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ECLI:EU:C:2016:688

JUDGMENT OF THE COURT (Third Chamber)

15 September 2016 (\*)

(Reference for a preliminary ruling — Directives 89/665/EEC and 92/13/EEC — Public procurement — Review procedures — National legislation making the admissibility of appeals against the acts of a contracting authority subject to giving a ‘good conduct guarantee’ — Charter of Fundamental Rights of the European Union — Article 47 — Right to an effective remedy)

In Joined Cases C-439/14 and C-488/14,

REQUESTS for a preliminary ruling under Article 267 TFEU, brought by the Curtea de Apel București (Court of Appeal, Bucharest, Romania) and the Curtea de Apel Oradea (Court of Appeal, Oradea, Romania), by judgments of 19 September 2014 and 8 October 2014, received at the Court on 24 September 2014 and 4 November 2014 respectively, in the proceedings

**SC Star Storage SA**

v

**Institutul Național de Cercetare-Dezvoltare în Informatică (ICI) (C-439/14),**

and

**SC Max Boegl România SRL,**

**SC UTI Grup SA,**

**Astaldi SpA,**

**SC Construcții Napoca SA**

v

**RA Aeroportul Oradea,**

**SC Porr Construct SRL,**

**Teerag-Asdag Aktiengesellschaft**

**SC Col-Air Trading SRL,**

**AVZI SA,**

**Trameco SA,**

**Iamsat Muntenia SA (C-488/14),**

THE COURT (Third Chamber),

composed of L. Bay Larsen, President of the Chamber, D. Šváby, J. Malenovský,  
M. Safjan and M. Vilaras (Rapporteur), Judges,

Advocate General: E. Sharpston,

Registrar: L. Carrasco Marco, Administrator,

having regard to the written procedure and further to the hearing on 14 January 2016,

after considering the observations submitted on behalf of:

- SC Star Storage SA, by A. Fetiță, avocate,
- SC Max Boegl România SRL, by F. Irimia, avocat,
- the Romanian Government, by R.-H. Radu, R. Hațieganu, D. Bulancea and M. Bejenar, acting as Agents,
- the Greek Government, by K. Georgiadis and K. Karavasili, acting as Agents,
- the European Commission, by A. Tokár and I. Rogalski, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 28 April 2016,

gives the following

### **Judgment**

1 These requests for a preliminary ruling concern the interpretation of Article 1(1) to (3) 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 2007/66/EC of the European Parliament and of the Council of 11 December 2007 (OJ 2007 L 335, p. 31) ('Directive 89/665'), and Article 1(1) to (3) of Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1992 L 76, p. 14), as amended by Directive 2007/66 ('Directive 92/13'), and Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter').

2 The requests have been made, in Case C-439/14, in proceedings between SC Star Storage SA and the Institutul Național de Cercetare-Dezvoltare în Informatică (ICI) (National Institute for Research and Development in Informatics (ICI)) concerning a procedure for the award of a public contract for the acquisition of an information technology infrastructure and services relating to the preparation, the management, development and completion of a cloud computing platform and, in Case C-488/14, proceedings between SC Max Boegl România SRL, SC UTI Grup SA, Astaldi SpA and SC Construcții Napoca SA ('Max Boegl and others') and RA Aeroportul Oradea SA, SC Porr Construct SRL, Teerag-Asdag Aktiengesellschaft, SC Col-Air Trading SRL, AZVI SA, Trameco SA and Iamsat Muntenia SA concerning a procedure for the award of a public contract relating to extension work and modernisation of the infrastructure of Oradea Airport (Romania).

## **Legal context**

### *EU law*

#### Directive 89/665

3 Paragraphs 1 to 3 of Article 1 of Directive 89/665, which is entitled 'Scope and availability of review procedures', provide:

'1. This Directive applies to contracts referred to in Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts [(OJ 2004 L 134, p. 114)], unless such contracts are excluded in accordance with Articles 10 to 18 of that Directive.

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

Member States shall take the measures necessary to ensure that, as regards contracts falling within the scope of Directive 2004/18/EC, 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 Community law in the field of public procurement or national rules transposing that law.

2. Member States shall ensure that there is no discrimination between undertakings claiming harm in the context of a procedure for the award of a contract as a result of the distinction made by this Directive between national rules implementing Community law and other national rules.

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.’

