JUDGMENT NO. 12 YEAR 2020

In this case, the Court considered a referral order raising a question as to the constitutionality of civil procedure provisions providing just compensation for parties to proceedings that fail to conclude within a reasonable time limit, insofar as it applies (according to the interpretation of the Supreme Court of Cassation) only to judicial proceedings, and not to merely administrative proceedings like the administrative forced liquidation proceedings at issue in the underlying matter. The Court held the question to be unfounded, ruling the provision constitutional. First, the Court affirmed that classifying administrative forced liquidation procedures differently from insolvency proceedings was justified by the public interests involved, and rejected the referring court's argument that the two overlapped entirely. Then, it pointed out that remedies were available to parties to unjustifiably prolonged administrative forced liquidation proceedings even if they did not have access to the challenged just compensation provision. This was despite the fact that administrative forced liquidation proceedings have no predefined time limit, given that time limits were established on a case-by-case basis, and in accordance with general principles for administrative actions. Since the referring court had alleged a violation of Article 117(1) of the Constitution on the grounds that the challenged provision conflicted with a judgment of the ECtHR, the Court pointed out, first, that the cited ECtHR judgment failed to fully take stock of the alternative remedies available to parties to administrative forced liquidation proceedings under the Italian system and, second, that its ruling also depended upon the fact that the applicant in the case before it had been waiting for the liquidation of its claim for nearly 25 years. The Court concluded by upholding the constitutionality of the challenged provisions.

[omitted]

THE CONSTITUTIONAL COURT

[omitted]

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Articles 1-*bis*(1) and (2), and Article 2(1) of Law No. 89 of 24 March 2001 (Provision of just compensation in the event of failure to comply with the reasonable time limit for proceedings and modifying Article 375 of the Code of Civil Procedure), initiated by the Court of Appeal of Bologna during proceedings between F.M. and the Ministry of Justice, with a referral order of 6 July 2018, registered as No. 152 of the 2018 Register of Referral Orders and published in the Official Journal of the Republic No. 43, first special series 2018.

Having regard to the entry of appearance filed by the President of the Council of Ministers;

after hearing Judge Rapporteur Mario Rosario Morelli in the public hearing of 4 December 2019;

after deliberation in chambers on 9 January 2020.

[omitted]

Conclusions on points of law

1.– Article 1-*bis* of Law No. 89 of 24 March 2001 (Provision of just compensation in the event of failure to comply with the reasonable time limit for proceedings and modifying Article 375 of the Code of Civil Procedure) provides, in paragraph 1, that, "[a] party to a trial has the right to seek preventive measures against violations of the Convention for the Protection of Human Rights and Fundamental Freedoms, ratified under Law No. 848 of 4 August 1955, due to failure to comply with the reasonable time limit under Article 6(1) of the Convention." And paragraph 2, which follows, states that, "a party which, despite having sought the preventive measures under Article 1-*ter*, has suffered material or non-material damage resulting from the unreasonable duration of the trial shall be entitled to just compensation."

Article 2, in turn, in its first paragraph, punishes the failure to seek preventive measures to avoid the unreasonable duration of the "trial" by barring the request as inadmissible.

Among other things, Article 2(2-*bis*) then specifies, in its third sentence, that "[t]he reasonable time limit shall be held to be complied with […] if the insolvency proceedings conclude within six years."

2.– In its interpretations of these provisions, the Supreme Court of Cassation has laid down the principle that the right to just compensation under Law No. 89 of 2001 only applies to the excessive duration of "proceedings" (entailing the exercise of judicial activity) and, therefore, does not include unreasonable prolongation of merely administrative proceedings (see, among many, Supreme Court of Cassation, Joint Civil Divisions, Judgment No. 4429 of 25 February 2014, and First Civil Division, Judgments Nos. 13088 of 28 May 2010, 23754 of 16 November 2007, and 483 of 15 January 2004).

In line with this principle, the Supreme Court of Cassation has thus held, in particular, that the right to damages in question does not apply to administrative liquidations, which are administrative proceedings to which judicial phases are only potentially tacked on, such as the declaration of a state of insolvency, any related appeals, and challenges to claim rejections (Supreme Court of Cassation, First Civil Division, Judgments Nos. 12729 of 10 June 2011, 28105 of 30 December 2009, and 17048 of 3 August 2007).

3.– Called to adjudicate upon a question of just compensation caused by the excessive duration of an administrative liquidation procedure, the Court of Appeal of Bologna, a single judge presiding, with the Referral Order referred to in the facts section, has raised questions as to the constitutionality of Articles 1-*bis*(1) and (2), and 2(1) of Law No. 89 of 2001, insofar as it prohibits, in keeping with the aforementioned interpretation, which is consolidated as "living law," the application of the right to just compensation under the law above to scenarios in which the excessive duration complained of pertains to an administrative liquidation. These constitutional infringements are alleged "in relation to Articles 3, 24, and 117(1) of the Constitution."

According to the referring court, the challenged provision, interpreted as described, infringes, on the one hand, upon Articles 3 and 24 of the Constitution, for the reason that, "for an identical advantageous legal position (being the creditor to an insolvency or forced administrative liquidation [*liquidazione coatta amministrativa*, LCA]), Law No. 89 of 2001 only attributes to the first (and not to the second) the possibility to obtain protection (due to the delay in concluding the insolvency proceedings) under the forms provided for by the same law."

