Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

26 March 2020*

(Reference for a preliminary ruling – Public procurement – Review procedures concerning the award of public supply and public works contracts – Directive 89/665/EEC – Procurement procedures of entities operating in the water, energy, transport and telecommunications sectors – Directive 92/13/EEC – Public procurement – Directives 2014/24/EU and 2014/25/EU – Review of the application of public procurement rules – National legislation which allows certain bodies to initiate a procedure of their own motion where there has been an unlawful amendment to a contract which is in the course of being performed – Time-barring of an authority's right to initiate a procedure of its own motion – Principles of legal certainty and proportionality)

In Joined Cases C-496/18 and C-497/18,

TWO REQUESTS for a preliminary ruling under Article 267 TFEU from the Fővárosi Törvényszék (Budapest High Court, Hungary), made by decisions of 7 June 2018, received at the Court on 30 July 2018, in the proceedings

Hungeod Közlekedésfejlesztési, **Földmérési, Út- és Vasúttervezési Kft**. (C-496/18),

Sixense Soldata (C-496/18),

Budapesti Közlekedési Zrt. (C-496/18 and C-497/18),

v

Közbeszerzési Hatóság Közbeszerzési Döntőbizottság,

intervener:

Közbeszerzési Hatóság Elnöke,

THE COURT (Fourth Chamber),

composed of M. Vilaras (Rapporteur), President of the Chamber, S. Rodin, D. Šváby, K. Jürimäe and N. Piçarra, Judges,

Advocate General: M. Bobek,

Registrar: R. Șereș, Administrator,

having regard to the written procedure and further to the hearing on 4 September 2019,

* Language of the cases: Hungarian.

after considering the observations submitted on behalf of:

– Budapesti Közlekedési Zrt., by T.J. Misefay, ügyvéd,

– the Közbeszerzési Hatóság Közbeszerzési Döntőbizottság, by É. Horváth, acting as Agent,

– the Közbeszerzési Hatóság Elnöke, by T.A. Cseh, acting as Agent,

– the Hungarian Government, by M.Z. Fehér, acting as Agent,

– the European Commission, by L. Haasbeek, P. Ondrůšek and A. Sipos, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 21 November 2019,

gives the following

Judgment

1 These requests for a preliminary ruling concern, in essence, the interpretation of Article 1(1) and (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 (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'), of Article 1(1) and (3) of Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1992 L 76, p. 14), as amended by Directive 2007/66, ('Directive 92/13'), of Article 83(1) and (2) 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), of Article 99(1) and (2) of 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 and repealing Directive 2004/17/EC (OJ 2014 L 94, p. 243), of Articles 41 and 47 of the Charter of Fundamental Rights of the European Union ('the Charter') and of the principles of legal certainty and proportionality.

2 The requests have been made in two sets of proceedings brought, first, by Hungeod Közlekedésfejlesztési, Földmérési, Út- és Vasúttervezési Kft. ('Hungeod'), Sixense Soldata ('Sixense') and Budapesti Közlekedési Zrt. (Case C-496/18), and, second, by Budapesti Közlekedési (Case C-497/18) against the Közbeszerzési Hatóság Közbeszerzési Döntőbizottság (Public Procurement Arbitration Panel of the Public Procurement Authority, Hungry; 'the Arbitration Panel') concerning the amendment of contracts in the course of being performed that were entered into following public procurement

Legal context

EU law

Directive 89/665

3 Article 1 of Directive 89/665 provides:

‘1. …

Member States shall take the measures necessary to ensure that, as regards contract award procedures falling within the scope of 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)], 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 ground that such decisions have infringed Community law in the field of public procurement or national rules implementing 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 public supply or public works contract and who has been or risks being harmed by an alleged infringement.’

4 Article 2d of Directive 89/665, headed ‘Ineffectiveness’, was inserted by Directive 2007/66 and is worded as follows:

‘1. Member States shall ensure that a contract is considered ineffective by a review body independent of the contracting authority or that its ineffectiveness is the result of a decision of such a review body in any of the following cases:

(a) if the contracting authority has awarded a contract without prior publication of a contract notice in the *Official Journal of the European Union* without this being permissible in accordance with Directive 2004/18/EC;

…

2. The consequences of a contract being considered ineffective shall be provided for by national law.’

Directive 92/13

5 Article 1 of Directive 92/13 provides:

‘1. …

Member States shall take the measures necessary to ensure that, as regards contracts falling within the scope of 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)], decisions taken by contracting entities 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 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.'

6 Article 2d of Directive 92/13, headed 'Ineffectiveness', was inserted by Directive 2007/66 and provides as follows:

'1. Member States shall ensure that a contract is considered ineffective by a review body independent of the contracting authority or that its ineffectiveness is the result of a decision of such a review body in any of the following cases:

(a) if the contracting authority has awarded a contract without prior publication of a notice in the *Official Journal of the European Union* without this being permissible in accordance with Directive 2004/17/EC;

…

2. The consequences of a contract being considered ineffective shall be provided for by national law.'

Directive 2007/66

7 Recitals 2, 25, 27 and 36 of Directive 2007/66 state:

'(2) Directives [89/665] and [92/13] … apply only to contracts falling within the scope of Directives [2004/18] and [2004/17] as interpreted by the Court of Justice of the European Communities, whatever competitive procedure or means of calling for competition is used, including design contests, qualification systems and dynamic purchasing systems. According to the case-law of the [Court], the Member States should ensure that effective and rapid remedies are available against decisions taken by contracting authorities and contracting entities as to whether a particular contract falls within the personal and material scope of Directives [2004/18] and [2004/17].

…

(25) Furthermore, the need to ensure over time the legal certainty of decisions taken by contracting authorities and contracting entities requires the establishment of a reasonable minimum period of limitation on reviews seeking to establish that the contract is ineffective.

…

(27) As this Directive strengthens national review procedures, especially in cases of an unlawful direct award, economic operators should be encouraged to make use of these new mechanisms. For reasons of legal certainty the enforceability of the ineffectiveness of a contract is limited to a certain period. The effectiveness of these time-limits should be respected.

…

(36) This Directive respects fundamental rights and observes the principles recognised in particular by the [Charter]. In particular, this Directive seeks to ensure full respect for 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.'

