



THE COURT OF APPEAL
CIVIL

Court of Appeal Record Number: 2022/32
Neutral Citation Number [2022] IECA 131

Donnelly J.
Faherty J.
Barniville J.

BETWEEN

WORD PERFECT TRANSLATION SERVICES LIMITED

APPELLANT

- AND -

THE MINISTER FOR PUBLIC EXPENDITURE AND REFORM

RESPONDENT

JUDGMENT of Mr. Justice David Barniville delivered on the 9th day of June, 2022

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1. Introduction

1. This is an appeal by the appellant, Word Perfect Translation Services Limited (“Word Perfect” or the “appellant”), from a decision of the High Court (Twomey J.), in a judgment given on 2 February 2022 ([2022] IEHC 54), dismissing Word Perfect’s challenge to a decision made by the respondent, The Minister for Public Expenditure and Reform (the “Minister”), through the Office of Government Procurement (the “OGP”), to adopt and publish on 15 May 2021 a Request for Tender (“RFT”), dated 12 May 2021, to establish a “*multi supplier framework agreement for the provision of Irish language translation services*” (the “RFT”) on the eTenders website. The High Court dismissed Word Perfect’s challenge on the ground that it did not have standing to bring the proceedings, as it had not submitted a tender in response to the RFT. The judge decided that Word Perfect was not an “*eligible person*” within the meaning of that term in Regulation 4 of the Remedies Regulations, which transposed into Irish law the EU Remedies Directive (described in more detail below) and so was not entitled to bring the

proceedings challenging the impugned decision under Regulation 8(1) of those Regulations.

2. Word Perfect had sought to challenge the decision to issue the RFT on several substantive grounds. The judge heard the parties' submissions on all of those grounds over the course of a four-day hearing in the High Court. The judge was persuaded by the respondent that, for various reasons, including the urgency of the matter, from the respondent's perspective at least, and as there were no facts in dispute, he should decide the standing issue first, in advance of deciding the substantive issues in the case. The judge gave judgment on 2 February 2022 ([2022] IEHC 54) and decided that Word Perfect was not an "*eligible person*" within the meaning of that term in the Remedies Regulations and did not, therefore, have standing to bring the proceedings, in circumstances where it had not submitted a tender in response to the RFT and where there were no exceptional circumstances in which, in effect, its failure to submit a tender could be overlooked. The High Court then made an order on 9 February 2022 giving effect to the judgment and refusing the reliefs sought by Word Perfect in the proceedings.

3. Word Perfect immediately appealed to this Court. The appeal was opposed by the respondent. While the automatic suspension of the entitlement of the respondent to conclude a framework agreement with successful tenderers under the competition lapsed on the making of the order by the High Court, the respondent undertook not to conclude any contract until the determination of the appeal.

4. The appeal involves a net issue, namely, whether Word Perfect was and is an "*eligible person*" within the meaning of that term in Regulation 4 of the Remedies Regulations, such that it had and has standing to maintain its challenge to the decision to issue and adopt the RFT. There are a number of judgments of the CJEU and of the Irish courts which are relevant to the resolution of the net issue. The judge considered and

applied the principles derived from those judgments in the judgment under appeal. However, Word Perfect contends that the judge misunderstood and misapplied those judgments. It maintains that the judge was wrong to identify a general rule that, in order to have standing to challenge a decision such as the decision at issue in this case, it is necessary for an applicant to have submitted a tender unless certain exceptions apply. On the other hand, the respondent maintains that the judge correctly interpreted the cases and applied the principles to be derived from them properly in holding that, in order to have standing to challenge the decision, Word Perfect was required to have submitted a tender, did not do so and did not, and could not, rely on any exception to the general rule. That, in a nutshell, is the issue which arises on this appeal.

5. For the reasons set out in this judgment, I am satisfied that the judge correctly applied the principles set out in the CJEU judgments and in the Irish cases and correctly decided that Word Perfect was not an “*eligible person*” and did not have standing to maintain its challenge to the relevant decision on the ground that it could have submitted but did not submit a tender in response to the RFT and did not and could not rely on any of the potentially relevant exceptions.

2. Factual Background

6. The relevant facts are not in dispute. They were set out in some detail in my judgment for the Court in Word Perfect’s appeal from the decision of the High Court to lift the automatic suspension which arose under Regulation 8(2) of the Remedies Regulations, which prevented the respondent from entering into the framework agreement with those operators who had successfully tendered in response to the RFT. In a judgment for the Court delivered on 12 November 2021 ([2021] IECA 305), I allowed Word Perfect’s appeal and decided that the automatic suspension should remain in place until the conclusion of the trial, with the continuation of the suspension thereafter being a matter for

the trial judge. In the course of that judgment, I outlined in some detail the reasons for the tender process commenced by the publication of the RFT on 15 May 2021, the terms of the competition and the challenge to the competition advanced by Word Perfect in the proceedings which it commenced in June 2021. It is unnecessary to repeat much of that detail here. Fortunately, in his judgment in the High Court, the judge provided a succinct summary on which it would be difficult to improve. For ease of reference, however, and in ease of the reader properly to understand this judgment, I will briefly sketch out the relevant background and the agreed facts.

7. The RFT published on 15 May 2021 sought tenders from operators for appointment to a framework agreement from which successful tenderers would be awarded contracts to provide Irish language translation services to a wide range of public bodies, including Government departments, the HSE, schools, universities, the Courts Service and An Garda Síochána. Those bodies were expected to procure their requirements for Irish language translation services under the terms of the framework to be established (the “2021 Framework”). The 2021 Framework was intended to replace a previous framework established in 2016 (the “2016 Framework”), which expired in July 2021. The 2021 Framework is worth €10m over a four-year term. Work under the 2021 Framework is to be divided into three lots, with each lot resulting in a separate framework agreement with successful tenderers. The framework applies to contracts with a value of €25,000 upwards. The RFT provides that contracts under the 2021 Framework will be awarded by a mixture of rotation and mini-competitions depending on the value and complexity or specialised nature of the work required. In respect of Lot 1 (translation of standard text), the RFT provides that contracts for work with a value of between €25,000 and €100,000 will be awarded by rotation. Contracts of €100,000 in that lot are to be awarded by mini-competitions. All contracts in Lot 2 (translation of technical text) and Lot 3 (translation

and proofreading of legal text and documents) are also to be awarded by mini-competitions. These mini-competitions are to be conducted among tenderers with whom the respondent entered into a framework agreement. The backdrop to the competition to establish the 2021 Framework is that there is a statutory obligation on many public bodies under the Official Languages Act 2003 to translate a wide range of materials into Irish.

8. Word Perfect was a party to the 2016 Framework and was the leading supplier of Irish translation services under that Framework. However, it decided not to submit a tender on foot of the RFT for the 2021 Framework. It was of the view that certain features of the tender process were unlawful and in breach of EU public procurement principles. It was unhappy with three aspects of the competition, in particular. The first concerned the intended use of the rotation system in respect of services in Lot 1, for contracts with a value of between €25,000 and €100,000. For reasons outlined at para. 17 of the 12 November 2021 judgment and at paras. 18-22 of the judgment of the High Court, Word Perfect contended that this aspect of the competition meant that the RFT was in breach of EU law. The second aspect of the competition challenged by Word Perfect was the inclusion of a minimum pricing requirement in Lots 1, 2 and 3 under which tenderers were not permitted to offer rates below certain minimum values. It claimed that the price-floor breached EU law and, in particular, the general principles of EU law of free competition as it prevented it from competing on prices below that figure, which it had successfully done previously. The third aspect of the competition challenged by Word Perfect was the minimum turnover requirement to be admitted to the 2021 Framework for each of the three lots. In each case the minimum annual turnover requirement is €40,000. Word Perfect contended that this was too low and breached various general principles of EU law.

9. The RFT was published on 15 May 2021. The deadline for the submission of tenders in response to the RFT was 14 June 2021. On 26 May 2021, Word Perfect raised a number

of clarification questions. The respondent replied to those clarification questions on 3 June 2021. In light of its belief that the tender process the subject of the RFT was unlawful, Word Perfect's solicitors sent a pre-action letter to the respondent on 4 June 2021. Further correspondence was exchanged between Word Perfect's solicitors and the Chief State Solicitor on behalf of the respondent on 9 June 2021. In a letter dated 10 June 2021, the Chief State Solicitor sent a substantive response to Word Perfect's solicitors rejecting the concerns raised by Word Perfect in respect of the tender process. At the end of that letter, the Chief State Solicitor stated:

“Our client does not consider that the RFT is unlawful and will not alter the terms of the tender or abandon this competition. It is their sincere hope that your client, as an important supplier in this market, will choose to tender and participate in the competition which aims to provide high calibre Irish translation services to framework clients into the future.”

10. Word Perfect relies on its involvement in the process in terms of seeking clarifications concerning the RFT and on that passage in the Chief State Solicitor's letter of 10 June 2021 as evidence of its interest in obtaining the relevant contract to be admitted to the 2021 Framework.

11. Word Perfect commenced the proceedings challenging the decision to adopt and publish the RFT on Friday, 11 June 2021. It took the view that the 30-day time limit for challenging the RFT under Regulation 7(2) of the Remedies Regulations expired on 13 June 2021 (which was a Sunday). Word Perfect was concerned that if it waited until the following day, Monday, 14 June 2021, it might be out of time. 14 June 2021 was also the deadline for the submission of tenders in response to the RFT.

12. Word Perfect decided not to submit a tender. The reasons for that decision were clearly set out in a number of affidavits sworn by Agim (Jimmy) Gashi, a director and the operations manager of Word Perfect. In his affidavit of 23 July 2021, Mr. Gashi stated:

“However, on seeing the RFT and in light of the rules adopted in the RFT, which we say are blatantly unlawful, we took the view that we had no other option but to challenge those rules, rather than participate in a process which was fundamentally flawed and unlawful.” (para. 77)

13. In his affidavit of 26 August 2021, Mr. Gashi stated.

“Similarly, the applicant did not submit a tender in light of what it considered to be very clear breaches on the part of the Respondent and how the competition is structured and the Applicant was simply not prepared to participate in a process that the Applicant believed was unlawful and fundamentally flawed.” (para. 28)

14. Finally, in his affidavit of 3 December 2021, Mr. Gashi stated:

“We did not wish to participate in a tender process that we considered to be unlawful and instead have exercised our rights to bring these proceedings.” (para. 14).

15. Consistent with these averments, in its written submissions for this appeal, Word Perfect stated:

“The tender submission deadline was on 14 June 2021. However, Word Perfect decided not to tender, given that it considered the rules of the competition to be unlawful.” (para. 18)

16. In his oral submissions on the appeal, Word Perfect’s counsel stated:

“We decided not to tender because we considered the RFT to be unlawful.”

17. Word Perfect agrees that there was no impediment to it putting in a tender and it did not seek to rely on any of the exceptional circumstances referred to in the case law. It did

not accept that it was necessary to put in a tender or to point to any exceptional circumstances in order to demonstrate its interest in obtaining the contract. The judge explained at para. 82 of his judgment that Word Perfect was not claiming that any of the exceptions referred to in the case law applied to it. He continued:

“On the contrary, it states that it decided not to tender. Indeed, the whole tenor of its submissions is that, as the leading supplier of Irish translation services, the rotation system, the floor price and the allegedly low turnover requirement, while they did not prevent Word Perfect from winning any State translation contracts, were likely to reduce its current market share of the State translation contracts since it would prejudice efficient firms (and Word Perfect claims to be one such firm) from tendering at prices before the price-floor.”

18. The judge then referred to the evidence of Word Perfect’s expert economist, Dr. Patrick McCloughan who stated that he had:

“...accepted that the turnover requirement did not prevent Word Perfect from bidding and that it could bid at above the floor-price and that if it did, it would have a very good chance of getting onto the Framework.” (para. 82)

19. There was no dispute between the parties in the High Court that the features of the RFT about which Word Perfect were complaining did not prevent it from putting in a tender or from obtaining a place on the 2021 Framework. Dr. McCloughan agreed that the turnover requirement did not prevent Word Perfect from tendering in response to the RFT. As noted by the judge, Dr. McCloughan accepted that Word Perfect could submit a tender at above the floor price and that if it did, *“in principle”*, it would have a very good chance of getting onto the 2021 Framework unless there was some disastrous failure in quality. Dr. McCloughan further accepted that none of the three features about which Word Perfect was complaining meant that a tender by Word Perfect was *“doomed to fail”*. He accepted

that if Word Perfect had put in a bid, “*in principle*”, none of those three features meant that Word Perfect’s bid would have been rejected. The respondent’s expert, Dr. Kevin Hannigan, gave evidence that if Word Perfect had put in a bid which complied with the requirements of the RFT it “*could have expected a place on the framework*” and that there was a “*very high probability of that.*” Although not expressly referring to Dr. Hannigan’s evidence, the judge appears to have proceeded on the basis that there was no disagreement between the parties on this issue.

20. In the proceedings, Word Perfect sought orders pursuant to Regulations 8(1)(a) and/or 9 and/or 14 of the Remedies Regulations setting aside, quashing or permanently suspending the respondent’s decision to adopt and publish the RFT, as well as interlocutory orders suspending the tender process and/or the procedure for the award of any contract on foot of the RFT and/or suspending implementation of the respondent’s decision. Various other orders were sought, including declarations and damages. In its statement of grounds, Word Perfect alleged that by reason of the three features of the competition complained of, the rules of the competition set out in the RFT were unlawful. At para. 15 of the statement of grounds, it was stated that the proceedings “*concerned the rules set out in the RFT*”. The proceedings did not, therefore, challenge any decision by the respondent to award to or to enter into any particular contract with a successful tenderer. In Part IX of the statement of grounds, at paras. 19-21 it was pleaded that:

- “(1) *Word Perfect is an “eligible person” within the meaning of Regulation 4 of the Remedies Regulations;*
- (2) *Word Perfect has an interest in obtaining the public contracts which are the subject of the RFT and of competing to provide services to the contracting authorities identified in the RFT; and*

(3) *Word Perfect has been harmed by and/or is at risk of being harmed by the alleged infringements on the part of the respondent.*”

21. Relying on the fact that it raised clarification questions in response to the RFT and issued pre-action correspondence, as well as relying on the contents of the Chief State Solicitor’s letter of 10 June 2021, Word Perfect also relies on certain averments by Mr. Gashi, which it maintains amount to uncontroverted evidence of its interest in obtaining the contract to be admitted to the 2021 Framework.

22. In his affidavit of 23 July 2021, Mr. Gashi stated:

“The 2016 Framework and, therefore, any replacement Framework, is of considerable importance to Word Perfect. As a provider of translation services throughout the State, the provision of Irish language translation services is very important to our company, not only because of the business generated from providing such services, but also because it is important for us from a reputational perspective to provide Irish language translation services to public bodies. That is especially so given that Irish is the official language of the State and I believe it to be important for any substantial Irish-based translation services company to be in this particular segment of the translation business.” (para. 11)

23. In his affidavit of 3 December 2021, Mr. Gashi stated:

“I wish to confirm that the Applicant has at all times and remains very interested in obtaining the contract that is the subject of these proceedings. We do not wish to participate in a tender process that we considered to be unlawful and instead have exercised our right to bring these proceedings. The contract at issue is of immense importance to the Applicant, as I discussed in my earlier affidavits, and we obviously would not have brought these proceedings were that not so.” (para. 14)

24. The respondent disputed Word Perfect's entitlement to maintain the proceedings. In response to para. IX of the statement of grounds, the respondent pleaded at para. 4 of its statement of opposition that:

- “(1) [Word Perfect] did not submit a tender or tenders pursuant to the RFT, as a consequence of which it is not an “eligible person” for the purposes of the... [Remedies Regulations]...;*
- (2) [Word Perfect] was not excluded from submitting tenders by anything other than its voluntary decision.*
- (3) [Word Perfect] failed to avail of the opportunities afforded to it to participate in the development of the Framework Agreements described in the RFT, prior to the Decision.”*

25. At para. 87 of his judgment in the High Court, the judge expressed his agreement with Word Perfect that it had an interest in the tender process *“as that term is generally understood”*. However, he went on to hold that it did not have an *“interest”* in obtaining the particular contract for the purposes of Regulation 4 of the Remedies Regulations as that term has been interpreted and applied in the European and Irish cases.

26. As noted earlier, although he heard submissions from the parties on the substantive points of challenge advanced by Word Perfect as well as on the standing issue, the judge was persuaded by the respondent to decide the standing issue first. He decided that issue against Word Perfect and as a result refused the relief sought by it.

27. Those are the relevant facts for the purposes of the net issue which the Court has to decide. I now turn to consider the relevant statutory provisions.

