Reports of Cases

OPINION OF ADVOCATE GENERAL
BOT
delivered on 10 April 2014[1]

Case C-19/13

Ministero dell'Interno
v
Fastweb SpA

(Request for a preliminary ruling from the Consiglio di Stato (Italy))

(Public procurement — Directive 89/665/EEC — Procedures for review of the award of public procurement contracts — Situations where the conditions for the use of a negotiated procedure without publication of a contract notice were not satisfied — Power of the review body to declare the contract ineffective — Scope of the exception laid down in Article 2d(4) of Directive 89/665, under which the review body must maintain the effects of the contract — Principle of equal treatment — Right to an effective remedy)

1. By this reference for a preliminary ruling, the Court is asked to define the scope of the powers conferred on the national court under Article 2d of Directive 89/665/EEC,[2] in terms of annulment and imposition of penalties, if it is established that a public procurement contract has been awarded in infringement of the rules concerning advertising and competitive procedure laid down in Directive 2004/18/EC.[3]

2. The objective of Directive 89/665 is to guarantee effective application of the rules relating to the award of public procurement contracts, by ensuring that there are effective and rapid review procedures in all Member States.[4] Through the amendment introduced by Directive 2007/66, the EU legislature sought to improve the effectiveness of those procedures by strengthening the guarantees of transparency and non-discrimination. With that in mind, it introduced, in Article 2d of Directive 89/655, penalties designed to be effective and dissuasive[5] so as to afford potential tenderers and economic operators who have been adversely affected effective judicial protection and to combat the most serious infringement of the law on public procurement, that is to say, the unlawful direct award of contracts.

1 — Original language: French.

2 — 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 2007/66/EC of the European Parliament and the Council of 11 December 2007 (OJ 2007 L 335, p. 31) ('Directive 89/665').

3 — Directive of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).

4 — See the third recital in the preamble to Directive 89/665 and the third subparagraph of Article 1(1) thereof. See also *Commission* v *Germany*, C-503/04, EU:C:2007:432, paragraph 35 and the case-law cited.

5 — See recitals 27 and 28 to Directive 2007/66.

3. Accordingly, under Article 2d(1)(a) of Directive 89/665, Member States are to ensure that a contract is declared ineffective by a review body independent of the contracting authority if the contracting authority has awarded the contract without prior publication of a contract notice in the *Official Journal of the European Union* in circumstances where to do so is not permissible under Directive 2004/18.

4. However, an exception to that rule is allowed under Article 2d(4) of Directive 89/665, the implications of which must be examined here.

5. Article 2d(4) of Directive 89/665 is worded as follows:

'The Member States shall provide that paragraph 1(a) of this Article does not apply where:

— the contracting authority considers that the award of a contract without prior publication of a contract notice in the [Official Journal] is permissible in accordance with Directive 2004/18 …,

— the contracting authority has published in the [Official Journal] a notice as described in Article 3a of this Directive expressing its intention to conclude the contract, and

— the contract has not been concluded before the expiry of a period of at least 10 calendar days with effect from the day following the date of the publication of this notice.'

6. Under Article 3a of Directive 89/665, the contracting authority must state, in the notice announcing its intention of concluding a contract, its name and contact details. It must also describe the object of the contract and give the justification for its decision to award it without prior publication of a contract notice in the Official Journal. In addition, the contracting authority must state the name and contact details of the economic operator in favour of whom a contract award decision has been taken and, where appropriate, any other relevant information that it may consider useful.

7. Article 2d(4) of Directive 89/665 is designed to facilitate pre-contractual remedies, since, if a notice announcing an intention to conclude a contract is published [6] and if signature of the contract is delayed for a minimum standstill period of 10 days, the court is able to correct the infringement of the public procurement rules in good time. [7]

8. By its reference, the Consiglio di Stato (Italy) is seeking a preliminary ruling by the Court on the interpretation and validity of Article 2d(4) of Directive 89/665 in the light of the principle of equal treatment, recognised by the case-law as a fundamental principle of EU law, and of the right to an effective remedy, which is enshrined in Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter').

9. The reference has been made in proceedings brought by Fastweb SpA against the Ministero dell'Interno (Ministry of the Interior). Those proceedings concern the award to Telecom Italia SpA of a public contract for the supply of electronic communications services for a duration of seven years and a value of EUR 521 500 000.

10. It is common ground in the present case that the Ministero dell'Interno failed to observe the public procurement rules in awarding the contract by means of a negotiated procedure without prior publication of a contract notice.

6 — That notice is also called 'notice for voluntary *ex ante* transparency'.

7 — See recital 28 to Directive 2007/66.

11. By decision of 8 January 2013, the Consiglio di Stato held that the award was unlawful and annulled it.

12. Nevertheless, the Consiglio di Stato noted that the Ministero dell'Interno had published in the Official Journal a notice announcing its intention of entering into the contract with Telecom Italia, in accordance with Article 3a of Directive 89/665. The Consiglio di Stato also acknowledged that the Ministero dell'Interno had observed the minimum standstill period of 10 days between the award of the contract and its signature. Under Article 2d(4) of that Directive, the national court is therefore required to maintain the effects of that contract, despite the illegality of its award.

13. It is against that background that the referring court has expressed its uncertainty as to the extent of the powers accorded to the national court to annul and to impose penalties.

14. The Consiglio di Stato has therefore stayed proceedings and referred the following questions to the Court for a preliminary ruling:

'(1) Must Article 2d(4) of Directive [89/665] be construed as meaning that, if, before awarding the contract directly to a specific economic operator, selected without prior publication of a contract notice, a contracting authority published the notice for voluntary ex ante transparency in the [Official Journal] and waited at least 10 days before concluding the contract, the national court is — always and in any event — precluded from declaring the contract to be ineffective, even if it is established that there has been an infringement of the provisions permitting, subject to certain conditions, the award of a contract without a competitive tendering procedure?

