

European Union, CJEU, Case Orizzonte Salute, judgment of 6 October 2015

Deciding bodies and decisions

CJEU, Case Orizzonte Salute, C-61/14, judgment of 6 October 2015, EU:C:2015:655

Area of law

Effective judicial protection

Subject matter

Access to justice - Public Procurement Proceedings - Judicial fees

The ECJ was asked to decide whether it is compatible with Article 47 CFR a national legislation according to which court fees charged in public procurement proceedings are higher than those charged in other civil proceedings. The ECJ also clarified whether the charging of multiple and cumulative fees within the same judicial proceedings may also be permitted, in the light of Article 47 CFR. Moreover, the European Court analyzed how national courts shall assess the compatibility with Article 47 CFR of national provisions introducing limits to access to courts.

Summary Facts Of The Case

Orizzonte Salute, an Italian association providing public and private bodies with nursing services, challenged before the Regional Administrative Tribunal of Trento (the *TAR Trento*) the reiterated awards, by the competent local authority (the *Azienda Pubblica di Servizi alla persona San Valentino Città di Levico Terme*, hereafter, the “*Azienda*”), of the management of nursing services to a competitor. Orizzonte Salute paid a standard court fee of EUR 650, namely the cost of instituting ordinary administrative proceedings. However, by decision of 5 June 2013, the Secretary General of the *TAR Trento* asked Orizzonte Salute to make an additional payment since, on account of its supplementary pleas, the dispute related to public procurement and it was therefore necessary to meet the standard fee for such cases, which amounted to EUR 2,000.

By a new action introduced on 2 July 2013, Orizzonte Salute challenged the above-mentioned decision before the *TAR Trento*, which acknowledged that court fees relating to public procurement proceedings were considerably higher than the amounts to be paid for administrative disputes in ordinary proceedings. Moreover, the same national legislation provided that the (same) fee should be paid not only upon registration of the application initiating proceedings, but also for cross-claims and supplementary pleas introducing new claims in the course of proceedings.

The *TAR Trento* considered that the national legislation could dissuade economic operators from

bringing proceedings, thus posing problems of compatibility with EU law. In effect, the overall value of the public contract at issue was higher than the thresholds beyond which the award of a contract must be made in accordance with the rules laid down in Directive 89/665. According to the *TAR Trento*, there were doubts as regards the compatibility with the principles of effectiveness, expediency, non-discrimination and availability laid down by Article 1 of that Directive. Accordingly, it decided to stay the proceedings and to ask to the CJEU whether Article 1 of Directive 89/665 precludes national legislation requiring, when actions are brought in administrative judicial proceedings relating to public procurement, the payment of higher court fees than in other matters.

At the outset, the CJEU pointed out that Directive 89/665 does not contain any provision relating specifically to the court fees to be paid by natural or legal persons when they bring an action against a decision on the award of a public contract. Therefore, in line with its established case law on national procedural autonomy, the CJEU affirmed that it is up to each Member State to lay down the detailed rules governing actions for safeguarding rights that individuals derive from EU law. However, these rules must 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). Accordingly, the CJEU moved on to considering whether legislation such as that at issue is consistent with the abovementioned principles.

The CJEU considered, first of all, the aspect relating to the high fees.

As regards the principle of effectiveness, the fact that the standard fee to be paid amounted to a maximum of 2% of the value of the contract led the Court to affirm that this does not render practically impossible or excessively difficult the exercise of rights conferred by EU public procurement law. The Court noted, in particular, that undertakings need to have an appropriate economic and financial capacity in order to participate to public procurement proceedings. Moreover, since the fee was imposed without distinction with regard to all individuals intending to bring an action against a decision adopted by contracting authorities, the CJEU concluded that the national legislation concerned did not give rise to discrimination between operators practising in the same sector of activity.

As regards the principle of equivalence, according to the Court, the fact that, in the context of procedures for the award of public contracts, the standard fee to be paid is larger than the amounts to be paid for administrative disputes subject to ordinary proceedings and the court fees charged in civil proceedings cannot in itself demonstrate an infringement of the principle at hand.

Concerning the issue of the cumulation of the standard fees, the CJEU observed that, insofar as it contributes to the proper functioning of the judicial system, the levying of multiple and cumulative court fees within the same administrative judicial proceedings is not, in principle, contrary to

Article 1 of Directive 89/665, read in the light of Article 47 CFR. In effect, it can act as a deterrent with respect to the submission of claims which are manifestly unfounded or which seek only to delay the proceedings. This is all the more true if the subject-matter of the actions or supplementary pleas are in fact separate and amount to a significant enlargement of the subject-matter of the dispute that is already pending. By contrast - the Court also observed ? if this is not the case, the levying of multiple and cumulative court fees is contrary to the availability of legal remedies ensured by Directive 89/665 and to the principle of effectiveness.

The CJEU therefore concluded that the national court should establish whether the different pleas concerned separate subject-matter and, if this was not the case, the applicant in the main proceedings should be relieved from the obligation to pay cumulative court fees.

Relation to the scope of the Charter

Article 47 EU Charter - Right to an effective remedy and to a fair trial

The Charter was applicable to the case because the latter concerned a public procurement proceedings that fell under the scope of Directive 89/665/EEC 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 2007 L 335/31). According to its Article 1, this Directive applies to contracts referred to in Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134/114). Article 7 of Directive 2004/18, entitled '*Threshold amounts for public contracts*', establishes the thresholds for the estimated values beyond which the award of a contract must be made in accordance with the rules in that directive. As anticipated, the public contract at issue in the case before the *TAR Trento* was higher than those thresholds.

Relation between the Charter and EHCR

The right to an effective remedy enshrined in Article 47(1) CFR corresponds to Article 13 ECHR. However, in Union law the protection is more extensive because it guarantees that that right is exercised before a court (whereas Article 13 ECHR grants the right to an effective remedy before a “national authority”, which can encompass also nonjudicial authorities).

Insofar as Article 47(1) CFR and Article 13 ECHR overlaps, Article 52(3) CFR requires that the former is interpreted as providing at least the same protection as granted by the latter, taking into account also the case law of the ECtHR. This obligation of parallel interpretation also extends to the issue of limitations: accordingly, any conditions concerning access to a court that is contrary to Article 13 ECHR, as interpreted by the ECtHR, must be regarded as being incompatible also with Article 47(1) CFR. On the contrary, the CJEU may embrace a more restrictive approach towards such conditions, thus granting broader protection to the person concerned.

Article 52(3) CFR indeed allows Union law to provide more extensive protection than that ensuing from the ECHR

Sources - EU and national law

National Law

- Articles 13 and 14 of Decree of the President of the Republic No 115, of 30 May 2002, as amended by Law No 228 of 24 December 2012 (‘the decree’).

EU Law

- 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 395/33), as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 (OJ 2007 L 335/31)

Sources - CJEU Case Law

On the principle of the procedural autonomy of the Member States

- C-568/08, *Combinatie Spijker Infrabouw-De Jonge Konstruktie and Others*, EU:C:2010:751

On the principle of equivalence and effectiveness

- C-145/08 and C-149/09, *Club Hotel Loutraki and Others*, EU:C:2010:247;
- C-538/13, *eVigilo*, EU:C:2015:166;
- C-470/99, *Universale-Bau and Others*, EU:C:2002:746
- C-169/14, *Sánchez Morcillo and Abril García*, EU:C:2014:2099
- C-417/13, *ÖBB Personenverkehr*, EU:C:2015:38

On the consistent interpretation of EU legislation with EU primary law

- C-212/13, *Ryneš*, EU:C:2014:2428
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