ECLI:EU:C:2021:1037

Provisional text

JUDGMENT OF THE COURT (Grand Chamber)

21 December 2021 (*)

(Reference for a preliminary ruling – Second subparagraph of Article 19(1) TEU – Obligation of Member States to provide remedies sufficient to ensure effective legal protection in the fields covered by Union law – Public procurement – Directive 89/665/EEC – Article 1(1) and (3) – Article 47 of the Charter of Fundamental Rights of the European Union – Judgment of a Member State's highest administrative court declaring inadmissible, in breach of the case-law of the Court of Justice, an action brought by a tenderer excluded from a public procurement procedure – No remedy against that judgment before the highest court in that Member State's judicial order – Principles of effectiveness and equivalence)

In Case C-497/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Corte suprema di cassazione (Supreme Court of Cassation, Italy), made by decision of 7 July 2020, received at the Court on 30 September 2020, in the proceedings

Randstad Italia SpA

v

Umana SpA,

Azienda USL Valle d'Aosta,

IN. VA SpA,

Synergie Italia agenzia per il Lavoro SpA,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, L. Bay Larsen, Vice-President, A. Arabadjiev, C. Lycourgos (Rapporteur), E. Regan, I. Jarukaitis, N. Jääskinen, I. Ziemele and J. Passer, Presidents of Chambers, M. Ilešič, J.-C. Bonichot, T. von Danwitz, M. Safjan, A. Kumin and N. Wahl, Judges,

Advocate General: G. Hogan,

Registrar: C. Di Bella, Administrator,

having regard to the written procedure and further to the hearing on 6 July 2021,

after considering the observations submitted on behalf of:

– Randstad Italia SpA, by M. Brugnoletti and S.D. Tomaselli, avvocati,

– Umana SpA, by F. Bertoldi, avvocato,

– Azienda USL Valle d'Aosta, by F. Dal Piaz and P. Borioni, avvocati,

– Synergie Italia agenzia per il Lavoro SpA, by A.M. Balestreri, avvocato,

– the Italian Government, by G. Palmieri, acting as Agent, and by S. Fiorentino and P. Gentili, avvocati dello Stato,

– the European Commission, by F. Erlbacher, P. Stancanelli, P.J.O. Van Nuffel and G. Gattinara, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 9 September 2021,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 4(3) and Article 19(1) TEU, and Article 2(1) and (2) and Article 267 TFEU, read in the light of Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter'), and also 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 relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 (OJ 2014 L 94, p. 1) ('Directive 89/665').

2 The request has been made in proceedings between, on the one hand, Randstad Italia SpA ('Randstad') and, on the other, Umana SpA, Azienda USL 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') concerning (i) the exclusion of Randstad from a procedure for the award of a public contract, and (ii) the regularity of that procedure.

Legal context

European Union law

3 Article 1 of Directive 89/665, entitled 'Scope and availability of review procedures', provides:

'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.

This Directive also applies to concessions awarded by contracting authorities, referred to in 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)] unless such concessions are excluded in accordance with Articles 10, 11, 12, 17 and 25 of that Directive.

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

Member States shall take the measures necessary to ensure that, as regards contracts falling within the scope of Directive [2014/24] or Directive [2014/23], 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.

…'

4 Article 2 of that directive, entitled 'Requirements for review procedures', provides in paragraph 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.’

5 Under Article 2a of the directive, entitled ‘Standstill period’:

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

2. A contract may not be concluded following the decision to award a contract falling within the scope of Directive [2014/24] or Directive [2014/23] before the expiry of a period of at least 10 calendar days with effect from the day following the date on which the contract award decision is sent to the tenderers and candidates concerned if fax or electronic means are used or, if other means of communication are used, before the expiry of a period of either at least 15 calendar days with effect from the day following the date on which the contract award decision is sent to the tenderers and candidates concerned or at least 10 calendar days with effect from the day following the date of the receipt of the contract award decision.

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

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

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

– a summary of the relevant reasons …, and

– a precise statement of the exact standstill period applicable …’

Italian law

6 The eighth paragraph of Article 111 of the Costituzione (Constitution) provides:

‘Appeals in cassation against decisions of the Consiglio di Stato [(Council of State, Italy)] and the Corte dei conti [(Court of Auditors, Italy)] are permitted only for reasons of jurisdiction.’

7 The first paragraph of Article 360 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; …’

8 Under the first and second paragraphs of Article 362 of the Code of Civil Procedure:

‘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.

