

Case C-491/19**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:**

26 June 2019

Referring court:

Kúria (Supreme Court, Hungary)

Date of the decision to refer:

2 May 2019

Defendant at first instance and appellant in cassation:

Emberi Erőforrások Minisztériuma (Ministry of Human Resources, Hungary)

Applicant at first instance and respondent in cassation:

Szent Borbála Kórház

Subject matter of the main proceedings

Protection of the financial interests of the European Union — Infringement of public procurement legislation that also constitutes a breach of contract — Jurisdiction of the civil court adjudicating on the breach of the subsidy agreement to establish an irregularity in the public procurement process

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

First, the purpose of the dispute in the main proceedings is to determine whether the bodies competent to conduct proceedings relating to irregularities ('irregularity proceedings') in a legal relationship arising from a subsidy agreement are empowered to examine directly any infringement having an impact prejudicial to the financial interests of the budget of the European Union and, if so, whether they are obliged to apply a financial correction.

Secondly, the request for a preliminary ruling is concerned with whether, in the event that the legal relationship arising from a subsidy agreement is found to be

violated by an irregularity constituting an infringement of a provision of public procurement legislation and a breach of that agreement, the applicable law is the Hungarian national legislation on claims relating to public contracts; that legislation makes the possibility of asserting civil claims based on an infringement of the Law on public contracts subject to the condition that a final declaration as to the existence of that infringement be made by a different body, the Közbeszerzési Döntőbizottság (Committee of Arbitration on Public Procurement, Hungary; ‘the Arbitration Committee’), or, following a judicial review of the Arbitration Committee’s decision, by a court. The request for a preliminary ruling is also concerned with whether, in the event that proceedings have not been instituted before the Arbitration Committee, the court hearing the civil claims is empowered to assess the irregularity in the public procurement process in the course of examining the breach of contract.

The legal basis of the request for a preliminary ruling is Article 267 TFUE.

Questions referred for a preliminary ruling

1 In the legal relationship arising from a subsidy agreement, are the authorities and intermediate bodies of the Member States which are competent to conduct irregularity proceedings at first or second tier empowered to examine directly in the course of the proceedings before them, in accordance with Council Regulation (EC) No 1083/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999 (‘the Regulation’), and in particular as part of the control mechanism provided for in Articles 60, 70 and 98 thereof, any infringement that has or may have an impact prejudicial to the financial interests of the budget of the European Union, and are they obliged, if necessary, to apply a financial correction?

2 Is the protection of the financial interests of the European Union effectively guaranteed by national procedural legislation, or by the case-law interpreting it, which, in the case of a subsidy agreement, allows a breach of that agreement consisting in an infringement of public procurement legislation (an irregularity) to be established, and any civil claim based on the establishment of that infringement to be asserted, only where a final declaration as to the existence of that infringement has been made by the Arbitration Committee or, following a judicial review of the decision of the Arbitration Committee, by a court?

3 If the infringement of public procurement legislation constitutes an irregularity but proceedings have not been instituted before the Arbitration Committee, is the court hearing the civil claims relating to compliance with the subsidy agreement empowered to assess the irregularity in the public procurement process in the course of examining the breach of the agreement?

Provisions of EU law relied on

- Council Regulation (EC) No 1083/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999 (OJ 2006 L 210, p. 25; corrigendum in OJ 2007 L 145, p. 38, and OJ 2008 L 301, p. 40; ‘the Regulation’): Articles 60, 70 and 98;
- Case-law of the Court of Justice of the European Union, in particular the judgments of 26 May 2016, *Județul Neamț and Județul Bacău* (C-260/14 and C-261/14, EU:C:2016:360); of 14 July 2016, *Wrocław — Miasto na prawach powiatu ítélet* (C-406/14, EU:C:2016:562); of 6 December 2017, *Compania Națională de Autostrăzi și Drumuri Naționale din România* (C-408/16, EU:C:2017:940); of 5 October 2000, *Commission v France* (C-18/98, EU:C:2000:54); of 4 June 2009 *Pometon* (C-158/08, EU:C:2009:349); of 17 September 2014, *Cruz & Companhia* (C-341/13, EU:C:2014:2230); of 18 December 2014, *Somvao* (C-599/13, EU:C:2014:2462); and of 7 August 2018, *Hochtief* (C-300/17, EU:C:2018:635).

