Opinion of Advocate General Hogan in Randstad Italia: Disarming the Constitutional Bomb

Note to: Opinion of Advocate General Hogan, Case C-497/20, Randstad Italia, 2021

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Abstract

In this essay I summarize the Randstad Italia case, involving a preliminary reference from the Corte di Cassazione to the Court of Justice of the European Union (“CJEU”). By referring to the CJEU, the Corte di Cassazione attempts to overcome the interpretation of Article 111(8) of the Italian Constitution provided by the Corte Costituzionale. The Corte di Cassazione deems the restrictive interpretation of the notion of “reason of jurisdiction” incompatible with the EU principle of effective judicial protection, as it prevents plaintiffs from being heard by the Corte di Cassazione when their procedural rights have been violated. The Opinion of Advocate General Hogan is then considered, and it is showed how it proposes a solution of the case that avoids a possible constitutional clash with Italy. AG Hogan suggests a minimum standard of effective protection that leaves room for national procedural autonomy, in this case via the restrictive interpretation of Article 111(8) given by the Corte Costituzionale.

Keywords


1 Abstract of the Opinion

AG Hogan proposes to answer the questions asked by the Corte di Cassazione in a nuanced manner. On the one hand, he suggests that effective judicial
protection only requires one level of scrutiny in court: once this requirement is satisfied, establishing further layers is a purely national decision. This allows him to avoid entering the details of Italian constitutional law and to disarm a potential conflict with the Corte Costituzionale. On the other hand, he recognizes that denying standing to applicants like Randstad conflicts with EU law insofar as it prevents them from obtaining the potential repetition of the tender. He suggests that such problems must not be solved adding a new layer of review, as the Corte di Cassazione suggests, but by making the action for State liability less difficult for individuals, possibly by overcoming the Brasserie du pêcheur-Factortame conditions of serious and manifest violation of EU law.

2 Key Passages from the Ruling

(Paragraph 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. 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, 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.

(Paragraph 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 or, for example, a Francovich-style action 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.

(Paragraph 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’

(Paragraph 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.

(Paragraph 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 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.

3 Comment

3.1 Overview of the Case
The reasons why the Corte di Cassazione referred to the Court of Justice of the European Union (“CJEU”) in the Randstad Italia case are at the same time legal and lato sensu political. The Opinion of Advocate General Hogan (which is commented here) and the judgment to come must therefore be understood in the context of a legally complex and politically sensitive controversy. The involvement of the CJEU in a clash between the Corte di Cassazione and the Corte Costituzionale on the interpretation of a crucial constitutional provision,2

1 Opinion of Advocate General Hogan, Case C-497/20, Randstad Italia, 2021.
namely Article 111(8) of the Italian Constitution, makes Randstad Italia perhaps the most delicate case coming to Luxemburg from Italy since the Taricco saga.\textsuperscript{3}

The case originated in the context of public procurement. The Aosta Valley (an autonomous region in Italy) launched a competitive procedure to award a contract of temporary supply of personnel and structured the competition in two phases. The tenderers were first scrutinized based on the technical requirements of the offer. The undertakings above 48 points in the first phase were admitted to the second stage, in which the most economically advantageous tender would be selected. Randstad Italia Spa joined the competition but was not admitted to the second stage. Randstad challenged this decision, and the Tribunale Amministrativo Regionale per la Valle d’Aosta was called to adjudicate on the case. Here is a first point to immediately note: the court in charge of the case was a specialized administrative court. Italy follows the French “dual” system of judicial review (giurisdizione amministrativa) to adjudicate on controversies in administrative law.\textsuperscript{4} As a plaintiff, Randstad used two different arguments to challenge the decision. First, it claimed that the technical evaluation of the offer, which led to the exclusion from the second stage, was flawed. Moreover, the second stage had been run in the meantime and the competitive procedure ended with a temporary association of undertakings (“TAU” SynergieUmana) as the winner: according to Randstad, a series of errors regarding the composition of the evaluating committee, the specification of the criteria to evaluate the financial viability of tenders, and the justification of the final decision invalidated the second stage too. Finally, there had been a failure to divide the call into lots.