Directive 2014/24

8 Recitals 121 and 122 of Directive 2014/24 state:

'(121) The evaluation has shown that there is still considerable room for improvement in the application of the Union public procurement rules. With a view to a more efficient and consistent application of the rules, it is essential to get a good overview on possible structural problems and general patterns in national procurement policies, in order to address possible problems in a more targeted way. …

(122) Directive [89/665] provides for certain review procedures to 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 Union law in the field of public procurement or national rules transposing that law. Those review procedures should not be affected by this Directive. However, citizens, concerned stakeholders, organised or not, and other persons or bodies which do not have access to review procedures pursuant to Directive [89/665] do nevertheless have a legitimate interest, as taxpayers, in sound procurement procedures. They should therefore be given a possibility, otherwise than through the review system pursuant to Directive [89/665] and without it necessarily involving them being given standing before courts and tribunals, to indicate possible violations of this Directive to a competent authority or structure. …'

9 As set out in Article 83(1) and (2) of Directive 2014/24:

'1. In order to effectively ensure correct and efficient implementation, Member States shall ensure that at least the tasks set out in this Article are performed by one or more authorities, bodies or structures. They shall indicate to the Commission all authorities, bodies or structures competent for those tasks.

2. Member States shall ensure that the application of public procurement rules is monitored.

…'

Directive 2014/25

10 Recitals 127 and 128 of Directive 2014/25 are, in essence, identical to recitals 121 and 122 of Directive 2014/24.

11 Article 99(1) and (2) of Directive 2014/25 provides:

'1. In order to effectively ensure correct and efficient implementation, Member States shall make sure that at least the tasks set out in this Article are performed by one or more authorities, bodies or structures. They shall indicate to the Commission all authorities or structures competent for those tasks.

2. Member States shall ensure that the application of public procurement rules is monitored.

…'

Hungarian law

The 2003 Law on Public Procurement

12 Article 303(1) of the közbeszerzésekről szóló 2003. évi CXXIX. törvény (Law No CXXIX of 2003 on Public Procurement; 'the 2003 Law on Public Procurement') provides:

'The parties may amend the part of the contract established on the basis of the conditions set out in the call for tenders or in the documentation relating thereto, and on the basis of the content of the tender, only where the contract, as a result of a circumstance which has arisen after the contract has been entered into – for a reason which was not foreseeable at the time when the contract was entered into – infringes the substantive legitimate expectations of one of the co-contractors.'

13 Article 306/A(2) of the 2003 Law on Public Procurement is worded as follows:

'Any contract coming within the scope of this law shall be void where:

(a) the public procurement procedure was unlawfully disregarded at the time when that contract was entered into

…'

14 Article 307 of the 2003 Law on Public Procurement provides:

'(1) The contracting entity is required to draw up, in accordance with the model laid down specifically by law, a statement regarding amendments to and performance of the contract, and shall publish it by way of a notice to be included in the *Közbeszerzési Értesítő* [*Public Procurement Journal*]. That notice shall be delivered no later than 15 working days from the amendment of the contract or from the performance of the contract by both parties. In the case of a contract concluded for a period exceeding one year or for an indefinite period, a statement of the partial performance of the contract shall be drawn up annually from the date on which the contract is entered into. The obligation to provide information relating to the performance of the contract requires – if performance takes place on another date, or on dates other than those envisaged – that date of performance of the contract recognised by the contracting entity and the date when payment is made be specifically stated. The party which entered into the contract as a tenderer shall declare in the statement whether it agrees with the elements set out therein.

…

(3) The President of the Council on Public Procurement shall take the initiative to commence a procedure of his own motion before [the Arbitration Panel] if it is plausible that the contract was amended in breach of Article 303, or that the contract was performed in breach of Article 304 or Article 305.'

15 Article 327 of the 2003 Law on Public Procurement provides:

'(1) The following bodies or persons may take the initiative to commence proceedings of their own motion before [the Arbitration Panel] if, in exercising their powers, they become aware of conduct or an omission which is contrary to this law:

(a) the President of the Council on Public Procurement;

…

(2) A procedure may be commenced of a body's own motion before [the Arbitration Panel]:

(a) on the initiative of one of the bodies referred to in paragraph 1(a), (b) and (d) to (i) within 30 days as from the date on which that body becomes aware of the infringement or, in the case where the public procurement procedure has been disregarded, from the date on which the contract was entered into, or – if that date cannot be established – from the date on which that body becomes aware of the start of the performance of the contract by one of the parties, but at the latest within one year as from the occurrence of the infringement, or within three years in cases where the public procurement procedure has been disregarded.

…'

16 Article 328 of the 2003 Law on Public Procurement provides:

'(1) The President of the Council on Public Procurement shall take the initiative to commence proceedings of his own motion before [the Arbitration Panel]

…

(c) in the case referred to in Article 307(3).

(2) Article 327(2) to (7) shall apply to the initiative referred to in paragraph 1 above.'

17 As set out in Article 379(2) of the 2003 Law on Public Procurement:

'The Council [on Public Procurement]

…

(l) shall follow attentively the amendment and performance of contracts entered into following a public procurement procedure (Article 307(4));

…'

The 2015 Law on Public Procurement

18 Article 2(8) of the közbeszerzésekről szóló 2015. évi CXLIII. törvény (Law No CXLIII of 2015 on Public Procurement; 'the 2015 Law on Public Procurement') provides:

'Unless otherwise provided in this law, the provisions of the [Civil Code] shall apply to contracts concluded following a public procurement procedure.'

19 Article 148(1) of the 2015 Law on Public Procurement Law is worded as follows:

'A procedure before [the Arbitration Panel] shall be initiated upon application or on a body or person's own motion.'

20 Article 152(1) and (2) of the 2015 Law on Public Procurement provides:

'(1) The following bodies or persons may take the initiative to commence a procedure of their own motion before [the Arbitration Panel] if, in exercising their powers, they become aware of conduct or an omission which is contrary to this law:

(a) the Közbeszerzési Hatóság Elnöke [the President of the Public Procurement Authority, Hungary];

…

(2) One of the bodies or persons referred to in paragraph 1 may take the initiative to commence a procedure of its own motion before [the Arbitration Panel] within 60 days as from the date on which that body becomes aware of the infringement, but

(a) at the latest within the time period of 3 years as from the occurrence of the infringement,

(b) by way of derogation from (a) above, where purchases have been made without a public procurement procedure having been organised, within a maximum of five years as from the date on which the contract was entered into, or – if that date cannot be established – as from the commencement of the performance of the contract by one of the parties, or

(c) by way of derogation from (a) and (b) above, where acquisitions have been made with financial aid, during the period for which documents must be retained as laid down specifically by law relating to the payment and use of the aid provided, but as a minimum within a period of 5 years from the occurrence of the infringement – where acquisitions have been made without a public procurement procedure having been organised, as from the date on which the contract was entered into or, if that date cannot be established, as from the commencement of the performance of the contract by one of the parties.'