Provisions of national law relied on

- A 2007-2013 programozási időszakban az Európai Regionális Fejlesztési Alapból, az Európai Szociális Alapból és a Kohéziós Alapból származó támogatások felhasználásának rendjéről szóló 4/2011. (I. 28.) Korm. rendelet (Decree 4/2011 of 28 January 2011 on the use of aid from the European Regional Development Fund, the European Social Fund and the Cohesion Fund for the 2007-2013 programming period; ‘the Decree’): Paragraph 2(1), points 24 and 27, Paragraph 86(3), Paragraph 87(2), Paragraph 90(2) to (4), Paragraph 92(1) and (2), Paragraph 97, Paragraph 98(1) to (3), and Paragraph 99(4).
- A közbeszerzésekről szóló 2011. évi CVIII. törvény (Law CVIII of 2011 on public contracts; ‘the Law on public contracts’).
- Az államháztartásról szóló 2011. évi CXCV. törvény (Law CXCV of 2011 on public finances; ‘the Law on public finances’): Paragraph 53/A(1).
- A Polgári Törvénykönyvről szóló 1959. évi IV. törvény (Law IV of 1959 approving the Civil Code (former Civil Code)): Paragraph 277(1).

Brief presentation of the facts and main proceedings

- 1 By document of 1 March 2011, the Nemzeti Fejlesztési Ügynökség (National Development Agency, Hungary), predecessor in law to the Emberi Erőforrások Minisztériuma (Ministry of Human Resources, Hungary) (defendant at first instance; ‘the defendant’), acting as provider of funds, granted a non-refundable

subsidy to the predecessor in law to Szent Borbála Kórház (Saint Barbara's Hospital ('the Hospital')) (applicant at first instance; 'the applicant') as part of an aid programme financed by both the Hungarian budget and the European Regional Development Fund; the grant of that subsidy served as the basis for the applicant and the intermediate body representing the defendant to conclude a subsidy agreement for a maximum amount of HUF 4 264 050 289 to carry out a project for the modernisation of the Hospital.

- 2 On the basis of the findings of a retrospective review of the public procurement procedures employed in connection with the renovation of four buildings at the Hospital, it was reported that there were indications of an irregularity. The Emberi Erőforrások Minisztériuma Pályázatok Felülvizsgáló Főosztálya (Inspectorate-General of Public Procurement at the Ministry of Human Resources), which conducted the first-tier irregularity proceedings, declared that the fact that the public contract for the renovation of the four buildings had been divided into four different lots and the value of each lot had been considered separately at the time of determining the estimated value infringed Paragraph 18(1) and (2) of the Law on public contracts, concerning the prohibition on splitting into lots.
- 3 As a result of the irregularity proceedings, that authority decided to disallow HUF 65 319 907 HUF of the value of the four contracts, that is to say 25% of the subsidy applied for.
- 4 After that decision had been challenged by the applicant, the second-tier irregularity proceedings were conducted by the Miniszterelnökség Jogi Ügyekért Felelős Helyettes Államtitkára (Undersecretary of State with responsibility for legal affairs at the Office of the Prime Minister), acting as Központi Koordinációs Szerv (central coordinating body), who confirmed the irregularity decision on 5 October 2016. The applicant paid back the amount of the subsidy which had been disallowed.
- 5 By its action, the applicant, seeking to enforce the agreement, requested that the defendant be compelled to pay HUF 65 319 917 plus default interest. The court of first instance granted that application in its judgment, which was upheld at second instance.
- 6 The defendant has lodged an appeal in cassation against the final judgment, by which it seeks to have that judgment set aside and the application dismissed in relation to the substance of the matter.

Essential arguments of the parties to the main proceedings

- 7 The applicant submits that, pursuant to Paragraph 134(2) of the Law on public contracts, the Arbitration Committee has exclusive competence to conduct proceedings relating to an infringement of public procurement legislation. In accordance with Paragraph 140(1)(g) of that Law, the entity granting the subsidy may institute proceedings before the Arbitration Committee where, in the

performance of its functions, that entity becomes aware of an act or omission which infringes the Law on public contracts.

