Case C-274/21

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

Subject matter of the main proceedings

Proceedings for the granting of an interlocutory injunction in the context of 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 proceedings for the granting of interlocutory injunctions 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 the procedure for granting an interlocutory injunction provided for in Article 2(1)(a) of Directive 89/665/EEC, as amended by Directive 2014/23/EU, which is also provided for at national level in Austria in proceedings before the Bundesverwaltungsgericht (Federal Administrative Court), in which it is also possible to bring about, for example, a temporary prohibition on the conclusion of framework agreements or on the conclusion of supply contracts, 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 procedure for granting an interlocutory injunction 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)? Is the procedure for granting interlocutory injunctions pursuant to Article 2(1)(a) of Directive 89/665/EEC, as amended by Directive 2014/23/EU, a procedure for granting provisional measures pursuant to Article 35 of the Brussels I Regulation?

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 an interlocutory injunction, as provided for in Article 2(1)(a) of Directive 89/665/EEC, as amended by Directive 2014/23/EU, 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, in the event of non-payment of fees, to prescribe – before or no later than at the same time as rejecting an application for an interlocutory injunction 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 (other types of) 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 application for an interlocutory injunction lodged in conjunction with an action, irrespective of the issue of the fees payable for judicial protection, whatever the amount, and, moreover, non-payment of flat-rate fees does not, in principle, preclude the disposal of an application for an interlocutory injunction lodged separately from an action in proceedings before the civil courts; 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 and, for example, does not lead to applications for the granting of suspensive effect being disposed of only by way of their rejection in such appeals or appeals on points of law?

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 2(1)(a) 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, *to 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*, to be interpreted as meaning that that requirement to act without undue delay confers a subjective right to have a decision taken without undue delay on an application for an interlocutory injunction and that it 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, before disposing of an application for an interlocutory injunction aimed at preventing further procurement by the contracting authority, determine the type of award procedure and the (estimated) contract value as well as the total number of separately contestable decisions contested or to be contested from specific award procedures and also, if necessary, the lots from a specific award procedure, even if those elements do not bear any relevance to the court's decision, 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, in the event of non-payment of fees, to prescribe – before or no later than at the same time as rejecting an application for an interlocutory injunction 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 vis-à-vis the applicant would ensue?

4. 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 conferring subjective rights on individuals and 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, before disposing of an application for an interlocutory injunction aimed at preventing further procurement by the 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, even if those elements do not bear any relevance to the court's decision, 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, in the event of non-payment of fees, to prescribe – before or no later than at the same time as rejecting an application for an interlocutory injunction 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 vis-à-vis the applicant would ensue?

5. Having regard to the other provisions of EU law, is the principle of equivalence to be interpreted as conferring on individuals subjective rights 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 an application for an interlocutory injunction within the meaning of Directive 89/665/EEC, as amended, (only) a chamber of an administrative court, as a judicial body, must prescribe flat-rate fees (leading to curtailed possibilities of judicial protection for the party liable to pay the fees) when fees for actions, interlocutory injunctions 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, 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 those fees, by way of a notice of a tax authority (notice prescribing fees), against which an appeal can 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?

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?

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, in the proceedings for the granting of an interlocutory injunction, 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 even 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 an interlocutory injunction is required to specify in his or her application for an interlocutory injunction the specific contract award procedure and the specific decision of a contracting authority, even where, in the case of award procedures without prior publication of a contract notice, that applicant will generally not know how many non-transparent award procedures the contracting authority has conducted and how many award decisions have already been taken in the non-transparent award procedures?

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 an interlocutory [injunction] the specific contract award procedure and the specific

contested, 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 cannot generally know how many non-transparent award procedures the contracting authority has conducted and how many award decisions have already been taken in the non-transparent award procedures?

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 an interlocutory injunction is required to pay flat-rate fees in an amount which he or she cannot ascertain in advance, 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 non-transparent award procedures have been conducted by the contracting authority and, if so, the number of such procedures and their estimated contract value and how many separately contestable award decisions have already been taken in the non-transparent award procedures?

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 In autumn 2020, the defendants concluded (at least) 15 framework agreements for the supply of antigen tests for the detection of COVID-19, each being concluded in a negotiated procedure without prior publication of a contract notice. Those framework agreements were each concluded with a single economic operator (Article 33(3) of Directive 2014/24/EU).

2 On 1 December 2020, the applicant lodged a written submission with the referring court in which it accused the defendants of having concluded in a non-transparent manner 21 framework agreements, each having a contract value of EUR 3 million, for the procurement of COVID-19 antigen tests. The applicant stated that that course of action and the individual call-offs made in connection with those framework agreements would harm it in a manner contrary to public procurement law.

