JUDGMENT NO. 120 YEAR 2020

In this case, the Court considered a question raised by a regional tax board as to the constitutionality of a provision of the consolidated law on the inheritance and gift tax. The referring tax board alleged that since the provision, which created an exception to the inheritance and gift tax for transfers of business enterprises or branches or shares thereof under certain conditions, did not extend to spouses of the donor, it violated the equality principle and protection of the family enshrined in the Constitution. The Court first rejected objections by State Counsel, in part by reaffirming its power to emit additive rulings and to review discretionary choices by the legislator for manifest or arbitrary unreasonableness. The Court acknowledged that calls for inheritance and gift tax relief in connection with family business enterprises had been the focus of a Recommendation of the European Commission, with regard to small and medium-sized enterprises, in the mid-1990s. However, the Court rejected the suggestion that the Commission's recommendations could still be connected to situations like the present case in the contemporary Italian tax context. It pointed out that the Italian tax context had significantly changed since the Commission had called on Member States to reduce taxes on inherited businesses and related assets, and the fiscal burden of such taxes was already reduced significantly by legislation. Then, it clarified the character of the concession within the overall tax system, deeming it outside the bounds of the purposes laid out in constitutional provisions. In particular, it pointed to the absence of a needs-based consideration or limitation to small and medium-sized enterprises, and emphasized that there was no obligation to extend tax relief to categories of persons well able to make tax contributions, and that, particularly in the case of large enterprises, to do so could incentivize bad market outcomes in terms of company management and resistance to sale. Turning to the merits of its review, the Court concluded that the question as to constitutionality was unfounded. It recalled that judicial review of tax provisions for violations of the equality principle call for a particularly high standard of scrutiny. It held that the legislator did not infringe the principle of equality when it distinguished between spouses and descendants, in its decision to extend the tax relief only to the former, pointing to distinctions including the greater likelihood that descendants will be younger than spouses of the deceased, and, thus, more likely to carry on the operation of the business. The Court ruled that the legislator acted within the bounds of its discretionary authority in selecting the list of subjects to whom the tax relief would apply.

[omitted]

THE CONSTITUTIONAL COURT

[omitted]

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Article 4-*ter* (*recte*: of Article 3(4-*ter*) of Legislative Decree No. 346 of 31 October 1990 (Approval of the consolidated law containing provisions concerning the inheritance and gift tax), as introduced by Article 1(78)(*a*) of Law No. 296 of 27 December 2006, containing "Provisions for making the annual and multi-year State budget (2007 Finance Law)," initiated by the Regional Tax Commission [*Commissione Tributaria Regionale*] of Emilia-Romagna in proceedings between the *Agenzia delle entrate-Direzione provinciale di Parma* and N.B. and others,

with a referral order of 1 February 2019, registered as No. 125 of the 2019 Register of Referral Orders, and published in the *Official Journal* of the Republic No. 37, first special series 2019.

Having regard to the intervention of the President of the Council of Ministers;

after hearing Judge Rapporteur Luca Antonini in chambers on 6 May 2020, in compliance with the Decree of the President of the Court of 20 April 2020, point 1) letter *a*);

after deliberation in chambers on 6 May 2020.

[omitted]

Conclusions on points of law

1.– The Regional Tax Board (*Commissione tributaria regionale*, CTR) of Emilia-Romagna, in reference to Articles 3(1) and 29 of the Constitution, questions the constitutionality of Article 4-*ter* (*recte*: of Article 3(4-*ter*)) of Legislative Decree No. 346 of 31 October 1990 (Approval of the consolidated law containing provisions concerning the inheritance and gift tax), as introduced by Article 1(78)(*a*) of Law No. 296 of 27 December 2006, containing "Provisions for making the annual and multi-year State budget (2007 Finance Law)," insofar as it fails to include, in the list of transfers of businesses or branches thereof, of company shares and of stocks, which are not subject to the inheritance and gift tax, transfers made to the spouse of the donor.