21 As set out in Article 153 of the 2015 Law on Public Procurement:

'(1) The President of the Public Procurement Authority shall take the initiative to commence the procedure of his own motion before [the Arbitration Panel]

…

(c) if it is plausible, in the light of the result of the monitoring carried out by the Public Procurement Authority in accordance with Article 187(2)(j), or even without administrative monitoring having been carried out, that the amendment or performance of the contract has been carried out in infringement of this law, in particular if an infringement of the type referred to in Article 142(2) has been committed.

…

(3) Article 152(2) to (8) shall apply to the initiative referred to in paragraphs 1 and 2.'

22 Article 187(1) and (2) of the 2015 Law on Public Procurement provides:

'(1) The task of the Public Procurement Authority shall be to contribute effectively, while taking into account the public interest and the interests of contracting entities and tenderers, to the development of public procurement policy, and to the emergence and generalisation of conduct that complies with public procurement law, in order to promote publicity and transparency of public spending.

The [Public Procurement] Authority

…

(j) shall follow attentively the amendment of contracts entered into following a public procurement procedure and, in the context of the administrative review …, performance shall also be monitored – in accordance with the detailed rules provided for specifically by law – and, inter alia, adopt the measures referred to in Article 153(1)(c) and in Article 175;

…'

23 As set out in Article 197(1) of the 2015 Law on Public Procurement:

'The provisions of this law shall apply to contracts entered into following award procedures … or public procurement procedures which commenced after its entry into force, to competition procedures commenced after that date, and to review procedures relating thereto which have been requested, commenced or brought of an authority's own motion, including dispute settlement procedures preceding an action. Article 139, Article 141, Article 142, Article 153(1)(c) and Article 175 shall apply to the possibility of amending, without carrying out a new public procurement procedure, contracts entered into following public procurement procedures which commenced before the entry into force of this law, and to the monitoring of amendments and the performance of contracts. The provisions of Chapter XXI shall also apply to review procedures relating to such contracts.'

Government Decree 4/2011

24 Article 1(1) of the 2007–2013 programozási időszakban az Európai Regionális Fejlesztési Alapból, az Európai Szociális Alapból és a Kohéziós Alapból származó támogatások felhasználásának rendjéről szóló 4/2011. (I. 28.) Korm. Rendelet (Government Decree 4/2011 of 28 January 2011 on the use of aid from the European Regional Development Fund, the European Social Fund and the Cohesion Fund for the 2007–2013 programming period; 'Government Decree 4/2011') provides as follows:

'The scope of this Regulation shall extend to (i) the assumption and implementation of commitments – whether for consideration or by way of grants – from the European Regional Development Fund, the European Social Fund and the Cohesion Fund … for the 2007–2013 programming period – with the exception of aid from European Territorial Cooperation programmes; (ii) the monitoring of implementation; (iii) natural and legal persons and entities without legal personality involved in the use, payment and monitoring of the grants; and (iv) applicants, recipients and beneficiaries of grants.'

25 As set out in Article 80(3) of Government Decree 4/2011:

'The beneficiary and the bodies involved in the payment of aid shall keep separate accounts for each project, register all the documents related to the project separately and retain them until at least 31 December 2020.'

The Civil Code

26 Article 200(2) of the Polgári Törvénykönyvről szóló 1959. évi IV. törvény (Law No IV of 1959 establishing the Civil Code) provides:

'Contracts which breach legal provisions and contracts concluded by evading a legal provision shall be void, save where a different legal consequence is provided for by law.'

27 Article 6:95 of the Polgári törvénykönyvről szóló 2013. évi V. törvény (Law No V of 2013 establishing the Civil Code) provides:

'Contracts which breach legal provisions and contracts concluded by evading a legal provision shall be void, save where a different legal consequence is provided for by law. Without prejudice to other legal penalties, a contract shall be void where a legal provision states so specifically or where the purpose of that provision is to prohibit the legal effect sought by means of the contract in question.'

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

Case C-496/18

28 On 30 September 2005, Budapesti Közlekedési, acting as contracting authority, published a call for tenders in the *Official Journal of the European Union* for the award of a public contract for the 'acquisition of a monitoring system for the surveillance of movements of the structures and the control of noise and vibrations during the first stage of construction of Line 4 of the metro in Budapest (Hungary)', the estimated value of which exceeded the Community thresholds and which received financial assistance from the European Union. The contract was awarded to a consortium of undertakings consisting of Hungeod and Sixense.

29 The corresponding contract was concluded on 1 March 2006.

30 On 5 October 2009, the contracting parties decided to amend the contract, claiming that unforeseeable circumstances had arisen. On 18 November 2009, a notice of that amendment of the contract was published in the *Közbeszerzési Értesítő* (*Public Procurement Journal*).

31 On 29 May 2017, the President of the Public Procurement Authority referred the matter to the Arbitration Panel, seeking, first, a declaration that the applicants in the main proceedings had committed an infringement by amending the contract in breach of Article 303(1) of the 2003 Law on Public Procurement and, second, the imposition of fines on the applicants. The President stated that he had become aware of the infringement on 30 March 2017 and referred to Article 153(3) and Article 152(2)(a) of the 2015 Law on Public Procurement as the basis for his request.

32 In its decision of 3 August 2017, the Arbitration Panel found, at the outset, that the procedural provisions of the 2015 Law on Public Procurement were applicable in the present instance, since, although that law did not enter into force until 1 November 2015 and, in principle, concerns only contracts entered into after that date, it applies, by virtue of the transitional provisions contained in Article 197(1) thereof, to the review of amendments to contracts made before it entered into force. The Arbitration Panel pointed out that the project carried out under the contract at issue in the main proceedings received EU funding and that, therefore, in accordance with Article 80(3) of Government Decree 4/2011, the period for a body or person to initiate a procedure of its own motion expires on 31 December 2020.

