



Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

5 April 2017*

(Reference for a preliminary ruling — Public procurement — Review procedures — Directive 89/665/EEC — Article 1(1) — Article 2(1) — Decision of a contracting authority allowing an economic operator to participate in a procurement procedure — Decision not amenable to review under the applicable national legislation)

In Case C-391/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunal Superior de Justicia de Andalucía (High Court of Justice of Andalusia, Spain), made by decision of 9 July 2015, received at the Court on 20 July 2015, in the proceedings

Marina del Mediterráneo SL and Others

v

Agencia Pública de Puertos de Andalucía,

intervening parties:

Consejería de Obras Públicas y Vivienda de la Junta de Andalucía,

Nassir Bin Abdullah and Sons SL,

Puerto Deportivo de Marbella SA,

Ayuntamiento de Marbella,

THE COURT (Fourth Chamber),

composed of T. von Danwitz, President of the Chamber, E. Juhász (Rapporteur), C. Vajda, K. Jürimäe and C. Lycourgos, Judges,

Advocate General: M. Bobek,

Registrar: V. Giacobbo-Peyronnel, Administrator,

having regard to the written procedure and further to the hearing on 29 June 2016,

* * Language of the case: Spanish.

after considering the observations submitted on behalf of:

- Marina del Mediterráneo SL and Others, by J.L. Torres Beltrán, procurador, and A. Jiménez-Blanco, abogado,
- the Agencia Pública de Puertos de Andalucía, by J.M. Rodríguez Gutiérrez, abogado,
- the Consejería de Obras Públicas y Vivienda de la Junta de Andalucía, by I. Nieto Salas, abogada,
- the Spanish Government, by M.A. Sampol Pucurull and M.J. García-Valdecasas Dorrego, acting as Agents,
- the Italian Government, by G. Palmieri, acting as Agent, assisted by P. Pucciariello and F. Di Matteo, avvocati dello Stato,
- the Austrian Government, by M. Fruhmann, acting as Agent,
- the European Commission, by E. Sanfrutos Cano and M.A. Tokár, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 8 September 2016,

gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 1(1) and Article 2(1) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 (OJ 2007 L 335, p. 31) ('Directive 89/665').
- 2 The request has been made in proceedings between Marina del Mediterráneo SL and Others, a temporary consortium known as 'Marina Internacional de Marbella', and the Agencia Pública de Puertos de Andalucía (Ports Agency of Andalusia; the 'Agency'), concerning the lawfulness of a decision by which that Agency allowed another temporary consortium to submit a tender in a public procurement procedure it had launched for the award of a public works concession contract.

Legal context

EU law

- 3 Recital 2 of Directive 89/665 states:

'... the existing arrangements at both national and Community levels for ensuring the [effective application of directives on public procurement] are not always adequate to ensure compliance with the relevant Community provisions particularly at a stage when infringements can be corrected'.

- 4 Article 1 of that directive, headed ‘Scope and availability of review procedures’, provides in paragraphs 1 and 3:

‘1. This Directive applies to contracts referred to in Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts [(OJ 2004 L 134, p. 114)], 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 Community law in the field of public procurement or national rules transposing that law.

...

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

- 5 Article 2 of Directive 89/665, headed ‘Requirements for review procedures’, provides in paragraph 1:

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

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

- 6 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) was repealed by Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors (OJ 2014 L 94, p. 243). Articles 3 to 7 in Section 2 of Chapter II of Title I of Directive 2014/25 set out the activities to which it applies.

- 7 Directive 2004/18 was repealed by 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). Article 57 of Directive 2004/18, entitled ‘Exclusions from the scope’, which is included in Title III, headed ‘Rules on public works concessions’, provides:

‘This Title shall not apply to public works concessions which are awarded:

- (a) in the cases referred to in Articles 13, 14 and 15 of this Directive in respect of public works contracts;
- (b) by contracting authorities exercising one or more of the activities referred to in Articles 3 to 7 of Directive 2004/17/EC where those concessions are awarded for carrying out those activities.

However, this Directive shall continue to apply to public works concessions awarded by contracting authorities carrying out one or more of the activities referred to in Article 6 of Directive 2004/17/EC and awarded for those activities, insofar as the Member State concerned takes advantage of the option referred to in the second subparagraph of Article 71 thereof to defer its application.’