The challenged provision, formulated as it applies *ratione temporis* in the pending proceedings, provides that: a) "[T]ransfers of businesses or branches thereof, of company shares and of stocks, including those carried out through the family pacts described in Articles 768-*bis et seq*. of the Civil Code to the advantage of heirs, are not subject to the tax" (sentence 1); b) "[i]n the case of company shares and stocks of the subjects described in Article 73(1)(*a*) of the consolidated law on income tax, in accordance with Decree of the President of the Republic No. 917 of 22 December 1986, the benefit falls exclusively to those shares through which control is gained or the requirements for control are met under Article 2359, paragraph 1, point 1), of the Civil Code" (sentence 2); c) "[t]he benefit applies on the condition that the beneficiaries carry out the operation of business activities or maintain control for a period of not less than five years from the date of the transfer, and submit, together with filing the declaration of inheritance or the deed of gift, the applicable declaration to that effect" (sentence 3); d) "[t]he failure to comply with the condition laid out in the previous sentence shall result in the loss of eligibility for the benefit and the payment of the tax in the ordinary way, the administrative sanction provided at Article 13 of Legislative Decree No. 471 of 18 December 1997, and default interest starting from the date when the tax should have been paid" (last sentence).

In particular, this scheme, as the provisions make plain, is an optional concessionary one: indeed, the beneficiaries of the transfer are not obliged to pay the tax on inheritance and gifts, provided that they carry out the operation of company activities or maintain control for a period of not less than five years from the date of the transfer, making a timely applicable statement to this effect in the declaration of inheritance or in the deed of gift.

In the view of the referring CTR, the challenged provision infringes, first of all, Article 3 of the Constitution, in relation to the principle of equality, in light of the unreasonable disparity of the fiscal scheme that applies to heirs and spouses of the donor.

The CTR argues that the scheme established by Article 3(4-*ter*) of Legislative Decree No. 346 of 1990 is preordained to favor "family continuity" in company management as well as "keeping the company in the family:" the pursuit of this purpose would also be assured if the transfer were to take place to benefit a donor's spouse, leading the CTR to conclude that there is an unjustified disparity in treatment.

Since the function of the challenged provision is, it is argued, essentially that of protecting families, the omission of spouses from the exemption in question allegedly causes the additional violation of the other constitutional provision referred to, Article 29 of the Constitution.

2.– State Counsel objects, as a preliminary matter, that the questions raised are inadmissible, merely asserting, on the first grounds, that the alleged inadmissibility derives from the fact that the referring CTR "calls for a clearly additive ruling", because it requests the extension of the concession to the donor's spouse.

The objection is unfounded, because it is based exclusively on the assumption, which is patently unfounded, that this Court may not hand down (and the referring CTR may not request) an additive ruling.

To the contrary, suffice it here to recall both the well-established case law that allows for that type of ruling generally, and that which allows for extending fiscal concessions when the underlying justification for the concessions is the same (see, among many, Judgment No. 242 of 2017).

2.1.– Equally unfounded is the other objection as to admissibility, which State Counsel makes on the basis of the broad discretion to which the legislator is entitled in tax matters.

If it is, indeed, true that the provisions establishing fiscal concessions amount to an exercise of discretionary power, this in any case does not preclude the intervention of this Court, given that said discretion remains nonetheless subject to challenge "for the possibility that it is manifestly arbitrary or irrational […]" (see, among many, Judgments Nos. 264 and 177 of 2017). State Counsel itself, moreover, in its argument for inadmissibility, states that constitutional review is possible in cases of the "manifest incongruity" of legislative choices and, in order to deny that such a scenario is present in this case, ends up disputing the foundation of the challenges on the merits.

3.– On the merits, the questions are unfounded.

In addition, it is important to place the exemption established by Article 3(4-*ter*) of Legislative Decree No. 346 of 1990 within the context of the tax system.

3.1.– The introduction of forms of tax relief concerning inheritance and gift taxes, with regard to the passage of businesses from one generation to another, was, in its time, called for by Recommendation 94/1069/EC of the European Commission on the transfer of small and medium-sized enterprises, adopted on 7 December 1994 (which was followed by Communication 98/C 93/02 of the Commission on the transfer of small and medium-sized enterprises, adopted on 27 March 1998).

