Reports of Cases

OPINION OF ADVOCATE GENERAL
WATHELET
delivered on 23 April 2015 [1]

Case C-689/13

Puligienica Facility Esco SpA (PFE)
v
Airgest SpA(Request for a preliminary ruling

from the Consiglio di Giustizia amministrativa per la Regione siciliana (Italy))

(Directive 89/665/EEC — Public procurement — Action for annulment of the act awarding the public procurement contract — Counterclaims seeking to challenge the participation in the tendering procedure of unsuccessful tenderers — Rule laid down by national case-law under which the national court may rule on the merits of the main action only if the counterclaim proves to be unfounded — Binding nature of principles stated by the plenary session of the national supreme administrative court, even where they are at odds with EU law — Judgment in Fastweb (C-100/12, EU:C:2013:448) — Article 267 TFEU — Primacy — Consistent interpretation)

I – **Introduction**

1. The present request for a preliminary ruling concerns, first, the interpretation of Article 1(3) 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 2007/66/EC of the European Parliament and the Council of 11 December 2007 [3] ('Directive 89/665'), and, secondly, the interpretation of Article 267 TFEU and the principles of the primacy of EU law and consistent interpretation.

2. The questions referred for a preliminary ruling by the national court, the Consiglio di Giustizia amministrativa per la Regione siciliana (Council of Administrative Justice for the Region of Sicily, Italy) concern two separate legal issues. The first question concerns the scope of the judgment in *Fastweb* (C-100/12, EU:C:2013:448), whilst the second concerns the interpretation of Article 267 TFEU in a situation in which national law requires a court to refer the case to its plenary session where doubts arise as to whether a principle of law stated by the plenary session is in conformity with EU law.

1 — Original language: French.
2 — OJ 1989 L 395, p. 33.
3 — OJ 2007 L 335, p. 31.

II – **Legal background**

A – *EU law*

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

'1. This Directive applies to contracts referred to in Directive 2004/18/EC 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.

…'

4. Article 2 of that directive, entitled 'Requirements for review procedures', provides in paragraph 1 thereof:

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

…

(b) either set aside or ensure the setting aside of decisions taken unlawfully …'

B – *Italian law*

1. The Constitution

5. Under the last paragraph of Article 111 of the Constitution, '[a]ppeals to the Court of Cassation against decisions of the Consiglio di Stato (Council of State) … are permitted only for reasons of jurisdiction'.

2. The Code of Administrative Procedure

6. Legislative Decree No 104 of 2 July 2010 (Ordinary Supplement to GURI No 156 of 7 July 2010) introduced the Code of Administrative Procedure.

7. According to Article 6(1) of that code, '[the] Consiglio di Stato is the administrative court of final instance'. Article 6(6) states furthermore that '[a]ppeals against decisions of the Tribunale amministrativa regionale della Sicilia (Regional Administrative Court, Sicily) shall be lodged with the Consiglio di Giustizia amministrativa per la Regione siciliana in accordance with the provisions governing that region's special status and the relevant implementing provisions.'

8. Article 42 of that code provides that '[d]efendants and intervening parties may submit applications where the object of such applications is related to the application in the main proceedings by way of counterclaim'.

9. Lastly, according to Article 99 of that code:

'1. Where the chamber to which the appeal is assigned considers that the point of law submitted for its consideration has given, or might give, rise to divergences in judicial decisions, it may, by order made on application by one of the parties or of its own motion, refer the case to be heard by the court sitting in the plenary session. The plenary session may, if it deems it appropriate, refer the matter back to the chamber.

2. Before a decision is taken, the President of the Consiglio di Stato may, an application by one the parties or of its own motion, refer any appeal to the court sitting in plenary session for a ruling on particularly important questions of principle or with a view to resolving divergences in judicial decisions.

3. If the chamber to which an appeal is assigned does not concur with a principle of law stated by the plenary session, it shall, by reasoned order, refer the decision on the appeal to the plenary session.

4. The plenary session shall rule on the dispute in its entirety, unless it decides to state a principle of law and to refer the remainder of the case back to the referring chamber.

5. If it considers the question to be of particular importance, the plenary session may in any event state the principle of law in the interests of the law, even where it rules that the action is in any way inadmissible or unfounded, or that the proceedings must be terminated. In such cases, the decision of the plenary session shall have no effect on the contested measure.'

3. Legislative Decree No 373 of 24 December 2003

10. On 24 December 2003, the Italian legislature adopted Legislative Decree No 373, entitled 'Measures for implementing the special statute of the Region of Sicily with regard to the exercise in that region of the functions assigned to the Consiglio di Stato' (Ordinary Supplement to GURI No 10 of 14 January 2004).

11. According to Article 1(2) of that legislative decree, '[t]he seat of the Consiglio di Giustizia amministrativa [per la Regione siciliana] shall be in Palermo; the court shall be composed of two chambers, one consultative the other judicial, which shall constitute local chambers of the Consiglio di Stato'.

III – **Facts of the main case**

12. By notice published on 18 January 2012, Airgest SpA, the company managing the civil airport of Trapani-Birgi (Italy), launched an open call for tenders for the provision of cleaning and ground maintenance services for that civil airport.

13. The contract was awarded, by definitive decision of 22 May 2012, to the temporary joint venture ('the temporary joint venture') created by Gestione Servizi Ambientali Srl ('GSA') and Zenith Services Group Srl.

14. Puligienica Facility Esco SpA (PFE), ('PFE'), which had also taken part in the tendering procedure and had been placed second, challenged that decision before the Tribunale amministrativo regionale della Sicilia. PFE claimed, inter alia, that the award decision should be annulled and, as a consequence, it should be awarded the contract.

15. In support of its action for review, PFE argued that the contracting authority should have excluded the temporary joint venture to which the contract was awarded on grounds of infringement of Article 38(1)(h) and (m) of Legislative Decree No 163/2006 of 12 April 2006 laying down the Code for public works contracts, public service contracts and public supply contracts pursuant to Directives 2004/17/EC and 2004/18/EC (GURI No 100 of 2 May 2006), point III.2.1 of the contract notice and point (c) of the tender specifications.