3 It requested that the BVwG initiate a review procedure regarding the legality of the selected award procedure(s), the calls for tender in the context of negotiated procedures without publication of contract notices, and the further planned call-offs or calls for competition under the framework agreements of Bundesbeschaffung GmbH (BBG), and also requested that the BVwG annul various decisions of the defendants.

4 On 1 December 2020, the applicant lodged, in addition, an application for an interlocutory injunction, according to which the BVwG was to prohibit the defendants, for the duration of the review procedure, from continuing the award procedure(s), from concluding supply contracts by way of direct award, from making call-offs or calls for competition under framework agreements of BBG concerning the supply of antigen tests, and from conducting a negotiated procedure without publication of a contract notice concerning the supply of antigen tests.

5 Also on 1 December 2020, the BVwG issued an order for regularisation, as it was not clear on the basis of the written submissions which specific separately contestable decisions from which award procedures the applicant was seeking to have annulled and with regard to which specific award procedures it was seeking a particular interlocutory injunction.

6 By written submission of 7 December 2020, the applicant stated that it was contesting only one separately contestable decision of the defendants in relation to one award procedure, namely the decision on the choice of award procedure for the ordering of additional ‘SARS-Cov-2 (COVID-19) antigen tests’ for mass testing in Austria.

7 In a written submission of 9 December 2020, it explained that its application for review was not directed against the framework agreements concluded by BBG, but against the impermissible call-off by the Republic of Austria, as the framework agreements concluded by BBG were limited to a call-off volume of EUR 3 million. The applicant stated that a call-off in excess of that therefore constitutes a direct award that is impermissible under public procurement law. It named three companies in respect of which it contested the respective procurement decision or a further call-off under a framework agreement.

8 The BVwG obtained a statement from the applicant on the flat-rate fees payable. The applicant stated that it was not contesting the conclusion of the 21 framework agreements of BBG, but rather the direct award for the order of the Republic of Austria for a further several million (estimated to be two million) SARS-Cov-2 (COVID-19) antigen tests. The applicant submits that it is completely out of the question for the fee payable to have to be calculated on the basis of the total value of the 21 framework agreements. Only the value of the actual or intended contracts should be used.

9 The applicant requested that the referring court determine in detail which award procedures and which contestable decisions of a contracting authority exist, even though, under the BVergG, the onus is on the applicant to designate the award procedure(s) and each contested decision of a contracting authority.

10 In its written submission of 5 January 2021, the applicant stated that, without this already being apparent in its application initiating proceedings of 1 December 2020, it is now concerned only with the call-offs under the framework agreements with the companies S and I from 20 November 2020 onwards. In that respect, it assumed that the permissible call-off volume under the framework agreements with S and I had been exceeded. It submitted repeatedly that, in that regard, it wishes to contest the call-offs exceeding the estimated contract value of the respective framework agreement on the ground that they constituted a ‘direct award’ (within the meaning of the terms used in the national BVergG). Whether, objectively, within the meaning of the national case-law, the applicant could possibly be referring to negotiated procedures without prior publication of a contract notice will be the subject of the investigations to be conducted by the BVwG.

11 With regard to the prohibition of self-incrimination, the facts of the case should be clarified to the effect that, according to a newspaper article, members of the Federal Government have apparently been reported (within the meaning of Paragraph 80 of the Strafprozessordnung (Code of Criminal Procedure)). The filing of a criminal complaint has been confirmed by the competent public prosecutor’s office, with the result that it is possible that criminal proceedings may take place in the future.

Essential arguments of the parties in the main proceedings

12 The applicant argues that the procurement activities lack transparency, since it is not known whether, for the conclusion of the contract in question, BBG conducted individual, separate award procedures without prior publication of a contract notice with one company in each case or conducted a single procedure with all the companies. It submits that, accordingly, when designating the award procedures it is forced also to take into account any possible negotiated procedures without prior publication of a contract notice and therefore any possible calls for competition based on existing framework agreements. As explained in detail in the application for review, the decision challenged by the applicant is de facto a single specific decision of the defendants, namely the decision to place orders for several million units of SARS-Cov-2 (COVID-19) antigen tests in an informal manner (without any basis in public procurement law).

13 According to the applicant, due to the flagrant breach of the transparency requirement under public procurement law, neither the contract notice nor the documents of the award procedure were available to it. Rather, the award is a form of direct award with a value of several million euros, which should not be concealed, or be capable of being concealed, by matters of form.

14 In the interest of effective judicial protection, the award procedure need not be specifically designated. The burden of specifically designating the award procedure cannot possibly be borne by the applicant in the case of the procurement of a product running to tens of millions, without publication of a contract notice, and without there being any other reliable information accessible to the applicant (such as tender documents), and where the sole basis is the state of knowledge based on information from the media. In the case under consideration, this would be tantamount to undermining effective judicial protection – in particular due to the flagrant breach of the transparency requirement.

