

A Court of Justice of the European Union

Commission of the European Communities *v* Ireland

(Case C-456/08)

B 2009 Sept 24; Acting President of Chamber JN Cunha Rodrigues,
Oct 29; Judges P Lindh, A Rosas, U Lõhmus, A Ó Caoimh
2010 Jan 28 Advocate General J Kokott

C *European Community — Public procurement — Contract review procedure — National provision limiting period for bringing proceedings for review of procurement decision — Possibility for limitation period to be applied to interim decisions by contracting authority existing but not specifically enacted — Proceedings to be brought “at the earliest opportunity and in any event within three months” — Court’s discretion to extend limitation period — Requirement of effective transposition of Community legislation — Lack of clear and precise legal context resulting from national provision — Whether member state at fault in maintaining provision — Irish Rules of Superior Courts, Ord 84A(4) — Council Directive 89/665/EEC (as amended by Council Directive 92/50/EEC), art 1(1) — Council Directive 93/37/EEC (as amended by Parliament and Council Directive 97/52/EC), art 8(2)*

E A number of undertakings replied to an invitation by the public road authority in Ireland to tender for a project to construct and operate a section of motorway, the Dundalk Western Bypass, and two of that number were invited to proceed to further negotiations. By letter of 14 October 2003 the authority informed one of the two candidates, the E consortium, of which S Ltd was a member, that it had been decided to select the other candidate, the C consortium, as the preferred tenderer, but that E’s offer had not been rejected, and that if further discussions with the C consortium did not culminate in the award of a contract, the E consortium could be invited to enter into discussions in the place of the C consortium. In December 2003 the road authority decided to award the contract to the C consortium, and the contract was signed on 5 February 2004. The E consortium was never officially notified of that decision. In an action for damages brought by S Ltd on 8 April 2004, in which various procedural irregularities were alleged, S Ltd argued that for the purposes of F Order 84A(4) of the Irish Rules of the Superior Courts¹ (“RSC”), which provided that “[an] application for the review of a decision to award or the award of a public contract shall be made at the earliest opportunity and in any event within three months from the date when grounds for the application first arose unless the court considers that there is good reason for extending such period”, the date on which the period for bringing an action began to run was 5 February 2004, when the contract was signed. The judge of the Irish High Court held that the relevant date was G 14 October 2003, when the E consortium was informed of the identity of the preferred tenderer, so that the action was statute-barred. After S Ltd had made a complaint to the Commission of the European Communities, the Commission brought an action against Ireland before the Court of Justice of the European Union, applying for a declaration that Ireland had failed to fulfil its obligations under article 1(1) of Council Directive 89/665/EEC on the application of review procedures to the award of public supply and public works contracts, as amended (“Directive H 89/665”)², which required member states to ensure that decisions taken by contracting authorities could be “reviewed effectively and, in particular, as rapidly as possible”, and under article 8(2) of Council Directive 93/37/EEC on procedures for

¹ Irish Rules of the Superior Courts, Ord 84A(4): see post, opinion, para 10.

² Council Directive 89/665/EEC, as amended, art 1(1): see post, opinion, para 7.

the award of public works contracts, as amended (“Directive 93/37”)³, which required contracting authorities to “promptly inform candidates and tenderers of the decisions taken on contract awards”. The Commission asserted that Ireland had failed in its obligations under article 1(1) of Directive 89/665, by maintaining in force Order 84A(4) of the RSC, in so far as it gave rise to uncertainty as to what decisions could be challenged in legal proceedings and as to how periods for bringing an action were to be determined, and under article 1(1) of Directive 89/665 and article 8(2) of Directive 93/37, by failing to notify the award decision in the Dundalk procurement procedure to the complainant.

On the Commission’s application—

Held, granting the application, that it was clear from, inter alia, the judgment of the Irish High Court that it was possible to interpret Order 84A(4) of the RSC such that the limitation period provided for by it was applicable not only to the final decision to award a public contract but also to interim decisions taken by a contracting authority during a procurement procedure, but that since that was not clearly expressed in that provision, the result was a legal situation that was not sufficiently clear and precise to enable candidates and tenderers to be fully informed of their rights and if necessary avail themselves of those rights before the national courts, and hence that Order 84A(4), in so depriving those parties of their right of effective review under article 1(1) of Directive 89/665, failed to comply with the principle of effectiveness that was embodied in article 1(1); that since the stipulation in Order 84A(4) that applications were to be made “at the earliest opportunity” rendered it possible for an action to be dismissed as out of time even before the expiry of the three months also referred to in that provision, a party could not predict with certainty what period would be accorded to it for bringing proceedings, so that the provision did not ensure effective transposition of Directive 89/665, and that although the grant to the national court of a discretionary power to extend a limitation period could constitute valid implementation of the Directive, as being in the interest of the proper administration of justice on the ground of fairness in a complex field such as public procurement, in the present case the existence of the discretionary power was not apt to compensate for the defect in Order 84A(4) inhering in the “at the earliest opportunity” provision; that, therefore, the Commission’s claim in relation to Order 84A(4) was well founded; that since contracting authorities were under a mandatory obligation under articles 1(1) of Directive 89/665 and 8(2) of Directive 93/37 to inform candidates and tenderers promptly of decisions taken on contract awards, the E consortium had never been officially informed of the decision to award the Dundalk Bypass contract to the C consortium, and an action for failure to fulfil obligations could rest on an infringement of Community law by national bodies in a specific individual case, the Commission had also made out its case in relation to notification; and that, in view of the foregoing, Ireland had failed in its obligations as alleged, and a declaration to that effect would therefore be made (post, judgment, paras 29–31, 41, 42, 55–58, 61–67, 74, 75, 80–83, operative part, para 1).

Dicta in Commission of the European Communities v Federal Republic of Germany (Case C-361/88) [1991] ECR I-2567, para 24, ECJ and *Commission of the European Communities v Federal Republic of Germany* (Joined Cases C-20 and C-28/01) [2003] ECR I-3609, para 30, 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 Federal Republic of Germany (Joined Cases C-20 and C-28/01) [2003] ECR I-3609, ECJ

³ Council Directive 93/37/EEC, as amended, art 8(2): see post, opinion, para 6.

- A *Commission of the European Communities v Federal Republic of Germany* (Case C-275/08) (unreported) 15 October 2009, ECJ
Commission of the European Communities v Grand Duchy of Luxembourg (Case C-221/94) [1996] ECR I-5669, ECJ
Commission of the European Communities v Ireland (Case C-392/96) [1999] ECR I-5901, ECJ
Commission of the European Communities v Kingdom of Belgium (Case C-263/96) [1997] ECR I-7453, ECJ
- B *Commission of the European Communities v Kingdom of Belgium* (Case C-474/08) (unreported) 29 October 2009, ECJ
Commission of the European Communities v Kingdom of Spain (Case C-444/06) [2008] ECR I-2045, ECJ
Commission of the European Communities v Republic of Austria (Case C-212/02) (unreported) 24 June 2004, ECJ
- C *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
SIAC Construction Ltd v National Roads Authority [2004] IEHC 128; [2005] EuLR 65
Santex SpA v Unità Socio Sanitaria Locale n 42 di Pavia (Case C-327/00) [2003] ECR I-1877, ECJ
- D *Universale-Bau AG v Entsorgungsbetriebe Simmering GmbH* (Case C-470/99) [2002] ECR I-11617, ECJ
- The following additional cases are referred to in the opinion of the Advocate General:
ASM Brescia SpA v Comune di Rodengo Saiano (Case C-347/06) [2008] ECR I-5641, ECJ
- E *Alcatel Austria AG v Bundesministerium für Wissenschaft und Verkehr* (Case C-81/98) [1999] ECR I-7671, ECJ
Asturcom Telecomunicaciones SL v Rodríguez Nogueira (Case C-40/08) [2010] 1 CMLR 865, ECJ
Commission of the European Communities v Federal Republic of Germany (Case 29/84) [1985] ECR 1661, ECJ
Commission of the European Communities v Federal Republic of Germany (Case C-490/04) [2007] ECR I-6095, ECJ
- F *Commission of the European Communities v French Republic* (Case C-233/00) [2003] ECR I-6625, ECJ
Commission of the European Communities v French Republic (Case C-177/04) [2006] ECR I-2461, ECJ
Commission of the European Communities v French Republic (Case C-327/08) (unreported) 11 June 2009, ECJ
Commission of the European Communities v Grand Duchy of Luxembourg (Case C-32/05) [2006] ECR I-11323, ECJ
- G *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-427/07) [2009] ECR I-6277, ECJ
Commission of the European Communities v Italian Republic (Case 363/85) [1987] ECR 1733, ECJ
- H *Commission of the European Communities v Italian Republic* (Case C-366/89) [1993] ECR I-4201, ECJ
Commission of the European Communities v Italian Republic (Case C-129/00) [2003] ECR I-14637, ECJ
Commission of the European Communities v Italian Republic (Case C-385/02) [2004] ECR I-8121, ECJ