16. GSA, the leader of the temporary joint venture, was then joined to the proceedings and filed a counterclaim, contending that PFE had no legal interest in bringing its action for review. That counterclaim was based, inter alia, on the fact that, according to GSA, PFE had failed to meet the conditions for admission to the tendering procedure because its bid was imprecise and it should therefore have been excluded from the procurement procedure.

17. The Tribunale amministrativo regionale della Sicilia considered the arguments of both parties and upheld both actions.

18. Following that judgment, the contracting authority excluded the companies in question. At the end of the investigation, conducted in accordance with that judgment, it also excluded all the other companies initially included in the ranking by reason of the same defect, namely failure to give specific indication of the security costs. A negotiated procedure was then initiated for the award of the services contract in question.

19. PFE appealed against the judgment of the Tribunale amministrativo regionale della Sicilia before the referring court, whilst GSA filed a cross-appeal, on the ground, inter alia, that the Tribunale had not adhered to the order for examination of appeals laid down in judgment No 4/2011 of the plenary session of the Consiglio di Stato ('judgment No 4/2011'), according to which, where a counterclaim is brought challenging the admissibility of the main action for review, the counterclaim must be examined before the main action.

20. In its request for a preliminary ruling, the referring court notes that discussion has already focused on the principle laid down in judgment No 4/2011 in the reference for a preliminary ruling that gave rise to the judgment in *Fastweb* (C-100/12, EU:C:2013:448).

21. In that case, two tenderers had been preselected by the contracting authority and invited to submit bids. Considering that the successful tenderer's bid did not comply with the tender specifications, the tenderer whose bid had not been selected had filed an action for review. In response to that action, the successful tenderer had, in turn, filed a counterclaim, maintaining that the unsuccessful bid should have been excluded on the ground that it also had failed to meet one of the minimum requirements contained in the tender specifications.

22. According to the national court hearing that case, the Tribunale amministrativo regionale per il Piemonte (Regional Administrative Court, Piedmont), both bids failed to meet the requirements and therefore both actions, the main action and the counterclaim, were to be upheld, and as a consequence the tendering procedure as a whole annulled. However, according to the principle of law laid down in judgment No 4/2011, the counterclaim should have been examined before the main action, since the former concerned the legal standing of the applicant in the main proceedings, challenging that applicant's admission to the tendering procedure.

23. In a reference for a preliminary ruling from the Tribunale amministrativo regionale per il Piemonte, the Court held that a counterclaim filed by the successful tenderer could not bring about the dismissal of the main action for review brought by a tenderer, where the validity of the bid submitted by each of the operators was challenged in the course of the same proceedings and on identical grounds. In such a situation, each competitor can claim a legitimate interest in the exclusion of the bids submitted by the others. [4]

24. Accordingly, the Court found that Article 1(3) of Directive 89/665 precluded an action for review filed by the tenderer whose bid was unsuccessful from being declared inadmissible following examination of the preliminary plea of inadmissibility raised by the successful tenderer, in the absence of a finding as to whether the technical requirements under the tender specifications were met both by the bid submitted by the successful tenderer and by the bid submitted by the tenderer which brought the main action. [5]

25. While referring to that case, the referring court also draws the Court's attention to the fact that in the main proceedings in the present case, unlike *Fastweb* (C-100/12, EU:C:2013:448), there were more than two participating companies, even though only two of them are parties to the main proceedings.

26. The referring court also draws the Court's attention to the rule laid down in Article 99(3) of the Code of Administrative Procedure, whereby, if it intends to depart from the line of authority set by the plenary session of the Consiglio di Stato, it is obliged to refer the disputed decision to the plenary session.

27. Consequently, in view of the specific features of the case on which it is required to adjudicate, the referring court has decided to seek a ruling from the Court on the interpretation of Article 1(3) of Directive 89/665 and on the interpretation of Article 267 TFEU.

IV – **The request for a preliminary ruling and the procedure before the Court**

28. By decision of 26 September 2013, received at the Court on 24 December 2013, the Consiglio di Giustizia amministrativa per la Regione siciliana decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling pursuant to Article 267 TFEU:

'(1) Do the principles laid down by the Court of Justice in its judgment in [*Fastweb* (C-100/12, EU:C:2013:448)], concerning the specific set of circumstances forming the subject-matter of the request for a preliminary ruling in that case, in which only two undertakings participated in a public procurement procedure, also apply — given the considerable similarities between those circumstances and the facts in the present case — to the case currently before this Council, in which the undertakings participating in the tendering procedure, even though more than two undertakings were admitted, were all excluded by the contracting authority without those

4 — Judgment in *Fastweb* (C-100/12, EU:C:2013:448, paragraph 33).

5 — Ibid. (paragraph 34 and operative part).

exclusion decisions being challenged by undertakings other than those involved in the present proceedings, with the result that, in the dispute currently before this Council, only two undertakings are concerned?

(2) In respect solely of issues which can be settled through the application of EU law, is it the case that, upon a proper construction of EU law and, in particular, of Article 267 TFEU, Article 99(3) of the Italian Code of Administrative Procedure is precluded to the extent that it makes all principles of law stated by the plenary session of the Consiglio di Stato binding upon all Chambers and Divisions of the Consiglio di Stato, even where it is clearly the case that the plenary session has stated, or may have stated, a principle that is contrary to or incompatible with EU law? Specifically,

— in the event that doubts arise as to whether a principle of law already stated by the Consiglio di Stato in plenary session is in conformity with or is compatible with EU law, is the Chamber or Division of the Consiglio di Stato to which the case is assigned under an obligation to make a reasoned order referring the decision on the appeal to the plenary session, even before it is able to make a request to the Court of Justice for a preliminary ruling as to whether the principle of law in question is in conformity with or is compatible with EU law; or, instead, may — or, rather, must — the Chamber or Division of the Consiglio di Stato, being national courts against whose decisions no appeal lies, independently refer — as ordinary courts applying EU law — a question to the Court of Justice for a preliminary ruling so as to obtain the correct interpretation of EU law?