On the point that the previous year's White Paper on Growth, Competitiveness, and Employment mentioned "the transfer of businesses as a priority area requiring measures to improve the situation," the Commission noted the "inadequacy of certain aspects of Member States' law, especially concerning company law, inheritance law and fiscal law," having ascertained that, "several thousand enterprises are obliged to cease trading every year because of insuperable difficulties affecting their transfer [and] the winding-up of these enterprises has negative repercussions on the economic fabric of businesses and on their creditors and employees."

The Recommendation then highlighted the fact that, "one of the main obstacles preventing the successful transfer of a family business" is the associated fiscal burden, to the extent that, "payment of an inheritance or gift tax may threaten the financial equilibrium of the enterprise, and therefore also its survival."

It then invited Member States to "take the necessary measures to facilitate the transfer of small and medium-sized enterprises in order to ensure their survival and to safeguard the jobs which depend on them" (Article 1), suggesting, among these, that they "encourage the owner, through taxation measures, to pass on his business by selling it or by transferring it to the employees, particularly when there is no successor in the family" (Article 1).

Specifically, in addition to inviting them to reduce taxation on revenue from capital gains in the event of sale or transfer (Article 7), the Recommendation called on the States to "reduce the taxes on assets exclusively used for the business in the case of transfer by gift or succession, including inheritance tax, gift tax and registration fees, provided that the business is genuinely kept as a going concern for a minimum period" (Article 6).

3.2.– These suggestions came during a time in which the inheritance tax was substantially onerous in other European nations as well as in Italy, where the tax took the form of a single tax payment, calculated both on the value of the individual inheritance shares, and on the overall value of the estate. In particular, for the spouse and the descendant beneficiaries of the transfer, the fiscal burden was only partly attenuated by the exemption that applied to their inheritance share and the allowances on the overall estate, given the fact that progressive tax rates applied to it in any case, according to brackets that varied, most recently, between 7 and 27 percent.

Later, however, with the inheritance and gift tax reform brought about by Article 69 of Law No. 342 of 21 November 2000 (Fiscal provisions), the legislator, in light of the indications laid out in the Recommendation mentioned above, significantly reduced the fiscal burden connected with inheritance.

Indeed, as a general matter, the progressive tax on the net overall hereditary estate was rescinded, and a proportional tax on individual shares was instituted, in the limited measure, as concerns spouses and direct descendants, of 4 percent net of the allowance.

Furthermore, particularly to facilitate transfers *mortis causa* or for gifts of companies or company shares or stocks, the reference to the start-up costs in the determination of the taxable amount was eliminated, and the concessionary regime previously inserted into Article 25(4-*bis*) of Legislative Decree No. 346 of 1990 by Law No. 662 of 23 December 1996 (Provisions streamlining public finance), consisting in a reduction of the tax applicable to enterprises located in mountainous zones, was extended to gifts (Article 25(4-*ter*) of Legislative Decree No. 346 of 1990). The provision institutes a reduction in the tax that applies to enterprises, shares of partnerships of persons or capital goods located in mountainous zone municipalities with fewer than 5,000 inhabitants or in fractions of municipalities with less than 1,000 inhabitants (even if part of larger mountainous zone municipalities), which are transferred to a spouse or a relative within three degrees of the deceased, "on condition that the beneficiaries effectively carry out business activities for a period of not less than five years from the date of the transfer."

Concessionary tax regimes intended to safeguard specific assets of small and medium-sized enterprises with an eye to the continuity of economic activity were, in any case, already provided for, under certain conditions, by Article 25 of Legislative

Decree No. 346 of 1990, with respect to real property used for carrying out the activity of the enterprise in the context of family craft businesses (paragraph 4) and to farm land passed on to working farmers in a familial context (paragraph 3), and with the addition of a specific concessionary regime the purpose of which was to "foster the continuity of agricultural enterprises" in the event of inheritance or gift benefitting descendants within three degrees of the deceased who met the requirements of so-called young farmers (Article 14 of Law No. 441 of 15 December 1998, containing "Provisions for the diffusion and recovery of youth entrepreneurship in agriculture," and later modifications).