Spanish law

- 8 Section 25(1) of Ley 29/1998 reguladora de la Jurisdicción Contencioso-administrativa (Law 29/1998 governing administrative courts) of 13 July 1998 (BOE No 167 of 14 July 1998, p. 23516) sets out what may be the subject of a review in the context of contentious administrative proceedings and, more specifically, the administrative acts open to challenge as follows:

‘Administrative appeal proceedings are admissible in respect of provisions of a general nature and express and implicit measures, whether definitive or procedural, adopted by the public authority which bring an end to the administrative procedure, if they decide, directly or indirectly, the substantive issues, render it impossible to continue the procedure, render it impossible to conduct a defence, or cause irreparable harm to legitimate rights or interests.’

- 9 Section 107(1) of Ley 30/1992 de Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común (Law 30/1992 on the legal provisions governing public authorities and ordinary administrative procedure) of 26 November 1992 (BOE No 285 of 27 November 1992, p. 40300), as amended by Ley 4/1999 (Law 4/1999) of 13 January 1999 (BOE No 12 of 14 January 1999, p. 1739) (‘Law 30/1992’), provides:

‘The parties concerned may seek review of decisions and administrative acts which decide, directly or indirectly, the substance of the case, make it impossible to continue the procedure or to put up a defence, or cause irreparable harm to legitimate rights or interests, which may be based on any of the grounds of invalidity or annulment provided for in Sections 62 and 63 of this Law.

The parties concerned may challenge the remaining preparatory acts for consideration in the decision bringing the procedure to an end.’

- 10 The Ley 30/2007 de Contratos del Sector Público (Law 30/2007 on public procurement) of 30 October 2007 (BOE No 261 of 31 October 2007, p. 44336), was amended by Ley 34/2010 (Law 34/2010) of 5 August 2010 (BOE No 192 of 9 August 2010, p. 69400) (‘Law 30/2007’), with the objective of including, in Sections 310 to 320, provisions relating to the special application in procurement proceedings.

- 11 Section 310(2) of Law 30/2007, which specifically relates to public procurement and implements the general rule laid down in Section 107(1) of Law 30/1992, provides:

‘The following acts may be the subject of an application:

- (a) Contract notices, specifications and contractual documents laying down the conditions which will govern the procurement procedure;
- (b) Preparatory acts adopted in the tendering procedure, provided that they decide, directly or indirectly, the award of the contract, make it impossible to continue the procedure or to put up a defence, or cause irreparable harm to legitimate rights or interests. Acts of the procurement board which decide to exclude tenderers will be considered preparatory acts which make it impossible to continue the procedure;
- (c) Award decisions adopted by the contracting authorities.’

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

- 12 On 12 April 2011, Marina del Mediterráneo SL and Others lodged, with the competent administrative body, a special application in procurement proceedings against the decision of the procurement board to allow the temporary consortium comprised of Nassir bin Abdullah and Sons SL, Puerto Deportivo de Marbella SA and l’Ayuntamiento de Marbella (Marbella City Council, Spain) (‘the second temporary consortium’) to submit a tender in the public procurement procedure for the award of the public works concession contract known as ‘Extension of the port of Marbella “la Bajadilla”’.
- 13 That procurement procedure was launched by the Agency, a special purpose public entity with operational autonomy and its own legal personality, forming part of the Consejería de Obras Públicas y Vivienda de la Junta de Andalucía (Department of Public Works and Housing of Andalucía, Spain). The call for tenders was published on 27 November 2010. According to statements made at the hearing before the Court, the value of that contract is EUR 77 000 000.
- 14 The two temporary consortia at issue in the main proceedings were the only tenderers that participated in the procurement procedure.
- 15 In their application, Marina del Mediterráneo and Others claimed, in essence, that the participation of the second temporary consortium in the procurement procedure infringed both national legislation and EU legislation, since, first, Marbella City Council is a public authority which does not have the status of an undertaking within the meaning of national legislation and which cannot be considered an economic operator without distorting the rules of free competition and equality of tenderers, and, secondly, that temporary consortium does not fulfil the requirements of economic and financial solvency in so far as the financial risks it takes are covered by the budget of that City Council.
- 16 By decision of 3 May 2011, the executive director of the Agency dismissed the application. In that decision, he referred to the case-law of the Court and, in particular, the judgment of 23 December 2009, *CoNISMa* (C-305/08, EU:C:2009:807), which confers the status of tenderer to any public entity or group consisting of such entities offering services on the market, even if only occasionally. In addition, the executive director took the view that the financial solvency of the second temporary consortium had been established on account of Marbella City Council’s revenue budget.
- 17 As is apparent from the documents before the Court, the public contract at issue in the main proceedings was awarded, by decision of 6 June 2011, to the second temporary consortium. An action brought against that decision by Marina del Mediterráneo and Others was dismissed by decision of 11 July 2011.