— In the event that the answer to the question in the preceding paragraph is that each Chamber and Division of the Consiglio di Stato is recognised as having the power or the obligation to refer questions directly to the Court of Justice for a preliminary ruling, or in every case in which the Court of Justice has taken a position — especially if it has done so at a time subsequent to the plenary session of the Consiglio di Stato — to the effect that the principle of law stated in the plenary session is not in conformity or not wholly in conformity with the correct interpretation of EU law, may or must each Chamber and each Division of the Consiglio di Stato, being ordinary courts applying EU law and against whose decisions no appeal lies, immediately apply the correct interpretation of EU law as provided by the Court of Justice or, instead, are they under an obligation, even in such cases, to make a reasoned order referring the decision on the appeal to the plenary session of the Consiglio di Stato, thereby deferring to the authority of the plenary session of the Consiglio di Stato and to its discretion all assessment of the application of EU law already declared binding by the Court of Justice?

— Lastly, is it not the case that an interpretation of the administrative procedural rules of the Italian Republic as meaning that any potential decision relating to a request to the Court of Justice for a preliminary ruling — or even merely the resolution of the case whenever that flows directly from the application of European Union legal principles already set out by the Court of Justice — is a matter exclusively for the plenary session of the Consiglio di Stato constitutes an obstacle, not only to the principles that proceedings are to be concluded within a reasonable period and that a review is to be available speedily in relation to procedures for the award of public contracts, but also to the requirement that EU law is to be promptly applied in full by all courts in all Member States, in a manner which must be consistent with its proper interpretation as provided by the Court of Justice, and moreover for the purposes of ensuring the broadest possible application of the principle of 'effectiveness' (*effet utile*) and the principle of the primacy (in terms not only of substance but also of procedure) of EU law over the national law of every single Member State (in the present case: over Article 99(3) of the Italian Code of Administrative Procedure)?'

29. Written observations were submitted by PFE, GSA, the Italian Government and the European Commission. They all also presented oral argument at the hearing on 11 March 2015.

V – **Analysis**

A – *The first question*

30. By its first question, the referring court queries whether the interpretation of Article 1(3) of Directive 89/665 given by the Court in *Fastweb* (C-100/12, EU:C:2013:448) applies in a situation in which even though more than two undertakings were originally admitted, all the undertakings participating in the tendering procedure at issue, were excluded by the contracting authority, without those exclusion decisions being challenged by any undertaking other than those involved in the main proceedings, with the result that only two of those undertakings were concerned.

31. In order to answer that question, I consider it is necessary first to ascertain the specific effect of the interpretation given by the Court in *Fastweb* (C-100/12, EU:C:2013:448) in order to determine, secondly, whether the number of tenderers influences that effect or is a condition for it. If it appears that the number of undertakings involved in the main proceedings does not alter the effects of the application of the rule as interpreted by the Court, the answer given to the referring court should be in the affirmative. Conversely, if it proves that Article 1(3) of Directive 89/665, as interpreted by the Court in *Fastweb* (C-100/12, EU:C:2013:448) can have no effect in a situation such as that in the main proceedings, it will be necessary to answer the first question in the negative.

1. Determining the effects of the interpretation given to Article 1(3) of Directive 89/665 in the judgment in *Fastweb* (C-100/12, EU:C:2013:448)

32. In the *Fastweb* case (C-100/12, EU:C:2013:448), the decisive factor is that the selected bid had, wrongly, not been excluded at the stage of verification of the tenders, even though it did not comply with the technical requirements under the tender specifications. [6]

33. According to the Court, in proceedings brought by a tenderer, 'a counterclaim filed by the successful tenderer cannot bring about the dismissal of an action for review brought by [the] tenderer where the validity of the bid submitted by each of the operators is challenged in the course of the same proceedings and on identical grounds [since], in such a situation, *each competitor can claim a legitimate interest in the exclusion of the bid[s] submitted by the other[s], which may lead to a finding that the contracting authority is unable to select a lawful bid*'. [7]

34. It therefore follows from those findings that the main action for review filed by the unsuccessful tenderer must not be declared inadmissible on the basis of the examination of the preliminary plea of inadmissibility, filed as a counterclaim by the successful tenderer, in the absence of a finding as to whether the technical requirements are met by both bids. [8] If both the bids are found not to comply, the practical consequence of that obligation is that the contracting authority is unable to select a lawful bid, which means that a new call for tenders must be arranged.

6 — See paragraph 32 of that judgment.

7 — Ibid. (paragraph 33). Emphasis added.

8 — See judgment in *Fastweb* (C-100/12, EU:C:2013:448, paragraph 34 and operative part).

2. The applicability of the interpretation given of Article 1(3) of Directive 89/665 in the judgment in *Fastweb* (C-100/12, EU:C:2013:448)

35. In the main proceedings, more than two undertakings were admitted to participate in the procedure at issue. However, it is apparent from the explanations provided by the referring court that, with the exception of the applicant in the main proceedings (and, through the counterclaim, the successful tenderer), none of the other undertakings excluded from the tendering procedure challenged its exclusion before the administrative authorities or the courts.

36. In such circumstances, if the court hearing the case were to find that both the bids at issue were unlawful, the contracting authority would not be obliged to arrange a new call for tenders but could, if appropriate, decide to award the contract to another undertaking on the list drawn up by the contracting authority.

37. That said, it cannot be excluded that one of the irregularities that led to the cancellation of the bids of the applicant in the main proceedings and the successful tenderer might also vitiate all the bids submitted. In those circumstances, the contracting authority must of necessity initiate a new procedure. [9]

38. In those circumstances, as the Court held in paragraph 33 of *Fastweb* (C-100/12, EU:C:2013:448), 'each competitor can claim a legitimate interest in the exclusion of the bid[s] submitted by the other[s], which may lead to a finding that the contracting authority is unable to select a lawful bid'.