#### Directive 92/13

4 Paragraphs 1 to 3 of Article 1 of Directive 92/13, which is also entitled ‘Scope and availability of review procedures’, provide:

‘1. This Directive applies to contracts referred to in Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors [(OJ 2004 L 134, p. 1)], unless such contracts are excluded in accordance with Article 5(2), Articles 18 to 26, Articles 29 and 30 or Article 62 of that Directive.

Contracts within the meaning of this Directive include supply, works and service contracts, framework agreements and dynamic purchasing systems.

Member States shall take the measures necessary to ensure that, as regards contracts falling within the scope of Directive 2004/17/EC, decisions taken by contracting entities 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 Community law in the field of procurement or national rules transposing that law.

2. Member States shall ensure that there is no discrimination between undertakings likely to make a claim in respect of harm in the context of a procedure for the award of a contract as a result of the distinction made by this Directive between national rules implementing Community law and other national rules.

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.’

#### Directive 2007/66

5 Recital 36 of Directive 2007/66 states:

‘This Directive respects the fundamental rights and observes the principles recognised 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 2004/17

6 Article 16(b) of Directive 2004/17 provides:

‘Save where they are ruled out by the exclusions in Articles 19 to 26 or pursuant to Article 30, concerning the pursuit of the activity in question, this Directive shall apply to contracts which have a value excluding value-added tax (VAT) estimated to be no less than the following thresholds:

...

(b) EUR 5 186 000 in the case of works contracts.’

Directive 2004/18

7 Article 7(b) and (c) of Directive 2004/18 provides as follows:

‘This Directive shall apply to public contracts which are not excluded in accordance with the exceptions provided for in Articles 10 and 11 and Articles 12 to 18 and which have a value exclusive of value-added tax (VAT) estimated to be equal to or greater than the following thresholds:

...

(b) EUR 207 000:

- for public supply and service contracts awarded by contracting authorities other than those listed in Annex IV,
- for public supply contracts awarded by contracting authorities which are listed in Annex IV and operate in the field of defence, where these contracts involve products not covered by Annex V,
- for public service contracts awarded by any contracting authority in respect of the services listed in Category 8 of Annex IIA, Category 5 telecommunications services the positions of which in the CPV are equivalent to CPC reference Nos 7524, 7525 and 7526 and/or the services listed in Annex II B;

(c) EUR 5 186 000 for public works contracts.’

*Romanian law*

8 Articles 271a and 271b of the Ordonanță de Urgență a Guvernului nr. 34/2006, privind atribuirea contractelor de achiziție publică, a contractelor de concesiune de lucrări publice și a contractelor de concesiune de servicii (Government Emergency Ordinance No 34/2006 on the procedures for the award of public supply, works and services contracts) as amended and supplemented by the Ordonanță de Urgență a Guvernului nr. 51/2014 (Government Emergency Ordinance No 51/2014) (the ‘OUG’) provides:

‘Article 271a

(1) For the purpose of protecting the contracting authority against the risk of any improper conduct, the party challenging the decision shall be required to provide a good conduct guarantee covering the entire period from the date on which the challenge/application/action is lodged to the date on which the decision of the National Council for Dispute Resolution/the judgment of the competent judicial authority has become final.

(2) The challenge/application/action shall be dismissed if the party challenging the decision fails to furnish proof that the guarantee referred to in paragraph 1 has been provided.

(3) The good conduct guarantee shall be provided by means of bank transfer or a guarantee instrument issued in compliance with legal requirements by a banking institution or an insurance company; the original guarantee shall be lodged at the offices of the contracting authority and a copy with the National Council for Dispute Resolution or the judicial authorities at the same time as the challenge/application/action is lodged.

(4) The total amount of the good conduct guarantee shall be determined by reference to the estimated value of the contract to be awarded, in accordance with the following rules:

(a) 1% of the estimated value, if this is lower than the threshold amounts provided for in Article 55(2)(a) and (b);

(b) 1% of the estimated value, if this is lower than the threshold amounts provided for in Article 55(2)(c), but not greater than the equivalent in [Romanian lei (RON)] of EUR 10 000, according to the exchange rate of the Romanian National Bank applicable at the date on which the guarantee is provided;

(c) 1% of the estimated value, if this is equal to or greater than the threshold amounts set out in Article 55(2)(a) and (b), but not greater than the equivalent in RON of EUR 25 000 according to the exchange rate of the Romanian National Bank applicable at the date on which the guarantee is provided;

(d) 1% of the estimated value, if this is equal to or greater than the threshold amounts set out in Article 55(2)(c), but not greater than the equivalent in RON of EUR 100 000 according to the exchange rate of the Romanian National Bank applicable at the date on which the guarantee is provided.