3. Relevant Statutory and EU Legislative Provisions

28. The parties are agreed on the applicable statutory and EU law provisions. The starting point is Council Directive 89/665/EEC of 21 December 1989 on the co-ordination

of the laws, regulations and administrative provisions relating to the application of review proceedings to the award of public supply and public works contracts (as amended) (the “Remedies Directive”). Two of the recitals to the Directive are of relevance. The first states that *“effective and rapid remedies must be available in the case of infringement of Community law in the field of public procurement or national rules implementing that law”*. The second refers to the need *“to ensure that adequate procedures exist in all the Member States to permit the setting aside of decisions taken unlawfully and compensation of persons harmed by an infringement.”*

29. The Remedies Directive was transposed into Irish law by the European Communities (Public Authorities’ Contracts) (Review Procedures) Regulations 2010 (S.I. No. 130 of 2010) as amended by the European Communities (Public Authorities’ Contracts) (Review Procedures) (Amendment) Regulations 2015 (S.I. No. 192 of 2015) and by the European Communities (Public Authorities’ Contracts) (Review Procedures) (Amendment) Regulations 2017 (S.I. No. 327 of 2017) (together the “Remedies Regulations”).

30. Article 1(1) of the Remedies Directive notes that framework agreements come within the terms of the Directive. It requires that Member States take the measures necessary to ensure that as regards certain contracts:

“...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.”

31. Article 1(3) provides:

“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.”

32. This provision sets out the standing requirement contained in the Remedies Directive. The “*detailed rules*” referred to in Article 1(3) are contained in Regulation 4 of the Remedies Regulations. It is in similar but not identical terms. Regulation 4 which bears the heading “*Persons to whom review procedures are available*”, provides:

“(4) For the purposes of these regulations, a person is an eligible person in relation to a reviewable public contract if the person –

- (a) has, or has had, an interest in obtaining the reviewable public contract, and*
- (b) alleges that he or she has been harmed, or is at risk of being harmed, by an infringement, in relation to that reviewable public contract, of the law of the European Communities or the European Union in the field of public procurement, or of a law of the State transposing that law.”*

33. Regulation 4 uses the term “*reviewable public contract*” in place of the term “*particular contract*” in Article 1(3). There is no significance to the different terminology. It is accepted that the Remedies Directive and the Remedies Regulations apply to the tender process provided for in the RFT and to any framework agreement to be entered into with successful tenderers. Under Article 1(3) of the Remedies Directive and Regulation 4 of the Remedies Regulations, a person can invoke the review procedures provided for where the person (a) has or has had an “*interest*” in obtaining the relevant contract and (b) alleges that he or she has been harmed or is at risk of being harmed by an alleged infringement of EU law in the field of public procurement or of Irish law transposing that law. The crux of the issue between the parties is whether Word Perfect has or had an “*interest*” in obtaining the contract to be admitted to the 2021 Framework

within the meaning of that term in Article 1(3) of the Remedies Directive and Regulation 4 of the Remedies Regulations.

34. Article 2(1) of the Remedies Directive is also relevant. Under that provision, Member States are required to ensure that measures taken concerning the review procedures specified in Article 1 must include provision for the 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.”*

35. The requirements contained in Article 2(1) are reflected in, and were transposed by, Regulation 8 of the Remedies Regulations. Under Regulation 8(1) an “*eligible person*” may apply to the High Court:

- “(a) for interlocutory orders with the aim of correcting an alleged infringement or preventing further damage to the eligible person’s interests, including measures to suspend or to ensure the suspension of the procedure for the award of the public contract concerned or the implementation of any decision taken by the contracting authority, or*

(b) *for review of the contracting authority's decision to award the contract to a particular tenderer or candidate.*"¹

36. There is an obligation in Regulation 8(4) for a person intending to make an application to the Court under Regulation 8 to first notify the contracting authority in writing of certain matters. That was the purpose of the pre-action correspondence sent by Word Perfect to the respondent on 4 June 2021.

37. The time period within which an application under Regulation 8(1) must be made is set out in Regulation 7(2). That provides that such an application must be made "*within 30 calendar days after the applicant was notified of the decision, or knew or ought to have known of the infringement alleged in the application*". That period can be extended. Regulation 10(2) states that rules of court "*may provide for the Court to grant leave, if the Court considers that there is good reason to do so, to make an application under Regulation 8 after the latest time permitted by Regulation 7(2)*". Those rules are contained in O.84A, r.4(2) RSC, which states that the High Court may grant an extension of time where it considers that there is "*good reason to do so*".

38. Regulation 10(1) provides that rules of court may provide for a "*preliminary procedure to decide whether an applicant under Regulation 8 is an eligible person in relation to a particular reviewable public contract.*" Provision for such an application is contained in O.84A, r.6(2) RSC. This provides for a procedure whereby an issue as to whether an applicant is an "*eligible person*" for the purposes of Regulation 4 may be determined as a preliminary issue. There was no application to have the issue of standing in this case determined as a preliminary issue. The issue was raised in the pleadings and in the submissions, as explained earlier, and was addressed in the course of the hearing,

¹ Although Regulation 8(1) does not appear expressly to include provision for review of a decision taken by the contracting authority in the course of the procedure for the award of the public contract short of the decision to award the contract to a particular tenderer or candidate, no point or issue was taken by any of the parties in respect of that apparent lacuna. The requirement to make provision for such review clearly arises under Article 2(1)(b) of the Remedies Directive.

although ultimately dealt with by the judge in advance of the other issues in the case. The judge decided that there was no obligation on the respondent to deal with the standing or eligibility issue as a preliminary issue and noted that the issue was dealt with in the same way (i.e. with the substantive issues in the case) in the leading Irish case of *Copymoore Limited & Ors v. Commissioners of Public Works in Ireland* [2013] IEHC 230 (“*Copymoore (No. 1)*”). It was, however, dealt with by way of a preliminary application in another of the Irish cases, *Payzone Ireland Limited v. National Transport Authority* [2021] IEHC 212 (“*Payzone*”). While Word Perfect argued in the High Court that it ought to have been dealt with as a preliminary issue and the judge disagreed, no appeal was brought by Word Perfect on that issue. The fact that the issue was not raised as a preliminary issue could, of course, be relevant to the question of costs and was considered in that context in a subsequent judgment delivered by the judge on the question of costs in this matter on 7 April 2022 ([2022] IEHC 219).

4. The Judgment of the High Court

39. In a detailed judgment the judge upheld the respondent’s objection to Word Perfect’s standing to challenge the decision adopting the RFT. He held that Word Perfect was not an “*eligible person*” within the meaning of that term in Regulation 4 of the Remedies Regulations on the ground that it did not have an interest in obtaining the contract for admission to the 2021 Framework.

40. Having set out the relevant background to the proceedings, the complaints made by Word Perfect in the proceedings concerning the RFT and the consequences of the automatic suspension on the contract award process, the judge then explained why he had decided to deal with the standing or eligibility issue as a standalone issue. Since Word Perfect has not appealed against the judge’s decision to deal with the standing issue in this way, it is not necessary to outline the judge’s reasons for doing so. I should make clear,

however, that I fully agree with those reasons and accept that it was the appropriate course of action for the judge to adopt.

41. The judge then proceeded to consider the standing issue. He set out the respective contentions of the parties, noting that Word Perfect was asserting an interest in obtaining the contract at issue, that it was the leading supplier of Irish translation services under the 2016 Framework and that, faced with what it considered to be an unlawful competition, it chose to bring the proceedings rather than to participate in such a process. Word Perfect contended that there was no requirement for it to have submitted a tender in order for it to be an “*eligible person*”. Word Perfect maintained that on the facts it complied with Regulation 4 and was clearly an “*eligible person*” with standing to bring the proceedings.

42. The respondent disagreed. It disputed Word Perfect’s interpretation of the term “*interest in obtaining*” the relevant contract for admission to the 2021 Framework. The respondent relied principally on the judgment of the CJEU in Case C-230/02 *Grossmann Air Service v. Republik Österreich* [2004] ECR I-1829 (“*Grossmann*”) and the judgment of Hogan J. in the High Court in *Copymoore (No. 1)*. The respondent relied on the emphasis in those cases on the significance of the applicant having submitted a tender in the procurement process in order to have standing to challenge the particular decision in that process.

43. Word Perfect disputed that interpretation and made the point that in both *Grossmann* and *Copymoore (No. 1)* the challenge was to the decision to award the particular contract after the tender process whereas it was seeking to challenge the legality of the RFT and not a decision to award a contract under the 2021 Framework since the automatic suspension on the award of such contracts remained in place.

44. Since Hogan J. in *Copymoore (No. 1)* dealt in detail with and quoted extensively from *Grossmann*, the judge based his analysis of the legal issues on *Copymoore (No. 1)*.

He identified some of the critical passages in *Copymoore (No. 1)* and *Grossmann*, including Hogan J.'s statements that “[it] is impossible to overlook the fact that the applicants did not submit a tender” and that in *Grossmann* the fact that no tender was submitted by the party seeking the review was regarded by the CJEU as “well-nigh dispositive” of the standing issue (para. 21 of *Copymoore (No. 1)*). The judge referred to the endorsement by Hogan J. of the statement by the CJEU in *Grossmann* that if a person “has not submitted a tender it will be difficult for such a person to show that he has an interest in challenging that decision or that he has been harmed or risked being harmed as a result of that award decision.” (para. 27 of *Grossmann*, para. 21 of *Copymoore (No. 1)*).

45. Having referred to Hogan J.'s reference to the fact that the CJEU in *Grossmann* acknowledged that there might be circumstances in which the tender terms were “so discriminatory that it would be pointless to insist on the parties seeking review to have submitted a tender even though it knew it was bound to be unsuccessful.” (para. 22 of *Copymoore (No. 1)*), the judge then reproduced paras. 22 and 23 of *Copymoore (No. 1)* in which Hogan J. in turn reproduced the contents of paras. 28-40 of the judgment of the CJEU in *Grossmann*. Those paragraphs included the CJEU's statement that “where an undertaking has not submitted a tender because there were allegedly discriminatory specifications in the documents relating to the invitation to tender, or in the contract documents, which have specifically prevented it from being in a position to provide all the services requested, [the undertaking] would be entitled to seek review of those specifications directly, even before the procedure for awarding the contract concerned is terminated.”

46. The judge gave emphasis to certain parts of the judgment in *Grossmann* as endorsed by Hogan J. in *Copymoore (No. 1)* (which I will consider in more detail below). He emphasised the statement by Hogan J. at para. 24 of *Copymoore (No. 1)* that the “clear

implication” of the decision in *Grossmann* is that the Remedies Directives “*positively precludes*” entities which neither submitted a tender nor challenged discriminatory tender criteria during the tender process from being regarded as eligible persons. The judge further noted that Hogan J. made reference to the judgment of the CJEU in Case C-129/04 *Espace Trianon S.A.* [2005] ECR. I-7805 (“*Espace Trianon*”) and observed that the CJEU “*again (at least) strongly implied that only persons who participated in the tender process have an interest in challenging the tender award*” (para. 25 of *Copymoore No. 1*).

47. The judge relied on the fact that at para. 30 of his judgment, Hogan J. stated that the applicants in that case who had not submitted a tender and had not taken action to challenge the tender process prior to the award of the contract “*must presumptively be regarded as not constituting ‘eligible persons’ as that term must be understood in light of Grossmann Air Services, since they did not submit a tender nor challenge its terms in legal proceedings prior to the actual award*”. (para. 30 of *Copymoore No. 1*).

48. The judge also endorsed the subsequent paragraphs in Hogan J.’s judgment where he acknowledged that there will be cases where an entity can challenge the contract award without having participated in the tender process but said that those cases “*are exceptional*”. Hogan J. had referred in that context to the judgment of Finlay Geoghegan J. in the High Court in *Ryanair Ltd v. Minister for Transport & Ors.* [2009] IEHC 171 (“*Ryanair*”). The judge noted that Hogan J. accepted that there may be other exceptions, including the failure properly to advertise the tender process as a result of which potential tenderers failed to submit a bid (para. 32 of *Copymoore (No. 1)*).

49. The judge also reproduced para. 33 of Hogan J.’s judgment in which he acknowledged that the question as to whether a particular entity satisfied the test of eligibility “*cannot always be determined in the abstract or by reference to some a priori formula such as whether a tender has actually been submitted*” and noted that allowance

would sometimes have to be made for the “*nature of the tender irregularity alleged*” before the question of eligibility could be completely determined (para. 33 of *Copymoore (No. 1)*). The judge noted that Hogan J. held that as the applicants in *Copymoore (No. 1)* had not submitted a tender and did not fall within any of the exceptions, they were not “*eligible persons*” under the Remedies Regulations and so their challenge under those Regulations was dismissed.

50. The judge then referred to the way in which the CJEU had reframed and answered the questions referred to it by the Austrian Court in *Grossmann*. The judge stated that the CJEU held in that case that the Remedies Directive did not preclude a person from being an “*eligible person*” where it had not submitted a tender in circumstances where it could not supply the services the subject of the tender due to the allegedly unlawful terms of the tender. The judge stated that the CJEU had, therefore, interpreted the Remedies Directive as meaning that the person in those circumstances “*may be regarded (as distinct from ‘must be regarded’)* as an eligible person and so this is a permitted exception to the requirement that a person, to be eligible to challenge a tender, must submit a tender”. (para. 72).

51. The judge summarised the analysis in *Grossmann* and *Copymoore (No. 1)* as being that in order for a person to be eligible to challenge procedures for the award of a contract under a public procurement process, the person must have an “*interest in obtaining*” the contract and must allege that it has been harmed or is at risk of being harmed by the alleged infringement. He noted that Regulation 4 of the Remedies Regulations (and Article 1(3) of the Remedies Directive) were interpreted by the CJEU in *Grossmann* and by Hogan J. in *Copymoore (No. 1)* in the context of a challenge to the award of a contract as distinct from a challenge to the terms of a request for tender (para. 74). The judge then stated (at para. 75):

“From these judgments, it is clear that the way to show that a party has an interest in a contract, for the purposes of Regulation 4, is primarily, and almost exclusively, by tendering for that contract.”

52. The judge stressed that in *Copymoore (No. 1)* Hogan J. stated that the “clear implication” from the approach taken by the CJEU in *Grossmann* was that the Remedies Directive “positively precludes” a person who has not submitted a tender from being an “eligible person” (para. 76). The judge noted again the terms used by Hogan J. that it was “impossible to overlook” the failure to put in a tender and that such would be “well-nigh dispositive” of the question as to whether that person had an “interest in obtaining” the relevant contract and that is was, therefore, “dispositive” of the issue as to whether that person was an “eligible person” for the purpose of challenging the tender process (para. 77).

53. The judge stated that that conclusion complied with logic, as Regulation 4 was not concerned with persons who had a “general interest” in tenders but rather with persons who had an interest in a “specific” contract. What better way, the judge asked, can one establish that a person has an interest in a specific contract “than by tendering for that contract”? That was not so, he said, where it would be pointless for the person to put in a tender where it would not be awarded the contract because of the allegedly unlawful terms of the tender process, although he noted that was not alleged by Word Perfect in this case. The judge then stressed that it is “tenderers” who are entitled to challenge the legality of a tender process and not “potential tenderers or others who might be said to have an interest, more generally, in the contract whether that is because of their involvement in a previous tender process, or because they are a major supplier of the services in question in the market generally or because of some engagement with the contracting authority complaining about the terms of the Request for Tender...”. (para. 79)

54. The judge stated that the conclusion that it is “*only tenderers, subject to exceptional circumstances, who can challenge a public procurement process*” is also supported by the opinion of Advocate General Stix-Hackl in *Espace Trianon* (referring to para. 48 of her opinion in that case)

55. The judge then considered exceptions to the requirements to submit a tender and found that those exceptions were not claimed and did not apply in this case. At para. 81 he stated:

“However, it is important to bear in mind that it is also clear from Copymoore and Grossmann that there are some exceptional situations in which a person will be regarded as having an interest even where [it] has not tendered for the contract, e.g. where it would be pointless insisting on an applicant, who wishes to challenge a tender process, submitting a tender even though [it] knew it was bound to be unsuccessful.”

56. The judge noted that those exceptions, referenced to by Hogan J. and by the CJEU in their interpretation of Regulation 4 and Article 1(3) respectively, were of no relevance in the present case since Word Perfect was not claiming that any of these exceptions applied to it. On the contrary, he noted, Word Perfect stated that it “*decided not to tender*” (para 81). In the same paragraph, the judge referred to Word Perfect’s expert evidence that the turnover requirement did not prevent it from putting in a tender and that it could have tendered above the floor-price. If it did, it would have had “*a very good chance of getting onto the Framework*” (para. 82).

57. The judge noted that since Word Perfect was not claiming to be entitled to rely on any exceptions, its argument on eligibility was focused on its view that the interpretation of Regulation 4 in *Copymoore (No. 1)* and of Article 1(3) in *Grossmann*, which requires a person seeking to challenge a tender process to have put in a tender for the contract, did not

apply to it, as it was challenging the terms of the tender process set out in the RFT and not the award of the contract itself.

58. The judge regarded Word Perfect as claiming that test for determining eligibility in the case of a challenge to the terms of a tender process was different from the test applicable in the case of a challenge to the award of a contract at the end of that process. The judge described Word Perfect as claiming that there is a *“different eligibility test, depending on the form or timing of the challenge to the tender process”* (para. 85). He described Word Perfect as claiming that the eligibility or *“interest”* test in a case of a challenge to the terms of the tender process would be satisfied *“where the challenger has an interest, as that term is more generally understood, in the tender process, such as where, as in this case, Word Perfect was the leading incumbent supplier of translation services under the previous tender process.”* (para. 86). He described Word Perfect’s case as being that it should be regarded as *“having an interest in”* the relevant contract, as that term is *“normally understood”*, and that such interest was acknowledged by the respondent in the Chief State Solicitor’s letter of 10 June 2021 to which reference has been made earlier (para. 86).