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.’

9 Article 6(1) of the codice del processo amministrativo (Code of Administrative Procedure) provides:

‘The Consiglio di Stato [(Council of State)] is the court of final instance in administrative cases.’

10 Article 110 of the Code of Administrative Procedure provides:

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

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

11 On 13 December 2017, USL launched a tendering procedure for the purpose of awarding a public contract with a value of approximately EUR 12 million, on the basis of the most economically advantageous tender, to an employment agency for the temporary supply of personnel.

12 A ‘minimum threshold’ – set at 48 points – was stipulated for technical offers, and tenderers awarded points below that threshold were to be excluded.

13 Eight tenderers participated in the process, including Randstad, GI Group Spa and a temporary association of undertakings formed by Synergie and Umana (‘Synergie-Umana’).

14 On 3 October 2018, after evaluating the technical offers, the procurement committee admitted GI Group and Synergie-Umana to the next stage, relating to the economic assessment of tenders. Randstad, which was in third place after the evaluation of technical offers, was excluded, its technical offer having been awarded one mark less than the minimum threshold.

15 On 6 November 2018, the contract was awarded to Synergie-Umana.

16 Randstad brought an action before the Tribunale amministrativo regionale della Valle d’Aosta (Regional Administrative Court, Valle d’Aosta, Italy) disputing, first, its exclusion from the

tendering procedure and, second, the regularity of that procedure. Its action thus concerned not only that exclusion, but also the award of the contract to Synergie-Umana.

17 In support of its action, Randstad argued in particular that there had been a failure to divide the call for tenders into lots, that the assessment criteria were imprecise and that the appointment of the procurement committee was unlawful. USL and Synergie-Umana contended that the pleas in law by which Randstad contested the regularity of the tendering procedure were inadmissible. They argued that Randstad did not have standing to raise those pleas, since it had been excluded from that procedure.

18 By judgment of 15 March 2019, the Tribunale amministrativo regionale della Valle d'Aosta (Regional Administrative Court, Valle d'Aosta) rejected that plea of inadmissibility. Since Randstad had participated lawfully in the tendering procedure and had been excluded from it on the basis of the negative assessment of its technical offer, Randstad did, according to that court, have standing to challenge the outcome of the procedure in all its aspects. On the merits, however, that court rejected all the pleas put forward by Randstad and, therefore, dismissed the action in its entirety.

19 Randstad brought an appeal against that judgment before the Consiglio di Stato (Council of State), reiterating the pleas it had raised at first instance. Synergie and Umana brought cross-appeals, criticising the Tribunale amministrativo regionale della Valle d'Aosta (Regional Administrative Court, Valle d'Aosta) for having ruled Randstad's pleas challenging the regularity of the procedure, and thus the ensuing award of the contract, to be admissible.

20 By judgment of 7 August 2019 ('the judgment of the Council of State'), the Consiglio di Stato (Council of State) rejected on the merits the ground of appeal by which Randstad disputed the mark awarded to its technical offer. Upholding, moreover, the cross-appeals brought by Synergie and Umana, the Consiglio di Stato (Council of State), by that judgment, varied the judgment under appeal to the extent that the Tribunale amministrativo regionale della Valle d'Aosta (Regional Administrative Court, Valle d'Aosta) had declared admissible, and therefore examined the substance of, the pleas put forward by Randstad to challenge the regularity of the procedure.

21 In support of its decision, the Consiglio di Stato (Council of State) held, in particular, that Randstad, 'which was excluded from the tendering procedure because it did not pass the "stress test" of the minimum threshold to be attained by the mark awarded for the technical offer by means of a pair-wise comparison, and which did not succeed in demonstrating the unlawfulness of the tendering procedure as regards the award of that mark, is … not only ineligible to participate in that procedure, but also lacks standing to challenge its results from other aspects, since it has a purely factual interest, analogous to that of any other economic operator in the sector that had not participated in the tendering procedure'.

22 Randstad appealed to the referring court, the Corte suprema di cassazione (Supreme Court of Cassation, Italy), against the judgment of the Council of State. It maintains that the latter has infringed its right to an effective remedy as affirmed in particular in Article 1 of Directive 89/665. Randstad refers in that regard to 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).

23 According to Randstad, the ground of appeal alleging infringement of the right to an effective remedy is among the reasons of 'jurisdiction' on the basis of which, according to the eighth

paragraph of Article 111 of the Constitution, appeals in cassation against decisions of the Consiglio di Stato (Council of State) are permitted.