33 On the merits, after finding that there had been an infringement of Article 303 of the 2003 Law on Public Procurement, the Arbitration Panel ordered Budapesti Közlekedési to pay a fine of HUF 25 000 000 (approximately EUR 81 275) and Hungeod and Sixense to pay, jointly and severally, a fine of HUF 5 000 000 (approximately EUR 16 255).

34 The applicants in the main proceedings brought an action against the Arbitration Panel's decision before the Fővárosi Törvényszék (Budapest High Court, Hungary).

35 The referring court is uncertain as to the requirements which arise from EU law, more specifically from the principle of legal certainty, in a situation where new legislation of a Member State, such as the 2015 Law on Public Procurement, authorises, in respect of a public contract concluded before that legislation entered into force, the monitoring authority to initiate of its own motion, notwithstanding the expiry of the limitation periods laid down by previous national legislation, an investigation into public procurement infringements committed before the new legislation entered into force in order to have the Arbitration Panel establish that an infringement has been committed and to impose a penalty.

36 The referring court states that, unlike cases in which the Court has been called upon to rule on time limits for bringing a review in public procurement procedures, Case C-496/18 concerns the right of a monitoring authority to initiate a review in the interest of the objective protection of rights. It is uncertain as to the application in such a situation of the principles of EU law, such as those of legal certainty or effectiveness.

37 The referring court also refers to the content of Article 99 of Directive 2014/25 and questions whether there are limits on the powers conferred on the Member States in relation to the prerogatives of the monitoring authorities and whether the requirements of EU law concerning the protection of persons with an interest in obtaining a particular contract also hold good in that context.

38 It expresses doubts as to the compatibility with EU law of the power provided for, as a transitional measure, in Article 197(1) of the 2015 Law on Public Procurement to review contractual amendments which were made before that law entered into force.

39 The referring court is uncertain as to whether it is possible to apply the rule that, in the case of a project financed by EU funds, the time limit for bringing a review is linked to the period for which documents are to be retained, since that rule was introduced by the 2015 Law on Public Procurement.

40 It wishes to know if it is relevant, for the purposes of determining the above questions of law, to ascertain the legal, regulatory, technical or organisational deficiencies or other obstacles that prevented an investigation from being conducted into the infringement of public procurement rules at the time when the infringement took place.

41 The referring court points out that recitals 25 and 27 of Directive 2007/66 emphasise the requirement of legal certainty only as regards reviews seeking to establish that the contract is ineffective and not as regards actions seeking to establish, and impose penalties in respect of, an infringement.

42 In those circumstances, the Fővárosi Törvényszék (Budapest High Court) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Must Article 41(1) and Article 47 of the [Charter], recitals 2, 25, 27 and 36 of Directive [2007/66], Article 1(1) and (3) of Directive [92/13] and, in this context, the principle of legal certainty, as a general principle of EU law, and the requirement for effective and rapid remedies against decisions by contracting authorities in public procurement cases, be interpreted as precluding legislation of a Member State which, in relation to public procurement contracts entered into before that legislation came into force, provides a general authorisation that enables the competent (monitoring) authority created by that legislation, after the periods established in the Member State’s previous legislation for bringing an action for review of public procurement infringements committed prior to the entry into force of the new legislation have expired but within the time period established in the new legislation, to commence proceedings to investigate a specific public procurement infringement and to rule on the substance, leading to a ruling that the infringement did take place, the imposition of a public procurement penalty, and the application of the consequences of the voiding of the public contract?

(2) Can the legal rules and principles referred to in Question 1 — and also the effective exercise of the (subjective and personal) right of review enjoyed by parties with an interest in the award of a public contract — be applied to the right to commence and conduct review proceedings conferred on the (monitoring) authorities created by the law of the Member State, which have the power to identify and investigate public procurement infringements of their own motion, and which are under a duty to defend the public interest?

(3) Does Article 99(1) and (2) of Directive [2014/25] mean that, in order to defend EU financial interests in the field of public procurement, the law of the Member State may, through the adoption of new legislation, confer on the (monitoring) authorities which have power under the law of the Member State to identify and investigate public procurement infringements of their own motion, and which are under a duty to defend the public interest, a general power to investigate public procurement infringements committed before the entry into force of the legislation in question and to commence and conduct proceedings, even where the time periods established under the previous legislation have expired?

(4) If — having regard to the legal rules and principles referred to in Question 1 — the (monitoring) authorities' power of investigation described in Questions 1 and 3 is held to be compatible with EU law, is any relevance to be ascribed to the legal, regulatory, technical or organisational deficiencies or other obstacles that prevented the public procurement infringement from being investigated at the time when the infringement took place?

(5) Even if, in the light of the above principles, the (monitoring) authorities which are authorised by the law of the Member State to identify and investigate public procurement infringements of their own motion, and which are under a duty to defend the public interest may be granted the power referred to in Questions 1 to 4, must Article 41(1) and Article 47 of the [Charter], recitals 2, 25, 27 and 36 of Directive [2007/66], Article 1(1) and (3) of Directive [92/13] and, in this context, the principle of legal certainty, as a general principle of EU law, and the requirement for effective and rapid remedies against decisions by contracting authorities in public procurement cases, and the proportionality principle, be interpreted as meaning that the national courts may assess whether the period of time that has elapsed between the occurrence of the infringement, the expiry of the period previously established for bringing an action for review, and the commencement of the proceedings to investigate the infringement, is reasonable and proportionate, and may use this as a basis for determining the legal consequences of the nullity of the contested decision or other consequences established by the law of the Member State?'

Case C-497/18

43 On 3 January 2009, Budapesti Közlekedési published, in its capacity as contracting authority, a call for tenders in the *Official Journal of the European Union* with a view to awarding a public contract for 'the provision of services requiring expertise in relation to the management of the DBR project during the first stage of construction of metro Line 4. 7th part: Risk management expert', the estimated value of which exceeded the Community thresholds and which received financial assistance from the European Union. The contract was awarded to Matrics Consults Ltd, which is established in the United Kingdom.

44 The corresponding contract was concluded on 14 May 2009. It was terminated on 16 November 2011 by Budapesti Közlekedési with effect from 31 December 2011.