59. The judge then stated (at para. 87):

“This Court would agree with Word Perfect that it has an interest in the tender process, as that term is generally understood. However, there is case law, to which reference has been made, as to how the expression ‘interest’ in Regulation 4 is to be interpreted. This makes it quite clear that the (almost) exclusive way to establish this interest is by submitting a tender and a failure to do so is practically dispositive of any question of the person having an interest.”

60. The judge then considered whether there was any merit to the claim by Word Perfect that the interpretation given in the cases to the term *“interest”* in obtaining a contract in

cases involving challenges to a contract award decision does not apply to a challenge to the terms of a tender process such as the challenge to the RFT in this case. Para 89 records the judge as stating that “*the answer to this question is yes*” for a number of reasons. This would appear to be a typographical error as the judge went on to reject the case which he recorded Word Perfect as making that a different test applied to a challenge to the terms of a tender process such as the challenge to the RFT in this case. The judge gave five reasons for his conclusion that the same interpretation applied irrespective of the nature of the decision being challenged and the timing of that challenge. Those reasons were:

- (i) The terms of Regulation 4 did not distinguish between eligibility for the purposes of a challenge to a contract award decision and eligibility for the purpose of a challenge to other decisions in the process such as the challenge to the RFT;
- (ii) The significant consequences of the commencement of a challenge to a public procurement process, namely, the automatic suspension of the award of the contract, were the same irrespective of whether the challenge was to the contract award decision or to a challenge to other decisions earlier in the process, such as the challenge to the RFT;
- (iii) Having regard to the interests of other parties affected, including persons who have put in tenders, a strict interpretation of the eligibility requirements was necessary, irrespective of the nature of the decision challenged, having regard to the consequences of the automatic suspension of the process;
- (iv) The Irish and European cases do not distinguish between challenges to contract award decisions and challenges to decisions taken at an earlier point in the process. In particular, the judge stated that there was nothing in *Grossmann* and *Copymoore (No. 1)* to support the conclusion that the principles set out in

those cases with respect to the interpretation of the standing or eligibility requirements were not equally applicable to challenges to other decisions such as the challenge to the RFT in this case. He felt that the fundamental principle in those cases, that an applicant should have submitted a tender unless one of the exceptions applied (such as where allegedly discriminating terms in the tender process prevented the applicant from providing the services), was applicable in both the case of a challenge to a contract award decision and to challenges to decisions earlier in the process. He stated that as Word Perfect did not claim that alleged discriminatory terms prevented it from supplying the services, it had to put in a tender before it could challenge the tender process before the contract was awarded (para. 108);

- (v) The CJEU has, in fact, applied the principles in *Grossmann* in a case involving a similar challenge to the terms of a tender process prior to a contract award decision in Case C-328/17 *Amt Azienda Trasporti e Mobilità SpA v. v Atpl Liguria* (“*Amt*”) (paras. 109-118). Having noted that the CJEU in *Amt* held that the findings derived from *Grossmann* were applicable “*mutatis mutandis in the present case*”, the judge stated (at para. 119):

“Similarly, in this case, this Court does not see any issue with it concluding that the interpretation of Article 1(3)/Regulation 4 in Copymoore and Grossmann should be applied in Word Perfect’s case to a challenge to a Request for Tender in the same way as it applies to a challenge to an award of a contract.”

61. The judge then addressed three other points made by Word Perfect. First, he dealt with the argument made by Word Perfect, based on the 30-day time limit to challenge the decision contained in Regulation 7(2) of the Remedies Regulations, that if it had decided to

submit a tender on the last date for submissions of tenders, 14 June 2021, after it had issued its proceedings on 11 June 2021, Word Perfect would only become an “*eligible person*” **after** it had issued the proceedings and not **at the time** it issued the proceedings, if the respondent’s interpretation of Regulation 4 were correct. Word Perfect contended that that would be absurd as it must be necessary to be able to know whether an applicant was an “*eligible person*” at the time it issued the proceedings and not at some point thereafter. The judge rejected that argument. He stated (at para. 128) that whether Word Perfect was an “*eligible person*” was “*completely within its own control, since it can simply submit a tender at any time*”. Therefore, “*any absurdity is brought about by its own decision not to submit a tender, combined with its decision as to when it issued the proceedings.*” The judge rejected the contention that Regulation 7(2) supported Word Perfect’s interpretation of Regulation 4. The judge then stated (at para. 130):

“What Word Perfect decides to do regarding the timing of its challenge is a separate matter, it is still required to be an eligible person, and whether it institutes proceedings on the day the Request for Tender is issued or on the expiry of the tender deadline is a matter for it.”

62. It might be noted here that it is the 30-day time limit contained in Regulation 7(2) which determines the date by which the proceedings would have to be issued rather than, as the judge may have suggested, the expiry of the tender deadline, unless of course the latter date was within the 30-day period or any period of extension granted by the Court. The judge further concluded that Regulation 4 was not implicitly amended by Regulation 7 in the manner suggested by Word Perfect.

63. Second, the judge dealt with the argument made by Word Perfect in reliance on O.84A, r.6(2) RSC and held that there was no obligation on the State to deal with the

eligibility question by way of a preliminary motion. He held that it was entitled to have the issue dealt with at the plenary hearing, as had happened in *Copymoore (No. 1)*.

64. Third, and finally, the judge dealt with an argument made by Word Perfect that the respondent had not objected to Word Perfect's standing in other proceedings in which Word Perfect has challenged another tender process for the procurement of foreign language interpretation services (which challenge was heard in the week prior to the hearing of this case). The judge felt that the difference in the approach taken by the respondent in that case and in the present case was irrelevant and had no bearing on the proper interpretation of the term "*eligible person*" in Regulation 4 of the Remedies Regulations. In any event, he held that in the other case, when Word Perfect challenged the tender process, the respondent decided to place the entire tender process on hold. In those circumstances, the judge stated that it would not have been appropriate for the respondent to claim that Word Perfect did not have standing as it had not submitted a tender in circumstances where the whole tender process had been put on hold (para. 136). The judge further held that, in any event, the fact that a party chose not to take a point based on the interpretation of a particular provision in one case does not have a bearing on the court's approach to the interpretation of the relevant term where an issue of interpretation is raised in another case. (para. 139).

65. In his summary section at the end of his judgment, the judge held that the eligibility requirement in the case of a challenge to a request for tenders is the same as that which applied in the case of challenge to the award of a contract, namely, that "*save in the most exceptional circumstances the applicant has to have submitted a tender*" (para. 140). He noted that the case law showed that the eligibility requirements were "*very strictly applied so that the failure to tender is 'nigh dispositive' (per Hogan J.) of an applicant's claim that it is entitled to challenge a tender process (if it did not submit a tender)*" (para. 141). He

stated that there were “*exceptional cases in which a failure to tender is not dispositive*”. (para. 142). He went on to state (at para. 144):

“However, crucially there is nothing in these three allegedly unlawful terms in the Request for Tender which prevented Word Perfect from tendering, or which prevented it from being awarded a contract. Accordingly, Word Perfect does not, and cannot, rely on any of the exceptions to say that it is ‘eligible’ to challenge the tender process (without having to submit a tender).”

66. Noting that Word Perfect “*chose not to submit a tender*”, the judge stated that that fact was “*impossible to overlook*” when determining the question of eligibility.

He stated:

“Without having tendered in the process, Word Perfect has challenged the legality of the entire process and so has stalled its operation by virtue of the automatic suspension which applies to public procurement contracts when a challenge is instituted.” (para. 145)

67. The judge concluded that for the reasons set out in his judgment, Word Perfect never had standing to bring the challenge as it had not submitted a tender. On that basis he concluded that the proceedings should be dismissed, and the automatic suspension should come to an end.

5. The Appeal

(a) Word Perfect’s Position

68. In its notice of appeal, Word Perfect maintains that the judge erred in determining that it was not an “*eligible person*” for the purpose of bringing the proceedings, in determining that it did not have an “*interest*” in obtaining the contract the subject of the proceedings and in determining that it never had standing and in dismissing the proceedings.

69. It contends, first, that:

- (a) The judge erred in his interpretation and application of Regulation 4 of the Remedies Regulations and Article 1(3) of the Remedies Directive in circumstances where (i) the evidence before the Court was that Word Perfect had and has an “*interest*” in obtaining the relevant contract for the admission to the 2021 Framework and (ii) the evidence of its interest is undisputed but, it says, was not referred to by the judge in his judgment, and
- (b) the judge erred in his interpretation and application of the case law, including *Grossmann, Amt* and *Copymoore (No. 1)*, in that the judge wrongly extrapolated from the case law a rule that a person could only be an “*eligible person*” for the purposes of Regulation 4 where either (a) it had submitted a tender in the tender process or (b) its failure to do so was due to the fact that any tender it submitted was bound to be unsuccessful.

70. Second, Word Perfect contends that the judge erred in determining that an applicant who seeks to challenge the lawfulness of tender documents was required to submit a tender before commencing proceedings, even if the tender submission deadline was at a later date. It maintains that the judgment of the High Court itself creates a rule that is in breach of EU law and, in particular, in breach of the principles of legal certainty and effective judicial protection.

71. Word Perfect developed these arguments in detailed written submissions and in oral submissions at the hearing of the appeal.

72. While acknowledging that the question as to whether a person is an “*eligible person*” for the purposes of Regulation 4 of the Remedies Regulations is a mixed question of law and fact, Word Perfect contends that it is primarily a question of fact and is very fact specific. The answer, it says, should be straightforward. It relies on a number of

matters in order to demonstrate that it had and has an interest in obtaining a contract admitting it to the 2021 Framework. Those matters include the following:

- (i) It was a leading supplier of Irish translation services under the 2016 Framework;
- (ii) It obtained the RFT through the eTenders portal and raised clarification questions, thereby participating in the procurement procedure;
- (iii) It issued detailed pre-action correspondence as required under Regulation 8(4);
- (iv) The respondent recognised Word Perfect's interest, as evidenced by The Chief State Solicitor's letter of 10 June 2021; and
- (v) There was uncontroverted evidence in the form of various averments in Mr. Gashi's affidavits demonstrating Word Perfect's interest in obtaining the relevant contract.

73. Word Perfect maintains that the judge failed to ask the basic question, which was whether as a matter of fact Word Perfect had an interest in obtaining the contract. If he had asked that question, the answer would have been clear. Word Perfect does and did have such an interest.

74. Word Perfect submits that the judge's conclusion that there is a rule that a person seeking to demonstrate that it has an interest in obtaining the relevant contract must either submit a tender or demonstrate that there was no point in doing so as it would have been unsuccessful was wrong. It submits that there is no such rule in Irish or EU law and that, in concluding otherwise, the judge misinterpreted and misapplied the relevant Irish and EU cases including *Grossmann, Amt* and *Copymoore (No. 1)*. *Grossmann* and *Copymoore (No. 1)* both involved challenges to decisions to award a contract. That was not the case here. While accepting that the CJEU in *Grossmann* decided that, in the case of such a challenge, it would be difficult to show an interest in obtaining the relevant contract if the

person challenging that decision had not submitted a tender, the CJEU did not rule out the possibility of being able to do so in some other way and was, in any event, not concerned in that case with challenges to other types of decisions taken in the course of a tender procedure. Word Perfect maintains that under Regulation 4, the requirement is to demonstrate an interest in obtaining the contract and there is no requirement to submit a tender in order to do so. It pointed out that in *Grossmann* and also in *Copymoore (No. 1)* the applicant had sat back and waited before seeking to challenge the decision after the contract had been awarded. The CJEU held that it was not entitled to do so, as did Hogan J. in *Copymoore (No. 1)*. Word Perfect submits that it did precisely what the CJEU in *Grossmann* said the applicant in that case should have done, namely, it challenged the decision without delay. That is also what Hogan J. decided in *Copymoore (No. 1)*. The applicants in that case had not taken steps to challenge the procedure but waited for the contract to be awarded and then sought to do so.

75. Word Perfect contends that, contrary to the statement by Hogan J. in *Copymoore (No. 1)* (at para. 33), that it was not always possible to determine eligibility “*in the abstract or by reference to some a priori formula such as whether a tender has actually been submitted*”, that is what the judge did in the present case. It contends that the judge did so on the basis of a misapplication and misreading of the Irish and EU cases. Word Perfect submits that there is no general rule under Irish or EU law that a tender must be submitted in order to demonstrate the necessary interest in obtaining the contract unless some exception to that rule can be established on the facts and that the judge concluded otherwise on the basis of a misreading or overreading of the cases. It submits that the judge was also wrong in holding that it is only tenderers who can seek to challenge decisions taken during a tender procedure, and not “potential tenderers” or others who may be said to have an interest more generally in the contract. Potential tenderers, it

submits, must be entitled to bring proceedings where they can demonstrate the requisite interest to seek a review of decisions taken during the tender procedure. Insofar as participation in the tender process was required in order to demonstrate the requisite interest in obtaining the contract, Word Perfect submits that it participated in the process by accessing the RFT and raising clarification questions in correspondence with the respondent.

76. Word Perfect maintains that the judge was wrong in holding, first, that a rule requiring the submission of a tender in order to demonstrate the requisite interest was necessary, and second, in holding that that rule was subject to a limited exception where it would be pointless requiring the submission of a tender where that tender was bound to be unsuccessful. It submits that there is no support for the contention that this is an exception to any general rule or that it amounts to the only circumstance in which tender documents can be challenged. It points to Article 2(1)(b) of the Remedies Directive which provides that review procedures must be provided to enable challenges to be brought to a whole range of decisions in the course of the tender process and that it is possible to envisage many situations where it would be inappropriate or absurd to require the submission of a tender in order to ensure standing to challenge the particular decision. It referred, for example, to other circumstances in which the submission of a tender could not be required, such as where there had been a pre-qualification procedure for potential tenderers and the party seeking to challenge that decision had not got through the pre-qualification stage. The submission of a tender could not be required in such circumstances. It also referred to the possibility that, in respect of a challenge to a decision taken at an early stage of the tender process, the 30-day time limit to challenge the decision under Regulation 7(2) of the Remedies Regulations might expire on a date well before the tender submission deadline.

Word Perfect submits that in those situations it would be absurd to require that a tender be submitted in order for a person to have standing to challenge the decision.

77. Word Perfect sought to distinguish this case from *Grossmann, Amt* and *Copymoore (No. 1)*. *Grossmann* and *Copymoore (No. 1)* involved challenges to contract award decisions where the applicants did not submit tenders and sat back and waited to challenge the decisions until after the contract award decisions were taken. Word Perfect was not challenging a contract award decision and did not sit back and wait until such a decision was taken. In these circumstances, it must be entitled to demonstrate its interest in obtaining the contract without having to submit a tender. It sought to distinguish *Amt* on various grounds, including that the fact at issue in that case was an Italian rule which imposed a requirement to submit a tender save in limited circumstances. There is no equivalent Irish rule. Further, the exceptions permitted under the Italian rule were more extensive than that recognised by the judge on his interpretation of Regulation 4, namely, where it would be pointless insisting on the submission of a tender which was bound to be unsuccessful. Word Perfect made the point that in both *Grossmann* and *Amt*, the CJEU answered the relevant questions referred by stating that the national rules at issue were not precluded in principle by Article 1(3) of the Remedies Directive. Yet the effect of the judge's judgment was to turn the substance of the national rules at issue in those cases into the minimum required under Article 1(3) by requiring that the person submit a tender in order to have standing to challenge the decision at issue unless it is not in a position to supply the services for which tenders were invited because of allegedly discriminatory specifications (in *Grossmann*) or because clauses in the call for tenders made it impossible to submit a tender (in *Amt*). Word Perfect argued that the CJEU answered those questions in the context of the relevant German and Italian rules which have no equivalent in Irish law, which is contained in Regulation 4. Word Perfect also drew attention to the fact that,

although the CJEU in *Amt* stated that it was only in exceptional cases that a right to bring proceedings is given to an operator who has not submitted a tender, it could not be regarded as excessive to require that operator to demonstrate that the relevant clauses in the call for tenders made it impossible to submit a tender. The CJEU went on, however, to state that while the “*stringency of the evidential requirements*” is not itself contrary to EU law, it was possible that, having regard to the “*specific circumstances of the case*”, its application might lead to an infringement of the right to bring proceedings under Article 1(3) and could, subject to a factual assessment carried out by the national court, affect the plaintiff’s right to effective judicial protection.

78. Word Perfect maintains that in reading in a requirement to submit a tender save in exceptional circumstances into Regulation 4, the judge was, effectively, impermissibly legislating. It further submitted that the judge misunderstood the case it was making in the High Court. It was not saying that a different test of eligibility applied in the case of a challenge to a contract award decision to that which applied where an earlier decision in the tender process has been challenged. The same test applies, namely, the test in Regulation 4, but the way in which the person challenging the decision could show an interest in obtaining the relevant contract would depend on the particular circumstances of the case. For reasons summarised earlier, Word Perfect maintain that it has established the necessary interest for the purposes of Regulation 4.