- 8 The applicant submits that, in accordance with Paragraph 165(1) of the Law on public contracts, the possibility of asserting a civil claim based on an infringement of public procurement legislation is subject to the condition that a final declaration as to the existence of that infringement be made by the Arbitration Committee or, following a judicial review of the Arbitration Committee's decision, by a court. To the extent that, in order to establish an irregularity as defined in point 24 of Paragraph 2(1) of the Decree, another authority must have adopted a decision or disposed of some issue beforehand, the responsible official at the authority conducting the irregularity proceedings may suspend those proceedings.
- 9 The applicant submits that the defendant was not empowered to examine the infringement of Paragraph 18(1) and (2) and Paragraph 122(7)(a) of the Law on public contracts, or to withdraw the subsidy on the basis of the outcome of the proceedings, since exclusive competence to assess whether the applicant did in fact infringe those provisions lies with the Arbitration Committee. It takes the view that the defendant would have acted properly if it had suspended the irregularity proceedings pursuant to Paragraph 87(2) of the Decree and instituted proceedings before the Arbitration Committee.
- 10 In its defence, the defendant contended that the action should be dismissed. It argued that, since the investment in the four buildings had been made as part of a project, the applicant had infringed Paragraph 18(1) and (2) of the Law on public contracts, with the result that, in the light of the overall value of the investment, the conditions for a negotiated procedure without publication of a contract notice (Paragraph 122(7) of the Law on public contracts) were not met.
- 11 The defendant noted that, in accordance with Article 60 of the Regulation, the managing authority and intermediate body are to ensure that the financing and operations selected are consistent with the criteria applicable to the operational programme and comply with the relevant provisions of EU and national law throughout the implementation period. It defended the legality of withdrawing the subsidy, having examined as part of its review whether the applicant could be found to have acted in breach of the agreement, and thus in a manner prejudicial to the financial interests of the general budget of the European Union or Hungary, or in such a way as to create a risk of such prejudice. In its examination of such matters, it was competent to establish the irregularity and was, therefore, empowered to withdraw part of the subsidy.
- 12 The defendant further argued that Paragraph 140(1) of the Law on public contracts and Paragraph 86(3) of the Decree simply make it possible for the entity granting the subsidy and the intermediate body to institute proceedings before the Arbitration Committee, but do not impose any obligation on them to do so.

Brief presentation of the grounds for the request for a preliminary ruling

- 13 Hungary has developed a dedicated procedural regime that makes the possibility of asserting claims based on an infringement of the Law on public contracts subject to the condition that a final declaration as to the existence of that infringement be made by decision of a separate body.
- 14 In essence, the Supreme Court must decide whether, on the basis of the defendant's lack of competence to establish an irregularity in the public procurement process, restoration of the amount withdrawn from a subsidy may be claimed on the basis of compliance with a subsidy agreement.
- 15 The referring court states that it has doubts, which are well-founded, as to whether the interpretation contained in the final judgment is correct. Articles 60, 70 and 98 of the Regulation require the first- and second-tier authorities hearing irregularity proceedings to be competent to establish and correct any irregularity, as well as to recover any amounts unduly paid. No national provision or interpretative practice can make the possibility of asserting a claim seeking repayment of a subsidy subject to the precondition that intermediate proceedings must have been conducted before another authority, in particular in the case where, for the first-tier authority hearing the irregularity proceedings, the institution of public procurement proceedings is only a possibility and not an obligation, and the authority empowered to make a second-tier decision, although also able to institute proceedings before the Arbitration Committee, is not bound, in terms of its decision on the appeal, by the content of the decision adopted by the Arbitration Committee.
- 16 The Court of Justice of the European has already held in the judgment [in Case] C-300/17, *Hochtief*, that EU law does not preclude national procedural legislation which makes the possibility of asserting a claim under civil law, in the event of an infringement of the rules governing public procurement and the award of public contracts, subject to the condition that the infringement should have been definitively established by an arbitration committee or, in the context of a judicial review of the decision of that arbitration committee, by a court.
- 17 According to the final judgment, the Hungarian legislature created the rules governing the division of competences with the purpose of avoiding legal uncertainty, which is to say that, in the event that the Arbitration Committee, which is competent to declare the existence of infringements in matters of public procurement and to which there is an obligation to submit the case, does not declare the existence of an infringement, such infringement cannot be pleaded in later civil proceedings. The purpose so pursued by the legislature is also confirmed by the case-law of the Hungarian higher courts, which states that, where the forum competent to do so has not established an act of infringement in a public procurement procedure, it is not possible to rely in an action under civil law on the legal consequences of infringement of the legislation governing public procurement procedure.