45 On 30 May 2017, the President of the Public Procurement Authority referred the matter to the Arbitration Panel, seeking, first, a declaration that Budapesti Közlekedési and Matrics Consults had committed infringements and, second, the imposition on them of fines. The President stated that, although the parties to the contract had not amended it in writing, they had, as a result of their

conduct when paying invoices and issuing certificates of performance, departed from the payment conditions defined at the time of the tender submission and included in the contract to such an extent that those changes had to be regarded as an amendment to the contract. Accordingly, the President of the Public Procurement Authority took the view that the parties had infringed Article 303(1) of the 2003 Law on Public Procurement. He stated that he had become aware of the infringement on 31 March 2017, the infringement being deemed to have taken place on 8 February 2010.

46 In its decision of 18 August 2017, the Arbitration Panel found, at the outset, that the procedural provisions of the 2015 Law on Public Procurement were applicable in the present instance, since, although that law did not enter into force until 1 November 2015 and, in principle, concerns only contracts concluded after that date, it applies, by virtue of the transitional provisions contained in Article 197(1) thereof, to the review of amendments to contracts made before the date on which it entered into force.

47 On the merits, the Arbitration Panel found that there had been an infringement of Article 303 of the 2003 Law on Public Procurement and ordered Budapesti Közlekedési to pay a fine of HUF 27 000 000 (approximately EUR 88 938) and Matrics Consults to pay a fine of HUF 13 000 000 (approximately EUR 42 822).

48 Budapesti Közlekedési and Matrics Consults brought an action against the Arbitration Panel's decision before the Fővárosi Törvényszék (Budapest High Court).

49 The referring court sets out considerations which are similar to those in Case C-496/18, as set out in paragraphs 35 to 41 of the present judgment.

50 In those circumstances, the Fővárosi Törvényszék (Budapest High Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Must Article 41(1) and Article 47 of the [Charter], recitals 2, 25, 27 and 36 of Directive [2007/66], Article 1(1) and (3) of Directive [89/665] and, in this context, the principle of legal certainty, as a general principle of EU law, and the requirement for effective and rapid remedies against decisions by contracting authorities in public procurement cases, be interpreted as precluding legislation of a Member State which, in relation to public procurement contracts entered into before that legislation came into force, provides a general authorisation that enables the competent (monitoring) authority created by that legislation, after the periods established in the Member State's previous legislation for bringing an action for review of public procurement infringements committed prior to the entry into force of the new legislation have expired but within the time period established in the new legislation, to commence proceedings to investigate a specific public procurement infringement and to rule on the substance, leading to a ruling that the infringement did take place, the imposition of a public procurement penalty, and the application of the consequences of the voiding of the public contract?

(2) Can the legal rules and principles referred to in Question 1 — and also the effective exercise of the (subjective and personal) right of review enjoyed by parties with an interest in the award of a public contract — be applied to the right to commence and conduct review proceedings conferred on the (monitoring) authorities created by the law of the Member State, which have the power to identify and investigate public procurement infringements of their own motion, and which are under a duty to defend the public interest?

(3) Does Article 83(1) and (2) of Directive [2014/24] mean that, in order to defend EU financial interests in the field of public procurement, the law of the Member State may, through the adoption of new legislation, confer on the (monitoring) authorities which have power under the law of the Member State to identify and investigate public procurement infringements of their

own motion, and which are under a duty to defend the public interest, a general power to investigate public procurement infringements committed before the entry into force of the legislation in question and to commence and conduct proceedings, even where the time periods established under the previous legislation have expired?

(4) If — having regard to the legal rules and principles referred to in Question 1 — the (monitoring) authorities' power of investigation described in Questions 1 and 3 is held to be compatible with EU law, is any relevance to be ascribed to the legal, regulatory, technical or organisational deficiencies or other obstacles that prevented the public procurement infringement from being investigated at the time when the infringement took place?

(5) Even if, in the light of the above principles, the (monitoring) authorities which are authorised by the law of the Member State to identify and investigate public procurement infringements of their own motion, and which are under a duty to defend the public interest may be granted the power referred to in Questions 1 to 4, must Article 41(1) and Article 47 of the [Charter], recitals 2, 25, 27 and 36 of Directive [2007/66], Article 1(1) and (3) of Directive [89/665] and, in this context, the principle of legal certainty, as a general principle of EU law, and the requirement for effective and rapid remedies against decisions by contracting authorities in public procurement cases, and the proportionality principle, be interpreted as meaning that the national courts may assess whether the period of time that has elapsed between the occurrence of the infringement, the expiry of the period previously established for bringing an action for review, and the commencement of the proceedings to investigate the infringement, is reasonable and proportionate, and may use this as a basis for determining the legal consequences of the nullity of the contested decision or other consequences established by the law of the Member State?'

51 By decision of the President of the Court of 18 September 2018, Cases C-496/18 and C-497/18 were joined for the purposes of the written and oral procedure and of the judgment.

Admissibility of the requests for a preliminary ruling

52 The President of the Public Procurement Authority and the Hungarian Government take the view that the requests for a preliminary ruling are inadmissible on the ground that the national legislation at issue in the main proceedings, specifically Article 303 of the 2003 Law on Public Procurement and Article 197 of the 2015 Law on Public Procurement, does not come within the scope of EU law.

53 In that regard, it should be noted that, according to settled case-law, questions on the interpretation of EU law referred by a national court in the factual and legislative context which that court is responsible for defining, and the accuracy of which is not a matter for the Court of Justice to determine, enjoy a presumption of relevance. Where such questions concern the interpretation of EU law, the Court is, in principle, bound to give a ruling (see, to that effect, judgment of 17 October 2019, *Comida paralela 12*, C-579/18, EU:C:2019:875, paragraph 18 and the case-law cited).

54 Thus, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine, in the light of the particular circumstances of the case, both the need for a preliminary ruling in order for it to deliver judgment, and the relevance of the questions submitted to the Court (judgment of 17 October 2019, *Comida paralela 12*, C-579/18, EU:C:2019:875, paragraph 19 and the case-law cited).

55 However, where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it, it may reject the request for a preliminary ruling as inadmissible (judgment of 17 October 2019, *Comida paralela 12*, C-579/18, EU:C:2019:875, paragraph 20 and the case-law cited).

56 In the present cases, by the questions which it has referred, the referring court asks the Court whether various provisions of EU law, be they set out in the Charter, in Directives 89/665 and 92/13 relating to review procedures in the field of public procurement, or in Directives 2014/24 and 2014/25 on the award of public contracts, and certain general principles of EU law, in particular those of legal certainty and proportionality, preclude the possibility, provided for by Hungarian legislation, of a national monitoring authority being authorised to initiate of its own motion, under new legislation, a procedure for the review of amendments made to a public contract so that the monitoring authority can impose penalties on the contracting parties and the contractual amendments may be set aside by the national court.

