Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

26 November 2015*

(Reference for a preliminary ruling — Public procurement — Directive 89/665/EEC — Principles of effectiveness and equivalence — Review procedures concerning the award of public contracts — Period allowed for commencing proceedings — National legislation making an action for damages subject to a precondition that the procedure be declared unlawful — Limitation period which starts to run irrespective of the applicant's knowledge of the unlawfulness)

In Case C-166/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the Verwaltungsgerichtshof (Administrative Court, Austria), made by decision of 25 March 2014, received at the Court on 7 April 2014, in the proceedings

MedEval — Qualitäts-, Leistungs- und Struktur-Evaluierung im Gesundheitswesen GmbH,

intervening parties:

Bundesminister für Wissenschaft, Forschung und Wirtschaft,

Hauptverband der österreichischen Sozialversicherungsträger,

Pharmazeutische Gehaltskasse für Österreich,

THE COURT (Fifth Chamber),

composed of T. von Danwitz, President of the Fourth Chamber, acting as President of the Fifth Chamber, D. Šváby, A. Rosas, E. Juhász (Rapporteur) and C. Vajda, Judges,

Advocate General: J. Kokott,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 22 April 2015,

after considering the observations submitted on behalf of:

— MedEval — Qualitäts-, Leistungs- und Struktur-Evaluierung im Gesundheitswesen GmbH, by M. Oder and A. Hiersche, Rechtsanwälte,

— the Hauptverband der österreichischen Sozialversicherungsträger, by G. Streit, Rechtsanwalt,

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

* Language of the case: German.

— the Italian Government, by G. Palmieri, acting as Agent, and by A. De Stefano, avvocato dello Stato,

— the European Commission, by B.-R. Killmann and A. Tokár, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 21 May 2015,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 (OJ 2007 L 335, p. 31; 'Directive 89/665'), and the principles of effectiveness and equivalence.

2 The reference has been made in proceedings brought by MedEval — Qualitäts-, Leistungs- und Struktur-Evaluierung im Gesundheitswesen GmbH ('MedEval') against a decision of the Bundesvergabeamt (Federal Procurement Office; 'the FPO'), by which the latter rejected MedEval's application for a declaration of the unlawfulness of the public procurement procedure held by the Hauptverband der österreichischen Sozialversicherungsträger (Central Association of Austrian Social Security Institutions) ('the Hauptverband') and concerning the implementation of an electronic medical prescription management system, which public contract was awarded to the Pharmazeutische Gehaltskasse für Österreich (General Salary Fund of Austrian pharmacists; 'the GSF').

Legal context

EU law

3 Recitals 2, 13, 14, 25 and 27 in the preamble to Directive 2007/66 state:

'(2) [Directive 89/665] … therefore [applies] only to contracts 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 351, p. 11)] … as interpreted by the Court of Justice of the [European Union], 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 of Justice, 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 [Directive 2004/18] …

…

(13) In order to combat the unlawful direct award of contracts, which the Court of Justice … has called the most serious breach of [EU] law in the field of public procurement on the part of a contracting authority or contracting entity, there should be provision for effective, proportionate and dissuasive sanctions. Therefore a contract resulting from an unlawful direct award should in principle be considered ineffective. The ineffectiveness should not be automatic but should be ascertained by or should be the result of a decision of an independent review body.

(14) Ineffectiveness is the most effective way to restore competition and to create new business opportunities for those economic operators which have been deprived unlawfully of their opportunity to compete. …

…

(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.'

4 Article 1 of Directive 89/665 provides:

'1. This Directive applies to contracts referred to in [Directive 2004/18], unless such contracts are excluded in accordance with Articles 10 to 18 of that Directive.

…

Member States shall take the measures necessary to ensure that, as regards contracts falling within the scope of [Directive 2004/18], 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 review procedures are available, under detailed rules which Member States may establish, at least to any person having or having had an interest in obtaining a particular contract who has been or risks being harmed by an alleged infringement.