24 The other parties to the main proceedings contend that not only is that appeal in cassation unfounded, it is also inadmissible. They argue that it concerns the legality of the assessment made by the Consiglio di Stato (Council of State) and does not therefore relate to the issue of the jurisdiction of the administrative courts.

25 According to the referring court, the refusal of the Consiglio di Stato (Council of State) to examine, in a case such as that in the main proceedings, pleas relating to the irregularity of the tendering procedure undermines the right to an effective remedy, within the meaning of EU law.

26 According to that court, in order for the uniformity and effectiveness of EU law to be protected, it must be possible for an appeal in cassation to be brought against such a judgment of the Consiglio di Stato (Council of State), pursuant to the eighth paragraph of Article 111 of the Constitution. Such an appeal would constitute the final remedy thereby preventing a judgment of the Consiglio di Stato (Council of State) that is contrary to EU law from acquiring the force of *res judicata*.

27 In that regard, the referring court considers that, where the application or interpretation of national legal provisions by the Consiglio di Stato (Council of State) is 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, in such cases it is exercising a power to create law which is not even within the national legislature's competence. That constitutes a lack of jurisdiction which should be amenable to appeal.

28 That being the case, the referring court notes that it is apparent from judgment No 6/2018 of the Corte costituzionale (Constitutional Court, Italy) of 18 January 2018 concerning the interpretation of the eighth paragraph of Article 111 of the Constitution (ECLI:IT:COST:2018:6, 'judgment No 6/2018') that it is not permitted, as Italian constitutional law currently stands, to equate a plea alleging infringement of EU law with a plea relating to 'jurisdiction', within the meaning of the eighth paragraph of Article 111 of the Constitution.

29 In application of that judgment, exceeding judicial authority, which may be contested by means of an appeal to the Corte suprema di cassazione (Supreme Court of Cassation) for reasons of jurisdiction, refers exclusively to two types of situation. First, such an appeal could be brought where there is a total lack of jurisdiction, that is, when the Consiglio di Stato (Council of State) or the Corte dei conti (Court of Auditors) asserts its own jurisdiction over an area reserved to the legislature or the administration, or when, on the contrary, it declines jurisdiction on the erroneous assumption that the subject matter absolutely cannot be the object of any judicial review. Second, an appeal relating to the exceeding of judicial authority could be brought where there is a relative lack of jurisdiction, when the Consiglio di Stato (Council of State) or the Corte dei conti (Court of Auditors) asserts jurisdiction over a subject matter attributed to another court or, on the contrary, declines it having wrongly concluded that jurisdiction lies with other courts.

30 The referring court considers that if it had to adhere to that interpretation of the eighth paragraph of Article 111 of the Constitution, it would have to declare Randstad's appeal in cassation inadmissible. It seems to the referring court, however, that that interpretation is incompatible with the right to an effective remedy, within the meaning of EU law. Should that be the case, it would be necessary to disregard the lessons to be drawn from judgment No 6/2018 and to examine the substance of Randstad's appeal in cassation.

31 The referring court states that, according to the consistent case-law of its own combined chambers prior to the delivery of judgment No 6/2018, 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 Constitution extended to cases of fundamental distortion of the law which could constitute a denial of justice, such as the application of a procedural rule under national law in a manner incompatible with the right to an effective remedy conferred by EU law.

32 The referring court therefore seeks a ruling from the Court of Justice on whether the right to an effective remedy, as laid down, in particular, in the second subparagraph of Article 19(1) TEU and in the first paragraph of Article 47 of the Charter, is such that it cannot be impossible, as it would be in particular under the eighth paragraph of Article 111 of the Constitution as interpreted by judgment No 6/2018, to rely, in the context of an appeal in cassation against a judgment of the Consiglio di Stato (Council of State), on grounds of appeal alleging an infringement of EU law.

33 Furthermore, in so far as the Consiglio di Stato (Council of State) has refrained in the main proceedings from asking the Court of Justice about the relevance, for the present case, of 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), invoked by Randstad, the referring court should be able, in the context of the appeal brought by that undertaking, to put that question to the Court.

34 In those circumstances, 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) … 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) …, 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 Consiglio di Stato (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 EU 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 EU 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) … 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 Corte suprema di cassazione (Supreme 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 Consiglio di Stato (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 EU 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 Consiglio di Stato (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?'

