ECLI:EU:C:2022:565

Provisional text

JUDGMENT OF THE COURT (Eighth Chamber)

14 July 2022 (*)

(Reference for a preliminary ruling – Public procurement – Regulation (EU) No 1215/2012 – Not applicable to procedures for granting an interlocutory injunction and review procedures as referred to in Article 2 of Directive 89/665/EEC in the absence of an international element – Directive 2014/24/EU – Article 33 – Treatment of a framework agreement as a contract, for the purposes of Article 2a(2) of Directive 89/665 – Not possible to award a new public contract where the quantity and/or maximum value of the works, supplies or services concerned laid down by the framework agreement has or have already been reached – National legislation providing for the payment of fees for access to administrative proceedings in the field of public procurement – Obligations to determine and pay the fees for access to proceedings before the court rules on an application for an interlocutory injunction or an action for review – Non-transparent procedure for the award of a public contract – Principles of effectiveness and equivalence – Effectiveness – Right to an effective remedy – Directive 89/665 – Articles 1, 2 and 2a – Article 47 of the Charter of Fundamental Rights of the European Union – National legislation providing for the dismissal of an action for review where the fees for access to proceedings have not been paid – Determination of the estimated value of a public contract)

In Joined Cases C-274/21 and C-275/21,

REQUESTS for a preliminary ruling under Article 267 TFEU from the Bundesverwaltungsgericht (Federal Administrative Court, Austria), made by decisions of 22 April 2021, received at the Court on 28 April 2021, in the proceedings

EPIC Financial Consulting Ges.m.b.H.

v

Republic of Austria,

Bundesbeschaffung GmbH,

THE COURT (Eighth Chamber),

composed of N. Jääskinen, President of the Chamber, N. Piçarra and M. Gavalec (Rapporteur), Judges,

Advocate General: T. Ćapeta,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– EPIC Financial Consulting Ges.m.b.H., by K. Hornbanger, Rechtsanwältin,

– the Austrian Government, by A. Posch and J. Schmoll, acting as Agents,

– the Hungarian Government, by M.Z. Fehér and R. Kissné Berta, acting as Agents,

– the European Commission, by P. Ondrůšek, P.J.O. Van Nuffel and G. Wils, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 These requests for a preliminary ruling concern the interpretation of (i) Article 1(1), Article 2(1)(a) and Article 2a(2) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 (OJ 2014 L 94, p. 1) ('Directive 89/665'), (ii) Article 1(1) and Article 35 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 (OJ 2012 L 351, p. 1), (iii) Article 81(1) TFEU, (iv) the principle of equivalence, (v) Article 4, Article 5(5) and Article 33(3) of 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 (OJ 2014 L 94, p. 65), and (vi) Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter').

2 The requests have been made in proceedings between EPIC Financial Consulting Ges.m.b.H. ('EPIC'), on the one hand, and the Republic of Austria and Bundesbeschaffung GmbH ('the federal purchasing company'), on the other, concerning the award by the Republic of Austria and Bundesbeschaffung GmbH of public contracts for the supply of tests to detect antigens produced by the SARS-CoV-2 virus (COVID-19) ('the antigen tests').

Legal context

European Union law

Directive 89/665

3 The fifth recital of Directive 89/665 is worded as follows:

'… since procedures for the award of public contracts are of such short duration, competent review bodies must, among other things, be authorised to take interim measures aimed at suspending such a procedure or the implementation of any decisions which may be taken by the contracting authority; … the short duration of the procedures means that the aforementioned infringements need to be dealt with urgently'.

4 Article 1 of that directive, entitled 'Scope and availability of review procedures', provides, in paragraphs 1 and 3 thereof:

'1. This Directive applies to contracts referred to in Directive [2014/24] unless such contracts are excluded in accordance with Articles 7, 8, 9, 10, 11, 12, 15, 16, 17 and 37 of that Directive.

…

Contracts within the meaning of this Directive include public contracts, framework agreements, works and services concessions and dynamic purchasing systems.

Member States shall take the measures necessary to ensure that, as regards contracts falling within the scope of Directive [2014/24] …, decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in Articles 2 to 2f of this Directive, on the grounds that such decisions have infringed Union law in the field of public procurement or national rules transposing that law.

…

3. Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement.'

5 Article 2 of Directive 89/665, entitled 'Requirements for review procedures', provides:

'1. Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for powers to:

(a) 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, including measures to suspend or to ensure the suspension of the procedure for the award of a public contract or the implementation of any decision taken by the contracting authority;

(b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure;

(c) award damages to persons harmed by an infringement.

…

3. When a body of first instance, which is independent of the contracting authority, reviews a contract award decision, Member States shall ensure that the contracting authority cannot conclude the contract before the review body has made a decision on the application either for interim measures or for review. The suspension shall end no earlier than the expiry of the standstill period referred to in Article 2a(2) and Article 2d(4) and (5).

4. Except where provided for in paragraph 3 and Article 1(5), review procedures need not necessarily have an automatic suspensive effect on the contract award procedures to which they relate.

5. Member States may provide that the body responsible for review procedures may take into account the probable consequences of interim measures for all interests likely to be harmed, as well as the public interest, and may decide not to grant such measures when their negative consequences could exceed their benefits.

A decision not to grant interim measures shall not prejudice any other claim of the person seeking such measures.

…'

6 Article 2a of that directive, entitled 'Standstill period', states:

'1. The Member States shall ensure that the persons referred to in Article 1(3) have sufficient time for effective review of the contract award decisions taken by contracting authorities, by adopting the necessary provisions respecting the minimum conditions set out in paragraph 2 of this Article and in Article 2c.

2. A contract may not be concluded following the decision to award a contract falling within the scope of Directive [2014/24] or Directive 2014/23/EU [of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (OJ 2014 L 94, p. 1)] before the expiry of a period of at least 10 calendar days with effect from the day following the date on which the contract award decision is sent to the tenderers and candidates concerned if fax or electronic means are used or, if other means of communication are used, before the expiry of a period of either at least 15 calendar days with effect from the day following the date on which the contract award decision is sent to the tenderers and candidates concerned or at least 10 calendar days with effect from the day following the date of the receipt of the contract award decision.

Tenderers shall be deemed to be concerned if they have not yet been definitively excluded. An exclusion is definitive if it has been notified to the tenderers concerned and has either been considered lawful by an independent review body or can no longer be subject to a review procedure.

Candidates shall be deemed to be concerned if the contracting authority has not made available information about the rejection of their application before the notification of the contract award decision to the tenderers concerned.

The communication of the award decision to each tenderer and candidate concerned shall be accompanied by the following:

– a summary of the relevant reasons as set out in Article 55(2) of Directive [2014/24], subject to Article 55(3) of that Directive, or in the second subparagraph of Article 40(1) of Directive [2014/23], subject to Article 40(2) of that Directive, and

– a precise statement of the exact standstill period applicable pursuant to the provisions of national law transposing this paragraph.'

7 Under Article 2b of that directive, entitled 'Derogations from the standstill period':

'Member States may provide that the periods referred to in Article 2a(2) of this Directive do not apply in the following cases:

…

(c) in the case of a contract based on a framework agreement as provided for in Article 33 of Directive [2014/24] and in the case of a specific contract based on a dynamic purchasing system as provided for in Article 34 of that Directive.

If this derogation is invoked, Member States shall ensure that the contract is ineffective in accordance with Articles 2d and 2f of this Directive where:

– there is an infringement of point (c) of Article 33(4) or of Article 34(6) of Directive [2014/24], and

– the contract value is estimated to be equal to or to exceed the thresholds set out in Article 4 of Directive [2014/24].'

Directive 2007/66/EC

8 Recitals 3, 4 and 36 of Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665 and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts (OJ 2007 L 335, p. 31) state:

'(3) Consultations of the interested parties and the case-law of the Court of Justice have revealed a certain number of weaknesses in the review mechanisms in the Member States. …

(4) The weaknesses which were noted include in particular the absence of a period allowing an effective review between the decision to award a contract and the conclusion of the contract in question. This sometimes results in contracting authorities and contracting entities who wish to make irreversible the consequences of the disputed award decision proceeding very quickly to the signature of the contract. In order to remedy this weakness, which is a serious obstacle to effective judicial protection for the tenderers concerned, namely those tenderers who have not yet been definitively excluded, it is necessary to provide for a minimum standstill period during which the conclusion of the contract in question is suspended, irrespective of whether conclusion occurs at the time of signature of the contract or not.

…

(36) This Directive respects fundamental rights and observes the principles recognised in particular by [the Charter]. In particular, this Directive seeks to ensure full respect for the right to an

effective remedy and to a fair hearing, in accordance with the first and second subparagraphs of Article 47 of the Charter.'

Directive 2014/24

9 The thresholds for the applicability of Directive 2014/24, relating to the estimated value of procurements, are set out in Article 4 thereof.

