

Case C-532/20

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

20 October 2020

Referring court:

Curtea de Apel București (Romania)

Date of the decision to refer:

12 June 2020

Appellant:

Alstom Transport SA

Respondents:

Compania Națională de Căi Ferate CFR SA

Strabag AG – Sucursala București

Swietelsky AG Linz – Sucursala București

Subject matter of the main proceedings

Appeal against the judgment of 8 August 2019 of the Tribunalul București (District Court, Bucharest), dismissing as out of time the appellant's application for review of a public procurement decision.

Subject matter and legal basis of the request for a preliminary ruling

Pursuant to Article 267 TFEU, interpretation is sought of the third subparagraph of Article 1(1), Article 1(3) and Article 2c of Directive 92/13.

Question referred for a preliminary ruling

Are the third subparagraph of Article 1(1), Article 1(3) and Article 2c of Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors to be interpreted as meaning that the period within which the successful tenderer in an award procedure may apply for review of the decision of the contracting authority declaring admissible the bid submitted by a tenderer placed lower in the ranking must be calculated by reference to the date on which the interest of the successful tenderer arose, that is, upon the lodging by the unsuccessful tenderer of an action against the outcome of the award procedure?

Provisions of EU law and case-law of the Court relied on

Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, Article 1(1), third subparagraph, Article 1(3) and Article 2c;

Judgments of 15 September 2005, *Intermodal Transports*, C-495/03, EU:C:2005:552, paragraph 37; of 6 October 1982, *Cilfit and Others*, 283/81, EU:C:1982:335, paragraph 16; of 12 December 2002, *Universale-Bau and Others*, C-470/99, EU:C:2002:746; of 28 January 2010, *Uniplex (UK)*, C-406/08, EU:C:2010:45, paragraph 32; of 8 May 2014, *Idrodinamica Spurgo Velox and Others*, C-161/13, EU:C:2014:307, paragraph 37; of 15 September 2016, *Star Storage and Others*, C-439/14 and C-488/14, EU:C:2016:688, paragraphs 43 to 45; and of 12 March 2015, *eVigilo*, C-538/13, EU:C:2015:166, paragraph 52; order of 14 February 2019, *Cooperativa Animazione Valdocco*, C-54/18, EU:C:2019:118, paragraph 29 et seq.

Provisions of national law relied on

Legea nr. 101/2016 privind remediile și căile de atac în materie de atribuire a contractelor de achiziție publică, a contractelor sectoriale și a contractelor de concesiune de lucrări și concesiune de servicii, precum și pentru organizarea și funcționarea Consiliului Național de Soluționare a Contestațiilor (Law No 101/2016 on remedies and review procedures relating to the award of public procurement contracts, sector-specific contracts and works and services concession contracts and on the organisation and operation of the National Council for the Resolution of Complaints; ‘Law No 101/2016’).

Article 2(1) of that law provides that ‘any persons who consider that their rights or legitimate interests have been infringed by an act of a contracting authority ...

shall be entitled to seek the annulment of that act ... in administrative or judicial proceedings in accordance with the provisions of this law’.

Article 3(1)(f) of Law No 101/2016 provides that, for the purposes of that law, the expression ‘persons who consider that their rights or legitimate interests have been infringed’ means ‘any economic operators that satisfy the following cumulative conditions:

- (i) they have or have had an interest in an award procedure; and
- (ii) they have suffered, are suffering or risk suffering harm as a result of an act of a contracting authority capable of producing legal effects ...’.

Article 3(3) of that law provides that, ‘for the purposes of paragraph 1(f)(i), persons shall be deemed to have or to have had an interest in an award procedure if they have not yet been definitively excluded from that procedure. Exclusion shall be definitive if it has been communicated to the candidate/tenderer in question and if it has been found lawful by the [National Council for the Resolution of Complaints]/court or if it can no longer be the subject of a review procedure’.

In accordance with Article 8(1)(a) of Law No 101/2016, persons who consider that their rights or legitimate interests have been infringed as a result of an act of a contracting authority may apply to the National Council for the Resolution of Complaints for the annulment of the act of the contracting authority within a period of 10 days beginning on the day following the day on which they became aware of the act of the contracting authority which they regard as unlawful.

Article 49(1) of Law No 101/2016 provides that ‘persons who consider that their rights or legitimate interests have been infringed may apply to the competent court, in accordance with the provisions of this law, so that the complaint may be resolved in judicial proceedings’.

Succinct presentation of the facts and procedure in the main proceedings

- 1 The respondent, Compania Națională de Căi Ferate CFR SA (‘CFR’), in its capacity as contracting authority, organised a sector-specific, public procurement procedure for the award of a works contract for the renovation of a railway line, to be funded by way of a Grant Agreement under the Connecting Europe Facility (CEF) – Transport sector.
- 2 To that end, on 6 December 2016, CFR published a call for tenders. The estimated value of the contract was 3 190 570 000 Romanian Lei (RON) and the award criterion was ‘the lowest price’. Asocierea RailWorks (‘RailWorks’), which is headed by the appellant, and Asocierea BraSig (‘BraSig’), to which the respondent companies belong, submitted bids in the award procedure.