(2) Is Article 2d(4) of Directive [89/665] — if interpreted as making it impossible to declare a contract ineffective, in accordance with national law (Article 122 of the Code [of Administrative Procedure]), even though the national court has established an infringement of the provisions permitting, subject to certain conditions, the award of a contract without a competitive tendering procedure — compatible with the principles of equality of the parties, of non-discrimination and of protecting competition, and does it guarantee the right to an effective remedy enshrined in Article 47 of the Charter …?'

15. The parties to the main proceedings have lodged observations, as have the Italian, Austrian and Polish Governments and also the European Parliament, the Council of the European Union and the European Commission.

16. In the present Opinion, I shall conclude that neither the aims of Directive 89/655 nor the wording of Article 2d of that directive preclude a Member State from allowing the review body freedom to assess the extent to which a contract concluded without prior publication of a contract notice in the Official Journal must be declared ineffective, if that body finds that, despite having published a notice in the Official Journal announcing its intention of concluding the contract and despite having observed the 10-day minimum standstill period between the award of the contract and its signature, the contracting authority has deliberately and intentionally infringed the rules regarding advertising and competitive procedure laid down in Directive 2004/18.

I – **Facts**

17. In 2003, the Public Safety Department of the Ministero dell'Interno entered into an agreement with Telecom Italia for the management and development of communications services. That contract was due to expire on 31 December 2011.

18. In view of the imminent expiry of that agreement, the Ministero dell'Interno re-appointed Telecom Italia, by decision of 15 December 2011, as its supplier and technological partner for the management and development of those services.

19. With a view to awarding the contract, the Ministero dell'Interno believed it possible to use a negotiated procedure without prior publication of a contract notice, on the basis of Article 57(2)(b) of Legislative Decree No 163 of 12 April 2006 laying down the Code of public works, services and supply contracts in implementation of Directives 2004/17/EC and 2004/18/EC (decreto legislativo n. 163 — Codice dei contratti pubblici relativi a lavori, servizi e forniture in attuazione delle direttive 2004/17/CE e 2004/18/CE),[8] which transposes Article 28(1)(e) of Directive 2009/81/EC into Italian law.[9]

20. Under Article 28(1)(e) of Directive 2009/81/EC, the contracting authority may award a contract by a negotiated procedure without prior publication of a contract notice 'when, for technical reasons or reasons connected with the protection of exclusive rights, the contract may be awarded only to a particular economic operator'.

21. In the circumstances, the Ministero dell'Interno considered Telecom Italia to be the only economic operator in a position to perform the service agreement, for technical reasons and in order to protect (certain) exclusive rights.

22. That decision was submitted to the Avvocatura Generale dello Stato (State Legal Advisory Service), which gave a favourable opinion on 20 December 2011 regarding the lawfulness of proceeding as planned.

23. On the same day, the Ministero dell'Interno published a notice in the Official Journal announcing its intention of awarding Telecom Italia the contract for 'the provision of electronic communications services, including voice telephony, mobile telephony and data transmission services, to the Civil Police and the armed service of the Carabinieri, in accordance with all the conditions laid down in the interests of national security concerning the confidentiality and security of information'.

24. On 22 December 2011, the Ministero dell'Interno adopted the administrative decision inviting Telecom Italia to take part in the negotiations scheduled for 23 December 2011.

25. The parties signed the framework agreement on 31 December 2011 — that is to say, after 10 days had elapsed from the date on which the notice was published in the Official Journal — for a duration of seven years and a value of EUR 521 500 000.

26. The contract award notice was published in the Official Journal on 16 February 2012.

27. Fastweb brought an action for annulment of the award before the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court of Lazio; 'the TAR'), which is the body responsible for hearing proceedings challenging the award of a public contract in Italy. Fastweb sought a declaration that the award was invalid and ineffective on the ground that the conditions laid down in Article 28(1)(e) of Directive 2009/81 for use of a negotiated procedure without publication of a contract notice had not been satisfied.

8 — Ordinary supplement to GURI No 100 of 2 May 2006. Decree as amended by Legislative Decree 152 of 11 September 2008 (ordinary supplement to GURI No 231 of 2 October 2008; 'Legislative Decree 163/2006').

9 — Directive of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC (OJ 2009 L 216, p. 76), as amended by Commission Regulation (EU) No 1251/2011 of 30 November 2011 (OJ 2011 L 319, p. 43) ('Directive 2009/81'). Article 28(1)(e) of Directive 2009/81 reproduces, essentially *verbatim*, the terms of Article 31(1)(b) of Directive 2004/18.

28. The TAR upheld the action. It found that the data and circumstances relied upon by the Ministero dell'Interno did not constitute 'technical reasons' for the purposes of Article 57(2)(b) of Legislative Decree 163/2006, but rather reasons relating to expediency and to difficulties that might arise if the contract were to be awarded to another economic operator. However, after annulling the award of the contract, the TAR held that it could not declare the contract to be ineffective as the Ministero dell'Interno had fulfilled the obligation of transparency and observed the minimum standstill period under Article 121(5) of the Code of Administrative Procedure, which transposes Article 2d(4) of Directive 89/665 into Italian law.

29. On the other hand, the TAR found that those provisions did not preclude it from declaring the contract ineffective as from 31 December 2013, on the basis of Article 122 of the Code of Administrative Procedure.

30. The Ministero dell'Interno and Telecom Italia each lodged an appeal against that judgment before the Consiglio di Stato.

