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Court of Justice of the European Union

Uniplex (UK) Ltd *v* NHS Business Services Authority

(Case C-406/08)

2009 Sept 24;
B Oct 29;
2010 Jan 28

Acting President of Chamber JN Cunha Rodrigues, Judges P Lindh, A Rosas, U Lõhmus, A Ó Caoimh
Advocate General J Kokott

European Community — Public procurement — Contract review procedure — National limitation period for bringing proceedings for breach of procurement rules — Proceedings to be brought "promptly" and in any event within specified time unless court discretion to extend period exercised by court — Whether
C *limitation period running from date of breach of public procurement rules or claimant's knowledge or deemed knowledge of breach — Whether court entitled to dismiss proceedings for not having been brought "promptly" — Manner of exercise of court's discretion — Public Contracts Regulations 2006 (SI 2006/5), reg 47(7)(b) — Council Directive 89/665/EEC (as amended by Council Directive 92/50/EEC), art 1(1)*

D The defendant, part of the United Kingdom National Health Service, invited tenders for a framework agreement for the supply of medical instruments, in a restricted procedure which was required to be carried out in accordance with European Parliament and Council Directive 2004/18/EC on procedures for the award of public works, supply and services contracts. The claimant, whose tender application was unsuccessful, alleged that the public procurement rules had been breached in various ways, and brought an action for inter alia a declaration that the breaches had occurred and damages. The defence was that the action had not been
E commenced in time, regard being had to the Public Contracts Regulations 2006[1], Part 9 of which transposed into UK law Council Directive 89/665/EEC[2] on the application of review procedures to the award of public supply and works contracts, as amended ("Directive 89/665"), and regulation 47(7)(b) of which required proceedings brought under the Regulations to be brought "promptly and in any event within three months from the date when grounds for the bringing of the proceedings first arose unless the court considers that there is good reason for extending the
F period within which proceedings may be brought". The High Court referred to the Court of Justice of the European Union for a preliminary ruling the questions whether, in the light of inter alia articles 1 and 2 of Directive 89/665, (i) a limitation period in a national provision such as regulation 47(7)(b) was to be taken as starting to run from the time when the alleged breach of procurement law occurred or the time when the unsuccessful tenderer knew or ought to have known of the breach, and (ii) how the national court was to apply any requirement for proceedings to be
G brought "promptly" and any discretion it had to extend the limitation period.

On the reference for a preliminary ruling—

Held, (1) that article 1(1) of Directive 89/665 required that the period for bringing proceedings seeking to have an infringement of the public procurement rules established or to obtain damages for the infringement of those rules should start to run from the date on which the claimant knew, or ought to have known, of that infringement (post, judgment, paras 32, 35, operative part, para 1).

Dicta in *Universale-Bau AG v Entsorgungsbetriebe Simmering GmbH* (Case
H C-470/99) [2002] ECR I-11617, para 78, ECJ applied.

(2) That article 1(1) of Directive 89/665 precluded a national provision such as that at issue, which allowed a national court to dismiss, as being out of time,

[1] Public Contracts Regulations 2006, reg 47(6)(7): see post, opinion, para 7.
[2] Council Directive 89/665/EEC (as amended), arts 1, 2: see post, judgment, paras 3, 4.

proceedings seeking to have an infringement of the public procurement rules established or to obtain damages for the infringement of those rules on the basis of the criterion, appraised in a discretionary manner, that such proceedings must be brought promptly (post, judgment, para 43, operative part, para 2).

(3) That Directive 89/665 required the national court, in exercise of the discretion conferred on it, to extend the limitation period only in such a manner as to ensure that the claimant had a period equivalent to that which it would have had if the period provided for by the applicable national legislation had run from the date on which the claimant knew, or ought to have known, of the infringement of the public procurement rules; and that if the national provisions did not lend themselves to an interpretation which accorded with Directive 89/665, the national court had to refrain from applying them, in order to apply Community law fully and to protect the rights conferred thereby on individuals (post, judgment, paras 47–50, operative part, para 3).

Dicta in *Santex SpA v Unità Socio Sanitaria Locale n 42 di Pavia* (Case C-327/00) [2003] ECR I-1877, paras 63 and 64, ECJ applied.

The following cases are referred to in the judgment:

Commission of the European Communities v Federal Republic of Germany (Case C-361/88) [1991] ECR I-2567, ECJ

Commission of the European Communities v Grand Duchy of Luxembourg (Case C-221/94) [1996] ECR I-5669, ECJ

Grossmann Air Service, Bedarfsluftfahrtunternehmen GmbH & Co KG v Republik Österreich (Case C-230/02) [2004] ECR I-1829, ECJ

Lämmerzahl GmbH v Freie Hansestadt Bremen (Case C-241/06) [2007] ECR I-8415, ECJ

Pfeiffer v Deutsches Rotes Kreuz, Kreisverband Waldshut eV (Joined Cases C-397–403/01) [2005] ICR 1307; [2004] ECR I-8835, ECJ

Santex SpA v Unità Socio Sanitaria Locale n 42 di Pavia (Case C-327/00) [2003] ECR I-1877, ECJ

Universale-Bau AG v Entsorgungsbetriebe Simmering GmbH (Case C-470/99) [2002] ECR I-11617, ECJ

von Colson v Land Nordrhein-Westfalen (Case 14/83) [1984] ECR 1891, ECJ

The following additional cases are referred to in the opinion of the Advocate General:

Åklagaren v Mickelsson (Case C-142/05) [2009] All ER (EC) 842; [2009] ECR I-4273, ECJ

Amaryllis Ltd v HM Treasury [2009] EWHC 962 (TCC); [2010] EuLR 85

Amministrazione delle Finanze dello Stato v Simmenthal SpA (Case 106/77) [1978] ECR 629, ECJ

Asturcom Telecomunicaciones SL v Rodríguez Nogueira (Case C-40/08) [2010] 1 CMLR 865, ECJ

Commission of the European Communities v Hellenic Republic (Case C-250/07) [2009] ECR I-4369, ECJ

Commission of the European Communities v Ireland (Case C-456/08) [2010] PTSR 1403, ECJ

Dynamic Medien Vertriebs GmbH v Avides Media AG (Case C-244/06) [2008] ECR I-505, ECJ

Edilizia Industriale Siderurgica Srl v Ministero delle Finanze (Case C-231/96) [1998] ECR I-4951, ECJ

Fabricom SA v État Belge (Joined Cases C-21 and 34/03) [2005] ECR I-1559, ECJ

Holleran (M) Ltd v Severn Trent Water Ltd [2004] EWHC 2508 (Comm); [2005] EuLR 364

Housieaux v Délégués du conseil de la Région de Bruxelles-Capitale (Case C-186/04) [2005] ECR I-3299, ECJ

A *Impact v Minister for Agriculture and Food* (Case C-268/06) [2008] ECR I-2483, ECJ
Jobsin Co UK plc (trading as Internet Recruitment Solutions) v Department of Health [2001] EWCA Civ 1241; [2001] EuLR 685, CA
Keymed (Medical and Industrial Equipment) Ltd v Forest Healthcare NHS Trust [1998] EuLR 71
Koppensteiner GmbH v Bundesimmobiliengesellschaft mbH (Case C-15/04) [2005] ECR I-4855, ECJ
B *Motosykletistiki Omospondia Ellados NPID (MOTOE) v Elliniko Dimosio* (Case C-49/07) [2008] ECR I-4863, ECJ
Orfanopoulos v Land Baden-Württemberg (Joined Cases C-482 and C-493/01) [2004] ECR I-5257, ECJ
Pressetext Nachrichtenagentur GmbH v Republik Österreich (Bund) (Case C-454/06) [2008] Bus LR D 118; [2008] ECR I-4401, ECJ
C *R (Mellor) v Secretary of State for Communities and Local Government* (Case C-75/08) [2010] PTSR 880; [2009] ECR I-3799, ECJ
Recheio—Cash & Carry SA v Fazenda Pública/Registo Nacional de Pessoas Colectivas (Case C-30/02) [2004] ECR I-6051, ECJ
Rewe-Zentralfinanz eG v Landwirtschaftskammer für das Saarland (Case 33/76) [1976] ECR 1989, ECJ
Thomas v Chief Adjudication Officer (Case C-328/91) [1993] QB 747; [1993] 3 WLR 581; [1993] ICR 673; [1993] 4 All ER 556; [1993] ECR I-1247, ECJ
D *Union nationale des entraîneurs et Cadres techniques professionels du football (Unectef) v Heylens* (Case 222/86) [1987] ECR 4097, ECJ
Veolia Water UK v Fingal County Council [2006] IEHC 137; [2007] 1 IR 690

REFERENCE by the Queen's Bench Division of the High Court

In proceedings between the claimant, Uniplex (UK) Ltd, and the defendant, NHS Business Services Authority, the High Court, by order of
E 30 July 2008, referred to the Court of Justice for a preliminary ruling under article 234EC two questions (see post, opinion, para 18) on the interpretation of Council Directive 89/665/EEC of 21 December 1989 on the co-ordination 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 L395, p 33), as amended by
F Council Directive 92/50/EEC of 18 June 1992 relating to the co-ordination of procedures for the award of public service contracts (OJ 1992 L209, p 1).

