

## JUDGMENT NO. 250 YEAR 2013

**In this case the Court heard an application by the President of the Council of Ministers challenging regional legislation which provided that the “presumed surplus” recorded in the financial year budget could be used “in order to cover non-hypothecated expenditure appropriations, including in particular those relating to the reallocation of the long-term capital account and current account expenditure arrears”. Essentially, it was argued that the region had balanced its books by allocating a presumed future budget surplus. The Court ruled the contested provisions unconstitutional, holding that the settlement of existing debts was a budgetary priority, which must be addressed using forms of coverage permitted by law, recalling its previous case law rejecting the notion of a presumed budgetary surplus.**

[omitted]

THE CONSTITUTIONAL COURT

[omitted]

gives the following

### JUDGMENT

in proceedings concerning the constitutionality of Articles 13 and 14 of Abruzzo Regional Law no. 3 of 10 January 2013 (Budget for financial year 2013, multi-year budget for 2013-2015), initiated by the President of the Council of Ministers by the application served on 18-20 March 2013, filed in the Court Registry on 21 March 2013 and registered as no. 50 in the Register of Applications 2013.

Having heard the judge rapporteur Aldo Carosi at the public hearing of 24 September 2013;

having heard the *Avvocato dello Stato* [State Counsel] Chiarina Aiello for the President of the Council of Ministers.

[omitted]

### *Conclusions on points of law*

1.– By the application referred to in the headnote, the President of the Council of Ministers raised a question concerning the constitutionality of Articles 13 and 14 of Abruzzo Regional Law no. 3 of 10 January 2013 (Budget for financial year 2013, multi-year budget for 2013-2015), with reference to Articles 81(4) and 117(3) of the Constitution.

The applicant argues that the said Articles provide for the use of a quota share of the “presumed financial balance” (a term used by the regional accounting law to refer to the presumed governmental spending surplus, which will be used below) at the end of financial year 2012 in order to cover non-earmarked expenditure appropriations, including in particular those relating to the reallocation of expired capital account and current account expenditure arrears, registered respectively under Chapters 323500 (Basic Forecasting Unit [BFU] 15.02.003) and 321920 (BFU 15.01.002).

The President of the Council of Ministers argues that, although the actual availability of a budget surplus had not yet been ascertained at the time the budget for financial year 2012 was approved, the regional law provided for the use of a quota share of that surplus in order to cover expenditure appropriations. It is thereby claimed to violate the principle of budgetary equilibrium pursuant to Article 81(4) of the Constitution and the fundamental principles on the coordination of public finances laid down by Article 117(3) of the Constitution. By the contested mechanism, Abruzzo Region is claimed to achieve “a balanced budget by recording a budget surplus that has not been ascertained and verified following the approval procedure for the previous year’s closing accounts”, thereby not ensuring expenditure coverage “through a prior control of the actual availability of the resources used in order to ensure an overall balance between revenue and expenditure”.

The applicant recalls that this Court has construed fundamental principles of accounting with specific reference to the budget surplus, asserting that a surplus may only exist, as a matter of law and for accounting purposes, if it was previously ascertained upon approval of the closing financial statement relating to the financial year in which the surplus was achieved. Until that time, the surplus cannot be “presumed and – as such – exist as a matter of law” (Judgment no. 70 of 2012).

Moreover, according to the applicant, the overall level of resources appropriated by the law under examination in the funds destined for reallocation to expired expenditure arrears was inconsistent with their total amount.

Essentially, the complaints raised by the applicant in relation to the principles invoked may be summarised as follows: a) achievement of a formally balanced budget by using the presumed budget surplus for financial year 2012 and its allocation to cover debts that have already fallen due or that will fall due during the current year; b)

creation of a substantial imbalance through this operation, aimed at increasing overall expenditure for financial year 2013; c) inadequacy of the fund appropriated for the reallocation of expired arrears having regard to the total amount of the same on 31 December 2011, which is claimed to be “equal to around 21 million euros, in contrast to the amount stated in the budget for 2013 in which a total of 9,000,000.00 euros are appropriated as funds for reallocation to expired expenditure arrears”.

2.– The challenges raised in relation to Article 117(3) of the Constitution are inadmissible.

The applicant does not provide any arguments that can link the contested provisions with the principle of constitutional law invoked, and does not aver any interposed rule capable of illustrating the supposed unlawful status of the provisions.

3.– As regards the challenges raised in relation to Article 81(4) of the Constitution, it is useful as a preliminary matter to consider the relationship between the grounds for unconstitutionality proposed and the contents of the individual paragraphs of the contested provisions.