- 18 By letter of 5 July 2011, Marina del Mediterráneo and Others lodged a contentious administrative appeal with the Tribunal Superior de Justicia de Andalucía (High Court of Justice of Andalusia, Spain) against the decision of 3 May 2011 of the executive director of the Agency. In the appeal, that temporary consortium, on the basis of the same arguments it put forward before the Agency in the context of the special application in procurement proceedings, seeks annulment of that decision and, accordingly, annulment of the measures that followed it, particularly the decision of 6 June 2011 awarding the contract at issue to the second temporary consortium.
- 19 By decision of 19 February 2015, the national court hearing the case informed the parties to the main proceedings that there might be grounds for inadmissibility of the contentious administrative appeal on the basis of national legislation which defines the acts that may be the subject of a special application in procurement proceedings. In accordance with that legislation, preparatory acts which decide, directly or indirectly, the award of the contract, make it impossible to continue the procedure or to put up a defence, or cause irreparable harm to legitimate rights or interests, may be the subject of an action in procurement proceedings.
- 20 Accordingly, the decision of a procurement board which does not exclude a tenderer but which, on the contrary, admits the tender and allows the tenderer to participate in the procurement procedure that has been initiated does not constitute a decision-making act which is open to review; that does not, however, prevent the person concerned from reporting any irregularities noted and using them subsequently when challenging the act awarding the contract at issue, which is indeed a decision-making act.
- 21 The referring court entertains doubts as to whether this national legislation is compatible with EU public procurement law as interpreted by the Court, in particular in its judgment of 11 January 2005, *Stadt Halle and RPL Lochau* (C-26/03, EU:C:2005:5).
- 22 In the light of those considerations, the Tribunal Superior de Justicia de Andalucía (High Court of Justice of Andalusia) decided to stay proceedings and to refer to the Court the following questions for a preliminary ruling:
- ‘1. In the light of the principles of sincere cooperation and the effectiveness of directives, are Articles 1(1) and 2(1)(a) and (b) of Directive 89/665 to be interpreted as precluding national legislation such as Section 310(2) of Law 30/2007 ... in so far as it prevents access to the special application in procurement proceedings in respect of the preparatory acts of the procurement board, such as the decision to admit a tender from a tenderer which, it is alleged, fails to comply with the provisions concerning proof of technical and economic solvency laid down in the national and EU legislation?
2. If the reply to the first question is in the affirmative, do Articles 1(1) and 2(1)(a) and (b) of Directive 89/665 have direct effect?’

Consideration of the questions referred

Preliminary observations

- 23 As a preliminary point, in relation to the doubts expressed by the Spanish Government concerning the admissibility of the request for a preliminary ruling in the present case, it must be borne in mind that, in accordance with the first and second subparagraphs of Article 1(1) of Directive 89/665, read in the light of recital 2 of Directive 2007/66, Directive 89/665 applies, in a context such as that in the main proceedings, only to contracts falling within the scope of Directive 2004/18, unless, however, such contracts are excluded in accordance with Articles 10 to 18 of that directive. The following

considerations are therefore based on the premiss that Directive 2004/18 is applicable to the contract at issue in the main proceedings and, therefore, that Directive 89/665 is also applicable to the procedure in the main proceedings, which it is for the referring court to ascertain.

