JUDGMENT NO. 206 YEAR 2019

In this case, the Court considered a referral order from the Ordinary Court of Catania questioning, during proceedings between the company known as Ediservice srl and the Presidency of the Council of Ministers and others, the constitutionality of Article 44(1) of Decree-Law no. 112 of 25 June 2008 (Urgent provisions on economic development, simplification, competitiveness, stabilisation of the public finances and tax equalisation), converted with amendments into Law no. 133 of 6 August 2008, Article 2(62) of Law no. 191 of 23 December 2009, on "Provisions for the preparation of the annual and multi-annual budget of the State (2010 Budget Law)", and Article 2(1) of Decree-Law no. 63 of 18 May 2012, (Urgent provisions regarding the reorganisation of government funding to publishing companies, and the sale of daily and periodical printed matter and institutional advertising), converted with amendments into Law no. 103 of 16 July 2012. In the case before the Court, a publishing company received half of the government funding to which it was allegedly entitled for financial year 2013, and the Ordinary Court of Catania challenged the law on government funding for publishers before the Constitutional Court with regard to the wording "and taking into account the total amounts allocated for the publishing sector in the national budget that constitute a maximum limit of expenditure" in Article 2(62) of Law no. 191 of 23 December 2009 on "Provisions for the preparation of the annual and multi-annual budget of the State (2010 Budget Law)", and Article 2(1) of Decree-Law no. 63 of 18 May 2012.

In the absence of specific constitutional discipline on the matter, the Court pointed out that constitutional case law has always considered the law regarding information to fall within the scope of the protection of the constitutional freedom of expression of thought, and, in respect of the founding principles of the form of State outlined in the Constitution, the Italian form of democracy must therefore be based on free public opinion informed by information presented through a plurality of sources, considering the central value of pluralism in a democratic system. The Judge Rapporteur states that the Court has upheld the protection of pluralism on several occasions, in reference to broadcasting and advertising, referring also to the bearing of freedom of information on the freedom of the expression of thought. However, he also points out that the constitutional importance of the freedom of expression of thought does not mean – as the referring court suggests – that there exists a general subjective right of publishing companies to receive government funding. What funding they may receive is subject to budgetary requirements that may vary from year to year, and the Presidency of the Council of Ministers provides for the autonomous management of expenditure within the limits of the resources available as entered among the specific basic budgetary terms of the forecast expenses of the Ministry of the Treasury, Budget and Economic Planning.

The Court thus recognises that there is a fundamental incoherence in a system where the Government is assigned the task of quantifying the funding to allocate for financing to publishers without also establishing clear and objective criteria for it to follow. Nevertheless, the Court acknowledges that it can neither replace nor supplement the legislation in question, as the necessity to resolve this shortcoming does not impose a constitutionally mandatory solution. For this reason, the Court ruled the question inadmissible.

[omitted]

THE CONSTITUTIONAL COURT

[omitted]

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Article 44(1) of Decree-Law no. 112 of 25 June 2008 (Urgent provisions on economic development, simplification, competitiveness, stabilisation of the public finances and tax equalisation), converted with amendments into Law no. 133 of 6 August 2008, Article 2(62) of Law no. 191 of 23 December 2009, on "Provisions for the preparation of the annual and multi-annual budget of the State (2010 Budget Law)", and Article 2(1), of Decree-Law no. 63 of 18 May 2012 (Urgent provisions regarding the reorganisation of subsidies to publishing companies, and the sale of daily and periodical printed matter and institutional advertising), converted with amendments into Law no. 103 of 16 July 2012, initiated by the Ordinary Court of Catania in the proceedings pending between the company known as Ediservice srl and the Presidency of the Council of Ministers and others, with a referral order of 7 June 2017, registered as no. 149 in the 2018 Register of Referral Orders and published in the *Official Journal of the Republic* no. 43, first special series 2018.