In March 2019, the Tribunale Amministrativo Regionale examined both arguments but rejected them: Randstad had standing in challenging both stages of the procedure, but the complaints were unfounded. Randstad, in turn, appealed to the Consiglio di Stato. This rejected the complaint again in November 2019; this time, however, it not only deemed Randstad’s arguments unfounded, but (accepting a cross-appeal by the TAU and the contracting authority) also refused to examine the second group of complaints (regarding the composition and


\textsuperscript{4} \textsc{Bignami}, “Regulation and the courts: judicial review in comparative perspective” in \textsc{Bignami} and \textsc{Zaring} (eds.), \textit{Comparative Law and Regulation}, Cheltenham, 2018, p. 275 ff., pp. 277–283.
decision of the commission in the second stage). According to the Consiglio di Stato, Randstad had no standing in challenging the second stage since they never joined it. The only legitimate complaint the plaintiff could rise regarding the first stage and its exclusion based on the technical insufficiency of the bid. The Consiglio di Stato found this complaint unfounded too and dismissed the appeal.

Again, Randstad challenged the judgment by the administrative court. The case was therefore brought to the Corte di Cassazione, and here comes the key legal aspect of the case. As already mentioned, in Italy administrative controversies are examined in a special system of courts, made of regional administrative tribunals as courts of first instance and of the Consiglio di Stato in Rome as court of appeal. The Corte di Cassazione is, therefore, outside the picture. However, in very specific circumstances a case previously examined by administrative judges may be revised by the Corte di Cassazione. According to Article 111(8) of the Italian Constitution, the decisions of the two special peak courts, namely the Consiglio di Stato and the Corte dei Conti, can be appealed in front of the Corte di Cassazione only “for reasons of jurisdiction”. By “reason of jurisdiction” the Constitution refers to disagreements on whether a certain case belongs to ordinary or administrative judges: when it is not clear who has the power to adjudicate, the Corte di Cassazione will act as the final arbiter. Here we can see a divergence between the Italian and the French models: in France, a special mixed body, the Tribunal des Conflits, made of judges from both the Cour de cassation and the Conseil d’État, is given the same task. This means that the body in charge of the actio finium regundorum will represent the two courts equally. In Italy, on the other hand, the position of the court of last resort on questions of jurisdiction confers to the Corte di Cassazione a privileged position. Randstad attempts to frame its exclusion from the tender as involving a question of jurisdiction, thus reviewable by the Corte di Cassazione. It argues that by refusing to examine the second group of complaints, regarding the second stage, the Consiglio di Stato violated its right to an effective judicial protection, also a right guaranteed by EU law. According to the plaintiff, a judicial decision like the judgment by the Consiglio di Stato, which radically deprives citizens and companies of the chance to be heard in court, would violate the principle of effective judicial protection.

5 Constitution of Italy, Art. 125: “Administrative tribunals of the first instance shall be established in the Region, in accordance with the rules established by the law of the Republic. Sections may be established in places other than the regional capital”, available at <https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf>.

6 Constitution of Italy, Art. 111(8): “Appeals to the Court of Cassation against decisions of the Council of State and the Court of Accounts are permitted only for reasons of jurisdiction”, available at <https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf>.
Yet can this argument be considered a “reason of jurisdiction”? Enter now the last character of the tale, the Italian *Corte Costituzionale*. What exactly “reason of jurisdiction” means is of course a matter of interpretation, the provision is not self-explanatory. But neither is obvious who the final arbiter of its meaning is: while it concerns the powers of the *Corte di Cassazione* (and will therefore be adjudicated each time this Court admits a case), it is also a constitutional provision, whose interpreter is the *Corte Costituzionale*. *Randstad Italia* becomes one of the tiles of a wider mosaic made of different interpretations of Article 111(8) by, respectively, the *Corte Costituzionale* and the *Corte di Cassazione*. In the last few years, the latter has at times favored an extensive reading of Article 111(8): “jurisdiction” would refer not only to the norms regarding the establishment and functioning of the special administrative and auditors’ courts, but also to the mistaken interpretation of procedural or substantive norms which *de facto* deprive plaintiffs and defendants of their procedural rights.7 Were a special judge to issue decisions depriving the parties of their rights, the *Corte di Cassazione* would be legitimizied to hear the case and adjudicate on it. The *Corte Costituzionale*, however, favors a different and narrower reading. With the seminal Judgment No. 8/2018, the *Corte Costituzionale* restricted the applicability of Article 111(8) only to cases in which special judges: a) invade the prerogatives of ordinary courts (or the other way around); b) intrude into competences reserved to the legislator or the executive; or c) refuse to decide over questions reserved to their competence.8 Any other case does not belong to the notion of “jurisdiction”. As a result, according to the *Corte Costituzionale*, even if procedural or substantive norms are wrongly interpreted or applied by a special judge, so as to *de facto* deprive the plaintiff or the defendant of their rights, that must be considered as mere and non-reviewable infringement of law (*violation de loi*) and not as a question of jurisdiction.