- 3 Initially, on 13 March 2018, CFR declared the bid submitted by RailWorks to be admissible and placed it in first position. Subsequently, however, on 5 July 2018, CFR excluded the bid, on the ground that it failed to satisfy certain requirements imposed in the award procedure. BraSig's bid was selected. A legal action was brought challenging CFR's decision to exclude RailWorks' bid and the acts designating BraSig as the successful tenderer, all of which were annulled by final judgment of the Curtea de Apel București (Court of Appeal, Bucharest) of 20 December 2018.
- 4 Later, following that judgment, on 12 February 2019, RailWorks' bid was declared admissible. Following a fresh evaluation of the bids submitted, RailWorks was informed, by letter of 19 June 2019, that its bid had been selected. Nothing was said in that letter regarding the way in which BraSig's bid had been evaluated.
- 5 On 20 June 2019, the appellant requested access to the procurement documents, so that it might examine and make copies of the relevant documents concerning the way in which BraSig's bid had been evaluated. Upon examining those documents, the appellant learned, on 25 June 2019, that BraSig's bid had been declared admissible and as meeting requirements.
- 6 BraSig was informed that its bid had been declared admissible but had not been selected, whereupon it brought an action challenging the outcome of the award procedure.
- 7 On 5 July 2019, the appellant brought an action before the Tribunalul București (District Court, Bucharest) ('the Tribunalul'), seeking, inter alia, the annulment of CFR's decision declaring BraSig's bid admissible and as meeting requirements, the annulment of the report on the award procedure and of all the documents relating to that procedure whereby BraSig's bid was considered admissible and as meeting requirements, and a finding that that bid was inadmissible.
- 8 By judgment of 8 August 2019, the Tribunalul dismissed that action on the ground that it had been brought out of time. The Tribunalul held that the period of 10 days laid down in Article 8(1)(a) of Law No 101/2016 had to be calculated starting from the date on which the appellant was informed of the outcome of the award procedure, not from the date on which the appellant actually became aware of the report on the award procedure and of the way in which the bid submitted by BraSig had been evaluated.
- 9 The appellant brought an appeal against that judgment before the referring court, arguing that the court of first instance had interpreted and applied the law incorrectly.

Essential arguments of the parties in the main proceedings

- 10 **The appellant** refers to the case-law of the Court of Justice relating to Article 2c of Directive 92/13 and maintains that the limitation period for applying for review starts to run from the ‘time when the persons concerned became aware of the existence of an infringement’. Therefore, the question of whether the action was brought out of time must be examined with reference to the time when the appellant actually became aware of the existence of the act whereby BraSig’s bid was declared admissible.
- 11 The appellant emphasises in this connection that the letter concerning the outcome of the award procedure had not provided it with any information regarding the way in which BraSig’s bid had been evaluated. It had requested access to the public procurement file, so that it might examine and make copies of the relevant documents concerning the way in which BraSig’s bid had been evaluated, on the day immediately following the day on which it received notification of the outcome. Upon examining those documents, it had learned, for the first time, on 25 June 2019, that BraSig’s bid had been considered admissible and as meeting requirements. The application had been lodged within the time limit of 10 days from the date on which it became aware of the act it considers unlawful.
- 12 The appellant sets out at length the abovementioned case-law of the Court of Justice relating to the point from which the limitation period for bringing an action seeking a declaration that there has been infringement of the rules governing the award of public procurement contracts starts to run. It follows from that case-law, in essence, that that limitation period starts to run from the date on which the complainant became aware or should have become aware of the supposed infringement of those rules. In this connection, the appellant reproduces a significant part (paragraph 29 et seq.) of the order of 14 February 2019, *Cooperativa Animazione Valdocco*, C-54/18, EU:C:2019:118.
- 13 On the basis of that case-law, given that (i) the subject of its action is an irregularity that was recorded only in the report on the award procedure, which was neither communicated nor published, (ii) it asked for access to the procurement documents the day after receiving the communication about the outcome of the procedure, and (iii) it brought its action within the legal period beginning at the time when it became aware of the harmful act, the appellant maintains that the provisions of EU law on which it relies, as interpreted by the Court of Justice, preclude the dismissal of its action on the ground that it was brought out of time.
- 14 The appellant also addresses the question of the need to ensure that review procedures are available to successful tenderers and maintains that, in accordance with Article 1(3) of Directive 92/13, review procedures must be made available to any person having an interest in obtaining a particular contract who risks being harmed by an alleged infringement.