…'

5 Article 2 of Directive 89/665, entitled 'Requirements for review procedures', states:

'1. 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, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure;

(c) award damages to persons harmed by an infringement.

…

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

7. Except where provided for in Articles 2d to 2f, the effects of the exercise of the powers referred to in paragraph 1 of this Article on a contract concluded subsequent to its award shall be determined by national law.

Furthermore, except where a decision must be set aside prior to the award of damages, a Member State may provide that, after the conclusion of a contract in accordance with Article 1(5), paragraph 3 of this Article or Articles 2a to 2f, the powers of the body responsible for review procedures shall be limited to awarding damages to any person harmed by an infringement.

…'

6 Article 2c of that directive, entitled 'Time-limits for applying for review', is worded as follows:

'Where a Member State provides that any application for review of a contracting authority's decision taken in the context of, or in relation to, a contract award procedure falling within the scope of [Directive 2004/18] must be made before the expiry of a specified period, this period shall be at least 10 calendar days with effect from the day following the date on which the contracting authority's decision is sent to the tenderer or candidate if fax or electronic means are used or, if other means of communication are used, this period shall be either at least 15 calendar days with effect from the day following the date on which the contracting authority's decision is sent to the tenderer or candidate or at least 10 calendar days with effect from the day following the date of the receipt of the contracting authority's decision. The communication of the contracting authority's decision to each tenderer or candidate shall be accompanied by a summary of the relevant reasons. In the case of an application for a review concerning decisions referred to in Article 2(1)(b) of this Directive that are not subject to a specific notification, the time period shall be at least 10 calendar days from the date of the publication of the decision concerned.'

7 Under the heading 'Ineffectiveness', Article 2d(1) of that directive provides:

'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];

…'

8 Under Article 2f of Directive 89/665, headed 'Time-limits':

'1. Member States may provide that the application for review in accordance with Article 2d(1) must be made:

…

(b) and in any case before the expiry of a period of at least six months with effect from the day following the date of the conclusion of the contract.

2. In all other cases, including applications for a review in accordance with Article 2e(1), the time-limits for the application for a review shall be determined by national law, subject to the provisions of Article 2c.'

Austrian law

9 The provisions transposing Directive 89/665 are found, in essence, in Chapter II of the fourth section of the Federal Law of 2006 on Procurement (Bundesvergabegesetz 2006; 'BVergG 2006'), which has been amended on a number of occasions.

10 In the version in force on 1 March 2011, the date on which MedEval complained to the FPO, Paragraph 312(3)(3) of the BVergG 2006 provided that that office had the power to declare a public procurement procedure unlawful, in particular on the ground that that procedure was implemented without prior notice or without prior call for competition.

11 Under Paragraph 331 of the BVergG 2006:

'(1) Where an undertaking had an interest in the conclusion of a contract within the scope of application of this Federal Law, it may, in so far as it has suffered harm in consequence of the alleged infringement, apply for a declaration that:

…

2. the implementation of a public procurement procedure without prior notice or without prior call for competition was unlawful on the grounds of an infringement of this Federal Law, the regulations issued on the basis of this law, or directly applicable Community law, …

…'

12 Paragraph 332(3) of the BVergG 2006, entitled 'Content and admissibility of the application for a declaration' was worded as follows:

'Applications pursuant to Paragraph 331(1)(2) to (4), must be lodged within six months of the day following the date of the award of the contract. …'

13 Paragraph 334(2) of the BVergG 2006 provided that, following the declaration that a procurement procedure was unlawfully conducted without the prior issue of a contract notice, the FPO must, in principle, declare the contract null and void.