79. Word Perfect also contends that the interpretation given to Regulation 4 by the judge amounts to a breach of EU principles of effectiveness, equivalence and legal certainty. It also made the point that the respondent had not objected to Word Perfect’s standing to maintain the other proceedings in relation to the tender process for foreign language interpretation services. It contends that the reason given by the judge for his view that it would not have been appropriate for the respondent to claim that Word Perfect did not

have standing because it had not submitted a tender was not consistent with the general rule and with the limited exception underlying the judge's interpretation of Regulation 4. Word Perfect suggested that that demonstrated an incoherence in the approach adopted by the judge.

80. Finally, in its oral submissions at the hearing of the appeal, Word Perfect sought to anticipate a point which did not arise before the High Court and was not addressed by the parties in their written submissions. The point which Word Perfect sought to anticipate was not, in fact, pursued with vigour by the respondent at the hearing of the appeal. The point was that by transposing Article 1(3) of the Remedies Directive into Irish law by means of a statutory instrument, Regulation 4 of the Remedies Regulations, the eligibility provisions could not be more liberal or go further than the minimum required or necessary under Article 1(3). Word Perfect contested the validity of that argument. However, by reason of s.3 of the European Communities Act 1972 and the case law interpreting and applying that provision, since the respondent did not make the point other than in passing, but rather contended that the interpretation of Regulation 4 on which it was relying was the interpretation given to Article 1(3) by the CJEU in the cases referred to, it is unnecessary to consider any further the brief submission advanced by Word Perfect on this point.

(b) Respondent's position

81. The respondent asks the Court to uphold the decision of the High Court and to dismiss the appeal. It stands over the judge's decision that Word Perfect is not an "*eligible person*" under Regulation 4 of the Remedies Regulation for the purposes of bringing the proceedings, that it does not and did not have an "*interest*" in obtaining the relevant contract and that it never had standing to bring the proceedings. It says that the judge was correct to dismiss them.

82. The respondent contends, first, that the judge did not err in his interpretation and application of Regulation 4 of the Remedies Regulations or Article 1(3) of the Remedies Directive and that:

- (i) the evidence before the High Court did not support Word Perfect's claim to have an "*interest in obtaining*" the contract and,
- (ii) the evidence was not sufficient to meet the threshold demonstrating an "*interest in obtaining*" the contract as that term in Regulation 4 has been interpreted by the CJEU and by the Irish Courts.

In that regard, the respondent notes that the judge referred to the relevant evidence at paras. 86 and 87 of his judgment. The respondent maintains that Word Perfect's assertion of an "*interest in obtaining*" a contract was disputed by the respondent and was not consistent with the evidence before the High Court. It maintains that the undisputed evidence is that Word Perfect was aware of the tender process provided for in the RFT and decided not to submit a tender. It points to the fact that the experts called by both sides were agreed that Word Perfect was in a position to submit a tender and that it had every likelihood of being admitted to the 2021 Framework had it done so.

83. The respondent further contends that the judge did not err in his interpretation and application of the principles set out in the European and Irish cases including *Grossmann, Amt* and *Copymoore (No. 1)*. The respondent submits that the judge correctly interpreted the case law as establishing a general principle that to qualify as an "*eligible person*" for the purposes of Regulation 4 an applicant must have submitted a tender unless exceptional circumstances exist which, the respondent contends, do not exist in the present case.

84. Second, the respondent maintains that the judge correctly rejected Word Perfect's submission that it would be absurd to interpret and apply the eligibility requirement so as to require a person to submit a tender prior to the expiration of the tender submission deadline.

The respondent further rejects Word Perfect's contention that the judgment creates a rule which is in breach of EU law and in breach of any of the general principles of EU law relied upon by Word Perfect.

85. Developing its position in written and oral submissions at the hearing, the respondent stressed the fact that Word Perfect was aware of the tender process commenced by the RFT, had sought clarifications in the course of the process, was eligible to submit a tender and the experts for both sides agreed that, had it done so, it had every likelihood of being admitted to the 2021 Framework. The respondent also stressed the timeline involved, noting that the tender submission deadline was Monday, 14 June 2021 and the proceedings were commenced by Word Perfect on Friday, 11 June 2021.

86. The respondent contends that the judge was correct in his interpretation of Regulation 4 of the Remedies Regulations and Article 1(3) of the Remedies Directive and of the CJEU and Irish judgments which have considered those provisions and was correct in identifying in the case law a general principle that, to have standing to seek a review in respect of a decision in the course of a tender process, an applicant must have submitted a tender, save in limited exceptional circumstances which do not apply in the present case. The respondent maintains that the judge correctly applied the leading cases, including *Grossmann, Amt* and *Copymoore (No. 1)*. It says that the interpretation given by the judge to Regulation 4, based on the case law, takes appropriate account of the interests of all of the parties involved, including the party seeking to challenge the decision, the contracting authority and other persons who have submitted tenders. It maintains that the general principle governing eligibility identified and applied by the judge appropriately balances the interests of all parties. The respondent contends that the general principle identified by the judge from the case law applies to determine standing to challenge all decisions in the course of a tender process and not merely the contract award decision. The same test, it

says, applies to all decisions. It relies on the judgment of the CJEU in *Amt* which applied the principles in *Grossmann* in the case of a challenge to the rules of a tender competition.

87. The respondent disputes the appellant's contention that the judge did not consider the evidence relevant to Word Perfect's claimed interest in obtaining the contract. The judge did consider the evidence including Word Perfect's position as the leading supplier of Irish translation services under the 2016 Framework, the statements made in the Chief State Solicitor's letter of 10 June 2021 and the evidence of the experts that none of the three features of the competition challenged by Word Perfect prevented it from submitting a tender and that, had it done so, it had a very good chance of being admitted to the 2021 Framework. The respondent submits that the judge was correct in concluding that the evidence did not support Word Perfect's case that it had the requisite "*interest in obtaining*" the contract for the purposes of Regulation 4 as that term was properly to be understood and applied by reference to the case law.

88. In addition to relying on *Grossmann*, *Amt* and *Copymoore (No. 1)*, the respondent also relies on a number of other European and Irish cases including *Espace Trianon*, *Payzone*, *Copymoore Limited v. Commissioners of Public Works of Ireland* [2016] IEHC 709 (McDermott J.) ("*Copymoore (No. 2)*") and *Student Transport Scheme Limited v. Minister for Education and Skills* [2012] IEHC 425 (McGovern J.) ("*Student Transport Scheme*").

89. The respondent contends that the judge was correct in his analysis of the cases and in recognising that there is a general principle requiring a person to submit a tender in order to challenge a decision made in the course of the tender process, save in limited exceptional circumstances. The exceptions would include where the terms of the tender process are so discriminatory that it would be pointless for the person seeking to challenge the relevant decision to put in a tender as its prospects of obtaining the contract would be

non-existent, where it was impossible for the person to have put in a tender by reason, for example, of the failure by the contracting authority properly to advertise the tender process and where the person had not met pre-tender qualification criteria and could not, therefore, have submitted a tender.

90. The respondent submits, relying on the opinion of Advocate General Stix-Hackl in *Espace Trianon*, that the decisive element in terms of the applicability of an exception where it would be impossible or at least pointless to put in a tender, must lie with the conduct of the contracting authority and must be distinguished from a situation where the person simply decided not to submit a tender.

91. The respondent also accepts that in considering whether an exception to the general principle requiring the submission of a tender applies, regard must be had to the nature of the infringement alleged by the party seeking to challenge the decision, as stated by Hogan J. in *Copymoore (No. 1)*. The nature of the infringement or irregularity complained of must be one which explains the failure by the person to put in a tender. However, Word Perfect did not rely on any of the exceptions and did not claim that there was any impediment to it putting in a tender. The respondent submits, therefore, that none of the potential exceptions (and it accepts that the categories or classes of exceptions are not closed) apply in this case. It contends that the Court must decide the case on the basis of the facts of this case and not on the basis of a hypothetical situation in which exceptions may exist.

92. The respondent also disputes the relevance to the present case of the 30-day time limit for challenging decisions under Regulation 7(2) of the Remedies Regulations. It points to the fact that in this case the time for challenging the RFT decision expired on 13 June 2021, a Sunday. The proceedings were commenced on Friday, 11 June 2021, while the tender submission deadline was 14 June 2021. It rejects the relevance of the argument

that in order to obtain standing to challenge a decision within the 30-day time period, a person might have to put in a tender even though the deadline for submission of tenders might be a considerable distance in the future, if the judge's interpretation of Regulation 7 were correct, and that that would be absurd. The respondent's position is that this is a hypothetical situation which does not arise on the facts of this case and that the judge was correct to consider the position on the basis of the facts of the case. It submits that this Court should approach the position on the same basis.

93. The respondent also rejects Word Perfect's contention that the judge's interpretation and application of Regulation 4 breached the principles of effectiveness, equivalence and legal certainty. It maintains that the terms of Article 1(3) of the Remedies Directive, as implemented by Regulation 4 of the Remedies Regulations, and as interpreted by the CJEU and by the Irish courts, provide for a careful balancing of those principles, taking account of all of the interests at issue, including those of contracting authorities and other persons who submitted tenders as part of the process.

94. The respondent also disputes any alleged breach of the principle of equivalence, in circumstances where the test for determining standing to challenge decisions under the Remedies Directive and Remedies Regulations is a different test to that which exists under Irish law in respect of challenges to other types of decision.

95. As regards Word Perfect's point that the respondent adopted a different position in the other proceedings heard by the judge, and did not object to Word Perfect's standing to maintain those proceedings, and that that approach undermines the respondent's approach and the judge's interpretation and application of Regulation 4, the respondent supports the reasons given by the judge for rejecting the relevance and validity of that submission.

96. The respondent also disputes the relevance of the statement which tenderers were required to sign, thereby accepting the terms and conditions of the RFT. It was suggested

by Word Perfect in its submissions on the appeal that accepting the terms and conditions of the RFT would have been inconsistent with its objections to the RFT. That was not a point made in any of the affidavits sworn on behalf of Word Perfect in the High Court, was not the subject of any submissions to the High Court and was, therefore, not addressed by the judge in his judgment. It was raised for the first time in the appeal. In any event, the respondent submitted that it had no merit as Word Perfect could have signed the statement without prejudice to its challenge.

97. Finally, in its oral submission on the appeal, the respondent tentatively advanced a submission, for the first time, based on s. 3 of the European Communities Act 1972. It did not do so with any great vigour. I address this issue very briefly towards the end of this judgment.

6. Analysis and Decision

(a) The Net Issue

98. This appeal involves a net issue, namely, whether Word Perfect was and is an “*eligible person*” within the meaning of that term in Regulation 4 of the Remedies Regulations. If it is, then it has standing to challenge the impugned decision by the respondent to issue and adopt the RFT. If the judge’s conclusion that Word Perfect is not an “*eligible person*” is correct, then it does not have standing to challenge the decision and the proceedings were correctly dismissed by the judge. It is important, therefore, to record that the appeal is not concerned with the merits of Word Perfect’s challenge and, in particular, whether its complaints about the three features of the competition challenged by it, namely, the award by rotation, the minimum pricing and the minimum turnover requirement, are well-founded.

(b) The Correct Approach to Determining Standing

99. The parties are agreed on many things. The first is that the question as to whether a person is an “*eligible person*” in the sense of having an “*interest in obtaining*” the relevant contract and being allegedly “*harmed*” or “*at risk of being harmed*” by an infringement of EU or Irish public procurement law is a mixed question of law and fact. The question of law concerns the proper interpretation of Art. 1(3) of the Remedies Directive and Regulation 4 of the Remedies Regulations, and the question of fact concerns the application of that proper interpretation to the facts of the case. Both parties agree, correctly in my view, that the resolution of the net issue involved in this case depends very much on the facts. The appropriate approach to be taken is, therefore, the same as that identified and applied by Finlay Geoghegan J. in the High Court in *Ryanair*, where, in determining whether the applicant had standing to challenge the validity of the Minister’s decision to award the contract at issue in that case for the particular Public Service Obligation (PSO) air route, the court had to consider whether the applicant had “*sufficient interest in the matter to which the application relates*” under O.84, r.20(5) RSC. Finlay Geoghegan J. stated that the appropriate approach was that set out by Walsh J. in the Supreme Court in *The State (Lynch) v. Cooney* [1982] IR 337 (“*Lynch*”). There, Walsh J. stated (at p.369):

“The question of whether a person has sufficient interest or not must depend upon the circumstances of every particular case. In each case the question of sufficient interest is a mixed question of fact and law which must be decided upon legal principles but, it should be added, there is greater importance to be attached to the facts because it is only by an examination of the facts that the Court can come to a decision as to whether there is a sufficient interest in the matter to which the application relates.” (quoted by Finlay Geoghegan J. at para. 50)

100. The position, therefore, is that not only did the judge have to identify the correct interpretation of Regulation 4, but he then also had to apply that interpretation to the particular facts of the case.

(c) The Relevant Facts

101. Those facts are not in dispute. Among the facts agreed between the parties are that Word Perfect was the leading supplier of Irish translation services under the 2016 Framework. The RFT for the competition for admission to the 2021 Framework was advertised on the eTenders website. Word Perfect was aware of the publication of the RFT. It sought clarification on 26 May 2021 on certain issues arising from the RFT and challenged three features of the RFT. The respondent replied to the clarification questions on 3 June 2021. Word Perfect's solicitors sent a pre-action letter setting out the grounds of its intended challenge on 4 June 2021. The Chief State Solicitor responded to that letter rejecting Word Perfect's complaints on 10 June 2021. None of the features complained of prevented it from putting in a tender by the tender expiration deadline. Word Perfect's decision not to put in a tender was because it did not wish to participate in what it believed was an unlawful and fundamentally flawed tender process and instead decided to exercise its right to issue proceedings. None of the features complained of meant that it would be pointless for Word Perfect to put in a tender or that its tender would be bound to fail. Word Perfect was in a position to deliver all of the services the subject of the RFT. If Word Perfect had tendered in accordance with the terms of the RFT, it would have had a very good chance of obtaining a contract admitting it to the 2021 Framework from which work would be allocated in accordance with the rules set out in the RFT. The time for challenging the decision to issue and publish the RFT expired on either Sunday 13 June 2021 or Monday 14 June 2021. The latter date was also the deadline for submission of tenders in response to the RFT. The proceedings were commenced on Friday, 11 June

2021 as Word Perfect did not want to take the risk of being out of time by issuing proceedings on Monday 14 June 2021.

102. It is important, therefore, to record that we are not dealing with the sort of situation which might potentially arise, and which was referred to in argument, where the 30-day time period within which proceedings have to be issued under Regulation 7(2) (subject to any extension granted by the court) would expire significantly in advance of the tender submission deadline and where it is possible to envisage real problems for a person who wishes to issue proceedings to challenge the particular decision taken in the tender procedure in putting in a tender at that stage. It may not even have had the opportunity of seeking clarifications or may not have received those clarifications from the contracting authority and thus may be a long way off being in a position to put in a tender. There is no doubt that a person in that position would have real problems in having to put in a tender in order to gain standing to challenge the decision. However, that is not the factual position presented by this case. Leaving aside again any possible extension of time, the expiry of the 30-day period for challenging the decision at issue was a day or so short of the tender submission deadline. Consistent with the approach described by Walsh J. in *Lynch* and applied by Finlay Geoghegan J. in *Ryanair*, it is critical to focus on the facts at issue and not on hypothetical situations which could potentially arise in other cases. That is the approach which the judge, in my view, correctly adopted in this case.

(d) Article 1(3) of the Remedies Directive/Regulation 4 of the Remedies Regulations

103. The starting point in determining this net issue must be Article 1(3) of the Remedies Directive referred to earlier. Under that provision, Member States are required to ensure that procedures to review decisions taken by contracting authorities are available “*under detailed rules which 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.” In Ireland, the “*detailed rules*” are those set out in Regulation 4 of the Remedies Regulations, as interpreted and applied by the Irish courts. Article 1(3) sets out the minimum requirement in terms of the persons to whom the review procedures required under that provision must be provided. They must be provided “*at least*” to the persons referred to. That is clear from Case C-327/00 *Santex* [2003] ECR I-1877 (para. 47) and *Grossmann* (para. 25). In Case C-492/06 *Consorzio Elisoccorco San Raffele v. Eliombarda Srl* [2007] ECR I-8189 (“*Consorzio*”), the CJEU confirmed that Article 1(3) of the Remedies Directive laid down only the “*minimum conditions*” to be satisfied by national review proceedings to ensure compliance with Community law public procurement requirements (para. 21). Later in its judgment, the CJEU held that Article 1(3) (as interpreted and applied by the Court):

“*...in no way precluded other Member States from making those review procedures more widely available under their national laws by enshrining a concept of standing to bring proceedings which is wider than the minimum guaranteed by the directive.*”
(para. 27)

104. In transposing Article 1(3) into national law by Regulation 4 of the Remedies Regulations, Ireland has adopted the minimum requirement and has not expanded the availability of the review proceedings beyond that required under Article 1(3). It has used more or less the same words in Regulation 4 as are used in Article 1(3).