Article 13 provides that: “1. Authorisation is granted to include within the budget a chapter 323500 (BFU 15.02.003) entitled “Special fund for the reallocation of expired capital expenditure arrears for administrative purposes, which are claimed by creditors”, pursuant to Article 34(7)(a) of Regional Law no. 3 of 25 March 2002, with the related appropriation of 6,000,000.00 euros. 2. The Head of the Budgetary Service is authorised to withdraw from the said fund, by his own decision, the amounts necessary in order to pay to creditors the amounts referred to under the previous paragraph, subject to the inclusion of the necessary appropriations in the relevant chapters or in new chapters of the budget. 3. The withdrawals and the resulting reallocations referred to under paragraph two shall be ordered following assessment and certification by the competent Directorate: – that the relative amounts have not been time barred; – that the obligation arose during the relevant original financial year; – of the commitment that gave rise to the liability, which subsequently became a long-term budgetary liability”.

Article 14 provides that: “1. Authorisation is granted to include within the budget a Chapter 321920 (BFU 15.01.002) entitled “Reserve fund for the reallocation of expired current account expenditure arrears for administrative purposes, which are claimed by creditors”, pursuant to Article 18(2) of Regional Law no. 3 of 25 March 2002, with the

related appropriation of 3,000,000.00 euros. 2. The Head of the Budgetary Service is authorised to withdraw from the said fund, by his own decision, the amounts necessary in order to pay to creditors the amounts referred to under the previous paragraph, subject to the inclusion of the necessary appropriations in the relevant chapters or in new chapters of the budget. 3. The withdrawals and the resulting reallocations referred to under paragraph two shall be ordered following assessment and certification by the competent Directorate: – that the relative amounts have not been time barred; – that the obligation arose during the relevant original financial year; – of the commitment that gave rise to the liability, which subsequently became a precluded budgetary liability”.

Through their symmetry, the two provisions establish a fund intended to pay expenditure, the obligation to pay which arose during the relevant original financial year, subject to compliance with the accounting procedures that gave rise to the expenditure commitment before it became a precluded budgetary liability, provided that the payables relating to the said expenditure category have not become time barred.

Taking account of the fact that “administrative preclusion [...] involves the removal from the financial accounts of outstanding expenditure arrears following the passage of a short period of time after the financial year in which the relative commitment was made [but which...] until expiry of the time-barring period does not however have any effect on the rights of the creditor, which are absolutely separate from the accounting procedures” (Judgment no. 70 of 2012), it is evident that the provisions under examination relate to the exercise of the power (and compliance with the duty) of the executive to honour the obligations entered into during previous financial years (which are thereby removed from the accounts for administrative purposes) that have already fallen due or will fall due during the current financial year.

In view of the above, it is important to stress that paragraph 1 of both contested Articles identifies both the type of expenditure as well as the manner in which it is to be covered, providing for its allocation to Chapters 323500 and 321920, items inserted respectively into BFUs 15.02.003 and 15.01.002, which – in turn – are related to the revenue item to which the presumed budget surplus for financial year 2012 is allocated. Paragraphs 2 and 3 of Articles 13 and 14 of Abruzzo Regional Law no. 3 of 2013 are limited to regulating the procedure for clearing the expenditure.

The objections raised with reference to Article 81(4) of the Constitution on the grounds summarised above relate exclusively to the part of paragraph 1 of the two Articles that stipulates the coverage arrangements, whilst no challenges are brought against the type of expenditure concerned – which is in turn identified in paragraph 1 – and the procedure relating to the clearing of previous debts, as regulated by the two paragraphs following the contested provisions.

3.1. – In the light of the above, the question raised in relation to Articles 13(1) and 14(1) with reference to Article 81(4) of the Constitution alleging the breach of the requirement for a balanced budget is well founded with respect solely to the part of paragraph 1 laying down the coverage arrangements for expenditure.

The principle of constitutional law invoked applies both in relation to the criteria for allocating expenditure and also through the “implementing” principle of budgetary unity, which may be inferred from Article 24(1) of Law no. 196 of 31 December 2009 (Law on public accounts and finance), as has already been asserted by this Court (Judgment no. 241 of 2013).

Both of the contested provisions are incompatible with the principles which may be inferred from Article 81(4) of the Constitution, as they entail: a) the undue use of the presumed budget surplus in order to honour obligations entered into during previous financial years that have already fallen due or will fall due during financial year 2013; b) the creation of a budgetary imbalance due to the increase in expenditure authorisations issued by the Region as a result of that operation.