15 An interpretation of the provisions of the BVergG 2018 to the effect that the applicant would be obliged to indicate the exact number and designation of the award procedure(s), as well as the designation of the separately contestable decisions of the defendant, without there being any possibility of having acquired that information, due to the lack of transparency on the part of the defendant, would contradict the requirements for effective judicial protection established by the Court of Justice in settled case-law.

16 The defendants dispute the applicant's standing to lodge an application, and request that the applications for interlocutory injunctions be dismissed [as unfounded] or, in the alternative, rejected [as being inadmissible].

17 Since, according to the unambiguous wording of Paragraph 344 of the BVergG 2018, according to which an application pursuant to Paragraph 342(1) of the BVergG 2018 must in any event contain the designation of the award procedure concerned as well as the separately contestable decision that is being contested,

the applicant itself is obliged to designate precisely the contested decision in the initial application, the BVwG is in any event not obliged to conduct investigations into the facts of the case, in accordance with the case-law of the Supreme Administrative Court.

18 The defendants take the view that the applicant's applications are unsubstantiated and do not serve to enforce a subjective right of a tenderer. They submit that those applications are therefore inadmissible.

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

19 In the present case, the BVwG is confronted with a situation in which the applicant has designated the subject matter of its challenge and also the claim for judicial protection in different ways.

20 Flat-rate fees are payable in Austria according to the number of contested decisions from a specific award procedure and the award procedure in respect of which an application for review and for an interlocutory injunction is made.

21 The national view of that fee scheme is that, in accordance with the case-law of the Constitutional Court, before the flat-rate fees due have been paid or prescribed in an order, the BVwG may not dispose of either an application for review or an application for an interlocutory injunction by granting, rejecting or dismissing it, nor may it discontinue the proceedings concerned after the associated application seeking judicial protection has been withdrawn, since the flat-rate fees payable in each case can no longer be prescribed after the application seeking judicial protection has been disposed of. The payment of sufficient fees is therefore a prerequisite for a decision on the merits.

22 If the fees due are not prescribed, the judicial officials could be considered to have unlawfully and culpably caused pecuniary damage to the treasury.

23 The Austrian Federal legal order does not otherwise contain any legislation providing for such rules, limited to the duration of the proceedings, on forfeiture or limitation periods in respect of fees for judicial protection. In other contexts, as a general rule, much longer time limits apply to the possibility of prescribing fees (for example, 5 years in civil law cases or 3 years in the case of appeals on points of law before the Supreme Administrative Court).

24 This means that, in particular in the case of non-transparent procurement activities such as those at issue in the present case, very extensive investigations into the facts of the case are necessary before the fees are prescribed – investigations that in some cases would not even be necessary for the purpose of disposing of the applications for judicial protection per se.

25 In such procurement activities that are non-transparent for the applicant, he or she may sometimes not even know at the time when he or she lodges the application

seeking judicial protection (and thereby triggers his or her liability for fees) the amount of the flat-rate court fees he or she will ultimately have to pay, depending on how many direct awards or negotiated procedures without prior publication of a contract notice have actually taken place and how many separately contestable decisions have been issued in that context.

26 In addition, under the law governing fees, the BVwG must also determine whether the applicant may have withdrawn applications by amending his or her applications seeking judicial protection one or more times; each withdrawal may lead to a subsequent flat-rate fee reduction of 25% for each application seeking judicial protection for which a fee is payable. It may also be necessary to determine whether new, additional requests for judicial protection have in fact been made.

27 In accordance with the case-law of the Supreme Administrative Court, this does not depend (primarily) on, for example, the applicant's designation of the award procedure, but on the target – in substantive terms – of the application, because this is what determines the procedures involved and the potential benefit.

28 In the case of a challenge in connection with supply contracts (for antigen tests, for example) with an estimated contract value of EUR 3 million per framework agreement, involving three contested decisions, and including applications for interlocutory injunctions in respect of central contracting authorities such as the Republic of Austria and 21 alleged cases involving a framework agreement, the flat-rate fees incurred would run to EUR 1 061 424.

29 The applicant has, to date, paid EUR 486 in flat-rate fees.

30 In the case of non-transparent procurement activities and procedural submissions made with the level of care of a prudent lawyer in respect of, for example, 21 award procedures and three contested, separately contestable decisions from those procedures, and a contract value of over twenty times the threshold for supply contracts, it will therefore not be until an order for regularisation of fees is made that a party such as the applicant may face a subsequent claim for flat-rate fees running to several million euros, which that party may not necessarily have expected beforehand.

31 In accordance with the case-law handed down at the highest judicial level by the Constitutional Court in case V 64/2019, the BVwG must first issue an order for regularisation of fees owing to insufficient payment of fees and then, owing to non-payment of the flat-rate fees subsequently demanded, prescribe those fees for the purpose of creating an enforceable order before, for example, the applications for review and for interlocutory injunctions described in the example can be finally disposed of.