105. It is also important to recall that the CJEU has consistently made clear that review proceedings provided for by Member States must ensure that decisions of contracting authorities in public procurement procedures must be capable of being subject to effective review as quickly as possible. In *Grossmann*, the CJEU referred to a series of cases which refer to that requirement, including: Case C-81/98 *Alcatel Austria & Ors* [1999] ECR I-07671 (“*Alcatel Austria*”), paras. 33 and 34; Case C-470/99 *Universale-Bau & Ors*.

[2002] ECR I-11617 (“*Universale-Bau*”), para. 74; and Case C-410/01 *Fritsch, Chiari & Partner & Others* [2003] ECR I-6413 (“*Fritsch Chiari*”), para. 30; See also, Case C-249/01 *Hackermüller* [2003] ECR I-6319, para. 22. At para. 36 of *Grossmann*, when examining the purpose of the Remedies Directive, the CJEU stated:

“In that regard, it is appropriate to recall that, as is apparent from the first and second recitals in the preamble, Directive 89/665 is intended to strengthen the existing mechanisms, both at national and Community level, to ensure the effective application of Community directives relating to public procurement, in particular at a stage when infringements can still be remedied. To that effect, Article 1(1) of that directive requires Member States to guarantee that unlawful decisions of contracting authorities can be subjected to effective review which is as swift as possible.”

106. Although Member States are allowed under Article 1(3) to determine the “*detailed rules*” for review proceedings in respect of public procurement decisions, subject to complying with the minimum requirements contained in that provision, the CJEU has consistently pointed out the limitations on the rule-making power of Member States by stating that Article 1(3) “*does not authorise them to give the term ‘interest in obtaining a public contract’ an interpretation which may limit the effectiveness of [the] Directive.*”: see, for example: *Universale-Bau*, para. 72, *Fritsch Chiari*, para. 34 and *Grossmann*, para. 42. That was the reason, for example, in *Fritsch Chiari* and in *Grossmann*, where the CJEU held that the relevant provisions of Austrian law, which made access to the national review procedures subject to and conditional on a prior application to a conciliation commission, were contrary to the Remedies Directive’s objectives of speed and effectiveness.

(e) Consideration of Relevant Case Law: General Rule and Exceptions

107. In considering whether Word Perfect had an “*interest*” in obtaining the relevant contract and whether it was allegedly harmed or likely to be harmed as a result of alleged public procurement breaches, the judge correctly identified *Grossmann* and its Irish equivalent, *Copymoore (No. 1)*, and *Amt* as being the most significant cases in terms of the correct interpretation of Article 1(3) of the Remedies Directives and Regulation 4 of the Remedies Regulations. Word Perfect is, of course, correct to point out that *Grossmann* and *Copymoore (No. 1)* involved challenges to contract award decisions where the applicants had sat back and waited for the award decisions to be made before seeking to challenge those decisions. However, Word Perfect is wrong, in my view, to focus primarily on that aspect of the judgments in those cases and to seek to minimise the significance of the other parts of those judgments which are strongly supportive of the interpretation given to Regulation 4 by the judge and applied by him to the facts of this case. Word Perfect is also, in my view, wrong in its attempt to distinguish *Amt*, a case involving somewhat different facts, but in which the CJEU very clearly endorsed and applied the principles set out in *Grossmann* (which were applied in an Irish context in *Copymoore (No. 1)*) in a case like this one, involving a challenge to a tender procedure in advance of the contract award decision. It is appropriate, therefore, at this stage to turn first to *Grossmann* and to the principles set out by the CJEU in that case and then to consider how those principles were applied in the context of Regulation 4 by Hogan J. in *Copymoore (No. 1)*. It will then be necessary to consider how the principles were applied by the CJEU in the case of a challenge to a tender procedure short of a contract award decision.

108. At issue in *Grossmann* was the compatibility with Articles 1(3) and 2(1)(b) of the Remedies Directive with a provision of Austrian law which was applied by the

Bundesvergabeamt (the Austrian Federal Public Procurement Office) to dismiss the applicant's application for a review of a contract award decision, on the ground that the applicant had failed to assert its legal interest in obtaining the contract at issue until after the award of the contract. The relevant provision of Austrian law was contained in para. 115(1) of the Bundesvergabegesetz (Federal Public Procurement Law) ("BVergG") which provided that, where an undertaking claimed to have an interest in the conclusion of a contract within the scope of the BVergG, it could apply for the contracting authority's decision in the contract award procedure to be reviewed on the grounds of unlawfulness, provided that it had been or risked being harmed by the alleged infringement. It can be seen immediately that the relevant provision of Austrian law was very similar to Regulation 4 of the Remedies Regulations.

109. The tender procedure at issue in *Grossmann* involved a tender for the provision for the Austrian Federal Government of non-scheduled passenger transport services by air. The applicant participated in the award procedure by submitting a tender. However, that procedure was terminated by the Ministry before any contract was awarded. The Ministry then issued another invitation to tender for the same services. The applicant obtained the documents for that invitation to tender but did not submit a tender and did not seek to challenge the tender procedure at that stage. Some months later, the applicant was informed of the intention by the Austrian Government to award the contract to another company and that was ultimately done. The applicant then applied to the Bundesvergabeamt to have the contracting authority's decision to award the contract to the other company set aside, and claimed, essentially, that the invitation to tender had been tailored from the beginning to one tenderer, namely the successful company. Its application was dismissed under the relevant provision of Austrian law on the ground that it had failed to assert its legal interest in obtaining the contract and had not brought any

challenge until after the award of the contract. The Bundesvergabeamt found that, since the applicant did not have large aircraft available to it, it was not in a position to provide all the services the subject of the tender and that was why it had not submitted a tender in the second award procedure for the contract.

110. The applicant applied to the Austrian Constitutional Court seeking to have that decision set aside. It was set aside on the ground that the Bundesvergabeamt wrongly failed to refer a question to the CJEU for a preliminary ruling as to whether its interpretation of para. 115(1) of the BVergG was in accordance with Community law. The case was sent back to the lower court which then made a reference to the CJEU.

111. Of most relevance for present purposes are the first and third questions referred to the Court. As noted earlier, those questions were reframed by the CJEU in its judgment. The Court said that the national court was asking essentially whether Articles 1(3) and 2(1)(b) of the Remedies Directive had to be interpreted as:

“...precluding a person from being regarded, once a public contract has been awarded, as having lost his right of access to the review procedures provided for by the Directive if he did not participate in the award procedure for that contract on the ground that he was not in a position to supply all the services for which bids were invited, because there were allegedly discriminatory specifications in the documents relating to the invitation to tender, but he did not seek review of those specifications before the contract was awarded.” (para. 23)

112. Therefore, on the facts of that case, the applicant did not participate in the award procedure by putting in a tender on the ground that, because of allegedly discriminatory specifications in the tender documents, it was not in a position to supply all of the required services. The applicant maintained that only an air company offering scheduled flights would be in a position to fulfil the requirements in the contract documents, and that that

had the effect of reducing the number of operators who were capable of providing all the services required.

113. The applicant did not challenge the invitation to tender before the contract was awarded. In contrast, in this case, Word Perfect does not and could not make the case that it was not in a position to supply all the services the subject of the RFT. It undoubtedly could but chose not to put in the tender because it was of the view that the tender process was unlawful and fundamentally flawed. However, unlike the applicant in *Grossmann*, Word Perfect did seek to challenge the terms of the RFT before any contract award decision was made. In its submissions on the appeal, Word Perfect concentrated on the second aspect of *Grossmann* but failed, in my view, to address fully the first aspect, namely, the failure by the applicant in that case to participate in the contract award procedure.

114. The CJEU in *Grossmann* dealt with both of the relevant aspects in its judgment. It dealt firstly with the relevance of the failure by the applicant to participate in the contract award procedure. It is clear from the judgment that when the CJEU was referring to participation in the contract award procedure, it was talking about submitting a tender and not merely accessing the request for tender documents and seeking clarifications. That is clear, for example, from para. 27 of the Court's judgment. In that paragraph, the CJEU stated:

“...participation in a contract award procedure may, in principle, with regard to Article 1(3) of Directive 89/665, validly constitute a condition which must be fulfilled before the person concerned can show an interest in obtaining the contract at issue or that he risks suffering harm as a result of the allegedly unlawful nature of the decision to award that contract. If he has not submitted a tender it will be difficult for such a person to show that he has an interest in challenging that decision or that he

has been harmed or risks being harmed as a result of that award decision.”

(emphasis added)

115. Word Perfect contends that the CJEU was not saying that the failure to submit a tender makes it impossible for such a person to establish standing to challenge the decision. That is true. However, as subsequently explained by Hogan J. in *Copymoore (No. 1)*, and as is apparent from the terms of the judgment in *Grossmann* itself, the CJEU used the term “*difficult*” as opposed to “*impossible*”, as it acknowledged that there were exceptions to the principle which it had just stated. The CJEU referred to a potential exception and the reasons for it at paras. 28-30 of its judgment. At para. 28, it stated that where the undertaking has not submitted a tender “*because there were allegedly discriminatory specifications*” in the tender documents or in the contract documents “*which have specifically prevented it from being in a position to provide all the services requested*”, it would be entitled to bring proceedings challenging those specifications even before the contract award decision. The CJEU explained why that was the case at paras. 29 and 30 of its judgment.

116. At para. 29 it said:

“On the one hand, it would be too much to require an undertaking allegedly harmed by discriminatory clauses in the documents relating to the invitation to tender to submit a tender, before being able to avail itself of the review procedures provided for by Directive 89/665 against such specifications, in the award procedure for the contract at issue, even though its chances of being awarded the contract are non-existent by reason of the existence of those specifications.”

117. At para. 30, the CJEU made the point that it is clear from Article 2(1)(b) of the Remedies Directive that review procedures in Member States must provide for procedures

to set aside unlawful decisions in the procurement process including those which provide for discriminatory specifications. The Court stated:

“It must, therefore, be possible for an undertaking to seek review of such discriminatory specifications directly, without waiting for the contract award procedure to be terminated.”

118. The present case is not a case in which Word Perfect did not submit a tender because of discriminatory specifications which would have specifically prevented it from being in a position to provide all of the services requested. On the contrary, it is accepted that there was nothing to prevent Word Perfect from submitting a tender and from being in a position to provide all of the services the subject of the RFT. It was not a case, therefore where its chances of being awarded a contract admitting it to the 2021 Framework were “*non-existent*” by reason of the existence of allegedly discriminatory specifications or otherwise. The exception to the general principle referred to by the CJEU requiring submission of a tender, failing which it would be difficult for the applicant to show that it had the requisite interest, does not apply and is not claimed by Word Perfect to apply on the facts of this case.

119. The CJEU then considered the second aspect of the case concerning the failure by the applicant to bring proceedings in respect of the invitation to tender prior to the contract award decision. Word Perfect focused on this aspect of the judgment in *Grossmann*. The Court again reframed the question referred by the Austrian court as asking:

“essentially, whether Article 1(3) of Directive 89/665 must be interpreted as meaning that it precludes a person who not only has not participated in the award procedure for a public contract but has not sought any review of the decision of the contracting authority determining the specifications of the invitation to tender either, from being regarded as having lost his interest in obtaining the contract and,

therefore, the right of access to the review procedures provided for by the Directive.” (para. 34)

120. It is clear from later in the judgment that when the Court refers to a person who has not participated in the contract award procedure it was referring to a person who has not done so because of the discriminatory specifications in the invitation to tender which effectively disqualified the person from participating in the award procedure (see para. 37). Its reference to participation in the award procedure must also be read in the context of what the Court said earlier at para. 27 when referring to the normal consequence of a failure to submit a tender. (See para. 114 above)

121. Having referred to the requirement on Member States to ensure that unlawful decisions of contracting authorities can be subject to effective and speedy review (at par. 36), the Court went on to state (at para. 37):

“It must be pointed out that the fact that a person does not seek review of a decision of the contracting authority determining the specifications of an invitation to tender which in his view discriminate against him, in so far as they effectively disqualify him from participating in the award procedure for the contract at issue, but awaits notification of the decision awarding the contract and then challenges it before the body responsible, on the ground specifically that those specifications are discriminatory, is not in keeping with the objectives of speed and effectiveness of Directive 89/665.” (emphasis added)

122. Critical to an understanding of what the CJEU was stating in that paragraph is that not only has the person waited before challenging the decision, but the reason why that person had not submitted a tender was because the discriminatory specifications in the invitation to tender effectively disqualified the person from participating in the award procedure for the particular contract. In stressing the CJEU’s reference to the need for

speed in challenging the decision, but in seeking to downplay the significance of the CJEU's reference to the reason why the person did not submit a tender in the first place, Word Perfect has failed fully to understand and has sought incorrectly to steer the Court away from the significance of the CJEU's judgment in *Grossmann* and its implications for this case. The significance of the reason why the applicant in *Grossmann* did not submit a tender was included in the CJEU's answer at para. 40 of the judgment to the questions as reframed by it. In answering two of the questions referred, the CJEU stated:

“...Articles 1(3) and 2(1)(b) of Directive 89/665 must be interpreted as not precluding a person from being regarded, once a public contract has been awarded, as having lost his right of access to the review procedures provided for by the Directive if he did not participate in the award procedure for that contract on the ground that he was not in a position to supply all the services for which bids were invited, because there were allegedly discriminatory specifications in the documents relating to the invitation to tender, but he did not seek review of those specifications before the contract was awarded.” (para. 40) (emphasis added)

123. We will see shortly how Hogan J. interpreted the significance of this answer (correctly in my view) in *Copymoore (No. 1)*. Before turning to that case, I should refer to the opinion of Advocate General Stix-Hackl in *Espace Trianon* (to which the judge referred in his judgment) and to the judgment of the CJEU in that case. I should immediately record that the case also concerned a challenge to a contract award decision in which an issue arose before a Belgian court as to whether proceedings brought by a consortium could be maintained, in circumstances where the decision by one member of the consortium to bring the proceedings was found to be irregular. In the course of her opinion, the Advocate General set out her understanding of the CJEU's judgment in *Grossmann*. Referring to para. 27 of *Grossmann*, the Advocate General stated:

“Contrary to the Commission’s argument, Member States are obliged as a matter of principle to grant standing to challenge a contract award procedure only to undertakings that have actually participated in that procedure.” (para. 39)

124. The Advocate General went on to note that there were exceptions to that “rule” but that they only applied in particular cases. She stated (at para. 40):

“...thus participation in a contract award procedure cannot be imposed as a requirement if the contracting authority has not even conducted a formal contract award procedure. Equally, an undertaking has access to the remedies provided for by the Directive where the only reason for its non-participation was that the terms of the invitation to tender appeared to render its participation pointless.”

125. Then, in a passage referred to with approval by the judge at para. 96 of his judgment in this case, the Advocate General stated (at para. 41):

“According to the Court’s case law, the requirement of participation in the contract award procedure should be departed from therefore only in cases in which participation was impossible or at the very least pointless. The decisive element is therefore that the cause of the impossibility of successful participation in a contract award procedure lies in the conduct of the contracting authority. Cases of impossibility must be distinguished, however, from those in which an undertaking does not even desire to participate in a contract award procedure. This also applies to the individual members of a consortium which do not desire to participate individually in a contract award procedure.”

126. Word Perfect submits that these observations by the Advocate General must be read in the particular context of the case where the challenge was being maintained by one member of the relevant consortium to a contract award decision. It relied in support of that

submission on what the Advocate General said at para. 23 of her opinion. She stated there that the answers given in respect of the particular reference:

“...cannot without qualification be applied, however, to review procedures concerning other decisions of the contracting authority, such as for example the non-selection of operators to be tenderers, that is to say the failure to invite them to submit a tender; or the exclusion of tenders. It must also be recalled that the main proceedings concern the setting aside of a decision.”

127. The Advocate General was, therefore, leaving open the question as to whether and how the “rule” to which she referred later in her opinion could be applied in the case of challenges to decisions taken earlier in the procedure, prior to a contract award decision. The CJEU subsequently addressed the applicability of the rule in the case of a challenge to such decisions in *Amt*, to which I will turn shortly. I do not accept, however, that the observations made and the principles applied by the Advocate General at paras. 39-41 of her judgment on the basis of *Grossmann* are not applicable to this case. In my view, as subsequently clarified by the CJEU in *Amt*, those principles are now entirely consistent with the approach subsequently taken by the Court in *Amt* in cases involving challenges to decisions taken earlier in the process, including the type of decision at issue in this case.