The request for an expedited procedure and the procedure before the Court

35 In its request for a preliminary ruling, the Corte suprema di cassazione (Supreme Court of Cassation) requested that this reference for a preliminary ruling be determined pursuant to an expedited procedure under Article 105 of the Rules of Procedure of the Court of Justice, on the ground, in essence, that the dispute in the main proceedings raises grave uncertainty about fundamental constitutional issues under national law, that there are numerous similar disputes pending in Italy, and that the dispute in the main proceedings concerns the field of public procurement, the importance of which in EU law was emphasised.

36 Article 105(1) of the Rules of Procedure provides that, at the request of the referring court or tribunal or, exceptionally, of his or her own motion, the President of the Court may decide, after hearing the Judge-Rapporteur and the Advocate General, that a reference for a preliminary ruling is to be determined pursuant to an expedited procedure where the nature of the case requires that it be dealt with within a short time.

37 It must be borne in mind, in that regard, that such an expedited procedure is a procedural instrument intended to address matters of exceptional urgency (judgment of 15 July 2021, *Commission* v *Poland* (*Disciplinary regime for judges*), C-791/19, EU:C:2021:596, paragraph 32 and the case-law cited).

38 In the present case, on 21 October 2020, the President of the Court decided, after hearing the Judge-Rapporteur and the Advocate General, to refuse the request made by the referring court, referred to in paragraph 35 above.

39 The fact that the case concerns an important aspect of the organisation of the courts of the Member State concerned is not, as such, a reason that establishes the exceptional urgency necessary to justify an expedited procedure. The same is true of the fact that a large number of persons or legal situations are potentially concerned by the questions referred (see, to that effect, order of the President of the Court of 18 September 2018, *Tedeschi and Consorzio Stabile Istant Service*, C-402/18, not published, EU:C:2018:762, paragraph 15) or that the dispute in the main proceedings relates to the field of public procurement (see, to that effect, order of the President of the Court of 13 November 2014, *Star Storage*, C-439/14, not published, EU:C:2014:2479, paragraphs 10 to 15).

40 Nevertheless, having regard to the nature and importance of the questions referred, the President of the Court decided that the present case should be given priority treatment in accordance with Article 53(3) of the Rules of Procedure.

41 In addition, pursuant to the third paragraph of Article 16 of the Statute of the Court of Justice of the European Union, the Italian Government requested the Court to sit in a Grand Chamber.

Consideration of the questions referred

The first question

42 As a preliminary point, it should be borne in mind that, according to settled case-law, 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 will enable the national court to determine the case before it. To that end, the Court may have to reformulate the questions referred to it (judgment of 15 July 2021, *The Department for Communities in Northern Ireland*, C-709/20, EU:C:2021:602, paragraph 61 and the case-law cited).

43 The first question concerns the effective judicial protection of rights conferred by EU law. It concerns, essentially, the question whether that protection is undermined if the highest court in the judicial order of a Member State does not have jurisdiction to set aside a judgment delivered in breach of EU law by the highest court in the administrative order of that Member State.

44 As the Advocate General noted in point 59 of his Opinion, Article 2(1) and (2) and Article 267 TFEU, mentioned in the first question, are of no relevance for that purpose.

45 It must be noted, first, that Article 2 TFEU concerns the division, between the European Union and its Member States, of the competence to legislate and adopt legally binding acts. The rules set out in that respect in paragraphs 1 and 2 of that article are unrelated to the question of jurisdiction raised by the referring court.

46 Second, as regards Article 267 TFEU, it must be recalled that this is part of a system intended to ensure judicial review of compliance with EU law, such review being ensured, as can be seen from Article 19(1) TEU, not only by the Court of Justice but also by the courts and tribunals of the Member States (see, to that effect, judgments of 13 March 2018, *European Union Copper Task Force* v *Commission*, C-384/16 P, EU:C:2018:176, paragraph 112, and of 25 February 2021, *VodafoneZiggo Group* v *Commission*, C-689/19 P, EU:C:2021:142, paragraph 143). In the context of that system, the procedure provided for by Article 267 TFEU is an instrument of cooperation between the Court of Justice and national courts and tribunals, by means of which the former provides the latter with interpretation of such EU law as is necessary for them to give judgment in cases upon which they are called to adjudicate (judgment of 5 July 2016, *Ognyanov*, C-614/14, EU:C:2016:514, paragraph 16 and the case-law cited). Yet the issue raised by the referring court in its first question, which, as is apparent from paragraph 43 of the present judgment, concerns the extent to which the highest court in the national judicial order must, for the purposes of ensuring the effective judicial protection required by EU law, have jurisdiction to carry out a judicial review of judgments delivered by the highest court in the national administrative order, is not in itself related in any way to the mechanism for cooperation between the Court of Justice and the national courts provided for by Article 267 TFEU.

