions adopted by contracting authorities in public procurement procedures, examining only the pleas raised before that committee.

43 In that regard, as regards the main proceedings, it must be noted first of all that, as is apparent from the request for a preliminary ruling, the national courts responsible for reviewing decisions of an arbitration committee called upon to examine, at first instance, actions for annulment against decisions adopted by contracting authorities in public procurement procedures must, under Article 339/A of the Code of civil procedure, dismiss as inadmissible any new plea in law which was not raised before that committee.

44 It is pursuant to that provision that the Fővárosi Ítélőtábla (Regional Court of Appeal, Budapest) dismissed the appeal brought by the appellant in the main proceedings against the judgment of the Fővárosi Bíróság (Budapest Municipal Court) dismissing the appeal against the initial arbitral decision of the arbitration committee. It is also on the basis of that provision that the Legfelsőbb Bíróság (former title of the Supreme Court) dismissed the appeal in cassation brought by the appellant in the main proceedings against the judgment of the Fővárosi Ítélőtábla (Regional Court of Appeal, Budapest).

45 According to the referring court, a combined application of Article 339/A of the Code of civil procedure and Article 350 of the Public Procurement Code could, however, have an effect contrary to EU law.

46 It points out, in that regard, referring to paragraph 39 of the judgment of 26 November 2015, *MedEval* (C-166/14, EU:C:2015:779), that 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. Indeed, in the light of the requirements of the legal certainty which contractual relations must be able to enjoy, the legal remedies intended to declare ineffective contracts concluded between contracting authorities and successful tenderers for public contracts must be formulated restrictively (primary legal protection). However, in so far as actions for damages (secondary legal protection), do not, in principle, have any bearing on the effectiveness of contracts

which have already been concluded, there is no justification for submitting those actions to procedures as stringent as those applicable to actions concerning the very existence or the performance of such contracts.

47 It is appropriate to recall, in that regard, that the Court did indeed hold, in paragraphs 41 to 44 of the judgment of 26 November 2015, *MedEval* (C-166/14, EU:C:2015:779), that the principle of effectiveness precludes, in certain circumstances, national procedural rules making the admissibility of actions for damages in the context of public procurement procedures subject to a prior finding of illegality of the contract award procedure concerned.

48 It must, however, be pointed out that the Court reached that conclusion in a very specific context, characterised by the fact that the action concerning the prior finding of the unlawfulness of the contract award procedure, alleging that there was no prior publication of any contract notice, was subject to a limitation period of six months which began to run from the day after the date of the award of the public contract in question, irrespective of whether the injured party was in a position to know of the illegality affecting that award decision or not. In such a context, a period of six months was likely not to allow the injured party to gather the necessary information with a view to challenging the lawfulness of the contract award procedure concerned, which therefore prevented the introduction of that action and was, therefore, liable to render practically impossible or excessively difficult the exercise of the right to bring an action for damages.

49 However, the situation at issue in the main proceedings clearly differs from that at issue in the case which gave rise to the judgment of 26 November 2015, *MedEval* (C-166/14, EU:C:2015:779).

50 It is appropriate to point out that, unlike the limitation rule at issue in the case which gave rise to the judgment of 26 November 2015, *MedEval* (C-166/14, EU:C:2015:779), the procedural rule laid down in Article 339/A of the Code of civil procedure does not undermine, as the Advocate General noted in points 47 to 49 of his Opinion, the right to an effective remedy and of access to an impartial court, guaranteed by the first and second paragraphs of Article 47 of the Charter (see, by analogy, judgment of 26 September 2013, *Texdata Software*, C-418/11, EU:C:2013:588, paragraph 87).

51 Although, furthermore, it is true that that national procedural rule lays down a requirement that the pleas raised before the arbitration committee and those raised before the courts responsible for reviewing the decisions of that committee must be strictly the same, therefore making it impossible for a person involved to raise a new plea during that procedure, the fact remains that it contributes, as the Advocate General noted in point 49 of his Opinion, to maintaining the effectiveness of Directive 89/665, the objective of which is, as the Court has already held, to ensure that decisions taken unlawfully by contracting authorities may be reviewed effectively and as rapidly as possible (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 43 and the case-law cited).