3.3.– Shortly after Law No. 342 of 2000, Law No. 383 of 18 October 2001 was passed (Initial measures for economic recovery). Article 13 of that law both abolished the inheritance and gift tax and left in place a tax only on gifts between non-relatives, or relatives by marriage or in parallel lines of descent beyond the fourth degree (over an allowance of 350 million Italian lire).

3.4.– Nevertheless, this abolition was an isolated parenthetical in the development of the tax system, because with Article 2, paragraphs 47-54, of Decree-Law No. 262 of 3 October 2006 (Urgent provisions on tax and finance), as replaced at the time of its conversion by Law No. 286 of 24 November 2006, the legislator, on the one hand, eliminated said Article 13 and, on the other, essentially "reintroduced" the abolished tax on inheritance and gifts.

This took place, first, by essentially bringing back into force the provisions of the consolidated law of inheritance and gift tax under Legislative Decree No. 346 of 1990, in the text in force on 24 October 2001, that is, with the modifications described, which were effected by the provisions of Article 69 of Law No. 342 of 2000. At the same time, the legislator significantly raised the allowance available to spouses and relatives (bringing it to 1,000,000 Euros for each beneficiary).

Furthermore, in line with the aforementioned suggestions from the European Commission, the legislator also introduced, with Law No. 55 of 14 February 2006 (Modifications to the Civil Code in the area of family pacts), the institution of the family pact in the context of the Civil Code's regulations on inheritance (Articles 768-*bis et seq*. of the Civil Code). This allows, for purposes intended to ensure the continuity of enterprises, for strategic planning of generational transfers ("to one or more descendants," as per Article 768-*bis* of the Civil Code) of the enterprise itself, including as an exception to the ban on inheritance pacts under Article 458 of the Code.

3.5.– In short, in the Italian system, by the time the legislator introduced the new tax concession on the intergenerational transfer of businesses, branches of businesses, company shares and stocks with the enactment of the 2007 Finance Law, the inheritance and gift tax burden had already been reduced significantly as a general matter. In addition, concessionary tax regimes were put in place in order to facilitate, in particular contexts, inheritance of enterprises, and specific contractual tools had been introduced in order to allow for the strategic planning of intergenerational transfer of enterprises.

The challenged provision then established an additional fiscal regime, which is particularly advantageous, and which includes (under specific conditions) a total exemption in the event of inter-generational transfer by gift or inheritance *mortis causa*.

From the choice to place this concession in Article 3 of Legislative Decree No. 346 of 1990, it may be inferred that, on the basis of the reference to it found in Articles 1(2) and 10(3) of Legislative Decree No. 347 of 31 October 1990 (Approval of the consolidated law containing provisions concerning mortgage and cadastral taxes),

concerning mortgage and cadastral taxes, the tax exemption operates, with the same conditions, in reference to these taxes as well (which would otherwise be owed where the enterprise includes real property).

4.– Once the regulatory context surrounding the provision in question is established, it is necessary, as a further premise, to clarify under which *species* it falls, within the broad context of the *genus* of so-called fiscal concessions, which do not amount to "accidental qualities" of the tax system, but rather the way of resolving complex issues of balancing the interests and values at stake when it comes to taxation.

This balancing is entrusted, in the first place, to the discretionary evaluation of the legislator, but remains reviewable by this Court on the basis of the proportionality of the balancing it has carried out, particularly when it involves a true exception to the general duty to participate in public spending on the basis of one's capacity to contribute (Articles 2, 3, and 53 of the Constitution), with implications for the related purposes of wealth redistribution and for the need to finance constitutional rights (Judgment No. 288 of 2019).

4.1.– It is also useful to specify that, above all in this area, fiscal systems, which are influenced by the high level of dynamism that characterizes financial policies, rarely tend to develop into conceptually orderly constructs, and the result tends rather to be characterized by heterogeneousness in how they are defined and by a markedly approximate tone in the regulatory language.

Nevertheless, it is both possible and appropriate, for purposes of constitutional justification, to draw a distinction (in the broad sense, because interconnections remain possible) between the different concessions.