(5) The good conduct guarantee must be valid for a period of at least 90 days, be irrevocable and provide for unconditional payment upon first request of the contracting authority where the challenge/application/action is rejected.

(6) If, on the day on which the good conduct guarantee is due to expire, the decision of the National Council for Dispute Resolution or the judgment of the judicial authority has not become final and the party challenging the decision has failed to extend the validity of the good conduct guarantee in accordance with the requirements laid down in paragraphs 1 to 5, the contracting authority shall retain the guarantee. The provisions set out in Article 271b(3) to (5) shall apply *mutatis mutandis*.

(7) The provisions set out in paragraphs 1 to 6 shall also apply *mutatis mutandis* where the action against the decision of the National Council for Dispute Resolution is brought by a person other than the contracting authority or the party challenging the decision, in accordance with Article 281.

#### Article 271b

(1) If the challenge is dismissed by the National Council for Dispute Resolution or by the judicial authority, where the party challenging the decision has brought proceedings directly before the latter, the contracting authority shall be required to retain the good conduct guarantee as from the time at which the decision of the National Council for Dispute Resolution/the judgment of the judicial authority becomes final. The requirement to retain the guarantee shall apply to the parts of the contract in respect of which the challenge has been dismissed.

(2) Paragraph 1 shall also apply where the party challenging the decision withdraws the challenge/application/action.

(3) The measure referred to in paragraph 1 shall not apply where the National Council for Dispute Resolution/the judicial authority dismisses the challenge as devoid of purpose or where the challenge/application/action is withdrawn following the adoption, by the contracting authority, of corrective measures necessary under Article 256c(1).

(4) Where the National Council for Dispute Resolution upholds the challenge, or the competent judicial authority upholds the action brought against the National Council for Dispute Resolution's decision to dismiss the challenge, the contracting authority shall be required to return the good conduct guarantee to the party challenging the decision no later than five days following the date on which the decision/judgment has become final.

(5) Where the party challenging the decision has brought proceedings directly before the judicial authority and the latter upholds the action, paragraph 4 shall apply *mutatis mutandis*.

(6) The amounts received by the contracting authority under the good conduct guarantee shall be classified as income of that contracting authority.’

### **The disputes in the main proceedings and the questions referred for a preliminary ruling**

#### *Case C-439/14*

9 On 1 April 2014, the ICI, as the contracting authority, published in the Sistemul Electronic de Achiziții Publice (Electronic Public Procurement System, ‘the EPPS’) a notice concerning the opening of a call for tenders for the award of a public contract for the acquisition of an information technology infrastructure and services relating to the preparation, management, development and completion of a cloud computing platform and the corresponding tender documents. The award criterion for that contract, with an estimated value of RON 61 287 713.71 (approximately EUR 13 700 000), net of value added tax (VAT) was that of ‘the lowest price’.

10 Following requests from economic operators, the ICI published a number of explanatory notes regarding the stipulations in the tender documents in the EPPS.

11 On 30 June 2014, Star Storage challenged Explanatory Notes No 4 and No 5 of 24 June 2014 and No 7 of 26 June 2014 before the Consiliul Național de Soluționare a Contestațiilor (National Council for Dispute Resolution, ‘the CNSC’).

12 By decision of 18 July 2014, the CNSC, based, inter alia, on Article 271a(2) of the OUG No 34/2006, dismissed that challenge as inadmissible, on the ground that Star Storage had not provided a good conduct guarantee.

13 On 5 August 2014, Star Storage brought an appeal before the Curtea de Apel București (Court of Appeal, Bucharest, Romania), seeking, inter alia, the annulment of that decision, arguing that the obligation to provide a good conduct guarantee laid down by Romanian law was contrary to the Romanian Constitution and EU law.

14 The referring court considers, due to its amount and the rules governing it, that the good conduct guarantee is liable to seriously undermine the right of economic operators to effective review procedures against the acts of the contracting authorities.