14 Under the heading 'Competence and proceedings', Paragraph 341(2) of the BVergG 2006 provided:

'A claim for damages is admissible only if there has been a prior declaration by the competent procurement supervisory authority that

…

2. the implementation of a public procurement procedure without prior notice or without prior call for competition was unlawful on the grounds of an infringement of this Federal Law, the regulations issued on the basis of this law, or directly applicable Community law, …

…'

The main proceedings and the question referred

15 On 10 August 2010, the Hauptverband concluded an agreement with the GSF concerning 'the implementation of a pilot project for the electronic medical prescription management ("e-Medikation") project in three pilot regions, including the requisite set-up and operation services'. It is apparent from the order for reference that the date of conclusion of the agreement was the same date as the award of the contract.

16 On 1 March 2011, MedEval applied to the FPO for a declaration that the public procurement procedure was unlawful since it infringed the BVergG 2006, on the ground that the notice of the contract in question was not published in advanced and there was no prior call for competition.

17 On 13 May 2011, on the basis of Paragraph 332(3) of the BVergG 2006, the FPO declared MedEval's action inadmissible. The FPO took the view that the starting point of the six-month limitation period provided for in that article within which to bring an action for a declaration of unlawfulness was the day following the award of the contract, irrespective of whether or not MedEval was aware, at that time, of the unlawfulness of the procedure at issue which, in the view of the FPO, was authorised by Article 2f(1)(b) of Directive 89/665.

18 MedEval brought an appeal before the Verwaltungsgerichtshof (Administrative Court) against that decision.

19 The referring court notes that, under Paragraph 312(3) of the BVergG 2006, the FPO is competent to make certain declarations following the award of the contract, including a declaration of the unlawfulness of a public procurement procedure without prior notice or prior call for competition. In that regard, that court points out that an action for a declaration of unlawfulness must be brought within six months of the day following the date of the award of the contract, in accordance with Paragraph 332(3) of the BVergG 2006.

20 It notes that, under Paragraph 341(2) of the BVergG 2006, a claim for damages connected with the unlawful award of a public contract is admissible only if the FPO has first declared that the public procurement procedure, carried out without prior publication of a contract notice or a call for competition, was unlawful. In that regard, that court points out that actions for a declaration of unlawfulness must be brought within six months of the day following the date of award of the contract in accordance with Paragraph 332(3) of the BVergG 2006.

21 The referring court states that that particular aspect of its national law follows from the fact that, if the FPO finds that the public procurement procedure is unlawful due to the lack of publication of a prior contract notice, the FPO must, in principle, declare that the contract is null and void. That specificity is thus such as to create a close link between the actions for damages and those seeking to terminate the agreement concluded in the award of a contract.

22 The referring court is doubtful as to whether making the admissibility of an action for damages in respect of infringement of the public procurement rules subject to a prescriptive six-month limitation period which starts running on the day following the date of award of the contract, irrespective of whether or not the applicant was aware of that award, complies with Directive 89/665 and with the principles of equivalence and effectiveness.

23 To support its query, that court relies in particular on the judgment in *Uniplex (UK)* (C-406/08, EU:C:2010:45), according to which the period for bringing proceedings to obtain damages should start to run from the date on which the claimant knew, or ought to have known, of that alleged infringement.

24 Finally, that court points out the fact that that judgment was delivered by the Court before the adoption of Directive 2007/66, during which time Directive 89/665 did not lay down any specific provision concerning the limitation periods as regards the bringing of proceedings in public procurement disputes.

25 In those circumstances, the Verwaltungsgerichtshof (Administrative Court) decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

'Is EU law — in particular the general principles of equivalence and effectiveness and [Directive 89/665] — to be interpreted as precluding a national legal situation in which an application for a declaration of an infringement of public procurement law must be made within six months of the conclusion of the contract, if the declaration of an infringement of public procurement law is a precondition not only of annulling the contract but also of bringing a claim for damages?'