As regards the first challenge, it is evident first that the expenditure coverage is flawed due to its pairing in a prohibited manner with the presumed budget surplus – an entity which does not exist in legal or economic terms (Judgment no. 70 of 2012) – and secondly that in requiring “that the budget cannot be structured in such a manner as to allocate certain sources of revenue to cover specific expenditure other than in situations involving express earmarking mandated by law for certain types of revenue (special purpose taxes, loans earmarked for investment, EU structural funds, etc.)” (Judgment no. 241 of 2013), the principle of unity does not permit obligatory connection of revenue to specific expenditure, since there is no specific provision allowing such an exception in the situation under examination.

As regards the second challenge, the joint effect of the violations described above of the principle of coverage and the principle of unity is to leave the budget for financial year 2013 imbalanced as a whole, as they stipulate an excess of expenditure compared to the resources actually available.

The scheme described, which fails to regard the parameter of constitutional law, enables resources that are actually available to be dedicated to discretionary expenditure not yet incurred or otherwise not yet completed, rather than using them on a priority basis in order to comply with obligations that have fallen due or will shortly fall due. This results in a breach of the principle of a balanced budget.

Moreover, the case under examination lacks the necessary “simultaneity [...] of the prerequisites justifying budgetary items” and “those underlying the revenue provisions necessary in order to provide financial coverage for the former” (Judgment no. 213 of 2008). In fact, whilst the payment of previous debts is legitimate and mandatory and cannot be conditional upon particular occurrences, the related resource of the presumed budget surplus is inconsistent with and cannot be used to cover the said expenditure.

3.2.– Precisely in relation to the principle invoked by the President of the Council of Ministers, it is important to recall that the principle that a balanced budget should be sought, which was previously identified by this Court as a dynamic precept of financial management (see *inter alia* Judgments no. 213 of 2008, no. 384 of 1991 and no. 1 of 1966) involves a continuous search for a harmonious and symmetrical balance between available resources and expenditure necessary in order to pursue public goals.

The said principle requires the administration to make commitments that are not limited solely to the time when the budget is approved, but which extend to all situations in which that balancing fails due to unexpected events or due to an inherent defect resulting from the very structure of the budgetary law. The circumstances of Abruzzo Region currently fall under this latter scenario, which first undermines the possibility of a balanced budget due to the improper use of the presumed budget surplus, and secondly cannot fail to provide for mandatory compliance with obligations relating to previous financial years.

This evident conflict can be resolved by making appropriate adjustments to the budget, whereby the executive retains discretion over its specific configuration in accordance with the principle of the priority allocation of resources available for

mandatory expenditure, and otherwise for obligations taken on, which will shortly fall due or have already fallen due.

In fact, the principle of a balanced budget includes substantive requirements: it cannot be limited to the formal balancing of expenditure against revenue (Judgment no. 1 of 1966), but must be extended – according to an ordered planning of financial transactions – to preventing the risk of a deficit, which results inevitably from the progressive accumulation of unpaid debts generated by inertia or delays on the part of the administration.

Moreover, the limits specified in the application by the President of the Council of Ministers – which did not contest the use of a further part of the presumed budget surplus (quantified at 1,053,840,000.00 euros) pursuant to Article 11 of the law under examination – do not exempt the Region from the specific requirement to seek, insofar as possible a balanced budget. This Court has already asserted (see Judgment no. 70 of 2012) that “Under the financial rules applicable to the public administrations, the general requirements to seek a balanced budget and budgetary equilibrium laid down by Article 81(4) of the Constitution are implemented through two rules, one static and the other dynamic: the former involves a pairing of revenue and expenditure forecasts”, whilst the latter involves the ongoing pursuit of an equilibrium between revenue and expenditure items comprising the budget by continuously balancing them against each other in such a way as to ensure that the result is generally zero. This creates a requirement for the public administration to monitor constantly the consistency between the structure of individual revenue and expenditure items comprising the budget.

In the case under examination, the limitation of the declaration that the use of the presumed budget surplus is unconstitutional with respect solely to the expenditure items at issue in the application does not exempt the Region from the requirement to comply with canons resulting from the constitutional principle requiring an overall balanced budget, also having regard to the significant size of the residual presumed budget surplus in absolute terms.

According to the case law of this Court, the presumed budget surplus is non-existent as a legal and accounting concept in view of the principle that “no expenditure may be established in budgetary items associated with a presumed surplus except that financed

out of earmarked funds duly appropriated during the previous financial year” (see Judgments no. 309 and no. 70 of 2012).