The Judge Rapporteur was Judge Cunha Rodrigues.

The facts are stated in the judgment.

M Sheridan (instructed by *A Stanic*) for the claimant.
R Williams for the defendant.
G *K Smith* and *I Rao*, agent, for the United Kingdom Government.
M Lumma and *J Möller*, agents, for the German Government.
A Collins SC and *D O'Hagan*, agent, for the Irish Government.
E White and *M Konstantinidis*, agents, for the Commission of the European Communities.

29 October 2009. **ADVOCATE GENERAL KOKOTT** delivered the
H following opinion.

(I) Introduction

1 This reference for a preliminary ruling from the High Court of Justice of England and Wales (Queen's Bench Division, Leeds District Registry)

gives the Court of Justice of the European Communities an opportunity to develop its case law on the remedies available to unsuccessful tenderers in public procurement procedures.

2 It is acknowledged that the member states may lay down appropriate limitation periods for remedies of this kind. Clarification is required, however, in particular on the question of the time from which those limitation periods may start to run: the time at which the alleged breach of procurement law occurred, or the time at which the unsuccessful tenderer knew or should have known of the breach. This problem, whose practical effects should not be underestimated, arises in the context of a provision of English law under which the period for bringing applications for review starts to run regardless of the unsuccessful tenderer's knowledge of the breach of procurement law, and any extension of the period is at the discretion of the national court.

3 As regards the legal issues raised, the present case has certain points of contact with *European Commission v Ireland* (Case C-456/08) [2010] PTSR 1403, in which I also deliver my opinion today.

(II) Legal context

(A) Community law

4 The Community law context of the present case is defined by Council Directive 89/665/EEC of 21 December 1989 on the co-ordination 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 Council Directive 92/50/EEC of 18 June 1992 relating to the co-ordination of procedures for the award of public service contracts. (The latest amendments to Directive 89/665, made by European Parliament and Council Directive 2007/66/EC 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 (OJ 2007 L335, p 31) (see in particular article 3(1)), are not relevant to the present case, as the period for their transposition lasts until 20 December 2009.)

5 Article 1 of Directive 89/665 provides:

> "1. The member states shall take the measures necessary to ensure that, as regards contract award procedures falling within the scope of Directives 71/305/EEC, 77/62/EEC, and 92/50/EEC, 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 the following articles and, in particular, article 2(7) on the grounds that such decisions have infringed Community law in the field of public procurement or national rules implementing that law.
>
> "2. Member states shall ensure that there is no discrimination between undertakings claiming injury in the context of a procedure for the award of a contract as a result of the distinction made by this Directive between national rules implementing Community law and other national rules.
>
> "3. The 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

A risks being harmed by an alleged infringement. In particular, the member states may require that the person seeking the review must have previously notified the contracting authority of the alleged infringement and of his intention to seek review."

(The reference in article 1(1) of Directive 89/665 to Directive 77/62 is to be read as a reference to European Parliament and Council Directive
B 2004/18/EC of 31 March 2004 on the co-ordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L134, p 114; corrigendum at OJ 2004 L351, p 44). This follows from article 82(2) of Directive 2004/18 in conjunction with article 33(2) of Council Directive 93/36/EEC of 14 June 1993 co-ordinating procedures for the award of public supply contracts (OJ 1993 L199, p 1).)

C **6** In addition, article 2(1) of Directive 89/665 contains the following provision:

"The member states shall ensure that the measures taken concerning the review procedures specified in article 1 include provision for the powers to: . . . (b) either set aside or ensure the setting aside of decisions taken unlawfully . . . ; (c) award damages to persons harmed by an
D infringement."

(B) National law

7 For England, Wales and Northern Ireland, Directive 89/665 was transposed by Part 9 of the Public Contracts Regulations 2006 ("the 2006 Regulations"), in force from 31 January 2006, regulation 47 of which
E provides, in extract:

"(1) The obligation on—(a) a contracting authority to comply with the provisions of these Regulations, other than [specified regulations], and with any enforceable Community obligation in respect of a public contract, framework agreement or design contest . . . is a duty owed to an economic operator"

F "(6) A breach of the duty owed in accordance with paragraph (1) or (2) is actionable by any economic operator which, in consequence, suffers, or risks suffering, loss or damage and those proceedings shall be brought in the High Court.

"(7) Proceedings under this regulation must not be brought unless—(a) the economic operator bringing the proceedings has informed the contracting authority or concessionaire, as the case may be, of the
G breach or apprehended breach of the duty owed to it in accordance with paragraph (1) or (2) by that contracting authority or concessionaire and of its intention to bring proceedings under this regulation in respect of it; and (b) those proceedings are brought promptly and in any event within three months from the date when grounds for the bringing of the proceedings first arose unless the court considers that there is good reason for extending the period within which proceedings may be brought"

H "(9) In proceedings under this regulation the court does not have power to order any remedy other than an award of damages in respect of a breach of the duty owed in accordance with paragraph (1) or (2) if the contract in relation to which the breach occurred has been entered into."

(III) Facts and main proceedings

8 The claimant, Uniplex (UK) Ltd, is a company established in the United Kingdom and an economic operator for the purposes of Directive 2004/18 and the 2006 Regulations. It is the sole distributor in the United Kingdom of haemostats manufactured by the Netherlands company Gelita Medical BV.

9 The defendant, NHS Business Services Authority, is part of the public health service of the United Kingdom, the National Health Service, which is owned and operated by the state. It is a contracting authority for the purposes of Directive 2004/18 and the 2006 Regulations.

10 On 26 March 2007 the defendant invited tenders, in a restricted procedure, for a framework agreement for the supply of haemostats to National Health Service institutions. (The award procedure was carried out by an authorised agent of the defendant, known as NHS Supply Chain.) A notice to that effect was published in the Official Journal of the European Union on 28 March 2007.

11 By letter of 13 June 2007 the defendant addressed an invitation to tender to five interested parties, including the claimant. The deadline for the submission of tenders was 19 July 2007. The claimant submitted its tender on 18 July 2007.

12 On 22 November 2007 the claimant was informed by the defendant in writing that awards had finally been made to three tenderers, but that the claimant would not be awarded a framework agreement. The letter also set out the award criteria, the names of the successful tenderers, the evaluated score of the claimant, and the range of the evaluated scores achieved by the successful tenderers. According to the criteria applied by the defendant, the claimant had achieved the lowest evaluated score of the five tenderers which had been invited to submit and had submitted bids. In the letter the claimant was also informed of its right to challenge the award decision and to seek further information.

13 In reply to a separate request by the claimant of 23 November 2007, the defendant on 13 December 2007 gave details of its method of evaluation with reference to its award criteria, and also of the characteristics and relative advantages of the bids of the successful tenderers compared with the claimant's tender.

14 On 28 January 2008 the claimant sent the defendant a letter before action alleging various breaches of the public procurement rules.

15 By letter of 11 February 2008 the defendant informed the claimant that the situation had changed. It had been found that the tender by Assut (UK) Ltd did not comply with the requirements, and B Braun (UK) Ltd, which had been placed fourth in the evaluation of the tenders, had been included in the framework agreement instead of Assut (UK) Ltd.

16 After a further exchange of correspondence between the claimant and the defendant, in which, inter alia, the starting point of the period for bringing proceedings was disputed, the claimant on 12 March 2008 commenced proceedings in the High Court, the court making the present reference. It seeks, inter alia, a declaration of the alleged breaches of procurement law, damages from the defendant in respect of those breaches, and—if the court has jurisdiction to make such an order—an order that the defendant award the claimant a framework agreement.

A **17** The referring court is uncertain whether the claimant brought its action in time and, if not, whether it should exercise its discretion to extend the period for bringing proceedings under regulation 47(7)(b) of the 2006 Regulations.