10 Article 5 of that directive, entitled 'Methods for calculating the estimated value of procurement', provides, in paragraph 5 thereof:

'With regard to framework agreements and dynamic purchasing systems, the value to be taken into consideration shall be the maximum estimated value net of [value added tax (VAT)] of all the contracts envisaged for the total term of the framework agreement or the dynamic purchasing system.'

11 Article 18 of that directive, entitled 'Principles of procurement', provides, in the first subparagraph of paragraph 1 thereof:

'Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.'

12 Article 32 of Directive 2014/24, entitled 'Use of the negotiated procedure without prior publication', provides, in paragraph 2 thereof:

'The negotiated procedure without prior publication may be used for public works contracts, public supply contracts and public service contracts in any of the following cases:

…

(c) in so far as is strictly necessary where, for reasons of extreme urgency brought about by events unforeseeable by the contracting authority, the time limits for the open or restricted procedures or competitive procedures with negotiation cannot be complied with. The circumstances invoked to justify extreme urgency shall not in any event be attributable to the contracting authority.'

13 Article 33, entitled 'Framework agreements', provides, in paragraphs 2 and 3 thereof:

'2. Contracts based on a framework agreement shall be awarded in accordance with the procedures laid down in this paragraph and in paragraphs 3 and 4.

Those procedures may be applied only between those contracting authorities clearly identified for this purpose in the call for competition or the invitation to confirm interest and those economic operators party to the framework agreement as concluded.

Contracts based on a framework agreement may under no circumstances entail substantial modifications to the terms laid down in that framework agreement, in particular in the case referred to in paragraph 3.

3. Where a framework agreement is concluded with a single economic operator, contracts based on that agreement shall be awarded within the limits of the terms laid down in the framework agreement.

For the award of those contracts, contracting authorities may consult the economic operator party to the framework agreement in writing, requesting it to supplement its tender as necessary.'

14 Article 49 of that directive, entitled 'Contract notices', provides:

'Contract notices shall be used as a means of calling for competition in respect of all procedures, without prejudice to the second subparagraph of Article 26(5) and Article 32. Contract notices shall contain the information set out in Annex V part C and shall be published in accordance with Article 51.'

15 Article 50 of that directive, entitled 'Contract award notices', provides, in paragraphs 1 and 2 thereof:

'1. Not later than 30 days after the conclusion of a contract or of a framework agreement, following the decision to award or conclude it, contracting authorities shall send a contract award notice on the results of the procurement procedure.

Such notices shall contain the information set out in Annex V part D and shall be published in accordance with Article 51.

2. Where the call for competition for the contract concerned has been made in the form of a prior information notice and the contracting authority has decided that it will not award further contracts during the period covered by the prior information notice, the contract award notice shall contain a specific indication to that effect.

In the case of framework agreements concluded in accordance with Article 33, contracting authorities shall not be bound to send a notice of the results of the procurement procedure for each contract based on that agreement. Member States may provide that contracting authorities shall group notices of the results of the procurement procedure for contracts based on the framework agreement on a quarterly basis. In that case, contracting authorities shall send the grouped notices within 30 days of the end of each quarter.'

16 Article 72 of Directive 2014/24, entitled 'Modification of contracts during their term', provides:

'1. Contracts and framework agreements may be modified without a new procurement procedure in accordance with this Directive in any of the following cases:

…

(e) where the modifications, irrespective of their value, are not substantial within the meaning of paragraph 4.

…'

Regulation No 1215/2012

17 Recital 10 of Regulation No 1215/2012 states:

‘The scope of this Regulation should cover all the main civil and commercial matters apart from certain well-defined matters, in particular maintenance obligations, which should be excluded from the scope of this Regulation following the adoption of Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations [(OJ 2009 L 7, p. 1)].’

18 Article 1(1) of that regulation provides:

‘This Regulation shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority (*acta iure imperii*).’

19 Article 35 of that regulation provides:

‘Application may be made to the courts of a Member State for such provisional, including protective, measures as may be available under the law of that Member State, even if the courts of another Member State have jurisdiction as to the substance of the matter.’

Austrian law

The Law on Public Procurement

20 Paragraph 144(1) of the Bundesvergabegesetz 2018 (Federal Law on the award of public contracts 2018) (BGBl. I, 65/2018; ‘the Law on Public Procurement’) provides:

‘The contracting authority may not award the contract before the expiry of the standstill period, failing which that contract shall be null and void. The standstill period shall begin when the notification of the contract award decision is communicated or made available. That period shall be 10 days in case of communication or making available by electronic means, and 15 days in case of communication by post or other suitable carrier.’

21 Paragraph 334 of that law provides:

‘(1) The Bundesverwaltungsgericht [(Federal Administrative Court, Austria)] shall rule, in accordance with the provisions of this section, on applications for review procedures (Section 2), for the adoption of interim orders (Section 3) and for declaratory proceedings (Section 4). Such applications shall be lodged directly with the Bundesverwaltungsgericht [(Federal Administrative Court)].

(2) Until the contract is awarded or the contract award procedure is revoked, the Bundesverwaltungsgericht [(Federal Administrative Court)] shall have jurisdiction, for the purpose of rectifying infringements of this federal law and regulations issued on the basis thereof or infringements of directly applicable EU law,

1. to adopt interim orders, and

2. to annul the contracting authority’s separately contestable decisions within the framework of the complaints put forward by the applicant.

(3) After a contract has been awarded, the Bundesverwaltungsgericht [(Federal Administrative Court)] shall have jurisdiction

…

3. to determine whether a contract award procedure has been unlawfully carried out without prior publication of a contract notice;

…

5. to determine whether a contract for the provision of a service on the basis of a framework agreement or a dynamic purchasing system has been awarded unlawfully on account of an infringement of Paragraph 155(4) to (9), Paragraph 162(1) to (5), Paragraph 316(1) to (3) or Paragraph 323(1) to (5);

…'

22 In accordance with Paragraph 336 of that law:

'(1) Contracting authorities and contracting entities coming within the scope of this federal law must provide the Bundesverwaltungsgericht [(Federal Administrative Court)] with all the information necessary for the performance of its duties and submit to it in due form all the documents required to that end. The same shall apply to the undertakings involved in a contract award procedure.

(2) If a contracting authority, a contracting entity or an undertaking has failed to submit documents, has failed to provide information, or has provided information but has failed to submit the contract award procedure documents, the Bundesverwaltungsgericht [(Federal Administrative Court)] may, if the contracting entity or undertaking has been expressly informed in advance of the consequences of that failure, rule on the basis of the claims of the participant that has not failed to do so.'

23 Paragraph 340 of that law states:

'(1) For applications under Paragraphs 342(1), 350(1) and 353(1) and (2), the applicant must pay a flat-rate fee in accordance with the following provisions:

1. The flat-rate fee must be paid when the application is lodged, in accordance with the rates set by the Federal Government by way of regulation.

…

4. In respect of applications under Paragraph 350(1), a fee equal to 50% of the fee set must be paid.

…

7. If an application is withdrawn before the hearing or, if no hearing takes place, before the delivery of the judgment or order, only a fee that is equal to 75% of the fee set for the respective application or the fee reduced in accordance with point 5 must be paid. Amounts previously paid in excess must be reimbursed.'

24 Paragraph 342 of the Law on Public Procurement provides:

‘(1) An undertaking may, until a contract has been awarded or until a declaration of revocation has been made, apply for the contracting authority’s separately contestable decision in the contract award procedure to be reviewed on account of unlawfulness, in so far as

1. it claims to have an interest in the conclusion of a contract coming within the scope of this federal law; and

2. the alleged unlawfulness has harmed or risks harming it.

…

(3) The application shall have no suspensive effect on the relevant contract award procedure.

…’

25 Paragraph 344 of that law provides:

‘(1) An application under Paragraph 342(1) must in any event contain:

1. the designation of the relevant contract award procedure and of the contested, separately contestable decision,

2. the designation of the contracting authority, the applicant and, where applicable, the contracting entity, including their electronic addresses,

3. a presentation of the relevant facts, including of the interest in the conclusion of the contract, and where the contract award decision is being challenged in particular, the designation of the tenderer envisaged for the award of the contract,

4. information about the harm that the applicant claims it risks suffering or is already suffering,

5. the designation of the applicant’s rights that it claims have been infringed (complaints) and the grounds on which the claim of unlawfulness is based,

6. an application for annulment of the contested, separately contestable decision,

7. the information necessary to assess whether the application has been lodged in due time.

(2) The application is in any event inadmissible in its entirety where

1. it does not concern a separately contestable decision, or

2. it has not been lodged within the time limit laid down in Paragraph 343, or

3. the appropriate fee has not been paid, despite requests having been made to that end.