39. In that regard, I note moreover that, in that judgment, the Court did not intend to limit its finding to the situation of a call for tenders that had generated interest from only two undertakings (and thus the submission of only two bids), since it envisages generally the legitimate interest of 'each competitor' [10] in the exclusion not of the bid of the *other competitor* but of the bids of the *other competitors*. [11]

40. Consequently, I consider that the obligation that the Court established in *Fastweb* (C-100/12, EU:C:2013:448), under which Article 1(3) of Directive 89/665 precludes the main action for review filed by the unsuccessful tenderer from being declared inadmissible on the basis of the examination of a preliminary plea of inadmissibility made in a counterclaim lodged by the successful tenderer, in the absence of a finding as to whether the technical requirements are met by both bids, [12] applies also in the circumstances of the main proceedings.

3. Possible impact of the difference between the grounds of irregularity relied on in support of the main action for review and in support of the counterclaim

41. Formally, the only fact stated by the referring court to be relevant is that, although more than two undertakings were admitted, all the undertakings participating in the public procurement procedure were excluded by the contracting authority without those exclusion decisions being challenged by undertakings other than those involved in the present proceedings, with the result that the dispute currently before that court is confined to those two undertakings.

9 — That is the situation which, it would appear, arose in the main proceedings, according to the description given by the referring court (see paragraph C4, p. 12 of the request for a preliminary ruling) and the information provided by the parties to the main proceedings (see p. 2 of PFE's written observations and paragraph 9 of GSA's written observations).

10 — Judgment in *Fastweb* (C-100/12, EU:C:2013:448, paragraph 33). Emphasis added.

11 — Idem, emphasis added. According to the Italian version of that judgment (the authoritative language of the case), 'ciascuno *dei concorrenti* può far valere un analogo interesse legittimo all'esclusione dell'offerta *degli atri*, che può indurre l'amministrazione aggiudicatrice a constatare l'impossibilità di procedere alla scelta di un'offerta regolare' (emphasis added).

12 — See paragraph 34 and operative part of the judgment in *Fastweb* (C-100/12, EU:C:2013:448).

42. I explained above how that particular detail does not affect the application of the rule laid down by the Court in *Fastweb* (C-100/12, EU:C:2013:448).

43. In its written observations, confirmed at the hearing, GSA relies, however, on a second factor that distinguishes this case from that giving rise to the judgment in *Fastweb* (C-100/12, EU:C:2013:448). It considers that the interpretation given in that judgment applies only if the defects relied on in support of the main action and the counterclaim are *identical*.

44. As GSA explains, its counterclaim is based on a different ground from that relied on by PFE in support of the main action. PFE seeks annulment of the award of the contract to GSA on the ground of breach of the disclosure obligations incumbent on tenderers; thus it relies on a plea alleging a procedural irregularity. GSA on the other hand seeks the exclusion of PFE on the ground that its bid was imprecise, that is to say, an irregularity going to the substance of the case.

45. I would observe first of all in that regard that the use of the plural in the language of the case (Italian) ('nell'ambito del medesimo procedimento *e per motivi identici*')[13] and the more general expression 'de nature identique' in the language of the deliberations (French), militates in favour of a broad interpretation of the concept of 'identical *grounds*' (not *an* identical ground) relied on in support of each of the two actions.[14] The fact that it is exceptional for grounds to be completely identical supports that interpretation.

46. Next, I think that whether the grounds relied on in support of the main action and the counterclaim are identical, in the same way as the number of tenderers, is not a decisive factor in the interpretation of Article 1(3) of Directive 89/665 given by the Court in *Fastweb* (C-100/12, EU:C:2013:448).

47. Where the Court states, in paragraph 33 of that judgment, that 'a counterclaim filed by the successful tenderer cannot bring about the dismissal of an action for review brought by a tenderer where the validity of the bid submitted by each of the operators is challenged in the course of the same proceedings and on identical grounds', the main point, as I explained above, is that, '[i]n such a situation, each competitor can claim a legitimate interest in the exclusion of the bid submitted by the other[s], which may lead to a finding that the contracting authority is unable to select a lawful bid'.[15]

48. Those two sentences together form one paragraph of the judgment and thus cannot be read independently of one another.

49. I therefore share the view expressed by the Commission in its observations that the decisive fact is whether the main action for review and the counterclaim create a legitimate interest in the reopening of the tendering procedure.

50. In the case at issue in the main proceedings, it appears — subject to examination in greater depth by the referring court — that the pleas put forward by PFE and GSA, although not identical, may be similar in nature (in that they concern the lawfulness of the other's bid) and, in any event, create for each of the operators in the case before the referring court, 'a legitimate interest in the exclusion of the bid submitted by the other' within the meaning of the judgment in *Fastweb* (C-100/12, EU:C:2013:448).

13 — Judgment in *Fastweb* (C-100/12, EU:C:2013:448, paragraph 33). Emphasis added.

14 — As previously observed by Advocate General Kokott, with regard to a judgment of the General Court of the European Union, where the French language version it is not authoritative (since it is not the language of the case) but is more precise than the version drafted in the language of the case, that language version, 'in which the judgment was drafted and deliberated, contains additional indications of what the [General Court] was in fact intending to refer to' (Opinion of Advocate General Kokott in *Bertelsmann and Sony Corporation of America* v *Impala*, C-413/06 P, EU:C:2007:790, point 253).

15 — Judgment in *Fastweb* (C-100/12, EU:C:2013:448, paragraph 33).

51. Moreover, as the Commission stated at the hearing on 11 March 2015, in addition to protecting the interests of the tenderers, the rule laid down by the Court in *Fastweb* (C-100/12, EU:C:2013:448) protects the interests of the contracting authority, which must be able to select the best lawful bid. In the case at issue in the main proceedings, strict application of the criterion of 'identical grounds' relied on in support of the main action and the counterclaim, might lead to the contracting authority being required to award the contract to an undertaking whose bid was, however, unlawful.