31. The Consiglio di Stato upheld the annulment of the award. It also held that the contracting authority had not adequately demonstrated that the conditions for use of a negotiated procedure without prior publication of a contract notice had been satisfied. In that regard, it found that what came to light, on the basis of all the arguments set out and documentation produced, including the technical report, was not so much the objective impossibility of entrusting those services to different economic operators, but rather the inexpediency of such a solution, essentially because, in the Ministry's view, it would inevitably involve changes, costs and a period of adjustment.

32. On the other hand, the Consiglio di Stato is uncertain as to the inferences properly to be drawn from that annulment in terms of the effects of the contract at issue in the light of the rules laid down by the EU legislature in Article 2d(4) of Directive 89/665.

II – **Italian law**

33. Directive 89/665 was transposed into Italian law by Legislative Decree No 53 of 20 March 2010, the content of which was subsequently incorporated into Article 120 et seq. of the Code of Administrative Procedure.

34. Article 121(1) of the Code of Administrative Procedure transposes Article 2d(1) of Directive 89/665 into Italian law. It provides that, in the following cases, the court which annuls the final award is to declare the contract to be ineffective, stating, in the light of the pleadings of the parties and the assessment of the seriousness of the conduct of the contracting entity and of the factual circumstances, whether the declaration of ineffectiveness is limited to the services still to be supplied at the date of publication of the decision or whether it is retroactive:

— if the contract has been definitively awarded without prior publication of a contract notice in the Official Journal or in the *Gazzetta ufficiale della Repubblica italiana*, when such publication was required under Legislative Decree 163/2006;

— if the contract has been definitively awarded by a negotiated procedure without publication of a notice, or awarded directly, when that was not permissible and with the result that no notice was published in the Official Journal or the Gazzetta ufficiale, when such publication was required by Legislative Decree 163/2006.

35. Article 2d(4) of Directive 89/665 was transposed into Italian law by Article 121(5) of the Code of Administrative Procedure, under which the ineffectiveness of the contract for which Article 121(1)(a) and (b) provide does not apply in the following circumstances:

— if, by reasoned decision adopted before the award procedure was initiated, the awarding body declared that the procedure without prior publication of a contract notice in the Official Journal or the Gazzetta ufficiale was permissible under Legislative Decree 163/2006;

— if the awarding body, for contracts with a Community dimension and of a value under the threshold, published a notice for voluntary *ex ante* transparency in the Official Journal and the Gazzetta ufficiale, respectively, pursuant to Article 79a of Legislative decree 163/2006, stating its intention of concluding the contract;

— if the awarding body did not conclude the contract until at least 10 days had elapsed after the day following the date on which the notice referred to in Article 121(1)(b) was published.

36. Article 122 of the Code of Administrative Procedure adds that, with the exception of the cases contemplated in Article 121(1) of the Code, the court which annuls the final award is to decide whether the contract should be declared ineffective, indicating from what date and taking into account the following: the interests of the parties; the real possibility that, in view of the irregularities established, the applicant might be awarded the contract; the stage reached in the performance of the contract; and the possibility of resuming the contract, in situations in which the irregularity flawing the award does not entail the obligation to recommence the procedure and an application for resumption of the contract has been made.

37. Article 3a of Directive 89/665 relating to the content and form of the notice for voluntary *ex ante* transparency is transposed into Italian law by Article 79a of Legislative Decree 163/2006.

III – **My analysis**

38. I have chosen to examine together the two questions referred by the Consiglio di Stato.

39. By those questions, the Consiglio di Stato is asking the Court, in essence, whether, under Article 2d(4) of Directive 89/665, read in the light of the principle of equal treatment and the right to an effective remedy, the national court is required, whatever the circumstances, to maintain the effects of a contract concluded without prior publication of a contract notice where the contracting authority has published in the Official Journal a notice stating its intention of concluding the contract and has observed the minimum standstill period, laid down in that provision, of 10 days between the award of the contract and its signature.

40. I think not. To my way of thinking, Article 2d(4) of Directive 89/665 cannot introduce an automatic mechanism of that nature, at the risk of compromising the effectiveness of the provisions introduced by the EU legislature in Directive 2007/66 and of infringing some of the fundamental principles recognised by that legislature vis-à-vis the economic operator who has been adversely affected.

41. Article 2 of Directive 2004/18, which is entitled ‘Principles of awarding contracts’ provides that contracting authorities must treat economic operators equally and non-discriminatorily and must act in a transparent way.

42. In that connection, the Court has held that the principle of equal treatment of tenderers or candidates constitutes a fundamental principle of EU law in the context of public procurement. [10] Respect for that principle must ensure the free movement of services within the European Union and its objective is to promote the development of healthy and effective competition between the economic operators concerned in all Member States. [11] As the Court has pointed out, it therefore precludes any negotiation between the contracting authority and a tenderer during a public procurement procedure. Respect for the principle of equal treatment implies not only non-discrimination on grounds of nationality, but also a duty of transparency in public procurement procedures. [12] The essential aim of that transparency is to ensure, in respect of all potential tenderers, a sufficient degree of advertising of the procurement procedure, thereby making it possible for the market to be opened up to competition and for the impartiality of the procedure to be reviewed. [13] It therefore seeks to avoid the risk of favouritism or arbitrariness on the part of the contracting authority so as to afford equality of opportunity to all tenderers when formulating their tenders. [14]

43. By dint of such duties, economic operators acquire rights which must be afforded effective judicial protection by the national courts. The courts must therefore be in a position to ensure that their judgments are fully complied with and they must be able to impose effective, proportionate and deterrent penalties so as to ensure that the rules relating to the award of public contracts are fully effective.