Indeed, in some cases, it is possible to trace the prevalence of a structural character, as the exemption from – or reduction of – a tax is rendered necessary by the consistent or systematic application of the basis for the tax (for example to avoid double taxation), either by identifying taxable persons or by taking note of a reduced or lack of ability to pay (which the legislator may find in relation to certain concrete circumstances or in relation to the particular features of the tax). Such scenarios involve tax relief provided for purposes intrinsic to the tax.

Other arrangements, on the other hand, are truly forms of relief, , because, unlike the examples described in the previous paragraph, they presuppose the existence of an ability to pay that is consistent with the structure of the tax, but, as an exception to the *dictum de omni* under Article 53(1) of the Constitution (Judgment No. 159 of 1985 contained an early ruling on this point), and also provide, for non-fiscal reasons, forms of exemptions, more advantageous substitute taxation, or other measures intended to lighten or eliminate the applicability of the tax burden in relation to predetermined cases.

It is, then, possible, within this category of concession, to distinguish between relief concerning which the non-fiscal purpose pursued by the legislator can be traced back to the implementation of other constitutional principles (such as, for example, the protection of the family, the right to health, or the development of social welfare) and relief concerning which, on the contrary, a purpose-based perspective cannot be reached. In this regard, it bears noting that the absence of this perspective does not make the latter type of concession unconstitutional *per se*, except when the non-fiscal purpose cannot be traced back in any way to reasons relating to the common good, and has features more in line with a mere privilege. In any case, the fact remains that, when it comes to judicial review of violations of the principle of equal taxation, this defect calls

for particularly rigorous scrutiny of the existence of an *eadem ratio* that can justify extending it to scenarios considered to be excluded.

4.2.– Coming now to the allegations of the referring CTR, which are based on the failure to include spouses in the list of subjects exempt from payment of the tax, allegedly infringing Articles 3 and 29 of the Constitution, the specific structure of the provision in question matters, and appears, first of all, to belong to the category of actual tax relief.

Indeed, it provides for an exemption where there is a recognized ability to pay the tax, since the tax on inheritance and gifts is "justified by the enrichment of the heir or the beneficiary, and, therefore, on the basis of their ability to pay, which is new and autonomous, including with respect to the taxes previously paid by the donor" (Judgment No. 54 of 2020). Therefore, it does not have a structural character, as its optional nature clearly confirms.

The exemption under discussion thus aims at facilitating – through elimination of the fiscal burden connected with transfers by inheritance or gift – intergenerational continuity of enterprises in the sphere of the descendants in the family in case of succession *mortis causa*, with respect to which transfer by gift can essentially be an anticipatory move.

This purpose of the provision may be gleaned above all from its wording, which, first, refers exclusively to conglomerates, company shares, and stocks, and, second, makes enjoyment of the benefit subject to the condition that the descendants "carry out the activity of the business or maintain control" for a period of at least five years.

Further confirmation of this is evident from the preparatory works, which reveal that the legislator, where the carrying forward of the business activity from parent to child was guaranteed, chose to eliminate the tax, "for purposes of facilitating the intergenerational passage of family businesses, which are […] one of the essential components of the productive structure of the nation" (report of the Sixth Permanent Commission to the Chamber of Deputies on the draft law containing the finance law for 2007).

4.3.– The purpose of facilitating continuity in family management of an enterprise, as it is considered in the structure of the exemption in question, exceeds the scope of the *favor familiae* principle expressed by Article 29 of the Constitution.

In theory, only in particular cases, for example that of family businesses where the owner and the owner's relatives are heavily involved in the work (and often also in managing the capital), there is the potential to consider a connection, but certainly not in the general sense found in the provision under review.

The legislative action before the Court, moreover, differs from other fiscal measures that are easily traceable to the constitutional protection of the family like, for example, tax deductions or credits for dependent children, which correspond to the goal of fostering the parental duty to "support, raise and educate their children, even if born out of wedlock" (Article 30(1) of the Constitution), and, at the same time, to give due consideration to the reduced ability to pay caused by the fulfillment of said duty.