(3) If an application pursuant to Paragraph 342(1) is lodged only after the contract has been awarded or the contract award procedure has been revoked, the Bundesverwaltungsgericht [(Federal Administrative Court)] must treat it as an application for a declaration under Paragraph 353(1), if

the applicant could not have known about the award or revocation and the application was lodged within the time limit referred to in Paragraph 354(2). At the request of the Bundesverwaltungsgericht [(Federal Administrative Court)], the applicant must, within a reasonable time limit laid down by that court, specify which declaration under Paragraph 353(1) he or she is applying for. If no declaration pursuant to Paragraph 353(1) is applied for until the expiry of that time limit, the application shall be rejected.'

26 Paragraph 350 of that law states:

'(1) The Bundesverwaltungsgericht [(Federal Administrative Court)] must, where an undertaking that does not clearly fail to meet the requirements relating to the application pursuant to Paragraph 342(1) requests it, order without delay interim measures, such as appear necessary and appropriate to remedy or prevent any harm to the applicant's interests that has occurred or risks occurring imminently on account of the alleged unlawfulness of a separately contestable decision.

(2) The application for the adoption of an interim order must contain:

1. the precise designation of the relevant contract award procedure, of the separately contestable decision, and of the contracting authority, the applicant and, where applicable, the contracting entity, including their electronic addresses,

2. a presentation of the relevant facts and of the fact that the conditions referred to in Paragraph 342(1) have been met,

3. the precise designation of the alleged unlawfulness,

4. the precise presentation of the harm to the applicant's interests that risks occurring imminently and a credible presentation of the relevant facts,

5. the precise designation of the interim measure sought and

6. the information necessary to assess whether the application has been lodged in due time.

…

(5) The Bundesverwaltungsgericht [(Federal Administrative Court)] must immediately notify the contracting authority and, where applicable, the contracting entity, that it has received an application for the adoption of an interim order seeking to prohibit the contract from being awarded, a framework agreement from being concluded, the declaration of revocation from being made or the tenders from being opened. Applications for the adoption of interim orders seeking to prohibit the contract from being awarded, a framework agreement from being concluded, the declaration of revocation from being made or the tenders from being opened shall have suspensive effect from the date of receipt of the communication that the application has been lodged until the decision on the application. The contracting authority or contracting entity may not, until a decision on the application has been taken:

1. award the contract or conclude the framework agreement, or

2. revoke the contract award procedure; or

3. open the tenders.

…

(7) An application for the adoption of an interim order shall be inadmissible if the appropriate fee has not been paid, despite requests having been made to that end.'

27 Paragraph 382 of that law states:

'This federal law transposes or takes account of the following acts of EU law:

…

2. Directive [89/665].

…

16. Directive [2014/24].'

The General Law on Administrative Procedure

28 Under Paragraph 49(1) of the Allgemeine Verwaltungsverfahrensgesetz (General Law on Administrative Procedure):

'A witness may refuse to give testimony:

1. in relation to questions the answer to which would entail, for the witness, one of his or her relatives … direct pecuniary harm, the risk of criminal prosecution, or dishonour;

…'

The Regulation on Flat-Rate Fees 2018

29 The Verordnung der Bundesregierung betreffend die Pauschalgebühr für die Inanspruchnahme des Bundesverwaltungsgerichtes in den Angelegenheiten des öffentlichen Auftragswesens (BVwG-Pauschalgebührenverordnung Vergabe 2018 – BVwG-PauschGebV Vergabe 2018) (Regulation of the Federal Government relating to the flat-rate fees for bringing proceedings before the Federal Administrative Court in public procurement matters (Regulation on Flat-Rate Fees 2018 – BVwG-PauschGebV 2018)) provides:

'On the basis of

1. Paragraph 340(1)(1) of the [Law on Public Procurement],

…

the following shall apply:

Fee rates

Paragraph 1. For applications under Paragraph 342(1) and Paragraph 353(1) and (2) [of the Law on Public Procurement], for applications under Paragraph 135 of [the Bundesgesetz über die Vergabe von Aufträgen im Verteidigungs- und Sicherheitsbereich (Bundesvergabegesetz Verteidigung und

Sicherheit 2012 – BVergGVS 2012) (Federal Law on the awarding of public contracts in the field of defence and security (Federal Law on defence and security public procurement 2012 – BVergGVS 2012)) (BGBl. I, 10/2012)], in conjunction with Paragraph 342(1) and Paragraph 353(1) and (2) [of the Law on Public Procurement], and for applications under Paragraph 86(1) and Paragraph 97(1) and (2) [of the Bundesgesetz über die Vergabe von Konzessionsverträgen (Bundesvergabegesetz Konzessionen 2018 – BVergGKonz 2018) (Federal Law on the awarding of concession public contracts (Federal law on public procurement concessions 2018 – BVergGKonz 2018)) (BGBl. I, 65/2018)], the applicant must, in each case, pay a flat-rate fee in accordance with the following provisions:

Direct award [EUR] 324

…'

Federal Constitutional Law on accompanying measures in respect of COVID-19 in public procurement matters

30 Under Paragraph 5 of the Bundesverfassungsgesetz betreffend Begleitmaßnahmen zu COVID-19 in Angelegenheiten des öffentlichen Auftragswesens (COVID-19 Begleitgesetz Vergabe) (Federal Constitutional Law on accompanying measures in respect of COVID-19 in public procurement matters (COVID-19 Accompanying Law on Procurement)) (BGBl. I, 24/2020), which was extended until 30 June 2021 (BGBl. I, 5/2021):

'If it appears, on the basis of the information contained in the application for the adoption of an interim order as regards a review in the context of the award of contracts in accordance with the [Law on Public Procurement] or the BVergGVS 2012, or if the contracting authority credibly states that a procurement procedure … serves to prevent and combat the spread of COVID-19 as a matter of urgency or to maintain public order in relation to the prevention and combating of the spread of COVID-19, the application for the adoption of an interim order seeking to prohibit the tenders from being opened, a framework agreement from being concluded, or the contract from being awarded shall have no suspensive effect. In that case, the contracting authority may award the contract, conclude the framework agreement or open the tenders before a decision on that application has been made.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

31 At the end of 2020, the Republic of Austria and the federal purchasing company (together, 'the contracting authority' or 'the defendants in the main proceedings') concluded 21 framework agreements worth EUR 3 million with a view to purchasing antigen tests.

32 On 1 December 2020, EPIC brought an action for review before the Bundesverwaltungsgericht (Federal Administrative Court) seeking, in essence, to challenge the conclusion of those framework agreements, on the ground that it had not been transparent and had infringed public procurement law. That action was accompanied by an application for an interlocutory injunction seeking, in essence, to prohibit, provisionally, the contracting authority from continuing the procedure or procedures for the award of contracts to supply antigen tests, the lawfulness of which is disputed by EPIC.

33 On the same day, the Bundesverwaltungsgericht (Federal Administrative Court) issued an initial order for regularisation vis-à-vis EPIC on the ground that its application initiating proceedings did not make it possible to identify clearly the separately contestable decisions, for the

purposes of Directive 89/665, the annulment of which EPIC was seeking, or the contract award procedures referred to in its application for an interlocutory injunction.

34 By written submission of 7 December 2020, EPIC disputed the need to regularise its application and stated that it was directed at the only decision of the contracting authority of which it had become aware via the media, namely the decision to have recourse to a direct award procedure for the award of a public contract concerning the order of several million additional antigen tests with a view to carrying out mass testing in Austria. EPIC claimed that, in flagrant breach of the principle of transparency, it had not been able to have access to any documents relating to the contract in question, with the result that it cannot be required to designate specifically the contract award procedure concerned, failing which its right to effective judicial protection would be infringed.

35 By additional written submission of 9 December 2020, EPIC stated that it sought to challenge not the actual conclusion of the 21 framework agreements by the contracting authority, but exclusively the purchases of some two million additional antigen tests from the company R between 29 October and 24 November 2020 for over EUR 3 million. It asserted that those purchases should be regarded as resulting from an unlawful direct award of a contract on the ground that they significantly exceed the volume laid down by the framework agreement concerned.

36 On 14 December 2020, EPIC stated that its application for an interlocutory injunction merely objected to any new orders made since 20 November 2020, from three named undertakings, which exceeded the maximum purchase value of EUR 3 million provided for in the framework agreements concerned.

37 Lastly, EPIC stated, in a written submission of 5 January 2021, that it now disputed exclusively purchases made starting from 20 November 2020 under the framework agreements concluded on 13 and 18 November 2020 respectively, with companies I and S. According to EPIC, those purchases exceeded the maximum purchase value of EUR 3 million provided for in those framework agreements.

38 EPIC states, ultimately, that it could not know, at the time it brought its action for review, the amount of the flat-rate court fees which it would be liable to pay since those fees are calculated on the basis of the number of contested measures. That number would have been impossible to determine in the light of the lack of transparency of the contract award procedures at issue in the main proceedings.