44. It was in order to guarantee the effective application of those principles and effective judicial protection for the tenderers concerned against the risks of favouritism or arbitrary behaviour on the part of the contracting authority that the EU legislature chose, in Directive 2007/66, to strengthen the effectiveness of proceedings brought in the Member States by persons with an interest in obtaining a specific contract and adversely affected by an alleged infringement. [15]

45. In principle, Directive 89/665 lays down only the minimum conditions to be satisfied by the review procedures established in domestic law [16] and, according to recital 20 to that directive, Directive 89/665 does not preclude the application of stricter penalties under national law, thus respecting, in accordance with recital 34, the principle of the procedural autonomy of the Member States.

46. Article 1(1) of Directive 89/665 accordingly requires Member States to ensure that any economic operator who has been adversely affected has access to a remedy that is effective and as rapid as possible against unlawful decisions taken by contracting authorities, in accordance with the conditions set out in Articles 2 to 2f of that directive. [17]

47. To that end and in accordance with Article 2(1) of Directive 89/665, Member States are required to ensure that the review body has the following powers:

— the power to adopt interim measures with the aim of correcting the alleged infringement or preventing further damage to the interests concerned;

10 — See the arguments concerning that principle in point 34 et seq. of my Opinion in *Wall* (C-91/08, EU:C:2009:659).

11 — See, inter alia, *Manova*, C-336/12, EU:C:2013:647, paragraph 28. See, also, *Wall*, EU:C:2010:182, in which the Court stated that '[Articles 43 EC and 49 EC] and the principles of equal treatment and non-discrimination on grounds of nationality, and the consequent obligation of transparency, pursue the same objectives as Council Directive [92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1), as amended by Commission Directive 2001/78/EC of 13 September 2001 (OJ 2001 L 285, p. 1)], in particular the free movement of services and their opening up to undistorted competition in the Member States' (paragraph 48).

12 — See *Commission* v *CAS Succhi di Frutta*, C-496/99 P, EU:C:2004:236, paragraph 109 and the case-law cited, and *Parking Brixen*, C-458/03, EU:C:2005:605, paragraph 49 and the case-law cited.

13 — See *Wall*, EU:C:2010:182, paragraph 36 and the case-law cited.

14 — *See Commission* v *Belgium*, C-87/94, EU:C:1996:161, paragraphs 54 to 56.

15 — See, inter alia, recitals 3 and 4 to that directive. See, also, *Commission* v *Austria*, C-212/02, EU:C:2004:386, paragraphs 20 to 22.

16 — See *Strabag and Others*, C-314/09, EU:C:2010:567, paragraph 33 and the case-law cited.

17 — See, also, *GAT*, C-315/01, EU:C:2003:360, paragraph 44 and the case-law cited.

— the power to annul decisions taken unlawfully; and

— the power to award damages to persons who have been adversely affected.

48. By Article 2(7) of Directive 89/655, the EU legislature leaves Member States free to determine in their national law the effects to attach to the exercise of those powers as regards the contract at issue.

49. However, the EU legislature excludes from the ambit of that freedom the situations contemplated in Articles 2d, 2e and 2f of that directive and, in particular, in cases in which the national court has annulled the contract for infringement of the rules on advertising and competitive procedure laid down in Directive 2004/18. Accordingly, the EU legislature chose, in such cases, to restrict the powers of the review body by expressly establishing the effects to attach to the annulment of the contract.

50. Thus, paragraph 1(1) of Article 2d of Directive 89/665, which is entitled 'Ineffectiveness', requires the review body to consider the contract ineffective if the contracting authority has awarded a contract without prior publication of a contract notice in the Official Journal, in circumstances in which it was not permissible under Directive 2004/18 to do so. The wording is clear and, in principle, Member States are left no discretion whatsoever.

51. The EU legislature gives reasons for that restriction in recital 13 to Directive 2007/66, stating that the unlawful direct award of contracts constitutes, according to the case-law of the Court of Justice, the most serious breach of EU law in the field of public procurement.[18] According to the EU legislature, it is therefore necessary to provide for effective, proportionate and dissuasive penalties, which means that such contracts should be considered to be ineffective.

52. That being so, if the review body finds that the award of a public contract by negotiated procedure without prior publication of a contract notice is unlawful, it must annul the contract and declare it ineffective so as to restore competition and to create new business opportunities for the economic operator who has been adversely affected.[19]

53. However, the stringency of that rule is relaxed in Article 2d(2) of Directive 89/665, since the EU legislature leaves Member States free to determine the consequences that must ensue following a declaration that a contract is ineffective.

54. What is more, an exception to the general rule is allowed under Article 2d(4) of Directive 89/665, the wording and scope of which I must now interpret here.

55. I note that, under that provision, 'Member States shall provide that paragraph 1(a) of [Article 2d] does not apply where':

— the contracting authority believed that conclusion of the contract without prior publication was permissible under Directive 2004/18;

— the contracting authority has met an obligation of transparency before the signature of the contract by publishing in the Official Journal a notice for voluntary *ex ante* transparency; and

— the contracting authority has observed the minimum standstill period of 10 days between publication in the Official Journal of the notice stating its intention of concluding the contract and the conclusion of the contract.

18 — See *Stadt Halle and RPL Lochau*, C-26/03, EU:C:2005:5, paragraph 37.

19 — Recital 14 to Directive 2007/66.