32 It is clarified in that respect that, according to the wording of the national law, the obligation to pay fees does not cease to apply even if the applications for review and for interlocutory injunctions are to be rejected owing to non-payment of fees.

33 Under the BVergG, only separately contestable decisions from a specific award procedure may be annulled within the meaning of the terminology of the BVergG ('set aside' within the meaning of Directive 89/665/EEC, as amended by Directive 2014/23/EU).

34 Therefore, it is either the *choice of direct award*, in the case of a direct award procedure pursuant to the BVergG, or the discernible decisions of a contracting authority listed in Paragraph 2(15)(a), in the case of a negotiated procedure without prior publication of a contract notice for the conclusion of a framework agreement with a single economic operator/undertaking, that enter(s) into consideration in the present case.

35 Accordingly, the applicant must designate the award procedure and the separately contestable decision in its application for review and in its corresponding application for an interlocutory injunction. In the case of several 'contested' award procedures, it must be clear which separately contestable decision from which award procedure is being contested.

36 In the case of a framework agreement concluded with a single undertaking/economic operator in a negotiated procedure without prior publication of a contract notice, the last decision that can be contested in that regard by the selected undertaking's competitors is the decision as to the undertaking with which the framework agreement is to be concluded.

37 Thereafter, in the case of a non-transparent award, a person seeking judicial protection under Directive 89/665/EEC, as amended by Directive 2014/23/EU, is left with only the award-specific remedy of an application for a declaratory finding.

38 If the evidence shows that direct awards within the meaning of Paragraph 31(11) of the BVergG do in fact exist, only the choice of the direct award procedure can be contested by way of an application for review.

39 In connection with applications for review, the first question that arises for the BVwG in the present case is whether, in the case of award procedures that are non-transparent for the applicants, judicial protection entailing such designation obligations in respect of the award procedure in applications for review and for interlocutory injunctions is, as such, equivalent, effective and fair.

40 If those designation obligations are not covered by EU law and are thus ineffective or superseded, it is conceivable that the BVwG would have jurisdiction to investigate and annul, of its own motion, identifiable decisions of contracting authorities from certain award procedures, which could then be set aside prior to the award of the contract. If, on the other hand, the designation obligations in question are in conformity with EU law, the BVwG must, if necessary, reject the applications owing to the lack of such designation following a regularisation procedure.

The principle of equivalence and the principle of effectiveness

41 The referring court takes the view that substantive public procurement law, as the sum of norms which prescribe, in particular, pre-contractual obligations of conduct for contracting authorities bound by public procurement law and for undertakings interested in performing public contracts, is special civil law, as law governing the conclusion of contracts, and therefore falls within the scope of the Brussels I Regulation.

42 Article 25 of the Brussels I Regulation provides for agreements conferring jurisdiction as a means of establishing jurisdiction. In the area of public procurement law, the Austrian Supreme Administrative Court has ruled out the possibility of agreements on jurisdiction in accordance with national procedural law. It might be inferred from this that the public procurement law laid down in the BVergG in Austria is not civil law.

43 The civil-law nature of substantive public procurement law (first question referred) is a question preliminary to the questions referred in connection with the principle of equivalence.

44 The German Bundesverwaltungsgericht (Federal Administrative Court) has certainly proceeded on the assumption – in the context of an international comparison – that public procurement law is to be categorised as civil law (BVerwG 02.05.2007, BVerwG 6 B 10.07, with further references).

45 Since by means of interlocutory injunctions, as provided for in Directive 89/665/EEC, as amended, and also in the national BVergG, the possibilities of concluding contracts can be greatly restricted for a limited period of time, the referring court takes the view that proceedings for issuing an interlocutory injunction pursuant to Article 2(1)(a) of Directive 89/665/EEC, as amended by Directive 2014/23/EU, are also proceedings concerning civil claims within the meaning of the judgment of the ECtHR of 15 October 2009, 15BSW 17056/06 *Micaleff v. Malta*.

46 The principle of equivalence under EU law requires that the enforcement of rights granted by EU law must not be more difficult, without justification on objective grounds, than the enforcement of rights deriving from the national legal order.

47 Accordingly, by virtue of the principle of equivalence, EU law prohibits procedural discrimination in the legal enforcement of rights derived from EU law in comparison to procedural rules by which rights created under purely national law are enforced.

48 In civil disputes initiated by an action brought before a district or regional court at first instance, the flat-rate court fees payable depend on the amount in dispute, which is generally known in advance to the plaintiff, a party comparable to the applicant in the context of public procurement law. The plaintiff therefore knows what fees to expect.