15 In those circumstances, the Curtea de Apel București (Court of Appeal, Bucharest) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:



‘Are the provisions in the third subparagraph of Article 1(1) and Article 1(3) of [Directive 89/665] to be interpreted as precluding a rule under which a “good conduct guarantee” must be lodged as a prerequisite for being granted access to procedures for reviewing the decisions of contracting authorities, such as the rule laid down in Article 271a and 271b of [the OUG] No 34/2006?’

*Case C-488/14*

16 On 21 January 2014, RA Aeroportul Oradea, in its capacity as the contracting authority, published a call for tenders in the EPPS for the award of a public contract for extension works and the modernisation of the infrastructures of Oradea Airport (Romania). The estimated amount of the contract is RON 101 232 054 (approximately EUR 22 800 000) net of value added tax, the award criterion adopted being ‘most economically advantageous tender’.

17 According to the report drawn up after the tender assessment, the bid submitted by the consortium of SC Max Boegl România SRL, SC UTI Grup SA and Astaldi SpA, was held to be ineligible, while that submitted by the consortium of SC Construcții Napoca SA, SC Aici Cluj SA and CS Icco Energ SRL was ranked second in accordance with the award criterion adopted.

18 Those two tendering consortia have each challenged that report before the CNSC. By its decision of 10 July 2014, those challenges were dismissed as being unfounded. As a consequence, those two consortia each brought an appeal against that decision before the Curtea de Apel Oradea (Court of Appeal, Oradea).

19 At the hearing, on 10 September 2014, that court drew the attention of the applicants in the main proceedings to the fact that, having regard to the entry into force on 1 July 2014 of Articles 271a and 271b of the OUG No 34/2006, they were required to provide a ‘good conduct guarantee’. Max Boegl and others then requested that an objection of unconstitutionality of those provisions be heard by the Curtea Constituțională (Constitutional Court, Romania) and that a request for a preliminary ruling be made to the Court of Justice.

20 In those circumstances, the Curtea de Apel Oradea (Court of Appeal, Oradea, Romania) stayed those proceedings and requested a preliminary ruling on the following question:

‘Must Article 1(1), (2) and (3) of [Directive 89/665] and Article 1(1), (2) and (3) of [Directive 92/13] be interpreted as precluding legislation which makes access to review procedures of decisions of contracting authorities subject to an obligation to deposit beforehand a “good conduct guarantee” such as that governed by Articles 271a and 271b of [the OUG] No 34/2006?’

### **Procedure before the Court**

21 By orders of 13 November 2014 and 10 December 2014, the President of the Court rejected the requests from the Curtea de Apel București (Court of Appeal, Bucharest) and the Curtea de Apel Oradea (Court of Appeal, Oradea) that Cases C-439/14 and C-488/14 be determined by the expedited procedure laid down by Article 105(1) of the Rules of Procedure of the Court of Justice.

22 By order of the President of the Court of Justice of 13 November 2014, Cases C-439/14 and C-488/14 were joined for the purposes of the written and oral procedure and judgment.

23 By judgment No 5 of 15 January 2015, the Curtea Constituțională (Constitutional Court) partially upheld the objection of unconstitutionality of Articles 271a and 271b of the OUG No 34/2006 raised by Star Storage and Max Boegl and others respectively.

24 By letter of 21 July 2015, the Court, in accordance with Article 101 of its Rules of Procedure, sent the Curtea de Apel București (Court of Appeal, Bucharest) and the Curtea de Apel Oradea (Court of Appeal, Oradea) a request for clarifications, asking them to submit their observations on the judgment of the Curtea Constituțională (Constitutional Court) No 5 of 15 January 2015 and its possible impact on their respective requests for a preliminary ruling.

25 By letter of 11 August 2015, received at the Court on 26 August 2015, the Curtea de Apel Oradea (Court of Appeal, Oradea) stated essentially that the judgment of the Curtea Constituțională (Constitutional Court) No 5 of 15 January 2015 had upheld the objection of unconstitutionality relating to the provisions of Article 271b(1) and (2) of the OUG No 34/2006, but had rejected that relating to the provisions of Article 271a and Article 271b(3) to (6) of the OUG No 34/2006, so that its request for a preliminary ruling no longer concerned the latter provisions.