39 For their part, the defendants in the main proceedings dispute the *locus standi* of EPIC since, until 10 December 2020, it did not have the professional qualifications required to market antigen tests. They also claim that EPIC's action for review is inadmissible, since it has not referred to the decision that is actually being contested and the procedure for the award of a public contract to which that decision relates. The defendants in the main proceedings also submit that, on 1 December 2020, they published, in the *Official Journal of the European Union,* a notice relating to an open procedure for the conclusion of a framework agreement for the supply of antigen tests. Moreover, the inadmissibility of the action for review brought before the Bundesverwaltungsgericht (Federal Administrative Court) entails, as a consequence, the inadmissibility of the application for an interlocutory injunction. In any event, according to them, pursuant to Paragraph 5 of the COVID-19 Accompanying Law, referred to in paragraph 30 of this judgment, that application cannot have a suspensive effect since the contested purchase of antigen tests was intended to prevent and combat the spread of COVID-19 as a matter of urgency. The defendants in the main proceedings also submit that each of the 21 framework agreements disputed by EPIC had been concluded with a

single partner, which EPIC could clearly establish by consulting the website of the federal purchasing company. Lastly, since EPIC's action for review was notified, no purchase of antigen tests has been carried out under the framework agreements concluded with the companies S and I respectively. Therefore, there is no separately contestable decision.

40 The Bundesverwaltungsgericht (Federal Administrative Court) states, first, that, in Austria, litigants bringing an action for review in public procurement matters must pay flat-rate fees for each of their applications. Those fees are calculated, inter alia, by reference to the number of contested decisions under a specific procedure for the award of a public contract. According to the case-law of the Verfassungsgerichtshof (Constitutional Court, Austria), the fee becomes payable at the time when the application is lodged and must be paid at that stage to the Bundesverwaltungsgericht (Federal Administrative Court). Accordingly, an action for review or an application for an interlocutory injunction is inadmissible where the fee relating to that action or application has not been duly paid despite a request having been made to that end. Similarly, that court cannot take formal note of a withdrawal until the flat-rate fees that are due have been paid to it. As the case may be, the members of that court could be regarded as having caused, by their fault, pecuniary damage to the State Treasury, for which they are liable with their own funds. It follows that, in the event of a non-transparent procedure for the award of a public contract, the applicant would be able to acquaint him- or herself with the amount of the flat-rate fees linked to his or her action for review only after the Bundesverwaltungsgericht (Federal Administrative Court) has carried out extensive investigations in order to identify the procedures for the award of a public contract and the separate decisions referred to by the applicant.

41 The referring court states in that regard that, for actions for review concerning the direct award of contracts, a flat-rate fee of EUR 324 must be paid per contract award procedure and per separately contestable decision. That sum is increased by 50%, thus amounting to EUR 486, where the action for review is accompanied by an application for an interlocutory injunction. However, if the estimated value of the contract exceeds by twenty times the threshold value fixed at EUR 750 000 for contracts for public services relating to public health, it is necessary to pay, for each procedure for the award of a public contract and each contested decision of the contracting authority, a fee of EUR 19 440.

42 Pursuant to those rules, the referring court informed EPIC that, in the circumstances of the dispute in the main proceedings, if, for each of the 21 framework agreements, it intended to challenge three decisions and seek interim measures by way of interlocutory procedures, the flat-rate fees would amount to EUR 1 061 424. Since, until now, EPIC has paid only EUR 486 in flat-rate fees, it could therefore be called upon to regularise the situation by paying an additional flat-rate fee of approximately EUR 1 000 000, which it could not necessarily have expected when it brought its action.

43 Second, the referring court states that EPIC has not demonstrated that, for the period prior to 10 December 2020, EPIC or its supplier had the professional qualifications required in Austria in order to market antigen tests.

44 Third, the referring court considers it likely that, at the time EPIC brought its action for review, it was unaware of both the number and type of contract award procedures conducted by the contracting authority and the number of separately contestable decisions already adopted in the contract award procedures at issue in the main proceedings. Thus, according to the referring court, EPIC could only make imprecise claims, even though the Austrian rules of civil procedure require, in principle, every applicant to set out the facts on which its action is based.

45 Fourth, the referring court states that, at the stage of its investigation, it was able to establish that there were 15 framework agreements concluded by the contracting authority, in autumn 2020, with a view to supplying antigen tests. Each of those framework agreements had been concluded with a single economic operator following a negotiated procedure without prior publication of a contract notice, in accordance with Article 32(2)(c) and Article 33(3) of Directive 2014/24.

46 Fifth, according to that court, EPIC has now limited itself to challenging specifically public contracts for the supply of antigen tests that have been directly awarded to the companies S and I and that exceed the estimated value of the framework agreement concluded with each of those companies. It should therefore be regarded, under Austrian law, as having withdrawn its action for review concerning the decisions adopted in the context of the other 19 framework agreements to which it had initially referred.

47 In the light of the foregoing considerations, the Bundesverwaltungsgericht (Federal Administrative Court) considers that the dispute in the main proceedings raises four sets of questions, having regard to EU law.

48 In the first place, that court states that actions for review concerning acts linked to a procedure for the award of a public contract come within the scope of civil matters within the meaning of Regulation No 1215/2012. The public procurement rules contained in Directive 2014/24 govern the pre-contractual obligations of contracting authorities and undertakings wishing to conclude agreements with those authorities. Therefore, the rules on public procurement come, in so far as they concern the conclusion of contracts, within the scope of special civil law and therefore within the scope of Regulation No 1215/2012.

49 Therefore, in accordance with the principle of equivalence, rules of civil procedure which are more flexible than those which that court must itself follow should apply. The referring court states in particular that, in civil matters, the court rules on the action for review and the application for an interlocutory injunction even if the applicant has not paid the flat-rate fees at the outset and without that calling into question the right of the Member State to collect those fees. Furthermore, no special flat-rate fee is payable before the civil courts in respect of applications for an interlocutory injunction linked to an action, which is itself subject to the obligation to pay a fee.

50 If the special fee system which prevails in the field of public procurement were held to be contrary to EU law, the referring court would consider the investigative measures necessary to set the fee to be subsidiary and could therefore, in accordance with the principle of procedural economy, dispose of the application for an interlocutory injunction very quickly, without first having to carry out extensive research in order to determine the number of contract award procedures and the decisions which were initially challenged.

51 In the second place, the referring court is uncertain whether the special fee system applicable in the field of public procurement is consistent with the right, guaranteed by Directive 89/665, that actions for review and applications for an interlocutory injunction may be disposed of as rapidly as possible and independently of matters connected with flat-rate court fees. In that regard, the obligation to identify, in mandatory terms, the contested decisions and procedures prior to the examination of the action for review on its merits, and the fact that it is impossible for a litigant to ascertain in advance, in particular where the procedure in question lacks transparency, the amount of the flat-rate court fees which he or she is liable to pay, raise difficulties. That court is also uncertain whether, in the event of the award of a contract following a non-transparent procedure, the right to effective judicial protection, guaranteed by Article 47 of the Charter, precludes the application of a court fee system under which the amount of the fees to be paid depends on the

estimated value of the contract, the number of contract award procedures at issue and the number of contested, separately contestable decisions.

52 In the third place, that court considers that Article 1(1) of Directive 89/665 may be interpreted as meaning that the conclusion of a framework agreement with a single economic operator corresponds, for the contracting authority, to the conclusion of a contract and is equivalent to the award of the contract at issue. Therefore, in the present case, the application for an interlocutory injunction should be dismissed on the ground that the contract concerned has already been awarded. According to the referring court, it is also necessary to specify the legal classification of public contracts awarded under a framework agreement whose maximum value has already been exceeded, as well as the methods for calculating the estimated value of such a contract.

53 In the fourth place, the Bundesverwaltungsgericht (Federal Administrative Court) states that Paragraph 336 of the Law on Public Procurement authorises it to give a judgment by default on the basis of the information provided by one party to the proceedings if another party thereto does not provide the information or documents requested. The obligation for the board members or staff of the contracting authority to provide details or information in order to eliminate the risk that such a judgment by default might be given to the detriment of that authority could be contrary to the prohibition on self-incrimination, which follows from Article 48 of the Charter. Contrary to what is provided for in Paragraph 49(1)(1) of the General Law on Administrative Procedure, Paragraph 336 of the Law on Public Procurement does not include any right to refuse to provide information. The information thus provided may reveal facts which may be used against the board members and staff of the contracting authority, in criminal proceedings or with a view to bringing actions for damages. The referring court states, moreover, that, according to a press article, members of the Austrian Federal Government are being prosecuted. That court thus considers that the possible relevance of the Court of Justice's answer to the question whether Paragraph 336 of the Law on Public Procurement is compatible with the prohibition on self-incrimination will be demonstrated, in the present case, by future investigations carried out in the context of the criminal proceedings reported by the media, which relate to certain administrators and concern the purchases of the antigen tests at issue in the main proceedings.