56. At the hearing, the Parliament and the Commission confirmed that those conditions are cumulative.

57. It is perfectly clear from recitals 13, 14 and 26 to Directive 2007/66 that, by introducing that exception to the general rule, the EU legislature is seeking to reconcile the various interests in play, that is to say, the interests of the undertaking that has been adversely affected, to which it is important to make available the remedies of pre-contractual interim relief and of annulment of the contract unlawfully concluded, and the interests of the contracting authority and the undertaking selected, which entails the need to prevent the legal uncertainty that might be engendered by the ineffectiveness of the contract.

58. The EU legislature couched Article 2d(4) of Directive 89/665 in mandatory terms and, save where otherwise provided in that instrument, that provision requires the review body to maintain the effects of a contract even though it has been annulled, if all three conditions are satisfied, in order to preserve the desired balance between the various parties concerned.

59. I believe that, by adding to Directive 89/665, in its initial version, a separate provision as specific as Article 2d(4), the EU legislature intended to lay down a common, mandatory rule for all Member States. By contrast with other provisions under which Member States are expressly left free to determine, within the framework of their procedural autonomy, the appropriate inferences to be drawn from the annulment of a contract and its ineffectiveness,[20] Article 2d(4) of Directive 89/665 does not appear to allow Member States to impose a stricter penalty in accordance with recital 20 to Directive 2007/66 and, in particular, to declare the contract ineffective.

60. Does that necessarily mean, as the referring court expressly asks, that the review body 'is — always and in any event — precluded' from declaring the contract to be ineffective?

61. To my mind, the discretion accruing to the review body is to be found in the review that it must undertake as to whether the conditions laid down in Article 2d(4) of Directive 89/665 — and, in particular, the first condition — were satisfied.

62. If the review body finds that the conditions laid down in Article 2d(4) of Directive 89/665 were met, it is then required to maintain the effects of the contract in accordance with the wording and objective of that provision. If, on the other hand, the review body finds upon completing its review that those conditions were not satisfied, it must then declare the contract to be ineffective in accordance with the rule laid down in Article 2d(1)(a) of Directive 89/665 and, in that connection, it enjoys the discretion conferred on it under Article 2d(2) of the directive.

63. The discretion enjoyed by the review body therefore depends on the outcome of its review.

64. I shall now dwell on the scope of that review. There are two reasons for doing so.

65. The first reason relates to the attainment of the objectives that the EU legislature seeks to pursue by means of Article 1(1) of Directive 89/665 and, in particular, through the establishment of effective legal remedies in respect of decisions taken by awarding authorities in infringement of procurement law.

20 — See, inter alia, Article 2d(3) of Directive 89/665, which introduces a qualification of the general rule laid down in Article 2d(1) by stating that 'Member States may provide that the review body … may not consider a contract ineffective, even though it has been awarded illegally … if the review body finds … that overriding reasons relating to a general interest require that the effects of the contract should be maintained'. The wording of that provision is clear, the EU legislature plainly recognising that the national court has a discretion when determining the most appropriate penalty where there are overriding reasons relating to the general interest.

66. Review by the courts is necessary in order to ensure observance of the principle of equal treatment and fulfilment of the attendant obligation of transparency and to impose, where appropriate, an effective and dissuasive penalty.

67. Such review is also necessary in order to ensure the effectiveness of an action brought, pursuant to Article 47 of the Charter, by an undertaking which has been adversely affected. It must be borne in mind that recital 36 to Directive 2007/66 expresses a commitment on the part of the EU legislature to the effect that the 'Directive respects fundamental rights and observes the principles recognised in particular by the Charter' and, in particular, seeks to ensure full respect for the right to an effective remedy as enshrined in Article 47 of the Charter. Respect for the right to an effective judicial remedy presupposes that the national court has discretion as regards the aspect of compliance with the applicable law and, in the present case, as regards the question whether the conditions laid down in Article 2d(4) of Directive 89/665 are satisfied.

68. The second reason relates to the wording used by the EU legislature to formulate the first condition, which is laid down in the first indent of Article 2d(4) of Directive 89/665.

69. I would point out that, under that provision, the national court is required to maintain the effects of the contract unlawfully concluded, if 'the contracting authority considers that the award of a contract without prior publication of a contract notice in the *Official Journal of the European Union* is permissible in accordance with Directive 2004/18'. [21]

70. It seems to me, however, that it would be extremely difficult to attain the objectives mentioned above by allowing the contracting authority so ample a measure of discretion as it enjoys under that provision, without it being open to some sort of judicial scrutiny.

71. That being so, that condition is purely enabling and legal protection for economic operators who have been adversely affected is undermined. [22]

72. First, that condition is tantamount to an acknowledgment that, regardless of the wording, context and objective of the provisions of Directive 89/665, the contracting authority is free to decide whether or not to issue a call for tenders and, consequently, whether or not to observe the principles of transparency and non-discrimination enshrined in Article 2 of Directive 2004/18, while at the same time it means that the contracting authority can be sure that a contract concluded in infringement of the rules on advertising will not be declared ineffective, if it has nevertheless published in the Official Journal a notice stating its intention of concluding the contract and has observed the 10-day minimum standstill period. The ousted economic operator will only be able to bring an action for damages, which will not make it possible to put the contract unlawfully awarded out to competition.

73. There is clearly a paradox here.

21 — Emphasis added. That wording reappears in Article 2e(2) of the **Proposal for a Directive of the European Parliament and of the Council amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts** (COM(2006) 195 final) and similar wording is to be found in Point 3 of the Explanatory Memorandum for that Proposal, which provides that '[w]hen an awarding authority *considers* that it has the right to directly award a contract …, it must … suspend the conclusion of the contract for a minimum period of ten calendar days, following sufficient publicity in the form of a simplified award notice' (emphasis added).