26 By letter of 14 September 2015, received at the Court on 23 September 2015, the Curtea de Apel București (Court of Appeal, Bucharest) also stated essentially that the judgment of the Curtea Constituțională (Constitutional Court) No 5 of 15 January 2015 had confirmed the constitutionality of the obligation to provide a good conduct guarantee as a condition of admissibility of any action and that, therefore, it was still necessary to examine whether the provisions of Articles 271a and 271b of the OUG No 34/2006, declared to be compatible with the Romanian Constitution, which make recourse to review procedures in award procedures for public contracts subject to the provision of a ‘good conduct guarantee’, may be regarded as compatible with the principle of effective judicial protection, as recognised by Article 1(1) to (3) of Directive 89/665 and Article 1(1) to (3) of Directive 92/13, read together with Article 47 of the Charter.

27 It also considers that the Romanian legislation requires an in-depth analysis of the fact that the good conduct guarantee must be provided in addition to the ‘tendering guarantee’ that the tenderer must also provide, in accordance with Article 43a of the OUG No 34/2006, which represents up to 2% of the estimated value of the contract, and the fact that it is not possible either to vary the amount of the good conduct guarantee which

is, in accordance with Article 271a(4) of the OUG No 34/2006, fixed automatically at 1% of the estimated value of the contract to be concluded up to a maximum amount equivalent to EUR 100 000, or to give a reduction or to agree on payment by instalment, according to the specific circumstances of a particular case.

28 Therefore, the Curtea de Apel București (Court of Appeal, Bucharest) asks the Court to answer the following question:

‘Must Article 1(1), (2) and (3) of [Directive 89/665] and Article 1(1), (2) and (3) of [Directive 92/13], read together with Article 47 of the Charter, be interpreted as precluding legislation which makes access to review procedures of decisions of contracting authorities subject to an obligation to deposit beforehand a “good conduct guarantee” such as that governed by Articles 271a and 271b of [the OUG No 34/2006]?’

29 Finally, by judgment No 750 of 4 November 2015, the Curtea Constituțională (Constitutional Court) also declared incompatible with the Romanian Constitution Article 271a(5) of the OUG No 34/2006 which provided for the unconditional payment upon first request of the good conduct guarantee to the contracting authority where the challenge/application/action was rejected.

### **Preliminary observations**

30 It must be held that, as the public contract at issue in Case C-439/14 concerns supplies and services, the value of which exceeds the threshold laid down by Article 7(b) of Directive 2004/18, Directive 89/665 is applicable in the dispute in the main proceedings.

31 However, the Romanian Government and the European Commission disagree as to the nature of the public contract at issue in Case C-488/14, the former taking the view that that contract is covered by Directive 2004/18 and, therefore, Directive 89/665, the latter considering that that contract is covered by Directive 2004/17 and, therefore, by Directive 92/13.

32 In that connection, it must be noted that, as the referring court in Case C-488/14 provides very little information as to the public contract at issue in the main proceedings, it is not possible for the Court to determine whether it falls within Directive 2004/17 or Directive 2004/18.

33 Nevertheless, although it is for the referring court to give a ruling on that issue, that uncertainty has no effect on the request for a preliminary ruling in Case C-488/14 because, as the Advocate General observed in point 25 of her Opinion, the value of the public contract at issue reaches the thresholds fixed for public works contracts by Article 7(c) of Directive 2004/18 and by Article 16(b) of Directive 2004/17.

34 The Court will therefore answer both the question referred in Case C-439/14 and that in Case C-488/14 simultaneously, since the provisions of Directives 89/665 and

92/13 whose interpretation is sought are, in any event, drafted in absolutely identical terms.

### **Consideration of the questions referred for a preliminary ruling**

35 It should be observed, first of all, as is clear from the explanations provided by the two referring courts in response to the request for clarifications from the Court of Justice and the observations submitted at the hearing, that the provisions of Article 271b(1) and (2) and those of Article 271a(5), last sentence, of the OUG No 34/2006 were declared to be contrary to the Romanian Constitution by the judgments of the Curtea Constituțională (Constitutional Court) No 5 of 15 January 2015 and No 750 of 4 November 2015 respectively.

36 The two referring courts have indicated that therefore they could no longer apply those provisions, which the Romanian Government confirmed at the hearing. However, they have expressly stated that they maintain their questions for a preliminary ruling as the other provisions of Romanian law at issue in the main proceedings were still applicable.