- 18 The Supreme Court considers that, although subsidy agreements and public contracts are very closely connected legal instruments, a distinction must be drawn between them, in particular as regards the rules governing the conditions for enforcing the obligations arising from them. The points of law which have emerged in the present dispute raise issues as to the interpretation of EU law, in particular the Regulation.
- 19 Having regard to the fact that the applicant's project was carried out with resources co-financed by the European Regional Development Fund and the Hungarian budget, it falls to be determined whether the interpretation of the Regulation and of the Decree implementing it provided in the final judgment is consistent with the purpose pursued by the EU legislature.
- 20 It is also appropriate to determine by way of interpretation whether a breach of contract constituting a manifest infringement of public procurement legislation falls within the scope of the concept of 'irregularity' as defined in EU law.
- 21 Article 2(7) of the Regulation and point 24 of Paragraph 2(1) of the Decree define the concept of irregularity [respectively] (i) as any infringement of a provision of EU law resulting from an act or omission by an economic operator which has, or would have, the effect of prejudicing the general budget of the European Union by charging an unjustified item of expenditure to the general budget, and (ii) as an infringement of provisions of national law and of the obligations entered into by the parties to a subsidy agreement which has, or would have, the effect of prejudicing the financial interests of the European Union and, thus, Hungarian financial interests.
- 22 The Regulation relevant to this case forms part of the mechanism designed to ensure the proper management of the European Union's funds and the safeguarding of its financial interests (judgment [in Case] C-260/14 y C-261/14, *Județul Neamț and Județul Bacău*). In its interpretation, the Court of Justice infers from this that it is the role of the European Union to finance, by the Funds, only actions conducted in complete conformity with EU law, including the rules applicable to public contracts (judgment [in Case] C-406/14, *Wrocław — Miasto na prawach powiatu*, and judgment [in Case] C-408/16, *Compania Națională de Autostrăzi și Drumuri Naționale din România*).
- 23 The referring court considers that the subsidy granted constitutes an advantage derived from the application of EU rules and that compliance with the relevant legislation is a condition for obtaining it. If that condition is not met, the advantage obtained loses its legal basis, not as a penalty but as a mere consequence of the finding of that irregularity (judgments in *Județul Neamț and Județul Bacău*, C-260/14 and C-261/14, *Pometon*, C-158/08, *Cruz & Companhia*, C-341/13, and *Somvao*, C-599/13). This raises the question of whether the beneficiary of a subsidy has an individual right to seek to have restored to him a subsidy which was withdrawn from him for breach of contract and which he repaid.

- 24 It must be determined by way of interpretation whether a procedural regime which allows a declaration of irregularity made in administrative proceedings to be reviewed in proceedings under civil law is consistent with the effective protection of the financial interests of the European Union (judgment [in Case] C-406/14, *Wrocław — Miasto na prawach powiatu*).
- 25 It is a matter of legal interpretation whether, in the event that the authorities or bodies competent to conduct irregularity proceedings are not empowered to establish irregularities consisting in the infringement of public procurement legislation but are able, where there are indications of an infringement of that legislation, to suspend the proceedings before them and refer the matter to the Arbitration Committee, such a division of competences does not make it excessively difficult or impossible to provide effective protection for the financial interests of the European Union and, thus, Hungarian financial interests.
- 26 In the assessment of that question, it is significant that the Hungarian legislation confines itself to offering the bodies that conduct irregularity proceedings the possibility of referring the matter to the Arbitration Committee. Given that proceedings before the Arbitration Committee can be instituted only within a certain time limit, some irregularities may end up being met with no legal consequences. What is more, the considerable length of the intermediate proceedings may lengthen the procedure, a fact which may also operate to the detriment of the effective protection of financial interests. Consideration must also be given to the fact that the content of the decision adopted in the intermediate proceedings is not binding on the authority hearing the appeal in the irregularity proceedings (Paragraph 98(3) of the Law on public contracts).
- 27 To the extent that the authorities that grant the subsidy are obliged, in order to establish a manifest infringement of public procurement legislation which also constitutes a breach of the subsidy agreement, to institute proceedings before another authority, and only a finding made on that basis empowers them to declare the existence of an irregularity and require the repayment of sums unduly disbursed, the power of review exercised by those authorities may be depleted. This may undermine the effectiveness of EU law, inasmuch as it allows the beneficiary of a subsidy, even in the event of serious infringements, to seek the full amount of that subsidy on the basis of compliance with the agreement.
- 28 In the light of the foregoing considerations, it falls to be decided whether the interpretation of the Law on public contracts that is contained in the final judgment is ideally suited to effectively protecting the financial interests of the European Union and, thus, Hungarian financial interests.
- 29 If the foregoing is answered in the negative, the question arises as to whether the body competent to conduct irregularity proceedings is also competent — even directly on the basis of the provisions of the Regulation — to establish an irregularity consisting in a manifest infringement of public procurement legislation.

- 30 It may be necessary to determine by way of interpretation whether, to the extent that the legislation based on the division of competences set out above is compatible with EU law but there has been no establishment of the irregularity by the Arbitration Committee, the court hearing a dispute under civil law may examine the applicant's conduct infringing the public procurement legislation, in the context of the breach of contract and the consequences arising from it, in particular where the decision adopted in the irregularity proceedings is not open to challenge before the courts.

WORKING DOCUMENT