54 In those circumstances, the Bundesverwaltungsgericht (Federal Administrative Court) decided, in Case C-274/21, to stay the proceedings on the application for an interlocutory injunction lodged by EPIC and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Does the procedure for granting an interlocutory injunction provided for in Article 2(1)(a) of Directive [89/665], 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 No 1215/2012]? 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) [TFEU]? Is the procedure for granting interlocutory injunctions pursuant to Article 2(1)(a) of Directive [89/665] a procedure for granting provisional measures pursuant to Article 35 of [Regulation No 1215/2012]?

(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], 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 action 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 [(*Revision*)] against decisions of administrative courts to the Verfassungsgerichtshof (Constitutional Court) or the Verwaltungsgerichtshof (Supreme Administrative Court[, Austria]) 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], 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 [(*Revision*)] to the [Verwaltungsgerichtshof (Supreme Administrative Court)] or an appeal to the [Verfassungsgerichtshof (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 [principle of acting expeditiously enshrined in] Article 2(1)(a) of Directive [89/665], 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] 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], (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 [Verfassungsgerichtshof (Constitutional Court)] or for appeals on points of law [(*Revision*)] to the [Verwaltungsgerichtshof (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 [(*Revision*)] before the [Verwaltungsgerichtshof (Supreme Administrative Court)] or an appeal before the [Verfassungsgerichtshof (Constitutional Court)]?

(6) Having regard to the other provisions of EU law, is Article 1(1) of Directive [89/665] 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] constitutes the conclusion of a contract pursuant to Article 2a(2) of Directive [89/665]?

(6.1) Are the words "contracts based on that agreement" in Article 33(3) of Directive [2014/24] 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 19 December 2018, *Autorità Garante della Concorrenza e del Mercato – Antitrust and Coopservice* (C-216/17, EU:C:2018:1034, 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] 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 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 Directive [89/665] 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?'

55 In the circumstances set out in paragraphs 40 to 53 of this judgment, the Bundesverwaltungsgericht (Federal Administrative Court) decided, in Case C-275/21, to stay the proceedings on the action for review brought by EPIC and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Does a review procedure before the Bundesverwaltungsgericht (Federal Administrative Court), which takes place in implementation of Directive [89/665], constitute a dispute concerning a

civil and commercial matter within the meaning of Article 1(1) of Regulation [No 1215/2012]? Does such a review procedure as referred to in the preceding question at least constitute a civil matter pursuant to Article 81(1) [TFEU]?

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

(2.1) Having regard to the other provisions of EU law, is the principle of equivalence to be interpreted as precluding the application of Austrian national rules under which, prior to the disposal of an application for an interlocutory injunction as provided for in Article 2(1)(a) of Directive [89/665], 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 [(*Revision*)] to the [Verwaltungsgerichtshof (Supreme Administrative Court)] or an appeal to the [Verfassungsgerichtshof (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 [principle of acting expeditiously] under Article 1(1) of Directive [89/665], according to which procurement review procedures must, in particular, be conducted as rapidly as possible, to be interpreted as meaning that that [principle] confers a subjective right to a rapid review procedure and precludes the application of Austrian national rules under which, even in the case of contract award procedures conducted in a non-transparent manner, the court must in every case determine, before disposing of an application for review, which must be directed at the annulment of a separately contestable decision of a contracting authority, the type of award procedure and the (estimated) contract value as well as the total number of contested, separately contestable decisions from specific award procedures and also,

if necessary, the lots from a specific award procedure, in order then to issue, if necessary, an order for regularisation via the presiding judge of the chamber of the court for the purpose of recovering fees and, in the event of non-payment of fees, to prescribe – before or no later than at the same time as rejecting an application for review due to failure to pay fees subsequently demanded – the procedural fees via the chamber of the court competent to rule on the application for review, failing which a loss of entitlement would ensue?

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

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

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

(6.1) Are the words “contracts based on that agreement” in Article 33(3) of Directive [2014/24] 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 19 December 2018, *Autorità Garante della Concorrenza e del Mercato – Antitrust and Coopservice* (C-216/17, EU:C:2018:1034, paragraph 64)], has already been exhausted, there is no longer a contract based on the framework agreement originally concluded?

(6.2) If Question 6.1. is answered in the affirmative: Having regard to the other provisions of EU law, are Articles 4 and 5 of Directive [2014/24] to be interpreted as meaning that the estimated contract value of an individual contract based on the framework agreement is always the estimated contract value pursuant to Article 5(5) of Directive [2014/24]? Or, in the case of a single contract based on a framework agreement, is the estimated contract value pursuant to Article 4 of that directive the contract value derived in application of Article 5 of that directive for the purposes of determining the estimated contract value for a single supply contract based on the framework agreement?

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

(8) Taking account also of the right to an effective remedy under Article 47 of the Charter, and having regard to the other provisions of EU law, is the requirement under Article 1(1) of Directive [89/665], that procurement review procedures must, in particular, be conducted effectively, to be interpreted as meaning that those provisions confer subjective rights and preclude the application of national rules under which the party seeking judicial protection by way of an application for review is required to specify in his or her application for review the specific award procedure in each case and the specific separately contestable decision of a contracting authority, even if, in the case of award procedures without prior publication of a contract notice that are non-transparent for that applicant, he or she will generally not know whether the contracting authority has conducted direct award procedures under national law that are non-transparent for the applicant or negotiated procedures without prior publication of a contract notice that are non-transparent for the applicant, or whether one or more non-transparent award procedures with one or more contestable decisions have been conducted?

(9) Having regard to the other provisions of EU law, is the requirement of a fair trial before a court or tribunal under Article 47 of the Charter to be interpreted as meaning that that provision confers subjective rights and precludes the application of national rules under which the party seeking judicial protection by way of an application for review is required to specify in his or her application for review the specific contract award procedure and the specific separately contestable decision of a contracting authority, even if, in the case of award procedures without prior publication of a contract notice, that applicant cannot generally know whether the contracting authority has conducted direct award procedures under national law that are non-transparent for the applicant or negotiated procedures without prior publication of a contract notice that are non-transparent for the applicant, or whether one or more award procedures with one or more separately contestable decisions have been conducted?

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

Consideration of the questions referred

The first questions in Cases C-274/21 and C-275/21

56 By its first questions in Cases C-274/21 and C-275/21, the referring court asks, in essence, whether the concept of 'civil and commercial matters' within the meaning of Article 1(1) of Regulation No 1215/2012 must be interpreted as including the procedures for granting an interlocutory injunction and review procedures as referred to in Article 2(1)(a) and (b) of Directive 89/665.

57 In that regard, it is sufficient to recall that Regulation No 1215/2012 is applicable only where a dispute concerns several Member States or a single Member State provided, in the latter case, that there is an international element because of the involvement of a third State. That situation is such as to raise questions relating to the determination of international jurisdiction (see, to that effect, judgments of 1 March 2005, *Owusu*, C-281/02, EU:C:2005:120, paragraphs 25 and 26, and of 7 May 2020, *Rina*, C-641/18, EU:C:2020:349, paragraph 25).

58 In the present case, that international element is lacking.

59 It follows that that regulation does not apply in the dispute in the main proceedings and that, accordingly, there is no need to answer the first questions in Cases C-274/21 and C-275/21.

The sixth questions and the sixth questions, point 1, in Cases C-274/21 and C-275/21, and the sixth question, point 2, in Case C-275/21

The sixth questions in Cases C-274/21 and C-275/21

60 By its sixth questions in Cases C-274/21 and C-275/21, the referring court asks, in essence, whether Article 1(1) of Directive 89/665 must be interpreted as meaning that the conclusion of a framework agreement with a single economic operator, in accordance with Article 33(3) of Directive 2014/24, corresponds to the conclusion of a contract as referred to in Article 2a(2) of Directive 89/665.

61 At the outset, it must be stated that the third subparagraph of Article 1(1) of Directive 89/665 expressly provides that the concept of 'contracts', within the meaning of that directive, includes framework agreements.

62 Therefore, the first subparagraph of Article 2a(2) of Directive 89/665 is applicable to framework agreements. Pursuant to that provision, a contract may not be concluded following the

decision to award a framework agreement concluded with a single economic operator, in accordance with Article 33(3) of Directive 2014/24, before the expiry of a standstill period of at least 10 or 15 calendar days, depending on the means of communication used, with effect from the day following the date on which the decision to award that framework agreement is sent to the tenderers and candidates concerned.