37 In those circumstances, while it is for the referring courts alone to draw conclusions from the judgments of the Curtea Constituțională (Constitutional Court) No 5 of 15 January 2015 and No 750 of 4 November 2015, for the resolution of the disputes before them, it must be held that the requests for a preliminary ruling concern solely the provisions of Romanian law relating to the good conduct guarantee held to be compatible with the Romanian Constitution.

38 It follows that, by their question, the referring courts ask essentially whether Article 1(1) to (3) of Directive 89/665 and Article 1(1) to (3) of Directive 92/13, read together with Article 47 of the Charter, must be interpreted as meaning that they preclude national legislation, such as that at issue in the main proceedings, which makes the admissibility of all actions against the acts of a contracting authority subject to the obligation for the applicant to provide a good conduct guarantee to the contracting authority, which must be refunded to the applicant whatever the outcome of the action.

39 In that connection, it must be recalled that Article 1(1) of Directive 89/665 and Article 1(1) of Directive 92/13 require the Member States to adopt the measures necessary to ensure that the decisions taken by the contracting authorities in public contract award procedures falling within the scope of Directives 2004/17 and 2004/18 may be reviewed effectively and, in particular, as rapidly as possible, on the ground that they have infringed EU law on public procurement or the national rules transposing that law.

40 Both Article 1(3) of Directive 89/665 and Article 1(3) of Directive 92/13 also lay down the obligation for the Member States to ensure, under detailed rules which the Member States may establish, that the review procedures are available, 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.

41 Those provisions, which are intended to protect tenderers against arbitrary behaviour on the part of the contracting authority, are thus designed to reinforce the existence, in all Member States, of effective remedies, so as to ensure 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 12 December 2002, *Universale-Bau and Others*, C-470/99, EU:C:2002:746, paragraph 71; of 11 September 2014, *Fastweb*, C-19/13, EU:C:2014:2194, paragraph 34, and of 12 March 2015, *eVigilo*, C-538/13, EU:C:2015:166, paragraph 50).

42 However, neither Directive 89/665 nor Directive 92/13 contains any provisions specifically governing the conditions under which those review procedures may be used. Thus, the Court has already held that Directive 89/665 laid down only the minimum conditions to be satisfied by the review procedures established in domestic law to ensure compliance with the requirements of EU law concerning public procurement (see, in particular, judgments of 27 February 2003, *Santex*, C-327/00, EU:C:2003:109, paragraph 47; of 19 June 2003, *GAT*, C-315/01, EU:C:2003:360, paragraph 45; and of 30 September 2010, *Strabag and Others*, C-314/09, EU:C:2010:567, paragraph 33).

43 However, according to settled case-law, the detailed procedural rules governing the remedies intended to protect rights conferred by EU law on candidates and tenderers harmed by decisions of contracting authorities, must not compromise the effectiveness of Directives 89/665 and 92/13, the objective of which is to ensure that decisions taken unlawfully by contracting authorities may be reviewed effectively and as rapidly as possible (see, in particular, judgments of 12 December 2002, *Universale-Bau and Others*, C-470/99, EU:C:2002:746, paragraph 72; of 27 February 2003, *Santex*, C-327/00, EU:C:2003:109, paragraph 51; of 3 March 2005, *Fabricom*, C-21/03 and C-34/03, EU:C:2005:127, paragraph 42; order of 4 October 2007, *Consorzio Elisoccorso San Raffaele*, C-492/06, EU:C:2007:583, paragraph 29; judgments of 12 March 2015, *eVigilio*, C-538/13, EU:C:2015:166, paragraph 40; and of 6 October 2015, *Orizzonte Salute*, C-61/14, EU:C:2015:655, paragraph 47).

44 In particular, care must be taken to ensure that the effectiveness of Directives 89/665 and 92/13 are not undermined (see judgments of 18 June 2002, *HI*, C-92/00, EU:C:2002:379, paragraphs 58 and 59, and of 11 December 2014, *Croce Amica One Italia*, C-440/14, EU:C:2014:2435, paragraph 40) or the rights conferred on individuals by EU law (judgments of 12 December 2002, *Universale-Bau and Others*, C-470/99, EU:C:2002:746, paragraph 72, and of 28 January 2010, *Uniplex (UK)*, C-406/08, EU:C:2010:45, paragraph 49).

