Reports of Cases

OPINION OF ADVOCATE GENERAL
HOGAN
delivered on 9 September 2021 [1]

Case C-497/20

Randstad Italia SpA
v
Umana SpA,
Azienda USL Valle d'Aosta,
IN. VA SpA,
Synergie Italia agenzia per il lavoro SpA

(Request for a preliminary ruling from the Corte suprema di cassazione (Supreme Court of Cassation, Italy))

(Reference for a preliminary ruling – Public procurement – Directive 89/665/EEC – Article 1 – Right to an effective remedy – Article 47 of the Charter of Fundamental Rights of the European Union – Obligation for Member States to provide for a review procedure – Access to review procedures – Action for annulment of the decision awarding a public contract – Counterclaim brought by the successful tenderer – Case-law of the Constitutional Court limiting the cases where an appeal in cassation is possible – Article 267 TFEU)

I. Introduction

1. The present request for a preliminary ruling raises important and, in some respects, novel issues concerning the question whether a Member State is obliged to provide a further right of appeal where an appellate court has itself misinterpreted or misapplied EU law. It also raises the question of what (if any) other remedies are available to the injured party in the event that there is no such right of appeal.

2. This request concerns more specifically the interpretation of Articles 4(3) and 19(1) TEU and of Articles 2(1) and (2) and 267 TFEU, read in the light of Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter'). It also raises issues concerning the proper interpretation of Article 1(1) and (3) and Article 2(1) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions

[1] Original language: English.

relating to the application of review procedures to the award of public supply and public works contracts,[2] as amended, inter alia, by Directive 2007/66/EC of the European Parliament and the Council of 11 December 2007.[3]

3. This application was made in the context of proceedings between Randstad Italia SpA ('Randstad') and Umana SpA, Azienda USL (Unità Sanitaria Locale) Valle d'Aosta (local health agency of the Valle d'Aosta region, Italy; 'USL'), IN. VA SpA and Synergie Italia agenzia per il lavoro SpA ('Synergie'). These proceedings concern, on the one hand, the exclusion of Randstad from a procedure for the award of a public contract and, on the other hand, the regularity of that procedure.

4. The Court is thus once again called upon to rule, at the request of an Italian court, on the scope of the obligation of the Member States, laid down in Article 1 of Directive 89/665, to ensure effective review of public contracts where, in the context of an action for annulment of the decision awarding a public contract, the successful tenderer brings a counterclaim against the unsuccessful tenderer.

5. However, this request occurs in a specific and sensitive context where, on the one hand, the Consiglio di Stato (Council of State, Italy) seems to have – at least at the time when it was called upon to rule on the dispute in question – some difficulty in applying the case-law of the Court on that issue and where, on the other hand, the Corte suprema di cassazione (Supreme Court of Cassation, Italy) has doubts about the extent of its jurisdiction with regard to appeals against judgments of the Consiglio di Stato (Council of State), as recently specified by the Corte costituzionale (Constitutional Court, Italy). With the present request for a preliminary ruling, the Court is therefore implicitly called upon to arbitrate a conflict between the three Italian supreme courts.

II. Legal Context

A. EU law

6. Recitals 17, 34 and 36 of Directive 2007/66 provide:

'(17) A review procedure should be available at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement.

…

(34) … In accordance with the principle of proportionality, as set out in [Article 5 TEU], this Directive does not go beyond what is necessary in order to achieve that objective, while respecting the principle of the procedural autonomy of the Member State.

…

[2] OJ 1989 L 395, p. 33.

[3] OJ 2007 L 335, p. 31.

(36) This Directive respects fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In particular, this Directive seeks to ensure full respect for the right to an effective remedy and to a fair hearing, in accordance with the first and second subparagraphs of Article 47 of the Charter.'

7. Article 1 of Directive 89/665, in its current version, entitled 'Scope and availability of review procedures', provide:

'1. This Directive applies to contracts referred to in Directive 2014/24/EU of the European Parliament and of the Council [of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65),] unless such contracts are excluded in accordance with Articles 7, 8, 9, 10, 11, 12, 15, 16, 17 and 37 of that Directive.

…

Member States shall take the measures necessary to ensure that, as regards contracts falling within the scope of Directive [2014/24] or Directive 2014/23/EU [of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (OJ 2014 L 94, p. 1)], decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in Articles 2 to 2f of this Directive, on the grounds that such decisions have infringed Union law in the field of public procurement or national rules transposing that law.

…

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

8. Article 2 of Directive 89/665 is entitled 'Requirements for review procedures'. According to the first two paragraphs of that provision:

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

(a) take, at the earliest opportunity and by way of interlocutory procedures, interim measures with the aim of correcting the alleged infringement or preventing further damage to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a public contract or the implementation of any decision taken by the contracting authority;

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

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

2. The powers specified in paragraph 1 and Articles 2d and 2e may be conferred on separate bodies responsible for different aspects of the review procedure.'

B. Italian law

9. The eight paragraph of Article 111 of the Italian Constitution provides:

'Appeals in cassation against decisions of the Council of State and the Corte dei conti [Court of Auditors] are permitted only for reasons of jurisdiction.'

10. Article 360(1)(1) of the Codice di procedura civile (Code of Civil Procedure) provides:

'Judgments delivered on appeal or at sole instance may be challenged by an appeal in cassation:

(1) for reasons relating to jurisdiction …';

11. Article 362(1)(2) of the same code provides:

'1. An appeal in cassation may be brought … against a decision given by a special court on appeal or at sole instance, for reasons relating to the jurisdiction of that court …

2. The following may be appealed in cassation at any time:

(1) positive or negative conflicts of jurisdiction between special judges, or between them and ordinary judges;

(2) negative conflicts of attribution between the public administration and the ordinary judge.'

12. Article 91 of the Codice del processo amministrativo (Code of Administrative Procedure) provides:

'Judgments [of the administrative courts] may be challenged by way of appeal, revocation, opposition by a third party or an appeal in cassation for reasons of jurisdiction only.'

13. Article 110 of the same code provides:

'An appeal in cassation may be brought against a judgment of the Consiglio di Stato [Council of State] for reasons of jurisdiction only.'

III. The facts of the main proceedings

14. USL launched a tendering procedure with a value of more than EUR 12 000 000 for the purpose of awarding a contract, on the basis of the most economically advantageous tender, to an employment agency for the temporary supply of personnel. The contracting authority stipulated in the tender documents that technical offers must exceed a 'minimum threshold' – set at 48 points – and that competitors awarded points below that threshold would be excluded.

15. Eight competing undertakings participated in the tender process, including Randstad, a temporary association of undertakings formed by Synergie and Umana ('the TAU'), and Gi Group Spa. After evaluating the technical offers, the procurement committee proceeded to make an

economic assessment of the tenders of the TAU and Gi Group alone and excluded Randstad for having failed to pass the threshold. The contract was ultimately awarded to the TAU on 6 November 2018.

16. Randstad brought proceedings before the Tribunale amministrativo regionale della Valle d'Aosta (Regional Administrative Court, Valle d'Aosta, Italy) disputing its exclusion for having failed to pass the threshold and challenging the award of the contract to the TAU. With a view to gaining readmission to the tendering procedure, Randstad argued that the points it had been awarded were unreasonable, that the assessment criteria were imprecise, that there had been a failure to justify the marks, that the appointment and composition of the procurement committee were unlawful, and that there had been a failure to divide the call for tenders into lots.

17. USL and the TAU defended that action, raising the objection that Randstad's pleas in law were inadmissible: they maintained that Randstad lacked standing to make the claims since it had, in any event, been excluded from the tendering procedure.

18. In a judgment published 15 March 2019, the Tribunale amministrativo regionale della Valle d'Aosta (Regional Administrative Court, Valle d'Aosta) rejected that objection to admissibility, taking the view that Randstad had legitimately participated in the tendering procedure, inasmuch as it met the requirements, and had been excluded from that procedure following a negative assessment of its tender, and that it therefore had standing to challenge the outcome of the tendering procedure. That court then proceeded to examine all the claims made in the action and dismissed them on their merits.

19. Randstad brought an appeal against that judgment of the Tribunale amministrativo regionale della Valle d'Aosta (Regional Administrative Court, Valle d'Aosta) before the Consiglio di Stato (Council of State), reiterating the arguments it had made at first instance. Synergie and Umana brought a cross-appeal, taking issue with the Regional Administrative Court's judgment in so far as that court had treated as admissible and had examined the substance of Randstad's claims, which they regarded as having been made by a person that lacked standing, having been excluded from the tendering procedure.

20. In a judgment published 7 August 2019, the Consiglio di Stato (Council of State) rejected the main ground of appeal by which Randstad disputed the award of insufficient points and upheld the cross-appeals. In particular, the Consiglio di Stato (Council of State) varied the judgment under appeal in part and held that Randstad lacked *locus standi* since it had been excluded from the tendering procedure. It followed that the Regional Administrative Court therefore should not have examined the substance of the other claims made in the main action.