47 Accordingly, the first question must be reformulated so as to remove Article 2(1) and (2) and Article 267 TFEU from the substance of that question.

48 In so far as the referring court refers moreover, in its first question, to the right to an effective remedy set out in Article 47 of the Charter, it should be borne in mind that, under Article 51(1), the Charter is addressed to the Member States only when they are implementing EU law.

49 In that regard, it must be noted that, in the field of public procurement at issue in the main proceedings, Article 1(1) and (3) of Directive 89/665 lays down the Member States' obligation to provide for effective reviews. It follows, as the Advocate General stated in point 67 of his Opinion, that, in that field, the right to an effective remedy and to a fair hearing, enshrined in the first and second paragraphs of Article 47 of the Charter, is relevant, in particular, when the Member States establish, in accordance with that obligation, detailed procedural rules governing the judicial remedies which safeguard the rights conferred by EU law on candidates and tenderers harmed by decisions of contracting authorities (see, to that effect, judgment of 7 September 2021, *Klaipėdos regiono atliekų tvarkymo centras*, C-927/19, EU:C:2021:700, paragraph 128 and the case-law cited).

50 Accordingly, the first question must also be reformulated to encompass Article 1(1) and (3) of Directive 89/665, which must be read in the light of Article 47 of the Charter.

51 It follows from the foregoing considerations that the first question must be understood as seeking to establish whether Article 4(3) and Article 19(1) TEU, and Article 1(1) and (3) of Directive 89/665, read in the light of Article 47 of the Charter, must be interpreted as precluding a provision of a Member State's domestic law which, according to national case-law, has the effect that individual parties, such as tenderers who participated in a procedure for the award of a public contract, cannot challenge the conformity with EU law of a judgment of the highest court in the

administrative order of that Member State by means of an appeal before the highest court in that Member State's judicial order.

52 On that point, it must be noted at the outset that, by virtue of the principle of primacy of EU law, rules of national law, even of a constitutional order, cannot be allowed to undermine the unity and effectiveness of EU law (judgment of 22 June 2021, *Latvijas Republikas Saeima (Penalty points)*, C-439/19, EU:C:2021:504, paragraph 135 and the case-law cited).

53 The effects of that principle are binding on all the bodies of a Member State, without, inter alia, provisions of domestic law relating to the attribution of jurisdiction, including constitutional provisions, being able to prevent that (judgment of 18 May 2021, *Asociaţia 'Forumul Judecătorilor din România' and Others*, C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, EU:C:2021:393, paragraph 245 and the case-law cited).

54 Consequently, where it is proved that a provision of EU law which imposes on the Member States a clear and precise obligation as to the result to be achieved, the national courts must disapply, if necessary, the provisions of domestic law leading to that infringement, even if they are constitutional provisions (see, to that effect, judgment of 18 May 2021, *Asociaţia 'Forumul Judecătorilor din România' and Others*, C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, EU:C:2021:393, paragraphs 250 and 251 and the case-law cited). Where the incompatibility of a provision of domestic law with EU law arises more specifically from the interpretation of that provision adopted by a court of the Member State concerned, that case-law must be disregarded (see, to that effect, judgment of 5 April 2016, *PFE*, C-689/13, EU:C:2016:199, paragraph 38 and the case-law cited).

55 It is important, therefore, to consider whether a limitation on the ability to bring an appeal in cassation against judgments of the highest court in a Member State's administrative order, such as that derived in the present case – according to the interpretation given in judgment No 6/2018 – from the eighth paragraph of Article 111 of the Constitution, is at odds with the requirements of effective judicial protection imposed by EU law, and therefore with the unity and with the effectiveness of EU law.

56 As regards those requirements, it must be noted that the second subparagraph of Article 19(1) TEU obliges Member States to provide remedies sufficient to ensure effective legal protection for individual parties in the fields covered by EU law (judgment of 26 March 2020, *Miasto Łowicz and Prokurator Generalny*, C-558/18 and C-563/18, EU:C:2020:234, paragraph 32 and the case-law cited).

57 The principle of the effective legal protection of individual parties' rights under EU law thus referred to in that provision is a general principle of EU law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, and which is now reaffirmed by Article 47 of the Charter (see, to that effect, judgment of 15 July 2021, *Commission* v *Poland* (*Disciplinary regime for judges*), C-791/19, EU:C:2021:596, paragraph 52 and the case-law cited).