45 Furthermore, it must be recalled, as is clear from recital 36 of Directive 2007/66, and therefore Directives 89/665 and 92/13 that it amended and supplemented, that they seek to ensure full respect for the right to an effective remedy and to a fair hearing, in accordance with the first and second paragraphs of Article 47 of the Charter.

46 Accordingly, when they set out detailed procedural rules for legal actions intended to ensure the protection of rights conferred by Directives 89/665 and 92/13 on candidates and tenderers harmed by the decisions of contracting authorities, the Member States must ensure compliance with the right to an effective remedy and to a fair hearing, enshrined in Article 47 of the Charter.

47 In the present case, Article 271a(1) to (5) of the OUG No 34/2006 requires any person taking part in an award procedure for public contracts and intending to challenge a decision of the contracting authority, either before the CNSC or directly before a court, to provide a good conduct guarantee as the condition of admissibility of any action. That guarantee, of an amount corresponding to 1% of the estimated value of the public contract concerned, limited to EUR 25 000 for public supply and services contracts and EUR 100 000 for public works contracts, must be provided to the contracting authority either by bank transfer or by a guarantee instrument issued by a banking establishment or an insurance company for a period of at least 90 days.

48 However, that guarantee must be refunded if the appeal is upheld, at the latest five days after the date on which the decision become definitive, in accordance with Article 271b(4) and (5) of the OUG No 34/2006, and also if the appeal is withdrawn or dismissed, the retention of the guarantee by the contracting authority being henceforth without a legal basis, having regard to the judgments of the Curtea Constituțională (Constitutional Court) No 5 of 15 January 2015 and No 750 of 4 November 2015.

49 As the Advocate General pointed out in point 37 of her Opinion, the good conduct guarantee thereby constitutes, as a pre-condition for getting any challenge examined, a limitation on the right to an effective remedy before a tribunal within the meaning of Article 47 of the Charter which, in accordance with Article 52(1) of the Charter can therefore be justified only if it is provided for by law, if it respects the essence of that right and, subject to the principle of proportionality, if it is necessary and genuinely meets objectives of general interest recognised by the EU or the need to protect the rights and freedoms of others (see judgment of 4 May 2016, *Pillbox 38*, C-477/14, EU:C:2016:324, paragraph 160).

50 It must be held that, in the cases in the main proceedings, the legal basis for the good conduct guarantee is clearly and precisely defined by the OUG No 34/2006, so that it must be regarded as being provided for by the national legislation (see judgments of 27 May 2014, *Spasic*, C-129/14 PPU, EU:C:2014:586; of 6 October 2015, *Delvigne*, C-650/13, EU:C:2015:648, paragraph 47; and of 17 December 2015, *WebMindLicenses*, C-419/14, EU:C:2015:832, paragraph 81). Furthermore, the fact that the good conduct guarantee may reach the substantial amount of EUR 25 000 or EUR 100 000 cannot lead to the conclusion that the obligation to give such a guarantee undermines the fundamental content of the right to an effective remedy since, in any event, that guarantee, cannot be kept by the contracting authority, whatever the outcome of the action.

51 Nonetheless, it must still be verified whether the good conduct guarantee corresponds to an objective in the general interest and whether, in the affirmative, it

complies with the principle of proportionality within the meaning of Article 52(1) of the Charter.

52 Article 271a(1) of the OUG No 34/2006 states that the aim of the good conduct guarantee is to protect the contracting authority from the risk of inappropriate conduct. The Romanian Government indicated, in its written submissions and at the hearing, that the good conduct guarantee was mainly intended to facilitate the conduct of award procedures for public contracts by preventing the improper use of remedies and any delays to the conclusion of the contract.

53 In that connection, it must be held that combating the abuse of remedies is, as the Advocate General noted in point 44 of her Opinion, a legitimate objective which contributes not only to the attainment of the objectives pursued by Directives 89/665 and 92/13, but also, more widely, to the proper administration of justice.

54 A financial condition such as the good conduct guarantee at issue in the main proceedings is a measure liable to discourage frivolous challenges and ensure that all individuals have their actions dealt with as rapidly as possible, in the interest of the proper administration of justice, in accordance with Article 47, first and second paragraphs, of the Charter.

55 However, although the interest of the proper administration of justice may justify the imposition of a financial restriction on the access by a person to a remedy, that restriction must however retain a reasonable relationship of proportionality between the means employed and the legitimate aim sought to be achieved (see, to that effect, judgment of 22 December 2010, *DEB*, C-279/09, EU:C:2010:811, paragraphs 47 and 60).