49 Whereas, under the BVergG, an application for an interlocutory injunction pursuant to point 4 of Paragraph 340(1) is subject to a flat-rate fee of 50% of the fees payable for the application for review, even if the interlocutory injunction is applied for in conjunction with the applications for review initiating the proceedings, no separate flat-rate fee is paid in proceedings before the civil courts in Austria for such interlocutory injunctions applied for in conjunction with an action, even though the action is in principle subject to an obligation to pay fees.

50 However, it appears to be of central importance in that respect that, in the case of flat-rate fees under the Gerichtsgebührengesetz (Law on court fees), a decision on the merits for actions and applications for an interlocutory injunction does not require that the fees have already been paid, and the State's entitlement to fees is not lost as a result.

51 Unlike the flat-rate fees under the BVergG, flat-rate court fees are prescribed by an administrative decision in the event of non-payment, without this having any other influence on the disposal of the action or the application for an interlocutory injunction.

52 The decision prescribing fees is then subject to appeal to the BVwG, as a court with full powers of examination and determination. The decisions on fees taken by the BVwG in that regard can then be challenged, in turn, by appeal on points of law to the Supreme Administrative Court or by appeal to the Constitutional Court.

53 In that respect, applicants for review and interlocutory injunctions before the BVwG who pursue judicial relief procedures provided for under EU law in accordance with Directive 89/665/EEC, as amended by Directive 2014/23/EU, appear to be in a worse position in many respects compared to purely national procedures for judicial relief.

54 Unlike in civil proceedings, additional flat-rate fees must in any event always be paid for an application for an interlocutory injunction lodged with the BVwG, which is generally lodged in conjunction with an application for a review.

55 Under the BVergG, the application for review and an interlocutory injunction is to be rejected where the applicant does not pay the flat-rate fees owed in the amount determined by the court as being payable following an order for regularisation of fees; he or she loses the substantive entitlement to disposal of the request for judicial relief on the sole basis of non-payment of fees. An application for review or an interlocutory injunction under the BVergG may also not be rejected on grounds other than the non-payment of fees prior to a decision prescribing fees, even if the case may to that extent already be ready for adjudication. In particular, contracting authorities facing applications for an interlocutory injunction that have legally suspensive effect may be adversely affected by the circumstance that, before the applications for an interlocutory injunction can be disposed of, the question of fees must first be resolved – failing which, judges may incur liability due to failure to prescribe flat-rate fees.

56 If the BVwG, as a judicial body, prescribes the flat-rate fees pursuant to the BVergG, the applicant does not have the right to appeal to an administrative court with full powers of examination and determination, as is otherwise the case, but rather is left with only either an appeal on points of law to the Supreme Administrative Court, in which questions pertaining to the assessment of evidence can be addressed only to a very limited extent, or the right of appeal to the Constitutional Court, whereby, as a matter of principle, an appeal can be brought only on account of the application of unlawful rules of a generally abstract nature or else on account of the unconstitutional application of the law in individual cases.

57 Irrespective of the view taken by the referring court that the fee system for actions brought before civil courts and applications for interlocutory injunctions lodged in conjunction with such actions and the fee system for applications for review, for a declaratory finding and for an interlocutory injunction must be equally favourable in accordance with the principle of equivalence under EU law, it is appropriate, for the purposes of further comparative legal analysis, to provide an outline of the fee system in connection with appeals against administrative decisions to administrative courts, appeals on points of law to the Supreme Administrative Court and appeals against decisions of an administrative court to the Constitutional Court.

58 Such appeals also incur fees. If, in the case of appeals against administrative decisions to an administrative court, appeals to the Constitutional Court or appeals on points of law to the Supreme Administrative Court, applications for the granting (or withdrawal) of suspensive effect are lodged, which, from a functional point of view, may in some cases achieve the same outcome as interlocutory injunctions, the Supreme Administrative Court has hitherto always taken the view that such applications, which are lodged together with the appeal or appeal on points of law, are not subject, as ancillary applications, to any additional flat-rate fee.

59 In none of the fee schemes outlined above in the context of administrative law is the payment of fees a condition of admissibility for the substantive disposal of the respective appeals.

60 If those three appeal fees outlined above are not paid, the competent tax office prescribes them by way of a notice. After that, the party liable to pay the fees has a right of appeal to the Bundesfinanzgericht (Federal Finance Court), as a court with full powers of examination and determination, the decisions of which are then in turn subject to a right of appeal on points of law to the Supreme Administrative Court or a right of appeal to the Constitutional Court.

61 In accordance with the principle of effectiveness under EU law, national provisions must not render practically impossible or excessively difficult the exercise of rights conferred by EU law in the field of public procurement. That requirement to ensure that effective enforcement of rights is possible is also

addressed in Article 1 of Directive 89/665/EEC, as amended by Directive 2014/23/EU, and in Article 47 of the Charter.