- Commission of the European Communities v Ireland* (Case C-455/08) (unreported) 23 December 2009, ECJ A
- Commission of the European Communities v Italian Republic* (Case C-410/03) [2005] ECR I-3507, ECJ
- Commission of the European Communities v Kingdom of the Netherlands* (Case C-339/87) [1990] ECR I-851, ECJ
- Commission of the European Communities v Kingdom of the Netherlands* (Case C-144/99) [2001] ECR I-3541, ECJ B
- Commission of the European Communities v Kingdom of Spain* (Case C-417/99) [2001] ECR I-6015, ECJ
- Commission of the European Communities v Kingdom of Spain* (Case C-503/03) [2006] ECR I-1097, ECJ
- Commission of the European Communities v Kingdom of Spain* (Case C-36/05) [2006] ECR I-10313, ECJ
- Commission of the European Communities v Republic of Austria* (Case C-29/04) [2005] ECR I-9705, ECJ C
- Commission of the European Communities v Republic of Austria* (Case C-507/04) [2007] ECR I-5939, ECJ
- Commission of the European Communities v United Kingdom* (Case C-382/92) [1994] ICR 664; [1994] ECR I-2435, ECJ
- Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland* (Case C-6/04) [2005] ECR I-9017, ECJ
- Dekra Éireann Teoranta v Minister for the Environment and Local Government* [2003] IESC 25; [2003] 2 IR 270 D
- 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-21/03 and C-34/03) [2005] ECR I-1559, ECJ
- Förster v Hoofddirectie van de Informatie Beheer Groep* (Case C-158/07) [2008] ECR I-8507, ECJ E
- “Goed Wonen”, *Stichting v Staatssecretaris van Financiën* (Case C-376/02) [2006] STC 833; [2005] ECR I-3445, ECJ
- Housieux v Délégués du conseil de la Région de Bruxelles-Capitale* (Case C-186/04) [2005] ECR I-3299, ECJ
- Impact v Minister for Agriculture and Food* (Case C-268/06) [2008] ECR I-2483, ECJ
- Koppensteiner GmbH v Bundesimmobiliengesellschaft mbH* (Case C-15/04) [2005] ECR I-4855, ECJ F
- Pfeiffer v Deutsches Rotes Kreuz, Kreisverband Waldshut eV* (Joined Cases C-397-403/01) [2005] ICR 1307; [2004] ECR I-8835, ECJ
- Plantanol GmbH & Co KG v Hauptzollamt Darmstadt* (Case C-201/08) (unreported) 10 September 2009, ECJ
- Pressetext Nachrichtenagentur GmbH v Republik Österreich (Bund)* (Case C-454/06) [2008] Bus LR D 118; [2008] ECR I-4401, ECJ G
- Recheio—Cash & Carry SA v Fazenda Pública/Registo Nacional de Pessoas Colectivas* (Case C-30/02) [2004] ECR I-6051, ECJ
- Revenue and Customs Comrs v Isle of Wight Council* (Case C-288/07) [2009] PTSR 875; [2008] STC 2964; [2008] ECR I-7203, ECJ
- Rewe-Zentralfinanz eG v Landwirtschaftskammer für das Saarland* (Case 33/76) [1976] ECR 1989, ECJ
- Uniplex (UK) Ltd v NHS Business Services Authority* (Case C-406/08) [2010] PTSR 1377, ECJ H
- Veolia Water UK v Fingal County Council* [2006] IEHC 137; [2007] IR 690
- Vereniging voor Energie, Milieu en Water v Directeur van de Dienst uitvoering en toezicht energie* (Case C-17/03) [2005] ECR I-4983, ECJ
- von Colson v Land Nordrhein-Westfalen* (Case 14/83) [1984] ECR 1891, ECJ

A ACTION

By application to the Court of Justice of the European Union dated 20 October 2008, the Commission of the European Communities brought an action against Ireland under article 226EC for a declaration in the terms set out in para 1 of the judgment, post, involving 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 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), and Council Directive 93/37/EEC of 14 June 1993 concerning the co-ordination of procedures for the award of public works contracts (OJ 1993 L199, p 54), as amended by European Parliament and Council Directive 97/52/EC of 13 October 1997 amending Directives 92/50/EEC, 93/36/EEC and 93/37/EEC concerning the co-ordination of procedures for the award of public service contracts, public supply contracts and public works contracts respectively (OJ 1997 L328, p 1).

The Judge Rapporteur was Judge Cunha Rodrigues.

D The facts are stated in the Advocate General's opinion and in the judgment.

G Zavvos, M Konstantinidis and E White, agents, for the European Commission.

A Collins SC and D O'Hagan, agent, for Ireland.

E 29 October 2009. ADVOCATE GENERAL KOKOTT delivered the following opinion.

(I) Introduction

1 This action for failure to fulfil obligations gives the Court of Justice an opportunity to develop its case law on the remedies available to unsuccessful tenderers in public procurement procedures.

F 2 First, the European Commission criticises Ireland on the ground that in a specific individual case an Irish authority, awarding a road construction project, did not inform the unsuccessful consortium of tenderers of the final award decision.

G 3 Secondly, the Commission and Ireland dispute whether the time limits laid down in Irish procedural law are formulated sufficiently clearly, precisely and predictably to enable effective review of the decisions of contracting authorities.

4 As regards the second issue, the present case has points of contact with *Uniplex (UK) Ltd v NHS Business Services Authority* (Case C-406/08) [2010] PTSR 1377, in which I also deliver my opinion today.

(II) Legal context

H (A) Community law

5 The Community law context of the present case is defined by Council Directive 93/37/EEC of 14 June 1993 concerning the co-ordination of procedures for the award of public works contracts and 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. (Since the award procedure at issue was carried out before 31 January 2006, 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 (OJ 2004 L134, p 114; and corrigendum OJ 2004 L351, p 44) is of no relevance in the present case.)

6 Article 8(2) of Directive 93/37, as amended by European Parliament and Council Directive 97/52/EC of 13 October 1997 amending Directives 92/50/EEC, 93/36/EEC and 93/37/EEC concerning the co-ordination of procedures for the award of public service contracts, public supply contracts and public works contracts respectively, contains the following provision:

“Contracting authorities shall promptly inform candidates and tenderers of the decisions taken on contract awards, including the reasons why they have decided not to award a contract for which there has been an invitation to tender or to start the procedure again, and shall do so in writing if requested. They shall also inform the Office for Official Publications of the European Communities of such decisions.”

7 Article 1 of Directive 89/665, 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—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 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.”

A (The reference in article 1(1) of Directive 89/665 to Directive 71/305 is to be read as a reference to Directive 93/37: see article 36(2) of Directive 93/37.)

(B) *National law*

B 8 As regards national law, first, the Irish European Communities (Award of Public Authorities' Contracts) Regulations 2006 (SI No 329/2006) ("the APAC Regulations"), and secondly, the Irish Rules of the Superior Courts ("the RSC") are relevant to the present case.

9 Regulation 49 of the APAC Regulations reads, in extract:

C "1) As soon as practicable after reaching a decision about entering into a public contract or framework agreement or admission to a dynamic purchasing system, a contracting authority shall inform candidates and tenderers of the decision by the most rapid means of communication possible (such as by electronic mail or by telefax) . . ."

"(5) A contracting authority shall not enter into a public contract with a successful tenderer unless at least 14 days have elapsed since the date on which tenderers were informed of the contract award decision in accordance with paragraph (1)."

D 10 Order 84A(4) of the RSC (which goes back to an amendment to the rules of procedure of the High Court of Ireland which was made by the Rules of the Superior Courts (No 4) (Review of the Award of Public Contracts) 1998 (SI 374/1998) and came into force on 19 October 1998) provides:

E "An application for the review of a decision to award or the award of a public contract shall be made at the earliest opportunity and in any event within three months from the date when grounds for the application first arose unless the court considers that there is good reason for extending such period."

(III) *Facts and pre-litigation procedure*

F 11 The Irish National Roads Authority ("NRA") is an authority responsible for the construction and maintenance of roads in Ireland.

12 On 10 July 2001 the NRA published in the Official Journal of the European Communities a call for interest in the design, building, financing and operation of the Dundalk Western Bypass motorway. The contractor was to establish a public-private partnership with the NRA and operate the motorway for a period expected to be 30 years.

G 13 In December 2001 the NRA invited four interested parties to proceed to negotiations. In April 2003 the NRA selected two of them to proceed to more intensive negotiations, namely the EuroLink consortium and the Celtic Roads Group consortium. On 8 August 2003 the NRA invited those consortia to submit a "best and final offer".

H 14 By letter of 14 October 2003 EuroLink was informed by the NRA that it had decided to select Celtic Roads Group as the preferred tenderer. The letter pointed out, however, that EuroLink's offer had not been rejected. If the further discussions with Celtic Roads Group did not lead to the award of a contract, the NRA reserved the right to invite EuroLink to enter into discussions with it in place of Celtic Roads Group.

15 On 9 December 2003 the NRA decided to award the contract to Celtic Roads Group. The contract was signed on 5 February 2004. From 9 February 2004 a notice to that effect was displayed on the NRA website, and a notice of the award was also published in the Official Journal of the European Union on 3 April 2004.

16 On 8 April 2004 SIAC Construction Ltd (“SIAC”), an undertaking which belonged to the unsuccessful EuroLink consortium, brought an action for compensation in the High Court of Ireland, based on various alleged defects in the award procedure.

17 By judgment of 16 July 2004 in *SIAC Construction Ltd v National Roads Authority* [2005] EuLR 65, the High Court of Ireland (Kelly J) dismissed the action as out of time. Contrary to the view taken by SIAC, the High Court considered that SIAC must have known the grounds for its claim at the latest by 14 October 2003, when EuroLink was informed by the NRA of the identity of its preferred tenderer. In accordance with Order 84A(4) of the RSC, SIAC should have brought its action at the latest three months from that date.

18 SIAC thereupon complained to the European Commission. In its complaint it alleged, *inter alia*, that it had not been informed at any time by the NRA of its award decision.