22 — A condition is 'enabling' if the origin or performance of the obligation depends solely on the intention of only one of the contracting parties.

74. I note that Directive 89/665 is expressly intended to strengthen the guarantees of transparency and non-discrimination in the field of public procurement so as to ensure that economic operators who have been adversely affected have effective judicial protection. [23] Moreover, I also note that it was to combat the unlawful award of privately negotiated public contracts and to protect potential tenderers against arbitrary decisions by the contracting authority that the EU legislature chose, in Directive 2007/66, to enhance the effectiveness of the review procedures. [24]

75. Second, as things stand, that condition allows the contracting authority to award a public contract directly, contrary to the requirements laid down in Directive 2004/18, by completing minimum procedural requirements and risking minimum penalties, which means that it is able to abuse the rights conferred on it.

76. As Fastweb points out in its observations, it is thus easier for the contracting authority to conclude a public contract with the undertaking of its choosing than to issue a proper call for tenders in accordance with the rules on advertising and competitive procedure laid down in Directive 2004/18.

77. First of all, the schedule of the call for tenders is avoided and the public contract can be awarded more quickly. The present case illustrates this point perfectly, since the procedure for awarding the contract at issue, which is for a duration of seven years and a value of EUR 521 500 000, was launched on 15 December 2011 and completed on 31 December 2011, that is to say, 15 days later.

78. Next, the rules on advertising are different. In a proper tendering procedure, the contracting authority is required to publish a contract notice and to notify each of the tenderers of the decisions taken. Prior publication and the opening of a competitive procedure are therefore formal requirements. In a negotiated procedure without publication of a contract notice, the contracting authority is required merely to publish a notice in the Official Journal, and the undertaking concerned then has 10 days within which to bring pre-contractual proceedings. Obviously, that publication does not ensure that the party concerned is as informed as he would be by the publication of a call for tenders in the Official Journal or individual notification of the decisions adopted by the contracting authority: the review procedures are commensurately limited.

79. Lastly, if the award of the contract is unlawful, owing inter alia to an irregularity in the tendering procedure, the contract may be declared ineffective. On the other hand, under the procedure provided for in Article 2d(4) of Directive 89/665, the review body is required to maintain the effects of the contract concluded in infringement of the rules on advertising and competitive procedure if the contracting authority published a notice for voluntary *ex ante* transparency and observed the minimum standstill period of 10 days between that publication and conclusion of the contract. The review body may, it is true, award damages against the contracting authority. However, the grant of damages does not enable the contract unlawfully awarded to be put out to competition.

80. I therefore consider it essential that, in the course of its verification of the conditions laid down in Article 2d(4) of Directive 89/665, the review body assess the conduct of the contracting authority. In my view, it should, in particular, determine whether the contracting authority acted in good faith and with due diligence when concluding the contract and whether the reasons it has given for awarding the contract by a negotiated procedure without publishing a contract notice in the Official Journal are or were legitimate.

81. That also seems to be the opinion expressed in their observations by the Italian and Polish Governments, and by the Council and the Commission. [25]

23 — See recital 3 to that directive.

24 — *Commission* v *Austria*, EU:C:2004:386, paragraphs 20 to 22.

25 — See paragraphs 22 and 27 of the observations submitted by the Italian Government, paragraph 12 of those submitted by the Polish Government, point 33 of those submitted by the Council and point 48 of those submitted by the Commission.

82. We must not lose sight of the fact that the maintenance of the effects of the contract, as provided for under Article 2d(4) of Directive 89/665, depends on the good faith of the contracting authority and is designed to preserve legal certainty for the other parties to the contract. The EU legislature expressly recognises this in recital 26 to Directive 2007/66, emphasising the need to 'avoid legal uncertainty which may result from ineffectiveness' of the contract. Moreover, the Court expressly acknowledged this in *Commission* v *Germany*. [26]

83. However, there cannot be legal certainty or legitimate expectations where the contracting authority has acted in bad faith in the application of the rule of law and has deliberately and intentionally failed to comply with the public procurement rules.

84. At the hearing, Telecom Italia suggested that the first indent of Article 2d(4) of Directive 89/665 in no way placed the contracting authority under a duty to act in good faith and with due diligence, arguing that the only obligation incumbent upon that authority is to state reasons for its decisions. I refuse to countenance that interpretation, because good faith on the part of administrative authorities is as integral part of their duties and forms the basis for the trust that the persons administered must be able legitimately to place in their actions. That is to say, good faith is one of the fundamental principles that must inform the daily business of those authorities. It seems quite obvious to me, therefore, that the first indent of Article 2d(4) of Directive 89/665 presupposes, for the purposes of its application, that the contracting authority acted in good faith.

85. It is essential, therefore, for the national court to examine the reasons which could, reasonably and honestly, have led the contracting authority to believe that it was entitled to award a contract by negotiated procedure, without publication of a contract notice; and to distinguish between a mistake committed in good faith and an intentional infringement of the procurement rules. It is after that examination that the national court will be in a position to determine the most appropriate penalty.

86. There are thus two possible situations.

87. The first situation is where the national court finds that the error of law made by the contracting authority is excusable because it has shown good faith. In those circumstances, the national court is required to maintain the effects of the contract in accordance with Article 2d(4) of Directive 89/665 so as to preserve the desired balance between the interests of the various parties.

88. In that connection, there is nothing to suggest that the review body may then impose alternative penalties such as those provided for in Article 2e(2) of Directive 89/665.

89. First, the review body may not impose an alternative penalty if there is no penalty in respect of which it would serve as an alternative. In other words, there must be a legal basis for the imposition of a penalty. In a situation where all the conditions laid down in Article 2d(4) are met, the EU legislature requires the review body, as we have seen, to maintain the effects of the contract, thus preventing that body from being able to penalise the contracting authority by declaring the contract ineffective. No 'penalty' exists, therefore, for the purposes of the directive.