62 Directive 89/665/EEC, as amended by Directive 2014/23/EU, is intended to ensure rapid and effective review procedures which may lead to the setting aside of decisions of contracting authorities. Interlocutory injunctions based on that directive are intended to allow interim measures connected with the main applications for review and annulment to be taken as quickly as possible.

63 In that respect, according to Article 1(1) of that directive, framework agreements are also contracts within the meaning of the directive.

64 The unconditional and sufficiently precise provisions of that directive can give rise to subjective rights for individuals (see, for example, Court of Justice, Case C-391/15).

65 In that respect, the BVwG takes the view that a subjective right exists under EU law to have applications for review and interlocutory injunctions disposed of as swiftly as possible and independently of issues relating to flat-rate court fees.

66 Having regard to the national fee system specifically created for the purposes of judicial protection in public procurement, the question that arises for the BVwG is whether, in the case of non-transparent award procedures, the triggering of liability for court fees at the time of lodging an application, the amount of which may not even be known at that time, can be in conformity with EU law, effective, fair, equivalent and in keeping with the requirement of a rapid procedure.

67 In other words, the question arises as to whether it is, in particular, equivalent, effective, fair and in keeping with the requirement of a rapid review procedure and interlocutory injunction procedure if the BVwG, even where the application for review and for an interlocutory injunction is potentially ready for adjudication, must nevertheless first determine at a different level how many decisions issued by a contracting authority (including when they were issued) from how many award procedures were contested by the applicant according to the intention of that party as objectively declared by way of the application for review together with the associated application for an interlocutory injunction at the time of initiation of the proceedings, and how many requests for review together with the associated request for an interlocutory injunction the applicant has maintained subsequently, in this case, for example, on 5 January 2021.

The individual questions referred

68 The BVwG takes the view that the situation under EU law and the direct effectiveness of EU law, including the inapplicability of national provisions conflicting therewith, must first be clarified before further, more or less extensive fact-finding regarding the relevant, case-specific legal situation can then be carried out on the basis of the clarified legal situation.

69 **Question 1:** If substantive public procurement law forms a specific part of civil law, it would appear to be necessary, in accordance with the principle of equivalence under EU law, that the enforcement of rights for the applicant in public procurement law is not regulated less favourably than in other areas of purely national civil law.

70 It is proposed that these questions be answered to the effect that substantive public procurement law, as the sum of norms laying down pre-contractual rights and obligations in the course of the contract formation process, is a field of civil law equivalent to the other rules on the conclusion of contracts, and that interlocutory injunctions pursuant to Article 2(1)(a) of Directive 89/665/EEC, as amended by Directive 2014/23/EU, likewise constitute proceedings pertaining to civil law and at any rate proceedings within the meaning of Article 35 of the Brussels I Regulation.

71 **Question 2:** This question seeks to ascertain whether the principle of equivalence under EU law, together with other EU law, means that the national fee system described above must be disapplied.

72 If the Court of Justice answers the question to the effect that EU law is such that applications for an interlocutory injunction and other legal remedies for the protection of individuals may be disposed of in Austria irrespective of the question of flat-rate fees and the payment thereof, the BVwG could consider the investigative steps required to determine fees to be subsidiary in the present case and, in accordance with the principle of procedural economy, could most likely dispose very quickly of the application(s) for an interlocutory injunction lodged, depending on the outcome of the investigations, without first having to conduct extensive investigations into the number of award procedures.

73 **Question 2.1:** Against the background of, in particular, the principle of equivalence under EU law, the question is raised as to whether, under EU law, an application for an interlocutory injunction may be subject to a separate flat-rate fee where it is lodged in conjunction with an application for review, even though, in other areas of civil law, applications for an interlocutory injunction lodged in conjunction with an action do not trigger an additional fee on top of the fee for bringing the action, and applications seeking suspensive effect lodged in conjunction with an appeal do not trigger an additional fee in other areas of administrative law.

74 In other words, if the Court of Justice rules that, due to procedural discrimination compared with other parties seeking judicial relief in Austria, the applicant for review is not required to pay any additional interlocutory injunction fees for applications for an interlocutory injunction lodged together with the application for review, the applicant's request for an interlocutory injunction could be disposed of much more swiftly and, in particular, without the need to conduct fee-specific investigations.

75 **Question 3:** This question seeks to ascertain whether it is impermissible under EU law – in particular in the light of the requirement of rapidity pursuant to Article 1(1) of Directive 89/665/EEC, as amended by Directive 2014/23/EU, or the requirement to act without undue delay pursuant to Article 2(1)(a) of that directive – to make the swift disposal of an application for review or for an interlocutory injunction conditional on the circumstance that the court fees payable for such an application have either already been paid or else are paid following an order for regularisation of fees in the event that the application is rejected owing to non-payment of fees, where, independently of the question of fees, that application could possibly be disposed of very quickly. It is proposed that this question be answered to the effect that it is impermissible.

