

**Case C-275/21**

**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:**

28 April 2021

**Referring court:**

Bundesverwaltungsgericht (Austria)

**Date of the decision to refer:**

22 April 2021

**Applicant:**

EPIC Financial Consulting Ges.m.b.H.

**Defendants:**

Republik Österreich

Bundesbeschaffung GmbH

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**Subject matter of the main proceedings**

Procedure for the review of one or more decisions in a contract award procedure

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

Interpretation of Directive 89/665/EEC and Regulation (EU) No 1215/2012; Conformity with EU law of national legislation on fees for judicial protection in the context of a review procedure before the Bundesverwaltungsgericht (Federal Administrative Court; ‘the BVwG’) and the consequences of non-payment of those fees; Article 267 TFEU

**Questions referred for a preliminary ruling**

1. Does a review procedure before the Bundesverwaltungsgericht (Federal Administrative Court), which takes place in implementation of Directive

89/665/EEC, as amended by Directive 2014/23/EU, constitute a dispute concerning a civil and commercial matter within the meaning of Article 1(1) of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation)? Does such a review procedure as referred to in the preceding question at least constitute a civil matter pursuant to Article 81(1) of the Treaty on the Functioning of the European Union (TFEU)?

2. Having regard to the other provisions of EU law, is the principle of equivalence to be interpreted as conferring subjective rights on individuals against the Member State and as precluding the application of Austrian national rules under which the court must, before disposing of an application for review, which must be directed at the annulment of a separately contestable decision of a contracting authority, determine the type of contract award procedure and the (estimated) contract value as well as the total number of contested, separately contestable decisions from specific award procedures and also, if necessary, the lots from a specific award procedure, in order then to issue, if necessary, an order for regularisation via the presiding judge of the competent chamber of the court for the purpose of recovering fees and then, in the event of non-payment of fees, to prescribe – before or no later than at the same time as rejecting an application for review due to failure to pay fees subsequently demanded – the procedural fees via the chamber of the court competent to deal with the application for review, failing which a loss of entitlement would ensue, when in civil cases in Austria, such as, for example, in the case of actions seeking compensation or injunctions for infringements of competition law, non-payment of fees does not otherwise preclude the disposal of an action, irrespective of the issue of the fees payable for judicial protection, whatever the amount, and, by way of further comparison, in Austria, non-payment of appeal fees for bringing appeals against administrative decisions or for appeals or appeals on points of law against decisions of administrative courts to the *Verfassungsgerichtshof* (Constitutional Court) or the *Verwaltungsgerichtshof* (Supreme Administrative Court) does not lead to the dismissal of an appeal owing to non-payment of fees?

2.1. Having regard to the other provisions of EU law, is the principle of equivalence to be interpreted as precluding the application of Austrian national rules under which, prior to the disposal of an application for an interlocutory injunction as provided for in Article 2(1)(a) of Directive 89/665/EEC, as amended by Directive 2014/23/EU, an order for regularisation of fees is to be made by the presiding judge of the chamber, sitting as a single judge, in the event of insufficient payment of flat-rate fees, and that single judge must reject the application for an interlocutory injunction in the event of non-payment of fees, when otherwise in civil actions in Austria, under the *Gerichtsgebührengesetz* (Law on court fees), no additional flat-rate court fees are to be paid, in principle, for an application for an interlocutory injunction lodged together with an action, on top of the fees for the action at first instance, and, moreover, with regard to applications for the granting of suspensive effect which are lodged together with

an appeal against an administrative decision to an administrative court, an appeal on points of law to the Supreme Administrative Court or an appeal to the Constitutional Court, and which, from a functional point of view, have the same or a similar objective in terms of judicial protection as an application for an interlocutory injunction, no separate fees must be paid for such ancillary applications for the granting of suspensive effect?