128. Before leaving the Advocate General’s opinion in *Espace Trianon*, I should deal with the point made by Word Perfect arising from what the Advocate General said at para. 49 of her opinion. She stated in that paragraph that the Remedies Directive “provides remedies only for tenderers” and, in that case, therefore, only for the consortium itself. At para. 79 of his judgment in this case, the judge made a similar point, namely, that it was “tenderers who are entitled to challenge the legality of a tender and not potential tenderers” or others who might have a more general interest in the particular contract. It is not completely correct to state that potential tenderers may not have an “interest in obtaining” a particular

contract and, therefore, cannot be “*eligible persons*” under Regulation 4. Advocate General Stix-Hackl in *Espace Trianon* made the point that the Remedies Directive provides remedies “*only for tenderers*” in the context of the particular facts of that case, where one part of a consortium was seeking to challenge a contract award decision. She was not saying that potential tenderers could never have standing to challenge decisions taken by contracting authorities. Potential tenderers would be encompassed by the exceptions to the rule she mentioned at para. 40 of her opinion. Nor can the judge have intended to say that potential tenderers could never be “*eligible persons*” since he too acknowledged that *Grossmann* and *Copymoore (No. 1)* made clear that there were exceptions to the general rule. Potential tenderers would, therefore, have standing to challenge the relevant decisions, provided that they came within one of the exceptions to the general rule.

129. The judgment of the CJEU in *Espace Trianon* was considered by Hogan J. in *Copymoore (No. 1)* as supporting the existence of a general rule requiring the submission of a tender in order to demonstrate the necessary interest in obtaining the contract (see para. 25 of the judgment in *Copymoore (No. 1)*). The CJEU in *Espace Trianon* stated at para. 19 of its judgment that:

“...it must be noted that Article 1(3), in referring to any person having an interest in obtaining a public contract, alludes, in a situation such as that in the main proceedings, to a person who, in tendering for the public contract at issue, has demonstrated his interest in obtaining it.”

130. The CJEU further noted that, in contrast to cases including *Grossmann*, there was nothing in the case at issue which prevented members of the consortium from together bringing an action for annulment of the relevant decisions in their capacity as associates or in their own names. The Court held, therefore, that a national procedural rule which

required an action for annulment of a contract award decision to be brought by all members of a tendering consortium did not limit the availability of such an action in a way which was contrary to Article 1(3) of the Remedies Directive (paras. 21 and 22).

131. *Copymoore (No. 1)* was similar in many respects to *Grossmann* and contains in it a strong endorsement by Hogan J. of the general rule requiring the submission of a tender in order to demonstrate an “*interest in obtaining*” the relevant contract and, therefore, to have standing to bring proceedings challenging a contract award decision under Regulation 4 of the Remedies Regulations, subject to exceptional circumstances discussed within the case law.

132. As noted earlier, in his judgment in this case, the judge followed the approach taken by Hogan J. in *Copymoore (No. 1)* and applied the principles identified and applied by Hogan J. in that case as derived from *Grossmann*. It should be noted that what Hogan J. was concerned with was Regulation 4 of the Remedies Regulations which, as observed earlier, is similar to the provision of Austrian law which was at issue in *Grossmann* and went no further than the minimum required in terms of standing under Article 1(3) of the Remedies Directive.

133. In *Copymoore (No. 1)*, the applicants challenged a decision by the contracting authority to award seven framework agreements to seven individual successful tenderers for managed print services. The framework agreements established a contractual framework whereby the seven successful tenderers would be invited to compete with each other through a series of mini-competitions for the provision of the relevant services throughout the public service. The applicants also challenged the validity of a circular published by the Minister which directed all public sector organisations to employ the successful tenderers for the supply of their managed print services. An issue arose as to the standing of the applicants to challenge the contract award decision as they had not

submitted tenders and had not commenced proceedings to challenge criteria which they maintained were discriminatory before the contract award decision was made. They only took action once they realised that, by virtue of the challenged circular, public service organisations would be required to use the services of the successful tenderers.

134. The judgment of Hogan J. is very important for present purposes because it reproduces and endorses many of the significant passages in *Grossmann* and because the judge in this case in turn endorsed many of those passages from the judgment of Hogan J. As noted earlier, at para. 21 of his judgment, Hogan J. stated that in the context of Regulation 4, it was “*impossible to overlook the fact that the applicants did not submit a tender*”. Referring to *Grossmann*, and to the fact that the applicant in that case had not submitted a tender, Hogan J. stated that the “*very fact that no tender had been submitted by the party seeking a review was regarded by the Court of Justice as well-nigh dispositive* (para. 21) and he quoted with approval para. 27 of the judgment in *Grossmann*. At para. 22, Hogan J. noted that the CJEU had acknowledged that there might well be circumstances where tender terms were “*so discriminatory that it would be pointless to insist on the party seeking review to have submitted a tender even though it knew it was bound to be unsuccessful*”. He then quoted with approval paras. 28, 29 and 30 of *Grossmann* (concerning the failure to participate in the contract award procedure) and paras. 31 and 32 (concerning the failure by the applicant in *Grossmann* to bring proceedings challenging the earlier decisions in the process prior to the contract award decision). At para. 23, Hogan J. quoted with approval paras. 34-40 from the judgment in *Grossmann*. He then said (at para. 24) that while the CJEU had merely stated that the Remedies Directive “*did not preclude*” national authorities from holding that entities which had neither submitted a tender as part of the process nor challenged discriminatory tender criteria during that process should not be regarded as “*eligible persons*”,

“... the clear implication of the decision in Grossmann Air Services is that the Directives positively preclude such entities from being regarded as eligible persons and I think in order to remain faithful to the underlying sentiments of the judgment that the decision must be read in this fashion.” (para. 24)

135. As noted earlier, Hogan J. observed that the CJEU applied the *Grossmann* principles in *Espace Trianon*. He said that in that case, the CJEU *“again (at least) strongly implied that only persons who participated in the tender process have an interest in challenging the tender award”* (para. 25).

136. Hogan J. then considered the implications of *Grossmann* for the case before him. He summarised the facts, as I have just done, noting that the applicants had not submitted a tender and had not challenged the decision prior to the contract award decision. He described the challenge to the contract award decision as being *“something of an afterthought and... opportunistic”* (para. 29.) He concluded that:

“...the applicants must presumptively be regarded as not constituting ‘eligible persons’ as that term must be understood in the light of Grossmann Air Services, since they did not submit a tender nor challenge its terms in legal proceedings prior to the actual award.” (para. 30)

137. Like the applicants in *Grossmann* and in *Copymoore (No. 1)*, Word Perfect did not submit a tender. However, unlike the applicants in those two cases, Word Perfect did challenge the tender procedure before the contract award decision. However, as discussed earlier, the CJEU considered the reason why the tender was not submitted as being highly relevant to the demonstration of the requisite *“interest in obtaining”* the particular contract. Having set out the presumption that the applicants in the case were not *“eligible persons”*, as they had not submitted a tender nor challenged the procedure prior to the contract award decision, Hogan J., like the CJEU in *Grossmann*, accepted that *“there may*

well be cases where an entity can challenge the contract award without having participated in the tender” but these cases were “*exceptional*” (para. 31). He referred in that context to *Ryanair*, where Finlay Geoghegan J. had held that the applicant, who had not participated in the particular process, did not have standing to make a generalised complaint about the conduct of the tender process but did have standing to make the case that the Minister was obliged in the special circumstances of the case to organise a fresh tender. He referred also (at para. 32) to other examples of possible exceptions to the general rule or principle requiring the submission of a tender in order to gain standing. They included where there was a failure properly to advertise the tender which prejudiced potential tenderers such that they did not submit a tender. He referred to a passage in one of the leading texts, Arrowsmith, *The Law of Public and Utilities Procurement* (London, 2005)², where, referring to *R v. Avon CC ex p Terry Adams Limited* [1994] Env. L.R. 442, Prof. Arrowsmith stated that:

“Standing can exist even when the claimant has not bid, if this has been caused by the purchaser’s breach of the rules, such as an unlawful failure to advertise the contract or the use of unlawful specifications.” (para. 21.6, p.1368).

138. Then, in a passage relied on by the appellant in this case, Hogan J. acknowledged that it was not always possible to determine the question of standing or eligibility “*in the abstract or by reference to some a priori formula such as whether a tender has actually been submitted.*” (para. 33) He stated that, as the judgment of Finlay Geoghegan J. in *Ryanair* demonstrated, “*allowances may sometimes have to be made for the nature of the tender irregularity alleged before this question can be completely determined.*” Hogan J. went on to consider the nature of the irregularities alleged and concluded that there was nothing in the alleged irregularities which precluded the applicants from submitting a

² See now, Arrowsmith, *The Law of Public and Utilities Procurement* (3rd edn, 2014)

tender. He noted (at para. 41) that they knew about the tender and had “*elected consciously not to participate*”. On that basis, by analogy with the reasoning of Finlay Geoghegan J. in *Ryanair*, he held that the applicants had no standing “*to make generalised complaints about a feature of the tender process in which they did not participate where the irregularities alleged could not possibly have prejudiced them.*” (para. 42).

139. Word Perfect contends that the judge did what Hogan J. cautioned should not be done, namely, he determined standing or eligibility in the abstract and by reference to an *a priori* formula such as whether it had submitted a tender in response to the RFT. I do not accept that that is correct. The judge did what Hogan J. had done in *Copymoore (No. 1)* and what the CJEU required be done in *Grossmann*, namely, he considered whether there was some good reason why the applicant had not submitted a tender. Hogan J. was not satisfied that there was any good reason in *Copymoore (No. 1)*. Here, unlike some of the cases discussed, it was not the case that it was pointless for Word Perfect to have submitted a tender as its chances of being awarded the contract were non-existent. Quite the opposite was the case here. The judge did, in fact, consider the possible application of any of the exceptions to the general rule and concluded that none were of relevance in Word Perfect’s case as it was not claiming that any of the exceptions applied to it. On the contrary, it made clear that it had decided not to tender. Therefore, the judge concluded that none of the exceptions were relevant (at paras. 81, 82 and 83 of the judgment). In my view, in approaching the matter in this way, the judge was acting in compliance with the approach required by the CJEU in *Grossmann* and applied by Hogan J. in *Copymoore (No. 1)*.

140. I am also satisfied that in summarising the position at paras. 43 and 44 of his judgment in *Copymoore (No. 1)*, Hogan J. was correctly summarising the relevant legal principles derived from Article 1(3) of the Remedies Directive as interpreted and applied by the CJEU in *Grossmann*. Hogan J. summarised the position as follows:

“43. In summary, therefore, it can be said that, generally speaking, an applicant who wishes to challenge the outcome of a tender award must have participated in that process in order to be counted an ‘eligible person’ for the purposes of the [Remedies] Regulations with standing to challenge that award. Exceptions may, however, have to be made for special cases such as where the failure to advertise properly may have resulted in a potential tenderer not submitting a tender.

44. In the present case the applicants consciously did not submit a tender even though they knew of the competition. In the light of Grossmann Air Services it must be presumed that they are not eligible persons, absent such exceptional circumstances. There are, however, no such exceptional circumstances in the present case...” (paras. 43 and 44)

141. I agree with this summary, and I am satisfied that the judge did not misread, overread, misunderstand or misapply the principles derived from *Grossmann* and *Copymoore (No. 1)* in his judgment. On the contrary, I am satisfied that he correctly identified and applied the correct principles in his interpretation of Regulation 4 of the Remedies Regulations and in his application of that interpretation to the facts. I do not accept that there is any merit to Word Perfect’s claim that in doing so the judge acted in breach of general principles of EU law such as the principles of effectiveness, equivalence and legal certainty. I will return briefly to a consideration of those principles later in this judgment.

142. While Word Perfect criticises the judge for not considering whether as a matter of fact Word Perfect had an “*interest in obtaining*” the relevant contract for entry into the 2021 Framework, and that he failed to consider the facts relevant to that question, I do not accept that that criticism is well founded. The judge did consider whether Word Perfect

had an interest in obtaining the contract “*as that term is generally understood*” (para. 87). He noted in the previous paragraph of his judgment that Word Perfect was the leading incumbent supplier of Irish translation services under the 2016 Framework. He also referred to the statement in the Chief State Solicitor’s letter of 10 June 2021 expressing the hope that Word Perfect “*as an important supplier in this market*” would choose to tender and participate in the competition. As acknowledged by the respondent, the judge did not, expressly, at least, advert to the fact that Word Perfect had sought clarifications in relation to aspects of the RFT on 26 May 2021 to which the respondent replied on 3 June 2021. However, I do not believe that that is of any particular significance in light of (a) the judge’s agreement with Word Perfect that it had an “*interest in the tender process*” as that term is generally understood and (b) the general requirement that an applicant submits a tender in order to gain standing to challenge the relevant decision (save in exceptional cases) where participation short of putting in a tender would not normally be regarded as sufficient (see para. 27 of *Grossmann*). The judge, therefore, considered the relevant facts and applied the principles set out in *Grossmann* and in *Copymoore (No. 1)* in reaching his conclusion that the general rule is that the almost exclusive way of demonstrating an “*interest in obtaining*” the relevant contract is by submitting a tender, subject to the existence of exceptional circumstances and that Word Perfect was not and could not rely on any exceptional circumstances as to why it had not submitted a tender in this case.

143. I do not believe that the judge’s conclusion can be faulted, at least as regards challenges to contract award decisions, as he based his conclusion on *Grossmann* and *Copymoore (No.1)*. What about challenges to other decisions taken earlier in the tender process, such as the challenge to the RFT in this case? Word Perfect argues that the judge mischaracterised the case it was making. It says that, contrary to what the judge stated (for example, at para. 85 of the judgment), it was not making the case that the test for

determining whether a person had an “*interest in obtaining*” the relevant contract for the purposes of Regulation 4 of the Remedies Regulations in the case of a challenge to the terms of a request for tenders was different to the test which applies in the case of a challenge to a contract award decision. Word Perfect claims that that is a mischaracterisation of the position which it put forward. It maintains that the applicable test is that set out in Regulation 4 and that the case it made before the High Court was that the analysis in *Grossmann* and in *Copymoore (No. 1)* had to be seen in the context of those cases, which involved challenges to contract award decisions by applicants who had not submitted tenders, and who complained when subsequently challenging the contract award decisions that the tender criteria were unlawful. Word Perfect confirmed in its submissions on the appeal that it was not making the case that a different test applies depending on whether the challenge is to a contract award decision or to a decision made earlier in the process, such as to the terms of the RFT. Rather, it submits that the case law shows that the way in which an applicant might show its interest in obtaining the relevant contract may differ depending on the context.

144. In considering whether the judge was correct in concluding that Word Perfect had not demonstrated an interest in obtaining the relevant contract by virtue of its failure to submit a tender, I should confirm my agreement with the judge (and with Word Perfect and the respondent) that the same eligibility test and the same principles apply to determine whether an applicant is eligible to challenge a decision made in the course of the public procurement procedure, irrespective of the nature of that decision and the point in time at which the decision was made. Those factors may, however, affect the existence or otherwise of one of the exceptions to the general rule requiring the submission of a tender in order to achieve standing to challenge the relevant decision.

145. The fact that the *Grossmann* principles are equally applicable to decisions taken earlier in the tender procedure is clear from the judgment of the CJEU in *Amt*, on which the judge correctly placed considerable reliance in his judgment. I should record here that I agree with the reasons given by the judge for his decision that the principles are the same, irrespective of the nature of the decision challenged and the point in time of the process at which the decision was made. One of the reasons given by the judge was based on the judgment in *Amt*.

146. Before turning to that judgment, I should also confirm my agreement with the submission made by Word Perfect that every decision in the procurement process, including the decision to adopt rules in a request for tenders is subject to review. That is clear from Articles 1(1) and 2(1)(a) and (b) of the Remedies Directive and Article 8 of the Remedies Regulations, as well as from several judgments of the CJEU, including Case C-92/00 *HI* [2002] ECR I-5553, para. 37; C-57/01 *Makedoniko Metro* [2003] ECR I-1091, para. 68; Case C-26/03 *Stadt Halle* [2005] ECR I-1, para. 27, and Case C-391/15 *Marina del Mediterráneo* ECLI:EU:C:2017:268, para. 26.

147. In *Marina del Mediterráneo*, the CJEU adopted a broad construction of the concept of a “*decision*” taken by a contracting authority and confirmed that Article 1(1) of the Remedies Directive did not lay down any restriction concerning the nature or content of the decisions to which it refers. The Court continued:

“Moreover, a restrictive interpretation of that concept would be incompatible with the terms of Article 2(1)(a) of that directive which requires Member States to make provision for interim relief procedures in relation to any decision taken by the contracting authorities...” (para. 27)

148. *Amt* is a good example of a case in which a decision taken earlier in the tender process was challenged by the applicants and in which issues concerning their standing

arose. The decision challenged in *Amt* was the same type of decision as was challenged by Word Perfect in this case. The facts of *Amt* are slightly convoluted. The applicant companies were operators of local public transport services at provincial or sub-provincial levels in Italy. They brought a challenge to the rules of a tender procedure for public transport services in the region of Liguria. The action was aimed at the notice for the selection of economic operators. The tender notice specified that regional public transport services would from then on be awarded in one single lot, which would cover the whole territory of the region of Liguria. The applicants decided that it would be impossible for any of them to provide public transport services individually at regional level. Therefore, they did not submit tenders under the tender procedure. They brought proceedings in the Regional Administrative Court in Liguria challenging the decision of the contracting authority to award the contract as one single lot covering that whole territory. They argued that, as a matter of principle, they had a right to a remedy under Articles 1(3) and 2(1)(b) of the Remedies Directive even where they had not participated in the tender process, where, in the context of the legislation relating to the particular tender procedure, it was certain or highly likely that it would be impossible for any of them to be awarded the contract. The evidence was that they would have had a good chance of winning the contract if it was organised at provincial level, but that the fact that the contract was to be awarded as one single lot covering the whole of the territory of the region meant that the chances that any of the applicants would be awarded the contract were reduced “*to almost zero*”.