4. Interim conclusion

52. In the light of the above considerations, I suggest that the Court's answer to the first question referred for a preliminary ruling should be that the interpretation of Article 1(3) of Directive 89/665 given in the judgment in *Fastweb* (C-100/12, EU:C:2013:448) is also applicable in a situation in which, first, an action for review has been brought by a single tenderer notwithstanding the fact that several undertakings had been admitted to the tendering procedure and, secondly, the successful tenderer has in turn filed a counterclaim in the same proceedings and both the applicant tenderer and the successful tenderer have a legitimate interest in excluding the other operator.

B – *The second question*

53. By its second question, the referring court asks the Court, in essence, whether Article 267 TFEU precludes the mechanism established by Article 99(3) of the Code of Administrative Procedure, which provides for mandatory referral to the plenary session of the Consiglio di Stato by any chamber of that court if it considers it necessary to disregard a principle of law stated by the plenary session. The referring court is uncertain whether that mechanism prevents it, first, from referring a question to the Court of Justice for a preliminary ruling and, secondly, from ruling in accordance with EU law directly and independently, disregarding that mechanism.

54. Since the referring court decided, by its first question, to ask the Court about the interpretation of the relevant directive, the need to answer the first part of the second question is questionable.

55. However, in the same way as the Court chose to answer all the questions raised in the case giving rise the judgment in *Cartesio* (C-210/06, EU:C:2008:723), I consider that '[i]t would be contrary to the spirit of cooperation which must guide all relations between national courts and the Court of Justice, and contrary also to the requirements of procedural economy, to require a national court first to seek a preliminary ruling on the sole question whether that court is one of those referred to in the third paragraph of Article [267 TFEU], before, where appropriate, having to formulate — subsequently and by a second reference for a preliminary ruling — the questions concerning the provisions of Community law relating to the substance of the dispute before it'. [16]

56. However, before answering that part of the question, I shall examine the second part, namely whether the referring court has jurisdiction to give a direct ruling in a manner consistent with EU law.

16 — Paragraph 70. Also, as the Court itself has made clear, it had 'already replied to a question relating to the characteristics of national courts in the light of the third paragraph of Article [267 TFEU] in a context offering certain similarities with that of the present reference for a preliminary ruling, without the admissibility of that question being disputed [in the judgment in *Lyckeskog* (C-99/00, EU:C:2002:329)]' (paragraph 71). That was also the case in the proceedings giving rise to the judgment in *Melki and Abdeli* (C-188/10 and C-189/10, EU:C:2010:363).

1. Whether the referring court has jurisdiction to give a direct ruling in a manner consistent with EU law

57. The referring court having decided to refer a question to the Court under Article 267 TFEU, the answer to the second part of the second question is to be found in the settled case-law of the Court, according to which the national court is bound, for the purposes of the decision to be given in the main proceedings, by the interpretation of the provisions at issue given by the Court in answer to the first question referred. The referring court must, therefore, disregard the principle of law stated in judgment No 4/2011 if it considers, as a result of the Court's interpretation referred to above, that it is not consistent with EU law. [17]

58. I note moreover that the plenary session of the Consiglio di Stato amended, by judgment No 9/2014 of 25 February 2014, ('judgment No 9/2014'), the principle of law it had established in judgment No 4/2011. If that principle of law, as amended, can be interpreted in a manner consistent with the meaning attributed to Article 1(3) of Directive 89/665 by the Court in *Fastweb* (C-100/12, EU:C:2013:448) and in the present case, it must not be disregarded. The requirement for national law to be interpreted in conformity with EU law is inherent in the Treaty, since it permits the national court, for matters within its jurisdiction, to ensure the full effectiveness of EU law when it adjudicates on the dispute before it. [18]

59. The principle that national law must be interpreted in conformity with EU law requires national courts to do whatever lies within their jurisdiction, taking the whole body of domestic law into consideration and applying the interpretative methods recognised by domestic law, with a view to ensuring that Directive 89/665 is fully effective and achieving an outcome consistent with the objective pursued by it. [19]

60. If, on the other hand, the principle of law stated in judgment No 4/2011, as amended by judgment No 9/2014, did not lend itself to being interpreted in accordance with Article 1(3) of Directive 89/665, the referring court would have no option but to refrain from applying it [20] in accordance with the principle of the primacy of EU law. [21]

61. In that regard, although the issue does not arise in the present case — since a reference has been made to the Court for a preliminary ruling — it is worth pointing out that the obligation on a national court to disapply a national provision which conflicts with EU law if no compatible interpretation of that provision proves possible does not alter the principle that the national court cannot be 'either compelled to make or prevented from making a reference to the Court for a preliminary ruling'. [22]

17 — See judgments in *Elchinov* (C-173/09, EU:C:2010:581, paragraph 30) and *Križan and Others* (C-416/10, EU:C:2013:8, paragraph 69).

18 — See judgments in *Pfeiffer and Others* (C-397/01 to C-403/01, EU:C:2004:584, paragraph 114); *Kücükdeveci* (C-555/07, EU:C:2010:21, paragraph 48); *Dominguez* (C-282/10, EU:C:2012:33, paragraph 24), and *Amia* (C-97/11, EU:C:2012:306, paragraph 28). According to settled case-law, a national court called upon to interpret its national law is required to do so, as far as possible, in the light of the wording and the purpose of the directive in question in order to achieve the result pursued by the latter (in addition to the judgments cited in this footnote, see also leading cases *von Colson and Kamann* (14/83, EU:C:1984:153, paragraph 26) and *Marleasing* (C-106/89, EU:C:1990:395, paragraph 8)).

19 — See, inter alia, judgments in *Dominguez* (C-282/10, EU:C:2012:33, paragraph 27) and *Amia* (C-97/11, EU:C:2012:306, paragraph 29).