Considering the entries of appearance of Ediservice srl and the *Federazione Italiana Liberi Editori* – FILE [Italian Federation of Free Publishers], and the intervention submitted by the President of the Council of Ministers and, *ad adiuvandum*, the company known as Avvenire Nuova Editoriale Italiana spa;

having heard Judge Rapporteur Giancarlo Coraggio in chambers on 4 June, 2019;

having heard Counsel Roberto Cociancich for Avvenire Nuova Editoriale Italiana spa, Andrea Scuderi for Ediservice srl, Massimo Luciani for the *Federazione Italiana Liberi Editori* – FILE and State Counsel [*Avvocato dello stato*] Gianfranco Pignatone for the President of the Council of Ministers.

[omitted]

Conclusions on points of law

1.− The Ordinary Court of Catania, pursuant to a referral order of 7 June 2017, registered as no. 149 in the 2018 Register of Referral Orders, raised questions regarding the constitutionality of Article 44(1) of Decree-Law no. 112 of 25 June 2008 (Urgent provisions on economic development, simplification, competitiveness, stabilisation of the public finances and tax equalisation), converted with amendments into Law no. 133 of 6 August 2008, with sole regard to the wording "and taking into account the total amounts allocated for the publishing sector in the national budget that constitute a maximum limit of expenditure", Article 2(62) of Law no. 191 of 23 December 2009, on "Provisions for the preparation of the annual and multi-annual budget of the State (2010 Budget Law)", and Article 2(1) of Decree-Law no. 63 of 18 May 2012 (Urgent provisions regarding the reorganisation of subsidies to publishing companies, and the sale of daily and periodical printed matter and institutional advertising), converted with amendments into Law no. 103 of 16 July 2012, in relation to Articles 2, 3, 21, 41(2), 97, 117 (1) of the Constitution, and the principle of the protection of legitimate expectations in relation to acts of the State.

[omitted]

4.− On the merits, the first group of questions – in logical order – raised by the referring court, in relation to Articles 2, 3 (principle of equality) and 21 of the Constitution, are

unfounded.
5.− There is no doubt that the freedom of expression of thought, of which the freedom of the press is a manifestation, constitutes a central value of our constitutional system, as acknowledged not only by the Constituent Assembly itself, which significantly deemed it necessary to adopt Law no. 47 of 8 February 1948 (Provisions on the Press) in order to protect this freedom, but subsequently also by this Court, which has long emphasised the relationship between freedom of expression of thought and democracy, affirming that the first is "'essential to the freedom' guaranteed by the Constitution" (Judgment no. 11 of 1968), "keystone of the democratic order" (Judgment no. 84 of 1969), and a "cornerstone of democracy in the whole legal system" (Judgment no. 126 of 1985).
5.1.− As for the right to information, Judgment no. 9 of 1965 stated that it "is among the fundamental freedoms proclaimed and protected by our Constitution, indeed one of those that best characterise the current system within the State, constituting a requisite for the way of being and the development of the life of the country in all its cultural, political and social aspects".
In the absence of a specific constitutional discipline on the matter, constitutional case law has always considered the law regarding information to fall within the scope of the protection of the constitutional freedom of expression of thought, since Article 21 of the Constitution "solemnly proclaims one of the principles characterising the current democratic system, guaranteeing to 'all' the right to freely express their thoughts 'by all means of dissemination' and, moreover, [lays down] further and specific laws for the protection of the press as a traditional and still irreplaceable means of dissemination for the purposes of informing the citizens and thereby shaping an informed and aware public opinion" (Judgment no. 105 of 1972).
5.2.− The "right to information", then, according to the teaching of this Court, must be determined and qualified in respect of the founding principles of the form of State outlined in the Constitution, which require that our democracy be based on free public opinion and be able to develop through the equal contribution of all to the establishment of the general will. Hence the constitutional imperative that the "right to information" guaranteed by Article 21 of the Constitution be qualified and characterised by a pluralism of sources from which knowledge and news may be drawn – which entails, furthermore, the obligation on the legislator to prevent the creation of dominant positions and to encourage access by the greatest possible number of different voices – so that citizens may have the opportunity to form their judgements from among a variety of voices and conflicting cultural orientations (Judgment no. 112 of 1993, referred to in Judgment no. 155 of 2002).
It is still the case to affirm that information represents "not so much a subject matter as a "precondition" for the implementation of the principles proper to the democratic State (Judgment no. 29 of 1996; in the same vein, Judgments no. 312 of 2003 and no. 348 of 1990).
6.− These statements of principle have had substantial consequences on the pluralism of information, entailing the recognition of the "central value of pluralism in a democratic system" (Judgments no. 21 of 1991 and no. 826 of 1988), to the point of justifying and even imposing measures on the legislator to ensure compliance.
6.1.− Specifically, the Court has affirmed the need for an effective guarantee of pluralism, with regard to the regulation of television broadcasters in order to allow both the expression of the various cultural components of society and their presence on the