57 It is apparent from the orders for reference that, when they were entered into, the contracts that were the subject of the amendments at issue in the main proceedings came within the scope of EU law, since the corresponding public contracts exceeded the thresholds laid down by the relevant EU legislation.

58 Furthermore, it is, prima facie, particularly necessary for the referring court to be provided with clarification as to whether the directives or the general principles of EU law which it invokes preclude procedures that can be initiated by an authority of its own motion, such as the procedure at issue in the main proceedings.

59 Lastly, there is nothing in the documents before the Court to suggest that the interpretation of EU law that is sought bears no relation to the subject matter of the disputes in the main proceedings or their purpose, or that the Court does not have before it the factual or legal material necessary to give a useful answer to the questions referred.

60 It follows from the foregoing that the requests for a preliminary ruling are admissible.

Consideration of the questions referred

Preliminary observations

61 According to the referring court, the outcome of the disputes in the main proceedings depends on whether the directives and general principles of EU law, referred to in paragraph 56 of the present judgment, preclude national legislation under which a national monitoring authority may initiate, of its own motion, a review procedure in respect of amendments made to public contracts, even though those amendments took place under previous legislation and the limitation period laid down by that legislation had already expired as at the date on which the monitoring authority initiated the procedure of its own motion.

62 In the first place, it should be noted that the provisions of the Charter invoked by the referring court are not relevant to a resolution of the disputes in the main proceedings.

63 It is clear from the wording of Article 41 of the Charter that it is addressed not to the Member States but solely to the institutions, bodies, offices and agencies of the European Union (see, to that effect, judgments of 21 December 2011, *Cicala*, C-482/10, EU:C:2011:868, paragraph 28, and of 9 March 2017, *Doux*, C-141/15, EU:C:2017:188, paragraph 60).

64 In addition, it should be noted that, when defining the detailed procedural rules governing the remedies intended to protect rights conferred by EU law on candidates and tenderers adversely affected by decisions of contracting authorities, the Member States are required to take care to ensure that the rights conferred on private individuals by EU law, in particular the right to an effective remedy and the right to a fair hearing, enshrined in Article 47 of the Charter, are not 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 to 45, and order of 14 February 2019, *Cooperativa Animazione Valdocco*, C-54/18, EU:C:2019:118, paragraph 30).

65 However, there is nothing in the documents before the Court to suggest that the procedure initiated by an authority of its own motion for the review of infringements of public procurement rules undermines the right to an effective remedy or the right to a fair hearing.

66 In the second place, as the various questions referred overlap in several respects, it is appropriate for them to be regrouped and reformulated in order to provide the referring court with the most precise answers possible.

67 Accordingly, it must be found that the referring court is asking, in essence, first, by its second questions, whether recitals 25 and 27 of Directive 2007/66, Article 1(1) and (3) of Directive 89/665, Article 1(1) and (3) of Directive 92/13, Article 83(1) and (2) of Directive 2014/24 and Article 99(1) and (2) of Directive 2014/25 require the Member States to adopt, or preclude them from adopting, legislation under which a monitoring authority may initiate of its own motion, on grounds of the protection of the European Union's financial interests, a procedure for the review of infringements of public procurement rules, second, by its first, third and fourth questions, whether the general principle of legal certainty precludes, in a review procedure initiated by a monitoring authority of its own motion, on grounds of protection of the European Union's financial interests, national legislation from providing that, in order to review the legality of amendments to public contracts, such a procedure must be brought within the limitation period set out in that national legislation, even where the limitation period laid down by previous legislation applicable on the date of the amendments has expired, and, third, by its fifth questions, if the first, third and fourth questions are answered in the negative, whether the principle of proportionality precludes a national court from being able to assess the reasonableness and proportionality of the periods that have elapsed between the commission of the infringement, the expiry of the previous limitation period and the procedure initiated in order to investigate the infringement, and from being able to draw the necessary conclusions as to the validity of the contested administrative decision, or any other legal consequence provided for by the law of the Member State.

The second questions

68 By its second questions, the referring court asks, in essence, whether recitals 25 and 27 of Directive 2007/66, Article 1(1) and (3) of Directive 89/665, Article 1(1) and (3) of Directive 92/13, Article 83(1) and (2) of Directive 2014/24 and Article 99(1) and (2) of Directive 2014/25 require the Member States to adopt, or preclude them from adopting, legislation under which a monitoring authority may initiate of its own motion, on grounds of protection of the European Union's financial interests, a review procedure in order to monitor infringements of public procurement rules.

69 In the first place, although the Hungarian Government submits that the recitals of an EU act are not binding, it must be pointed out that the operative part of an act is indissociably linked to the statement of reasons for it, with the result that, when it has to be interpreted, account must be taken of the reasons which led to its adoption (judgments of 27 June 2000, *Commission v Portugal*, C-404/97, EU:C:2000:345, paragraph 41, and of 4 December 2019, *Consorzio Tutela Aceto Balsamico di Modena*, C-432/18, EU:C:2019:1045, paragraph 29).

70 It follows that Directive 2007/66 must be interpreted in the light of recitals 25 and 27 of that directive.

71 In the second place, it should be pointed out that Directives 89/665 and 92/13, in particular Article 1(3) of those directives, do indeed merely provide that the Member States are to ensure that review procedures are 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 (see, to that effect, judgment of 21 October 2010, *Symvoulio Apochetefseon Lefkosias*, C-570/08, EU:C:2010:621, paragraph 37).

72 Those provisions are intended to protect economic operators against arbitrary behaviour on the part of contracting authorities and thus seek to ensure the existence, in all Member States, of effective remedies, so as to ensure the effective application of the EU rules on the award of public contracts, in particular at a stage where infringements can still be rectified (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 41).

73 Nonetheless, although Directives 89/665 and 92/13 require that remedies should be available to undertakings having or having had an interest in obtaining a particular contract and which have been or risk being harmed by an alleged infringement, Article 1(3) of Directive 89/665 and Article 1(3) of Directive 92/13 cannot be regarded, as the Advocate General observes in point 63 of his Opinion, as carrying out a complete harmonisation and, therefore, as envisaging all possible remedies in public procurement matters.