In the context of *Randstad Italia*, this means that if one accepts the broader reading of Article 111(8) favored by the *Corte di Cassazione*, the case will in fact be reviewable, for the *Consiglio di Stato*’s refusal to examine the second group of complaints deprived Randstad of effective protection. If, on the other hand, the narrower interpretation accepted by the *Corte Costituzionale* is to prevail, then Randstad’s case is in dire straits. Since Judgment No. 8/2018 by the *Corte Costituzionale*, see Tomaiuoli, “Il rinvio pregiudiziale per la pretesa, ma incostituzionale, giurisdizione unica”, Consulta Online, 2020, p. 698 ff., pp. 702–704, available at: <https://www.giurcost.org/studi/tomaiuoli2.pdf>.

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Costituzionale was deemed at settling the question once and for all, there seems to be nothing to do for the Corte di Cassazione but to reject Randstad’s request.

It is here, however, that the Randstad Italia case shows its connection to the supranational context. Siding with previous cases like Melki⁹ and A v B,¹⁰ in the case at stake the referring judge exploits the broader context of constitutional pluralism to try to overcome a national constitutional norm (of judicial origin, i.e., the interpretation of the Constitution provided by Judgment No. 8/2018). As previously mentioned, the right to effective judicial protection is also an EU right, entrenched in Article 19 of the Treaty on European Union (“TEU”) and in Article 47 of the Charter of Fundamental Rights of the EU (“CFR”). It is also connected to Article 4(3) TEU, the principle of loyal cooperation: when enforcing EU law, Member States must ensure the effectiveness of loyal cooperation and national judges will be the keepers of such effectiveness. Finally, Articles 2 and 267 of the Treaty on the Functioning of the European Union (“TFEU”), respectively specifying the EU’s powers and codifying the preliminary reference mechanism, require that judgments by the CJEU on EU law are then enforced by domestic courts to be effective. If national judges were not able to apply EU norms as interpreted by the CJEU, Article 267 TFEU would lose its effet utile. While these provisions codify the right to effective judicial protection in EU primary law, secondary provisions like those enshrined in Directives 2007/66, 89/665, 23–24/2014, as interpreted by the CJEU,¹¹ entail that the mere likelihood of securing an advantage such as the repetition of the tendering procedure guarantees to Randstad an interest to challenge both stages.

3.2 The Preliminary Reference

It is this series of EU provisions which forms the backbone of the preliminary reference that the Italian Corte di Cassazione issued in September 2020 after receiving Randstad’s appeal against the judgment by the Consiglio di Stato.¹² The Corte di Cassazione asks three questions to the CJEU, based on the idea that an interpretation of Article 111(8) of the Italian Constitution as the one

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⁹ Joined cases C-188/10 and C-189/10, Melki and Abdeli, 2010. Melki is recalled by the Corte di Cassazione as it stated that limitations on the power to use the preliminary reference would be illicit and would deprive EU law of its effectiveness. According to the Italian court, the restrictive interpretation of Art. 111(8) would restrict the scope of application of Art. 267 TFEU.

¹⁰ Case C-112/13, A v B and Others, 2014.

¹¹ Cases C-100/12, Fastweb, 2013; C-689/13, Puligienica, 2016; C-333/18, Lombardi, 2019.

provided by the *Corte Costituzionale* in Judgment No. 8/2018 may not be consistent with EU law.