The first question

- 24 By its first question, the referring court asks, in essence, whether Articles 1(1) and 2(1)(a) and (b) of Directive 89/665 must be interpreted as precluding national legislation under which a decision allowing a tenderer to participate in a procurement procedure — a decision allegedly adopted in breach of EU public procurement law or the national legislation transposing it — is not classed among the preparatory acts of a contracting authority which may be subject to an independent judicial review.
- 25 Article 310(2)(b) of Law 30/2007 allows an independent review to be sought of preparatory acts which decide, directly or indirectly, the award of a contract, make it impossible to continue a procedure or to put up a defence, or cause irreparable harm to legitimate rights or interests; however, any other preparatory acts, such as a decision allowing a tenderer to participate in a procurement procedure, may, as is apparent from the file submitted to the Court, be challenged only in the context of a review of a decision awarding a public contract.
- 26 It should be noted that the wording of Article 1(1) of Directive 89/665 assumes, by using the words ‘as regards ... procedures’, that every decision of a contracting authority falling under EU rules in the field of public procurement and liable to infringe them is subject to the judicial review provided for in Article 2(1)(a) and (b) of that directive. That provision thus refers generally to the decisions of a contracting authority without distinguishing between those decisions according to their content or time of adoption (see judgment of 11 January 2005, *Stadt Halle and RPL Lochau*, C-26/03, EU:C:2005:5, paragraph 28 and the case-law cited).
- 27 That broad construction of the concept of a ‘decision’ taken by a contracting authority is confirmed by the fact that Article 1(1) of Directive 89/665 does not lay down any restriction with regard to the nature or content of the decisions it refers to. Moreover, a restrictive interpretation of that concept would be incompatible with the terms of Article 2(1)(a) of that directive which requires Member States to make provision for interim relief procedures in relation to any decision taken by the contracting authorities (see, to that effect, judgment of 11 January 2005, *Stadt Halle and RPL Lochau*, C-26/03, EU:C:2005:5, paragraph 30 and the case-law cited).
- 28 It follows that a decision allowing a tenderer to participate in a public procurement procedure, such as that at issue in the main proceedings, constitutes a decision within the meaning of Article 1(1) of Directive 89/665.
- 29 That interpretation of the concept of ‘decisions taken by the contracting authorities’ which are amenable to review is not called into question by the fact that the Court held, in paragraph 35 of the judgment of 11 January 2005, *Stadt Halle and RPL Lochau* (C-26/03, EU:C:2005:5), that acts which form part of the internal reflections of the contracting authority with a view to a public award procedure are not amenable to review. As regards the decision at issue in the main proceedings to admit the tender submitted by a tenderer, it must be held that such a decision, by its very nature, falls outside the internal reflections of the contracting authority. Moreover, that decision was communicated to Marina del Mediterráneo and Others.
- 30 As regards the time from which review procedures must be available, it is appropriate to recall that, as is apparent from its first and second recitals, Directive 89/665 is intended to strengthen the existing mechanisms, both at national and EU levels, to ensure the effective application of the directives relating to public procurement, in particular at a stage when infringements can still be corrected. To

that effect, the third subparagraph of Article 1(1) of that directive requires Member States ‘to ensure that ... decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible’ (see judgment of 12 December 2002, *Universale-Bau and Others*, C-470/99, EU:C:2002:746, paragraph 74).