Therefore, the provision under scrutiny today, which, above all, is totally independent of any verification of a state of need on the part of the beneficiaries, exceeds the scope of the protection offered by the "principal constitutional precepts (Articles 29-31 of the Constitution) in place to protect families and, in particular, situations of potential fragility within them" (Judgment No. 54 of 2020).

4.4.– The concession established by the provision under review, due to how it is structured, also exceeds the scope of Article 41 of the Constitution, which is the other constitutional reference to which it could, in the abstract, refer, and which, therefore, irrespective of the challenges raised by the referring CTR, must in any case be taken into consideration by this Court in order to duly frame the nature of the exemption in question.

Moreover, fiscal concessions often constitute a typical and effective economic policy tool intended to incentivize, orient, or stimulate the production sector. Thus, they may well turn out to fall under the scope of Article 41 of the Constitution, in various forms and ways.

The concession under review is, nonetheless, not targeted directly at businesses, but rather aims at facilitating continuity to the benefit of descendants at the time of the passage from one generation to the next.

In light of this, it bears considering that, more generally speaking, the need to guarantee the continuity of businesses has been recognized in the case law of this Court, in particular when it is geared toward guaranteeing the right to work, where the legislator has "sought to achieve an intervention intended to guarantee its continuity and to enable the significant value of the company (comprised of a broad range of assets and contractual relationships) to be preserved in order thereby to avoid also a serious employment crisis" (Judgment No. 270 of 2010). Thus in the name of, among other things, "the constitutionally significant interest of maintaining employment along with the duty incumbent upon public institutions to take all efforts to that effect" (Judgment No. 85 of 2013).

In theory, even the purpose pursued by the concession in question, with regard to the aspect inherent to the continuation of production activities, could correspond to the need to prevent the weight of the taxes at the time of inheritance from creating financial difficulties that endanger the company's survival, resulting in job loss and other repercussions for the fabric of the economy. Analogous forms of relief are, furthermore, provided for in other systems, but rarely include full exemptions, which are, however, provided in connection with far more burdensome inheritance taxes.

In the concrete, however, the exemption in Article 3(4-*ter*) of Legislative Decree No. 346 of 1990 is granted irrespective of any consideration of the size of the business, particular adverse economic circumstances, or factors indicating any difficulty on the part of the successors to pay the tax, and it belongs to a tax system, like the one currently in force in Italy, characterized (inasmuch as the descendants and spouse involved in this case are concerned) by a rate of 4 percent and by substantial allowances.

Despite the fact that at issue here is a property tax (broadly speaking), it does not automatically follow to theorize that the problems of liquidity that come from the duties flowing from the inheritance tax in force may, in most cases, threaten the survival of the business.

In any case, this risk is more realistically referred and more reasonably justified in connection with small and medium-sized enterprises than with large ones. The object of the aforementioned Recommendation of the European Commission was, not by chance, limited to the former.

Therefore, in the concrete it is excessive that even transfers of large companies, their branches, or their company shares, the value of which may reach hundreds of

millions or even several billion euros, should be fully exempt from the tax, even in the event that the beneficiaries are fully capable of meeting the financial burden.

This makes the exemption in question, because of how it is structured, in part misaligned with the purpose, which is worthy of protection in and of itself, of ensuring the survival of companies and, therefore, of preventing the dissipation of the universe of social values that are undoubtedly connected with it, which derive from its capacity, in various forms and ways, to benefit society.

Moreover, by the combined effect of paragraph 1 of Article 58 of the Decree of the President of the Republic No. 917 of 22 December 1986 (Approval of the consolidated law on income taxes), and of Article 8(1-*bis*) of Legislative Decree No. 346 of 1990, unlike what occurs in the case of the sale of a company, transfers by cause of death or free gift does not constitute capital gains on the company itself, and the relative start-up costs are not included in the calculation of the taxable amount for purposes of the inheritance and gift tax. Therefore, the exemption in question, by completely eliminating the fiscal burden, could even constitute a disincentive to sale. While this would, also, encourage continuity in the ownership of the enterprise, it would remain within the same family community, and it cannot be taken for granted that this directly or indirectly ensures a suitable level of management quality (a problem that becomes more serious the larger the size of the business).