With the first question, the *Corte di Cassazione* asks whether Articles 4(3) and 19(1)-(2) TEU, and Article 267 TFEU, “also read in the light of Article 47 of the Charter”, are incompatible with a domestic interpretation (Judgment No. 8/2018) which does not allow decisions incompatible with the CJEU’s judgments to be appealed in front of the *Corte di Cassazione* as reasons of jurisdiction. By not allowing the *Corte di Cassazione* to review judgments by the *Consiglio di Stato* in cases like *Randstad Italia*, the principle of effective judicial protection would be circumvented and the *effet utile* of Article 267 TFEU diminished. The first question is particularly interesting as the *Corte di Cassazione* is quite explicitly attempting to overcome the domestic interpretation of a constitutional provision as provided by the *Corte Costituzionale* through the preliminary reference. Famous cases like *Internationale Handelgesellschaft* and *Taricco I* are quoted as precedents in the case law of the CJEU that justify such move. Moreover, the *Corte di Cassazione* draws a line between cases in which ordinary judges deal with areas under EU’s jurisdiction according to the treaties and areas outside the scope of EU law. Only in the latter case we may speak of infringement of law in the classic sense of continental administrative law (*violation de loi*): here the judge failing to properly apply primary norms would be an institution, part of a sovereign State, unable to properly perform the judicial function. In the former case, on the other hand, the judge is merely the executor of the EU’s will, it acts as a supranational judge. In the material fields conferred to the EU, the State has renounced its sovereignty: not even the legislator could regulate them.

With the second question, the *Corte di Cassazione* asks whether the same EU provisions again are incompatible with a domestic interpretation that prevents appeals to the Court of decisions by the *Consiglio di Stato* which unlawfully avoid a preliminary reference to the CJEU beyond the conditions listed in *cilfit*. Such interpretation would threaten the uniform application and effective judicial protection of EU law.

With the third question the Court asks whether under EU law a plaintiff may be prevented from challenging a public competition once it was excluded from participating after a first preliminary stage, also in the light of a series of previous decisions by the CJEU.

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As a result, the Corte di Cassazione refers to the CJEU, asking for a potentially explosive preliminary ruling. The CJEU will now have to consider the scope and application of the principle of effective judicial protection, subject today to significant applications in the context of the rule of law crisis, to adjudicate whether it is in fact infringed in Randstad Italia. This principle will have to be balanced with the constitutional identity of Italy, manifested in the interpretation of Article 111(8) given by the Corte Costituzionale: a delicate balance which may trigger a constitutional crisis as in the days of Taricco, perhaps even the application of the counter-limits doctrine.

3.3 **Opinion of Advocate General Hogan**

Advocate General (“AG”) Hogan, who released his Opinion on 9 September 2021, was called to advise the CJEU in a case coupling legal technicalities and political sensitiveness. The complex issue of judicial politics underlying the case is abridged at the beginning of the brief: “[w]ith the present request for a preliminary ruling, the Court [of Justice of the European Union] is therefore implicitly called upon to arbitrate a conflict between the three Italian supreme courts” (para. 5).

After summarizing the previous stages of the case (paras. 14–25) and the preliminary reference (paras. 26–33), the first substantive point made by Hogan regards the correctness of Randstad’s claims on its exclusion from the procedure. According to the AG, it is indeed true that the case-law of the CJEU recalled by the plaintiff (Fastweb, PFE, Lombardi) means that tenderers cannot be denied standing if there is the mere possibility that the review may re-award the contract or void the entire procedure. The Italian Consiglio di Stato was therefore wrong in accepting the cross-appeal and denying standing to Randstad (paras. 40–51). This way, the AG also anticipates the proposed answer to the third question raised by the Corte di Cassazione: it is incompatible with Article 1 of Directive 89/665, as interpreted by the CJEU, that a tenderer is denied standing when the review may lead to void the procedure and force the contracting authority to launch a new one (paras. 100–107).

According to Hogan, however, misapplication by a court of last instance cannot be solved by allowing a further degree of scrutiny. If the CJEU stated that EU law requires Article 111(8) of the Italian Constitution to be interpreted as requiring to allow the Corte di Cassazione the power to review such cases (contra the current interpretation of the Corte Costituzionale), then the problem of the Consiglio di Stato misinterpreting EU law would be solved by adding a new layer of review. However, this would not be a viable solution, according to the AG: such institutional mechanism would in fact run into a
regressus ad infinitum. Indeed, if it takes a third degree of review (the Corte di Cassazione) to prevent misinterpretation of EU law by a second instance judge (the Consiglio di Stato), why not imagine a fourth level too? After all, the Corte di Cassazione may misapply EU law as well. Where will the infinite regress of layers of review required by EU law end (para. 75)? It is up to the States to decide on how to organize their judiciary and ensure the effective judicial protection of rights. EU law, specifically Directive 89/665, merely requires that a minimum of effective judicial protection is ensured (paras. 64–65): effective access to one judge must be granted for the principle of effective judicial protection to be respected. Once that minimum requirement is satisfied, the principle of procedural autonomy allows States to choose how many degrees will be granted (para. 72). In Randstad Italia, the locus standing granted by the Tribunale Amministrativo Regionale is sufficient remedy and no violation of the principle of effective judicial protection shall be detected (para. 74).