market. Examining the limits to concentration in the publishing sector, the Court found that they were functional to ensuring a variety of voices, pointing out moreover that, given the existence of a barrier to entry to the television sector due to the non-unlimited nature of frequencies, differently from the press, recourse to the licensing system was necessary (Judgments no. 420 of 1994, no. 826 of 1988 and no. 148 of 1981).

In a situation of limited availability of frequencies, with negative effects on compliance with the principles of pluralism, the Court (Judgment no. 466 of 2002) reiterated the need to ensure access to the broadcasting system by the "greatest possible number of different voices" and stressed the inadequacy of mere competition between the public and private sectors for the purposes of meeting the described constitutional requirements relating to information.

Thus, called upon to examine the legislation governing State subsidies for the expansion of digital terrestrial television broadcasting, the Court (Judgments no. 168 of 2008 and no. 151 of 2005) found that they were constitutional, since the purpose of the disputed laws was to promote such expansion as a primary condition for implementing the principles of the democratic State.

6.2.− In another – but no less significant respect – Order no. 61 of 2008 stated that the Parliamentary Commission for the Orientation and Supervision of Radio and Television Services is vested with powers that arise from the need to guarantee the principle, based on Article 21 of the Constitution, of pluralism of information, according to which the presence of a parliamentary body for orientation and supervision serves to prevent the national broadcasting service from being administered by the Government in an "exclusive or dominant manner."

In subsequent Judgment no. 69 of 2009 (after referring to Judgments no. 194 of 1987 and no. 225 of 1974), again in relation to the powers of the aforesaid Commission, this Court recognised that the impartiality and objectivity of information can be guaranteed only through the plurality of sources and ideal, cultural and political orientations, given the impossibility of the news and the contents of programmes being, in and of themselves, always and in every case, objective. Parliamentary representation, which traditionally reflects the pluralism of society, is therefore the most appropriate custodian of the conditions necessary to shield the directors of the company holding the licence, as far as possible, from pressure and influence, which would inevitably affect their objectivity and impartiality.

6.3.− Furthermore, pluralism of information also underlies the Court's interventions concerning quantitative advertising limits, since the principles underlying the measures regarding quantitative television advertising limits are intended to protect consumers, and television viewers in particular, in addition to safeguarding competition and television pluralism (Judgment no. 210 of 2015).

6.4.− It should also be remembered that pluralism of information also has a bearing on freedom of expression of thought (Article 21 of the Constitution), understood (Judgment no. 122 of 2017, evoking Judgments no. 112 of 1993, no. 826 of 1988, and no. 148 of 1981) according to its passive meaning as the right to be informed, given the existence of the "right [...] to free knowledge of the manifestations of thought circulating in society [...]" (Judgment no. 122 of 2017, cited above).

7.− However, the constitutional importance of the freedom of expression of thought does not mean – as the referring court suggests – that there exists a general subjective right of publishing companies to measures in support of publishing.

7.1.− The claim is based on a combination of the article in the Constitution that defines

whichever right is examined from time to time, and Article 2 of the Constitution, but also and above all the second paragraph of Article 3 of the Constitution, which requires the removal of "the economic and social obstacles which by limiting the freedom and equality of citizens, prevent the full development of the human person and the effective participation of all workers in the political, economic and social organisation of the country".