Finally, and still with regard to the purposes related to society, it bears noting that the concession in question may also favor a concentration of wealth that is independent of any reasonable approximation of merit or individual capability, thus creating an obstacle for socio-economic mobility and equal opportunity for participation in society.

Thus, these factors lead to the conclusion that the provision at issue, given its current structure, not only does not overlap with an interest falling under Article 41 of the Constitution, but can even lead, if applied to large companies, to outcomes that, as stated above, go beyond the goal, given that the broader a fiscal exemption is, the more stringent the requirements should be that justify receiving it.

However, it should not go overlooked that said exemption also applies to transfers *mortis causa* or by gift, of company shares and stocks in companies not incorporated in Italy (although always limited to shares that allow for acquiring or meeting the requirements for control under Article 2359(1)(1) of the Civil Code). This exemption, therefore, which structurally lacks any possible hypothetical justification as a disincentive to the migration of the legal headquarters of businesses to nations that can maintain tax systems that are far more competitive than the Italian one. This phenomenon is highly detrimental for Italy, given the resulting, significant loss of tax revenue, and is rendered advantageous in part by the absence of any European-level standardization of direct taxation.

It is important, lastly, to recall that, in its Judgment of 17 December 2014, the Federal Constitutional Court of Germany, hearing a question referred by the Federal Fiscal Court, declared incompatible with the principle of equality (and giving the legislator a fixed timeframe in which to take action) a fiscal concession (analogous to the one at issue in this case, but less broad and more rigorous in its reference to the preservation of jobs, and, above all, appearing in a context in which the tax is markedly higher) provided by the German system with regard to taxes on inheritance and gifts in the event of transfer of corporate assets by succession *mortis causa*. The German Court held that the provision was disproportionate insofar as it was not limited to small and

medium-size enterprises and was not connected to any form of verification of the effective needs of the affected businesses.

5.– Having clarified the nature of the concessionary measure introduced by the legislator in the terms above, the proposition that the failure to extend the tax concession in question to spouses is unconstitutional on the grounds put forward by the referring CTR must be rejected.

5.1.– First of all, the alleged infringement of Article 3 of the Constitution, in relation to the principle of equality, is unfounded.

Indeed, when a tax break like the one described here comes under consideration, it triggers a particularly rigorous level of scrutiny (as explained above at point 4.1) as to the existence of an *eadem ratio* that can lead to a determination that the principle of equality has been violated.

Specifically speaking, the purpose of the challenged provision, as described above, is to incentivize the continuation of business activities by heirs within the family of the donor on the occasion of succession *mortis causa*, with respect to which, as also stated above, transfer by gift is something that essentially, even if not necessarily, occurs beforehand.

This rationale does not apply in an identical way to the scenario of transfer to the descendants themselves and to that of a transfer that benefits a spouse.

It is, indeed, true that there is an objective element shared by both scenarios, since transferring a company to a spouse can achieve the objective of the continuity of the enterprise.

Nevertheless, one differing factor derives from the fact that the exemption in question is, even diachronically speaking, continuous with the regulatory provision that only a short time ago introduced family pacts into the Civil Code (Article 768-*bis* of the Civil Code). This new contract form, which provides an explicit exception to the general ban on inheritance pacts under Article 458 of the Civil Code and requires the participation of the spouse and all heirs legally entitled to a part of the estate, allows business owners to transfer the business or the shares exclusively to his or her descendants, and not to their spouse, who, like the other individuals who would be rightful heirs if, at the time, inheritance proceedings for the business owner were to begin, will receive their portion, unless they renounce it, with the payment of a sum that corresponds to the value of the shares to which they are entitled under Articles 536 *et seq.* of the Civil Code.

Thus, the legislator first provided a specific contractual tool intended to facilitate succession in a particular type of asset, to the exclusive advantage of descendants; also, in the exercise of its discretionary power, it limited the fiscal benefit here under scrutiny to the same individuals.