Consideration of the question referred

26 By its question, the referring court asks, in essence, whether EU law, in particular the principles of effectiveness and equivalence, precludes national legislation which makes bringing an action for damages in respect of the infringement of a rule of public procurement law subject to a prior finding that the public procurement procedure for the contract in question was unlawful because of the lack of prior publication of a contract notice, where the action for a declaration of unlawfulness is subject to a six-month limitation period which starts to run on the day after the date of the award of the public contract in question, irrespective of whether or not the applicant in that action was in a position to know of the unlawfulness affecting the decision of the awarding authority.

27 As a preliminary point, it must be borne in mind that, in accordance with the first and second subparagraphs of Article 1(1) of Directive 89/665, read in the light of recital 2 in the preamble to Directive 2007/66, Directive 89/665 applies, in a context such as that in the main proceedings, only to contracts falling within the scope of Directive 2004/18, unless, however, such contracts are excluded in accordance with Articles 10 to 18 of that directive. The following considerations are therefore based on the premiss that Directive 2004/18 is applicable to the contract at issue in the main proceedings and, therefore, that Directive 89/665 is also applicable to the procedure in the main proceedings, which it is for the referring court to ascertain.

28 It is appropriate to recall that Article 1(1) and (3) of Directive 89/655 requires the Member States to take the measures necessary to ensure that decisions taken by the contracting authorities which are incompatible with EU law may be reviewed effectively and, in particular, as rapidly as possible and ensure wide availability of reviews with respect 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 (judgment in *Orizzonte Salute*, C-61/14, EU:C:2015:655, paragraph 43).

29 To that effect, Directive 89/665 provides, in Article 2(1), that the Member States are to provide in their national laws for three types of action enabling persons harmed in a public procurement procedure to apply to the competent authority for, firstly, 'interim measures with the aim of correcting the alleged infringement or preventing further damage to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of [the] public contract or the implementation of any decision taken by the contracting authority', secondly, the setting aside of decisions taken unlawfully and, thirdly, the award of damages.

30 With regard to the limitation periods for bringing actions, Article 2f(1) of Directive 89/665, inserted by Directive 2007/66, states that the Member States may provide for limitation periods for applications under Article 2d to have a contract declared ineffective and, in any case, a limitation period of at least six months with effect from the day following the date of the conclusion of the contract.

31 In that regard, recitals 25 and 27 in the preamble to Directive 2007/66 state that the period of limitation on reviews seeking to establish that the contract is ineffective is justified by 'the need to ensure over time the legal certainty of decisions taken by contracting authorities and contracting entities', which requires that 'the effectiveness of these time-limits … be respected'.

32 As regards all the other legal actions concerning public contracts, including actions for damages, Article 2f(2) of Directive 89/665 states that, subject to the provisions of Article 2c of that directive, not relevant to the question referred, 'the time-limits for the application for a review shall be determined by national law'. Accordingly, it is for each Member State to define those procedural time-limits.

33 The fact that the EU legislature decided, firstly, expressly to regulate the time-limits concerning actions for a declaration that a contract is ineffective and, secondly, to leave the time-limits concerning actions of a different kind to be decided under the Member States' national laws shows that the legislature accorded a particular importance to the first category of actions, in the light of the efficiency of the system of actions concerning public procurement.

34 Thus, Article 2f(1)(b) of Directive 89/665 does not preclude provisions of national law such as those at issue in the main proceedings which provide that an action seeking to have declared ineffective a public contract concluded without prior publication of a contract notice or prior call for competition must be brought within a period of six months with effect from the day following the date of award of that contract, in so far as the date of award of the contract corresponds to the date of conclusion of the contract. Such provisions also correspond to the aim pursued by Article 2f(1)(b) of Directive 89/665 set out in particular in recital 27 in the preamble to Directive 2007/66, according to which the limitation on the enforceability of the ineffectiveness of a contract should be respected.

35 As regards actions for damages, it must be noted that Directive 89/665 provides, in Article 2(6), that Member States may provide that where damages are claimed, the contested decision must first be set aside 'by a body having the necessary powers' without, however, laying down a rule as regards the time-limits for bringing actions or other conditions for the admissibility of such actions.