63 Furthermore, as the European Commission has submitted in its written observations, that interpretation is such as to ensure the effectiveness of Directive 89/665. As the case may be, as stated in recital 4 of Directive 2007/66, which amended and supplemented Directive 89/665, the absence of a period allowing an effective review between the decision to award a contract and the conclusion of the contract in question could result in contracting authorities and contracting entities who wish to make irreversible the consequences of the disputed award decision proceeding very quickly to the signature of the contract. It is precisely in order to remedy that weakness in the review mechanisms existing in the Member States, which is a serious obstacle to effective judicial protection for the tenderers concerned, namely those tenderers who have not yet been definitively excluded, that a minimum standstill period has been introduced, during which the conclusion of the contract in question is suspended, irrespective of whether that conclusion occurs at the time of signature of the contract or not.

64 In the light of the foregoing considerations, the answer to the sixth questions in Cases C-274/21 and C-275/21 is that Article 1(1) of Directive 89/665 must be interpreted as meaning that the conclusion of a framework agreement with a single economic operator, in accordance with Article 33(3) of Directive 2014/24, corresponds to the conclusion of a contract as referred to in Article 2a(2) of Directive 89/665.

The sixth questions, point 1, in Cases C-274/21 and C-275/21

65 By its sixth questions, point 1, in Cases C-274/21 and C-275/21, the referring court asks, in essence, whether Article 33(3) of Directive 2014/24 must be interpreted as meaning that a contracting authority may continue to rely, for the purpose of awarding a new contract, on a framework agreement in respect of which the quantity and/or maximum value of the works, supplies or services concerned laid down therein has or have already been reached.

66 In that regard, it is clear from the case-law of the Court that, by concluding a framework agreement, a contracting authority may make commitments only up to a maximum quantity and/or a maximum value of the works, supplies or services concerned, with the result that, once that limit has been reached, that framework agreement will no longer have any effect (judgment of 17 June 2021, *Simonsen & Weel*, C-23/20, EU:C:2021:490, paragraph 68).

67 Accordingly, as the Austrian Government and the Commission have submitted in their written observations, a contract can no longer be lawfully awarded, pursuant to Article 33(2) of Directive 2014/24, on the basis of a framework agreement whose limit has been exceeded and which, therefore, is rendered ineffective, unless that award does not substantially modify that agreement, for the purposes of Article 72(1)(e) of Directive 2014/24 (see, to that effect, judgment of 17 June 2021, *Simonsen & Weel*, C-23/20, EU:C:2021:490, paragraph 70).

68 The answer to the sixth questions, point 1, is therefore that Article 33(3) of Directive 2014/24 must be interpreted as meaning that a contracting authority may no longer rely, for the purpose of awarding a new contract, on a framework agreement in respect of which the quantity and/or maximum value of the works, supplies or services concerned laid down therein has or have already

been reached, unless the award of that contract does not entail a substantial modification of that framework agreement, as provided for in Article 72(1)(e) of that directive.

The sixth question, point 2, in Case C-275/21

69 In view of the answer given to the sixth question, point 1, in Case C-275/21, there is no need to answer the sixth question, point 2, in that case.

The second questions, the second questions, point 1, and the fifth questions in Cases C-274/21 and C-275/21

70 By its second questions, its second questions, point 1, and its fifth questions in Cases C-274/21 and C-275/21, the referring court asks, in essence, whether the principle of equivalence must be interpreted as precluding national legislation which lays down, in respect of applications for an interlocutory injunction and actions for review relating to a procedure for the award of a public contract, procedural rules that are different from those which apply, inter alia, to civil proceedings.

71 By those questions, the referring court refers, more specifically, to three national rules that apply in particular to applications for an interlocutory injunction and actions for review lodged in the field of public procurement: first, the rule that, in that field, the admissibility of an application for an interlocutory injunction or of an action for review is subject to the payment by the litigant of flat-rate court fees, so that the merits of that action or application may be examined only if those fees have been paid in advance; second, the rule that, in that field, an application for an interlocutory injunction lodged at the same time as an action for review on the merits gives rise to the imposition of a specific flat-rate fee and, third, the rule that, in that same field, flat-rate court fees are not imposed by an administrative decision, with the result that those fees cannot be challenged before a court with unlimited jurisdiction.

72 It must be borne in mind that Article 1(1) and (3) of Directive 89/665 requires the Member States, as regards procedures for the award of public contracts, to take the measures necessary to guarantee reviews which are effective and as rapid as possible against decisions of the contracting authorities which are incompatible with EU law and to ensure that the review procedures are available to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement. That directive thus leaves Member States a discretion in the choice of the procedural guarantees for which it provides, and the formalities relating thereto. In particular, that directive does not contain any provision relating specifically to the court fees to be paid by individuals when they lodge, in accordance with Article 2(1)(a) and (b) of that directive, an application for an interlocutory injunction or an action for annulment against an allegedly unlawful decision concerning a procedure for the award of a public contract (judgment of 6 October 2015, *Orizzonte Salute*, C-61/14, EU:C:2015:655, paragraphs 43 to 45).

73 Therefore, in the absence of EU rules governing the matter, it is for each Member State, in accordance with the principle of the procedural autonomy of the Member States, to lay down the detailed rules of administrative and judicial procedures governing actions for safeguarding rights which individuals derive from EU law. Those detailed procedural rules must, however, be no less favourable than those governing similar domestic actions (principle of equivalence) and must not render practically impossible or excessively difficult the exercise of rights conferred by EU law (principle of effectiveness) (judgments of 6 October 2015, *Orizzonte Salute*, C-61/14,

EU:C:2015:655, paragraph 46, and of 21 December 2021, *Randstad Italia*, C-497/20, EU:C:2021:1037, paragraph 58).

74 The fact that the flat-rate court fees that a litigant must pay, in the context of procedures for the award of a public contract, are higher than the fees due in civil proceedings cannot, as such, demonstrate an infringement of the principle of equivalence (see, by analogy, judgment of 6 October 2015, *Orizzonte Salute*, C-61/14, EU:C:2015:655, paragraph 66).

75 That principle requires that actions based on an infringement of national law and similar actions based on an infringement of EU law be treated equally and not that there be equal treatment of national procedural rules applicable to proceedings of a different nature such as civil proceedings, on the one hand, and administrative proceedings, on the other, or applicable to proceedings falling within two different branches of law (judgment of 6 October 2015, *Orizzonte Salute*, C-61/14, EU:C:2015:655, paragraph 67).

76 Moreover, that principle is not relevant as regards two types of actions both of which are based on a breach of EU law (see, to that effect, judgment of 6 October 2015, *Târşia*, C-69/14, EU:C:2015:662, paragraph 34).

77 The principle of equivalence cannot therefore be interpreted as requiring Member States to extend their most favourable rules to all actions brought in a certain field of law (see, to that effect, judgments of 15 September 1998, *Edis*, C-231/96, EU:C:1998:401, paragraph 36, and of 26 January 2010, *Transportes Urbanos y Servicios Generales*, C-118/08, EU:C:2010:39, paragraph 34).

78 In the light of the foregoing considerations, the answer to the second questions, the second questions, point 1, and the fifth questions in Cases C-274/21 and C-275/21 is that the principle of equivalence must be interpreted as not precluding national legislation which lays down, in respect of applications for an interlocutory injunction and actions for review relating to a procedure for the award of a public contract, procedural rules that are different from those which apply, inter alia, to civil proceedings.

The eighth and ninth questions in Cases C-274/21 and C-275/21

79 By its eighth and ninth questions in Cases C-274/21 and C-275/21, the referring court asks, in essence, whether Article 1(1) of Directive 89/665, read in the light of Article 47 of the Charter, must be interpreted as precluding national legislation requiring a litigant to identify, in his or her application for an interlocutory injunction and action for review, the procedure for the award of a public contract concerned and the separately contestable decision that he or she is challenging, even where the contracting authority has opted for a procedure for the award of a public contract without prior publication of a contract notice.

80 As a preliminary point, it should be noted that, in the present cases, the Court is not asked about the interpretation of Article 32(2)(c) of Directive 2014/24 in order to determine whether the contracting authority having recourse to a negotiated procedure without prior publication of a contract notice is compatible with that directive. The referring court appears to endorse the contracting authority's choice to have recourse, in the dispute in the main proceedings, to such a procedure in order to obtain the supply of antigen tests as a matter of urgency. The Austrian Government and the Commission state, moreover, that it is apparent from point 2.3.4 of the Guidance from the European Commission on using the public procurement framework in the emergency situation related to the COVID-19 crisis (OJ 2020 C 108 I, p. 1) that 'negotiated procedures without prior publication may offer the possibility to meet immediate needs' and that

those procedures ‘cover the gap until more stable solutions can be found, such as framework contracts for supplies and services, awarded through regular procedures (including accelerated procedures)’.

81 In any event, it cannot be disputed that, in the absence of prior publication of a contract notice, referred to in Article 49 of that directive, or of a contract award notice, referred to in Article 50 thereof, a litigant is not in a position to determine the type of procedure for the award of a public contract concerned and the number of contestable decisions.

