

Press Release of 18 January 2022

ABUSE OF OFFICE: THE “NECESSITY AND URGENCY” OF THE 2020 REFORM IS NOT UNREASONABLE

The provision contained in the so-called “Simplification Decree”, which restricts, by defining in clearer terms, the scope of the offence of abuse of office did not result solely from the need to combat “defensive bureaucracy” and the attendant deficiencies resulting from the expansion within the case law of the scope of the offence. It was “the need to ‘restart’ the country quickly following the extended shutdown imposed in order to combat the pandemic which – in the assessment of the Government (and also of Parliament upon conversion) – that established its extraordinary nature and urgent status. This assessment cannot in any case be deemed to be manifestly unreasonable or arbitrary”.

This is an extract from the reasons given for [judgment no. 8](#) filed today (author of the judgment Franco Modugno), in which the Constitutional Court declared unfounded a question concerning the constitutionality of Article 23(1) of Decree-Law no. 76 of 16 July 2020 (converted into Law no. 120/2020), which had been raised by the Judge in charge of Preliminary Investigations at the Court of Catanzaro with reference to Article 77 of the Constitution.

The Court addressed the lengthy treatment of the issue of abuse of office within political, parliamentary and judicial circles as well as “defensive bureaucracy” resulting from an expansion in the scope of the offence, as applied by the courts, where “public officials refrain [...] from making decisions whereby, whilst considering them to be beneficial in the pursuit of the public interest, they prefer to take other less challenging decisions [...], or more often not to act at all, out of fears of exposing themselves to possible criminal charges (so-called ‘fear of signature’)”. However, the Court held that

the choice to enact the contested legislation came to fruition “only following the emergency caused by the COVID-19 pandemic, within the context of a heterogeneous urgent measure aimed at giving a new impetus to the national economy, which had been placed under severe strain by the long shutdown of production activity ordered during the initial acute phase of the emergency”.

The amendment restricting the scope of the criminal offence had been challenged by the Judge in charge of Preliminary Investigations at the Court of Catanzaro as regards both the decision to implement it through urgent legislation, as well as the correctness in substantive terms of the solutions specifically adopted. The judge sought a ruling of unconstitutionality that would have had as its effect the revival of the previous rule providing for the offence of abuse of office, which had been broader in scope.

The Court held that the contested change was not “eccentric and absolutely extraneous”, in terms of its subject matter and purpose, from the decree-law into which it had been incorporated, which included a variety of provisions sharing the common objective of promoting the country’s economic recovery following the shutdown of production activities during the initial acute phase of the emergency caused by the pandemic. The judgment goes on to note that a widespread view held throughout the government was that this recovery could be facilitated also “by a sharper delineation of responsibilities”. From this perspective, “the change is also not an isolated ‘monad’”, but is linked “with provisions aimed at ‘reassuring’ civil servants” as regards the other “risk” of liability for the loss of public funds, which was also altered to render its scope more circumscribed. The Court therefore concluded that the contested legislation was not “patently extraneous to the ultimate aim underlying the decree”.

The Court also held that the prerequisites of extraordinary necessity and urgency had been met, having resulted, in the Government’s assessment, specifically from the epidemiological emergency and the need to “restart” the country quickly.

On the other hand, the question concerning the substantive content of the changes, which according to the Judge in charge of Preliminary Investigations at the Court of Catanzaro had excessively weakened protection for the proper conduct and impartiality of the public administration (Articles 3 and 97 of the Constitution), was declared inadmissible. The aim of the question was to obtain a ruling against a person accused of a criminal offence,

but it did not fall under any of the scenarios in which the Court is permitted to issue such a ruling. The judgment also recalls that the requirement of safeguarding constitutional values is not limited solely to criminal protection and that “the establishment of a criminal offence is indeed a last resort, to which the legislator has recourse where, according to its discretionary assessment, it considers this to be necessary owing to the absence or inadequacy of any other forms of protection”.

Rome, 18 January 2022

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