- 31 As the Court has already held, although Directive 89/665 has not formally laid down the time from which the possibility of review, as provided for in Article 1(1), must be open, the objective of that directive, as referred to in the preceding paragraph, does not authorise Member States to make the exercise of the right to apply for review conditional on the fact that the public procurement procedure in question has formally reached a particular stage (see, to that effect, judgment of 11 January 2005, *Stadt Halle and RPL Lochau* (C-26/03, EU:C:2005:5, paragraph 38).
- 32 It is settled case-law that, in the absence of EU rules laying down the time from which a possibility of review must be open, it is for national law to lay down the detailed rules of judicial procedures governing actions for safeguarding rights which individuals derive from EU law. Those detailed procedural rules must, however, be no less favourable than those governing similar domestic actions (principle of equivalence) and must not render practically impossible or excessively difficult the exercise of rights conferred by EU law (principle of effectiveness) (judgments of 30 September 2010, *Strabag and Others*, C-314/09, EU:C:2010:567, paragraph 34; 6 October 2015, *Orizzonte Salute*, C-61/14, EU:C:2015:655, paragraph 46; and 26 November 2015, *MedEval*, C-166/14, EU:C:2015:779, paragraphs 32, 35 and 37).
- 33 In particular, 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 must not compromise the effectiveness of Directive 89/665 (see, to that effect, judgments of 3 March 2005, *Fabrimcom*, C-21/03 and C-34/03, EU:C:2005:127, paragraph 42; 6 October 2015, *Orizzonte Salute*, C-61/14, EU:C:2015:655, paragraph 47; and 15 September 2016, *Star Storage and Others*, C-439/14 and C-488/14, EU:C:2016:688, paragraph 43).
- 34 As regards, more specifically, a decision such as that at issue in the main proceedings allowing a tenderer to participate in a public procurement procedure, the fact that the national legislation at issue in the main proceedings requires, in all cases, a tenderer to wait for a decision awarding the contract in question before it may apply for a review of a decision allowing another tenderer to participate in that procurement procedure infringes the provisions of Directive 89/665.
- 35 That interpretation is not called into question by the finding that full implementation of the objective sought by Directive 89/665 would be undermined if candidates and tenderers were allowed to invoke, at any stage of the award procedure, infringements of the rules of public procurement, thus obliging the contracting authority to restart the entire procedure in order to correct such infringements (judgment of 12 March 2015, *eVigilo*, C-538/13, EU:C:2015:166, paragraph 51 and the case-law cited). That finding concerns the justification of reasonable time limits for applying for review of decisions which may be challenged and not the barring of an independent review of a decision allowing a tenderer to participate in a public procurement procedure, such as follows from the legislation at issue in the main proceedings.
- 36 Furthermore, it is for the referring court to determine whether the other conditions relating to the availability of review procedures, as provided for in Directive 89/665, are satisfied. In that regard, it should be noted that, in accordance with the third subparagraph of Article 1(1) and Article 1(3) of that directive, in order for the review of decisions taken by a contracting authority to be regarded as effective, review procedures must be available 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 of EU public procurement law or rules transposing that law (see, to that effect, judgment of 5 April 2016, *PFE*, C-689/13, EU:C:2016:199, paragraph 23). It is therefore, more specifically, for the national

court to determine, in the context of the main proceedings, whether Marina del Mediterráneo and Others have or have had an interest in obtaining the contract in question and have been or risk being harmed by the decision of the Agency to admit the tender of the second temporary consortium.

- 37 It follows from all of the foregoing considerations that the answer to the first question is that, in a situation such as that in the main proceedings, Articles 1(1) and 2(1)(a) and (b) of Directive 89/665 must be interpreted as precluding national legislation under which a decision allowing a tenderer to participate in a procurement procedure — a decision allegedly adopted in breach of EU public procurement law or the national legislation transposing it — is not classed among the preparatory acts of a contracting authority which may be subject to an independent judicial review.

The second question

- 38 By its second question, the referring court asks whether Articles 1(1) and 2(1)(a) and (b) of Directive 89/665 have direct effect.
- 39 In that regard, it should be recalled that the Court has already held that Articles 1(1) and 2(1)(b) of that directive are unconditional and sufficiently clear to create rights for individuals on which they may rely, where necessary, against contracting authorities (see judgment of 2 June 2005, *Koppensteiner*, C-15/04, EU:C:2005:345, paragraph 38).
- 40 As the Advocate General noted in point 70 of his Opinion, such an assessment applies equally to Article 2(1)(a) of Directive 89/665 in the light of both its clear and precise wording and the proximity of its subject matter to that of Article 2(1)(b) of the directive.
- 41 It follows from all of the foregoing considerations that the answer to the second question is that Articles 1(1) and 2(1)(a) and (b) of Directive 89/665 have direct effect.

Costs

- 42 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 (Fourth Chamber) hereby rules:

- 1. Articles 1(1) and 2(1)(a) and (b) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007, must be interpreted as precluding national legislation under which a decision allowing a tenderer to participate in a procurement procedure — a decision allegedly adopted in breach of EU public procurement law or the national legislation transposing it — is not classed among the preparatory acts of a contracting authority which may be subject to an independent judicial review.**
- 2. Articles 1(1) and 2(1)(a) and (b) of Directive 89/665, as amended by Directive 2007/66, have direct effect.**

[Signatures]