Another differing factor comes from the consideration that the descendants – who are generally younger than the donor's spouse – are, according to the *id quod plerumque accidit* principle, those in the best position to carry forward the operation of production activities for the greatest length of time, or at least for the five-year minimum from the date of transfer required by the legislator.

The legislative decision to limit the concession exclusively to the scenario of intergenerational transfer to benefit descendants does not, therefore, appear to be arbitrary, as it is justified from the perspective of the "longer duration" of the continuity of the economic activity. Thus, transfer to a spouse is not fully comparable to transfers benefitting descendants.

In light of the above considerations, there is not, then, total overlap between the scenarios being compared, such that the legislator could be considered to have fallen into manifest arbitrariness.

Nor is this conclusion prevented by the fact that the exemption was later extended to spouses by Law No. 244 of 24 December 2007, containing "Provisions for the formation of the annual and multi-year State budget (2008 Finance Law)." The non-manifest unreasonableness of limiting the benefit need not preclude, in and of itself, the possibility to later expand its concrete availability. Indeed, it falls within the scope of legislative discretion, obviously within the limits of reasonableness, to evaluate the "measure" of the continuity it aims to guarantee by means of the tax break.

Likewise, the provisions put forward by the referring CTR as "examples" of extension of fiscal concessions in the event of succession, "without distinguishing between the members of the surviving family unit," do not lead to an opposite conclusion.

It is indeed true that Article 25 of Legislative Decree No. 346 of 1990 provides for a reduction of the inheritance and gift tax with regard to: a) farm land included in the inherited assets, where bequeathed to a spouse or to a direct-line relative, or to brothers or sisters of the deceased, as long as said persons are working farmers and that the bequest takes place in the context of a farming family, meaning one that 'is directly and regularly engaged in the cultivation of lands or the raising and farming of livestock […]' (paragraph 3); b) the real property included in the inherited assets used to carry out the business of the enterprise, where bequeathed to the spouse or to relatives of the deceased in a direct line up to the third degree, as long as this occurs 'in the sphere of a family craft business, as defined by Law No. 443 of 8 August 1985, and by Article 230-*bis* of the Civil Code' (paragraph 4); c) if located in mountainous zone municipalities or in fractions thereof that are small in size, to the 'businesses, shares of partnerships of persons or capital goods' transferred to the spouse or a relative of the deceased up to the third degree, on the condition that the beneficiaries carry out the activity of the business for five years (paragraph 4-*bis*).

Nevertheless, it is clear that these regulatory provisions aim to incentivize – albeit, unlike the challenged concession, by means of a reduction, rather than a full exemption from the tax – specific sectors of production (like farming activities carried out by a family of working farmers or family craft businesses), or to encourage entrepreneurial activity where this, taking into account the specific surrounding environment and, thus, the market context in which it is carried out, could generate low, or in any case less, income with respect to other geographical contexts.

In sum, this matter deals with scenarios with regard to which the legislator has, in its discretion, identified the addressees intended to benefit from the tax reduction in consideration of the specific qualities that characterize them.

5.2.– For the reasons laid out above (point 4.3), equally unfounded is the allegation that the provision infringes Article 29 of the Constitution, which the referring Commission argued on the basis of inferences that substantially overlap with those offered in support of the alleged infringement of the principle of equality.

ON THESE GROUNDS

THE CONSTITUTIONAL COURT

declares that the questions as to the constitutionality of Article 3(4-*ter*) of Legislative Decree No. 346 of 31 October 1990 (Approval of the consolidated law containing provisions concerning the inheritance and gift tax), as introduced by Article

1(78)(*a*) of Law No. 296 of 27 December 2006, containing "Provisions for making the annual and multi-year State budget (2007 Finance Law)," raised, in reference to Articles 3(1) and 29 of the Constitution, by the Regional Tax Board of Emilia-Romagna, with the referral order indicated in the Headnote, are unfounded.

Decided in Rome, at the seat of the Constitutional Court, *Palazzo della Consulta*, 6 May 2020.

Signed:

Marta CARTABIA, President

Luca ANTONINI, Author of the Judgment