(IV) Order for reference and procedure before the Court of Justice

B **18** By order of 30 July 2008, received at the Court of Justice on 18 September 2008, the High Court stayed the proceedings before it and referred the following questions to the Court of Justice for a preliminary ruling:

> "Where an economic operator is challenging in national proceedings the award of a framework agreement by a contracting authority
C following a public procurement exercise in which he was a tenderer and which was required to be conducted in accordance with Directive 2004/18/EC (and applicable implementing national provisions), and is in those proceedings seeking declarations and damages for breach of applicable public procurement provisions as regards that exercise and award:
>
> "(a) is a national provision such as Regulation 47(7)(b) of the Public
D Contracts Regulations 2006 which states that those proceedings are to be brought promptly and in any event within three months from the date when grounds for the bringing of the proceedings first arose, unless the court considers that there is good reason for extending the period, to be interpreted, in light of articles 1 and 2 of Directive 89/665/EEC and the Community law principle of equivalence and the Community law
E requirement for effective legal protection, and/or the principle of effectiveness, and having regard to any other relevant principles of EC law, as conferring an individual and unconditional right upon the tenderer against the contracting authority such that the time for the bringing of proceedings challenging such a tender exercise and award starts running as from the date when the tenderer knew or ought to have
F known that the procurement procedure and award infringed EC public procurement law or as from the date of breach of the applicable public procurement provisions; and
>
> "(b) in either event how is a national court then to apply (i) any requirement for proceedings to be brought promptly and (ii) any discretion as to extending the national limitation period for the bringing of such proceedings?"

G **19** In the procedure before the Court of Justice, in addition to the claimant and the defendant, the United Kingdom and Irish Governments and the Commission of the European Communities made written and oral observations. (The hearing in the present case took place on the same day as that in *European Commission v Ireland* (Case C-456/08) [2010] PTSR 1403.) The German Government also took part in the
H hearing.

(V) Assessment

20 By its two questions the High Court seeks essentially to know what requirements derive from Community law for the interpretation and

application of limitation periods in the public procurement review procedure.

21 Directive 89/665 makes no express provision on the time limits that apply to review procedures under article 1 of the Directive: see also my opinion in *Pressetext Nachrichtenagentur GmbH v Republik Österreich (Bund)* (Case C-454/06) [2008] ECR I-4401, para 154. (In future, however, article 2c of Directive 89/665, as amended by Directive 2007/66, will define basic Community law requirements for national time limits for applications for review.) However, the Court of Justice has consistently held that the member states may in the exercise of their procedural autonomy introduce reasonable limitation periods for bringing proceedings, provided that they comply with the principles of equivalence and effectiveness: see, for example, *Rewe-Zentralfinanz eG v Landwirtschaftskammer für das Saarland* (Case 33/76) [1976] ECR 1989, para 5; *Edilizia Industriale Siderurgica Srl v Ministero delle Finanze* (Case C-231/96) [1998] ECR I-4951, paras 20 and 35; *Recheio—Cash & Carry SA v Fazenda Pública/Registo Nacional de Pessoas Colectivas* (Case C-30/02) [2004] ECR I-6051, para 18 and *Asturcom Telecomunicaciones SL v Rodríguez Nogueira* (Case C-40/08) [2010] 1 CMLR 865, para 41. Those two principles are also reflected in article 1 of Directive 89/665, the principle of equivalence in article 1(2) and the principle of effectiveness in article 1(1): see my opinion in *Pressetext Nachrichtenagentur* [2008] ECR I-4401, para 155.

22 In the present case it is the principle of effectiveness that is the focus of interest. *That* the United Kingdom can lay down limitation periods for applications for the review of decisions of contracting authorities is not in dispute: see on this point *Universale-Bau AG v Entsorgungsbetriebe Simmering GmbH* (Case C-470/99) [2002] ECR I-11617, in particular paras 71 and 76; *Santex SpA v Unità Socio Sanitaria Locale n 42 di Pavia* (Case C-327/00) [2003] ECR I-1877, para 52 and *Lämmerzahl GmbH v Freie Hansestadt Bremen* (Case C-241/06) [2007] ECR I-8415, para 50. The dispute between the parties concerns merely certain details of the interpretation and application of the national rules on limitation. They disagree on whether a limitation provision such as that in regulation 47(7)(b) of the 2006 Regulations has due regard to the requirements of Community law. In this connection the referring court wishes to know (i) whether it may take as the point when time starts running the date of the breach of procurement law, or must take the date when the applicant knew or ought to have known of the breach (first question), (ii) whether in a review procedure it may dismiss an action as inadmissible if it has not been brought "promptly" (first part of the second question), and (iii) how it should exercise its discretion with respect to a possible extension of time (second part of the second question).

23 It depends on the answers to those questions whether or not the referring court must regard the application brought by the claimant as brought in time within the meaning of regulation 47(7)(b) of the 2006 Regulations.

24 I shall start by addressing the first question (see section A below) and the second part of the second question (see section B below), which are closely connected, before turning to the first part of the second question (see section C below).

25 Contrary to the oral submissions of the defendant, the United Kingdom and Ireland, it cannot be decisive for the answer to those questions that a provision such as regulation 47(7)(b) of the 2006 Regulations may reflect a long tradition in the member state concerned.

26 Certainly, when requirements of Community law are being interpreted, attention should indeed always be paid to whether they can be fitted into national law with as little friction as possible. For all that, the Court of Justice's primary function is to ensure that in the interpretation and application of European Community law the law is observed (first paragraph of article 220EC) and—working together with the national courts—to give effect to the rights that individuals derive from Community law.

(A) Relevance of knowledge of the breach of procurement law for determining when time starts running (first question)

27 By its first question, the referring court seeks essentially to know whether it may take as the point when the limitation period starts running in review procedures under procurement law the date of the breach of procurement law, or must take the date when the applicant knew or ought to have known of the breach.

28 The opinions of the parties differ on this point. The claimant, the German Government and the Commission take the view that, at least with reference to legal remedies that do not affect the validity of contracts, no limitation period may start before the applicant knew or ought to have known of the alleged breach of procurement law. By contrast, the defendant and the United Kingdom and Irish Governments insist that the running of time cannot depend on whether the applicant knew or ought to have known of a breach of procurement law: it suffices to give the national courts a discretion to extend the limitation period.

29 The latter view is reflected in the practice of both the English courts (the referring court cites the judgment of the Court of Appeal of England and Wales (Dyson LJ) of 13 July 2001 in *Jobsin Co UK plc (trading as Internet Recruitment Solutions) v Department of Health* [2001] EuLR 685, paras 23 and 28 (that judgment related to the predecessor to regulation 47(7)(b) of the 2006 Regulations, whose content was identical); see also the judgment of the High Court (Langley J) of 17 November 1997 in *Keymed (Medical and Industrial Equipment) Ltd v Forest Healthcare NHS Trust* [1998] EuLR 71, 92) and the Irish courts (Ireland refers in its written observations to the judgment of the High Court of Ireland (Clarke J) of 2 May 2006 in *Veolia Water UK v Fingal County Council* [2007] 1 IR 690, paras 28–54.) According to that case law, the period for review of a procurement decision starts to run, in accordance with regulation 47(7)(b) of the 2006 Regulations (in Ireland there is an essentially similar rule on limitation periods under Order 84A(4) of the Rules of the Superior Courts (SI No 374 of 1998): that rule is the subject of the action by the Commission for failure to fulfil obligations in *Commission of the European Communities v Ireland* (Case C-456/08) [2010] PTSR 1403, in which I am also delivering my opinion today), regardless of whether the tenderer or candidate concerned knew or ought to have known of the breach of procurement law complained of. The applicant's lack of knowledge of the breach of procurement law may at most be relevant to extending the period, and in that respect is one of a

number of aspects which the national court takes into account when exercising its discretion. (The observations of Dyson LJ in *Jobsin Co UK plc v Department of Health* [2001] EuLR 685 which are quoted in the order for reference, are illuminating in this respect:

> "A service provider's knowledge is plainly irrelevant to the question whether he has suffered or risks suffering loss or damage as a result of a breach of duty owed to him by a contracting authority . . . Knowledge will often be relevant to whether there is good reason for extending time within which proceedings may be brought, but it cannot be relevant to the prior question of when the right of action first arises": para 23 of the judgment.

At the hearing before the Court of Justice, the parties were in agreement that the national court is not obliged to grant such an extension of time.)

30 Against the background of this dominant practice of the English courts—there appear also to be judges in England who differ from this approach: at the hearing before the Court of Justice, the judgment of the High Court (Coulson J) of 8 May 2009 in *Amaryllis Ltd v HM Treasury* [2010] EuLR 85 was mentioned in this connection—it will be discussed below whether it is compatible with the requirements of Community law for a limitation period such as that in regulation 47(7)(b) of the 2006 Regulations to start running regardless of whether the applicant knew or ought to have known of the breach of procurement law in question.