82 It follows that national legislation requiring, in such a situation, a litigant to indicate that type of information, in his or her application for an interlocutory injunction and action for review, has the effect of rendering practically impossible the exercise of rights conferred by EU law and, accordingly, compromises the effectiveness of Directive 89/665 (see, by analogy, judgments of 28 January 2010, *Uniplex (UK)*, C-406/08, EU:C:2010:45, paragraph 40, and of 12 March 2015, *eVigilo*, C-538/13, EU:C:2015:166, paragraphs 39 and 40), the objective of which is to ensure that decisions taken unlawfully by contracting authorities may be reviewed effectively and as rapidly as possible (judgment of 6 October 2015, *Orizzonte Salute*, C-61/14, EU:C:2015:655, paragraph 43).

83 Such legislation is also contrary to the right to an effective remedy guaranteed by Article 47 of the Charter, which is sufficient in itself and need not be made more specific by provisions of EU or national law to confer on individuals a right which they may rely on as such (judgment of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257, paragraph 78).

84 In those circumstances, the answer to the eighth and ninth questions in Cases C-274/21 and C-275/21 is that Article 1(1) of Directive 89/665, read in the light of Article 47 of the Charter, must be interpreted as precluding national legislation requiring a litigant to identify, in his or her application for an interlocutory injunction or action for review, the procedure for the award of a public contract concerned and the separately contestable decision that he or she is challenging, where the contracting authority has opted for a procedure for the award of a public contract without prior publication of a contract notice and the contract award notice has not been published yet.

The third and fourth questions in Cases C-274/21 and C-275/21

85 By its third and fourth questions in Cases C-274/21 and C-275/21, the referring court asks, in essence, whether Article 2(1) of Directive 89/665, read in the light of Article 47 of the Charter, must be interpreted as precluding national legislation which, for the sole purpose of calculating the amount of the flat-rate court fees which the litigant must pay, failing which his or her application for an interlocutory injunction or action for review would be dismissed on that ground alone, requires a court to determine, before ruling on such an application or action, the type of procedure for the award of a public contract concerned, the (estimated) value of the contract at issue and the total number of separately contestable decisions and, where appropriate, the lots from the procedure for the award of a public contract concerned, where the contracting authority has opted for a procedure for the award of a public contract without prior publication of a contract notice and, at the time the action for review is brought, the contract award notice has not been published yet.

86 In that regard, it should be borne in mind that, under the fourth subparagraph of Article 1(1) of Directive 89/665, the Member States must take the measures necessary to ensure that, as regards public contracts falling inter alia within the scope of Directive 2014/24, decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in Articles 2 to 2f of Directive 89/665, on the grounds that

such decisions have infringed EU law in the field of public procurement or national rules transposing that law.

87 As has been pointed out in paragraph 72 of this judgment, Directive 89/665 does not, however, contain any provision relating specifically to the court fees to be paid by individuals when they lodge, in accordance with Article 2(1)(a) and (b) of that directive, an application for an interlocutory injunction or an action for annulment against an allegedly unlawful decision concerning a procedure for the award of a public contract.

88 That being so, it is for the Member States, when they lay down detailed procedural rules governing the judicial remedies intended to safeguard rights conferred by EU law on candidates and tenderers harmed by decisions of contracting authorities, to ensure that neither the effectiveness of Directive 89/665, the objective of which is to ensure that decisions taken unlawfully by contracting authorities may be reviewed effectively and as rapidly as possible, nor rights conferred on individuals by EU law are undermined. In addition, as is clear from recital 36 thereof, Directive 2007/66, and Directive 89/665 that it amended and supplemented, seek to ensure full respect for the right to an effective remedy and to a fair hearing, enshrined in the first and second paragraphs of Article 47 of the Charter (see, to that effect, judgments of 12 December 2002, *Universale-Bau and Others,* C-470/99, EU:C:2002:746, paragraphs 72 and 73; of 15 September 2016, *Star Storage and Others*, C-439/14 and C-488/14, EU:C:2016:688, paragraphs 42 to 46; of 7 August 2018, *Hochtief*, C-300/17, EU:C:2018:635, paragraph 38; and of 7 September 2021, *Klaipėdos regiono atliekų tvarkymo centras*, C-927/19, EU:C:2021:700, paragraph 128).

89 In that context, it should be noted that the provisions of Directive 89/665, intended to protect tenderers against arbitrary behaviour on the part of the contracting authority, are designed to reinforce existing arrangements for ensuring the effective application of the EU rules on the award of public contracts, in particular where infringements can still be rectified (see, to that effect, judgments of 11 August 1995, *Commission* v *Germany*, C-433/93, EU:C:1995:263, paragraph 23, and of 15 September 2016, *Star Storage and Others*, C-439/14 and C-488/14, EU:C:2016:688, paragraph 41).

90 In the context of a procedure for the award of a public contract organised in a non-transparent manner, the right to apply for interim protection is crucial. Recital 5 of Directive 89/664 states, furthermore, that, since procedures for the award of public contracts are of such short duration, competent review bodies must, among other things, be authorised to take interim measures aimed at suspending such a procedure or the implementation of any decisions which may be taken by the contracting authority, and that the short duration of the procedures means that the infringements of the rules of public procurement procedures need to be dealt with urgently.

91 In order to achieve that objective, Article 1(1) of Directive 89/665 provides for the establishment in the Member States of review procedures which are effective, and in particular as rapid as possible, against decisions which may have infringed EU law in the field of public procurement or national rules implementing that law. More specifically, Article 2(1)(a) of that directive requires Member States to make provision for the powers 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’ (judgment of 9 December 2010, *Combinatie Spijker Infrabouw-De Jonge Konstruktie and Others*, C-568/08, EU:C:2010:751, paragraphs 52 and 53).

92 Where the contracting authority has opted for a procedure for the award of a public contract without prior publication of a contract notice and, at the time when the action for annulment against

a decision linked to that procedure is brought, the contract award notice has not been published yet, that right to interim protection is very likely to be reduced to nothing if the court called upon to rule on the application for an interlocutory injunction must, before being able to adopt an interim measure and for the sole purpose of calculating the amount of the flat-rate court fees which the litigant must pay, identify the type of procedure followed for the award of the public contract, state the estimated value of the contract at issue, and identify all the decisions taken by the contracting authority in the context of that procedure. That risk is even higher where a procedure has been organised in breach of the principle of transparency enshrined in the first subparagraph of Article 18(1) of Directive 2014/24. In that type of situation, it is highly likely that that court might have to conduct long and complicated investigations. As long as its investigations continue, it will be impossible for that court to suspend the contracting authority's purchases challenged by the applicant.

93 Such a constraint on a court called upon to rule in urgent proceedings is thus manifestly disproportionate to the point of undermining the right to an effective remedy guaranteed by Article 47 of the Charter.

94 Furthermore, it is important to point out, as the Court has already stated, that the effectiveness of Directive 89/665 is called into question where the only possible remedy is that before the court ruling on the merits. The option of bringing proceedings for the annulment of the contract itself is not such as to compensate for the impossibility of challenging the act of awarding the contract concerned, before the contract is concluded. Thus, where the contract has already been signed, the fact that the only judicial review provided for is an *ex post* review excludes the possibility of bringing an action at a stage where infringements can still be rectified and therefore does not make it possible to ensure full legal protection of the applicant before the conclusion of the contract (see, to that effect, judgments of 3 April 2008, *Commission* v *Spain*, C-444/06, EU:C:2008:190, paragraph 38; of 11 June 2009, *Commission* v *France*, C-327/08, not published, EU:C:2009:371, paragraph 58; and of 23 December 2009, *Commission* v *Ireland*, C-455/08, not published, EU:C:2009:809, paragraph 28).

95 In those circumstances, national legislation which prevents a court with which an application for an interlocutory injunction has been lodged from ruling on that application until, first, the information referred to in paragraph 92 of this judgment has been gathered and, second and consequently, the flat-rate court fees have been paid by the person making that application, infringes both Article 2(1)(a) of Directive 89/665 and Article 47 of the Charter.

96 By contrast, the requirement for acting expeditiously does not apply to the same degree to a situation in which a litigant brings an action before a national court seeking the annulment of a separately contestable decision taken by a contracting authority and to a situation where the litigant lodges an application for an interlocutory injunction, as a preventive measure. Therefore, national legislation, such as the Austrian legislation, which requires the communication of the information referred to in paragraph 92 of this judgment, in proceedings for the annulment of a separately contestable decision taken by the contracting authority, does not infringe EU law.