21. According to the Consiglio di Stato (Council of State), once it had been excluded from the tendering procedure Randstad lacked standing, because it had a purely factual interest, like any other operator in the sector that had not participated in the tendering procedure. The Consiglio di Stato (Council of State) followed its earlier case-law according to which a competitor that has been excluded from a tendering procedure has no standing to challenge the tender documents, unless it obtains a ruling that its exclusion was unlawful.

22. Randstad brought an appeal in cassation against the judgment of the Consiglio di Stato (Council of State) before the referring court. Synergie, Umana and the contracting authority are defending that appeal.

23. Randstad maintains that the Consiglio di Stato (Council of State) infringed Article 362(1) of the Italian Code of Civil Procedure and Article 110 of the Italian Code of Administrative Procedure, in that it ruled that a person excluded from a tendering procedure – by means of a decision whose lawfulness has not been definitively established, inasmuch as it is disputed in legal proceedings – has no standing and no interest in bringing a complaint concerning the tendering procedure. That, it contended, entails a breach of the principle of effective judicial protection which is enshrined in Directive 89/665, and a denial of access to such protection which may be challenged by way of an appeal in cassation for reasons of jurisdiction, in accordance with the eighth paragraph of Article 111 of the Italian Constitution.

24. Randstad relies on the case-law of the Court of Justice according to which even the mere likelihood of securing an advantage by bringing an action, consisting in the outcome thereof, whatever it may be, such as a repetition of the tendering procedure, is capable of establishing an interest in bringing proceedings and the right to judicial protection. The appellant cites for this purpose the judgments of 4 July 2013, *Fastweb* (C-100/12, EU:C:2013:448); of 5 April 2016, *PFE* (C-689/13, EU:C:2016:199); and of 5 September 2019, *Lombardi* (C-333/18, EU:C:2019:675).

25. The respondents argue that the appeal is inadmissible. They maintain that the ground of appeal in question concerns an alleged infringement of the law. It is not a 'reason of jurisdiction' and therefore cannot be invoked before the Corte suprema di cassazione (Supreme Court of Cassation) in order to challenge a judgment of the Consiglio di Stato (Council of State).

26. According to the referring court, the appeal in cassation referred to in the eighth paragraph of Article 111 of the Italian Constitution should, in such a case, be available. The effectiveness of Article 267 TFEU would be undermined if the national court were prevented from immediately applying EU law in accordance with the case-law of the Court of Justice. In a case such as the present, an appeal in cassation would be the final means of preventing a judgment of the Consiglio di Stato (Council of State) which (it is said) is contrary to EU law from becoming *res judicata*.

27. However, it is apparent from Judgment No 6 of 18 January 2018 of the Corte costituzionale (Constitutional Court) [4] concerning the eighth paragraph of Article 111 of the Italian Constitution ('Judgment No 6/2018') that it is not permissible, in the current state of Italian constitutional law as interpreted in that judgment, to equate a breach of EU law with a plea relating to jurisdiction. According to that judgment, '"Exceeding judicial authority", which may be contested by means of appeal to the Supreme Court of Cassation for reasons pertaining to jurisdiction [within the meaning of the eighth paragraph of Article 111 of the Italian Constitution], as it has always been understood … refers exclusively to two types of scenarios: those characterised by a total lack of jurisdiction, that is, when the Council of State or the Court of Auditors asserts its own jurisdiction over the area reserved to the legislator or the administration (a so-called invasion or encroachment), or when, on the contrary, it denies jurisdiction on the erroneous assumption that the subject matter cannot, absolutely speaking, be the object of its judicial review (so-called abstention), as well as those scenarios [characterised by a relative lack of] jurisdiction, when an administrative or Court of Auditors judge asserts jurisdiction over a subject matter attributed to a different jurisdiction or, on the contrary, denies it on the erroneous assumption that it belongs to other courts'. [5]

[4] Judgment of 18 January 2018, No 6/2018 (ECLI:IT:COST:2018:6).

[5] Judgment No 6/2018, paragraph 15 (in its English translation available on the website of the Corte costituzionale (Constitutional court) (https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/Sentenza%20n.%206%20del%202018%20red.%20Coraggio%20EN.pdf).

28. The referring court concludes that it should declare Randstad's appeal in cassation inadmissible if it were to comply with that judgment of the Corte costituzionale (Constitutional Court). That being so, it queries whether Judgment No 6/2018, which limits, in administrative matters, the jurisdiction of the Corte suprema di cassazione (Supreme Court of Cassation) referred to in the eighth paragraph of Article 111 of the Italian Constitution to cases in which it is alleged that the Consiglio di Stato (Council of State) has disregarded the 'external limits' of its jurisdiction, would infringe EU law.

29. In that regard, the referring court considers that, where the Consiglio di Stato (Council of State) misapplies or misinterprets national provisions of law in a manner incompatible with the provisions of EU law as interpreted by the Court of Justice, it is exercising a jurisdictional power which it does not have. In reality it is exercising a power to create law which is not even conferred on the national legislature. This constitutes a lack of jurisdiction which should be subject to an appeal to the Corte suprema di cassazione (Supreme Court of Cassation). It is irrelevant in this respect whether the judgment of the Court of Justice from which the incompatibility between the application or interpretation by the national court and EU law arose is prior or subsequent to that application or interpretation.

30. The referring court points out that, prior to Judgment No 6/2018, the consistent case-law of its own combined chambers was that, in the event of an appeal against a judgment of the Consiglio di Stato (Council of State), the review of the external limits of 'jurisdiction', within the meaning of the eighth paragraph of Article 111 of the Italian Constitution, did not extend to the review of the interpretative choices made by the administrative court that might involve simple errors '*in iudicando*' (on the merits) or '*in procedendo*' (on the procedure), unless there was a fundamental distortion of the applicable rules which could constitute a denial of justice, such as an error *in procedendo* consisting in the application of a domestic procedural rule which had the effect of denying the party concerned access to the judicial protection granted by directly applicable provisions of EU law.

31. Such an approach would be compatible with the principles of equivalence and effectiveness which, according to the case-law of the Court of Justice, condition the exercise of the procedural autonomy of the Member States. Judgment No 6/2018 and the case-law which has developed in its wake are, on the contrary, incompatible with those principles.

32. Then, it is also important for the Corte suprema di cassazione (Supreme Court of Cassation) to know, following that reference for a preliminary ruling, whether or not the approach followed by the Consiglio di Stato (Council of State) in the contested judgment is compatible with the judgments of 4 July 2013, *Fastweb* (C-100/12, EU:C:2013:448); of 5 April 2016, *PFE* (C-689/13, EU:C:2016:199); and of 5 September 2019, *Lombardi* (C-333/18, EU:C:2019:675). This aspect of the dispute raises two separate issues.

33. First, the referring court wonders whether the case-law already established by the Court of Justice concerning the right of review of tenderers excluded from public procurement procedures is transposable to a case such as that at issue in the main proceedings. Second, since the Consiglio di Stato (Council of State) refrained, without giving reasons, from asking the Court of Justice whether the lessons to be drawn from the judgments cited in the previous point of this Opinion are transposable to a case such as that at issue in the main proceedings, it is important, in the view of the referring court, that it should itself now be able to refer that question to the Court of Justice.

IV. The request for a preliminary ruling and the procedure before the Court

34. It is in those circumstances that, by decision of 7 July 2020, received at the Court on 30 September 2020, the Corte suprema di cassazione (Supreme Court of Cassation) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Do Article 4(3) TEU, Article 19(1) TEU, Article 2(1) and (2) TFEU, and Article 267 TFEU, read in the light of Article 47 of the Charter, preclude an interpretative practice such as that regarding the eighth paragraph of Article 111 of the Italian Constitution, Article 360(1)(1) and Article 362(1) of the Italian Code of Civil Procedure, and Article 110 of the Italian Code of Administrative Procedure – under which provisions an appeal in cassation against a judgment of the Consiglio di Stato (Council of State) may be brought for "reasons of jurisdiction" – such as that which emerges from Judgment No 6/2018 of the Corte costituzionale (Constitutional Court) and from subsequent national case-law, in which it has been held, marking a departure from the approach previously taken, that the remedy of an appeal in cassation, on grounds of a "lack of jurisdiction", is not available for the purpose of challenging judgments in which the Council of State has applied interpretative practices developed nationally but in conflict with judgments of the Court of Justice, in sectors governed by EU law (in the present case, public procurement) and with regard to which the Member States have waived their right to exercise sovereign powers in a manner incompatible with EU law, with the effect of consolidating infringements of Community law that might have been rectified using the remedy of an appeal in cassation and of undermining the uniform application of EU law and the effectiveness of the judicial protection afforded to individuals in legal situations of Community significance, contrary to the requirement that EU law be fully and duly applied by every court in a manner necessarily consistent with its correct interpretation by the Court of Justice, regard being had to the limits on the "procedural autonomy" of the Member States in the structuring of their rules of procedure?