31 Article 1(1) of Directive 89/665 requires it to be possible for decisions taken by contracting authorities to be reviewed for infringements of procurement law "effectively and, in particular, as rapidly as possible". That is an expression both of the principle of effectiveness ("effectively") and of the requirement of rapid action ("as rapidly as possible"). Neither of those concerns may be put into practice at the expense of the other (see also my opinion of today's date in *Commission v Ireland* (Case C-456/08) [2010] PTSR 1403, para 56). A fair balance between them must instead be struck, and this is to be assessed in the light of the type and consequences of the particular legal remedy and the rights and interests of all parties concerned.

32 In my opinion in *Pressetext Nachrichtenagentur GmbH v Republik Österreich (Bund)* (Case C-454/06) [2008] ECR I-4401, I have previously suggested a solution based on a differentiation between primary and secondary legal protection: see, on this and the following, paras 161–171 of that opinion.

The difference between primary and secondary legal protection

33 If a remedy is aimed at having a contract already concluded with a successful tenderer declared void (*primary legal protection*), it is reasonable to lay down an absolute limitation period of comparatively short duration. The particularly severe legal consequence of the invalidity of an already concluded contract is justification for laying down a period that also runs regardless of whether the applicant knew, or at least ought to have known, that the award of the contract was contrary to procurement law. Both for the contracting authority and for its contractual partner, there is a clear need, deserving of protection, for legal certainty with respect to the validity of the contract that has been concluded: opinion in *Pressetext*

Nachrichtenagentur, para 162. The requirement of review "as rapidly as possible" within the meaning of article 1(1) of Directive 89/665 therefore carries particular weight in the field of primary legal protection.

34 It is otherwise if a remedy is directed merely at a declaration of an infringement of procurement law and possibly an award of compensation (*secondary legal protection*). Such a remedy does not affect the existence of a contract already concluded with a successful tenderer. The contractual partners' need for certainty of planning and their interest in performing the public contract swiftly are not affected. Accordingly, there is no occasion to subject applications for secondary legal protection to the same strict limitation periods as applications for primary legal protection. On the contrary, the aim of effective review which article 1(1) of Directive 89/665 imposes on the member states argues in favour of giving more weight to the legal protection interests of the unsuccessful tenderer or candidate, and hence in favour of more generous limitation periods which do not start running until the person concerned knows or ought to know of the alleged breach of procurement law: opinion in *Pressetext Nachrichtenagentur*, paras 163–167.

35 Contrary to the view taken by the defendant and the United Kingdom Government, such a differentiation between primary and secondary legal protection does not lead to "lack of transparency" and "legal uncertainty". Nor is it suitable only for cases such as *Pressetext Nachrichtenagentur* in which a contracting authority makes a "direct award" with no prior notice of the award.

36 The distinction between primary and secondary legal protection is, rather, of general validity. It makes it possible to strike a fair balance between "effective review" and "review as rapidly as possible", and is sketched out in Directive 89/665 itself. Even in the original version of the Directive, a distinction is drawn in article 2(1)(b) and (c) between the setting aside of unlawful decisions on the one hand and the awarding of compensation on the other. In future, articles 2d, 2e and 2f of Directive 89/665, as amended by Directive 2007/66, will show more plainly this distinction between primary and secondary legal protection, also and particularly with respect to limitation periods. (If a contract is to be declared invalid, articles 2d and 2f(1) of Directive 89/665, as amended by Directive 2007/66, are relevant. If, on the other hand, compensation is to be awarded, articles 2e and 2f(2) in conjunction with article 2c of Directive 89/665, as amended by Directive 2007/66, apply.)

37 The present case concerns not primary but only secondary legal protection. That becomes especially clear if one looks at the introductory words to the questions formulated by the High Court. That passage speaks exclusively of applications for a declaration of a breach of procurement law and for the award of compensation. That is the context of the questions referred. (That is also supported by regulation 47(9) of the 2006 Regulations. The defendant admittedly points out that in the main proceedings the claimant made more extensive claims. However, in relation to the factual and legal context of references for preliminary rulings, the Court of Justice must proceed from the statements made by the referring court (settled case law: see *Orfanopoulos v Land Baden-Württemberg* (Joined Cases C-482 and 493/01) [2004] ECR I-5257, para 42 and

Dynamic Medien Vertriebs GmbH v Avides Media AG (Case C-244/06) [2008] ECR I-505, para 19).)

38 There is therefore no reason to subject the applications brought by the claimant in the main proceedings to the same strict limitation periods that might perhaps apply to applications for a declaration of the invalidity of a contract or indeed for a contracting authority to be ordered to enter into a contract.

Time running from when the applicant knew or "ought to have" known of the breach of procurement law

39 The principle of effectiveness, as expressed in article 1(1) of Directive 89/665, requires that a limitation period for claims for compensation and applications for declarations of breaches of procurement law may not start to run until the time when the applicant knew or ought to have known of the alleged breach of procurement law: see my opinion in *Pressetext Nachrichtenagentur* [2008] ECR I-4401, para 171.

40 The Court of Justice has also expressed this in *Universale-Bau AG v Entsorgungsbetriebe Simmering GmbH* (Case C-470/99) [2002] ECR I-11617, para 78: it considers that the spirit and purpose of rules on limitation are to ensure that unlawful decisions of contracting authorities, "*from the moment they become known to those concerned*" (emphasis added)—this is also clear in the French version of *Universale-Bau*, French being the language in which the judgment was drafted and deliberated on: "dès qu'elles sont connues des intéressés"—are challenged and corrected as soon as possible. (Interestingly, the defendant leaves out precisely this para 78 of the judgment in *Universale-Bau*, although it otherwise cites the full text of the relevant passage of the court's reasoning: paras 74–79.)

41 It is of course for the referring court to ascertain the time from which the person concerned knew or ought to have known of a breach of procurement law. (The parties to the main proceedings disagree as to whether the claimant ought to have known of the alleged infringements of procurement law from the letter of 22 November 2007 or only from the letter of the defendant of 13 December 2007: see paras 12 and 13 above. After reading those two letters, it seems to me that the first of them confines itself to extremely general statements from which an unsuccessful tenderer can hardly work out why he was unsuccessful and whether procurement law was applied correctly. The second letter, on the other hand, contains at least two statements which arouse the suspicion that infringements of procurement law were committed. First, the claimant is given a zero mark in the category "Price and other cost-effectiveness factors" because it offered only its list price: the contracting authority appears to have completely ignored the fact that one tenderer's list price may be lower than another's discount price, and that what ultimately matters is the comparison of the prices actually offered. Secondly, all tenderers who had not previously been active in the market for haemostats in the United Kingdom were apparently marked at zero in the category "UK customer base", which suggests covert discrimination against tenderers from other countries. In the end, however, it will be the task of the referring court to make the necessary findings in this respect.) In order to give a useful answer, however, the Court of Justice may, in a spirit of co-operation with national courts, provide all the guidance that it regards as necessary: *Motosykletistiki Omospondia Ellados NPID*

(MOTOE) v Elliniko Dimosio (Case C-49/07) [2008] ECR I-4863, para 30 and *Åklagaren v Mickelsson* (Case C-142/05) [2009] ECR I-4273, para 41; to the same effect, *Thomas v Chief Adjudication Officer* (Case C-328/91) [1993] ICR 673, para 13.

42 The mere fact that a tenderer or candidate has learnt that his tender has been unsuccessful does not yet mean that he knows of any breach of procurement law. Consequently, that fact on its own cannot yet set any limitation periods running for applications for secondary legal protection. As the claimant correctly submits, an unsuccessful tenderer or candidate for his part could also not rely, in an application for review, on the mere statement that his tender had not been accepted.

43 Only once the unsuccessful tenderer or candidate has been informed of the essential reasons for his being unsuccessful in the award procedure may it generally be presumed that he knew or in any case ought to have known of the alleged breach of procurement law. (The same may apply if a tenderer or candidate complains of a breach of procurement law and his complaint is rejected by the contracting authority with reasons being given.) Only from then on is it possible for him sensibly to prepare a possible application for review and to estimate its chances of success: to that effect, *Union nationale des entraîneurs et Cadres techniques professionels du football (Unectef) v Heylens* (Case 222/86) [1987] ECR 4097, para 15 and *R (Mellor) v Secretary of State for Communities and Local Government* (Case C-75/08) [2010] PTSR 880, para 59; see also my opinion in *Housieaux v Délégués du conseil de la Région de Bruxelles-Capitale* (Case C-186/04) [2005] ECR I-3299, para 32, and my opinion in *Mellor's* case, especially para 31. Before receiving such reasons, on the other hand, the person concerned cannot as a rule effectively exercise his right to a review: opinion of Advocate General Poiares Maduro in *Commission of the European Communities v Hellenic Republic* (Case C-250/07) [2009] ECR I-4369, para 28.