149. Under the relevant provision of the Italian Code of Civil Procedure (Article 100), in order to bring or oppose a claim, a party had to have “*sufficient legal interest in that claim*”. Under two provisions of the relevant regional law (Articles 9(1) and 14(1)), provision was made for the public transport services in the region to be awarded on the

basis of one single lot. The referring court sought to ascertain the constitutionality of those provisions of the regional law from the Italian Constitutional Court. Before the Constitutional Court gave judgment, the Region of Liguria adopted a new regional law, amending the earlier provisions and providing that the relevant transport services were no longer required to be awarded on the basis of one single lot but could be awarded in four lots corresponding to four homogeneous territorial areas, and that those lots had to be defined so as to ensure the widest possible participation in the call for tenders.

Notwithstanding the amendment to the relevant provisions of the regional law, the Constitutional Court proceeded to examine the constitutionality of those provisions and decided that the applicants' complaints were inadmissible. It referred to settled case law of the Italian administrative courts to the effect that an undertaking which does not take part in a call for tenders cannot challenge a tender procedure nor the contract award decision on the basis that it did not have sufficient legal interest but merely a factual interest in obtaining the relevant contract. The Constitutional Court did, however, refer to the fact that the case law of the administrative courts provided for exceptions or derogations from that rule where an applicant challenges "*inter alia, the clauses of the tender notice which directly exclude it or clauses imposing obligations which are clearly unreasonable, totally disproportionate, or which make it impossible to submit a tender*" (para. 24 of the judgment of the CJEU). The Constitutional Court held that the case before it was not one of those exceptional cases, notwithstanding that the provisions challenged affected the plaintiffs' chances of being awarded the tender, which were "*reduced to almost zero*" whereas otherwise they would have had a "*very good chance of being awarded the contract*". The CJEU noted that the reasoning of the Constitutional Court did not disclose "*any certain and present obstacle to participation in the procedure, but only a possibility of damage which may be relied on only by a party which has taken part in the procedure*".

and only at the end of that procedure, as a result of the failure to award that contract to the applicant” (para. 25). The referring court pointed out that, according to the Constitutional Court’s interpretation of the procedural requirement to have an interest in bringing the proceedings, an action brought by a company which had not taken part in a tender procedure would be inadmissible if it is “*very likely, but not absolutely certain*” that the undertaking could not be awarded the contract in question. The referring court inferred that access to legal protection would, therefore, be “*almost systematically subject to participation in the tender procedure, which would in itself generate significant expenses, even if the company intended to challenge the legality of the tender procedure itself on the ground that it excessively restricted competition.*” (para. 26). The referring court was left with the task of determining the allocation of costs in the main proceedings and made a reference to the CJEU seeking to ascertain whether Articles 1(3) and 2(1)(b) of the Remedies Directive had to be interpreted, in the circumstances of the case in question, as conferring a right to bring proceedings by an undertaking who did not submit a tender on the ground that it was “*certain or very likely that it could not win the contract at issue*”. (para. 27).

150. Again, as in *Grossmann*, the CJEU slightly reframed the question, noting that the referring court was asking “*essentially*” whether Article 1(3) of the Remedies Directive precluded national legislation, such as the Italian law at issue in the case, which did not allow an undertaking to bring proceedings challenging decisions of a contracting authority relating to a tender procedure in which it decided not to participate on the ground that the legislation applicable to that procedure made it “*very unlikely*” that they would be awarded the contract concerned.

151. In answering that question, the CJEU reproduced several of the paragraphs from its judgment in *Grossmann*, including the critical paragraphs in which it had set out the

general rule requiring the submission of a tender and made provision for possible exceptions to that rule where, by reason of the discriminatory clauses in the tender documents, the chances of an undertaking being awarded the contract work were “*non-existent*” namely, paras. 27, 29 and 30 of the judgment in *Grossmann*, quoted at paras. 46 and 47 of the judgment in *Amt*. At para. 49, the CJEU stated that the findings derived from the judgment in *Grossmann* “*are applicable mutatis mutandis in the present case.*”

152. Critically, therefore, the CJEU held in *Amt* that the principles governing the standing to challenge decisions taken as part of a tender process are the same as those applicable to challenges to contract award decisions themselves. The principles set out in *Grossmann* and applied in *Copymoore (No. 1)* are equally applicable, therefore, to challenges to earlier decisions in the process.

153. Having reached that conclusion, the CJEU then went on to consider the exceptions which exist under the Italian law as interpreted by the Italian courts which included, but were not limited to, the situation where the terms of the tender procedure made it impossible to submit a tender (para. 50). The CJEU held that the requirements laid down in Article 1(3) of the Remedies Directive were satisfied if an operator which has not submitted a tender has the right to bring proceedings “*inter alia, where it considers that the specifications contained in the documents relating to the call for tenders makes it impossible to submit a tender.*” (para. 51).

154. The CJEU then pointed out that in order not to undermine “*the objectives of speed and effectiveness*” laid down in the Remedies Directive, such an action could not be brought after notification of the contract award decision (referring to para. 37 of *Grossmann*). The Court continued (at para. 53):

“*Furthermore, since it is only in exceptional cases that a right to bring proceedings is given to an operator which has not submitted a tender, it cannot be regarded as*

excessive to require that operator to demonstrate that the clauses in the call for tenders make it impossible to submit a tender.”

155. In other words, the Italian law governing the need to demonstrate an interest in the proceedings, as interpreted and applied by the case law of the Italian courts, which required that an operator submit a tender in order to demonstrate the requisite interest, subject to an exceptional case where the clauses in the call for tender made it “*impossible*” to submit a tender, were consistent with Article 1(3) of the Remedies Directive. The clear implication from that is that the fact that it was only “*very unlikely*”, as opposed to “*impossible*”, that the operator would be awarded the contract concerned would not have been sufficient. It must be remembered that the CJEU reached that decision in a case which, like the present case, involved a challenge to the terms of the tender set out in the equivalent to a request for tenders. The CJEU referred expressly to the impossibility of submitting a tender as that was the exception which was most potentially relevant to the facts of the case. It does not appear from the case being made by the applicants in this case that any of the other exceptions referred to in the established case law of the Italian courts had any relevance to the facts of the case.

156. It is true that the CJEU went on, in para. 54 of the judgment in *Amt*, to state that while the “*the stringency of the evidential requirements*” was not itself contrary to EU law on public procurement, nonetheless, it was “*possible that, having regard to the specific circumstances of the case in the main proceedings, its application may lead to an infringement of the right to bring proceedings*” under Article 1(3) of the Remedies Directive. The Court held that it was for the referring Court to make a “*detailed assessment*” on the facts as to whether the application of the Italian legislation, as interpreted by the Italian courts, was “*in practice liable to affect the right of the plaintiffs in the main proceedings to effective judicial protection.*” (para. 55)

157. The CJEU then set out in the next two paragraphs of the judgment what it considered to be “*valuable guidance*” for the referring court to enable it to carry out that assessment. (paras. 56 and 57). In para. 57, it referred to some of the relevant facts, including the fact that the applicants had previously provided regional transport services before the launch of the tender procedure which was subsequently cancelled.

158. The CJEU answered the question referred by the Italian court, as reframed by it, as follows:

“Having regard to the foregoing considerations, the answer to the question referred is that both Article 1(3) of Directive 89/665 and Article 1(3) of Directive 92/13 must be interpreted as meaning that they do not preclude national legislation, such as that at issue in the main proceedings, which does not allow economic operators to bring an action against the decisions of a contracting authority relating to a tendering procedure in which they have decided not to participate on the ground that the legislation applicable to that procedure made the award to them of the contract concerned very unlikely.

However, it is for the competent national court to make a detailed assessment, taking account of all the relevant information characterising the context of the case brought before it, as to whether the application of that legislation in practice is liable to affect the right of the economic operators concerned to the right to effective judicial protection.” (para. 58)

159. In other words, the Italian provisions, as interpreted by the Italian courts, which prevent an operator from bringing proceedings unless it has submitted a tender is not precluded by Article 1(3) of the Remedies Directive, where the reason why it did not submit a tender was because it was “*very unlikely*” the contract would be awarded to them

as opposed to it being “*impossible*” for the contract to be awarded. However, it was still for the national court to decide on the facts whether the requirement to establish impossibility as opposed to it being “*very unlikely*” in practice was liable to breach the operator’s right to effective judicial protection.

160. In my view, the application by the CJEU in *Amt* of the *Grossmann* principles to a decision similar to that challenged in the present case is, both on the law and on the facts, fatal to Word Perfect’s claim that it has established an “*interest in obtaining*” the relevant contract under the 2021 Framework. I do not accept that the judgment can be distinguished for the reasons advanced by Word Perfect. The fact that the case concerned an Italian rule as interpreted by the Italian courts is not a distinguishing factor. Italian law required the establishment of a legal interest in the claim and the Italian courts decided that that had to be done by submitting a tender, save in certain exceptional circumstances. That is very similar to the approach taken by Hogan J. in *Copymoore (No. 1)*. He referred to the relevant provision of Irish law, namely, Regulation 4 of the Remedies Regulations, and then considered how that provision was properly to be interpreted in light of the decisions of the CJEU in *Grossmann* and *Espace Trianon* and applied to the facts of the case before him. Nor is it relevant that the scope of exceptions to the general rule under Italian law may have been more broad than those already recognised under Irish law. The scope of the exceptions applicable under Italian law, apart from the impossibility exception, was not considered relevant by the CJEU. It did not consider any of the other exceptions contained in the Italian case law referred to by the Court. It is clear from the cases, including *Copymoore (No. 1)* and the judgment of the judge in this case, that the exceptions to the general rule are not closed and can arise in various different circumstances. The exceptions are, however, irrelevant to this case as the judge correctly concluded, since Word Perfect does not claim to be entitled to rely upon any of them. It seeks to

demonstrate an interest in obtaining the relevant contract in ways other than by the submission of a tender. However, *Amt* confirms that the requirement to submit a tender, subject to certain exceptions, in order to demonstrate standing to challenge a decision in the tender procedure, such as a decision setting out the terms of a request for tenders, is not, in principle, precluded by Article 1(3) of the Remedies Directive (or, by inference, Regulation 4 of the Remedies Regulations).

161. Word Perfect cannot, in my view, derive any assistance from the fact that the CJEU in *Amt* left open the possibility that, on the particular facts of the case, the referring court might decide on the particular facts of the case that the application of the Italian legislation (as interpreted by the Italian courts) was liable in practice to affect the rights of the applicants in that case to effective judicial protection. I do not believe that Word Perfect can derive assistance from that part of the judgment in *Amt* as the Court there was focusing on the stringency of the evidential requirements to be met by an operator in order to bring itself within the impossibility exception. That is a world apart from what is at issue in this case, where Word Perfect accepts that it could have submitted a tender but decided not to, and where the judge correctly accepted on the basis of the expert evidence of both parties that, had Word Perfect done so, it would very likely have been awarded a contract admitting it to the 2021 Framework. Not only, therefore, was it not impossible for Word Perfect to have submitted a tender, or impossible, or even very unlikely, for it to have been awarded a contract, but rather it was perfectly possible for it to have done so, and very likely that, had it done so, it would have been awarded a contract. I do not accept, therefore, that Word Perfect has put forward any reason for the Court to distinguish or disapply or temper the application of the principles in *Amt* to the present case, at least in terms of the general principle to be applied.

162. While it is perhaps of limited relevance in light of the stance taken by Word Perfect, I should make clear that I do not accept the submission made by Word Perfect that the judge suggested (at para. 81 of his judgment) that the only exception to the general rule requiring the submission of a tender in order to demonstrate standing to bring proceedings challenging a decision made in the course of a tender process is, where by virtue of the rule challenged, the applicant would not be successful in the tender process, and so the submission of a tender would be pointless. As I have sought to demonstrate, and as the judge found, the main cases, namely *Grossmann*, *Copymoore (No. 1)* and *Amt* establish that there is a general rule requiring the submission of a tender in order to achieve standing. They also establish that there are exceptions to the general rule which will depend on the particular circumstances of the case, including the nature of the infringements or irregularities alleged, as explained by Hogan J. in *Copymoore (No. 1)*. It is not correct to say that the judge acknowledged the existence of only one exception as Word Perfect contends. The CJEU in *Grossmann* was concerned with one of the potential exceptions, namely, where the allegedly discriminatory specifications specifically prevented the undertaking from being in a position to provide all of the services and, therefore, its chances of being awarded the contract were “*non-existent*”. It would, therefore, have been pointless to have submitted a tender. The Court considered that exception as it was the only one potentially relevant on the facts of the case. Hogan J. in *Copymoore (No. 1)* acknowledged the existence of different potential exceptions. At para. 31 of his judgment, he referred, “*for example*”, to a type of exception considered by Finlay Geoghegan J. in *Ryanair*. He also referred, “*for example*”, to other possible exceptions at para. 32 including the failure by the contracting authority to advertise the tender process and, in his quotation from *Arrowsmith*, he referred to another possible exception where there were “*unlawful specifications*” in the tender documents. Hogan J. also acknowledged the

possibility of other exceptions by stating that allowance might sometimes have to be made for the nature of the tender irregularity alleged (para. 33). Finally, when summarising his conclusions on the issue (at para. 34), Hogan J. noted that exceptions might have to be made for special cases, “*such as*” where there was a failure to advertise the tender process properly which may have resulted in a potential tenderer not submitting a tender. Clearly, therefore, Hogan J. was open to the possibility of other exceptions. So too was the judge himself in his judgment in this case. At para. 81 of the judgment, when referring to the fact that *Grossmann and Copymoore (No. 1)* had allowed for the fact that there could be exceptions to the general rule where a person could be regarded as having an interest in obtaining the contract even where that person had not tendered for the contract, he gave an example (using the abbreviation “*e.g.*”) of where it would be pointless to require the submission of a tender which was bound to be unsuccessful. It is plain from the words he used that the judge was not limiting the potential exceptions to the one he mentioned but was merely giving that as an example.

163. Other possible exceptions were referred to in the course of argument on the appeal and indeed were accepted by the respondent as being potential exceptions depending on the facts. They included where a potential tenderer had not met certain pre-qualification tender criteria and, therefore, was not permitted to put in a tender. Such a person could not be required to put in a tender in order to have standing to challenge a decision or an aspect of the tender procedure which was allegedly unlawful. Another possible exception referred to in argument was where the 30-day time limit for challenging a decision under Regulation 7(2) of the Remedies Regulations would expire well before the tender submission date and at a time when clarifications may be outstanding. While the respondent adopted the position in argument that even in such a situation an applicant would still have to submit a tender, I do not accept that that necessarily is the case. It may

well be open to the applicant to persuade the court on the particular facts that it should be unnecessary to submit a tender in order to have standing to bring proceedings by virtue of the stage in the process of tender at which the decision sought to be challenged was made and the looming time limit for the challenge of that decision. However, it is neither necessary nor appropriate to express definitive views on the range of possible exceptions to the general rule, as Word Perfect has not sought to rely on any exception. This appeal must be decided by reference to the particular facts and not by reference to the range of hypothetical situations which might potentially arise in other cases.

(f) Principle of Legal Certainty

164. There is not, in my view any validity to the suggestion that the approach taken by the judge infringes the principle of legal certainty, in that operators would not know for certain whether they had to submit a bid or whether they could rely on any possible exception to the general rule. The existence of a general rule with exceptions has been endorsed by the CJEU in *Grossmann* and in *Amt* and in the other cases referred to. The CJEU was not of the view that there was any infringement of the principle of legal certainty in the approach which it adopted in those cases. It is particularly striking that, in *Amt*, the CJEU upheld the general principle requiring the submission of a tender in order to have standing to challenge the decision in question, as well as the compatibility with Article 1(3) of the Remedies Directive of the impossibility exception under the Italian law at issue, but nonetheless left open the possibility that the Italian court could reach a view on the facts that the strict application of that exception could affect the applicants' right to effective judicial protection. By giving guidance to the national court to assist it to decide the case on the facts, the CJEU did not have any concern that the approach it was taking breached the principle of legal certainty. That is presumably because it was of the view that it did not. Nor, in my view, did the approach taken by the judge in this case. It is not a breach of

the principle of legal certainty for a general rule to exist which is subject to exceptions, the categories of which are not closed, and the application of which depends on the particular circumstances of the case.

(g) Judge Not Legislating

165. It follows that I do not accept the criticism Word Perfect makes of the judge's approach to the interpretation and application of Regulation 4 to the facts of this case. The judge was not engaged in a form of legislating by creating a new rule. On the contrary, the judge was following and correctly applying the approach to the interpretation of Article 1(3) of the Remedies Directive and Regulation 4 of the Remedies Regulations given by the CJEU in a line of cases starting with *Grossmann* and ending with *Amt*, and by Hogan J in *Copymoore (No. 1)*. Further, I am satisfied that the reasons given by the judge in support of his conclusion that there is a general rule or principle requiring that an applicant submit a tender in order to have standing to challenge a decision taken as part of the tender procurement process, subject to exceptions, and for his conclusion that that rule (and exceptions) applies to decisions taken at an earlier point in the tender process prior to the contract award decision, are correct and persuasive. The most persuasive of those reasons is the fact that the CJEU confirmed that the *Grossmann* principles applied in the case of challenges to decisions in the tender process, such as that taken by Word Perfect to the impugned decision in this case.