58 However, provided there are EU rules on the matter, it is, in accordance with the principle of procedural autonomy, for the national legal order of each Member State to establish procedural rules for the remedies referred to in paragraph 56 of the present judgment, on condition, however, that those rules are not – in situations governed by EU law – less favourable than in similar domestic situations (principle of equivalence) and that they do not make it impossible in practice or

excessively difficult to exercise the rights conferred by EU law (principle of effectiveness) (see, to that effect, judgment of 10 March 2021, *Konsul Rzeczypospolitej Polskiej w N.*, C-949/19, EU:C:2021:186, paragraph 43 and the case-law cited).

59 Thus, EU law in principle does not preclude Member States 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 principles of equivalence and effectiveness (judgment of 17 March 2016, *Bensada Benallal*, C-161/15, EU:C:2016:175, paragraph 27).

60 As regards observance of the principle of equivalence, it appears, in the light of the information provided in the order for reference and at the hearing before the Court, that the eighth paragraph of Article 111 of the Constitution, as interpreted in judgment No 6/2018, limits, according to the same procedural rules, the jurisdiction of the Corte suprema di cassazione (Supreme Court of Cassation) to hear and determine appeals against judgments of the Consiglio di Stato (Council of State), regardless of whether these are based on provisions of national law or of EU law.

61 In those circumstances, it must be held that such a rule of domestic law does not breach the principle of equivalence.

62 So far as the principle of effectiveness is concerned, it must be borne in mind that EU law does not have the effect of requiring Member States to establish remedies other than those established by national law, unless it is apparent from the overall scheme of the national legal system in question that no legal remedy exists that would make it possible to ensure, even indirectly, respect for the rights that individuals derive from EU law, or the sole means of obtaining access to a court is effectively for individuals to break the law (see, to that effect, judgment of 14 May 2020, *Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság*, C-924/19 PPU and C-925/19 PPU, EU:C:2020:367, paragraph 143 and the case-law cited).

63 In the present case, while it is for the referring court to ascertain whether there is in principle such a remedy in the Italian legal order in the field of public procurement, there is ostensibly nothing in the request for a preliminary ruling or in the observations lodged before the Court to suggest that Italian procedural law in itself has the effect of making it impossible or excessively difficult to exercise, in this area of administrative law, the rights conferred by EU law.

64 In circumstances in which such a legal remedy does exist, making it possible to ensure respect for the rights that individual parties derive from EU law, it is, as is apparent from the case-law referred to in paragraph 62 of the present judgment, entirely open – from the point of view of EU law – to the Member State concerned to confer jurisdiction on the highest court in its administrative order to adjudicate on the dispute at last instance, in relation both to the facts and to points of law, and consequently to prevent the dispute from being open to further substantive examination in an appeal in cassation before the highest court in its judicial order.

65 It follows that, provided it is established that a judicial remedy such as that described in the preceding paragraph exists, a rule of domestic law such as the eighth paragraph of Article 111 of the Constitution, as interpreted by judgment No 6/2018, also does not undermine the principle of effectiveness and reveals nothing that would indicate any infringement of the second subparagraph of Article 19(1) TEU.

66 That conclusion cannot be called into question on the basis of Article 4(3) TEU, which requires the Member States to take any appropriate measure, general or particular, to ensure

fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the European Union. As regards the system of remedies sufficient to ensure effective judicial review in the fields covered by EU law, Article 4(3) TEU cannot be interpreted as meaning that the Member States are required to provide new legal remedies, which they are not however required to do under the second subparagraph of Article 19(1) TEU.

67 In the particular field of public procurement, Article 1 of Directive 89/665, read in the light of the first paragraph of Article 47 of the Charter, does not, moreover, militate against that conclusion.

68 It is apparent from Article 1(1) of Directive 89/665 that, in accordance with the conditions set out in Articles 2 to 2f thereof, the decision taken by the contracting authority in a tendering procedure falling within the scope of Directive 2014/24 or Directive 2014/23 must be capable of being reviewed effectively and as rapidly as possible as to its conformity with EU law in the field of public procurement or with national rules transposing that law. Article 1(3) makes clear, moreover, that such reviews must 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.

69 In so far as individual parties have access, in the relevant field, to an independent and impartial tribunal previously established by law, within the meaning of the second paragraph of Article 47 of the Charter, which appears to be the case – subject to verification by the referring court – in the Italian legal system, a national rule of law which prevents substantive assessments by the highest court in the administrative order from being open to further examination by the highest court in the judicial order cannot be regarded as a limitation, within the meaning of Article 52(1) of the Charter, of the right to a fair trial laid down in Article 47 of the Charter.

70 However, it must be borne in mind that, in accordance with the case-law of the Court, the admissibility of reviews referred to in Article 1 of Directive 89/665 cannot be made subject to the condition that the applicant adduces evidence that the contracting authority will have to restart the public procurement procedure if the review is successful. The mere existence of such a possibility must be regarded as being sufficient in that respect (see, to that effect, judgment of 5 September 2019, *Lombardi*, C-333/18, EU:C:2019:675, paragraph 29).

71 It follows that in a case such as that in the main proceedings, where Randstad, as a tenderer excluded from a tendering procedure, brought an action before the administrative court at first instance that was based on pleas aimed at demonstrating the irregularity of that procedure, the substance of that action had to be examined.

72 In the case of tenderers which have been excluded from the tendering procedure, Article 2a of Directive 89/665 makes clear that these are no longer to be deemed to be concerned and the contract award decision must not therefore be communicated to them if their exclusion has become definitive. However, where those tenderers have not yet been definitively excluded, the contract award decision, accompanied by a summary of the relevant reasons and a statement of the standstill period for conclusion of the contract following that decision, must be communicated to them. It is apparent from reading paragraphs 1 and 2 of that article together that compliance with those minimum conditions is intended to enable such tenderers to seek an effective review of that decision.

73 In accordance with Article 2a(2) of Directive 89/665, the exclusion of a tenderer is definitive if it has been notified to that tenderer and has been ‘considered lawful’ by an ‘independent review body’ or can no longer be subject to a review procedure. That directive, which seeks to ensure full respect for the right to an effective remedy and to a fair hearing (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), must be interpreted in the light of the second paragraph of Article 47 of the Charter. In those circumstances, the term 'independent review body' within the meaning of Article 2a of that directive must, for the purposes of determining whether the exclusion of a tenderer has become definitive, be understood to mean an independent and impartial tribunal previously established by law, within the meaning of Article 47 of the Charter.

74 The fact that the exclusion decision is not yet definitive thus determines, for those tenderers, their standing to challenge the contract award decision, and that standing cannot be weakened by other – irrelevant – factors, such as the ranking of the excluded tenderer's offer or the number of participants in the tendering procedure (see, to that effect, in particular, judgments of 11 May 2017, *Archus and Gama*, C-131/16, EU:C:2017:358, paragraphs 57 and 58, and of 5 September 2019, *Lombardi*, C-333/18, EU:C:2019:675, paragraphs 29 to 32).

75 In the present case, by deciding that the independent review body seised at first instance, the Tribunale amministrativo regionale della Valle d'Aosta (Regional Administrative Court, Valle d'Aosta), should have declared inadmissible the pleas calling the award decision into question, on the ground that Randstad had been excluded from the procedure, the Consiglio di Stato (Council of State) disregarded the rule, laid down by the EU legislature and recalled in the case-law of the Court of Justice, that only the definitive exclusion, within the meaning of Article 2a(2) of Directive 89/665, can have the effect of depriving a tenderer of standing to challenge the award decision.

76 It must be noted, in regard to the facts of the case in the main proceedings, that it is apparent from the file available to the Court that both at the time when Randstad brought the action before the Tribunale amministrativo regionale della Valle d'Aosta (Regional Administrative Court, Valle d'Aosta) and at the time when the latter gave its ruling, the decision of the procurement committee to exclude Randstad from the procedure had not yet been considered lawful by the Tribunale amministrativo regionale della Valle d'Aosta (Regional Administrative Court, Valle d'Aosta) or by any other independent review body.

77 It would thus appear that the variation of the judgment of the Tribunale amministrativo regionale della Valle d'Aosta (Regional Administrative Court, Valle d'Aosta) by the Consiglio di Stato (Council of State), declaring inadmissible that part of Randstad's action by which the award of the contract to Synergie-Umana was challenged, is incompatible with the right to an effective remedy guaranteed by Article 1(1) and (3) of Directive 89/665, read in the light of Article 2a(2) of that directive. Consequently, the judgment of the Consiglio di State (Council of State) is also inconsistent with the first paragraph of Article 47 of the Charter.

78 However, in a situation such as that at issue in the main proceedings, where, subject to verification by the referring court, national procedural law in itself permits interested persons to bring an action before an independent and impartial tribunal and to assert effectively that EU law, and provisions of national law transposing EU law into the domestic legal order, have been infringed, but where the highest court in the administrative order of the Member State concerned, adjudicating at last instance, wrongly makes the admissibility of that action subject to conditions that have the effect of depriving those interested persons of their right to an effective remedy, EU law does not require that that Member State make provision – for the purpose of addressing the infringement of that right to an effective remedy – for the possibility of lodging an appeal before the highest court in the judicial order against such inadmissibility decisions from the highest administrative court, where no such remedy is provided for under its national law.

79 In that situation, the remedy against the infringement of Directive 89/665 and the first paragraph of Article 47 of the Charter resulting from the case-law of the highest administrative court lies in the obligation, for every administrative court of the Member State concerned, including the highest administrative court itself, to disregard that case-law which is not in conformity with EU law, and, if that obligation is not fulfilled, in the possibility of the European Commission instituting proceedings against that Member State for failure to fulfil its obligations.

80 It is moreover open to individuals who may have been harmed by the infringement of their right to an effective remedy as a result of a decision of a court adjudicating at last instance to hold that Member State liable, provided that the conditions relating to the sufficiently serious nature of the breach and to the existence of a direct causal link between that breach and the loss or damage sustained by the injured party are satisfied (see, to that effect, in particular, judgments of 30 September 2003, *Köbler*, C-224/01, EU:C:2003:513, paragraph 59; of 24 October 2018, *XC and Others*, C-234/17, EU:C:2018:853, paragraph 58; and of 4 March 2020, *Telecom Italia*, C-34/19, EU:C:2020:148, paragraphs 67 to 69).

81 In the light of all of the foregoing considerations, the answer to the first question is that Article 4(3) and Article 19(1) TEU, and Article 1(1) and (3) of Directive 89/665, read in the light of Article 47 of the Charter, must be interpreted as not precluding a provision of a Member State's domestic law which, according to national case-law, has the effect that individual parties, such as tenderers who participated in a procedure for the award of a public contract, cannot challenge the conformity with EU law of a judgment of the highest court in the administrative order of that Member State by means of an appeal before the highest court in that Member State's judicial order.

The second question

82 By its second question, the referring court asks, in essence, whether Article 4(3) and Article 19(1) TEU and Article 267 TFEU, read in the light of Article 47 of the Charter, must be interpreted as precluding a provision of domestic law which, according to national case-law, has the effect that individual parties cannot, by means of an appeal in cassation to the highest court in the judicial order of that Member State against a judgment of the highest court in that Member State's administrative order, challenge the failure, without reason, by the latter court adjudicating at last instance to submit a request for a preliminary ruling to the Court of Justice, despite there being some uncertainty as to the correct interpretation of EU law.

83 However, it is apparent from the file available to the Court that Randstad does not put forward in its appeal in cassation any grounds of appeal alleging that the Consiglio di Stato (Council of State) refrained, contrary to the third paragraph of Article 267 TFEU, from submitting a request for a preliminary ruling to the Court of Justice, as Randstad confirmed when questioned in that regard at the hearing before the Court of Justice.

84 It follows that, in the context of the proceedings before it, the referring court is not obliged to determine whether, in the light of the requirements ensuing from EU law, the Member States are required to make provision in their legal system for appeals to be brought before the highest court in the judicial order when the highest court in the administrative order has refrained from putting a question to the Court of Justice for a preliminary ruling; the answer to the second question is therefore irrelevant for the purpose of resolving this dispute.

85 Since it bears no relation to the subject matter of the dispute in the main proceedings, the second question is, in accordance with settled case-law, inadmissible (see, to that effect, judgment

of 15 July 2021, *Ministrstvo za obrambo*, C-742/19, EU:C:2021:597, paragraph 30 and the case-law cited).

The third question

86 In view of the answer given to the first question, there is no need to answer the third question.

Costs

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

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

Article 4(3) and Article 19(1) TEU, and 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 by Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014, read in the light of Article 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as not precluding a provision of a Member State's domestic law which, according to national case-law, has the effect that individual parties, such as tenderers who participated in a procedure for the award of a public contract, cannot challenge the conformity with EU law of a judgment of the highest court in the administrative order of that Member State by means of an appeal before the highest court in that Member State's judicial order.

[Signatures]

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* Language of the case: Italian.