- 15 According to the appellant, it satisfies the two conditions imposed by those provisions. On the one hand, it has an interest in the award procedure, inasmuch as, at the time of lodging its application, its interest consisted in preserving its right to sign the contract which was the subject of the award and, on the other, it risks being harmed by the error which CFR made when it evaluated BraSig's bid a second time, in that it deemed admissible a bid that did not meet the requirements and was not admissible. The risk of harm need not be current, but may be a future risk, since the applicable provisions do not require that the risk should already have materialised.
- 16 In the appellant's view, the successful tenderer is entitled to dispute a bid that has been declared admissible but has not been selected, regardless of whether it is aware of the lodging of an action challenging its own bid, since the only exception to the rule establishing an interest is where the tenderer has been definitively excluded from the award procedure, as is provided for in Article 2a of Directive 92/13. That, however, is not the case for the appellant.
- 17 As regards the interest in bringing proceedings concerning public procurement, the appellant reproduces the case-law of the Court of Justice on the subject and maintains that even a tenderer whose bid is selected must be guaranteed the right to challenge a bid that has been declared admissible but has not been selected solely because of the application of the 'lowest price' award criterion. If the applicable legal provisions were interpreted otherwise, the successful tenderer would be unable to challenge a bid declared admissible but not selected, even if it is affected by a series of irregularities and might subsequently be selected. Such reasoning would be directly contrary to the provisions of EU law which clearly establish the need to ensure that decisions of a contracting authority may be challenged by any person who can demonstrate an interest.
- 18 In conclusion, the appellant asserts that, in a situation such as that in the main proceedings, the third subparagraph of Article 1(1), Article 1(3) and Article 2c of Directive 92/13 preclude the dismissal of an action brought by a successful tenderer to challenge a decision declaring admissible a bid that has not been selected, on the ground that that action has been brought out of time.
- 19 **The respondents** have made no observations regarding the issues raised.

Succinct presentation of the grounds for the reference for a preliminary ruling

- 20 The referring court states that the legal issue that must be resolved in the appeal that has been brought before it concerns the lawfulness of the judgment of the court of first instance dismissing the appellant's action on the ground that it was brought out of time.
- 21 To that end, it is necessary to determine the date on which the 10-day period laid down in Article 8(1) of Law No 101/2016 starts to run. In addition, it will be

necessary to establish whether, in light of the right to an effective remedy, provided for by Article 1(1) of Directive 92/13 and afforded to the persons referred to in Article 1(3) of that directive, the interest of the successful tenderer in the award procedure in bringing an action challenging the outcome of the procedure arises precisely at the time when that tenderer becomes aware of the outcome of the procedure.

- 22 Article 2c of the directive establishes that the date on which the period that the Member States may specify for bringing an application for review of an act of a contracting authority starts to run must be the day following the date on which the contracting entity's decision is sent to the tenderer or candidate concerned. The wording of the EU law thus refers to the tenderer or candidate concerned.¹ On the one hand, the interest of the tenderer or candidate in the public procurement procedure arises from the fact of its participation in a public procurement procedure. On the other, the interest in bringing proceedings against an act of the contracting entity is present when the tenderer is capable of obtaining some practical advantage by availing itself of that remedy.
- 23 More specifically, on the date when the outcome of the procedure was communicated, the appellant was declared the successful tenderer. The referring court wonders whether, in those circumstances, the time limit laid down in national law, in application of Article 2c of the directive, must be calculated starting from the day following the date on which the successful tenderer became aware of the act of the contracting entity by which the bid placed lower in the ranking was declared admissible. Alternatively, in those same circumstances, that court questions whether the time limit should be calculated starting from the date on which the successful tenderer became aware that the tenderer placed lower in the ranking had brought an action challenging the outcome of the procedure.
- 24 The referring court points out that, in the present case, it is argued that a successful tenderer does not have a present interest in challenging the outcome of the procedure at the time of communication of that outcome, but that that interest became a present interest when the outcome of the procedure was disputed by a tenderer placed lower in the ranking.
- 25 The referring court states that, if that line of defence should be rejected, it would be necessary to hold that the successful tenderer must be required to bring an action in relation to a declaration of the admissibility of other bids placed lower in the ranking within a period which starts to run on the day following the date on which the outcome of the procedure is communicated. Thus, the referring court wonders whether fixing, in all cases, the date on which the period for applying for review starts to run depends on the date on which the outcome of the procedure is

¹ Translator's note: the Romanian word '*interesat*' has no equivalent translation in some language versions of the directive; it is missing, for example, in the French, English and Italian versions, and is present in the German version ('*betroffen*').

communicated effectively ensures that the successful tenderer has access to appeal proceedings.

- 26 The referring court therefore considers that it is necessary to secure a uniform interpretation of the relevant rules of Directive 92/13. As regards the need to make a reference for a preliminary ruling, the referring court states, first, that the provisions of EU law cited in the question referred have not been interpreted with reference to a factual situation such as that in the present case, and so the national court is not relieved of its obligation to make a reference. Secondly, the referring court considers that the correct application of EU law is not so clear in the present case as to leave no reasonable doubt, such that it need not make a reference to the Court of Justice for a preliminary ruling. Thirdly, the judgment that will be delivered in the present case will be final within the system of domestic appeals. Therefore, in accordance with the third paragraph of Article 267 TFEU, the referring court is obliged to submit a request to the Court of Justice for an interpretation of the provisions of EU law relevant to these proceedings.