But there is no such necessity in the case in question, in which the safeguards offered by the legal system to protect the pluralism of information and the market are able to ensure this value, so that financial aid from the State to guarantee this fundamental right is not required.

7.2.− The reference to Judgment no. 275 of 2016 therefore bears no relevance: the judgment, which concerns the right to education of disabled persons enshrined in Article 38 of the Constitution, held that the school transport and assistance service is part of the indefectible nucleus of guarantees of that right, precisely because that right constitutes an essential component ensuring its effectiveness.

8.− Consequently, further arguments regarding the infringement of the freedom of economic initiative under Article 41(2) of the Constitution are unfounded, once the lack of a right to a financial contribution in relation to this business sector has been recognised.

9.− The other group of questions relating to the infringement of the principle of the protection of legitimate expectations in acts of the State, including with regard to the European legal order, are also unfounded.

9.1.− In this regard, it is not necessary to dwell on the albeit significant limits within which this right has been recognised in the national and supranational case law, since here the *de facto* premises for legitimate expectation are lacking: it has been noted, in fact, that the statutes and lower-ranking laws governing subsidies for publishing have always stated the discretionary nature of the grants and their dependence on budgetary resources, so it is evident that publishing can rely on neither the existence of funding nor on any specific sum.

10.− A further central group of questions raised by the referring court concern the violation of the principle of reasonableness combined with Articles 21 and 97 of the Constitution, since leaving the calculation of subsidies to the discretion of the Government, with no indication of the objective criteria, would be contrary to the principle of impartiality and transparency of the public administration, and would fail to ensure the allocation of substantial and adequate funding, thus leading to difficulties concerning the independence and plurality of information.

11.− The questions raised essentially concern the role attributed to the Presidency of the Council of Ministers in establishing the amount of funding to be allocated to publishing.

11.1.− In this regard, it should be noted that following Law no. 204 of 22 December 2008 (National budget for financial year 2009 and multi-annual budget for the three-year period 2009-2011), and Law no. 192 of 23 December 2009 (National budget for financial year 2010 and multi-annual budget for the three-year period 2010-2012), an accounting structure for the State budget has been adopted based on a classification of financial resources according to two main groupings: missions, which represent the main functions of public expenditure and outline its strategic objectives, and the specific spending programs into which the missions are broken down.

11.2.− In implementing these principles, pursuant to Article 8 of Legislative Decree no. 303 of 30 July 1999 (Organisation of the Presidency of the Council of Ministers,

pursuant to Article 11 of Law no. 59 of 15 March 1997), "[...] the Presidency shall provide for the autonomous management of expenditure within the limits of the resources available as entered among the specific basic budgetary items of the forecast expenses of the Ministry of the Treasury, Budget and Economic Planning. Through his decrees, the President establishes, in line with the criteria for classifying expenses in the national budget, the structure of the budgets and the regulation of expenses management".

The provision was implemented by a Decree of the President of the Council of Ministers [d.P.C.m.] of 22 November 2010 (Rules governing the financial and accounting autonomy of the Presidency of the Council of Ministers). The budget of the Presidency of the Council of Ministers provides for a "Communications" item in concomitance with the national budget (MEF chapters); it includes a number of measures, some of which in support of publishing. The distribution of financial resources for these measures is left to the Presidency itself, with the consequence that allocation of funds to the sector in question remains subject to discretionary choices regarding the distribution of resources, and this, obviously, falls within the logic of the current budget system and is not inconsistent with the general structure of public finance outlined in previous legislation.

12.− In reality, there is a serious fundamental gap in the laws in question, which is demonstrated in particular by the fact that they have not been harmonised with the – also primary – legislative provisions that establish the conditions for access to funding (in particular, direct subsidies for the publishing companies that qualify), also quantifying them.