44 Directive 2004/18 accordingly lays down already today, in article 41(1) and (2), that contracting authorities must inform unsuccessful tenderers and candidates of the reasons for their rejection. To the same effect, article 2c of Directive 89/665, inserted by Directive 2007/66, provides for future cases that the communication of the contracting authority's decision to each tenderer or candidate must be accompanied by a summary of the relevant reasons, and that any limitation periods for applications for review may not expire until a certain number of calendar days after that communication.

45 Merely for the sake of completeness, it may be mentioned that the time when the period starts running for bringing a claim for compensation must not be made to depend on the fact that the applicant knew or ought to have known of the *damage* occurring to him. (That the term "occurrence of the damage" was used in the first sentence of para 167 of my opinion in *Pressetext Nachrichtenagentur GmbH v Republik Österreich (Bund)* (Case C-454/06) [2008] ECR I-4401 is an editing mistake. The correct version is that it suffices that the person concerned knew or ought to have known of the alleged *infringement of procurement law*, as follows from paras 169 and 171 of that opinion.) The damage that follows from a breach of duty sometimes comes to light only after some delay. Waiting for knowledge of the damage would thus run counter to the principle of review "as rapidly as

possible" within the meaning of article 1(1) of Directive 89/665. In return, however, it must be made possible for the tenderer or candidate concerned, if necessary, first to make an application for a declaration of a breach of procurement law and then to quantify the damage and claim compensation in subsequent proceedings.

The national court's discretion to grant an extension of the limitation period

46 The defendant and the United Kingdom and Irish Governments object that effective legal protection does not necessarily require, however, that the limitation periods for seeking remedies in review proceedings run only from the time when the tenderer or candidate concerned knew or ought to have known of the alleged infringement of procurement law. They submit that a provision such as regulation 47(7)(b) of the 2006 Regulations ensures effective legal protection by giving the national court a discretion to extend, if appropriate, the period for bringing proceedings.

47 That argument does not convince me.

48 Article 1(1) in conjunction with article 1(3) of Directive 89/665 gives any person who has or had an interest in obtaining a particular public contract and who has been or risks being harmed by an alleged infringement an *individual right* to review of the decisions of the contracting authority: to that effect, *Koppensteiner GmbH v Bundesimmobiliengesellschaft mbH* (Case C-15/04) [2005] ECR I-4855, para 38 and *Lämmerzahl GmbH v Freie Hansestadt Bremen* (Case C-241/06) [2007] ECR I-8415, second sentence of para 63. As I explain in para 75 of my opinion in the parallel case of *Commission v Ireland* (Case C-456/08) [2010] PTSR 1403, the effective assertion of such a claim cannot be made to depend on the discretion of a national body, not even the discretion of an independent court.

49 Regulation 47(7)(b) of the 2006 Regulations does not give the national court any legal criteria for the exercise of its discretion as regards a possible extension of time. At the hearing before the Court of Justice, all the parties moreover agreed in submitting that the applicant's lack of knowledge of a breach of procurement law is only one of several aspects which influence the national court's assessment. Thus lack of knowledge *may* lead to an extension of the period, but that is not mandatory. Furthermore, the national court may, as Ireland observes, limit an extension of time to specific complaints and refuse it for others, so that an action by the unsuccessful tenderer or candidate may well be only partially admissible.

50 It thus becomes unpredictable for the person concerned in the individual case whether it will be worth his while to claim a legal remedy. Such a legal position may deter unsuccessful tenderers or candidates—especially those from other member states—from asserting their legal right to review of the decisions of contracting authorities. The objective of effective review, as prescribed by article 1(1) of Directive 89/665, cannot be achieved with certainty in those circumstances.

Practical problems in determining whether an applicant "knows" or "ought to know"

51 The defendant and the United Kingdom further assert that it will lead to considerable practical problems if a limitation period does not start

A running until the date on which the unsuccessful tenderer or candidate knew or ought to have known of the alleged breach of procurement law. It is not easy, for example, to assess what the knowledge must relate to in the particular case or at what time it was acquired or from when it must be presumed.

52 It suffices to point out here that the same practical problems also arise if a court, when exercising its discretion as to a possible extension of time, has to consider the time from which the applicant knew or ought to have known of the breach of procurement law he complains of. A provision such as regulation 47(7)(b) of the 2006 Regulations cannot avoid such practical problems: it merely treats them from a different point of view.

C The deterrent effect of actions for compensation

53 Ireland also objects that an over-generous approach to time limits for bringing actions for compensation may have a highly deterrent effect on contracting authorities (a "chilling effect") and cause considerable delay to award procedures. This submission was adopted at the hearing by the defendant and the United Kingdom.

D **54** This argument is also unconvincing, however.

55 Successful actions for compensation by unsuccessful tenderers or candidates may undoubtedly entail a substantial financial burden for the contracting authority. This risk is, however, the price to be paid by a contracting authority so that effective legal protection in connection with the award of public contracts can be provided. Any attempt to minimise the attendant financial risks for the contracting authority will necessarily be at the expense of effective legal protection.

56 A too restrictive approach to the conditions for obtaining secondary legal protection would ultimately also jeopardise the achievement of the objectives of the review procedure. Those objectives do not only include the provision of legal protection for the tenderers and candidates concerned. The review procedure is in fact also intended to have a disciplinary effect on contracting authorities, by ensuring that the rules of European procurement law—in particular the requirement of transparency and the prohibition of discrimination—are observed and any infringements penalised.

57 Merely in passing, it may be observed that not even a limitation rule such as regulation 47(7)(b) of the 2006 Regulations is capable of excluding the chilling effect mentioned. As already noted, that provision leaves it in the discretion of the national court to extend the limitation periods for unsuccessful tenderers or candidates, especially where they had no previous knowledge of the alleged infringement of procurement law. This possibility of an extension of time may thus lead to the contracting authority, long after the contract has been concluded with the successful tenderer or candidate, still being exposed to the risk of claims for compensation. Because of the unpredictability of the exercise of judicial discretion, this risk is if anything more difficult for the contracting authority to calculate in the context of regulation 47(7)(b) of the 2006 Regulations than with a rule under which the limitation period starts to run as soon as the person concerned knows or ought to know of the alleged breach of procurement law.

(B) The national court's discretion to grant an extension of time (second part of the second question)

58 The second part of the second question is closely connected with the first question. The referring court essentially wishes to know what steps it should take if an unsuccessful tenderer or candidate did not initially know of the alleged breach of procurement law, and was not in a position in which he ought to have known of it, so that he could not make an application for review within the three-month period under regulation 47(7)(b) of the 2006 Regulations.

59 According to settled case law, the courts of the member states are required to interpret and apply national law consistently with Directives: on the principle of interpretation in conformity with Directives generally, see *von Colson v Land Nordrhein-Westfalen* (Case 14/83) [1984] ECR 1891, para 26; *Pfeiffer v Deutsches Rotes Kreuz, Kreisverband Waldshut eV* (Joined Cases C-397–403/01) [2005] ICR 1307, para 113 and *Impact v Minister for Agriculture and Food* (Case C-268/06) [2008] ECR I-2483, para 98; on Directive 89/665 specifically, see also *Santex SpA v Unità Socio Sanitaria Locale n 42 di Pavia* (Case C-327/00) [2003] ECR I-1877, para 63 and *Lämmerzahl GmbH v Freie Hansestadt Bremen* (Case C-241/06) [2007] ECR I-8415, para 62. Specifically with respect to procurement review procedures, they must interpret the national provisions laying down a limitation period, as far as is at all possible, in such a way as to ensure observance of the principle of effectiveness deriving from Directive 89/665: *Santex* [2003] ECR I-1877, para 62.

60 As I have explained in connection with the first question (see paras 31–46 above), limitation periods for actions for declarations and compensation in connection with public contracts may not start to run until the time when the applicant knew or ought to have known of the alleged breach of procurement law. The referring court must therefore do whatever lies within its jurisdiction to achieve that objective: see *Pfeiffer* [2005] ICR 1307, paras 118 and 119 and *Impact* [2008] ECR I-2483, para 101.