3. Having regard to the other provisions of EU law, is the requirement under Article 1(1) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Directive 2014/23/EU, according to which *procurement review procedures must, in particular, be conducted as rapidly as possible*, to be interpreted as meaning that that requirement of rapidity confers a subjective right to a rapid review procedure and precludes the application of Austrian national rules under which, even in the case of contract award procedures conducted in a non-transparent manner, the court must in every case determine, before disposing of an application for review, which must be directed at the annulment of a separately contestable decision of a contracting authority, the type of award procedure and the (estimated) contract value as well as the total number of contested, separately contestable decisions from specific award procedures and also, if necessary, the lots from a specific award procedure, in order then to issue, if necessary, an order for regularisation via the presiding judge of the chamber of the court for the purpose of recovering fees and, in the event of non-payment of fees, to prescribe – before or no later than at the same time as rejecting an application for review due to failure to pay fees subsequently demanded – the procedural fees via the chamber of the court competent to rule on the application for review, failing which a loss of entitlement would ensue?

4. Having regard to the principle of transparency under Article 18(1) of Directive 2014/24/EU and the other provisions of EU law, is the right to a fair trial before a court or tribunal under Article 47 of the Charter (Charter of Fundamental Rights of the European Union (2012/C 326/02) EN 26.10.2012, *Official Journal of the European Union* C 326/391) to be interpreted as precluding the application of Austrian national rules under which, even in the case of contract award procedures conducted in a non-transparent manner, the court must in every case, before disposing of an application for review, which must be directed at the annulment of a separately contestable decision of a contracting authority, determine the type of award procedure and the (estimated) contract value as well as the total number of contested, separately contestable decisions from specific award procedures and also, if necessary, the lots from a specific award procedure, in order then to issue, if necessary, an order for regularisation via the presiding judge of the chamber of the court for the purpose of recovering fees and, in the event of non-payment of fees, to prescribe – before or no later than at the same time as rejecting an application for review due to failure to pay fees subsequently demanded – the procedural fees via the chamber of the court competent to deal with the application for review, failing which a loss of entitlement would ensue?

5. Having regard to the other provisions of EU law, is the principle of equivalence to be interpreted as conferring subjective rights on individuals against the Member State and as precluding the application of Austrian national rules under which, in the event of non-payment of flat-rate fees for the lodging of an application for review of decisions of contracting authorities within the meaning of Directive 89/665/EEC, as amended (or, as the case may be, also for a finding of illegality in connection with a contract award for the purpose of obtaining compensation), (only) a chamber of an administrative court, as a judicial body, must prescribe flat-rate fees which have not been paid but are payable (leading to curtailed possibilities of judicial protection for the party liable to pay the fees) when fees for actions and appeals in civil court proceedings are otherwise prescribed, in the event of non-payment, by an administrative decision in accordance with the Gerichtliches Einbringungsgesetz (Law on judicial collection) and, moreover, in administrative law, appeal fees for appeals to an administrative court or to the Constitutional Court or for appeals on points of law to the Supreme Administrative Court are as a general rule prescribed, in the event of non-payment of the fees, by way of a notice of an administrative authority (notice prescribing fees), against which an appeal can as a general rule always be brought before an administrative court and then, in turn, an appeal on points of law before the Supreme Administrative Court or an appeal before the Constitutional Court?

6. Having regard to the other provisions of EU law, is Article 1(1) of Directive 89/665/EEC, as amended by Directive 2014/23/EU, to be interpreted as meaning that the conclusion of a framework agreement with a single economic operator pursuant to Article 33(3) of Directive 2014/24/EU constitutes the conclusion of a contract pursuant to Article 2a(2) of Directive 89/665/EEC, as amended by Directive 2014/23/EU, and, consequently, the decision of a contracting authority as to the single economic operator pursuant to Article 33(3) of Directive 2014/24/EU with which that framework agreement is to be concluded constitutes a contract award decision pursuant to Article 2a(1) of Directive 89/665/EEC, as amended by Directive 2014/23/EU?

6.1. Are the words ‘*contracts based on that agreement*’ in Article 33(3) of Directive 2014/24/EU to be interpreted as meaning that a contract based on the framework agreement exists where the contracting authority awards an individual contract expressly on the basis of the framework agreement concluded? Or is the cited phrase ‘*contracts based on that agreement*’ to be interpreted as meaning that if the total quantity covered by the framework agreement within the meaning of the judgment of the Court of Justice in Case C-216/17, paragraph 64, has already been exhausted, there is no longer a contract based on the framework agreement originally concluded?