(2) Do Article 4(3) TEU, Article 19(1) TEU, and Article 267 TFEU, read in the light of Article 47 of the Charter, preclude the eighth paragraph of Article 111 of the Italian Constitution, Article 360(1)(1) and Article 362(1) of the Italian Code of Civil Procedure, and Article 110 of the Italian Code of Administrative Procedure from being interpreted and applied, as they have been in national judicial practice, in such a manner that an appeal in cassation before the Combined Chambers [of the Court of Cassation] for "reasons of jurisdiction", on grounds of a "lack of jurisdiction", cannot be brought for the purpose of challenging a judgment in which the Council of State, ruling in a dispute involving issues concerning the application of EU law, refrains, without reason, from making a reference to the Court of Justice for a preliminary ruling, where the conditions relieving a national court of that obligation, which have been exhaustively listed by the Court of Justice (in its judgment of 6 October 1982, *Cilfit and Others*, 283/81 [EU:C:1982:335]) and which must be strictly interpreted, are absent, contrary to the principle that national rules and procedural practices, even those arising from legislation or the Constitution, are incompatible with EU law if they prevent a national court (of last instance or otherwise), even temporarily, from making a reference for a preliminary ruling, with the effect of usurping the Court of Justice's exclusive jurisdiction to interpret Community law correctly and in binding fashion, of making any conflicts of interpretation between the law applied by national courts and EU law irremediable (and promoting the consolidation of such conflicts of interpretation), and of undermining the uniform application and effective judicial protection of the rights enjoyed by individuals under EU law?

(3) Do the principles expressed by the Court of Justice in its judgments of 5 September 2019, *Lombardi*, C-333/18[, EU:C:2019:675]; of 5 April 2016, *PFE*, C-689/13[, EU:C:2016:199]; and of 4 July 2013, *Fastweb*, C-100/12[, EU:C:2013:448], in connection with Article 1(1) and (3) and Article 2(1) of [Directive 89/665], as amended by [Directive 2007/66], apply to the case in the main proceedings in which an undertaking has challenged its exclusion from a tendering procedure and the award of the contract to another undertaking and the Council of State has examined the substance only of the ground of appeal whereby the excluded undertaking disputed the points awarded to its technical offer, which were below the "minimum threshold", and has examined as a matter of priority the cross-appeals brought by the contracting authority and the successful tenderer, has upheld them and has declared inadmissible (and refrained from examining the substance of) the other grounds of the main appeal disputing the outcome of the tendering procedure for other reasons (imprecise tender assessment criteria in the tendering specifications, failure to justify the marks awarded, unlawful appointment and composition of the tender committee), in accordance with national judicial practice according to which an undertaking that has been excluded from a tendering procedure has no standing to bring a claim disputing the award of the contract to a competitor undertaking, even by way of the lapse of the tendering procedure, it being necessary to determine the compatibility with EU law of the effect of depriving the undertaking of the right to submit for the court's examination each and every reason for which it disputes the outcome of the tendering procedure, in a situation where that undertaking's exclusion has not been definitively established and where every competitor may argue a similar legitimate interest in the exclusion of its competitors' tenders, which could make it impossible for the contracting authority to choose a regular tender and make it necessary to launch a new tendering procedure in which every tenderer might participate?'

35. In its order for reference, the Corte suprema di cassazione (Supreme Court of Cassation) requested that the present reference for a preliminary ruling be dealt with under an expedited procedure pursuant to Article 105 of the Rules of Procedure of the Court of Justice.

36. In support of its request, the referring court submitted, in essence, that there are valid reasons for seeking to clarify swiftly questions of constitutional importance. The number of appeals against judgments of the Consiglio di Stato (Council of State) in EU law cases that are pending before the Corte di cassazione (Supreme Court of Cassation) shows that there is grave uncertainty as to the scope of the judicial protection of rights conferred by EU law. This needs to be dispelled, particularly in a key sector such as public procurement, in order, inter alia, to avoid the consolidation of national case-law of courts of last instance that might be followed in numerous other rulings.

37. On 21 October 2020, the President of the Court decided, after hearing the Judge-Rapporteur and the Advocate General, to refuse the referring court's request regarding the expedited procedure. On the same day, the President of the Court also decided to give priority treatment to the present case in accordance with Article 53(3) of the Rules of Procedure.

38. Written observations were submitted by Randstad, Umana, the USL, Synergie, the Italian Government, and the Commission. In addition, Randstad, Umana, the Italian Government, and the Commission presented oral arguments at the hearing on 6 July 2021.

V. Preliminary remarks on the context

39. As mentioned in the introduction to this Opinion, the present case concerns, at the outset, the scope of the obligation of the Member States, laid down in Article 1 of Directive 89/665, to ensure effective review of public contracts in the particular situation where a counterclaim is brought by the successful tenderer. The questions referred are, moreover, part of a wider debate between the three Italian supreme courts. In this context, before examining more specifically the questions asked by the Corte suprema di cassazione (Supreme Court of Cassation), it seems useful to begin the analysis by recalling, not only the case-law of the Court of Justice on the subject, but also the Italian procedural context.

A. Synthesis of the case-law of the Court on Directive 89/665 when a counterclaim is brought by the successful tenderer

40. The question of how to deal under Directive 89/665 with a situation in which a claim is brought against a tenderer seeking its exclusion and a counterclaim is submitted is not new. One can, I think, fairly say that the effect of a series of references for preliminary ruling has been that the issue of standing in public procurement proceedings has been clearly resolved by the Court.

41. First, it follows from the third subparagraph of Article 1(1) and Article 1(3) of Directive 89/665 that in order for the review of decisions taken by contracting authorities to be regarded as effective, they must be available at least to any person having or having had an interest in obtaining a particular contract who has been or risks being harmed by an alleged infringement. [6]

42. Accordingly, where, following a public procurement procedure, two tenderers bring actions, each seeking the exclusion of the other, each of those tenderers will have an interest in obtaining a particular contract within the meaning of the provisions referred to in the preceding paragraph. On the one hand, the exclusion of one tenderer may lead to the other being awarded the contract directly in the same procedure. On the other, if all tenderers are excluded and a new public procurement procedure is launched, each of those tenderers may participate in the new procedure and thus obtain the contract indirectly. [7]

43. It follows that the counterclaim brought by the successful tenderer cannot bring about the dismissal of an action for review brought by an unsuccessful tenderer where the validity of the bid submitted by each of the operators is challenged in the course of the same proceedings, given that, in such a situation, each competitor can claim a legitimate interest in the exclusion of the bid submitted by the other, which may lead to a finding that the contracting authority is unable to select a lawful bid. [8]

44. Second, the Court has also pointed out that the number of participants in the public procurement procedure concerned as well as the number of participants who have instigated review procedures and the differing legal grounds relied on by those participants are irrelevant to

[6] See, to that effect, judgments of 4 July 2013, *Fastweb* (C-100/12, EU:C:2013:448, paragraph 25); of 5 April 2016, *PFE* (C-689/13, EU:C:2016:199, paragraph 23); and of 5 September 2019, *Lombardi* (C-333/18, EU:C:2019:675, paragraph 22).

[7] See, to that effect, judgments of 5 April 2016, *PFE* (C-689/13, EU:C:2016:199, paragraph 27), and of 5 September 2019, *Lombardi* (C-333/18, EU:C:2019:675, paragraph 23).

[8] See, to that effect, judgments of 4 July 2013, *Fastweb* (C-100/12, EU:C:2013:448, paragraph 33); of 5 April 2016, *PFE* (C-689/13, EU:C:2016:199, paragraph 24); and of 5 September 2019, *Lombardi* (C-333/18, EU:C:2019:675, paragraph 24).

the question of the applicability of the principle according to which the interests pursued in actions by tenderers, in the context of reciprocal 'excluding' actions, are to be regarded as equivalent in principle. [9]

45. That means that this principle also applies when other tenderers have submitted bids in the context of the procurement process and when the reciprocal 'excluding' actions by parties, do not relate to bids ranked lower than those that are the subject of the 'excluding' actions. [10] Indeed, if the action by the unsuccessful tenderer were held to be well founded, the contracting authority could decide to cancel the procurement procedure and open a new one on the ground that the remaining valid bids do not sufficiently meet the contracting authority's expectations. [11]

46. Third, in that regard, the Court stated that under those circumstances, the admissibility of the main action cannot, without depriving Directive 89/665 of its effectiveness, be contingent on a prior finding that all of the bids ranked lower than that of the tenderer are invalid. [12]

47. The importance of this is that each of the parties to the proceedings has a legitimate interest in the exclusion of the bids submitted by the other competitors. The reasoning here is that one of the irregularities justifying the exclusion of both the successful tenderer's bid and that of the tenderer challenging the contracting authority's decision may also vitiate the other bids submitted in the tendering procedure, which may result in that authority having to launch a new procedure. [13]

48. It follows from that case-law of the Court that the admissibility of the main action cannot be made subject to the condition that the tenderer must adduce evidence that the contracting authority will have to restart the public procurement procedure. The mere existence of such a possibility must be regarded as being sufficient in that respect. [14]

49. In other words, a tenderer excluded from a public procurement procedure must have the right to seek a review of the decision to exclude him from the procurement procedure as well as to access a review of other decisions of the contracting authority provided that any such review might at least *theoretically* result in either the awarding of the contract to the claimant or to a new procurement procedure. [15]

50. If I may now anticipate matters covered in the course of the third question, I am therefore of the view that inasmuch as the Consiglio di Stato (Council of State) ruled otherwise in the case at hand, this amounted – objectively speaking [16] – to a failure properly to apply the existing jurisprudence of the Court of Justice regarding *locus standi* in procurement matters. These standing rules – which, of necessity, are broad and liberal – serve the important public policy goal of ensuring that undertakings who maintain that they have been improperly or unfairly excluded from the procurement process may challenge that decision. The procurement rules seek to ensure that public monies are disbursed fairly and that public contracts are awarded on

[9] See, to that effect, judgments of 5 April 2016, *PFE* (C-689/13, EU:C:2016:199, paragraph 29), and of 5 September 2019, *Lombardi* (C-333/18, EU:C:2019:675, paragraph 30).