This part of Hogan’s reasoning, which answers the first question, deserves some comment. Three aspects are worth considering.

First, this conclusion is based on EU law only. That Member States have the right to organize their judiciary as they prefer, provided that they ensure a minimum standard of effective judicial protection, is a proposition based on a balancing exercise between procedural autonomy and effective judicial protection. According to Hogan, the conditions that must be respected for a restriction of effective judicial protection to be acceptable are listed in Article 52(1) of the CFR (para. 69). The problematic issue of domestic constitutional law raised by the Corte di Cassazione suddenly disappears. That the Corte di Cassazione disagrees with the interpretation of Article 111(8) provided by the Corte Costituzionale in Judgment No. 8/2018 would be relevant only if EU law required more than one degree of review, which it does not. Hogan’s proposal has the advantage, from the point of view of the CJEU, of avoiding any direct interpretation and even analysis of national constitutional provisions. The AG can simply avoid to take any stance on whether the disapplication of Article 111(8) of the Constitution, were it in conflict with EU law, would entail a violation of the constitutional identity of Italy and force the Corte Costituzionale to lift the counter-limits.15

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15 Whether Art. 111(8) is part of the core of the national constitution that the Corte Costituzionale would defend lifting the counter-limits or not is not obvious. Italian constitutional lawyers disagree on this. See Roberto Bin, positive on lifting the counter-limits in Randstad, in Bin, “È scoppiata la terza ‘guerra tra le Corti’? A proposito del controllo esercitato dalla Corte di Cassazione sui limiti della giurisdizione”, Federalismi, 2020, p. 1 ff., pp. 8–10, available at: <https://www.federalismi.it/nv14/articolo-documento.cfm?Artid=44450>. On the
one can see a certain difference between this attitude and the Opinion of AG Bot in *Taricco II*, in which whether a substantive conception of limitation period was part of the national constitutional identity was in fact discussed *expressis verbis* by the AG.16 Also, no reference to possible precedents like *Melki* is made, although this was recalled by the *Corte di Cassazione* in the reference. Briefly, Hogan’s proposal disarms the potential constitutional bomb by answering the question from the perspective of EU norms only and dismissing the internal quarrel between the *Corte di Cassazione*, the *Consiglio di Stato*, and the *Corte Costituzionale* (a quarrel of which, again, the AG is perfectly aware).

The second element worth considering in the answer proposed to the first question regards the way in which the question itself has been rephrased by the AG. The complex series of provisions recalled by the *Corte di Cassazione* is heavily simplified. Articles 2(1) and 267 **TFEU** are deemed irrelevant: the former as it merely regards the attribution of powers to the EU, the latter the preliminary ruling mechanism. Even Articles 4(3) and 19(1) **TEU** are deemed unnecessary to answer the question asked by the *Corte di Cassazione*. The key provision, according to the AG, is only Article 47 **CFR**: the requirement of establishing an independent judiciary in Article 19(1) corresponds to the individual right enshrined in Article 47. As a result, the principle of effective judicial protection, to be balanced against procedural autonomy, is directly embodied in Article 47 (paras. 57–62). This exemplifies one of the most important consequences of the entry into force of the **CFR**, namely the absorption of general principles in a written provision (Article 47).17

Lastly, Hogan faces the problem of how handling misinterpretation of EU law, provided that the “institutional” solution of adding second or third layers of review is not a real solution and belongs to States’ procedural autonomy anyhow. The result, from his point of view, must lie either in action for infringement as in


17 The relations between the **CFR** and the general principles can be conceptualized in several ways, depending on the value assigned to the Charter, whether it is declaratory, exhaustive, or hierarchically superior to the general principles. The case study of Art. 21 of the **CFR** seems to suggest that there is no uniform doctrine on the relations between the two in the case-law of the Court yet. The absorption of a general principle in the corresponding **CFR** provision is, therefore, not obvious. See HANCOX, “The Relationship Between the Charter and General Principles: Looking Back and Looking Forward”, Cambridge Yearbook of European Legal Studies, 2020, p. 233 ff.
Article 258 TFEU or in a Francovich-style liability action on behalf of the plaintiff (para. 75). The latter solution is surely the most important, as it is the only one directly viable to damaged individuals. In what is perhaps the most innovative proposal in the entire Opinion, the Advocate General considers revisiting the Francovich doctrine itself.18 Article 47 CFR also entails, according to Hogan, that protection of individuals’ interests through States’ liability must be effective, not merely theoretical. However, the requirement of seriousness in the breach of EU law and the need for the States to have manifestly and gravely disregarded the limits of their discretion, as in the Brasserie du pêcheur and Factortame cases,19 have made it hard for individuals to be compensated for their losses. Even more so in the light of “[c]onsiderations of judicial politeness or respect for venerable national judicial institutions” (para. 80): too often States’ liability for violation or misinterpretation of EU law by the judiciary as established in Köbler20 has become excessively difficult in practice. Therefore, the right to effective judicial protection in Randstad Italia is at risk not so much because the Corte di Cassazione is in no position to review it, given the restrictive interpretation of Article 111(8), but rather because seeking redress against States’ violations of EU law is too difficult (paras. 79–81). The proposal is to move away from the Brasserie-Factortame requirement of “grave and manifest violation” of EU law by the judge towards an evaluation of whether the judicial error was objectively excusable (paras. 82 and 84). This is particularly needed in areas like public procurement, in which the contracting authorities – State’s bodies exactly as the judges – already are under a form of strict liability (para. 83). More specific remarks on how to apply the standard of strict liability to judges are not provided, but these lines are interesting enough as they propose a substantive revision of one of the most important doctrines in EU law. Whether the Court will follow the AG on this point is something to carefully look at in the judgment to come.

The rest of the Opinion answers the two remaining questions. The second, concerning the possible weakening of the mechanism of preliminary ruling, were Article 111(8) to be interpreted restrictively, is dismissed: in fact, EU law prohibits national norms preventing judges from using the preliminary reference mechanism where appropriate or even mandatory. Yet, this minimum requirement is granted under Italian law: nothing prevented the Consiglio di Stato or the Tribunale Amministrativo Regionale from using such instrument (para. 95). Indeed, the Consiglio di Stato did not abide by such duty, but this violation of

20 Case C-224/01, Köbler, 2003.
EU law did not depend on some legal obstacle preventing the Consiglio from referring ex Article 267 TFEU. For the same reasons exposed when answering the first question, misinterpretation cannot be corrected by adding a new layer of review by reinterpreting Article 111(8) of the Constitution (paras. 96–97). The answer to such violation must be found elsewhere (again, Article 258 TFEU or Francovich-style action are suggested). As for the last question asked by the Corte di Cassazione, whether under EU law a plaintiff may be prevented from challenging a public competition once it was excluded from participating after a first preliminary stage, the Opinion suggests answering in the positive: as already mentioned, indeed not having examined Randstad’s complaints against the second stage of the procedure must be considered unlawful under EU law. The Consiglio di Stato erred in that regard (paras. 106–107).

4 Conclusion

AG Hogan’s Opinion in Randstad Italia is filled with interesting remarks. First, it stresses once more the central role that the CFR is today playing in EU law when it comes to rights’ protection: the unwritten principle of effective judicial protection is simply swallowed by Article 47 in Hogan’s reading. Second, an EU law-centered interpretation of the case is what allows the AG to avoid discussing Italian constitutional law. By relying on the view that effective judicial protection can be indeed balanced against procedural autonomy, he dismisses the idea that judicial misinterpretations of EU law must be corrected by adding further and further layers of judicial review, as suggested by the Corte di Cassazione. It is up to States’ procedural autonomy to decide how to organize its judiciary, provided that at least one level of review is granted. This solution allows the AG to disarm the potential constitutional conflict and probably avoids another Taricco case. Finally, the AG recognizes that misinterpretation or violation of EU law cannot remain unsanctioned, but that this must happen through actions for infringement or States’ liability. To balance the restriction on effective judicial protection, the Brasserie-Factortame requirement of “grave and manifest violation” for the latter must be revised and a standard of strict liability applied to judges as well, so that the individual can seek redress at least in Francovich-style actions.

We are now to wait for the judgment of the CJEU. Whether the Court will accept the AG’s proposals on the three points just considered (the role of the CFR, the neutralization of constitutional conflict, and the reassessment of the Brasserie-Factortame doctrine), is to be seen. In any case, the Opinion is telling of the momentous and delicate questions underlying the Randstad Italia reference. The Court’s judgment will likely not pass unnoticed.