97 The answer to the third and fourth questions referred in Cases C-274/21 and C-275/21 is therefore that Article 2(1) of Directive 89/665, read in the light of Article 47 of the Charter, must be interpreted as:

– precluding national legislation which requires a court with which an application for an interlocutory injunction is lodged seeking to prevent purchases on the part of the contracting authority, to determine, before ruling on that application, the type of contract award procedure

concerned, the (estimated) value of the contract at issue and the total number of separately contestable decisions and, where appropriate, the lots from the contract award procedure concerned, for the sole purpose of calculating the amount of the flat-rate court fees which the person making that application must pay, failing which that application would be dismissed on that ground alone, where the contracting authority has opted for a procedure for the award of a public contract without prior publication of a contract notice and, at the time the action for annulment against a decision linked to that procedure is brought, the contract award notice has not been published yet;

– not precluding national legislation which requires a court before which an action for the annulment of a separately contestable decision taken by the contracting authority is brought to determine, before ruling on that action, the type of contract award procedure concerned, the (estimated) value of the contract at issue and the total number of separately contestable decisions and, where appropriate, the lots from the contract award procedure concerned, for the sole purpose of calculating the amount of the flat-rate court fees which the applicant must pay, failing which his or her action would be dismissed on that ground alone.

The tenth questions in Cases C-274/21 and C-275/21

98 By its tenth questions in Cases C-274/21 and C-275/21, the referring court asks, in essence, whether Article 47 of the Charter must be interpreted as precluding national legislation which requires a litigant lodging an application for an interlocutory injunction or an action for review to pay flat-rate court fees of an amount impossible to foresee, where the contracting authority has opted for a procedure for the award of a public contract without prior publication of a contract notice or, as the case may be, without subsequent publication of a contract award notice, with the result that it can be impossible for the litigant to ascertain the estimated value of the contract and the number of separately contestable decisions adopted by the contracting authority on the basis of which those fees were calculated.

99 At the outset, it must be pointed out, as the Austrian Government has stated, that the person lodging an application for an interlocutory injunction or an action for review can ascertain in advance the detailed rules for calculating the flat-rate court fees payable by him or her, in the field of public procurement, since those rules are clear from Paragraph 340 of the Law on Public Procurement, read in conjunction with the Regulation on Flat-Rate Fees 2018 referred to in paragraph 29 above.

100 Nevertheless, where the contracting authority has recourse to a procedure for the award of a public contract without prior publication of a contract notice, a litigant who has lodged an application for an interlocutory injunction or an action for review may be aware neither of the estimated value of the contract concerned nor of the number of separately contestable decisions already adopted by the contracting authority on the basis of which those flat-rate fees are calculated.

101 Accordingly, that litigant can be unable to foresee the amount of the flat-rate fees which he or she must pay.

102 According to the referring court, in the circumstances of the dispute in the main proceedings, it was the fact that it was impossible for EPIC, first, to determine the type of procedure for the award of a public contract followed by the contracting authority and, second, to count the contestable decisions adopted by the contracting authority that led that company to challenge, initially, the 21 framework agreements concluded by the contracting authority and the three decisions taken under each of those framework agreements. Since EPIC chose to lodge an application for an interlocutory injunction and an action for review on the merits against all those

decisions, it incurred, according to the referring court, the payment of flat-rate court fees of an amount exceeding EUR 1 000 000.

103 Thus, national legislation which requires a litigant to pay flat-rate court fees of an amount that is impossible to foresee before that person lodges his or her application for an interlocutory injunction or action for review makes it practically impossible or excessively difficult for him or her to exercise his or her right to an effective remedy, and therefore infringes Article 47 of the Charter, including where that amount represents only a tiny fraction of the value of the contract(s) concerned.

104 The answer to the tenth questions in Cases C-274/21 and C-275/21 therefore is that Article 47 of the Charter must be interpreted as precluding national legislation which requires a litigant lodging an application for an interlocutory injunction or an action for review to pay flat-rate court fees of an amount impossible to foresee, where the contracting authority has opted for a procedure for the award of a public contract without prior publication of a contract notice or, as the case may be, without subsequent publication of a contract award notice, with the result that it can be impossible for the litigant to ascertain the estimated value of the contract and the number of separately contestable decisions adopted by the contracting authority on the basis of which those fees were calculated.

The seventh questions in Cases C-274/21 and C-275/21

105 By its seventh questions in Cases C-274/21 and C-275/21, the referring court asks, in essence, whether Articles 47 and 48 of the Charter preclude national legislation pursuant to which a contracting authority which has the status of defendant in a dispute relating to the award of a public contract must submit, in the context both of an application for an interlocutory injunction and of an action for review, all the information and documents requested of it, even where, first, a judgment by default may be given against it and, second, the communication of that information and those documents may lead to its administrators or staff incriminating themselves under criminal law.

106 In that regard, it should be noted, as the Austrian Government has submitted and as has been pointed out it in paragraph 53 of this judgment, that it follows from the requests for a preliminary ruling that, in the present case, the relevance of the answer to those questions will be demonstrated by any potential future investigations to be carried out in the context of the criminal proceedings reported by the media, relating to certain administrators and concerning the purchases of the antigen tests at issue in the main proceedings.

107 In so doing, the referring court itself points out the hypothetical nature of the seventh questions in the present cases. In addition, that court merely refers to criminal proceedings brought against members of the Austrian Federal Government, without establishing a link between those proceedings and the present cases.

108 Moreover, as the Commission has stated in its written observations, those questions are irrelevant in so far as the referring court does not explain how the prohibition against self-incrimination could apply in a situation where the administrators or staff of the contracting authority provide a national court with information relating to the conduct of the contracting authority, without themselves incurring a priori any criminal penalty.

109 Lastly, the referring court merely makes a general reference to Articles 47 and 48 of the Charter, and merely submits that the Austrian legislation severely restricts the effectiveness of the judicial protection guaranteed by Directive 89/665, without, however, identifying the provisions of

EU law that are liable to apply to the situation at issue in the main proceedings and, accordingly, render those two articles of the Charter applicable to the dispute in the main proceedings.

110 It follows that the seventh questions are hypothetical and, accordingly, inadmissible.

Costs

111 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Eighth Chamber) hereby rules:

1. **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, as amended by Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014, must be interpreted as meaning that the conclusion of a framework agreement with a single economic operator, in accordance with Article 33(3) of 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, corresponds to the conclusion of a contract as referred to in Article 2a(2) of Directive 89/665, as amended by Directive 2014/23.**

2. **Article 33(3) of Directive 2014/24 must be interpreted as meaning that a contracting authority may no longer rely, for the purpose of awarding a new contract, on a framework agreement in respect of which the quantity and/or maximum value of the works, supplies or services concerned laid down therein has or have already been reached, unless the award of that contract does not entail a substantial modification of that framework agreement, as provided for in Article 72(1)(e) of that directive.**

3. **The principle of equivalence must be interpreted as not precluding national legislation which lays down, in respect of applications for an interlocutory injunction and actions for review relating to a procedure for the award of a public contract, procedural rules that are different from those which apply, inter alia, to civil proceedings.**

4. **Article 1(1) of Directive 89/665, as amended by Directive 2014/23, read in the light of Article 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as precluding national legislation requiring a litigant to identify, in his or her application for an interlocutory injunction or action for review, the procedure for the award of a public contract concerned and the separately contestable decision that he or she is challenging, where the contracting authority has opted for a procedure for the award of a public contract without prior publication of a contract notice and the contract award notice has not been published yet.**

5. **Article 2(1) of Directive 89/665, as amended by Directive 2014/23, read in the light of Article 47 of the Charter of Fundamental Rights, must be interpreted as:**

– **precluding national legislation which requires a court with which an application for an interlocutory injunction is lodged seeking to prevent purchases on the part of the contracting authority, to determine, before ruling on that application, the type of contract award procedure concerned, the (estimated) value of the contract at issue and the total number of**

separately contestable decisions and, where appropriate, the lots from the contract award procedure concerned, for the sole purpose of calculating the amount of the flat-rate court fees which the person making that application must pay, failing which that application would be dismissed on that ground alone, where the contracting authority has opted for a procedure for the award of a public contract without prior publication of a contract notice and, at the time the action for annulment against a decision linked to that procedure is brought, the contract award notice has not been published yet;

– **not precluding national legislation which requires a court before which an action for the annulment of a separately contestable decision taken by the contracting authority is brought to determine, before ruling on that action, the type of contract award procedure concerned, the (estimated) value of the contract at issue and the total number of separately contestable decisions and, where appropriate, the lots from the contract award procedure concerned, for the sole purpose of calculating the amount of the flat-rate court fees which the applicant must pay, failing which his or her action would be dismissed on that ground alone.**

6. **Article 47 of the Charter of Fundamental Rights must be interpreted as precluding national legislation which requires a litigant lodging an application for an interlocutory injunction or an action for review to pay flat-rate court fees of an amount impossible to foresee, where the contracting authority has opted for a procedure for the award of a public contract without prior publication of a contract notice or, as the case may be, without subsequent publication of a contract award notice, with the result that it can be impossible for the litigant to ascertain the estimated value of the contract and the number of separately contestable decisions adopted by the contracting authority on the basis of which those fees were calculated.**

[Signatures]

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* Language of the case: German.