20 — See inter alia, concerning Directive 89/665, judgment in *Uniplex (UK)* (C-406/08, EU:C:2010:45, paragraph 49). Although the Court now consistently holds that 'the question whether a national provision must be disapplied in as much as it conflicts with EU law arises only if no compatible interpretation of that provision proves possible' (judgments in *Dominguez* (C-282/10, EU:C:2012:33, paragraph 23) and *Amia* (C-97/11, EU:C:2012:306, paragraph 27) or more recently in the judgment in *Spedition Welter* (C-306/12, EU:C:2013:650, paragraph 28)), the obligation 'to disapply', laid down in the judgment in *Simmenthal* (106/77, EU:C:1978:49, paragraphs 21 and 24), is not called in question. See, in that regard, the operative part of the judgment in *Amia* (C-97/11, EU:C:2012:306), and the judgment in *A* (C-112/13, EU:C:2014:2195, paragraph 36).

21 — See, to that effect, judgment in *Kücükdeveci* (C-555/07, EU:C:2010:21, paragraph 54).

22 — Ibid. (paragraph 53).

62. The question remains, however, as to what impact Article 267 TFEU may have on a procedural measure such as that provided in Article 99 of the Code of Administrative Procedure.

2. The impact of Article 267 TFEU on the mechanism for mandatory referral to the plenary session of the Consiglio di Stato

63. As a preliminary point, I must agree with Advocate General Mazák when he stated that, in cases where provisions of national law have limited the possibility for a national court or tribunal to make a reference to the Court of Justice for a preliminary ruling under Article 267 TFEU, the Court has 'ruled systematically in favour of the broadest freedom for national courts or tribunals to refer to it questions on the validity and interpretation of EU law'. [23]

64. Three considerations support that general assessment:

— first, the Court has held, as regards courts which are not ruling at final instance, that they must 'be free, if [they consider] that the ruling on law made by the superior court could lead [them] to give a judgment contrary to [European Union] law, to refer to [it] questions which concern [them]'; [24]

— secondly, national courts against whose decisions there is no judicial remedy under national law are, under the third paragraph of Article 267 TFEU, required to make a reference to the Court where they are faced with a question concerning the interpretation of EU law, in order to 'prevent a body of national case-law that is not in accordance with the rules of [European Union] law coming into existence in any Member State', [25] and

— thirdly, the Court has held that a national court which, in a case concerning EU law, considers that a provision of national law is not only contrary to EU law but also unconstitutional, does not lose the right or escape the obligation under Article 267 TFEU to refer questions to the Court of Justice on the interpretation or validity of EU law by reason of the fact that the declaration that a rule of national law is unconstitutional is subject to a mandatory reference to the constitutional court. [26]

65. It is within that precise context that the second question raised by the referring court must be answered.

66. According to Article 1(2) of Legislative Decree No 373 of 24 December 2003, the Consiglio di Giustizia amministrativa per la Regione siciliana is composed of two chambers, which constitute local chambers of the Consiglio di Stato. Its judicial nature for the purposes of Article 267 TFEU is therefore not in doubt and the possibility for it to refer a question to the Court for a preliminary ruling is undeniable. [27]

23 — View of Advocate General Mazák in *Melki and Abdeli* (C-188/10 and C-189/10, EU:C:2010:319, point 62). See also, for the affirmation of that principle by the Court, judgment in *Rheinmühlen-Düsseldorf* (166/73, EU:C:1974:3, paragraph 3) and, for its continuing confirmation, judgments in *Mecanarte* (C-348/89, EU:C:1991:278, paragraph 44); *Palmisani* (C-261/95, EU:C:1997:351, paragraph 20); and *Cartesio* (C-210/06, EU:C:2008:723, paragraph 88). Case-law subsequent to delivery of the View of Advocate General Mazák does not contradict that conclusion: see judgments in *Melki and Abdeli* (C-188/10 and C-189/10, EU:C:2010:363, paragraph 41); *Elchinov* (C-173/09, EU:C:2010:581, paragraph 26); *Kelly* (C-104/10, EU:C:2011:506, paragraph 61); *Križan and Others* (C-416/10, EU:C:2013:8, paragraph 64), or, very recently, *A* (C-112/13, EU:C:2014:2195, paragraph 35).

24 — See judgment in *Rheinmühlen-Düsseldorf* (166/73, EU:C:1974:3, paragraph 4) and, for its continuing confirmation, judgments in *Cartesio* (C-210/06, EU:C:2008:723, paragraph 94); *ERG and Others* (C-378/08, EU:C:2010:126, paragraph 32); *Melki and Abdeli* (C-188/10 and C-189/10, EU:C:2010:363, paragraph 42); *Elchinov* (C-173/09, EU:C:2010:581, paragraph 27); *Kelly* (C-104/10, EU:C:2011:506, paragraph 61); and *Križan and Others* (C-416/10, EU:C:2013:8, paragraph 68).

25 — Judgment in *Lyckeskog* (C-99/00, EU:C:2002:329, paragraph 14 and the case-law cited).

26 — See judgments in *Melki and Abdeli* (C-188/10 and C-189/10, EU:C:2010:363, paragraph 45), which refers to paragraphs 39, 45 and 46 of the judgment in *Mecanarte* (C-348/89, EU:C:1991:278), and to *A* (C-112/13, EU:C:2014:2195, paragraph 38).

27 — I note, moreover, that the Court has already responded to a number of requests for a preliminary ruling from the Consiglio di Giustizia amministrativa per la Regione siciliana (see judgment in *Valvo* (C-78/07, EU:C:2008:171); order in *Rizzo* (C-107/11, EU:C:2012:96), and judgment in *Ottica New Line di Accardi Vincenzo* (C-539/11, EU:C:2013:591)).

67. In those circumstances, the only question which might arise is whether, in view of the obligation to refer the matter to the plenary session introduced by Article 99(3) of the Code of Administrative Procedure, the Consiglio di Giustizia amministrativa per la Regione siciliana must be regarded as a national court against whose decisions there is no judicial remedy under national law for the purposes of the third paragraph of Article 267 TFEU, or whether the decision of that court is open to judicial review.