76 **Question 4:** The referring court takes the view that it is unfair for all parties to the proceedings if, in the case of non-transparent award activities such as those in the present case, the court must conduct extensive investigations into the facts relevant to the calculation of the fees, and possibly issue an order for regularisation of fees and then, if necessary, reject the application for review or for an interlocutory injunction owing to the non-payment of the required fees. If such a fee system were impermissible under EU law and should therefore also be disapplied at the national level, the BVwG could possibly dispose of the present applications much more quickly.

77 **Question 5:** As a general rule, there is a right of appeal to an administrative court with full powers of examination and determination against an administrative authority's decision prescribing court fees, whereas, in the case of award-specific court fees under the BVergG for applications for review, for a declaratory finding and for an interlocutory injunction, there is, after a decision on fees taken at first instance, only a right of appeal to the Constitutional Court and Supreme Administrative Court against a decision prescribing fees, and those two supreme courts do not conduct a comprehensive review (see paragraph 57 above).

78 In comparison, in the case of court fees for actions in civil proceedings or for appeals under administrative law, an administrative notice prescribing fees is issued, which can always be contested by way of an appeal to the competent administrative court and then, in turn, by way of an appeal on points of law to the Supreme Administrative Court or an appeal to the Constitutional Court.

79 The referring court takes the view that such a national scheme – which is discriminatory with regard to judicial protection – for court fees payable when seeking judicial protection in the context of public procurement under the BVergG is generally impermissible under EU law, especially if consideration is given to the fact that the payment of those court fees, unlike other court fees, is actually a prerequisite for a decision on the merits.

80 **Question 6:** This question asks whether, in particular in the light of Article 1(1) of Directive 89/665/EEC, as amended by Directive 2014/23/EU, the conclusion of a framework agreement with a single economic operator constitutes, from the point

of view of a contracting authority, the conclusion of a contract under the aforementioned directive and thus the award of the contract under national law.

81 If this question is answered in the affirmative, it is clear in conformity with EU law that, for the purposes of the preliminary investigation continued in the proceedings before the BVwG, from that point onwards, only applications for a declaratory finding were admissible pursuant to Paragraph 334 of the BVergG at national level, and applications for an interlocutory injunction must be rejected on the sole ground that the 'award of a contract' has already been made.

82 It is proposed that those two questions be answered to the effect that the conclusion of a framework agreement with a single economic operator constitutes the conclusion of a contract or the award of a contract, since Article 1 of the abovementioned directive already provides for such equivalence.

83 **Question 6.1:** This question seeks clarification as to whether, under EU law, contracts concluded on the basis of a framework agreement are based on that framework agreement even if, in that context, the total quantity covered by the framework agreement within the meaning of the judgment of the Court of Justice in Case C-216/17 has already been exceeded. If that question is answered in the affirmative, it would have to be assumed from the perspective of national law – subject to the results of the investigation – that the contracts in excess of the total quantity could be contested only by way of an application for a declaratory finding, without an interlocutory injunction being permissible in that respect, because they were concluded after the conclusion of the framework agreement.

84 If, conversely, the Court of Justice were to conclude that individual contracts are no longer based on the original framework agreement after the total quantity covered by the original framework agreement has been exceeded, it is necessary in such a case to examine whether new individual contracts are (were) either direct awards under national law or were intended or awarded as supply contracts in a non-transparent award procedure or are to be assessed as individual contracts on the basis of a new further framework agreement concluded in a non-transparent manner. Thus, in such a situation, new applications for review prior to the award of the contract or applications for an interlocutory injunction in that regard are still possible. Depending on this, it is then necessary to determine whether applications for review, for a declaratory finding or for an interlocutory injunction against such new procurements are admissible.

85 For reasons of procedural economy, it is proposed that these two questions be answered to the effect that contracts concluded on the basis of a framework agreement are based on the framework agreement even if the total quantity covered by the framework agreement had already been exhausted.

86 **Question 7:** This question raises the issue of the obligation to provide information against the background of the prohibition of self-incrimination.

87 Paragraph 49(1)(1) of the AVG, which is applicable in the present case, provides for a right for witnesses to refuse to give evidence, in accordance with which a witness may refuse to testify in relation to questions the answering of which would entail a direct financial loss or the risk of criminal prosecution for the witness or a member of his or her family or would dishonour the witness or a member of his or her family.

88 In accordance with Paragraph 51 of the AVG, that right to refuse to give evidence is also applicable to parties to proceedings, although in that case there is no right to refuse to give evidence on the ground of a financial loss.

89 Pursuant to Paragraph 336 of the BVergG, where a party to the proceedings does not provide information or does not submit documents that have been requested, a discretionary decision can be taken to give a default judgment based on the allegations of the other party to the proceedings.