19 Following that complaint, the Commission first sent the Irish authorities an administrative letter on 15 November 2004, asking for further information on the facts. Ireland’s answer of 25 April 2005 was not capable of dispelling the Commission’s doubts. A letter of formal notice was thereupon sent by the Commission to Ireland on 10 April 2006, and a supplementary letter of formal notice on 15 December 2006, to which Ireland replied by letters of 30 May 2006 and 21 February 2007 respectively.

20 Since, however, Ireland’s explanations still failed to satisfy the Commission, it issued a reasoned opinion within the meaning of the first paragraph of article 226EC on 1 February 2008, and required Ireland to take the necessary steps to comply with the reasoned opinion within two months. On 25 June 2008 Ireland replied to the reasoned opinion, stating, *inter alia*, that an amendment to the national laws, regulations and administrative provisions was being considered in the course of the transposition of Directive 2007/66. However, that answer too did not appear to the Commission to be adequate.

(IV) Forms of order sought by the parties and procedure before the Court of Justice

21 By a pleading of 14 October 2008, received at the Court of Justice on 20 October 2008, the Commission brought the present action against Ireland under the second paragraph of article 226EC.

22 The Commission asks the court to (i) declare that, by reason of the rules on time limits in the national legislation regulating the exercise of the right of tenderers to judicial review in public procurement procedures and by failing to notify the award decision to the complainant against that award decision, Ireland has failed to fulfil its obligations, concerning the applicable time limits, under article 1(1) of Directive 89/665 as interpreted by the court and, concerning the lack of notification, under article 1(1) of Directive 89/665 as interpreted by the court and article 8(2) of Directive 93/37, and (ii) order Ireland to pay the costs.

A 23 Ireland contends for its part that the court should dismiss the action and order the Commission to pay the costs.

24 The court received written submissions on the Commission's action, followed by oral argument on 24 September 2009. (The hearing took place immediately after the hearing in *Uniplex (UK) Ltd v NHS Business Services Authority* (Case C-406/08) [2010] PTSR 1377.)

B (V) *Assessment*

25 The Commission's action will be well founded if Ireland has failed to fulfil one of its obligations under the EC Treaty. Those obligations include, in accordance with the third paragraph of article 249EC and article 10EC, the duty to achieve the results aimed at by Community Directives.

C 26 In the present case the Commission bases its action on two pleas. The first plea concerns an individual case: it relates to the alleged failure to inform the unsuccessful consortium of tenderers of the award decision for the Dundalk Western Bypass motorway construction project. The second plea goes beyond that individual case: it denounces as contrary to Community law the provision of Irish law on the time limits for seeking remedies, as laid down in Order 84A(4) of the RSC.

D (A) *First plea: failure to notify the award decision*

27 By its first plea, the Commission accuses Ireland of a failure to fulfil its obligations under articles 1(1) of Directive 89/665 and 8(2) of Directive 93/37, consisting in the fact that the NRA did not inform the unsuccessful tenderer, in accordance with those provisions, of its award decision concerning the Dundalk Western Bypass motorway construction project.

E 28 Both the Commission and Ireland tacitly assume that the Dundalk Western Bypass motorway construction project put out to tender by the NRA was a public works contract for the purposes of Directive 93/37.

29 The NRA as the contracting authority was therefore obliged under article 8(2) of Directive 93/37 to inform tenderers or candidates promptly of its decision on the award of that contract.

F 30 The same obligation also arises under article 1(1) of Directive 89/665, because effective legal protection against award decisions can only be ensured if all candidates or tenderers are informed in good time and in detail of precisely those decisions: *Commission of the European Communities v Republic of Austria* (Case C-212/02) (unreported) 24 June 2004, para 21 and *Commission of the European Communities v Kingdom of Spain* (Case C-444/06) [2008] ECR I-2045, para 38; to the same effect, the earlier decision in *Alcatel Austria AG v Bundesministerium für Wissenschaft und Verkehr* (Case C-81/98) [1999] ECR I-7671, para 43.

G 31 It is not disputed, however, that in the present case the NRA never formally informed EuroLink, the unsuccessful consortium of tenderers to which SIAC belonged, of its decision to award the road construction project in question to the competing consortium Celtic Roads Group.

H 32 Nor could the announcement of 9 February 2004 on the NRA's website and the notice of 3 April 2004 in the Official Journal of the European Union provide an adequate substitute. They merely informed the public of the final conclusion of the contract between the NRA and Celtic Roads Group. But in order to make effective legal protection possible for the

unsuccessful candidates or tenderers, they should have been informed in good time before the contract was concluded—instead of being informed only after the creation of a *fait accompli*—about the NRA’s award decision: to that effect, *Commission v Austria* 24 June 2004, para 21. A

33 The NRA thus failed to comply with its obligations to provide information under article 8(2) of Directive 93/37 and article 1(1) of Directive 89/665 with respect to the Dundalk Western Bypass motorway construction project. B

34 Ireland objects that in the present case SIAC none the less suffered no injustice. In view of the circumstances of the particular case, at no time was there any uncertainty for SIAC as to the tenderer to which the NRA would award the contract. Ireland refers here to the NRA’s letter of 14 October 2003, in which the EuroLink consortium was informed of the selection of Celtic Roads Group as the preferred tenderer. From that time at the latest, SIAC must in Ireland’s view have been aware that—“except in very exceptional circumstances”—an award decision would be made in favour of Celtic Roads Group. On this point, Ireland expressly adopts the reasoning of the High Court of Ireland in the national review proceedings: see, in that regard, *SIAC Construction Ltd v National Roads Authority* [2005] EuLR 65. C

35 This objection fails, however. In its letter of 14 October 2003 the NRA did not notify any final award decision; it even expressly informed EuroLink that its offer had not been rejected. The selection of a “preferred tenderer” by NRA may already have been an important decision as to the direction to take, but it did not involve a definitive determination of a tenderer. The NRA expressly reserved the right to invite EuroLink to enter into discussions in the place of Celtic Roads Group at a later date if appropriate. EuroLink could therefore assume for the time being that it was not yet completely out of the running. D

36 Apart from that, in an action under article 226EC for failure to fulfil obligations, which is objective in nature, it is in any case irrelevant whether actual damage or other adverse effects have occurred as a result of the conduct of official bodies of a member state: *Commission of the European Communities v Ireland* (Case C-392/96) [1999] ECR I-5901, para 61; *Commission of the European Communities v French Republic* (Case C-233/00) [2003] ECR I-6625, para 62; *Commission of the European Communities v French Republic* (Case C-177/04) [2006] ECR I-2461, para 52 and *Commission of the European Communities v Kingdom of Spain* (Case C-36/05) [2006] ECR I-10313, para 38. E

37 Ireland stresses, finally, that its national law is in harmony with the obligations under Community law to provide information: those are correctly transposed in article 49(1) of the APAC Regulations. In those circumstances, an individual case in which no information was given on the award decision cannot be stigmatised as a breach of Community law. F

38 This argument of Ireland is also unconvincing, however. First, it is by no means undisputed whether article 49(1) of the APAC Regulations in fact correctly transposes the obligations under Community law to provide information: separate proceedings for failure to fulfil obligations are pending against Ireland on this point (see *Commission of the European Communities v Ireland* (Case C-455/08) (unreported) 23 December 2009). Secondly, it is settled case law that, in an action for failure to fulfil G H

- A obligations, not only can the compatibility of a member state's laws, regulations and administrative provisions with Community law be examined, but an infringement of Community law by the national bodies in a specific individual case can also be ascertained: see, inter alia, *Commission of the European Communities v Kingdom of Spain* (Case C-503/03) [2006] ECR I-1097, and—in relation to the award of public contracts—
- B *Commission of the European Communities v Federal Republic of Germany* (Joined Cases C-20 and 28/01) [2003] ECR I-3609; *Commission of the European Communities v Italian Republic* (Case C-385/02) [2004] ECR I-8121; *Commission of the European Communities v Republic of Austria* (Case C-29/04) [2005] ECR I-9705; *Commission of the European Communities v Hellenic Republic* (Case C-250/07) [2009] ECR I-4369 and
- C *Commission of the European Communities v Federal Republic of Germany* (Case C-275/08) (unreported) 15 October 2009.

39 Altogether, I therefore conclude that the Commission's first plea is well founded.

(B) *Second plea: rules on time limits for legal remedies in Irish procedural law that are contrary to Community law*

- D 40 By its second plea, the Commission accuses Ireland of an infringement of article 1(1) of Directive 89/665, consisting in the fact that Order 84A(4) of the RSC regulates the limitation period for applications in review procedures in a way which conflicts with the requirements of Community law.

- E 41 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
- F 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.

- G 42 In the present case it is the principle of effectiveness that is the focus of interest. That Ireland can lay down limitation periods for applications for
- H 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 national rules on limitation. The essential issue is whether those rules are sufficiently clear to make *effective review* within the meaning of article 1(1) of Directive 89/665 possible. The Commission denies this. It refers to lack of clarity in connection with determining the kinds of decisions against which challenges must be brought within the period laid down by Order 84A(4) of the RSC, and to lack of clarity as regards the duration of that period.

(1) Determination of the kinds of decisions to which the limitation period applies (first part of the second plea)

43 By the first part of its second plea, the Commission complains that there is legal uncertainty as to the kind of procurement law decisions against which challenges must be brought within the period laid down by Order 84A(4) of the RSC. According to its wording, Order 84A(4) applies only to the review of “a decision to award or the award of a public contract”. In practice, however, according to the Commission, the scope of that provision is extended also to interim decisions, so that applications for their review can likewise be brought only within the period laid down by Order 84A(4).

44 The facts relied on by the Commission in this respect are not in dispute. Both the submissions of Ireland in the present proceedings for failure to fulfil obligations and the judgment of the High Court of Ireland on the Dundalk Western Bypass motorway construction project (*SIAC Construction Ltd v National Roads Authority* [2005] EuLR 65) confirm that the period laid down in Order 84A(4) is in practice applied by the competent Irish authorities not only to challenges to final decisions (“a decision to award or the award of a public contract”) but also to challenges to interim decisions taken by contracting authorities. (The meaning of national laws, regulations and administrative provisions is to be ascertained in the light of the interpretation given to them by the national courts: see *Commission of the European Communities v United Kingdom* (Case C-382/92) [1994] ICR 664, para 36; *Commission of the European Communities v Italian Republic* (Case C-129/00) [2003] ECR I-14637, para 30 and *Commission of the European Communities v Federal Republic of Germany* (Case C-490/04) [2007] ECR I-6095, para 49.)

45 It is very much in dispute between the parties, however, whether Order 84A(4) of the RSC, as interpreted and applied by the national authorities, complies with the requirements of article 1(1) of Directive 89/665.

46 Article 1(1) of Directive 89/665 requires that decisions of contracting authorities may be reviewed “effectively and, in particular, as rapidly as possible” for breaches of procurement law.

47 To achieve that objective of the Directive, the member states must, in accordance with the third paragraph of article 249EC in conjunction with article 10EC, take all appropriate measures, both general and particular. According to settled case law, they must establish a specific legal framework in the area in question: *Commission of the European Communities v Kingdom of the Netherlands* (Case C-339/87) [1990] ECR I-851, para 25; *Commission of the European Communities v Federal Republic of Germany* (Case C-361/88) [1991] ECR I-2567, para 24; *Commission of the European Communities v Italian Republic* (Case C-366/89) [1993] ECR I-4201,

A para 17; *Commission of the European Communities v Italian Republic* (Case C-410/03) [2005] ECR I-3507, para 32 and *Commission of the European Communities v Republic of Austria* (Case C-507/04) [2007] ECR I-5939, para 298. They must make the situation in national law sufficiently precise, clear and transparent for individuals to be able to ascertain their rights and obligations: *Commission of the European Communities v Federal Republic of Germany* (Case C-361/88) [1991] ECR I-2567, para 24; *Commission of the European Communities v Italian Republic* (Case C-366/89) [1993] ECR I-4201, para 17; *Commission of the European Communities v Grand Duchy of Luxembourg* (Case C-221/94) [1996] ECR I-5669, para 22; *Commission of the European Communities v Kingdom of Spain* (Case C-417/99) [2001] ECR I-6015, para 38 and *Commission of the European Communities v Ireland* (Case C-427/07) [2009] ECR I-6277, para 55.

C 48 Moreover, the same follows from the principle of legal certainty, which is a general legal principle forming part of the Community legal order, and must be observed by the member states when they exercise their powers within the scope of Community law: *Stichting “Goed Wonen” v Staatssecretaris van Financiën* (Case C-376/02) [2006] STC 833, para 32; *Revenue and Customs Comrs v Isle of Wight Council* (Case C-288/07) [2009] PTSR 875, para 48 and *Plantanol GmbH & Co KG v Hauptzollamt Darmstadt* (Case C-201/08) (unreported) 10 September 2009, para 43. According to settled case law, one of the requirements of legal certainty is that rules of law must be clear, precise and predictable in their effects, especially where they may have negative consequences for individuals and undertakings: *Vereniging voor Energie, Milieu en Water v Directeur van de Dienst uitvoering en toezicht energie* (Case C-17/03) [2005] ECR I-4983, para 80; *ASM Brescia SpA v Comune di Rodengo Saiano* (Case C-347/06) [2008] ECR I-5641, para 69; *Förster v Hoofddirectie van de Informatie Beheer Groep* (Case C-158/07) [2008] ECR I-8507, para 67 and *Plantanol* 10 September 2009, para 46.

E 49 For a limitation rule such as that in Order 84A(4) of the RSC, the requirements of clarity, precision and predictability apply especially. An unclear limitation provision is liable to entail substantial negative consequences for individuals and undertakings. If a tenderer or candidate misses a deadline for bringing proceedings under Order 84A(4), he is barred from complaining of possible breaches of procurement law and loses the possibility of subjecting the award decision in question to a review. He is no longer entitled to go to court to obtain the public contract as such or at least compensation for the public contract he has lost. (The Dundalk Western Bypass motorway construction project, which gave rise to the present proceedings for failure to fulfil obligations, is a clear example of the preclusionary effect of Order 84A(4): in Ireland’s view, SIAC should already have challenged the NRA’s interim decision on the selection of the preferred tenderer within the period laid down by Order 84A(4) and already put forward its complaints as to the choice of the Celtic Roads Group consortium at that stage. When it made its subsequent challenge to the final decision, SIAC, as the judgment of the High Court of Ireland in *SIAC Construction Ltd v National Roads Authority* [2005] EuLR 65 found, was already out of time with its application.)

H 50 Yet the application of a limitation period must precisely not 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 *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.

51 Only if it is clear beyond doubt that even preparatory acts of contracting authorities or the interim decisions at issue in the present case start the limitation period under Order 84A(4) running can tenderers and candidates take the necessary precautions to have possible breaches of procurement law reviewed effectively within the meaning of article 1(1) of Directive 89/665 and to avoid their challenges being statute-barred.

52 In this context, I regard it as incompatible with the requirements of article 1(1) of Directive 89/665 for the scope of the limitation period under Order 84A(4) to be extended in Ireland to the review of interim decisions, without that being clearly expressed in the wording of the provision. That is because the effects of the limitation rule, in particular the extent of its preclusive effect, cannot be predicted with sufficient certainty by tenderers and candidates in award procedures. The objective of effective review of decisions taken by contracting authorities, prescribed by article 1(1) of Directive 89/665, is thereby undermined.

Ireland's objection that a time limit for challenging interim decisions corresponds to the objectives of Directive 89/665, in particular the requirement to act rapidly

53 Ireland contends that under Directive 89/665 and the case law on that Directive, all decisions taken by contracting authorities are open to challenge. The extension of the limitation rule in Order 84A(4) of the RSC to interim decisions is in harmony with the requirements of Community law. Moreover, Directive 89/665 is based on a requirement to act rapidly. Article 1(1) demands not only effective review but also review that is carried out as rapidly as possible of decisions of contracting authorities. The review of all decisions taken by contracting authorities must therefore be subject to the time limit laid down by Order 84A(4). If it were permissible for unsuccessful tenderers to wait until the issue of the final award decision and make all their complaints then, there would be a risk of lengthy legal uncertainty and a considerable loss of time in connection with the award of public contracts. Furthermore, in Ireland's view, it would become impossible to remedy possible infringements of procurement law while an award procedure was still under way.

54 In this connection, it must be observed that Ireland is of course free to provide for limitation periods for procurement law review of preparatory acts and interim decisions of contracting authorities, for example the drawing-up of a shortlist or the choice of a preferred tenderer. As already mentioned (see para 41 above), the determination of appropriate limitation periods is compatible with Community law, provided that the principles of equivalence and effectiveness are observed in so doing. Such limitation periods—even comparatively short ones—may in particular be legitimate and appropriate if Community law lays down a requirement of rapid action in a certain field, by insisting—as in the case of procurement law—on action

A being taken “as rapidly as possible” (article 1(1) of Directive 89/665): *Universale-Bau AG v Entsorgungsbetriebe Simmering GmbH* (Case C-470/99) [2002] ECR I-11617, para 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, paras 50 and 51; see also my opinion in *Pressetext Nachrichtenagentur GmbH v Republik Österreich (Bund)* (Case C-454/06) [2008] ECR I-4401, para 157. (See also the third and sixth recitals in the Preamble to Directive 89/665, which speak of “rapid remedies” and the need for “infringements . . . to be dealt with urgently” respectively. In future, moreover, article 2c of Directive 89/665 (inserted by Directive 2007/66) makes clear that national provisions under which “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/EC must be made before the expiry of a specified period” are permissible.)

55 It is therefore entirely correct that, by extending the limitation rule in Order 84A(4) of the RSC to interim decisions, Ireland is pursuing a legitimate aim in harmony with the Directive: to that effect, *Universale-Bau* [2002] ECR I-11617, paras 75–79; *Lämmerzahl* [2007] ECR I-8415, paras 50 and 51 and *Grossmann Air Service, Bedarfsluftfahrtunternehmen GmbH & Co KG v Republik Österreich* (Case C-230/02) [2004] ECR I-1829, paras 30 and 36–39. That aim must, however, be achieved in national law in conformity with the requirements of legal certainty. The limitation rule must be clearly and precisely worded and predictable in its effects. The existence of a national practice which serves the aims of a Directive does not release the member state from the obligation to create a legal situation that is sufficiently precise, clear and transparent for individuals to be able to ascertain their rights and obligations: *Commission of the European Communities v Federal Republic of Germany* (Case C-361/88) [1991] ECR I-2567, para 24; *Commission of the European Communities v Italian Republic* (Case C-366/89) [1993] ECR I-4201, para 17 and *Commission of the European Communities v Grand Duchy of Luxembourg* (Case C-221/94) [1996] ECR I-5669, para 22.

56 In the present case, moreover, it should be borne in mind that Directive 89/665 imposes on the member states not only the aim of *rapid* review but also the aim of *effective* review of award decisions: see article 1(1) of Directive 89/665. A national practice which achieves only one of those aims at the expense of the other is not in harmony with the Directive. The extension of the limitation period under Order 84A(4) of the RSC to interim decisions may indeed serve the aim of rapid review; without that also being made clear in the wording of Order 84A(4), however, the practice of the Irish authorities operates at the expense of legal certainty, and thus ultimately jeopardises the achievement of the aim of effective review (see paras 49 and 50 above).

57 There is moreover no fundamental contradiction between the requirement of legal certainty and the requirement of rapid action in procurement law: see once more *Universale-Bau* [2002] ECR I-11617, paras 76–78. On the contrary, reviewing the decisions of contracting authorities as rapidly as possible helps to create legal certainty, provided that

the applicable procedure, including limitation periods, is regulated in national law as clearly, precisely and predictably as possible. A

58 Ireland's first objection must therefore be rejected.

Ireland's objection that its national law is a common law system

59 Ireland further objects that its national law is a common law system. It says that in such a system not only statutory provisions but also decisions of the courts are determinative. Tenderers and candidates should obtain legal advice if necessary. B

60 On this point, it must be observed that a Directive leaves it to the national authorities to choose the form and methods for achieving the desired result: third paragraph of article 249EC. The transposition of a Directive into national law therefore does not necessarily require the adoption of express and specific legal provisions, and a general legal context may also suffice in this respect. What matters, however, is that with such a method of proceeding, the full application of the Directive actually is ensured with sufficient clarity and precision: *Commission of the European Communities v Federal Republic of Germany* (Case 29/84) [1985] ECR I 661, para 23; *Commission of the European Communities v Italian Republic* (Case 363/85) [1987] ECR I 733, para 7; *Commission of the European Communities v Kingdom of the Netherlands* (Case C-144/99) [2001] ECR I-3541, para 17; *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland* (Case C-6/04) [2005] ECR I-9017, para 21; *Commission of the European Communities v Grand Duchy of Luxembourg* (Case C-32/05) [2006] ECR I-11323, para 34 and *Commission of the European Communities v Ireland* (Case C-427/07) [2009] ECR I-6277, paras 54 and 55. C D E

61 If the position in national law derives from the interplay of statutory provisions and "judge-made" law, that must not take place at the expense of the clarity and precision of the provisions and rules concerned. That applies all the more where a Directive is intended to confer rights on the individual (see again *Commission v Ireland* (Case C-427/07), para 55) and an unclear or complex legal position with respect to limitation periods could lead to the loss of rights—in the present case the loss of the right to review of decisions taken by contracting authorities. Foreign tenderers and candidates in particular could be deterred from seeking public contracts in Ireland by a complex and non-transparent legal situation. F

62 National courts are obliged to interpret and apply the provisions of 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 I 891, 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 Unita 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 G H

A observance of the principle of effectiveness deriving from Directive 89/665: *Santex* [2003] ECR I-1877, para 62.

B 63 It is not compatible with those requirements for a national court to apply the limitation period laid down by law for the right to apply for review—in this case Order 84A(4) of the RSC—by going beyond its wording and applying it by analogy also to the review of decisions for which the legislature has not prescribed such a limitation period. The legal position is thereby made less transparent. The tenderers and candidates affected run the risk, in view of the preclusive effect of the limitation period, of losing their right to the review of certain decisions. The objective laid down in article 1(1) of Directive 89/665 of effective review of the decisions of contracting authorities is thereby undermined (see also paras 49–52 above).

C 64 In this context, Ireland’s second objection must also be rejected.

Interim conclusion

65 Altogether, therefore, I conclude that the first part of the Commission’s second plea should be upheld.

D (2) Length of the limitation period (second part of the second plea)

E 66 By the second part of its second plea, the Commission objects to the phraseology of Order 84A(4) of the RSC, according to which applications for review must be made “at the earliest opportunity and in any event within three months”. It says that this provision leaves the tenderers and candidates in question uncertain as to the precise length of the limitation period, and makes it disproportionately difficult for them to bring an application for review. Moreover, according to the Commission, there is no indication of when an application within three months suffices and when the application must be brought earlier, before the expiry of three months.

F 67 It should be noted, first, that there need not necessarily be two independent limitation periods if a provision combines an indication of time expressed in days, weeks, months or years with the words “at the earliest opportunity” or a similar expression. Many provisions use such additions simply in order to emphasise the need for rapidity and to remind applicants of their responsibility, in their own interests, for taking the necessary steps as early as possible, in order best to protect their interests.

G 68 In the latter sense, for example, the Court of Justice itself formerly used the words “as soon as possible” in relation to possible applications by the parties for an extension of speaking time at the hearing: see direction 50 of the practice directions relating to direct actions and appeals, in the version of 15 October 2004 (OJ 2004 L361, p 15); under that rule, an application to extend the length of speaking time at the hearing had to “reach the Court [of Justice] as soon as possible” and could only be taken into consideration if it was received “at the latest two weeks before the date of the hearing”.
H Members of the temporary staff of the Community who become unemployed must comply with certain formalities “as soon as possible and no later than [within certain defined time limits]”: article 1(2)(a) and (b) of Commission Regulation (EC) No 780/2009 of 27 August 2009 laying down provisions for implementing the third sub-paragraph of article 28a(2) and the third sub-paragraph of article 96(2) of the Conditions of Employment of

Other Servants of the European Communities (OJ 2009 L226, p 3). Similar wording may also be found where the intention is to state that public authorities handling certain applications or procedures are subject to a duty to act expeditiously: see for instance article 3(2) of European Parliament and Council Directive 2003/4/EC of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC (OJ 2003 L141, p 26), and also—on the predecessor provisions—my opinion in *Housieaux v Délégués du conseil de la Région de Bruxelles-Capitale* (Case C-186/04) [2005] ECR I-3299, para 23. 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; compare also article 2(1)(a) of Directive 89/665 and article 41(1) and (2) of Directive 2004/18.)

69 In relation to the limitation rule in Order 84A(4) of the RSC at issue in this case, however, it cannot be presumed with certainty that the words “at the earliest opportunity” are merely intended to express the principle of acting expeditiously. Rather, according to Ireland’s submissions in the procedure before the Court of Justice, it cannot be ruled out that the expression “at the earliest opportunity” in Order 84A(4) has a wider meaning, and is to be understood as an independent limitation period which may make applications for review inadmissible even before the expiry of the three-month period which exists “in any event”.

70 It is true that Ireland appears to assume that an application for review will normally be in time if it is made “in any event within three months from the date when grounds for the application first arose”. At the same time, however, Ireland emphasises, referring to a judgment of the Supreme Court of Ireland of 4 April 2003 in *Dekra Éireann Teoranta v Minister for the Environment and Local Government* [2003] 2 IR 270 (Ireland refers in particular to para 14(a) of the decision of Denham J), that the “primary obligation” of an applicant in the context of Order 84A(4) of the RSC is to bring his action “at the earliest opportunity”. In certain circumstances that could lead to an application for review being dismissed as out of time even if it was made within the three-month period. (Quoting an obiter dictum from the judgment of the Supreme Court of Ireland in *Dekra Éireann Teoranta*, Ireland states that “in certain circumstances a court could refuse an application under Order 84A, rule 4, brought within three months where the prejudice to the public or a party could be such that the application should be refused”.) It is thus at least not excluded that the words “at the earliest opportunity” in Order 84A(4) are understood by the Irish courts as an independent limitation period. (In this connection, the observations of Denham J in *Dekra Éireann Teoranta* [2003] 2 IR 270 are particularly illuminating. Denham J, at p 285, states to begin with, on the essentially identical limitation provision in Order 84(21)(1) of the RSC: “Whilst there is a discretion in the court to extend this time, there is also a discretion to refuse the application even within the months specified in the Rules of the Superior Courts.” Denham J then addresses the question of the interpretation of the limitation provision in Order 84A(4) of the RSC, at issue in the present case, and, at p 286, interprets it as follows:

A “in all the circumstances of a case a court may determine in its discretion that the prejudice to the public or a party could be such that . . . the application should be refused. Since urgency and rapidity is an underpinning policy of applications regarding public contracts, the test requires that such applications be made rapidly and an applicant must explain reasonably any delay.”)

B 71 If it is the case that the expression “at the earliest opportunity” in Order 84A(4) of the RSC really gives the Irish courts power, at their discretion, to dismiss applications for review as inadmissible even before expiry of the three-month period, then it does not satisfy the requirements of Community law. A limitation period whose duration is at the discretion of the competent court is not predictable in its effects.
C 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. (On this point, see also para 69 of my opinion of today’s date in *Uniplex (UK) Ltd v NHS Business Services Authority* (Case C-406/08) [2010] PTSR 1377.)

D 72 Since it cannot be ruled out that the words “at the earliest opportunity” in Order 84A(4) of the RSC are understood by the national courts as an independent limitation period, that provision is furthermore not sufficiently clear to ensure that it is applied in a manner consistent with Community law: *Commission of the European Communities v Italian Republic* (Case C-129/00) [2003] ECR I-14637, para 33. For this reason
E too, Order 84A(4) of the RSC is not an adequate transposition of Directive 89/665.

Ireland’s objection that the national courts could if necessary extend the limitation period at their discretion

F 73 Ireland contends that Order 84A(4) of the RSC gives the national courts a discretion to extend the period for bringing applications for review; as an example, Ireland cites 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.