36 In the present case it appears, in principle, that Article 2(6) of Directive 89/665 does not preclude a provision of national law such as Paragraph 341(2) of the BVergG 2006 under which a claim for damages is admissible only if there has been a prior finding of an infringement of procurement law. However, the combined application of Paragraph 341(2) of the BVergG 2006 and Paragraph 332(3) of the same law has the effect that an action for damages is inadmissible in the absence of a prior decision finding that the public procurement procedure for the contract in question was unlawful, where the action for a declaration of unlawfulness is subject to a six-month limitation period which starts to run on the day after the date of the award of the public contract in question, irrespective of whether or not the applicant was in a position to know of the unlawfulness affecting that award decision.

37 Having regard to the considerations in paragraphs 32 and 35 of the present judgment, it is for the Member States to lay down the detailed procedural rules governing actions for damages. Those detailed procedural rules must, however, be no less favourable than those governing similar domestic actions (principle of equivalence) and must not render practically impossible or excessively difficult the exercise of rights conferred by EU law (principle of effectiveness) (see, to that effect, judgments in *eVigilo*, C-538/13, EU:C:2015:166, paragraph 39, and *Orizzonte Salute*, C-61/14, EU:C:2015:655, paragraph 46).

38 In consequence, it is necessary to examine whether the principles of effectiveness and equivalence preclude a national rule such as that set out in paragraph 36 of the present judgment.

39 As regards the principle of effectiveness, it is appropriate to point out that the degree of necessity for legal certainty concerning the conditions for the admissibility of actions is not identical for actions for damages and actions seeking to have a contract declared ineffective.

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

41 Making the admissibility of actions for damages subject to a prior finding that the public procurement procedure for the contract in question was unlawful because of the lack of prior publication of a contract notice, where the action for a declaration of unlawfulness is subject to a six-month limitation period, irrespective of whether or not the person harmed knew that there had been an infringement of a rule of law, is likely to render impossible in practice or excessively difficult the exercise of the right to bring an action for damages.

42 Where there has been no prior publication of a contract notice, such a limitation period of six months is likely not to enable a person harmed to gather the necessary information with a view to a possible action, thus preventing that action from being brought.

43 Awarding damages to persons harmed by an infringement of the public procurement rules constitutes one of the remedies guaranteed under EU law. Thus, in circumstances such as those at issue in the main proceedings, the person harmed is deprived not only of the possibility of having the awarding authority's decision annulled, but also of all the remedies provided for in Article 2(1) of Directive 89/665.

44 Consequently, the principle of effectiveness precludes a system such as that at issue in the main proceedings.

45 In those circumstances, there is no need to examine whether the principle of equivalence precludes a national rule such as that at issue in the main proceedings.

46 Having regard to the foregoing considerations, the answer to the question referred is that EU law and in particular the principle of effectiveness preclude national legislation which makes bringing an action for damages in respect of the infringement of a rule of public procurement law subject to a prior finding that the public procurement procedure for the contract in question was unlawful because of the lack of prior publication of a contract notice, where the action for a declaration of unlawfulness is subject to a six-month limitation period which starts to run on the day after the date of the award of the public contract in question, irrespective of whether or not the applicant in that action was in a position to know of the unlawfulness affecting the decision of the awarding authority.

Costs

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

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

European Union law, in particular the principle of effectiveness, precludes national legislation which makes bringing an action for damages in respect of the infringement of a rule of public procurement law subject to a prior finding that the public procurement procedure for the contract in question was unlawful because of the lack of prior publication of a contract notice, where the action for a declaration of unlawfulness is subject to a six-month limitation period which starts to run on the day after the date of the award of the public contract in question, irrespective of whether or not the applicant in that action was in a position to know of the unlawfulness affecting the decision of the awarding authority.

[Signatures]