[10] See, to that effect, judgment of 5 September 2019, *Lombardi* (C-333/18, EU:C:2019:675, paragraph 26).

[11] See, to that effect, judgment of 5 September 2019, *Lombardi* (C-333/18, EU:C:2019:675, paragraph 28).

[12] See, to that effect, judgment of 5 September 2019, *Lombardi* (C-333/18, EU:C:2019:675, paragraph 29).

[13] See, to that effect, judgments of 5 April 2016, *PFE* (C-689/13, EU:C:2016:199, paragraph 28), and of 5 September 2019, *Lombardi* (C-333/18, EU:C:2019:675, paragraph 27).

[14] See, to that effect, judgment of 5 September 2019, *Lombardi* (C-333/18, EU:C:2019:675, paragraph 29).

[15] See, to that effect, Ginter, C., Väljaots, T., 'Excluded Tenderer's Access to a Review in a Public Procurement Procedure', *European Procurement & Public Private Partnership Law Review*, 2018/4, pp. 301 to 306, esp. p. 303.

[16] See, in this respect, the caveat set out in point 78 of the present Opinion.

the basis of objectively justifiable criteria. The misapplication of these standing rules is not, therefore, simply a technical failure or error on the part of a national court but is rather one which has the potential to impact – sometimes in a far-reaching way – on the efficiency and even the integrity of the entire procurement process.

51. It is true that the judgment in *Lombardi* (itself a reference from the Consiglio di Stato) was delivered in September 2019 about a month after the judgment of the Consiglio di Stato (Council of State) at issue in the present case. Yet in truth the existing case-law of this Court in cases such as *Fastweb* and *PPE* had already given very clear guidance on this general question of standing in procurement matters. In any event, even if there was a real doubt within the various chambers of the Consiglio di Stato (Council of State) concerning the proper application of this earlier case-law – as the judgment in *Lombardi* duly records [17] – that court as a court of last resort was itself obliged to make a reference pursuant to the third paragraph of Article 267 TFEU.

B. Public procurement and review procedures in Italy

52. In a very schematic way, the review procedures in Italy in the field of public procurement fall under the jurisdiction of the administrative courts. There are two levels of jurisdiction: the Tribunali Amministrativi Regionali (Regional Administrative Courts) deal with disputes at first instance and an appeal can then be lodged before the Consiglio di Stato (Council of State).

53. In addition to this 'classic' organisation, the eighth paragraph of Article 111 of the Italian Constitution provides that appeals in cassation against decisions of the Consiglio di Stato (Council of State) are permitted, but only for reasons of jurisdiction.

54. The Corte costituzionale (Constitutional Court) has recently framed the scope of this specific appeal before the Corte suprema di cassazione (Supreme Court of Cassation) in Judgment No 6/2018. As previously explained, according to that judgment, 'exceeding judicial authority' refers exclusively to two types of scenarios: those characterised by a total lack of jurisdiction, that is, when the Consiglio di Stato (Council of State) asserts its own jurisdiction over the area reserved to the legislature or the administration (a so-called invasion or encroachment), or when, on the contrary, it denies jurisdiction on the erroneous assumption that the subject matter cannot, absolutely speaking, be the object of its judicial review (so-called abstention), as well as those scenarios characterised by a relative lack of jurisdiction, when an administrative judge asserts jurisdiction over a subject matter attributed to a different jurisdiction or, on the contrary, denies it on the erroneous assumption that it belongs to other courts. [18]

55. In the same judgment, the Corte costituzionale (Constitutional Court) made two further clarifications. On the one hand, the intervention of the Corte suprema di cassazione (Supreme Court of Cassation), in the context of its review of jurisdiction, 'cannot be justified even by the infringement of EU [law]'. [19] On the other hand, it is also 'impermissible to challenge judgments [by this procedural route] where an administrative court … has adopted an interpretation of a procedural or substantive rule in such a way that the full merits of the case are not subject to adjudication'. [20]

[17] See, in that regard, judgment of 5 September 2019, *Lombardi* (C-333/18, EU:C:2019:675, paragraphs 13 to 19).

[18] See, to that effect, Judgment N 6/2018, paragraph 15 (English version). See the website address in footnote 5 of the present Opinion.

[19] Judgment No 6/2018, paragraph 14.1 (English version). See the website address in footnote 5 of the present Opinion.

[20] Judgment No 6/2018, paragraph 17 (English version). See the website address in footnote 5 of the present Opinion.

VI. Analysis

A. The first question

56. By its first question, the Corte suprema di cassazione (Supreme Court of Cassation) asks, in substance, whether Article 4(3) TEU, Article 19(1) TEU, Article 2(1) and (2) TFEU, and Article 267 TFEU, read in the light of Article 47 of the Charter, preclude a rule such as the eighth paragraph of Article 111 of the Italian Constitution, as interpreted in Judgment No 6/2018, according to which an appeal in cassation for reasons of jurisdiction is not available for the purpose of challenging judgments in which the court of second degree has applied interpretative practices developed nationally but in conflict with judgments of the Court of Justice, in sectors governed by EU law.

1. On the provisions relevant to answer the first question

57. According to settled case-law of the Court, in the procedure laid down by Article 267 TFEU providing for cooperation between national courts and the Court, it is for the latter to provide the national court with an answer which will be of use to it and enable it to determine the case before it. To that end, the Court may have to reformulate the questions referred to it. The Court has a duty to interpret all provisions of EU law which national courts require in order to decide the actions pending before them, even if those provisions are not expressly indicated in the questions referred to the Court of Justice by those courts. [21]

58. Consequently, even if, formally, the referring court has limited its first question to the interpretation of Article 4(3) TEU, Article 19(1) TEU, Article 2(1) and (2) TFEU, and Article 267 TFEU, read in the light of Article 47 of the Charter, that does not prevent the Court of Justice from providing the referring court with all the elements of interpretation of EU law that may be of assistance in adjudicating in the case before it, whether or not the referring court has referred to them in the wording of its question. It is, in that regard, for the Court to extract from all the information provided by the national court, in particular from the grounds of the decision referring the questions, the points of EU law which require interpretation in view of the subject matter of the dispute in the main proceedings. [22]

59. In that regard, it appears that the interpretation of Article 2(1) and (2) TFEU and of Article 267 TFEU does not appear, in view of the information contained in the request for a preliminary ruling, to be necessary in order to provide a useful answer to the first question referred, given that those articles relate, respectively, to the rules in relation the exclusive and sharing competence of the Union and to the preliminary ruling mechanism. On the contrary, it must be recalled, as is clear from its recital 36, Directive 2007/66, and therefore Directive 89/665 that it amended and supplemented, seek to ensure full respect for the right to an effective remedy and to a fair hearing, in accordance with the first and second paragraphs of Article 47 of the Charter. [23]

[21] See, to that effect, judgment of 2 April 2020, *Ruska Federacija* (C-897/19 PPU, EU:C:2020:262, paragraph 43).

[22] See, to that effect, judgments of 19 November 2020, *5th AVENUE Products Trading* (C-775/19, EU:C:2020:948, paragraph 34), and of 22 April 2021, *PROFI CREDIT Slovakia* (C-485/19, EU:C:2021:313, paragraph 50).

[23] See, to that effect, judgment of 15 September 2016, *Star Storage and Others* (C-439/14 and C-488/14, EU:C:2016:688, paragraph 45).

60. Similarly, to the extent that it applies to the Member States, Article 47 of the Charter echoes the second subparagraph of Article 19(1) TEU and gives specific expression to the principle of sincere cooperation laid down in Article 4(3) TEU.[24] Thus, it is clear, according to settled case-law, first, that 'under the principle of sincere cooperation laid down in Article 4(3) TEU, it is for the courts of the Member States to ensure judicial protection of a person's rights under EU law [and, secondly, that] Article 19(1) TEU requires Member States to provide remedies sufficient to ensure effective legal protection, *within the meaning in particular of Article 47 of the Charter*, in the fields covered by EU law'.[25] Moreover, the Court has already pointed out that the requirement on the part of the Member States laid down in Article 19(1) TEU '*corresponds* to the right enshrined in Article 47 of the Charter'.[26]

61. In that context, as it is not disputed that a procedure of review before independent courts exists in Italy and that the debate is not about the establishment of a remedy but about the way that remedy is implemented by the competent courts, Articles 4(3) and 19(1) TEU do not seem to be useful either.