6.2. If Question 6.1. is answered in the affirmative:

Having regard to the other provisions of EU law, are Articles 4 and 5 of Directive 2014/24/EU to be interpreted as meaning that the estimated contract value of an individual contract based on the framework agreement is always the estimated

contract value pursuant to Article 5(5) of Directive 2014/24/EU? Or, in the case of a single contract based on a framework agreement, is the estimated contract value pursuant to Article 4 of that directive the contract value derived in application of Article 5 of that directive for the purposes of determining the estimated contract value for a single supply contract based on the framework agreement?

7. Having regard to the other provisions of EU law, is the right to a fair trial before a court or tribunal under Article 47 of the Charter (Charter of Fundamental Rights of the European Union (2012/C 326/02) EN 26.10.2012, *Official Journal of the European Union* C 326/391) to be interpreted as precluding the application of a rule under which the contracting authority designated in the procurement dispute must provide all the information required and produce all the documents required – whereby failure to do so in either respect may lead to a default decision to its detriment – if the officials or employees of that contracting authority who are required to provide that information on behalf of the contracting authority may thereby be exposed to the risk of possibly having to incriminate themselves under criminal law if they provide the information or produce the documents?

8. Taking account also of the right to an effective remedy under Article 47 of the Charter, and having regard to the other provisions of EU law, is the requirement under Article 1(1) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Directive 2014/24/EU,

that procurement review procedures must, in particular, be conducted effectively,

to be interpreted as meaning that those provisions confer subjective rights and preclude the application of national rules under which the party seeking judicial protection by way of an application for review is required to specify in his or her application for review the specific award procedure in each case and the specific separately contestable decision of a contracting authority, even if, in the case of award procedures without prior publication of a contract notice that are non-transparent for that applicant, he or she will generally not know whether the contracting authority has conducted direct award procedures under national law that are non-transparent for the applicant or negotiated procedures without prior publication of a contract notice that are non-transparent for the applicant, or whether one or more non-transparent award procedures with one or more contestable decisions have been conducted?

9. Having regard to the other provisions of EU law, is the requirement of a fair trial before a court or tribunal under Article 47 of the Charter to be interpreted as meaning that that provision confers subjective rights and precludes the application of national rules under which the party seeking judicial protection by way of an application for review is required to specify in his or her application for review the specific contract award procedure and the specific separately contestable decision

of a contracting authority, even if, in the case of award procedures without prior publication of a contract notice, that applicant cannot generally know whether the contracting authority has conducted direct award procedures under national law that are non-transparent for the applicant or negotiated procedures without prior publication of a contract notice that are non-transparent for the applicant, or whether one or more award procedures with one or more separately contestable decisions have been conducted?

10. Having regard to the other provisions of EU law, is the requirement of a fair trial before a court or tribunal under Article 47 of the Charter to be interpreted as meaning that that provision confers subjective rights and precludes the application of national rules under which the party seeking judicial protection by way of an application for review is required to pay flat-rate fees in an amount which he or she cannot foresee at the time when the application is lodged, because, in the case of contract award procedures without prior publication of a contract notice that are non-transparent for that applicant, he or she cannot generally know whether the contracting authority has conducted direct award procedures under national law or non-transparent negotiated procedures without prior publication of a contract notice, and how high the estimated contract value is in the case of any negotiated procedure without prior publication of a contract notice that may have been conducted, or how many separately contestable decisions have already been issued?

**Provisions of EU law relied on**

Treaty on the Functioning of the European Union (TFEU), in particular Article 81(1)

Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation), in particular Article 1(1) and Article 35

Directive 89/665/EEC, as amended by Directive 2014/23/EU, in particular Article 1(1), Article 2(1)(a) and Article 2a(2)

Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, in particular Article 33(3)

Charter of Fundamental Rights of the European Union, in particular Article 47

**Provisions of national law relied on**

Bundesvergabegesetz 2018 (2018 Federal Law on procurement), BGBl I 2018/65 ('the BVergG'), in particular Paragraphs 2, 31, 46, 142 et seq., 334, 336, 340 et seq., 344, 350, 353, 354, 356 and 382

Allgemeines Verwaltungsverfahrensgesetz (General Law on administrative procedure; 'the AVG'), in particular Paragraphs 49 and 51

BVwG-Pauschalgebührenverordnung Vergabe 2018 (2018 Regulation on flat-rate fees for recourse to the Federal Administrative Court in public procurement matters), BGBl II 2018/212 ('Regulation on flat-rate fees')