166. Nor is there any merit to Word Perfect's contention that in interpreting Regulation 4 as he did, and in applying that interpretation to the facts, based on the judgments of the CJEU in cases such as *Grossmann* and *Amt*, the judge was elevating the substance of the national rules at issue in those cases into what at a minimum is required in terms of access to review procedures under Article 1(3) of the Remedies Directive. The national rule at issue in *Grossmann* was the minimum required under Article 1(3) and was almost identical

to Regulation 4 of the Remedies Regulations. The national rule at issue in *Amt* was that the claimant had to show a sufficient legal interest in the claim and that rule was interpreted and applied in a particular manner by the Italian courts. The CJEU in that case focused on one of the exceptions to the general requirement that a tender had to be submitted in order to have standing to challenge the decision at issue. Here, the judge did not elevate the Italian rule at issue, as interpreted by the Italian courts, into the minimum required under Article 1(3) of the Remedies Directive. Rather, he applied the principles set out by the CJEU in that case in his interpretation of Regulation 4 and in his application of that interpretation to the facts of the case. That is precisely what Hogan J. had done in *Copymoore (No. 1)*. He applied the principles set out in *Grossmann* and in *Espace Trianon* in his interpretation of Regulation 4 and in his application of that interpretation to the facts. In my view, therefore, the judge's approach in this case was correct and consistent with the case law of the CJEU and of the Irish courts and is not open to the criticism made by Word Perfect.

(h) The Other Irish Cases

167. It is not necessary to embark on a detailed analysis of the other Irish cases relied on by the respondent and addressed in submissions by the parties. However, some comment is appropriate. The High Court in *Student Transport Scheme* did not engage in a detailed analysis of Article 1(3) of the Remedies Directive or Regulation 4 of the Remedies Regulations. McGovern J. in that case referred to the opinion of the Advocate General in *Espace Trianon* that Member States were only under an obligation to grant standing to those who had participated in the procurement processes, save in exceptional circumstances, where successful participation in a contract award procedure was impossible due to the conduct of the contracting authority. He also referred to the judgment of Finlay Geoghegan J. in *Ryanair* and her endorsement of the approach to the assessment

of standing by Walsh J. set out in *Lynch*. McGovern J. concluded that the applicant had given very little evidence of its capacity to provide the services the subject of the procurement procedure, namely, the school transport scheme. McGovern J. took into account the fact that the applicant was a shelf company which was only founded a short time before the proceedings were commenced. He held that in the circumstances the applicant had not met the test for eligibility set out in Regulation 4. It appears that McGovern J.'s conclusion on the eligibility issue was *obiter* as he had already found against the applicant on the substance of the case and held that the provisions of the Remedies Directive and the Remedies Regulations did not apply.

168. *Copymoore (No. 2)* involved a challenge by the same applicants in *Copymoore (No. 1)* to a subsequent tender process for a proposed framework for the supply of printers and related services on several grounds. The applicants did not each separately submit a tender in the course of the tender process on the basis that they contended that because the qualification criteria were set at a level which was disproportionate, discriminatory and in breach of the principles of competition, their chances of successfully submitting a tender were non-existent. The case made was that the majority of the applicants were not in a position to meet the qualification criteria and were excluded from the tender process at the very outset because of the disproportionate and discriminatory level at which they were set. It can immediately be seen that the facts of that case were radically different to the present case where no such claim was made by Word Perfect. In the course of his detailed judgment, McDermott J. considered and applied the principles in *Grossmann* and referred to *Student Transport Scheme*, *Ryanair* and *Copymoore (No. 1)*. He held that a number of the applicants who had not submitted tenders were entitled to maintain the proceedings on the basis of their submission that the specifications set out in the RFT rendered it impossible for them to succeed in the tender process. The court went on, however, to

reject the substance of their claims. At para. 80 of his judgment, McDermott J. referred to *Grossmann* and observed that those who had not participated in the tendering process did not have standing to bring proceedings challenging decisions made in that process “*save in exceptional circumstances where the applicants’ successful participation in the process is made impossible due to the conduct of the Contracting Authority for example by setting unlawful requirements.*” He held that it was for the applicant to establish this on the evidence and that the position would “*vary from case to case but an applicant must demonstrate a sufficient interest in the proposed tender.*” (para. 80) It seems to me that McDermott J., in referring to the “*exceptional circumstances*” being where successful participation was made impossible due to the conduct of the contracting authority setting unlawful requirements, was not stating that that was the only possible exception. It was, however, the only such exception potentially relevant in that case. He gave this as an example of the exceptions which may exist. As I have already indicated, the categories of exceptions are not closed, and exceptional circumstances are not confined to where the applicants’ successful participation in the process is made impossible due to the conduct of the contracting authority such as by setting unlawful requirements. Other possible exceptional circumstances may arise.

169. The judge referred in the course of his judgment to the recent decision of O’Moore J. in *Payzone*. The parties referred to that judgment in the course of their written and oral submissions on the appeal. In that case, the applicant sought to challenge a tender award decision in circumstances where the applicant did not itself submit a tender but rather agreed to participate in two other tenders, one of which was successful. However, the successful tenderer informed the applicant that it was not after all part of the successful tender and would play no part in the contract. The applicant then sought to challenge the contract award decision. The respondent contended that the applicant was not an “*eligible*

person” for the purpose of Regulation 4 of the Remedies Regulations and brought an application for an order dismissing the proceedings under O.84A, r.6(2) RSC. O’Moore J. held that on a literal or purposive meaning of Article 1(3) of the Remedies Directive or Regulation 4 of the Remedies Regulations, the applicant did not qualify as an “*eligible person*”. In his judgment, O’Moore J. carefully considered a number of the judgments of the CJEU including *Grossmann* and *Espace Trianon* as well as that of Hogan J. in *Copymoore (No. 1)*. He made the point that while it may be difficult for a party who has not submitted a tender to establish an interest in obtaining the contract at issue, it is “*possible*” to do so and that a party does not have to submit a “*doomed tender*” in order to prove it has an interest in obtaining the relevant contract (para. 41). The decision of O’Moore J. to accede to the respondents and to dismiss the proceedings is the subject of an appeal to this Court. The appeal was listed for hearing at the end of last year but was adjourned to enable discussions to take place between the parties. The appeal remains pending before this Court and it would, therefore, be inappropriate for me to say anything about the correctness or otherwise of the decision in the case. It is sufficient to note that the leading judgments were all considered by O’Moore J. in that case and applied by him to the particular facts. Whether he was correct or not in his ultimate decision will be a matter for the Court to decide, if the appeal in that case is heard.

(i) Principles of Effectiveness and Equivalence

170. In addition to contending that the judgment of the High Court creates a rule that is in breach of the general principle of legal certainty, a contention I have rejected earlier, Word Perfect also contends that the judgment breaches the principles of effectiveness and equivalence. I do not agree.

171. With respect to the principle of effectiveness, I accept the respondent’s submission that, in setting out the general principles to be applied in considering the standing of an

applicant to challenge a particular decision taken in the course of a public procurement tender process, the CJEU in *Grossmann* and in the subsequent cases was alive to the principle of effectiveness and carefully factored it in to the principles on standing set out by the Court in those cases. For example, at para. 36 of its judgment in *Grossmann*, the CJEU made express reference to the requirement imposed on Member States under Article 1(1) of the Remedies Directive to ensure that unlawful decisions of contracting authorities in the course of a procurement procedure be subject to “*effective review which is as swift as possible*”, referring to many of the earlier judgments of the CJEU in support of that principle, including *Alcatel Austria*, *Universale-Bau* and *Fritsch Chiari*. The CJEU made further reference in that case to the need to take into account the principle of effectiveness in interpreting the term “*interest in obtaining*” the contract in Article 1(3) of the Remedies Directive. At para. 42, referring to its earlier judgment in *Fritsch Chiari*, the CJEU stated that, while Article 1(3) expressly allowed Member States to determine the “*detailed rules*” for determining standing to invoke review procedures in respect of decisions taken in the public procurement field, that did not authorise Member States to give the term “*interest in obtaining*” the contract “*an interpretation which may limit the effectiveness of that Directive*”. Similarly, in *Amt*, the CJEU was alive to the need to ensure that the general rule endorsed by the Court in that case, as being compatible with EU law, was not in practice liable to affect the rights of the applicants in the proceedings to effective judicial protection. While the *Grossmann* principles were endorsed by the CJEU in that case, the Court left open the possibility that the Italian court might find that, in practice, the application of the Italian national law could affect the right of the applicants to such protection.

172. There is no question, in my view, of the principle of effectiveness being infringed on the facts of this case in circumstances where the reason why Work Perfect did not submit a

tender was its own decision not to do so, and it did not and could not claim that it was prejudiced in any way by the actions of the respondent in putting in a tender, or that it was impossible for it to do so, or impossible for it to have obtained a contract admitting it to the 2021 Framework. Word Perfect did not make any of those cases, nor could it have done so on the evidence. I do not accept, therefore, that there is any basis to the contention that the approach taken by the trial judge and his decision in this case breached the principle of effectiveness.

173. Nor do I accept that the judge's decision breached the principle of equivalence. Word Perfect contends that, in effect, in order to comply with the general principle of EU law of equivalence, the judge was bound to interpret the standing requirements in Regulation 4 of the Remedies Regulations no more narrowly than the Irish Courts had interpreted the "*sufficient interest*" requirement in O.84, r.20(5) RSC in the case of judicial review challenges governed by national law. I do not agree. I accept the respondent's submission that the test of "*sufficient interest*" in O.84, r.20(5) RSC in respect of judicial review challenges governed by national law is a different test to the test set out in Article 1(3) of the Remedies Directive as transposed into Irish law by Regulation 4 of the Remedies Regulations. To establish eligibility or standing under Regulation 4, the applicant must demonstrate more than "*sufficient interest*", in that it must demonstrate an "*interest in obtaining*" the relevant contract as well as that it has allegedly suffered or will suffer harm as a result of the alleged unlawful act complained of. As set out in the CJEU case law, as considered by the judge and discussed earlier in this judgment, it is a different test to the "*sufficient interest*" test in O.84, r.20(5) RSC. That is clear also from the judgment of Hogan J. in *Copymoore (No. 1)*. As regards Word Perfect's reliance on the decision of Finlay Geoghegan J. in *Ryanair* that the applicant had standing to argue that the Minister was obliged to run a new tender process, even though it had not participated in the

original tender process, that judgment is of no assistance to the applicant. The court was not concerned in that case with the issue of standing under Regulation 4 of the Remedies Regulations, but rather with whether the applicant had demonstrated a “*sufficient interest*” for the purposes of O.84, r.20 RSC. Word Perfect was required by Regulation 4 to show more than “*sufficient interest*” for the purposes of O.84, r.20 RSC when seeking to challenge the impugned decision in this case. It was required to satisfy the standing requirement set out in Regulation 4 of the Remedies Regulations, as interpreted by Hogan J. in *Copymoore (No. 1)* in reliance on the principles set out by the CJEU in *Grossmann* and in the subsequent cases. There is, in my view, therefore, no breach of the principle of equivalence.

(j) Respondent’s Failure to Raise Standing in a Different Case

174. There is no merit to Word Perfect’s contention that the fact that the respondent did not object to Word Perfect’s standing to challenge the RFT for interpretation services in the other proceedings heard by the judge prior to this case meant that it was not entitled to raise the issue in this case. It was a matter for the respondent to raise an issue as to Word Perfect’s eligibility to maintain the challenge of that case. The fact that it chose not to do so does not mean that it was not entitled to raise the issue in this case. They are separate cases. In addition, I am satisfied that the judge was correct in drawing a distinction between what happened in relation to the tender process in those other proceedings and what happened in this case. In the other case, the respondent put the tender process on hold once Word Perfect’s challenge was received. It would have been surprising in those circumstances for the respondent to seek to challenge Word Perfect’s ability to maintain those proceedings on the basis that it did not submit a tender in circumstances where the entire tender process was put on hold.

(k) Significance of Tenderer's Statement

175. I am also satisfied that there is no merit to the submission made by Word Perfect, for the first time in its written submissions for the appeal, that submitting a tender and signing the Tenderer's Statement would have been entirely inconsistent with its objections to the RFT. However, there would have been nothing to prevent Word Perfect from putting in a tender and making it clear in the Tenderer's Statement or elsewhere that it did not accept that aspects of the RFT were valid or lawful and that it was putting in its tender without prejudice to its complaints and objections to those aspects. I do not accept that this amounted to a good reason why Word Perfect did not or could not put in a tender and, in fairness, this point was not pressed with any great vigour at the hearing.

(l) New Point on Appeal: s.3 of European Communities Act 1972

176. Finally, as noted earlier, in its oral submissions on the appeal Word Perfect sought to anticipate a point which it expected might be made by the respondent in its oral submissions on the appeal. The point was, somewhat tentatively, made by the respondent in its oral submissions. The point was that as the State had transposed Article 1(3) of the Remedies Directive into Irish law by Regulation 4 of the Remedies Regulations, a statutory instrument made under s.3 of the European Communities Act 1972, Regulation 4 could not be interpreted as going further than the minimum required or necessary under Article 1(3). The argument was based on cases such as *Meagher v. Minister for Agriculture* [1994] 1 IR 329 and the decision of the Court of Appeal (judgment delivered by Hogan J.) in another Word Perfect case, *Word Perfect Translation Services Limited v. Minister for Public Expenditure & Reform* [2018] IECA 35. This argument was not advanced in the High Court and was not made in the respondent's written submissions on the appeal. It is fair to say that, in those circumstances, it was somewhat tentatively advanced by the respondent in circumstances where it contended that the correct interpretation of Regulation 4 was

clear on the basis of the case law relied on. I do not believe that it would be appropriate for the Court to express a view on the merits of this argument where it was not raised before the High Court, was not considered by the High Court, was not addressed by the parties in their written submissions and was only advanced and responded to in passing at the hearing of the appeal. The Court did not, therefore, have the benefit of detailed argument on the point and the judge did not have the opportunity of considering the point at all. In those circumstances, I would prefer to leave over any consideration of an argument along those lines to a case in which it was fully argued and considered and properly raised as part of the appeal.

7. Summary and Conclusion

177. In summary, I have concluded that the judge was correct in his interpretation of Regulation 4 of the Remedies Regulations, which he derived from a well-established line of authority from the CJEU, including cases such as *Grossmann*, as applied by the High Court (Hogan J.) in *Copymoore (No. 1)* and in a number of subsequent judgments of the High Court, and most recently by the CJEU in *Amt*.

178. The judge was, in my view, correct to find that, in general, in order to be an “*eligible person*” within the meaning of that term in Regulation 4, in the sense of having an “*interest in obtaining*” the contract at issue in the public procurement tender procedure, and alleging harm or risk of harm by the alleged infringement of EU public procurement law, the applicant must have participated in the particular tender procedure by submitting a tender. That general principle or rule is subject to exceptions, the categories of which are not closed, but include where it was not possible for the applicant to put in a tender for various reasons, including (but not limited to) where the tender procedure was not properly advertised and also where, by reason of alleged discriminatory specifications or otherwise, it would have been impossible for the applicant to succeed in the tender procedure, and the

tender would, therefore, have been pointless or doomed to fail. The scope of the range of possible exceptions to the general principle or rule was not at issue in this appeal as Word Perfect did not claim to be entitled to rely on any exception. Rather, it challenged the existence of any such general rule requiring an applicant to put in a tender in order to have standing to challenge the decision at issue.

179. I have concluded that the judge was correct in deciding that Word Perfect was caught by the general principle or rule and that it had not established that it had an “*interest in obtaining*” the contract for admission to the 2021 Framework or that it would be harmed by the alleged infringement for the purposes of Regulation 4 in circumstances where it did not, but could have, put in a tender as a result of its own decision not to participate in what it regarded as a fundamentally flawed tender procedure.

180. I have considered and rejected all of the grounds of appeal advanced by Word Perfect in its appeal from the judgment and order of Twomey J. in the High Court. I am satisfied that the judge was correct in his interpretation of Regulation 4 of the Remedies Regulations and in his application of that interpretation to the facts as agreed and found by him.

181. In those circumstances, I would dismiss Word Perfect’s appeal and affirm the order of the High Court.

182. As Word Perfect has been unsuccessful in its appeal, it would seem to me that it should be ordered to pay the respondent’s costs of the appeal, such costs to be adjudicated upon in default of agreement. However, I would suggest that the matter be further listed at the earliest opportunity so that final orders can be made on the appeal, including an order for the costs of the appeal and for confirmation that the respondent is free to proceed to conclude the contracts for admission to the 2021 Framework.

183. Donnelly J. and Faherty J. have requested that I state that they are both in agreement with this judgment.