62. Accordingly, as suggested by the Commission,[27] I consider that the first question put by the referring court should be understood as asking whether Article 1(1) and (3) of Directive 89/665, read in the light of Article 47 of the Charter must be interpreted as meaning that they preclude a rule such as the eighth paragraph of Article 111 of the Italian Constitution, as interpreted in Judgment No 6/2018, according to which an appeal in cassation for reasons of jurisdiction is not available for the purpose of challenging judgments in which the court of second degree has applied interpretative practices developed nationally but in conflict with judgments of the Court of Justice, in sectors governed by EU law.

2. The framework of the analysis: the procedural autonomy under Article 47 of the Charter

63. The obligation for Member States to organise a review procedure in the field of public procurement is laid down in Article 1(1) of Directive 89/665. According to the third subparagraph of that provision, Member States shall take the measures necessary to ensure that, as regards contracts falling within the scope of Directive 2014/24 or Directive 2014/23, decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible on the grounds that such decisions have infringed EU law in the field of public procurement or national rules transposing that law.

64. In that regard, Article 1(3) of Directive 89/665 only specifies that Member States have to ensure that the review procedures are available, under detailed rules which they 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.

65. In other words, Directive 89/665 does not contain any provisions specifically governing the conditions under which those review procedures may be used. That directive prescribes only the minimum conditions to be satisfied by the review procedures established in domestic law to

[24] Opinion of Advocate General Sharpston in Joined Cases *Star Storage and Others* (C-439/14 and C-488/14, EU:C:2016:307, footnote 32).

[25] Judgment of 14 June 2017, *Online Games and Others* (C-685/15, EU:C:2017:452, paragraph 54, emphasis added). See also judgment of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)* (C-824/18, EU:C:2021:153, paragraph 143).

[26] Judgment of 27 September 2017, *Puškár* (C-73/16, EU:C:2017:725, paragraph 58). Emphasis added. See also, to that effect, judgment of 16 May 2017, *Berlioz Investment Fund* (C-682/15, EU:C:2017:373, paragraph 44).

[27] Written observations of the Commission, paragraphs 35 and 39.

ensure compliance with the requirements of EU law concerning public procurement.[28] In any case, it must be admitted that Directive 89/665 does not contain any specific provisions concerning appeals which can or must be organised.

66. However, in a context where there are no EU rules governing the matter, the Court has consistently held that it is for every Member State to lay down the detailed rules of administrative and judicial procedures for safeguarding rights which individuals derive from EU law.[29] This respect for the procedural autonomy of Member States is expressly mentioned in recital 34 of Directive 2007/66 and is reflected in Article 1(3) of Directive 89/665.

67. Accordingly, as previously stated by the Court, when they set out detailed procedural rules for legal actions intended to ensure the protection of rights conferred by Directive 89/665 on candidates and tenderers harmed by the decisions of contracting authorities, the Member States must ensure compliance with the right to an effective remedy and to a fair hearing, enshrined in Article 47 of the Charter.[30]

68. In other words, in implementing Directive 89/665, the Member States retain, in accordance with their procedural autonomy, the option of adopting rules which may differ from one Member State to another. They must, however, ensure that those rules do not frustrate the requirements arising from that directive, in particular as regards the judicial protection, guaranteed by Article 47 of the Charter, which underpins it.[31] That means that the characteristics of a remedy such as that under Article 1(1) of Directive 89/665 must be determined in a manner consistent with Article 47 of the Charter rather than by reference to the principles of equivalence and effectiveness, these requirements only 'embody[ing] the general obligation on the Member States to ensure judicial protection of an individual's rights under [EU] law',[32] now enshrined in Article 19(1) TEU and Article 47 of the Charter.[33]

69. A limitation on the right to an effective remedy before a tribunal within the meaning of Article 47 of the Charter can therefore be justified, in accordance with Article 52(1) of the Charter, only if it is provided for by law, if it respects the essence of that right and, subject to the principle of proportionality, if it is necessary and genuinely meets objectives of general interest recognised by the EU or the need to protect the rights and freedoms of others.[34]

28 See, to that effect, judgment of 29 July 2019, *Hochtief Solutions Magyarországi Fióktelepe* (C-620/17, EU:C:2019:630, paragraph 52).

29 See for example, with regard to Directive 89/665, judgment of 12 March 2015, *eVigilo* (C-538/13, EU:C:2015:166, paragraph 39).

30 See, to that effect, judgment of 15 September 2016, *Star Storage and Others* (C-439/14 and C-488/14, EU:C:2016:688, paragraph 46).

31 See, to that effect, in relation to the Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ 2002 L 190, p. 1), as amended by Council Framework Decision 2009/299/JHA of 26 February 2009 (OJ 2009 L 81, p. 24), judgment of 10 March 2021, *PI* (C-648/20 PPU, EU:C:2021:187, paragraph 58).

32 Judgment of 15 April 2008, *Impact* (C-268/06, EU:C:2008:223, paragraph 47). See also judgments of 18 March 2010, *Alassini and Others* (C-317/08 to C-320/08, EU:C:2010:146, paragraph 49), and of 14 September 2016, *Martínez Andrés and Castrejana López* (C-184/15 and C-197/15, EU:C:2016:680, paragraph 59).

33 See, to that effect, Opinion of Advocate General Wathelet in *Hochtief* (C-300/17, EU:C:2018:405, points 32 to 35).

34 See, to that effect, judgment of 15 September 2016, *Star Storage and Others* (C-439/14 and C-488/14, EU:C:2016:688, paragraph 49).

3. Application to the principles to present case

70. In the present case, the rule at issue concerns the limitation of the right to appeal in cassation for reasons of jurisdiction. However, it follows from the settled case-law of the Court that Article 47 of the Charter does not requires two levels of jurisdiction.[35] Indeed, under this provision, the principle of effective judicial protection does not afford a right of access to a second level of jurisdiction but only to a court or tribunal.[36]

71. In those circumstances, the fact that the appeal in cassation available to the unsuccessful tenderer is, as a third level of jurisdiction, limited to questions of jurisdiction can certainly not, in itself, be considered to be contrary to EU law even if it prevents a challenge to a judgment in which the court of second instance applied an interpretation of national law which, objectively speaking, is contrary to EU law.

72. Indeed, EU law does not in principle preclude Member States, in accordance with the principle of procedural autonomy, from restricting or imposing conditions on the pleas which may be relied on in proceedings in an appeal in cassation, subject to respect for the guarantees laid down in Article 47 of the Charter.[37] However, if the national procedural rules ensure that the right to an examination of the substance of the tenderer's claim by the court of first instance and, where appropriate, on appeal, is respected,[38] the procedural rule at issue is not likely to undermine the effectiveness of Directive 89/665 or the requirements of Article 47 of the Charter.

73. I would also add, for the sake of completeness, that, in any event, if a procedural rule such as the limitation on the right to appeal in cassation at issue in the main proceedings were to be regarded as a limitation on the right to an effective remedy before a tribunal within the meaning of Article 47 of the Charter, it would have to be admitted that it is a measure, on the one hand, provided for 'by law' and, on the other hand, liable to discourage frivolous challenges and ensure that all individuals have their actions dealt with as rapidly as possible, in the interest of the proper administration of justice, in accordance with Article 47, first and second paragraphs, of the Charter.[39] Finally, the rule in question does not go beyond what is necessary to achieve this objective.

[35] See, to that effect, judgments of 19 June 2018, *Gnandi* (C-181/16, EU:C:2018:465, paragraph 57), and of 26 September 2018, *Belastingdienst/Toeslagen (Suspensory effect of the appeal)* (C-175/17, EU:C:2018:776, paragraph 34). It may also added that to date the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 ('the ECHR'), does not create or require the existence of a right to a second level of jurisdiction either, at least in civil matters.

[36] See, to that effect, judgments of 17 July 2014, *Sánchez Morcillo and Abril García* (C-169/14, EU:C:2014:2099, paragraph 36); of 11 March 2015, *Oberto and O'Leary* (C-464/13 and C-465/13, EU:C:2015:163, paragraph 73); of 19 June 2018, *Gnandi* (C-181/16, EU:C:2018:465, paragraph 57); of 26 September 2018, *Belastingdienst/Toeslagen (Suspensory effect of the appeal)* (C-175/17, EU:C:2018:776, paragraph 34); and of 29 July 2019, *Bayerische Motoren Werke and Freistaat Sachsen* v *Commission* (C-654/17 P, EU:C:2019:634, paragraph 51).

[37] See, to that effect (with reference to the principles of effectiveness and equivalence rather than Article 47 of the Charter), judgment of 17 March 2016, *Bensada Benallal* (C-161/15, EU:C:2016:175, paragraph 27).

[38] On this requirement, see judgment of 5 September 2019, *Lombardi* (C-333/18, EU:C:2019:675, paragraph 33).