In fact, Article 3(3) of Law no. 250 of 1990 grants "undertakings that publish periodicals and are run by cooperatives, foundations, charitable organisations or companies of which the majority of the share capital is held by non-profit-making cooperatives, foundations or charitable organisations" an annual subsidy for a fixed amount per printed copy, up to a certain number of copies, irrespective of the number of newspapers.

Art. 8 of Legislative Decree no. 70 of 15 May 2017 (Redefinition of the regulation of direct subsidisation of companies publishing newspapers and periodicals, implementing Articles 2, paragraphs 1 and 2, of Law no. 198 of 26 October 2016), while not regulating the subject matter in the case at issue, establishes, *inter alia*, that the subsidy includes a quota for the costs directly linked to the production of the publication and a quota relating to the number of copies sold, indicating the criteria and modalities whereby the right of eligible companies to obtain the benefit subsists, pursuant to Article 2, paragraph 1, letters a), b) and c) of the legislative decree.

On the one hand, publishing companies are subjected to laws that see them as holders of rights relating to the allocation of the resources in question; on the other hand, they are exposed to the risk of a reduction in, or even the total loss of, those resources. The system therefore suffers from internal incoherence due to legislative choices that first create expectations and then authorise their denial.

It is therefore clear that in a sector such as the one under examination, characterised by the presence of a fundamental right, there is a need for transparency and clarity to be restored to the regulatory framework, and especially for the allocation of resources to meet certain and objective criteria.

12.1.− However, the Court notes that this cannot lead to the questions being declared well founded.

First of all, it is clear that it is not possible to take the route of simply deleting the disputed provisions: this would be detrimental to the party to the judgment before the referring court, which would be denied all funding, reduced though it may be.
Moreover, the adoption of laws compliant with the abovementioned canons in terms of the necessity to harmonise the system does not impose a constitutionally mandatory solution and cannot therefore be the subject of intervention by the Court, any decision on the matter falling within the province of the legislator.
Specifically, the indications of quantity expressed in Article 2(2) of Decree-Law no. 63 of 2012 for the year 2010 cannot be regarded as an implicit solution within the legal system.
This is, in fact, a maximum and certainly not a minimum limit, as the referring court claims, to overcome the problem of the legislative void resulting from the possible acceptance of the question.
12.2.− In conclusion, the questions of constitutionality raised in relation to Articles 3 (principle of reasonableness), 21 and 97 of the Constitution must be declared inadmissible.

ON THESE GROUNDS
THE CONSTITUTIONAL COURT

1) *declares* inadmissible the questions of constitutionality concerning Article 44(1) of Decree-Law no. 112 of 25 June 2008 (Urgent provisions on economic development, simplification, competitiveness, stabilisation of the public finances and tax equalisation), converted with amendments into Law no. 133 of 6 August 2008, Article 2(62) of Law no. 191 of 23 December 2009, on "Provisions for the preparation of the annual and multi-annual budget of the State (2010 Budget Law)", and Article 2(1) of Decree-Law no. 63 of 18 May 2012 (Urgent provisions regarding the reorganisation of subsidies to publishing companies, and the sale of daily and periodical printed matter and institutional advertising), converted with amendments into Law no. 103 of 16 July 2012, initiated with reference to Articles 3 (principle of reasonableness), 21 and 97 of the Constitution by the Ordinary Court of Catania with the order referred to in the headnote;
2) *declares* unfounded the questions of constitutionality regarding Article 44(1) of Decree-Law No. 112 of 2008, as converted, Article 2(62) of Law no. 191 of 2009, Article 2(1) of Decree-Law no. 63 of 2012, as converted, raised in relation to Articles 2, 3 (principle of equality), 21, and 41(2), of the Constitution, and the principle of the protection of legitimate expectations in relation to acts of the State, also in relation to Article 117, first paragraph, of the Constitution, by the Ordinary Court of Catania, with the order referred to in the headnote.
Decided in Rome, at the seat of the Constitutional Court, *Palazzo della Consulta*, on 4 June 2019.