26 — EU:C:2007:432, paragraph 33 and the case-law cited. See also, by analogy, *Strabag and Others*, EU:C:2010:567, in which the Court stated that time-barring rules are necessary 'so as to prevent the candidates and tenderers from being able, at any moment, to invoke infringements of that legislation, thus obliging the contracting authority to restart the entire procedure in order to correct such infringements' (paragraph 37 and the case-law cited).

90. Secondly, as regards the alternative penalties under Article 2e of Directive 89/665, the EU legislature expressly refers to situations in which the review body may, instead of declaring the contract ineffective, impose a fine or shorten the duration of the contract, and no mention is made of the situation covered by Article 2d(4) of the directive. [27]

91. In those circumstances, it can reasonably be asked whether the material scope of Article 2e of Directive 89/665 should be construed more broadly. I do not think so. To do so would be to disregard the very terms of Article 2(7) of the directive and the intention of the EU legislature. In Article 2(7) of Directive 89/665, the EU legislature expressly excluded the situations referred to in Article 2e from the ambit of the freedom accorded to Member States to determine the effects that must attach to the exercise of their power to impose penalties.

92. The second situation is where the review body considers the error of law to be inexcusable, on the view that the contracting authority has deliberately and voluntarily infringed the rules on prior advertising and competitive procedure. In that situation, the infringement must, obviously, be penalised. There is no legitimate reason for maintaining the effects of a contract the conclusion of which constitutes, within the meaning of the case-law of the Court of Justice, the most serious breach of EU law in the field of public procurement.

93. In those circumstances, the review body is then required to declare the contract ineffective in accordance with the rule laid down in Article 2d(1)(a) of Directive 89/665 and to restore the rights of the economic operator adversely affected by that fraudulent act.

94. In that situation, Member States cannot be denied the power to declare the contract ineffective because, if they were, the contracting authority would then be free to infringe the rules of law on advertising and competitive procedure, subject to having to pay, depending on the circumstances, damages to the economic operator adversely affected. That interpretation would undoubtedly jeopardise the objectives that the EU legislature intended to pursue when adopting Directive 2007/66. [28]

95. It should not be forgotten that the whole point is to ensure that the penalty is effective. In a situation in which the contracting authority has clearly acted with the aim of circumventing the applicable rules, only the ineffectiveness of the contract ensures a dissuasive and effective penalty.

96. Nor should it be forgotten that the aim of Directive 89/665 is to ensure respect for the principle of equal treatment. Only by annulling the contract unlawfully concluded and divesting it of its effects is it possible to restore competition in the market and to create new business prospects for the economic operator who has been unlawfully denied the opportunity of participating in the tendering procedure.

97. That said, it is appropriate at this stage to point out that the review body remains free to assess the extent to which the contract is to be declared ineffective, in accordance with Article 2d(2) of Directive 89/665.

27 — Those situations are the following: (i) the situation referred to in Article 1(5) of Directive 89/665, in which the contract is concluded even though the economic operator adversely affected has lodged a complaint with the contracting authority; (ii) the situation referred to in Article 2(3) of that directive, in which the contracting authority concludes the contract before the national court rules on the application for interim relief or on the action; (iii) the situation referred to in Article 2a(2) of that directive, in which the conclusion of the contract following the award decision takes place before the expiry of the 10-day minimum standstill period following notification of that decision to the tenderers or candidates; and (iv) the situation in which the contract has been declared ineffective for the reasons expressly laid down in Article 2(1) of that directive.

28 — According to settled case-law, in order to ensure the uniform interpretation and application of a provision, one EU language version of which differs from the other language versions, it must be interpreted by reference not only to the general scheme of the rules of which it forms part but also to the objective pursued by the EU legislature (see, inter alia, Endendijk, C-187/07, EU:C:2008:197, paragraph 22 et seq.).

98. We have seen that Article 2d(2) of Directive 89/665 provides that Member States are to be free to determine in their national law the consequences of a contract being considered ineffective. According to the EU legislature, Member States may accordingly confer on the review body the power to cancel all the contractual obligations retroactively or to limit the scope of the cancellation of the contract to the obligations that have yet to be performed. Nevertheless, the EU legislature intends, in the latter case, to confer a broad measure of discretion on the review body. It refers expressly to the wording of Article 2e(2) of Directive 89/655. Under that provision, Member States may confer on the review body broad discretion to take into account all the relevant factors — including the seriousness of the infringement, the behaviour of the contracting authority and, in the cases referred to in Article 2d(2) of that directive, the extent to which the contract remains in force — in order to decide, depending on the circumstances, whether the duration of the contract should be shortened or whether financial penalties should be imposed.

99. And accordingly it is there that, upon reading Article 2d(2) and Article 2e(2) of Directive 89/665 together, that we can see at the point of interconnection the discretion enjoyed by the review body when it has to declare the ineffectiveness of a contract concluded unlawfully.

100. In the light of all those factors, I therefore feel that neither the aims of Directive 89/665 nor the wording of Article 2d thereof preclude a Member State from allowing the review body freedom to assess the extent to which a contract concluded without prior publication of a contract notice in the Official Journal must be declared ineffective, if it finds that, despite having published a notice in the Official Journal expressing its intention of concluding the contract and having observed the minimum standstill period of 10 days between the award of the contract and its signature, the contracting authority has deliberately and intentionally infringed the rules on advertising and competitive procedure laid down in Directive 2004/18.