G 74 Such a possibility of extending time may indeed make it easier for the courts to do justice in the individual case. It is not capable, however, of curing the shortcomings described above of Order 84A(4) with respect to the requirements of clarity, precision and predictability of the limitation rule. For the tenderers and candidates concerned, it is not predictable in advance, even taking into account this possibility of extending time, how much time they will have to prepare an application for review properly or whether such a remedy has a prospect of success. On the contrary, a limitation rule which
H is already unclear in any case is thereby endowed with a further element of uncertainty.

75 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 also explain in paras 48–50 of my opinion of today’s date in *Uniplex (UK) Ltd v NHS Business Services Authority* (Case C-406/08) [2010] PTSR 1377, the effective assertion of such a claim cannot be made to depend on the absolute discretion of a national body, not even the discretion of an independent court.

76 Ireland’s first objection must therefore be rejected.

Ireland’s objection that no action has yet been dismissed as out of time on the ground of non-compliance with the “at the earliest opportunity” rule

77 Ireland additionally argues that no Irish court has yet dismissed an application for review as out of time because it was brought within three months but not “at the earliest opportunity”.

78 This second objection also fails. To prove that a Directive has not been adequately or properly transposed, it is not necessary to establish the actual effects of the national transposition measures. Whether the transposition is inadequate or defective appears rather from the wording of the relevant legislation itself: *Commission of the European Communities v Ireland* (Case C-392/96) [1999] ECR I-5901, para 60. An action seeking a declaration of a failure to fulfil obligations is objective in nature, and can be brought even before any actual damage has been incurred or other harmful effects produced: *Commission v Ireland* (Case C-392/96), para 61; *Commission of the European Communities v French Republic* (Case C-233/00) [2003] ECR I-6625, para 62; *Commission of the European Communities v French Republic* (Case C-177/04) [2006] ECR I-2461, para 52, and *Commission of the European Communities v Kingdom of Spain* (Case C-36/05) [2006] ECR I-10313, para 38.

Ireland’s objection that the national legal position is about to be altered

79 Finally, Ireland defended itself in the pre-litigation procedure with the argument that national law would in any case be amended in connection with the transposition of Directive 2007/66, which would make it possible to clarify Order 84A(4) of the RSC.

80 On this point, it suffices to point out that, according to settled case law, the question whether there is a failure to fulfil obligations must be determined by reference to the situation obtaining in the relevant member state at the end of the period laid down by the reasoned opinion: subsequent changes cannot be taken into account by the Court of Justice: see, inter alia, *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland* (Case C-6/04) [2005] ECR I-9017, para 49; *Commission of the European Communities v Kingdom of Spain* (Case C-417/99) [2001] ECR I-6015, para 34; *Commission of the European Communities v Grand Duchy of Luxembourg* (Case C-32/05) [2006] ECR I-11323, para 22 and *Commission of the European Communities v Ireland* (Case C-427/07) [2009] ECR I-6277, paras 64 and 65. (Specifically on the argument that transposition of Directive 2007/66 is imminent, see *Commission of the European Communities v French Republic* (Case

A C-327/08) 11 June 2009, paras 21–26.) Still less can amendments to national law be taken into account if they are still in the planning or drafting stage.

Interim conclusion

B 81 Altogether, I conclude that the second part of the second plea is also well founded, and that the Commission’s action must therefore succeed in its entirety.

(VI) *Costs*

C 82 In accordance with article 69(2) of the Rules of Procedure, the unsuccessful party must be ordered to pay the costs, if they have been applied for in the successful party’s pleadings. Since the Commission has made such an application and Ireland has been unsuccessful, Ireland must be ordered to pay the costs.

(VII) *Conclusion*

D 83 On the above basis, I propose that the Court of Justice should (i) declare that Ireland has failed to fulfil its obligations under the EC Treaty, in that (a) the Irish National Roads Authority did not inform the unsuccessful tenderer of its award decision concerning the Dundalk Western Bypass motorway construction project, contrary to the requirements of article 8(2) of Council Directive 93/37 and article 1(1) of Council Directive 89/665, and (b) it is not sufficiently clear from Order 84A(4) of the Rules of the Superior Courts, contrary to the requirements of article 1(1) of Directive E 89/665/EEC, how long the limitation period is for an application for review of an award decision, and what decisions of the contracting authority are affected by that period, and (ii) order Ireland to pay the costs of the proceedings.

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

G 1 By its application, the Commission of the European Communities asks the Court of Justice to declare that, by reason of the rules on time limits in the national legislation regulating the exercise of the right of tenderers to judicial review in public procurement procedures and by failing to notify the award decision to the complainant in the procurement procedure in question, Ireland has failed to fulfil its obligations, concerning the applicable time limits, under 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 (“Directive 89/665”), as H interpreted by the Court of Justice, and, concerning the lack of notification, under article 1(1) of Directive 89/665, as interpreted by the Court of Justice, and article 8(2) of Council Directive 93/37/EEC of 14 June 1993 concerning the co-ordination of procedures for the award of public works contracts, as amended by European Parliament and Council Directive 97/52/EC of 13 October 1997 (“Directive 93/37”).

Legal context

A

Community legislation

2 Article 1(1) of Directive 89/665 provides:

“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 (OJ 1977 L13, p 1)], and [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.”

B

C

3 Under article 2(1):

“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 the procedure for the award of a public contract or the implementation of any decision taken by the contracting authority; (b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure; (c) award damages to persons harmed by an infringement.”

D

E

4 Article 8(2) of Directive 93/37 provides:

“Contracting authorities shall promptly inform candidates and tenderers of the decisions taken on contract awards, including the reasons why they have decided not to award a contract for which there has been an invitation to tender or to start the procedure again, and shall do so in writing if requested. They shall also inform the Office for Official Publications of the European Communities of such decisions.”

F

G

National legislation

5 Order 84A(4) of the Rules of the Superior Courts (“the RSC”), in the version resulting from SI 374/1998, provides:

“An application for the review of a decision to award or the award of a public contract shall be made at the earliest opportunity and in any event within three months from the date when grounds for the application first arose unless the court considers that there is good reason for extending such period.”

H

A *Background to the dispute and pre-litigation procedure*

6 The National Roads Authority (“the NRA”) is a public authority responsible for the construction and maintenance of roads in Ireland.

7 SIAC Construction Ltd (“SIAC”) is a limited liability company established in Ireland, which carries on business in the construction sector.

B 8 The NRA published a call for interest in the Official Journal of the European Communities on 10 July 2001 to design, build, finance and operate the Dundalk Western Bypass. The contractor was required to establish a public-private partnership with the NRA and to operate that section of motorway for approximately 30 years.

9 In December 2001 four candidates were invited to proceed to negotiations.

C 10 Of those four candidates two were selected in April 2003 to proceed to more intensive negotiations: these were a consortium called EuroLink, of which SIAC formed part, and a consortium called Celtic Roads Group (“CRG”).

11 On 8 August 2003 the NRA invited EuroLink and CRG to submit a best and final offer.

D 12 By letter of 14 October 2003 EuroLink was informed that the NRA had decided to designate CRG as the preferred tenderer. That letter from the NRA pointed out that that was not a rejection of the offer submitted by EuroLink. The letter explained that the NRA would proceed with discussions with CRG, potentially leading to the award of the contract for the project in question. However, if such discussions were to terminate without a contract being awarded, the NRA reserved the right to invite EuroLink to enter into discussions with it in place of CRG.

E 13 On 9 December 2003 the NRA decided to award the contract in question to CRG.

14 On 5 February 2004 the NRA signed the contract with CRG. A notice to that effect was displayed on the NRA website on 9 February 2004. The contract award notice was published in the Official Journal of the European Union on 3 April 2004.

F 15 On 8 April 2004 SIAC brought an action for damages before the High Court of Ireland. It complained, inter alia, first, of the selection of the negotiated procedure and, secondly, of certain irregularities which, in its view, had occurred at the stage of introducing and evaluating the best and final offers. With regard to limitation periods, SIAC claimed that the date on which the period for bringing an action began to run was the date on which the contract with CRG was signed, that is to say, 5 February 2004.

G 16 The High Court took the view that the relevant grounds for bringing the action arose on the date on which the consortium to which SIAC belonged was informed of the identity of the preferred tenderer, namely 14 October 2003. SIAC, it ruled, ought to have brought its action no later than three months after that date, in accordance with Order 84A of the RSC. The High Court, by its judgment of 16 July 2004 in *SIAC Construction Ltd v National Roads Authority* [2005] EuLR 65, accordingly dismissed SIAC’s action as being out of time.

H 17 SIAC submitted a complaint to the Commission. The latter sent a letter of formal notice to Ireland on 10 April 2006, to which that member state replied on 30 May 2006.

18 On 15 December 2006 the Commission sent an additional letter of formal notice to Ireland, which replied on 21 February 2007. A

19 As it was not satisfied by the explanations which it had received, the Commission sent Ireland a reasoned opinion on 1 February 2008, inviting that member state to take the measures necessary for compliance within a period of two months. Ireland replied to that reasoned opinion on 25 June 2008.

20 As it considered that reply to be unsatisfactory, the Commission brought the present action. B

The action

The first head of claim

21 By its first head of claim the Commission alleges that the NRA did not inform the unsuccessful tenderer of its decision awarding the contract for the design, construction, financing and operation of the Dundalk Western Bypass. C

Arguments of the parties

22 The Commission submits that notification of the public contract award decision to the unsuccessful candidates and tenderers is required under article 8(2) of Directive 93/37. It also submits that, in the context of Directive 89/665, complete legal protection presupposes an obligation to inform candidates and tenderers of the award decision. D

23 The communication to EuroLink, by letter from the NRA of 14 October 2003, of the fact that CRG had been designated as the preferred tenderer was not, the Commission contends, tantamount to a rejection of the offer submitted by EuroLink. That letter cannot therefore be regarded as constituting the notification of the award decision provided for in Directive 89/665 and in article 8(2) of Directive 93/37. E

24 Since it is common ground that SIAC did not receive notification of the final award of the contract at issue, the requirements of those provisions were not complied with.

25 Ireland accepts the obligation on member states to ensure prompt notification to candidates and tenderers of decisions taken on contract awards. It argues that it has faithfully transposed article 8(2) of Directive 93/37, which lays down that obligation, into its domestic legal order. The Commission, moreover, is not claiming that the relevant Irish legislation does not comply with the requirements of Community law. F

26 With regard to the contract relating to the Dundalk motorway bypass, Ireland accepts that communication of the preferred tenderer to EuroLink on 14 October 2003 does not constitute notification of the decision to award the contract. G

27 Ireland claims, however, that, as is apparent from the judgment of the High Court of Ireland of 16 July 2004 [2005] EuLR 65, it was, as of 14 October 2003, clear to SIAC that a decision had been taken to award the contract. SIAC must have been aware that the NRA was engaged in the process necessary to conclude a contract with CRG. In Ireland's view it follows that, in the circumstances of the present case, no injustice was caused by the lack of notification of the final decision to award the contract. H

A 28 Ireland submits that, as its national law faithfully transposes the Community rules on notification of decisions concerning the award of public contracts, Ireland cannot be considered to have failed in its obligations under Community law on the basis of a single incident of non-notification.

The court's assessment

B 29 Article 8(2) of Directive 93/37 requires contracting authorities to inform candidates and tenderers promptly of the decisions taken on contract awards. Notification to unsuccessful candidates and tenderers of the public contract award decision is mandatory under that provision.

C 30 That same obligation also arises under article 1(1) of Directive 89/665, inasmuch as the possibility of bringing an effective action against award decisions can be ensured only if all candidates or tenderers are informed in good time of those decisions: see, to that effect, *Commission of the European Communities v Republic of Austria* (Case C-212/02) (unreported) 24 June 2004, para 21, and *Commission of the European Communities v Kingdom of Spain* (Case C-444/06) [2008] ECR I-2045, para 38.

D 31 It is not disputed that in the present case the NRA never officially informed EuroLink of its decision to award the contract in question to CRG.

32 The announcement of the award on the NRA's website on 9 February 2004 and the publication thereof on 3 April 2004 in the Official Journal of the European Union cannot adequately rectify that failure.

E 33 That information was released into the public domain after the signature of the contract on 5 February 2004. In order to make effective legal protection possible for the candidates or tenderers, however, they ought to have been informed of the NRA's award decision in good time before the contract was concluded: see, to that effect, *Commission v Austria* (Case C-212/02), para 21 and *Commission v Spain* (Case C-444/06), para 38.

F 34 The NRA thus failed in its obligations under article 8(2) of Directive 93/37 and article 1(1) of Directive 89/665 to provide information in regard to the contract in question.

35 Referring in this connection to the NRA's letter of 14 October 2003, Ireland submits that in the present case SIAC nevertheless did not suffer any injustice. In its view, after that date, SIAC must have been aware that the NRA was in the process of signing a contract with CRG.

36 That argument cannot be accepted.

G 37 First of all, the NRA did not, by its letter of 14 October 2003, notify the definitive decision to award the contract in question. It merely indicated that it had selected CRG as the preferred tenderer. The NRA even stated that, in the event that the discussions between it and CRG did not lead to the award of a contract, it reserved the right to enter into discussions with EuroLink in place of CRG. At that stage, EuroLink had not been definitively ruled out as a potential candidate for the contract and could legitimately take the view that the procedure for the award of that contract had not been completed.

H 38 Secondly, and in any event, the finding that a member state has failed to fulfil its obligations is not bound up with a finding as to the damage flowing from that failure: *Commission of the European Communities v Kingdom of Belgium* (Case C-263/96) [1997] ECR I-7453, para 30, and

Commission of the European Communities v Federal Republic of Germany (Joined Cases C-20 and 28/01) [2003] ECR I-3609, para 42. A

39 Last, Ireland argues that the national legislation at issue satisfies the information obligations which are imposed by the Community legislation. In those circumstances, a single incident of failure to notify a decision concerning the award of a public contract cannot justify a finding that the member state in question has failed to fulfil its obligations under Community law. B

40 That argument also cannot be accepted.

41 Without its being necessary to rule on the assertion that the national legislation at issue transposes adequately the relevant requirements of Community law, suffice it to recall that, according to settled case law, an action for failure to fulfil obligations makes possible not only an examination of the compatibility of a member state's laws, regulations and administrative provisions with Community law but also a determination that there has been an infringement of Community law by the national bodies in a specific individual case: see, concerning the award of public contracts, *Commission v Germany* (Joined Cases C-20/01 and C-28/01), para 30 and *Commission of the European Communities v Federal Republic of Germany* (Case C-275/08) (unreported) 15 October 2009, para 27. C

42 It follows that the first head of claim is well founded. D

The second head of claim

43 The Commission's second head of claim consists of two parts. First, the Commission argues that the national legislation in question gives rise to uncertainty as to what decision must be challenged through legal proceedings. It maintains, secondly, that that legislation is unclear on how periods within which proceedings must be brought are to be determined. E

The first part of the second head of claim

Arguments of the parties

44 The Commission states that it is difficult for tenderers to know what decision by the contracting authority they have to challenge and on what date the period for challenging that decision begins to run. The Commission argues that that uncertainty is attributable to the wording of Order 84A(4) of the RSC and its uncertain interpretation. F

45 The Commission asserts that the expression "a decision to award or the award of a public contract" used in Order 84A(4) refers to decisions which may be challenged and that that provision makes no reference to earlier interim decisions taken by the contracting authority. In its judgment of 16 July 2004 [2005] EuLR 65, the High Court took the view that that provision applies not only to the decision to award a contract or to the award of such a contract, but also to decisions taken by contracting authorities in respect of public procurement procedures. G

46 In the Commission's view, the national legislation in question appears not to be in line with the fundamental principle of legal certainty and the requirement of effectiveness envisaged by Directive 89/665, which is an application of that principle, since tenderers are left in uncertainty as to their situation when they intend to bring an action against an award decision H

A taken by a contracting authority in a two-stage procedure in which the final award decision is taken after a tenderer has been selected.

47 The Commission argues that it must be made clear to tenderers whether Order 84A(4) applies not only to decisions to award contracts, but also to interim decisions taken by a contracting authority during the tendering procedure, including those concerning the selection of the preferred tenderer.

B 48 Ireland points out that article 1 of Directive 89/665 requires member states to ensure that there are effective legal remedies against all decisions taken by contracting authorities in public procurement procedures and not only against decisions to award contracts in those procedures. In Ireland's view, the Irish courts interpret and apply Order 84A(4) of the RSC in accordance with those requirements. The High Court's judgment of 16 July 2004 in particular states clearly that that provision allows proceedings to be brought against any decision taken by contracting authorities in a public procurement procedure, which is entirely consistent with article 1 of Directive 89/665.

C 49 With regard to the date from which the period for challenging an interim decision by a contracting authority begins to run, Ireland observes that Directive 89/665 requires that it be possible for decisions taken by contracting authorities to be reviewed rapidly. An application can be examined expeditiously only if both parties to the dispute are obliged to act quickly in the relevant proceedings. That objective could not be attained if the parties were allowed to await formal notification of the award decision before bringing proceedings, even though they had all the elements of fact and law necessary for bringing such an action.

D 50 Ireland submits that, if a tenderer could simply await notification of a formal decision not to award it the contract in question, despite knowing that it was not going to be awarded the contract, as found by the High Court in *SIAC Construction Ltd v National Roads Authority* [2005] EuLR 65, significant delay would ensue for the review of all decisions by contracting authorities.

E The court's assessment

F 51 The Court of Justice has already held that Directive 89/665 does not preclude national legislation which provides that any application for review of a contracting authority's decision must be commenced within a period laid down to that effect and that any irregularity in the award procedure relied on in support of such application must be raised within the same period, if it is not to be out of time, with the result that, when that period has passed, it is no longer possible to challenge such a decision or to raise such an irregularity, provided that the period in question is reasonable: *Lämmerzahl GmbH v Freie Hansestadt Bremen* (Case C-241/06) [2007] ECR I-8415, para 50 and case law cited.

G 52 That case law is based on the consideration that the full implementation of the objective sought by Directive 89/665 would be undermined if candidates and tenderers were allowed to invoke, at any stage of the award procedure, infringements of the rules of public procurement, thereby obliging the contracting authority to restart the entire procedure in order to correct such infringements: *Lämmerzahl*, para 51.

53 On the other hand, national limitation periods, including the detailed rules for their application, should not in themselves be such as to render virtually impossible or excessively difficult the exercise of any rights which the person concerned derives from Community law: *Lämmerzahl*, para 52. A

54 Order 84A(4) of the RSC provides that “An application for the review of a decision to award or the award of a public contract” must be made within a specified period. B

55 However, as occurred in the dispute which gave rise to the High Court’s judgment of 16 July 2004, the Irish courts may interpret that provision as applying not only to the final decision to award a public contract but also to interim decisions taken by a contracting authority during the course of that public procurement procedure. If the final decision to award a contract is taken after expiry of the period laid down for challenging the relevant interim decision, the possibility cannot be excluded that an interested candidate or tenderer might find itself out of time and thus prevented from bringing an action challenging the award of the contract in question. C

56 According to the Court of Justice’s settled case law, the application of a national limitation period must not lead to the exercise of the right to review of decisions to award public contracts being deprived of its practical effectiveness: see, to that effect, *Universale-Bau AG v Entsorgungsbetriebe Simmering GmbH* (Case C-470/99) [2002] ECR I-11617, 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 *Lämmerzahl* [2007] ECR I-8415, para 52. D

57 As observed by the Advocate General in para 51 of her opinion, only if it is clear beyond doubt from the national legislation that even preparatory acts or interim decisions of contracting authorities at issue in public procurement cases start the limitation period running can tenderers and candidates take the necessary precautions to have possible breaches of procurement law reviewed effectively within the meaning of article 1(1) of Directive 89/665 and to avoid their challenges being statute-barred. E

58 Accordingly, it is not compatible with the requirements of article 1(1) of that Directive if the scope of the period laid down in Order 84A(4) of the RSC is extended to cover the review of interim decisions taken by contracting authorities in public procurement procedures without that being clearly expressed in the wording thereof. F

59 Ireland disagrees with such a conclusion, contending that the application of such a period for challenging interim decisions corresponds to the objectives of Directive 89/665, in particular the requirement of rapid action. G

60 It is true that article 1(1) of Directive 89/665 requires member states to ensure that decisions taken by contracting authorities may be reviewed effectively and as rapidly 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* [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*, paras 50 and 51. H

A 61 However, 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 create a legal situation 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.

B
C 62 The above-mentioned objective of rapidity 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 ensuring effective review proceedings laid down in article 1(1) of Directive 89/665.

D 63 The extension of the limitation period under Order 84A(4) of the RSC to interim decisions taken by contracting authorities in public procurement procedures in a manner which deprives the parties concerned of their right of review satisfies neither the requirements of legal certainty nor the objective of effective review. Interested parties must be informed of the application of limitation periods to interim decisions with sufficient clarity to enable them effectively to bring proceedings within the periods laid down. The failure to provide such information cannot be justified on grounds of procedural rapidity.

E 64 Ireland submits that the Irish courts interpret and apply Order 84A(4) in conformity with the requirements of Directive 89/665. This argument refers to the significant role played by case law in common-law countries such as Ireland.

F 65 It should be noted in this regard that, according to the Court of Justice's settled case law, although the transposition of a Directive into domestic law does not necessarily require the provisions of the Directive to be reproduced in precisely the same words in a specific, express provision of national law and a general legal context may be sufficient, it is nevertheless necessary that that legal context be sufficiently clear and precise as to enable the parties concerned to be fully informed of their rights and, if necessary, avail themselves of those rights before the national courts: *Commission of the European Communities v Kingdom of Belgium* (Case C-474/08) (unreported) 29 October 2009, para 19 and case law cited.

G 66 Order 84A(4) of the RSC, however, does not satisfy those requirements inasmuch as it allows national courts to apply, by analogy, the limitation period which it provides for challenges to public contract award decisions to challenges to interim decisions taken by contracting authorities in the course of those procurement procedures, in respect of which no express provision was made by the legislature for that limitation period to apply. The resulting legal situation is not sufficiently clear and precise to exclude the risk that concerned candidates and tenderers may be deprived of their right to challenge decisions in public procurement matters handed down by a national court on the basis of its own interpretation of that provision.

H

67 It follows that the first part of the second head of claim is well A
founded.

The second part of the second head of claim

Arguments of the parties

68 The Commission points out that Order 84A(4) of the RSC requires B
actions to be brought “at the earliest opportunity and in any event within
three months”. The Commission takes the view that that formulation leaves
tenderers in uncertainty when they consider exercising their right under
Community law to bring proceedings against a decision of a contracting
authority. Indeed, tenderers would discover what interpretation was to be
given to the formulation “at the earliest opportunity” only after their action
had been brought and the competent court had exercised its discretion in C
interpreting that provision. Such a situation runs counter to the principle of
legal certainty.

69 That provision, it continues, also creates a further uncertainty as to
the question of the cases in which the three-month limitation period will be
applied, and as to that of the other cases in which that period will be shorter
because it was possible to bring an action at an earlier opportunity. D

70 The Commission accordingly submits that Order 84A(4) of the RSC
lacks clarity and gives rise to legal uncertainty. The Commission considers
that, in view of the obligation to respect the principle of legal certainty, the
applicable period has to be a fixed one which can be interpreted in a clear
and foreseeable manner by all tenderers.

71 Ireland replies that, to date, no Irish court has dismissed, as being out
of time, any action challenging a decision of a contracting authority made in E
the course of a public contract award procedure which was brought within
the three-month limitation period but not at the earliest opportunity.
Ireland takes the view that any such interpretation could not be upheld, since
the expression “in any event” indicates that any action brought within three
months will be within time. Moreover the High Court of Ireland has
expressly held that, where appropriate, the three-month limitation period F
will be extended.

72 Ireland observes that Order 84A(4) of the RSC gives the Irish courts
the discretion to extend the period within which proceedings must be
brought. The grant of discretion to a court by a legislative provision is a
legitimate option available to the member states when regulating periods for
bringing proceedings. The member states are not obliged to establish G
immutable limitation periods.

The court’s assessment

73 Since Directive 89/665 pursues an objective of rapid action, it is
legitimate for a member state, in implementing that Directive, to require
interested parties to be diligent in bringing actions for review.

74 However, the wording of Order 84A(4) of the RSC, which provides H
that all relevant applications “shall be made at the earliest opportunity 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

A three-month period if those courts take the view that the application was not made “at the earliest opportunity” within the terms of that provision.

75 It is not possible for parties concerned to predict what the limitation period will be if this is left to the discretion of the competent court. It follows that a national provision providing for such a period does not ensure effective transposition of Directive 89/665.

B 76 Ireland asserts, by way of reply to such a conclusion, that no Irish court has dismissed an action relating to public procurement as being out of time on the ground that it was not brought “at the earliest opportunity”.

77 Suffice it to point out in this regard that, in order to determine whether a Directive has been adequately transposed, it is not always necessary to establish the actual effects of the legislation transposing it into national law; the situation is different if the legislation itself harbours the insufficiencies of transposition: see, to that effect, *Commission of the European Communities v Ireland* (Case C-392/96) [1999] ECR I-5901, para 60.

C 78 Ireland explains that Order 84A(4) of the RSC confers discretion on the Irish courts to extend the periods for bringing proceedings.

D 79 That provision provides for the application of the period laid down therein “unless the court considers that there is good reason for extending such period”.

E 80 Admittedly, such a provision in itself, independently of its context, must be recognised as a valid implementation of Directive 89/665. In a field such as public procurement, in which procedures can be complex and the facts may vary widely, the opportunity granted by the national legislature to national courts to extend, on grounds of fairness, the periods within which actions must be brought may be in the interests of the proper administration of justice.

F 81 However, the possibility for national courts to extend periods for bringing actions, as provided for in Order 84A(4) of the RSC, is not such as to compensate for the shortcomings in that provision, having regard to the clarity and precision which Directive 89/665 requires in respect of the system of limitation periods. Even if the candidate or tenderer concerned takes into account the possibility that periods may be extended, it will still not be able to predict with certainty what period will be accorded to it for the purpose of bringing proceedings, in view of the reference to the obligation to bring an action at the earliest opportunity.

82 Consequently, the second part of the second head of claim is well founded.

G 83 In the light of the foregoing, it must be held that (i) by reason of the fact that the NRA did not inform the unsuccessful tenderer of its decision to award the contract for the design, construction, financing and operation of the Dundalk Western Bypass, and (ii) by maintaining in force Order 84A(4) of the RSC, in so far as it gives rise to uncertainty as to what decision must be challenged through legal proceedings and as to how periods for bringing an action are to be determined, Ireland has failed, as regards the first head of claim, to fulfil its obligations under article 1(1) of Directive 89/665 and article 8(2) of Directive 93/37 and, as regards the second head of claim, to fulfil its obligations under article 1(1) of Directive 89/665.

H

Costs

84 Under article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs to be awarded against Ireland and the latter has been unsuccessful, Ireland must be ordered to pay the costs.

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

1 Declares that (i) by reason of the fact that the National Roads Authority did not inform the unsuccessful tenderer of its decision to award the contract for the design, construction, financing and operation of the Dundalk Western Bypass, and (ii) by maintaining in force Order 84A(4) of the Rules of the Superior Courts, in the version resulting from Statutory Instrument No 374 of 1998, in so far as it gives rise to uncertainty as to what decision must be challenged through legal proceedings and as to how periods for bringing an action are to be determined, Ireland has failed, as regards the first head of claim, to fulfil its obligations under 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, and article 8(2) of Council Directive 93/37/EEC of 14 June 1993 concerning the co-ordination of procedures for the award of public works contracts, as amended by European Parliament and Council Directive 97/52/EC of 13 October 1997, and, as regards the second head of claim, to fulfil its obligations under article 1(1) of Directive 89/665, as amended by Directive 92/50;

2 Orders Ireland to pay the costs.

MIH