74 Consequently, those provisions must be interpreted as neither requiring Member States to provide for, nor precluding them from providing for, the existence of remedies in favour of national monitoring authorities so that those authorities can, in order to ensure the protection of the European Union's financial interests, obtain a declaration that infringements of public procurement rules have occurred.

75 Neither recitals 25 and 27 nor Articles 1 and 2 of Directive 2007/66, which inserted Article 2d into Directives 89/665 and 92/13, respectively, undermine such an interpretation.

76 By providing, in essence, that Member States are to ensure that a contract is considered ineffective by a review body that is independent of the contracting authority, Article 2d of Directive 89/665 and Article 2d of Directive 92/13 have served only to strengthen the review procedures which those directives require the Member States to implement, that is to say, review procedures available to undertakings having or having had an interest in obtaining a particular contract and which have been or risk being harmed by an alleged infringement.

77 In the third place, Article 83 of Directive 2014/24 and Article 99 of Directive 2014/25, which are drafted in identical terms, cannot be interpreted as requiring Member States to provide for, or as precluding them from providing for, a mechanism for a review brought by an authority of its own motion in the public interest, such as that at issue in the main proceedings.

78 In that regard, it must be stated that Article 83 of Directive 2014/24 and Article 99 of Directive 2014/25 – further context for which is given, respectively, in recitals 121 and 122 of the former directive and in recitals 127 and 128 of the latter directive – appear in Title IV, headed 'Governance', of each of those directives.

79 Thus, recital 121 of Directive 2014/24 and recital 127 of Directive 2014/25 merely state that those provisions seek to ensure a 'good overview of possible structural problems and general patterns in national procurement policies, in order to address possible problems in a more targeted way'.

80 Recital 122 of Directive 2014/24 and recital 128 of Directive 2014/25 state that the review procedures provided by Directives 89/665 and 92/13, respectively, should not be affected by Directives 2014/24 and 2014/25. Those recitals go on to state that citizens, concerned stakeholders and other persons or bodies which do not have access to those review procedures have a legitimate interest, as taxpayers, in sound procurement procedures, and should therefore be given a possibility, otherwise than through the review system pursuant to Directives 89/665 and 92/13 and without it necessarily involving them being given standing before courts and tribunals, to indicate possible breaches of Directives 2014/24 and 2014/25 to a competent authority or structure.

81 In that context, Article 83 of Directive 2014/24 and Article 99 of Directive 2014/25 each provide, in their respective paragraphs 1, that, in order effectively to ensure correct and efficient implementation of those directives, Member States are to ensure that at least the tasks set out in those articles are performed by one or more authorities, bodies or structures and, in their respective paragraphs 2, that Member States are to ensure that the application of public procurement rules is monitored.

82 In so doing, those provisions contain minimum requirements pursuant to which the Member States are obliged to establish mechanisms for monitoring the application of public procurement rules.

83 In that context, it must be noted that those provisions do not prohibit the Member States from providing for the existence of review procedures in favour of national monitoring authorities which allow those authorities to obtain a declaration of their own motion that there have been infringements of public procurement rules in order to ensure the protection of the European Union's financial interests in the field of public procurement. On the contrary, as the Advocate General states in points 72 and 73 of his Opinion, a procedure of that nature is one of the possible expressions of the new role ascribed to national monitoring authorities by Article 83 of Directive 2014/24 and by Article 99 of Directive 2014/25.

84 It follows from the foregoing that the various provisions and recitals examined in paragraphs 69 to 83 of the present judgment neither require Member States to allow, nor preclude them from allowing, a monitoring authority to initiate of its own motion, on grounds of protection of the European Union's financial interests in the field of public procurement, a review procedure in order to monitor infringements of public procurement rules.

85 However, it should be noted that, where such an automatic review procedure is provided for, it comes within the scope of EU law since the public contracts which are the subject of such a review come within the material scope of the public procurement directives.

86 Accordingly, such an automatic review procedure must comply with EU law, including the general principles of EU law, of which the general principle of legal certainty forms part.

87 Consequently, the answer to the second questions referred is that recitals 25 and 27 of Directive 2007/66, Article 1(1) and (3) of Directive 89/665, Article 1(1) and (3) of Directive 92/13, Article 83(1) and (2) of Directive 2014/24 and Article 99(1) and (2) of Directive 2014/25 must be interpreted as neither requiring Member States to adopt, nor as precluding them from adopting, legislation under which a monitoring authority may initiate of its own motion, on grounds of protection of the European Union's financial interests, a review procedure in order to monitor infringements of public procurement rules. However, where provision is made for such a procedure, it comes within the scope of EU law since the public contracts which are the subject of such a review come within the material scope of the public procurement directives and it must therefore comply with EU law, including the general principles of EU law, of which the general principle of legal certainty forms part.

The first, third and fourth questions

88 By its first, third and fourth questions, the referring court asks, in essence, whether the general principle of legal certainty precludes, in the context of a review procedure initiated by a monitoring authority of its own motion on grounds of protection of the European Union's financial interests, new national legislation from providing that, in order to review the legality of amendments to public contracts, such a procedure must be initiated within the limitation period which is laid down in that legislation, even though the limitation period laid down by previous legislation applicable at the date of those amendments has expired.

89 At the outset, it should be noted that EU law prohibits only substantial amendments to a public contract corresponding to amendments to the provisions of a public contract during its currency which constitute a new award of a contract, within the meaning of Directive 2014/24, on the ground that they are materially different in character from the original contract and, therefore, such as to demonstrate the parties' intention to renegotiate its essential terms (see, to that effect, judgments of 19 June 2008, *pressetext Nachrichtenagentur*, C-454/06, EU:C:2008:351, paragraph 34, and of 29 April 2010, *Commission* v *Germany*, C-160/08, EU:C:2010:230, paragraph 99).

90 While, under EU law, the principle of legal certainty is binding on every national authority, that is so only when that authority is responsible for applying EU law (judgments of 17 July 2008, *ASM Brescia*, C-347/06, EU:C:2008:416, paragraph 65, and of 21 March 2019, *Unareti*, C-702/17, EU:C:2019:233, paragraph 34).

91 As is clear from paragraph 85 of the present judgment, where a national monitoring authority initiates of its own motion a review procedure in respect of amendments made to a public contract which is in the course of being performed and which comes within the scope of EU public procurement rules, such a review also comes within the scope of EU law.