68. In the second hypothesis, the referring court is *free* to refer to the Court questions which are of concern to it if it considers that the ruling on law made by the superior court could lead it to give a judgment contrary to EU law. In the first hypothesis, the referring court is, on the contrary, *required* to make a reference to the Court for a preliminary ruling where it doubts whether a principle of law established by the plenary session of the Consiglio di Stato is in conformity with EU law.

69. As I noted above, Article 1(2) of Legislative Decree No 373 of 24 December 2003 states that the Consiglio di Giustizia amministrativa per la Regione siciliana is composed of two chambers, which constitute local chambers of the Consiglio di Stato.

70. According to Article 6(1) of the Code of Administrative Procedure, '[t]he Consiglio di Stato is the administrative court of final instance'.

71. Although, under the last paragraph of Article 111 of the Constitution, appeals to the Court of Cassation are permitted against decisions of the Consiglio di Stato, they are limited to questions concerning the allocation of jurisdiction between the various Italian courts.

72. In those circumstances, in the same way that the Court recently held that the fact it is possible to bring an action before a constitutional court limited to an examination of a potential infringement of the rights and freedoms guaranteed by the national constitution or by an international agreement provides no justification for the view that a Supreme Court cannot be classified as a court against whose decisions there is no judicial remedy under national law within the meaning of the third paragraph of Article 267 TFEU,[28] I do not propose to cast doubt on the classification of the Consiglio di Stato and the local chambers which form part of it as a court of 'final instance'.

73. The Corte suprema di cassazione itself held in judgment No 2403, delivered in combined chambers on 4 February 2014, that within the Italian system of administrative courts it fell to the Consiglio di Stato, its chambers and the plenary session, without distinction, to adjudicate as the court of final instance for the purposes of the third paragraph of Article 267 TFEU.

74. Mandatory referral to the plenary session of the Consiglio di Stato, as laid down in Article 99(3) of the Code of Administrative Procedure, does not appear to me to alter that analysis, since it cannot be classed as a 'remedy' for the purposes of the third paragraph of Article 267 TFEU.

75. That procedural measure is not available to the parties, only to the chamber of the Consiglio di Stato hearing the case. Moreover, it cannot be used to vary a decision taken by a lower court and may be used only to vary judgments of the plenary session of the Consiglio di Stato itself.

76. In addition, according to the case-law of the Consiglio di Stato cited by the Italian Government, there is no procedural sanction for failure to apply Article 99(3) of the Code of Administrative Procedure.[29]

28 — See judgment in *Križan and Others* (C-416/10, EU:C:2013:8, paragraph 72).

29 — Judgment No 4185 of 6 August 2014 of the Third Chamber of the Consiglio di Stato.

77. Consequently, in accordance with the objective underlying the obligation laid down in the third paragraph of Article 267 TFEU, the Consiglio di Giustizia amministrativa per la Regione siciliana, when faced with a question concerning the interpretation of EU law, should be required to make a reference to the Court of Justice in order to prevent a body of national case-law that is not in accordance with the rules of EU law coming into existence (or continuing). [30]

78. It is true that the likelihood of a body of national case-law coming into existence that conflicts with EU law is limited by the fact that if the referral of a decision to the plenary session of the Consiglio di Stato under Article 99(3) of the Code of Administrative Procedure is based on the calling into question of a principle of law which, it is alleged, is contrary to EU law, the plenary session cannot, *a fortiori*, evade its obligation to make a reference to the Court for a preliminary ruling.

79. However, despite that particular procedural aspect, I can see at least two reasons why Article 267 TFEU cannot be interpreted as precluding a chamber of the Consiglio di Stato hearing a case from itself making a reference to the Court before any referral is made to the plenary session.

80. First, to withhold from a chamber of a court against whose decisions there is no judicial remedy under domestic law the possibility of referring a matter to the Court of Justice solely because the plenary session of that same court would be required to do so would conflict with the settled case-law of the Court, which has always given 'national courts *the widest* discretion in referring matters to the Court if they consider that a case pending before them raises questions involving interpretation of provisions of EU law, or consideration of their validity, which are necessary for the resolution of the case'. [31]

81. Secondly, the Court has held that a national court which, in a case concerning EU law, considers that a provision of national law is not only contrary to EU law, but also unconstitutional, does not lose the right or escape the obligation under Article 267 TFEU to refer questions to the Court of Justice on the interpretation or validity of EU law by reason of the fact that the declaration that a rule of national law is unconstitutional is subject to a mandatory reference to the constitutional court. [32]

82. The Court has held that that article of the Treaty precludes Member State legislation which establishes an interlocutory procedure for the review of the constitutionality of national laws, in so far as the priority nature of that procedure prevents the national court from exercising its right or fulfilling its obligation to refer questions to the Court of Justice for a preliminary ruling, both before the submission of a question on constitutionality to the national court responsible for reviewing the constitutionality of laws and, as the case may be, after the decision of that court on that question. [33]

83. That approach is particularly necessary in the present case because the provision at issue requires the Consiglio di Giustizia amministrativa per la Regione siciliana to defer to the jurisdiction of the plenary session of the Consiglio di Stato, unlike the provision requiring a prior referral on the issue on constitutionality in *Melki and Abdeli* (C-188/10 and C-189/10, EU:C:2010:363). Indeed, under Article 99(4) of the Code of Administrative Procedure, where a matter is referred to the plenary session of the Consiglio di Stato it must 'rule on the dispute in its entirety, unless it decides to state a principle of law and to refer the remainder of the case back to the referring chamber'.

30 — Judgment in *Lyckeskog* (C-99/00, EU:C:2002:329, paragraph 14 and the case-law cited).

31 — Judgment in *Križan and Others* (C-416/10, EU:C:2013:8, paragraph 64 and the case-law cited). Emphasis added.

32 — See judgments in *Melki and Abdeli* (C-188/10 and C-189/10, EU:C:2010:363, paragraph 45), which refers to paragraphs 39, 45 and 46 of the judgment in *Mecanarte* (C-348/89, EU:C:1991:278), and *A* (C-112/13, EU:C:2014:2195, paragraph 38).