90 However, Paragraph 336 of the BVergG does not provide for any rights to refuse to give evidence or to provide information, such as those provided for in Paragraph 49(1)(1) of the AVG.

91 The BVwG takes the view that there could be a violation of the prohibition of self-incrimination if officials or employees on the contracting authority side are required to provide information and details in order to avoid the risk of a default decision, even if doing so may result in the disclosure of facts that could subsequently be used against those officials and employees under criminal law (and/or the law on compensation).

92 If, on the other hand, there were no such possibility of a default decision in the event of a failure to provide information or to submit documents, this would limit the effectiveness of judicial protection in respect of public procurement.

93 From the aspect of fundamental rights, it is proposed that this question be answered to the effect that obligations to provide information and submit documents do not exist if such obligations would create an obligation for natural persons acting for the contracting authority to incriminate themselves.

94 **Questions 8 and 9:** These questions call into question the sufficient effectiveness and fairness of the national provisions in the case of award procedure activities that are not transparent to the applicant.

95 It seems at least feasible and possible that, when the applicant submitted the application initiating proceedings, it did not know how many award procedures of what kind (direct awards, negotiated procedures without prior publication of contract notices) were being conducted or had been conducted by the defendants, and how many separately contestable decisions the defendants had already taken in the award procedure(s).

96 This means that, possibly without there being any transparency in that regard, a burden of assertion regarding award procedures to be specifically designated and regarding separately contestable decisions was imposed on the applicant. Accordingly, the applicant made non-specific allegations in the proceedings.

97 On the other hand, every applicant in Austrian civil proceedings must, within the scope of his or her burden of assertion, present the facts on which the claim is based and, in the absence of any statutory provisions to the contrary as regards the burden of proof, also bears the objective burden of proof (‘*Feststellungslast*’) in accordance with the generally applicable principle, if those facts cannot be proved or can be proved only in part.

98 Such risks arising from the burden of assertion and proof therefore appear to be generally inherent in the Austrian legal system, especially on the civil side (for example in tort law and competition law).

99 If the BVergG requires the specifically contested, separately contestable decision from a specific award procedure to be specified in order for an application for review and for an interlocutory injunction to be admissible, including where the application would otherwise be rejected following an order for regularisation, it is sometimes very difficult, if not impossible, for a party seeking judicial protection to be able to know with sufficient certainty, and in particular in due time before the award of the contract, how many separately contestable decisions have already been issued in how many award procedures.

100 However, if that lack of transparency on the part of the party seeking judicial protection is considered in the context of a comparison with other systems of judicial protection and, in particular, with actions before the Austrian civil courts, such a comparison shows that it is also the case in those contexts that the applicant seeking judicial protection first bears the burden of assertion and then the objective burden of proof, that is to say, the risk that the facts on which the claim is based cannot be proved.

101 In the light of the outcome of that comparative analysis of procedural law, it is therefore proposed that the questions be answered to the effect that such designation obligations do not call into question the effectiveness or fairness of the system of judicial protection under the BVergG per se.

102 **Question 10:** This question seeks to ascertain whether the right to a fair trial under Article 47 of the Charter allows, in the context of public procurement activities that are non-transparent for parties seeking judicial protection, the application of a system of court fees in which the amount of the court fees ultimately to be paid depends on the amount of the estimated contract value, the number of contract award procedures carried out with a certain contract value and the number of separately contestable decisions.

103 The referring court takes the view that the lack of transparency for the applicant in the present case means that it appears unfair to require flat-rate fees for

applications for review and for an interlocutory injunction for each separately contestable decision from each specific award procedure once the court has duly determined how many separately contestable decisions, from how many award procedures, with what estimated contract value the applicant was seeking to challenge. It appears to be unfair because, by way of a comparison, parties seeking judicial protection before a civil court generally already know how much they will have to pay in court fees when they bring an action, including an action with an associated application for an interlocutory injunction. In the court fee system pursuant to Paragraph 340 of the BVergG, parties seeking judicial protection may have to consider the possibility of substantial 'fee surprises'.

104 If Questions 8 and 9 were to be answered to the effect that EU law requires that, where non-transparent awards are being contested, the designation obligations in respect of the contested decision and the award procedure concerned do in fact cease to apply when an application is lodged, but then, nevertheless, the amount of fees to be paid pursuant to Paragraph 340 of the BVergG and the Regulation on flat-rate fees is to be determined only in the course of the review and interlocutory injunction proceedings on the basis of the award procedures with a certain estimated contract value that can then be determined and on the basis of the number of decisions to be set aside, the non-transparency of the amount of fees at the time when an application is lodged would become even more pronounced.

105 It is therefore proposed that the question be answered to the effect that this is unfair under EU law, and national rules on fees must accordingly be disapplied if such rules require the applicant to pay fees which he or she could not foresee at the time of lodging the application owing to the non-transparency of the award procedure.