[39] See, to that effect (in relation to a good conduct guarantee), judgment of 15 September 2016, *Star Storage and Others* (C-439/14 and C-488/14, EU:C:2016:688, paragraph 54). In that regard, it should be recalled that the Court interprets Article 1(1) and (3) of Directive 89/665 as requiring the Member States to adopt the measures necessary to ensure that the decisions taken by the contracting authorities in public contract award procedures may be reviewed effectively and, in particular, as rapidly as possible, on the ground that they have infringed EU law on public procurement or the national rules transposing that law (see, to that effect, judgments of 12 March 2015, *eVigilo*, C-538/13, EU:C:2015:166, paragraph 50; of 15 September 2016, *Star Storage and Others*, C-439/14 and C-488/14, EU:C:2016:688, paragraph 39; and of 29 July 2019, *Hochtief Solutions Magyarországi Fióktelepe*, C-620/17, EU:C:2019:630, paragraph 50).

74. Article 47 of the Charter naturally requires the establishment of a remedy that is effective both in law and in practice.[40] However, if it appears, on the one hand, that access to a 'tribunal' within the meaning of Article 47 of the Charter is guaranteed without difficulties, and that, on the other hand, national law confers on this 'tribunal' the competence to examine the merits of the dispute – as demonstrated by the judgment of the Tribunale amministrativo regionale della Valle d'Aosta (Regional Administrative Court, Valle d'Aosta) in the present case – neither Directive 89/665 nor Article 47 of the Charter can be interpreted as requiring a further level of appeal in order to remedy a misapplication of these rules by the appeal court.

75. Indeed, as several parties have pointed out, one must ask what would happen if the court of third instance in turn upheld the interpretation of the court of second instance. Would Article 1(1) and (3) of Directive 89/665, read in the light of Article 47 of the Charter, then require the organisation of a fourth level of jurisdiction? That question essentially answers itself. To my mind, the solution to a misapplication of EU law by a court of last instance must be found in other procedural forms, such as an action for failure to fulfil obligations pursuant to Article 258 TFEU[41] or, for example, a *Francovich*-style action[42] offering the possibility of holding the State liable in order to obtain by this means legal protection of the rights of individuals recognised by EU law.[43]

4. Further remarks on the Francovich case-law and the need for its development

76. In that regard, it must be admitted that, at the hearing, there was much discussion as to what remedies might be open to Randstad in the present circumstances, as it seems fair to say that the actual decision of the Consiglio di Stato (Council of State) itself – which rejected the appeal on standing grounds – seemed to have few defenders.

77. There was a suggestion at the hearing that Randstad might be able to invoke Article 2(1)(c) of Directive 89/665 which provides for the award of damages in respect of infringements of the procurement process. While, strictly speaking, it is unnecessary to decide this point, it would seem to me that this provision relates simply to the jurisdiction of the national courts to award damages on a strict liability basis in respect of breaches of the procurement rules by *a contracting authority* as distinct from the misapplication of EU public procurement law by a court. It was also observed that potential liability might lie with the Italian State in respect of a claim for *Francovich* damages arising from a failure of the judicial system of that State properly to apply EU law.

78. In that regard, it may be observed that the precise circumstances as to why the Consiglio di Stato (Council of State) came to find against Randstad on this point are not altogether clear. In the event that other actions were subsequently to be taken by Randstad, this would be a matter for the competent national court to determine and to assess the reasons why the Consiglio di Stato (Council of State) *appears* not to have applied the well-established case-law of the Court in relation to standing in procurement matters or, in so far as that court had doubts, for its failure (as a court of last resort) to make the appropriate Article 267 TFEU reference. There may, perhaps, be an explanation for the decision of the Consiglio di Stato (Council of State) in this matter.

[40] See, to that effect (on Articles 6 and 13 ECHR), Varga, Z., 'National Remedies in the Case of Violation of EU Law by Member State Courts', *CML Rev.*, 2017, vol. 54, pp. 52 to 80, esp. p. 75.

[41] See, to that effect, judgment of 4 October 2018, *Commission* v *France (Advance payment)* (C-416/17, EU:C:2018:811).

[42] Judgment of 19 November 1991, *Francovich and Others* (C-6/90 and C-9/90, EU:C:1991:428).

[43] See, to that effect, judgments of 4 March 2020, *Telecom Italia* (C-34/19, EU:C:2020:148, paragraphs 67 to 69), and judgment of 29 July 2019, *Hochtief Solutions Magyarországi Fióktelepe* (C-620/17, EU:C:2019:630, paragraph 64).

79. I would nevertheless take this opportunity to observe that I think that the *Francovich* jurisprudence should now be read with fresh eyes in the light of the requirements of Article 47 of the Charter and, if necessary, developed further in this light. It is clear from the judgment of 5 March 1996, *Brasserie du pêcheur and Factortame* (C-46/93 and C-48/93, EU:C:1996:79) ('judgment in *Brasserie du pêcheur and Factortame*') that Member States are liable to pay compensation in respect of a sufficiently serious breach of EU law where they have 'manifestly and gravely disregarded the limits of its discretion'. [44]

80. The difficulty, however, with the practical application of this test is that clear failures by Member States (including judicial failures) may too often and perhaps too readily be excused on the ground that such errors were made honestly or were otherwise pardonable in the circumstances or, at all events, that they are not 'manifest and grave'. Considerations of judicial politeness or respect for venerable national judicial institutions should not, however, make one hesitate to describe such errors as 'manifest and grave' in the *Brasserie du pêcheur* sense of this term where such is warranted. A willingness or propensity to excuse manifest and grave failures by a Member State in its application of EU law by downgrading the seriousness of such failures would itself represent a clear denial of an effective remedy to litigants under Article 47 of the Charter, especially where, viewed objectively, the failure to apply clearly established EU law cannot realistically be justified or otherwise excused. While the scope of *Francovich* is, perforce, never far from view in the present case, the issue will nevertheless have to await resolution at a later stage since it is not directly raised in the present proceedings.

81. At the same time, any willingness to excuse the failures of Member States is but cold comfort to a litigant if the availability of a '*Francovich* action' were itself to be made excessively difficult in practice. This may be summed up by saying that if the failure by an appellate court against whom there is no further right of appeal properly to apply the well-established case-law of the Court of Justice does not itself sound an action in damages by reason of the 'manifest and grave disregard' criteria, then it is necessary that these criteria – which, after all, predate the entry into force of the Charter – should themselves be further refined. If the promise of Article 47 of the Charter is not to be a hollow one, then it seems to me that the failure in this instance by a court of final appeal to apply the settled case-law of the Court should give rise to *Francovich*-style liability on the part of the Member State in question. The Court of Justice has, in any event, ruled that where a national court has violated EU law 'in manifest breach of the case-law of the Court', this is something which in itself suggests a sufficiently serious breach. [45]

82. All of this calls to mind the case of the Sherlock Holmes story regarding the dog which did not bark. [46] In that vein it is the general absence of the case-law on this topic which is telling. [47] That in itself may be regarded as an indication that these errors and failures are in practice too readily excused and that for many whose EU rights have not been secured, a *Francovich* remedy remains an illusion rather than a reality. This is yet a further reason why the 'grave and manifest' criteria in the judgment in *Brasserie du pêcheur and Factortame* may require to be reassessed so that EU law is enforced with the appropriate degree of vigour by the judiciary of the Member States, even if allowance should also be made for the particular factors identified by this Court in the judgment of 30 September 2003, *Köbler* (C-224/01, EU:C:2003:513) in respect of liability for judicial error,

[44] Judgment in *Brasserie du pêcheur and Factortame* (paragraph 55).

[45] See, to that effect, judgments of 30 September 2003, *Köbler* (C-224/01, EU:C:2003:513, paragraph 56), and of 25 November 2010, *Fuß* (C-429/09, EU:C:2010:717, paragraph 52).

[46] 'The Adventure of the Silver Blaze' in Conan Doyle, A., *The Memoirs of Sherlock Holmes*, London, 1892.

[47] See, generally, Beutler, B., 'State Liability for Breaches of Community Law by National Courts: Is the Requirement of a Manifest Infringement of the Applicable Law an Insurmountable Obstacle?', *CML Rev*. 46, 2009, pp. 773 to 787.

namely, 'the specific nature of the judicial function', together with the requirements of legal certainty.[48] Yet *Francovich* is, so to speak, a dog which must be allowed to bark for it is that very barking which should serve to warn us that the rights which EU law intended to vouchsafe and protect are being compromised – sometimes silently – by national judicial error.

83. To this one might add that in the special context of a public procurement violation it would be somewhat incongruous that Directive 89/665 should provide for a form of strict liability for error on the part of a contracting authority while at the same time liability for national judicial error in respect of any review of the procurement process were to remain at a dauntingly elevated level.

84. For my part, however, I think that the law has to some degree moved on since the judgment of 30 September 2003, *Köbler* (C-224/01, EU:C:2003:513). In the light of the subsequent entry into force of Article 47 of the Charter, I consider that, for the reasons already stated, it is also necessary to examine whether the judicial error at issue was *objectively* excusable. Absent such an examination, there is a real danger that the application of the criteria laid down in the judgment in *Brasserie du pêcheur and Factortame* would in practice tend to make the recovery of *Francovich* damages in respect of judicial error excessively difficult such that it would be only in quite special circumstances where these conditions of liability would be likely to be met.

5. Conclusion on the first question

85. In summary, therefore, I am of the view that Article 1(1) and (3) of Directive 89/665, read in the light of Article 47 of the Charter must be interpreted as meaning that it does not preclude a rule such as the eighth paragraph of Article 111 of the Italian Constitution, as interpreted in Judgment No 6/2018, according to which an appeal in cassation on grounds of a 'lack of jurisdiction' is not available for the purpose of challenging judgments in which the court of second instance has applied interpretative practices developed nationally but which are objectively in conflict with judgments of the Court of Justice, in sectors governed by EU law.

86. The solution in respect of the misapplication of EU law by a court of last instance must be found in other procedural forms, such as an action for failure to fulfil obligations pursuant to Article 258 TFEU or, the possibility of holding the State liable in order to obtain legal protection of the rights recognised by EU law.

B. The second question

87. By its second question, the Corte suprema di cassazione (Supreme Court of Cassation) asks, in substance, whether Article 4(3) TEU, Article 19(1) TEU, and Article 267 TFEU, read in the light of Article 47 of the Charter, preclude the rules relating to appeals in cassation for 'reasons of jurisdiction' from being interpreted and applied in such a manner that an appeal in cassation before the Combined Chambers of the Supreme Court of Cassation cannot be brought for the purpose of challenging a judgment in which the Consiglio di Stato (Council of State) refrains, without reason, from making a reference to the Court of Justice for a preliminary ruling, where the conditions relieving a national court of that obligation, as listed by the Court in its judgment of 6 October 1982, *Cilfit and Others* (283/81 EU:C:1982:335), are absent.

[48] See, to that effect, judgment of 30 September 2003, *Köbler* (C-224/01, EU:C:2003:513, paragraph 53).

88. The idea behind that question is that a national court cannot be prevented, even temporarily, from making a reference for a preliminary ruling, as this would have the effect of usurping the Court's exclusive jurisdiction to interpret EU law correctly and in binding fashion, thereby undermining the uniform application and effective judicial protection of the rights enjoyed by individuals under EU law.

89. At the outset it might be observed that the Corte di cassazione (Court of Cassation) raises an additional question in the introductory part of the request for a preliminary ruling relating to the second question, which does not appear in the wording of the question finally asked. In fact, it is clear from paragraph 50 of the reference for a preliminary ruling that the Corte suprema di Cassazione (Supreme Court of Cassation), in addition to the question formally posed, also questions the approach whereby it could not itself make a reference for a preliminary ruling directly.

90. Given that this issue is not included in the question finally referred, I will be brief. Moreover, the answer to this question does not seem to me to be in doubt. Indeed, it is settled case-law that Article 267 TFEU gives national courts the widest discretion in referring matters to the Court if they consider that a case pending before them raises questions involving the interpretation of provisions of EU law, or consideration of their validity, which are necessary for the resolution of the case.[49] Consequently, if the Corte suprema di cassazione (Supreme Court of Cassation) is validly seised, national rules of procedure cannot affect the powers and obligations conferred on that court under Article 267 TFEU.[50]

91. That being said, and I come now to the second question expressly referred, I do not think that the national rules of procedure such as the rule at issue which limits the appeal in cassation to questions of jurisdiction must necessarily, in order to be compatible with EU law, be interpreted as allowing an appeal in cassation where a court of first instance or a court against whose decisions there is no judicial remedy under national law, does not refer a question to the Court of Justice.

92. Indeed, since it is for the national courts to apply EU law, the first task of interpretation necessarily falls to them. As previously stated by the Court, national courts, in collaboration with the Court of Justice, fulfil a duty entrusted to them both of ensuring that in the interpretation and application of the Treaties the law is observed.[51] It follows from the judicial system established by the Treaties – and in particular Article 4(3) TEU, Article 19(1) TEU and Article 267 TFEU to which the referring court refers – that the Court does not have a monopoly on the interpretation of EU law but rather has exclusive jurisdiction to give the *definitive* interpretation of that law.[52]

[49] See, to that effect and among others, judgments of 16 December 2008, *Cartesio* (C-210/06, EU:C:2008:723, paragraph 88); of 15 January 2013, *Križan and Others* (C-416/10, EU:C:2013:8, paragraph 64); and of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)* (C-824/18, EU:C:2021:153, paragraph 91 and the case-law cited).

[50] See, to that effect, judgment of 18 July 2013, *Consiglio Nazionale dei Geologi* (C-136/12, EU:C:2013:489, paragraph 32). The fact that both the Consiglio di Stato (Council of State) and the Corte di cassazione (Court of Cassation) could be regarded as being obliged to make a reference to the Court under the third paragraph of Article 267 TFEU in the same litigation is not an issue. On the contrary, in that situation, if no reference has been made to the Court of Justice by a court such as the Consiglio di Stato (Council of State), then a court such as the Combined Chambers of the Corte di cassazione (Court of Cassation) must itself submit the question to the Court of Justice (see, to that effect, in a context where two courts are likely to be obliged to make a reference to the Court of Justice, judgment of 4 November 1997, *Parfums Christian Dior*, C-337/95, EU:C:1997:517, paragraph 30).

[51] See, to that effect, Opinion 1/09 *(Agreement creating a Unified Patent Litigation System)* of 8 March 2011 (EU:C:2011:123, paragraph 69), and judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses* (C-64/16, EU:C:2018:117, paragraph 33).

[52] See, to that effect, Opinion 1/17 of 30 April 2019 (EU:C:2019:341, paragraph 111).

93. The obligation on national courts and tribunals against whose decision there is no judicial remedy to refer a matter to the Court of Justice under the third paragraph of Article 267 TFEU is based on cooperation, established with a view to ensuring the proper application and uniform interpretation of EU law in all the Member States, between national courts, in their capacity as courts responsible for the application of EU law, and the Court. [53]

94. What Article 267 TFEU enables is thus the opening of a dialogue between the Court of Justice and the courts and tribunals of the Member States. [54] As already recalled in this Opinion, in accordance with settled case-law, this provision gives national courts the widest discretion in referring matters to the Court if they consider that a case pending before them raises questions involving the interpretation of provisions of EU law, or consideration of their validity, which are necessary for the resolution of the case before them. [55] In addition, it must be borne in mind that, under the third paragraph of Article 267 TFEU, when there is no judicial remedy under national law against the decision of a court or tribunal of a Member State, that court or tribunal is, *in principle*, obliged to bring the matter before the Court of Justice, where a question relating to the interpretation of EU law is raised before it. [56]

95. In this specific context of cooperation established by Article 267 TFEU, what is forbidden is, therefore, for a rule of national law *to prevent* a national court from exercising that discretion, or from complying with that obligation. [57] In other words, the *minimum* requirement is that the court designated by the national procedural system to rule on issues related to EU law – such as, in this case, the Tribunali amministrativi regionali (Regional Administrative Courts) and the Consiglio di Stato (Council of State) in the field of public procurement – should have the possibility, if not the obligation, to proceed to a preliminary ruling. If it is the case, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. [58] To summarise, as recently explained by Advocate General Bobek, the logic of the case-law of the Court in this area seeks only to ensure that national rules of procedure do not prevent points of EU law from being raised, with a request for a preliminary ruling potentially being made regardless of the stage of proceedings. [59]

96. However, as will be seen in my analysis of the third question asked by the Corte suprema di cassazione (Supreme Court of Cassation), if it is clear that the Consiglio di Stato (Council of State) should have referred a question to the Court of Justice if it had any a doubt on the scope of application of Article 1(1) and (3) of Directive 89/665 as previously interpreted by the Court, it must be noted that there was nonetheless no national procedural rule preventing it from initiating this dialogue with the Court of Justice.

[53] See, to that effect, judgments of 6 October 1982, *Cilfit and Others* (283/81, EU:C:1982:335, paragraph 7), and of 9 September 2015, *X and van Dijk* (C-72/14 and C-197/14, EU:C:2015:564, paragraph 54).

[54] See, to that effect, judgment of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)* (C-824/18, EU:C:2021:153, paragraph 90).

[55] See the case-law cited in footnote 49.

[56] See, to that effect, judgment of 24 October 2018, *XC and Others* (C-234/17, EU:C:2018:853, paragraph 43). See also, under another formulation, judgments of 5 April 2016, *PFE* (C-689/13, EU:C:2016:199, paragraph 32); and of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)* (C-824/18, EU:C:2021:153, paragraph 92).

[57] See, to that effect, judgments of 5 April 2016, *PFE* (C-689/13, EU:C:2016:199, paragraphs 32 and 33), and of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)* (C-824/18, EU:C:2021:153, paragraph 93).

[58] See, to that effect, judgment of 9 September 2015, *X and van Dijk* (C-72/14 and C-197/14, EU:C:2015:564, paragraph 57).

[59] See, to that effect, Opinion of Advocate General Bobek in *Consorzio Italian Management and Catania Multiservizi* (C-561/19, EU:C:2021:291, point 27).

97. In my view, the failure to refer a question to the Court for a preliminary ruling is therefore likely to result in substantive illegality (due to the misapplication of EU law which was wrongly interpreted by the national court) and/or procedural illegality (due to the failure to refer a question to the Court for a preliminary ruling when the court in question was obliged to do so), but it should not be regarded as a question of jurisdiction in the sense understood by the eighth paragraph of Article 111 of the Italian Constitution. As I indicated at the end of my analysis of the first question referred, even if these solutions are not optimal, the answer to a misapplication of EU law by a court of last instance – and I add here including the obligations under Article 267 TFEU – must be found in other procedural forms, such as an action for failure to fulfil obligations or the possibility of holding the State liable for damages in order to obtain legal protection of the rights of individuals.

98. Indeed, in view of the essential role played by the judiciary in the protection of the rights derived by individuals from the rules of EU law, as I have already indicated, the full effectiveness of those rules would be called into question and the protection of those rights would be weakened if individuals were precluded from being able, under certain conditions, to obtain compensation or damages when their rights are prejudiced by an infringement of EU law attributable to a decision of a court or tribunal of a Member State adjudicating at last instance. [60]

99. Consequently, in accordance with the foregoing considerations, I arrive at the conclusion that Article 4(3) TEU, Article 19(1) TEU, and Article 267 TFEU, read in the light of Article 47 of the Charter, do not preclude the rules relating to appeals in cassation for reasons of jurisdiction from being interpreted and applied in such a manner as to prevent an appeal in cassation before the Combined Chambers of the Corte suprema di cassazione (Supreme Court of Cassation) from being brought for the purpose of challenging a judgment in which the Consiglio di Stato (Council of State) refrains, without reason, from making a reference to the Court of Justice for a preliminary ruling.

C. The third question

100. By its third question, the Corte suprema di cassazione (Supreme Court of Cassation) asks, in substance, whether the interpretation of Article 1(1) and (3) and Article 2(1) of Directive 89/665, as amended by Directive 2007/66, which derives from the judgments of the Court of Justice of 4 July 2013, *Fastweb* (C-100/12, EU:C:2013:448), of 5 April 2016, *PFE* (C-689/13, EU:C:2016:199), and of 5 September 2019, *Lombardi* (C-333/18, EU:C:2019:675), applies to the case in the main proceedings.

101. In that regard, according to settled case-law, the justification for making a request for a preliminary ruling is not for advisory opinions to be delivered on general or hypothetical questions, but rather that it is necessary for the effective resolution of a dispute concerning EU law. [61]

102. However, given that I arrived at the conclusion, in relation to the first question referred, that the limitation of the jurisdiction of the Corte di cassazione (Supreme Court of Cassation) as provided for in the eighth paragraph of Article 111 of the Italian Constitution, as interpreted in Judgment No 6/2018, is not contrary to Article 1(1) and (3) of Directive 89/665 and Article 47 of

[60] See, to that effect, judgments of 30 September 2003, *Köbler* (C-224/01, EU:C:2003:513, paragraph 33), and of 9 September 2015, *Ferreira da Silva e Brito and Others* (C-160/14, EU:C:2015:565, paragraph 47).

[61] See, to that effect, judgment of 3 October 2019, *A and Others* (C-70/18, EU:C:2019:823, paragraph 73).

the Charter, the referring court should lack jurisdiction to examine, in the main proceedings, the scope of Directive 89/665. I nonetheless propose to consider this question in the event that the Court were to decide differently.

103. As a reminder, in the main proceedings, Randstad has challenged its exclusion from a tendering procedure and the award of the contract to another undertaking. However, the Consiglio di Stato (Council of State) has examined the substance only of the ground of appeal whereby Randstad disputed the points awarded to its technical offer – which were below the 'minimum threshold' – and has examined as a matter of priority the cross-appeals brought by the contracting authority and the successful tenderer. It has upheld those cross-appeals while refraining from examining the substance of the other grounds of the main appeal disputing the outcome of the tendering procedure for other reasons than those relating to the points awarded to its technical offer.

104. I have already set out in the preliminary remarks of this Opinion the case-law of the Court on the scope of the obligation to provide a review procedure laid down in Article 1(1) and (3) of Directive 89/665, in the specific context where a counterclaim is brought by the successful tenderer. At this stage, it can therefore be stated that the criterion which determines the obligation of a court to examine the applicant's appeal is that each of the parties to the proceedings has a legitimate interest in the exclusion of the bids submitted by the other competitors. That means that one cannot exclude the possibility that one of the irregularities justifying the exclusion of both the successful tenderer's bid and that of the tenderer challenging the contracting authority's decision may also vitiate the other bids submitted in the tendering procedure, which may result in that authority having to launch a new procedure. [62]

105. The Court has been particularly clear on this point: 'the admissibility of the main action cannot, without depriving Directive 89/665 of its effectiveness, be contingent on a prior finding that all of the bids ranked lower than that of the tenderer are invalid [or] subject to the condition that the tenderer adduces evidence that the contracting authority will have to restart the public procurement procedure. *The mere existence of such a possibility must be regarded as being sufficient in that respect*'. [63] The tenderer whose bid has been excluded by the contracting authority from a public procurement procedure may be refused access to a review of the decision awarding the public contract only if the decision to exclude that tenderer has been confirmed by a decision that has acquired the force of *res judicata* before the court hearing the review of the contract award decision has given its decision, so that that tenderer must be regarded to be definitively excluded from the public procurement procedure at issue. [64]

106. In the main proceedings, first, it is not disputed that Randstad had not been yet definitively excluded from the procurement process when it lodged its appeal before the Consiglio di Stato (Council of State). Second, it follows from the reference for a preliminary ruling that Randstad put forward, as one of the pleas for its readmission to the tendering procedure, the illegality of the appointment and composition of the procurement committee responsible for carrying out the economic assessment. However, if those irregularities were found to exist, they would justify the exclusion of both the successful tenderer's bid and that of the tenderer challenging the contracting authority's decision and would also vitiate the other bids submitted in the tendering procedure, which could lead the contracting authority to have to launch a new procedure.

62 See, to that effect, judgments of 5 April 2016, *PFE* (C-689/13, EU:C:2016:199, paragraph 28), and of 5 September 2019, *Lombardi* (C-333/18, EU:C:2019:675, paragraph 27).

63 Judgment of 5 September 2019, *Lombardi* (C-333/18, EU:C:2019:675, paragraph 29). Emphasis added.

64 See, to that effect, judgment of 5 September 2019, *Lombardi* (C-333/18, EU:C:2019:675, paragraph 31 and the case-law cited).

107. In those circumstances, it seems certain to me that the principle established and confirmed by the case-law cited by the referring court was applicable in the main proceedings. The Consiglio di Stato (Council of State) was therefore obliged to recognise Randstad's interest in challenging, both at first instance and on appeal, the regularity of the procedure and therefore of the decision to award the contract or, alternatively, to submit a request to the Court of Justice on that matter in case of doubt.

VII. Conclusion

108. Accordingly, in the light of the foregoing considerations, I propose that the Court should answer the questions referred by the Corte suprema di cassazione (Supreme Court of Cassation, Italy) as follows:

(1) Article 1(1) and (3) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended, inter alia, by Directive 2007/66/EC of the European Parliament and the Council of 11 December 2007, read in the light of Article 47 of the Charter, must be interpreted as meaning that it does not preclude a rule such as the eighth paragraph of Article 111 of the Italian Constitution, as interpreted in Judgment No 6/2018, according to which an appeal in cassation for reasons of jurisdiction is not available for the purpose of challenging judgments in which the court of second degree has applied interpretative practices developed nationally but in conflict with judgments of the Court of Justice, in sectors governed by EU law.

    The solution in respect of the misapplication of EU law by a court of last instance must be found in other procedural forms, such as an action for failure to fulfil obligations pursuant to Article 258 TFEU or, the possibility of holding the State liable in order to obtain legal protection of the rights of individuals recognised by EU law.

(2) Article 4(3) TEU, Article 19(1) TEU, and Article 267 TFEU, read in the light of Article 47 of the Charter, do not preclude the rules relating to appeals in cassation for reasons of jurisdiction from being interpreted and applied in such a manner as to prevent an appeal in cassation before the Combined Chambers of the Corte di cassazione (Court of Cassation) from being brought for the purpose of challenging a judgment in which the Consiglio di Stato (Council of State) refrains, without reason, from making a reference to the Court of Justice for a preliminary ruling.

    In the alternative,

(3) The interpretation of Article 1(1) and (3) and Article 2(1) of Directive 89/665, as amended by Directive 2007/66, which derives from the judgments of the Court of Justice of 4 July 2013, *Fastweb* (C-100/12, EU:C:2013:448); of 5 April 2016, *PFE* (C-689/13, EU:C:2016:199); and of 5 September 2019, *Lombardi* (C-333/18, EU:C:2019:675), applies to the case of the main proceedings where the decision to exclude the unsuccessful tenderer had not been confirmed by a decision which had acquired the force of *res judicata* when the court hearing the review of the contract award decision gave its decision and where that tenderer had put forward a plea which could lead the contracting authority to have to launch a new procedure.