33 — Judgment in *Melki and Abdeli* (C-188/10 and C-189/10, EU:C:2010:363, paragraph 57 and operative part). See also judgment in *A* (C-112/13, EU:C:2014:2195, paragraph 46 and operative part).

84. The mere fact that, within the procedural system at issue in the main proceedings, it is not a matter of mandatory prior referral to another court but to the plenary session of the court hearing the main case does not appear to me to justify a derogation from the various principles underlying a broad interpretation of Article 267 TFEU and from the freedom of that national court to refer a question to the Court for a preliminary ruling.

85. The Court has not been called upon before to give a ruling on that particular point. However, the approach adopted in the judgment in *Parfums Christian Dior* (C-337/95, EU:C:1997:517) appears to me to support the analysis proposed and to be capable of being applied, *mutatis mutandis*, to the situation in which the referring court finds itself.

86. In that case, in which the national court asked the Court of Justice to rule on whether it or the Benelux Court was to be regarded as the national court against whose decisions there was no judicial remedy under national law, and which court was therefore obliged under the third paragraph of Article 267 TFEU to make a reference to the Court of Justice, the Court concluded that either court should be regarded as being obliged to make a reference to the Court under the third paragraph of Article 267 TFEU where a question relating to the interpretation of EU law was raised before it.

87. However, in that type of situation the Court has held that the two courts were not actually obliged to make a reference to it, since the authority of an interpretation provided under Article 267 TFEU might 'deprive [the] obligation [to make a reference for a preliminary ruling] of its purpose and thus empty it of its substance'. [34]

88. Although that case involved two separate courts, that particular situation is none the less similar to the situation of a chamber of the Consiglio di Stato and its plenary session: both are national courts against whose decisions there is no judicial remedy under national law.

89. Accordingly, it would seem to me that the reasoning employed by the Court in *Parfums Christian Dior* (C-337/95, EU:C:1997:517) could be transposed, if necessary, to the present case: 'if, prior to making a reference to the [plenary session], a court like [a chamber of the Consiglio di Stato] has made use of its power to submit the question raised to the Court of Justice, the authority of the interpretation given by the latter may remove from a court like the [plenary session of the Consiglio di Stato] its obligation to submit a question in substantially the same terms before giving its judgment. Conversely, if no reference has been made to the Court of Justice by a court like the [chamber of the Consiglio di Stato], a court like the [plenary session of the Consiglio di Stato] must submit the question to the Court of Justice, whose ruling may then remove from the [chamber of the Consiglio di Stato] the obligation to submit a question in substantially the same terms before giving its judgment'. [35]

3. Interim conclusion

90. First, if the principle of law stated in judgment No 4/2011 and amended in judgment No 9/2014 were not capable of being interpreted in a manner consistent with Article 1(3) of Directive 89/665, as described by the Court in *Fastweb* (C-100/12, EU:C:2013:448) and in the present case, the referring court would have to disapply it.

34 — Judgment in *Parfums Christian Dior* (C-337/95, EU:C:1997:517, paragraph 29).

35 — Judgment in *Parfums Christian Dior* (C-337/95, EU:C:1997:517, paragraph 30). It should be noted that, under Article 99(4) of the Code of Administrative Procedure, the plenary session may adjudicate on the entire dispute or decide merely to state a principle of law and to refer the remainder of the case back to the referring chamber.

91. Secondly, I consider that Article 267 TFEU precludes a provision such as Article 99(3) of the Code of Administrative Procedure, interpreted as requiring the chamber of a court against whose decisions there is no judicial remedy, where it does not concur with a principle of law stated by the plenary session of that same court, to refer to the plenary session the decision under appeal, without first having the opportunity to make a reference to the Court of Justice for a preliminary ruling.

92. Therefore, unless Article 99 of the Code of Administrative Procedure were to be interpreted as being consistent with EU law, a chamber of the Consiglio di Stato wishing to make a reference to the Court under Article 267 TFEU would have to disapply Article 99(3) of the Code of Administrative Procedure. Thus, '[p]ursuant to the principle of the primacy of [EU] law, a conflict between a provision of national law and a directly applicable provision of the Treaty is to be resolved by a national court applying [EU] law, if necessary by refusing to apply the conflicting national provision, and not by a declaration that the national provision is invalid, the powers of authorities, courts and tribunals in that regard being a matter to be determined by each Member State'. [36]

VI – **Conclusion**

93. In the light of the above considerations, I propose that the Court should answer the question referred for a preliminary ruling by the Consiglio di Giustizia amministrativa per la Regione siciliana as follows:

(1) The interpretation of Article 1(3) 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 the Council of 11 December 2007, given by the Court of Justice of the European Union in the judgment in *Fastweb* (C-100/12, EU:C:2013:448) is also applicable in a situation in which, first, an action for review has been filed by a single tenderer, even though several undertakings had been admitted to the tendering procedure and, secondly, the successful tenderer has in turn filed a counterclaim in the same proceedings and both the applicant tenderer and the successful tenderer have a legitimate interest in excluding the other operator.

(2) Where a provision of a directive has already been interpreted by the Court of Justice of the European Union, a national court against whose decisions there is no judicial remedy under national law must interpret national law in the manner advocated by the Court of Justice of the European Union and, if no such interpretation proves possible, disapply the provision of national law at issue without first being either compelled to make or prevented from making a reference to the Court of Justice of the European Union for a preliminary ruling.

Article 267 TFEU precludes a provision such as Article 99(3) of the Italian Code of Administrative Procedure, interpreted as requiring the chamber of a court against whose decisions there is no judicial remedy, where it does not concur with a principle of law stated by the plenary session of that same court, to refer to the plenary session the decision under appeal, without having the opportunity to make a reference to the Court of Justice of the European Union for a preliminary ruling.

36 — Judgment in *Filipiak* (C-314/08, EU:C:2009:719, paragraph 82).