101. On the contrary, it seems to me that that is the obvious interpretation if we wish to guarantee the effectiveness of Directive 89/665 and to ensure the protection of the fundamental rights accorded to the economic operator unlawfully denied the opportunity to participate in the tendering procedure.

102. In the context of the main proceedings, I think it will therefore be for the competent national court to assess the legitimacy of the reasons on which the Minister dell'Interno relied in order to award the contract at issue by negotiated procedure without prior publication of a contract notice in the Official Journal.

103. In that regard, I wish to make the following points.

104. In the present case, I reiterate that the Ministero dell'Interno considered it legitimate to use that procedure, basing its view on Article 57(2)(b) of Legislative Decree 163/2006, which transposes Article 28(1)(e) of Directive 2009/81/EC into Italian law.

105. I note that, under that provision, that procedure is permitted 'when, for technical reasons or reasons connected with the protection of exclusive rights, the contract may be awarded only to a particular economic operator'.

106. In the circumstances, the Ministero dell'Interno believed that Telecom Italia was the only economic operator in a position to perform the service agreement, for technical reasons and in order to protect (certain) exclusive rights.

107. However, the TAR found that the data and circumstances relied upon by the Ministero dell'Interno did not constitute 'technical reasons' for the purposes of Article 57(2)(b) of Legislative Decree 163/2006, but were rather considerations relating to expediency and to the difficulties that could arise if the contract were awarded to another economic operator.

108. Similarly, the Consiglio di Stato held that the contracting authority had not proved to the requisite legal standard that the conditions for using a negotiated procedure without prior publication of a contract notice had been satisfied. In that regard, it found that what came to light, on the basis of all the arguments set out and documentation produced, including the technical report, was not so much the objective impossibility of entrusting those services to different economic operators, but rather the supposed inexpediency of such a solution, essentially because, in the Ministry's view, it would necessarily involve changes, costs and a period of adjustment.

109. It is true that, in the light of the information before the Court, the Ministero dell'Interno does not appear to put forward specific technical reasons or even requirements relating to the particular nature of the equipment at issue or to the sensitivity of the contract.

110. I understand that, in the field of public safety or defence, it may be legitimate to refrain from applying certain provisions of procurement law, since some contracts are so sensitive that it would be inappropriate to publicise them and open them up to competition between economic operators beforehand. That is the position in the case of contracts concluded by intelligence services or relating to counter-espionage activities, for example. It is also the case for particularly sensitive purchases, requiring an extremely high degree of confidentiality, such as those linked to anti-terrorism or related specifically to sensitive activities carried out by the forces of law and order.

111. In the present case, the Ministero dell'Interno does not appear to mention such circumstances. Admittedly, it states that the contract is for 'the provision of electronic communications services, including voice telephony, mobile telephony and data transmission services, to the Civil Police and the armed service of the Carabinieri, *in accordance with all the conditions laid down in the interests of national security concerning the confidentiality and security of information*'.[29] However, it appears — particularly in the light of the findings of the TAR and of the Consiglio di Stato — that the Ministero dell'Interno has not established the sensitive nature of the contract and the equipment at issue or even mentioned special requirements connected, for example, with information security or the protection of confidential or classified information which, in the interests of national security, might in fact require specific protection and involve a particular choice of candidate.

112. Moreover, I am surprised by the chronology of events, and particularly by the speed with which the contract was awarded. It is apparent from the papers before the Court that the Ministero dell'Interno decided to renew the telephony contract concluded in 2003 with Telecom Italia only 15 days before that agreement expired, that is to say, on 15 December 2011. Furthermore, it is also apparent from the documents before the Court that the contract was signed on 31 December 2011, that is to say, 15 days later. That conduct surprises me in view of the importance for the operation of the authorities concerned, the duration of the contract (seven years) and its value (EUR 521 500 000), unless it is considered that there was an understanding between the Ministero dell'Interno and Telecom Italia that the agreement would be renewed.

113. Lastly, I think that it is clearly necessary to take into account the fact that the Ministero dell'Interno is a public authority with legal advisers who have enough sense not to commit an error of assessment as regards the circumstances in which a public contract may be awarded without being advertised or put out to competition beforehand.

114. That said, it will be for the competent national court to determine, in the light of all the information at its disposal, whether such an error is excusable or whether it indicates a deliberate and intentional infringement of the rules on procurement.

29 — Emphasis added.

115. Having regard to all those factors, I therefore believe that Article 2d(4) of Council Directive 89/665, read in the light of the principle of equal treatment and of the right to an effective remedy, is to be interpreted as not precluding a Member State from allowing the review body freedom to assess the extent to which a contract concluded without prior publication of a contract notice in the Official Journal must be declared ineffective, if it finds that, despite having published a notice in the Official Journal announcing its intention of concluding the contract and having observed the minimum standstill period of 10 days between the award of the contract and its signature, the contracting authority has deliberately and intentionally infringed the rules on advertising and competitive procedure laid down in Directive 2004/18.

IV – **Conclusion**

116. In the light of the foregoing considerations, I therefore propose that the Court give the following answer to the question referred by the Consiglio di Stato:

Article 2d(4) 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, as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007, read in the light of the principle of equal treatment and of the right to an effective remedy, is to be interpreted as meaning that it does not preclude a Member State from allowing the review body freedom to assess the extent to which a contract concluded without prior publication of a contract notice in the *Official Journal of the European Union* must be declared ineffective, if it finds that, despite having published a notice in the Official Journal announcing its intention of concluding the contract and having observed the minimum standstill period of 10 days between the award of the contract and its signature, the contracting authority has deliberately and intentionally infringed the rules on advertising and competitive procedure laid down in Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts.