Court of Justice of the European Union
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Press and Information

Judgment in Case C-497/20
Randstad Italia

EU law does not preclude the highest court in the judicial order of a Member State from being unable to set aside a judgment delivered in breach of EU law by that Member State's highest administrative court

This is without prejudice, however, to the possibility of persons harmed by such a breach claiming compensation from the Member State concerned

Azienda USL Valle d'Aosta (local health agency of the Valle d'Aosta region, Italy) launched a procedure for the purpose of awarding a public contract to an employment agency for the temporary supply of personnel. Randstad Italia SpA ('Randstad') was among the tenderers which participated in that procedure. Following the evaluation of technical offers, Randstad was excluded, the marks for its offer having failed to reach the minimum threshold set.

Randstad brought an action before the competent administrative court of first instance seeking, first, to challenge its exclusion from the tendering procedure and, second, to demonstrate the irregularity of that procedure. The action was declared admissible but was dismissed on the merits. However, the Consiglio di Stato (Council of State, Italy), before which an appeal was brought, held that the pleas challenging the regularity of the procedure should have been declared inadmissible, since Randstad did not have the necessary standing to raise them. Accordingly, it amended the judgment delivered at first instance in that respect. Randstad appealed against that judgment to the Corte suprema di cassazione (Supreme Court of Cassation, Italy), which stated, regarding the substance, that the refusal by the Council of State to examine the pleas relating to the irregularity of the tendering procedure undermines the right to an effective remedy, within the meaning of EU law. However, it noted that Italian constitutional law, [1] as interpreted by the Corte costituzionale (Constitutional Court, Italy), [2] requires such an appeal to be declared inadmissible. **Appeals in cassation against decisions of the Council of State are permitted only for reasons of jurisdiction,** whereas in the present case Randstad's appeal was based on a plea alleging an infringement of EU law.

Against that background, the Supreme Court of Cassation decided to refer the matter to the Court of Justice in order to clarify, in essence, whether EU law [3] precludes a provision of domestic law which, according to national case-law, does not allow individual parties to challenge, by means of an appeal in cassation to that court, the conformity with EU law of a judgment of the highest administrative court.

The Court of Justice, sitting in the Grand Chamber, rules that such a provision is consistent with EU law.

[1] Eighth paragraph of Article 111 of the Costituzione (Constitution).
[2] Judgment No 6/2018 of 18 January 2018 concerning the interpretation of the eighth paragraph of Article 111 of the Constitution (ECLI:IT:COST:2018:6).
[3] 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 ('the Charter').

Findings of the Court

In the light of the principle of procedural autonomy, the Court observes that, subject to any EU rules on the matter, **it is for the national legal order of each Member State to establish procedural rules for remedies to ensure effective legal protection, within the meaning of Article 19 TEU, for individual parties in the fields covered by EU law**. However, it is necessary to ensure that those rules are not 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). 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, provided that those two principles are respected.

As regards the **principle of equivalence**, the Court notes that, in this case, the jurisdiction of the referring court to hear and determine appeals against judgments of the Council of State is limited according to the same rules, regardless of whether the appeals are based on provisions of national law or of EU law. Consequently, observance of that principle is ensured.

As to the **principle of effectiveness**, the Court recalls that EU law does not have the effect of requiring Member States to establish remedies other than those established by national law, unless no legal remedy exists that would make it possible to ensure respect for the rights that individuals derive from EU law. Provided that, in the present case, the referring court finds that such a legal remedy does exist, which seems on the face of it to be the case, it is 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 a dispute at last instance, in relation both to the facts and to points of law, and consequently to prevent that dispute from being open to further substantive examination in an appeal in cassation before the highest court in its judicial order. Thus, the national provision at issue also does not undermine the principle of effectiveness and reveals nothing from which it could be concluded that Article 19 TEU has been infringed. That conclusion does not conflict with the provisions of Directive 89/665 under which, in the field of public procurement, the Member States are obliged to guarantee the right to an effective remedy. [4]

However, the Court notes that, in the light of the right to an effective remedy guaranteed by that directive and by Article 47 of the Charter, **the Council of State was wrong to have found the action brought by Randstad before the administrative courts to be inadmissible**. In that regard, the Court recalls, first, that it is sufficient, in order for that action to be declared admissible, that there is a possibility that the contracting authority will, should the review be successful, have to restart the public procurement procedure. Second, under that directive, the action may be brought only by a tenderer who has not yet been definitively excluded from the tendering procedure, and the exclusion of a tenderer is definitive only if it has been notified to that tenderer and has been 'considered lawful' by an independent and impartial tribunal. [5]

In the present case, the Council of State disregarded that rule, in so far as both at the time when Randstad brought the action before the court of first instance and at the time when the latter gave its ruling, the decision of the procurement committee to exclude that tenderer from the procedure had not yet been considered lawful by that court or by any other independent review body.

However, in a situation such as that in the present case, where national procedural law in itself permits interested persons to bring an action before an independent and impartial tribunal and to assert before it, 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**

[4] Article 1(1) and (3) of Directive 89/665.
[5] Article 2a(2) of Directive 89/665, interpreted in the light of Article 47 of the Charter.

possibility of lodging an appeal before the highest court in the judicial order against such inadmissibility decisions from the highest administrative court.

Lastly, the Court points out that **that outcome is without prejudice to the right of 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 the Member State concerned liable**, provided that the conditions laid down by EU law to that effect are satisfied, in particular the condition relating to the sufficiently serious nature of the infringement of that right.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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