56 In that connection, it must be observed that, although the obligation to provide a good conduct guarantee is a less dissuasive measure in its current version than in its initial version, since it can no longer be automatically and unconditionally kept by the contracting authority in the case that the appeal is rejected or withdrawn, that obligation is still able to achieve the objective of combating frivolous actions pursued by the Romanian legislation.

57 First, as the Advocate General observed in point 55 of her Opinion, providing a good conduct guarantee involves a financial burden for the applicant, whether he makes a bank transfer or gives a bank guarantee.

58 The amount of the good conduct guarantee is fixed as a percentage of the price of the public contract considered which may reach EUR 25 000 for public supply and public service contracts and EUR 100 000 for public works contracts.

59 Mobilising a sum of that amount by bank transfer, like the requirement to take the steps necessary to constitute a bank guarantee and pay the fees relating to it are such as to encourage applicants to carefully consider bringing an action. Furthermore, in so far as it undermines the applicant's resources or, at least, its ability to obtain credit until that

guarantee is refunded, the good conduct guarantee is of such a nature that it encourages applicants to act prudently in the proceedings they bring, consistent with the requirement in Article 1(1) of Directive 89/665 and Article 1(1) of Directive 92/13 that the review procedures referred to therein are conducted as rapidly as possible. As the Romanian Government submitted at the hearing, it is conceivable that such a financial condition will encourage potential litigants to seriously evaluate their interest in bringing legal proceedings and their chance of winning and thereby dissuade them from bringing claims which are manifestly unfounded or which only seek to delay the award of a contract (see, by analogy, judgment of 6 October 2015, *Orizzonte Salute*, C-61/14, EU:C:2015:655, paragraph 73).

60 Second, pursuant to the judgments of the Curtea Constituțională (Constitutional Court) No 5 of 15 January 2015 and No 750 of 4 November 2015, as the automatic and unconditional retention of the good conduct guarantee by the contracting authority and its payment upon the first request are no longer possible, it cannot be held that the obligation to constitute that guarantee in itself, as a condition for the admissibility of all actions, goes beyond what is necessary to achieve the objective of combating improper actions that it pursues.

61 The good conduct guarantee of 1% of the value of the public contract, limited in accordance with the type of contract remains modest (see judgment of 6 October 2015, *Orizzonte Salute*, C-61/14, EU:C:2015:655, paragraph 58), in particular for tenderers which must normally demonstrate a certain financial capacity. That guarantee may, next, and in any event, be constituted in the form of a bank guarantee. Finally, it has to be constituted only for the period between the filing of the application and final judgment.

62 Lastly, in its answer to the request for clarifications sent by the Court, the Curtea de Apel București (Court of Appeal, Bucharest) requested the Court to answer its question taking account of the guarantee of good conduct and the tendering guarantee that the tenderer must also constitute under Article 43a of the OUG No 34/2006. However, it has not provided any information in that regard either concerning the current tendering guarantee scheme or its relationship to the good conduct guarantee. In those circumstances, the Court is unable to express a view on that matter.

63 Having regard to the foregoing considerations, the answer to the questions referred is that Article 1(1) to (3) of Directive 89/665 and Article 1(1) to (3) of Directive 92/13, read in the light of Article 47 of the Charter, must be interpreted as meaning that they do not preclude national legislation, such as that at issue in the main proceedings, which makes the admissibility of any action against an act of the contracting authority subject to the obligation for the applicant to constitute a good conduct guarantee that it provides to the contracting authority, if that guarantee must be refunded to the applicant whatever the outcome of the action.

## **Costs**



64 Since these proceedings are, for the parties to the main proceedings, a step in the actions before the national courts, the decisions on costs are a matter for those courts. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

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

**Article 1(1) to (3) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007, and Article 1(1) to (3) of Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, as amended by Directive 2007/66, and read in the light of Article 47 of the Charter of Fundamental Rights of the European Union must be interpreted as meaning that they do not preclude national legislation, such as that at issue in the main proceedings, which makes the admissibility of any action against an act of the contracting authority subject to the obligation for the applicant to constitute a good conduct guarantee that it provides to the contracting authority, if that guarantee must be refunded to the applicant whatever the outcome of the action.**

[Signatures]

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\* Language of the case: Romanian.

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