4.– The declaration that Articles 13(1) and 14(1) of Regional Law no. 3 of 2013 are in part unconstitutional does not have the effect of invalidating the remaining part of Articles 13(1) and 14(1) and the arrangements for clearing the expenditure necessary in order to comply with obligations pertaining to previous financial years provided for under paragraphs 2 and 3 of those Articles.

The provisions referred to provide for accruals to the funds for reallocating long-term capital account and current expenditure arrears in order to comply with liabilities taken on during previous financial years, provided that they have not become time barred.

Although they are not restricted by specific legislation to any particular budgetary revenue, the expenditure to be reallocated falls under the category of mandatory expenditure, which is moreover related to the existence of debts duly contracted and obligations that have fallen due or will fall due during the relevant financial year. As has been observed by this Court (see Judgment no. 70 of 2012), payment of the overdue debts of the public administration is a priority objective – amongst the various legislative references under Community and national law, it is important to refer to Directive no. 2011/7/EU of 16 February 2011, “Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions (consolidated version) (Text with EEA relevance )” – not only due to the critical financial situation which the delay causes to creditors, but also due to the close relationship with the financial equilibrium of public budgets, which is inherently undermined by the existence of debts not timeously honoured.

Therefore, compliance with the obligations entered into under the terms of resolutions correctly adopted and properly implemented amounts to a mandatory requirement for Abruzzo Region, but must occur in accord with the requirements of sound financial management, complying with the principles resulting from Article 81(4) of the Constitution, and must rely on the forms of coverage permitted under law.

5.– Pursuant to Article 27 of Law no. 87 of 11 March 1953 (Provisions on the establishment and functioning of the Constitutional Court) moreover, Articles 1 and 4 of Abruzzo Regional Law no. 3 of 2013 must be ruled unconstitutional on a consequential

basis insofar as they provide for the registration respectively on the revenue and expenditure sides of the budget for the year and the cash budget for 2013 of the presumed budget surplus amounting to 9,000,000.00 euros, equal to the sum total of the amounts destined under Articles 13 and 14 to the reallocation of long-term capital account and current account expenditure arrears.

6.– An analogous ruling must be adopted in relation to Article 11 of Abruzzo Regional Law no. 3 of 2013 insofar as it applies the presumed budget surplus for the 2012 financial year of 9,000,000.00 euros – equal to the sum total of the amounts destined under Articles 13 and 14, to the reallocation of expired capital account and current account expenditure arrears – to the 2013 budget. Since this Article is evidently correlated to the above provisions, there is a clear consequential effect resulting from the decision adopted in relation to them.

7.– As a result of the declaration that Articles 13(1) and 14(1) of Abruzzo Regional Law no. 3 of 2013 are in part unconstitutional, the question concerning the allegedly insufficient coverage for funds destined for reallocating expenditure relating to long-term capital account and current account arrears is moot.

#### ON THESE GROUNDS

#### THE CONSTITUTIONAL COURT

1) declares that Articles 13(1) and 14(1) of Abruzzo Regional Law no. 3 of 10 January 2013 (Budget for financial year 2013, multi-year budget for 2013-2015) are unconstitutional with regard to the allocation of expenditure to chapters 323500 (BFU 15.02.003) and 321920 (BFU 15.01.002) of the 2013 budget;

2) consequently rules, pursuant to Article 27 of Law no. 87 of 11 March 1953 (Provisions on the establishment and functioning of the Constitutional Court), that Article 1 of Abruzzo Regional Law no. 3 of 2013 is unconstitutional insofar as it provides for the registration within the revenue side of the budget for the year and in the 2013 cash budget of the presumed surplus for financial year 2012 of 9,000,000.00 euros;

3) consequently rules, pursuant to Article 27 of Law no. 87 of 1953, that Article 4 of Abruzzo Regional Law no. 3 of 2013 is unconstitutional insofar as it provides for the

registration within the expenditure side of the budget for the year and in the 2013 cash budget of the presumed surplus for financial year 2012 of 9,000,000.00 euros;

4) consequently rules, pursuant to Article 27 of Law no. 87 of 1953, that Article 11 of Abruzzo Regional Law no. 3 of 2013 is unconstitutional insofar as it applies to the 2013 budget the presumed surplus for financial year 2012 of 9,000,000.00 euros;

Decided in Rome at the seat of the Constitutional Court, *Palazzo della Consulta*, on 21 October 2013.