61 Consequently, the referring court is required above all to deal with the limitation period under regulation 47(7)(b) of the 2006 Regulations, in harmony with the Directive, in such a way that in the case of proceedings for declarations and compensation it does not already start to run from the time of the breach of procurement law, but only from the time at which the applicant knew or ought to have known of that breach of procurement law.

62 Should regulation 47(7)(b) of the 2006 Regulations not be amenable to such an interpretation, then the referring court would *as an alternative* have to look, in the context of its discretion to extend the time limit, for a solution that was compliant with the Directive. The aim of effective review as prescribed by article 1(1) of Directive 89/665 would then lead to the national court's discretion being as it were "reduced to zero". It would thus be *obliged* to grant an extension of time to an applicant such as the claimant in the present case.

63 That extension of time would have to be at least long enough for the applicant to have available for the preparation and submission of his claim, from the point at which he knew or ought to have known of the alleged infringement of procurement law, the three months mentioned in regulation 47(7)(b) of the 2006 Regulations. In addition, the national court of course remains free to grant, in the exercise of its discretion, having regard

A to the circumstances of the individual case, a more generous extension of time, if it considers that necessary in order to arrive at a fair solution.

(C) The requirement to apply for review promptly (first part of the second question)

64 By the first part of its second question, the referring court wishes
B essentially to know whether in review proceedings it can dismiss an action as inadmissible if it has not been submitted "promptly".

65 According to the limitation provision in regulation 47(7)(b) of the 2006 Regulations, an application for review is only admissible if it is brought "promptly and in any event within three months from the date when grounds for the bringing of the proceedings first arose". That requirement to
C initiate the review procedure promptly apparently allows the English court, in its discretion, to dismiss applications for review as inadmissible even before the expiry of the three-month period. At the hearing before the Court of Justice, the parties to the main proceedings and the United Kingdom Government agreed that in their practice the English courts do in fact make use of this possibility of dismissing an application on the ground of "lack of promptness": at the hearing before the court, the parties mentioned in
D this connection inter alia the judgment of the High Court (Cooke J) of 4 November 2004 in *M Holleran Ltd v Severn Trent Water Ltd* [2005] EuLR 364. (Ireland submitted in the present proceedings for a preliminary ruling that the essentially identical limitation rule in Irish law (in accordance with Order 84A(4) of the Rules of the Superior Courts, an application for review must be made "at the earliest opportunity and in any event within three
E months) does not produce any such effects. Nevertheless, in the proceedings for failure to fulfil obligations which are being heard in parallel to the present case, Ireland indicated that in certain circumstances an application for review may under Irish law be dismissed as out of time even if it has been made within the three-month period: see on this point my opinion of today's date in *Commission v Ireland* (Case C-456/08) [2010] PTSR 1403, para 70.)

F **66** The application of a limitation period must not, however, lead to the exercise of the right to review of award decisions being deprived of its practical effectiveness: to that effect, *Universale-Bau AG v Entsorgungsbetriebe Simmering GmbH* (Case C-470/99) [2002] ECR I-11617, in particular para 72; *Santex SpA v Unità Socio Sanitaria Locale n 42 di Pavia* (Case C-327/00) [2003] ECR I-1877, paras 51 and 57 and
G *Lämmerzahl GmbH v Freie Hansestadt Bremen* (Case C-241/06) [2007] ECR I-8415, para 52; on procedural rules generally, see *Fabricom SA v État belge* (Joined Cases C-21 and 34/03) [2005] ECR I-1559, para 42.

67 Article 1(1) of Directive 89/665 requires that it must be possible for decisions of contracting authorities to be reviewed "effectively and, in particular, as rapidly as possible". As I explain in more detail in my opinion in *Commission v Ireland* [2010] PTSR 1403 (see paras 47–49 of that
H opinion, with references to the case law), in order to achieve that aim of the Directive, the member states must create a clear legal framework in the field in question. They are obliged to establish a sufficiently precise, clear and transparent legal position, so that individuals can know what their rights and obligations are.

68 For a limitation rule such as regulation 47(7)(b) of the 2006 Regulations, the requirements of clarity, precision and predictability apply to a special degree. Lack of clarity with respect to the applicable time limits is liable, in view of the threat of an action being time-barred, to entail serious harmful consequences for individuals and undertakings.

69 A limitation period such as that under regulation 47(7)(b) of the 2006 Regulations, the duration of which is placed at the discretion of the competent court by the criterion "promptly", is not predictable in its effects. The tenderers and candidates concerned are uncertain as to how much time they have to prepare their applications for review properly, and they are scarcely able to estimate the prospects of success of such applications. The objective imposed by article 1(1) of Directive 89/665 of effective review of decisions taken by the contracting authorities is thereby missed: see para 71 of my opinion in *Commission v Ireland*.

70 In consequence, the national courts may not declare an application for review, brought within the three-month period under regulation 47(7)(b) of the 2006 Regulations, inadmissible on the ground of "lack of promptness". They are obliged to interpret and apply the provisions of national law in a manner consistent with the Directive: see on this point the case law cited in para 59 above. With regard specifically to review procedures under procurement law, they must—as already mentioned—interpret the national rules laying down a limitation period, as far as is at all possible, in such a way as to ensure observance of the principle of effectiveness deriving from Directive 89/665: *Santex* [2003] ECR I-1877, para 62.

71 In this connection I may point out that a criterion of promptness need not necessarily be understood in the sense of an independent limitation period. If a provision combines an indication of time expressed in days, weeks, months or years with the word "promptly" or a similar expression, that addition can also be interpreted as emphasising the need for rapid action and reminding applicants of their responsibility, in their own interests, for taking the necessary steps as early as possible, in order best to protect their interests: see the examples in para 68 of my opinion in *Commission v Ireland* [2010] PTSR 1403. (In procurement law too, the concept of a "duty of diligence, which falls to be categorised more as an obligation as to means than an obligation as to results", is not unknown: *Commission of the European Communities v Hellenic Republic* (Case C-250/07) [2009] ECR I-4369, para 68.)

72 Against that background, the referring court will have to examine whether the criterion of acting "promptly" in regulation 47(7)(b) of the 2006 Regulations can be interpreted to the effect that it does not constitute an independent barrier to admissibility but merely contains a reference to the need for rapidity.

73 Should it not be possible to interpret regulation 47(7)(b) of the 2006 Regulations to that effect, in compliance with the Directive, the national court is obliged to apply Community law to its full extent and to protect the rights it confers on individuals, if necessary by disapplying any provision whose application would in the particular case lead to a result contrary to Community law: *Amministrazione delle Finanze dello Stato v Simmenthal SpA* (Case 106/77) [1978] ECR 629, para 24; *Santex*

A [2003] ECR I-1877, para 64 and *Lämmerzahl GmbH v Freie Hansestadt Bremen* (Case C-241/06) [2007] ECR I-8415, para 63.

(VI) Conclusion

74 On the basis of the above considerations, I propose that the Court of Justice give the following answers to the reference for a preliminary ruling
B from the High Court: (1) article 1(1) of Directive 89/665 requires that a limitation period for applications for a declaration of an infringement of procurement law and for actions for compensation does not start to run until the time at which the applicant knew or ought to have known of the alleged infringement of procurement law. (2) Article 1(1) of Directive 89/665/EEC precludes a limitation provision which allows the national court in its discretion to dismiss applications for a declaration of an infringement of
C procurement law and actions for damages as inadmissible by reference to a requirement to bring proceedings promptly. (3) The national court is obliged to do whatever lies within its jurisdiction to achieve a result compatible with the aim of Directive 89/665/EEC. If such a result cannot be achieved by way of interpreting and applying the limitation rule in a manner consistent with the Directive, the national court is obliged to leave that rule
D unapplied.

28 January 2010. **THE COURT** (**Third Chamber**) delivered the following judgment in Luxembourg.

1 This reference for a preliminary ruling concerns the interpretation of Council Directive 89/665/EEC of 21 December 1989 on the co-ordination of the laws, regulations and administrative provisions relating to the
E application of review procedures to the award of public supply and public works contracts, as amended by Council Directive 92/50/EEC of 18 June 1992 ("Directive 89/665"), with regard to the date from which the period for bringing proceedings starts to run in public procurement cases.

2 The reference has been made in the context of a dispute between the claimant, Uniplex (UK) Ltd, and the defendant, NHS Business Services
F Authority, concerning the conclusion of a framework agreement.

Legal context

Community legislation

3 Article 1(1) of Directive 89/665, as substituted by article 41 of Directive 92/50, provides:

G "The member states shall take the measures necessary to ensure that, as regards contract award procedures falling within the scope of [Council Directive 71/305/EEC of 26 July 1971 concerning the co-ordination of procedures for the award of public works contracts (OJ, English Special Edition 1971 (II), p 682)], [Council Directive 77/62/EEC of 21 December 1976 co-ordinating procedures for the award of public supply contracts
H (OJ 1977 L13, p 1)], and [Council Directive 92/50/EEC], 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 the following articles and, in particular, article 2(7) on the grounds that such decisions have infringed Community law in the field of public procurement or national rules implementing that law."

4 Under article 2(1) of Directive 89/665: A

"The member states shall ensure that the measures taken concerning the review procedures specified in article 1 include provision for the powers to: (a) take, at the earliest opportunity and by way of interlocutory procedures, interim measures with the aim of correcting the alleged infringement or preventing further damage to the interests concerned, including measures to suspend or to ensure the suspension of B the procedure for the award of a public contract or the implementation of any decision taken by the contracting authority; (b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure; (c) award damages to C persons harmed by an infringement."

5 Article 41 of European Parliament and Council Directive 2004/18/EC of 31 March 2004 on the co-ordination of procedures for the award of public works contracts, public supply contracts and public service contracts provides:

"1. Contracting authorities shall as soon as possible inform candidates D and tenderers of decisions reached concerning the conclusion of a framework agreement, the award of the contract or admittance to a dynamic purchasing system, including the grounds for any decision not to conclude a framework agreement or award a contract for which there has been a call for competition or to recommence the procedure or implement a dynamic purchasing system; that information shall be given in writing E upon request to the contracting authorities.

"2. On request from the party concerned, the contracting authority shall as quickly as possible inform:—any unsuccessful candidate of the reasons for the rejection of his application,—any unsuccessful tenderer of the reasons for the rejection of his tender, including, for the cases referred to in article 23, paragraphs (4) and (5), the reasons for its F decision of non-equivalence or its decision that the works, supplies or services do not meet the performance or functional requirements,—any tenderer who has made an admissible tender of the characteristics and relative advantages of the tender selected as well as the name of the successful tenderer or the parties to the framework agreement. The time taken may in no circumstances exceed 15 days from receipt of the written request . . ." G

National legislation

6 Regulation 47(7) of the Public Contracts Regulations 2006 ("the 2006 Regulations"), adopted in order to implement Directive 89/665 into domestic law, provides:

"Proceedings under this regulation must not be brought unless . . . H (b) those proceedings are brought promptly and in any event within three months from the date when grounds for the bringing of the proceedings first arose unless the court considers that there is good reason for extending the period within which proceedings may be brought."

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

7 The claimant, a company established in the United Kingdom, is the sole distributor in that member state of haemostats manufactured by Gelita Medical BV, a company established in the Netherlands.

8 The defendant is part of the National Health Service, the state-owned and -operated public health service in the United Kingdom. It is a contracting authority for the purposes of Directive 2004/18.

9 On 26 March 2007 the defendant launched a restricted tendering procedure for the conclusion of a framework agreement for the supply of haemostats. A notice to that effect was published in the Official Journal of the European Union on 28 March 2007.

10 On 13 June 2007 the defendant issued an invitation to tender to five suppliers, including the claimant, which had expressed interest in that framework agreement. Tenders were to be submitted by 19 July 2007.

11 The award criteria, with the relevant weighting to be given to each, set out in the tendering documentation sent to the tenderers, were as follows: price and other cost effectiveness factors (30%); quality and clinical acceptability (30%); product support and training (20%); delivery performance and capability (10%); product range/development (5%), and environmental/sustainability (5%).

12 The claimant submitted its tender on 18 July 2007.

13 On 22 November 2007 the defendant sent to the claimant a letter indicating that it had decided to conclude a framework agreement with three tenderers. The claimant was notified that it would not be awarded a framework agreement, as it had obtained the lowest marks of the five tenderers which had been invited to submit, and which had submitted, bids. That letter set out the award criteria, with the corresponding weighting, and indicated the names of the successful tenderers, the range of the successful scores and the claimant's evaluated score.

14 According to that letter the range of the successful scores was between 905.5 and 971.5, whereas the claimant had obtained a score of 568.

15 The letter of 22 November 2007 also informed the claimant of its right to challenge the decision to conclude the framework agreement in question, of the mandatory ten-day standstill period that would apply from the date of notification of that decision to conclusion of the framework agreement, and of the claimant's entitlement to seek an additional debriefing.

16 The claimant requested a debriefing by e-mail dated 23 November 2007.

17 The defendant replied on 13 December 2007 by providing details of its approach to the evaluation of the award criteria as to characteristics and relative advantages of the successful tenders in relation to the claimant's tender.

18 That letter stated, inter alia, first, that the claimant had been given a score of zero for price and other cost effectiveness factors because it had submitted its list prices. All the other tenderers had offered discounts on their list prices. Secondly, with respect to the delivery performance and capability criterion, all tenderers which were new to the haemostats market in the United Kingdom received a score of zero for the sub-criterion relating to customer base in the United Kingdom.

19 On 28 January 2008 the claimant sent the defendant a letter before action alleging a number of breaches of the 2006 Regulations. The claimant claimed in that letter that time did not start to run for the bringing of proceedings until 13 December 2007. The claimant requested a reply from the defendant by 13 February 2008, but added that if the defendant took the view that time did not run from that date, it should reply by 6 February 2008.

20 By letter dated 11 February 2008 the defendant notified the claimant that there had been a change of circumstances. It had been discovered that the bid of Assut (UK) Ltd was non-compliant and that B Braun UK Ltd, which had been placed fourth under the evaluation of tenders, had been awarded a position on the framework agreement in place of Assut (UK) Ltd.

21 The defendant responded to the claimant's letter before action by letter dated 13 February 2008, denying the various allegations made by the claimant. In that letter the defendant also asserted, as a preliminary point, that the events giving rise to the claimant's complaints had occurred no later than 22 November 2007, which was the date on which the decision not to include the claimant in the framework agreement had been communicated to it. The defendant asserted that 22 November 2007 was the latest date from which time began to run for the purposes of regulation 47(7)(b) of the 2006 Regulations.

22 The claimant responded by letter on 26 February 2008. In that letter it continued to maintain that the period for bringing proceedings under the 2006 Regulations did not begin to run until 13 December 2007.

23 On 12 March 2008 the claimant brought proceedings before the High Court of Justice (England and Wales), Queen's Bench Division, inter alia seeking, first, a declaration that the defendant had breached the applicable public procurement rules and, secondly, damages.

24 The High Court decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling: [the questions are set out in para 18 of the Advocate General's opinion, ante].

The questions referred

The first question

25 By its first question, the national court asks, in essence, whether article 1 of Directive 89/665 requires that the period for bringing proceedings seeking to have an infringement of the public procurement rules established or to obtain damages for the infringement of those rules starts to run from the date of the infringement of those rules or from the date on which the claimant knew, or ought to have known, of that infringement.

26 The objective of Directive 89/665 is to guarantee the existence of effective remedies for infringements of Community law in the field of public procurement or of the national rules implementing that law, so as to ensure the effective application of the Directives on the co-ordination of public procurement procedures. However, Directive 89/665 contains no provision specifically covering time limits for the applications for review which it seeks to establish. It is therefore for the internal legal order of each member state to establish such time limits: *Universale-Bau AG v Entsorgungsbetriebe Simmering GmbH* (Case C-470/99) [2002] ECR I-11617, para 71.

A **27** The detailed procedural rules governing the remedies intended to protect rights conferred by Community law on candidates and tenderers harmed by decisions of contracting authorities must not compromise the effectiveness of Directive 89/665: *Universale-Bau*, para 72.

28 It is for that reason appropriate to determine whether, in the light of the purpose of Directive 89/665, national legislation such as that at issue in the main proceedings does not adversely affect rights conferred on
B individuals by Community law: *Universale-Bau*, para 73.

29 In that regard, it should be recalled that article 1(1) of Directive 89/665 requires member states to guarantee that unlawful decisions of contracting authorities can be subjected to effective review which is as swift as possible: *Universale-Bau*, para 74.

30 However, the fact that a candidate or tenderer learns that its
C application or tender has been rejected does not place it in a position effectively to bring proceedings. Such information is insufficient to enable the candidate or tenderer to establish whether there has been any illegality which might form the subject matter of proceedings.

31 It is only once a concerned candidate or tenderer has been informed of the reasons for its elimination from the public procurement procedure that it may come to an informed view as to whether there has been an
D infringement of the applicable provisions and as to the appropriateness of bringing proceedings.

32 It follows that the objective laid down in article 1(1) of Directive 89/665 of guaranteeing effective procedures for review of infringements of the provisions applicable in the field of public procurement can be realised only if the periods laid down for bringing such proceedings start to run only
E from the date on which the claimant knew, or ought to have known, of the alleged infringement of those provisions: see, to that effect, *Universale-Bau*, para 78.

33 This conclusion is supported by the fact that article 41(1) and (2) of Directive 2004/18, which was in force at the time of the facts in the main proceedings, requires contracting authorities to notify unsuccessful candidates and tenderers of the reasons for the decision concerning them.
F Such provisions are consistent with a system of limitation periods under which those periods start to run from the date on which the claimant knew, or ought to have known, of the alleged infringement of the provisions applicable in the field of public procurement.

34 The same conclusion is also supported by the amendments made to Directive 89/665 by European Parliament and Council Directive 2007/66/EC
G 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, even though the period for transposition of that Directive did not expire until after the facts in the main proceedings had occurred. Article 2c of Directive 89/665, introduced by Directive 2007/66, provides that the decision of the contracting authority is to be communicated to each candidate or tenderer, accompanied by a
H summary of the relevant reasons, and that the period for making an application for review expires only after a specified number of days following that communication.

35 The answer to the first question accordingly is that article 1(1) of Directive 89/665 requires that the period for bringing proceedings seeking to

have an infringement of the public procurement rules established or to obtain damages for the infringement of those rules should start to run from the date on which the claimant knew, or ought to have known, of that infringement.

The second question

36 The second question consists of two parts. The first concerns the interpretation of Directive 89/665 in relation to a requirement under national law that proceedings be brought promptly. The second relates to the effects which that Directive has on the discretion conferred on the national court to extend periods within which proceedings must be brought.

The first part of the second question

37 By the first part of the second question, the national court asks, in essence, whether Directive 89/665 is to be interpreted as precluding a provision, such as regulation 47(7)(b) of the 2006 Regulations, which requires that proceedings be brought promptly.

38 As observed in para 29 of this judgment, article 1(1) of Directive 89/665 requires member states to guarantee that decisions of contracting authorities can be subjected to effective review which is as swift as possible. In order to attain the objective of rapidity pursued by that Directive, member states may impose limitation periods for actions in order to require traders to challenge promptly preliminary measures or interim decisions taken in public procurement procedures: see, to that effect, *Universale-Bau AG v Entsorgungsbetriebe Simmering GmbH* (Case C-470/99) [2002] ECR I-11617, paras 75–79; *Grossmann Air Service, Bedarfsluftfahrtunternehmen GmbH & Co KG v Republik Österreich* (Case C-230/02) [2004] ECR I-1829, paras 30 and 36–39 and *Lämmerzahl GmbH v Freie Hansestadt Bremen* (Case C-241/06) [2007] ECR I-8415, paras 50 and 51.

39 The objective of rapidity pursued by Directive 89/665 must be achieved in national law in compliance with the requirements of legal certainty. To that end, member states have an obligation to establish a system of limitation periods that is sufficiently precise, clear and foreseeable to enable individuals to ascertain their rights and obligations: see, to that effect, *Commission of the European Communities v Federal Republic of Germany* (Case C-361/88) [1991] ECR I-2567, para 24 and *Commission of the European Communities v Grand Duchy of Luxembourg* (Case C-221/94) [1996] ECR I-5669, para 22.

40 Furthermore, the objective of rapidity pursued by Directive 89/665 does not permit member states to disregard the principle of effectiveness, under which the detailed methods for the application of national limitation periods must not render impossible or excessively difficult the exercise of any rights which the person concerned derives from Community law, a principle which underlies the objective of effective review proceedings laid down in article 1(1) of that Directive.

41 A national provision such as regulation 47(7)(b) of the 2006 Regulations, under which proceedings must not be brought "unless . . . those proceedings are brought promptly and in any event within three months", gives rise to uncertainty. The possibility cannot be ruled out that

such a provision empowers national courts to dismiss an action as being out of time even before the expiry of the three-month period if those courts take the view that the application was not made "promptly" within the terms of that provision.

42 As the Advocate General observed in para 69 of her opinion, a limitation period whose duration is placed at the discretion of the competent court is not predictable in its effects. Consequently, a national provision providing for such a period does not ensure effective transposition of Directive 89/665.

43 It follows that the answer to the first part of the second question is that article 1(1) of Directive 89/665 precludes a national provision, such as that at issue in the main proceedings, which allows a national court to dismiss, as being out of time, proceedings seeking to have an infringement of the public procurement rules established or to obtain damages for the infringement of those rules on the basis of the criterion, appraised in a discretionary manner, that such proceedings must be brought promptly.

The second part of the second question

44 By the second part of the second question, the national court asks, in essence, what effects follow from Directive 89/665 in respect of the discretion conferred on the national court to extend periods within which proceedings must be brought.

45 In the case of national provisions transposing a Directive, national courts are bound to interpret national law, so far as possible, in the light of the wording and purpose of the Directive concerned in order to achieve the result sought by that Directive: see *von Colson v Land Nordrhein-Westfalen* (Case 14/83) [1984] ECR 1891, para 26 and *Pfeiffer v Deutsches Rotes Kreuz, Kreisverband Waldshut eV* (Joined Cases C-397–403/01) [2005] ICR 1307, para 113.

46 In the present case, it is for the national court, as far as is at all possible, to interpret the domestic provisions establishing the limitation period in a manner which accords with the objective of Directive 89/665: see, to that effect, *Santex SpA v Unità Socio Sanitaria Locale n 42 di Pavia* (Case C-327/00) [2003] ECR I-1877, para 63 and *Lämmerzahl GmbH v Freie Hansestadt Bremen* (Case C-241/06) [2007] ECR I-8415, para 62.

47 In order to satisfy the requirements in the answer given to the first question, the national court dealing with the case must, as far as is at all possible, interpret the national provisions governing the limitation period in such a way as to ensure that that period begins to run only from the date on which the claimant knew, or ought to have known, of the infringement of the rules applicable to the public procurement procedure in question.

48 If the national provisions at issue do not lend themselves to such an interpretation, that court is bound, in exercise of the discretion conferred on it, to extend the period for bringing proceedings in such a manner as to ensure that the claimant has a period equivalent to that which it would have had if the period provided for by the applicable national legislation had run from the date on which the claimant knew, or ought to have known, of the infringement of the public procurement rules.

49 In any event, if the national provisions do not lend themselves to an interpretation which accords with Directive 89/665, the national court must refrain from applying those provisions, in order to apply Community law

fully and to protect the rights conferred thereby on individuals: see, to that effect, *Santex* [2003] ECR I-1877, para 64 and *Lämmerzahl* [2007] ECR I-8415, para 63.

50 The answer to the second part of the second question is accordingly that Directive 89/665 requires the national court, by virtue of the discretion conferred on it, to extend the limitation period in such a manner as to ensure that the claimant has a period equivalent to that which it would have had if the period provided for by the applicable national legislation had run from the date on which the claimant knew, or ought to have known, of the infringement of the public procurement rules. If the national provisions do not lend themselves to an interpretation which accords with Directive 89/665, the national court must refrain from applying them, in order to apply Community law fully and to protect the rights conferred thereby on individuals.

Costs

51 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 of Justice, other than the costs of those parties, are not recoverable.

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

1 Article 1(1) of Council Directive 89/665/EEC of 21 December 1989 on the co-ordination 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 Council Directive 92/50/EEC of 18 June 1992, requires that the period for bringing proceedings seeking to have an infringement of the public procurement rules established or to obtain damages for the infringement of those rules should start to run from the date on which the claimant knew, or ought to have known, of that infringement.

2 Article 1(1) of Directive 89/665, as amended by Directive 92/50, precludes a national provision, such as that at issue in the main proceedings, which allows a national court to dismiss, as being out of time, proceedings seeking to have an infringement of the public procurement rules established or to obtain damages for the infringement of those rules on the basis of the criterion, appraised in a discretionary manner, that such proceedings must be brought promptly.

3 Directive 89/665, as amended by Directive 92/50, requires the national court, by virtue of the discretion conferred on it, to extend the limitation period in such a manner as to ensure that the claimant has a period equivalent to that which it would have had if the period provided for by the applicable national legislation had run from the date on which the claimant knew, or ought to have known, of the infringement of the public procurement rules. If the national provisions do not lend themselves to an interpretation which accords with Directive 89/665, as amended by Directive 92/50, the national court must refrain from applying them, in order to apply Community law fully and to protect the rights conferred thereby on individuals.

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