The cited provisions of the BVergG and the Regulation on flat-rate fees can be summarised as follows:

- Applications for review prior to the award of a contract, by which separately contestable decisions of contracting authorities may be annulled, that is to say, set aside within the meaning of Directive 89/665/EEC, as amended, presuppose that the contract has not yet been awarded in the award procedure. If the contract has been awarded, only an action for declaratory relief is possible.
- Applications for review may be directed only at the annulment of a separately contestable decision, whereby the question of what constitutes a separately contestable decision in a given case is to be answered by reference to the list of such decisions in Paragraph 2(15)(a) of the BVergG, depending on the type of contract award procedure.
- On the basis of a regulation fixing amounts, direct awards, as provided for in Paragraph 46 of the BVergG, are currently permissible only up to the amount of EUR 100 000.
- The granting of an interlocutory injunction, as provided for in Paragraph 350 et seq. of the BVergG (under EU law, in Article 2 of Directive 89/665/EEC, as amended by Directive 2014/23/EU), is permissible only for the purpose of securing applications for review which are directed against separately contestable decisions from specific contract award procedures. Once a contract has been awarded, the granting of an interlocutory injunction based on Paragraph 351 of the BVergG is impermissible.
- Paragraphs 344(1) and 350(2) of the BVergG provide that an applicant must designate the contract award procedure and the contested decisions of a contracting authority from that procedure, whereby those decisions must be separately contestable in accordance with the list in Paragraph 2(15) of the BVergG.
- As follows from Paragraph 344(1) and (2) and Paragraph 350(2) of the BVergG, an application for review and an application for an interlocutory

injunction lodged for the purpose of securing that application must always be lodged in relation to a single decision of a contracting authority.

– For applications for review relating to direct awards, a flat-rate fee of EUR 324 is payable for each direct award procedure and for each separately contested decision. For each additionally lodged application for an interlocutory injunction, an additional 50% of that fee is payable, thus EUR 486 (for each direct award).

### **Succinct presentation of the facts and procedure in the main proceedings**

- 1 The facts and procedure in the main proceedings in the present case are as set out in the summary of the request for a preliminary ruling in Case C-274/21.

### **Succinct presentation of the reasoning in the request for a preliminary ruling**

- 2 The statements of the referring court correspond, in essence, to those in the request for a preliminary ruling in Case C-274/21. In this respect, reference is made to paragraphs 13-106 of the summary of that request for a preliminary ruling. In the present order for reference, the following is furthermore stated with regard to Questions 6 and 6.2:
- 3 The questioned equivalence of the decision to conclude a framework agreement with a single economic operator and a contract award decision within the meaning of Directive 89/665/EEC, as amended by Directive 2014/23/EU, is additionally relevant to the determination to be made in this case, because, under national law, a request for a declaratory finding is admissible only in the event that the contracting authority has unlawfully failed to take a contract award decision, and, if the Court of Justice were to find that the decision on the conclusion of a framework agreement is to be equated with a contract award decision, the referring court takes the view that that request for a declaratory finding would have to be admissible in accordance with EU law even if a framework agreement has been concluded without a prior decision as to the economic operator with which the framework agreement is to be concluded.
- 4 Alternative question 6.2: By this alternative question, which is posed in the event that Question 6.1 is answered in the affirmative, the BVwG seeks to ascertain the rules according to which the estimated contract value of an individual contract based on a framework agreement within the meaning of Article 33(3) of Directive 2014/24/EU is to be calculated. If the contract value of the individual contract is calculated in the same way as the contract value of the framework agreement, then, in the case of a framework agreement concluded above the threshold, as is currently to be assumed in the present case, the possibilities of judicial protection provided for in Austria for cases in which the threshold is exceeded will, in line with EU law, always be available. If, under EU law, the contract value of the individual contract is to be calculated in accordance with the rules for supply



contracts, then, in Austria, under the BVergG, it is possible that (only) the rules providing for judicial protection may apply, in particular for applications for a declaratory finding in respect of contracts below the threshold, and it could also be the case that the individual contracts to be valued below the national direct award limit of EUR 100 000 are to be regarded as being permissible in their entirety. This will be the case unless, for contracts based on a framework agreement, the calculation rules under Article 5(9) or (11) of Directive 2014/24/EU do not generally apply in any event.

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