92 It is therefore necessary to examine whether such a review, initiated by an authority of its own motion in order to have a penalty imposed on contracting parties which have unlawfully amended the contract binding them, or even to obtain a declaration that the contract is ineffective on that ground, complies with the principle of legal certainty where the new national legislation which makes provision for that review allows the limitation periods to be reopened in respect of the amendments made, even though those amendments took place while previous legislation was in force and the limitation period provided for by that previous legislation had already expired on the date on which the review procedure was initiated.

93 In that regard, the principle of legal certainty requires, in particular, that rules of law be clear, precise and predictable in their effects, in particular where they may have negative consequences for individuals and undertakings (judgments of 17 July 2008, *ASM Brescia*, C-347/06, EU:C:2008:416, paragraph 69, and of 17 December 2015, *X-Steuerberatungsgesellschaft*, C-342/14, EU:C:2015:827, paragraph 59).

94 It must also be borne in mind that, while the principle of legal certainty precludes rules from being applied retroactively, that is to say, to a situation which existed before those rules entered into force, and irrespective of whether such application might produce favourable or unfavourable effects for the person concerned, the same principle requires that any factual situation should normally, in the absence of any express contrary provision, be examined in the light of the legal rules existing at the time when the situation obtained, the new rules thus being valid only for the future and also applying, save for derogation, to the future effects of situations which came about during the period of validity of the old law (see, to that effect, judgments of 3 September 2015, *A2A*, C-89/14, EU:C:2015:537, paragraph 37, and of 26 May 2016, *Județul Neamț and Județul Bacău*, C-260/14 and C-261/14, EU:C:2016:360, paragraph 55).

95 Furthermore, as regards limitation periods specifically, it is clear from the Court's case-law that, in order to fulfil their function of ensuring legal certainty, limitation periods must be fixed in advance (see, to that effect, judgments of 15 July 1970, *ACF Chemiefarma* v *Commission*, 41/69, EU:C:1970:71, paragraph 19, and of 5 May 2011, *Ze Fu Fleischhandel and Vion Trading*, C-201/10 and C-202/10, EU:C:2011:282, paragraph 52) and be sufficiently foreseeable (see, to that effect, judgments of 5 May 2011, *Ze Fu Fleischhandel and Vion Trading*, C-201/10 and C-202/10, EU:C:2011:282, paragraph 34, and of 17 September 2014, *Cruz & Companhia*, C-341/13, EU:C:2014:2230, paragraph 58).

96 In the present cases, it is clear from the documents before the Court that, having regard to the dates of the amendments to the public contracts at issue in the main proceedings, Article 327(2)(a) of the 2003 Law on Public Procurement was applicable. The time limit afforded by that provision to the President of the Council on Public Procurement for initiating of his own motion a procedure before the Arbitration Panel in respect of those amendments had already passed several years prior to the date on which the 2015 Law on Public Procurement entered into force, this, however, being a matter which the referring court will have to verify.

97 Accordingly, by allowing procedures to be initiated by an authority of its own motion with regard to amendments made to public contracts where those procedures were time-barred under the relevant provisions of the 2003 Law on Public Procurement applicable to those amendments, Article 197(1) of the 2015 Law on Public Procurement is not intended to cover existing legal situations, but is a provision with retroactive effect.

98 As Budapesti Közlekedési and the Commission have stated, that legislation authorises the authority competent to initiate such a procedure to reopen the limitation period even though that period had expired while the previous legislation was in force.

99 It is true that EU law exceptionally allows an act to be recognised as having retroactive effect when the purpose to be attained so demands and when the legitimate expectations of the persons concerned are duly respected (see, to that effect, judgment of 15 July 2004, *Gerekens and Procola*, C-459/02, EU:C:2004:454, paragraph 24).

100 However, the principle of the protection of legitimate expectations precludes amendments to national legislation which allow a national monitoring authority to initiate a review procedure even though the limitation period provided for by previous legislation, which was applicable on the date of those amendments, has expired.

101 Lastly, the considerations set out in paragraphs 90 to 100 of the present judgment cannot be called into question by the fact that the 2015 Law on Public Procurement seeks to ensure the protection of the European Union's financial interests in relation to public procurement and to mitigate the legal, technical or organisational deficiencies which allegedly resulted from the application of the previous legislation.

102 Consequently, the answer to the first, third and fourth questions is that the general principle of legal certainty precludes, in a review procedure initiated by a monitoring authority of its own motion on grounds of protection of the European Union's financial interests, new national legislation from providing that, in order to review the legality of amendments to public contracts, such a procedure must be initiated within the limitation period laid down in the new legislation, even though the limitation period provided for by the previous legislation, which was applicable on the date of those amendments, has expired.

The fifth questions

103 By its fifth questions, the referring court asks, in essence, whether, in the event that the first, third and fourth questions are answered in the negative, the principle of proportionality precludes a national court from being able to assess the reasonableness and proportionality of the periods that have elapsed between the commission of the infringement, the expiry of the previous limitation periods and the procedure initiated in order to investigate the infringement, and from being able to draw conclusions as to the validity of the contested administrative decision or any other legal consequence provided for by the law of the Member State.

104 In the light of the answer given to the first, third and fourth questions, there is no need to answer the fifth questions.

Costs

105 Since these proceedings are, for the parties to the main proceedings, a step in the actions 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. **Recitals 25 and 27 of Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts, Article 1(1) and (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, Article 1(1) and (3) of Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, as amended by Directive 2007/66, Article 83(1) and (2) 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, and Article 99(1) and (2) of 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 and repealing Directive 2004/17/EC must be interpreted as neither requiring Member States to adopt, nor as precluding them from adopting, legislation under which a monitoring authority may initiate of its own motion, on grounds of protection of the European Union's financial interests, a review procedure in order to monitor infringements of public procurement rules. However, where provision is made for such a procedure, it comes within the scope of EU law since the public contracts which are the subject of such a review come within the material scope of the public procurement directives and it must therefore comply with EU law, including its general principles, of which the general principle of legal certainty forms part.**

2. **The general principle of legal certainty precludes, in a review procedure initiated by a monitoring authority of its own motion on grounds of protection of the European Union's financial interests, new national legislation from providing that, in order to review the legality of amendments to public contracts, such a procedure must be initiated within the limitation period laid down in the new legislation, even though the limitation period provided for by the previous legislation, which was applicable on the date of those amendments, has expired.**

[Signatures]