52 In that regard, it is appropriate to recall that the Court has held that the principle that it is for the parties to proceedings to take the initiative, which means that the court is bound by the obligation to keep to the subject matter of the dispute and to base its decision on the facts put before it and to refrain from acting of its own motion, except in exceptional cases to safeguard the public interest, the rights of the defence and ensure the proper conduct of proceedings by, in particular, protecting them from the delays inherent in examination of new pleas (see, to that effect, judgments of 14 December 1995, *van Schijndel and van Veen*, C-430/93 and C-431/93, EU:C:1995:441, paragraphs 20 and 21, and of 7 June 2007, *van der Weerd and Others*, C-222/05 to C-225/05, EU:C:2007:318, paragraphs 34 and 35).

53 In the present case, as is apparent from the file submitted to the Court, Hochtief has not been unable to bring an action for annulment against the decision of the contracting authority removing it from the procedure, either before the arbitration committee, or, subsequently, before the national courts responsible for the judicial review of the decision made by that committee.

54 Nor can the view be taken that Hochtief was unable to raise, in due time, the plea alleging, in essence, that it had not had the opportunity of adducing evidence that, in the present case, the participation of the expert whom it had designated as project manager and who had worked with the contracting authority was not such as to distort competition, in line with paragraphs 33 to 36 of the judgment of 3 March 2005, *Fabricom* (C-21/03 and C-34/03, EU:C:2005:127).

55 In accordance with the settled case-law of the Court, an interpretation which, in the exercise of the jurisdiction conferred on it by Article 267 TFEU, the Court gives of a rule of EU law, clarifies and defines, where necessary, the meaning and scope of that rule as it must be or ought to have been understood and applied from the time of its coming into force (see, inter alia, judgments of 27 March 1980, *Denkavit italiana*, 61/79, EU:C:1980:100, paragraph 16, and of 13 January 2004, *Kühne & Heitz*, C-453/00, EU:C:2004:17, paragraph 21).

56 It follows that, in a situation such as that at issue in the main proceedings, a tenderer, such as Hochtief, was able to raise the complaint alleging that it had not had the opportunity of establishing that the fact that it had designated as project leader an expert who had participated in the preparation of the call for tenders with the contracting authority was not such as to distort competition, even in the absence of any relevant case-law of the Court in that regard.

57 Furthermore, although it is true that the judgment of 3 March 2005, *Fabricom* (C-21/03 and C-34/03, EU:C:2005:127), was not available in the Hungarian language until after Hochtief brought its action before the arbitration committee and even its action against the committee's decision before the national court of first instance, that cannot, however, by itself, allow the conclusion that it was absolutely impossible for Hochtief to raise such a complaint.

58 It follows from the foregoing that EU law, and in particular Article 1(1) and (3) of Directive 89/665, read in the light of Article 47 of the Charter, must be interpreted as meaning that, in the context of an action for damages, it does not preclude a national procedural rule, such as that at issue in the main proceedings, which restricts the judicial review of arbitral decisions issued by an arbitration committee responsible at first instance for the review of decisions taken by contracting authorities in public procurement procedures to examine only the pleas raised before that committee.

Costs

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

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

1. **Article 2(6) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended by Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts, must be interpreted as not precluding a national procedural rule, such as that at issue in the main proceedings, which makes the possibility of asserting a claim under civil law in the event of an infringement of the rules governing public**

procurement and the award of public contracts subject to the condition that the infringement be definitively established by an arbitration committee or, in the context of judicial review of an decision of that arbitration committee, by a court.

2. **European Union law, and in particular Article 1(1) and (3) of Directive 89/665, as amended by Directive 2014/23, read in the light of Article 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as meaning that, in the context of an action for damages, it does not preclude a national procedural rule, such as that at issue in the main proceedings, which restricts the judicial review of arbitral decisions issued by an arbitration committee responsible at first instance for the review of decisions taken by contracting authorities in public procurement procedures to examine only the pleas raised before that committee.**

[Signatures]