And, at the same time, the referring court alleges that it infringes upon Article 117(1) of the Constitution – in relation to Article 13 (which does not appear in the Headnote, but is mentioned in the reasoning) of the European Convention on Human Rights (ECHR), signed at Rome on 4 November 1950, ratified and executed with Law No. 848 of 4 August 1955 – on grounds that the aforementioned living law has come into conflict with the European Court of Human Rights (ECtHR) judgment of 11 January 2018, *Cipolletta v. Italy*, which allegedly equated administrative liquidation proceedings to insolvency proceedings, in the context of granting the same right (of creditors) to just compensation for the excessive duration of proceedings.

[omitted]

5.– On the merits, the question as to constitutionality is, considering all the proffered grounds, unfounded.

5.1.– Administrative liquidation is, as we know, and like insolvency, a "receptacle" of procedures, providing a context in which judicial aspects are inserted – by dint of potentially late-filed contestations, challenges, or claims filed late – only after registering the statement of financial affairs, which concludes the initial and key phase of the liquidation official's verification of creditor claims. This key phase, on the contrary, entails proceedings of an administrative character.

What makes administrative forced liquidation unlike insolvency – as this Court has stressed for many years – is justified by the public purpose of the proceedings (Judgments Nos. 363 of 1994, 159 of 1975, and 87 of 1969), since they concern companies which, while operating in the sphere of private law, nevertheless involve multiple interests, either because they have to do with particular sectors of the national economy, in relation to which the State assumes the task of defending public

trust, or because they are in a complementary relationship with the public administration from a teleological and organizational point of view. In particular, initiating administrative forced liquidation proceedings depends on the nature of the debtor entity (banks, insurance companies, cooperatives, entities under supervision, and the like).
The reason for removing such companies from the strictly judicial function lies, therefore, in the fact that administrative forced liquidation involves preeminent public interests (with respect to exclusively executive ones), with ties to economic, industrial, or social policy purposes.
This means that, between the two types of proceedings being compared, there is not the complete "overlap" in the positions of the respective creditors, that the referring court presupposes to exist and argues is a reason for the alleged disparity of treatment between the two when it comes to just compensation *ex lege* No. 89 of 2001.
Indeed, the protection of creditors of companies subject to administrative forced liquidation proceedings differ in two ways from the protection of other creditors in insolvency proceedings, insofar as the public interests that justify the administrative procedure, first, mitigate the importance of individual rights to credit to some degree and, second and on the contrary, bolster the prospect that credits will ultimately be satisfied, as an effect of the simultaneous objective of keeping the productive network of the debtor company operating, a goal the administrative proceedings can pursue.
5.2.– It is also relevant that the fact that just compensation does not apply to forced liquidation (insofar as it is) administrative, as the challenged provisions establish, does not mean that creditors are entirely without compensatory remedies in the event that proceedings are, without justification, excessively long.
Outside the bounds of a "trial" – on which Article 6(1) ECHR has a direct impact, and to which the rules on just compensation *ex lege* No. 89 of 2001 properly and exclusively apply – the field of administrative proceedings is not excluded from principles and rules that place sanctions on the administrative authorities and structures, in the event they unjustifiably delay the pursuit of the interests they are charged with overseeing.
Indeed, Law No. 241 of 7 August 1990 (New provisions on administrative proceedings and the right to access administrative documents) provides, in Article 2-*bis*(1), that the public administrative bodies must provide compensation for unjust damages sustained as a result of the failure to observe the time limits for concluding proceedings.
And, despite the fact that administrative forced liquidation proceedings do not have a predefined time limit for their conclusion, this does not mean that no such time limit may, in concrete cases, and in relation to the unique features and complexity of individual liquidation matters, be established in light of the general principles that govern administrative actions. These principles – the rule of proportionality, the prohibition of added burdens, the duty to conclude proceedings and to protect the expectations that the parties involved attach to them – which must also be read in keeping with the criteria established by the case law of the ECtHR.
5.3.– Therefore, the alleged violation of Articles 3 and 24 of the Constitution does not exist.
6.– The above analysis also excludes any violation of Article 117(1) of the Constitution, which the referring court alleges on the grounds that the provisions in question conflict with the aforementioned ECtHR judgment of 11 January 2018.
That judgment – which, as the dissenting judge thereto has observed, was a departure from the well-established case law of the ECtHR concerning non-adversarial administrative procedure – recognized the appellant's right to receive compensation (of 24,000 euros) as damages for "moral injury" suffered. The reasoning rested, first, on the premise of principle that the fact that administrative forced liquidation proceedings were, as an internal matter, classified differently from insolvency proceedings did not justify applying the internal compensatory remedy in line with Article 6(1) ECHR to only the latter type, and not to the former.

And, second, the reasoning relied on the fact that the proceedings from which the applicant awaited an answer to the credit claim had already been pending "altogether nearly 25 years," and the Government had put forward "no fact or convincing argument that could justify such a delay."

The judgment, therefore, for one thing, fails to fully take stock, among its premises, of the compensatory remedies put in place by the Italian legal system which also apply to the proceedings at issue in it. And, for another, its ruling responds to the purpose of protecting the interests of the applicant, which it held to have been infringed due to the particular elements of the concrete case. This protection is "fragmented," and is, by nature, complementary to the "systemic" protection put in place at the national level (Judgments Nos. 67 of 2017 and 264 of 2012).

This leads to a conclusion that the question as to constitutionality raised by the referring courts is unfounded, including in relation to these last-considered constitutional provisions.

ON THESE GROUNDS

THE CONSTITUTIONAL COURT

declares that the questions as to the constitutionality of Articles 1-*bis*(1) and (2) and 2(1) of Law No. 89 of 24 March 2001 (Provision of just compensation in the event of failure to comply with the reasonable time limit for proceedings and modifying Article 375 of the Code of Civil Procedure), raised in reference to Articles 3, 24, and 117(1) of the Constitution by the Court of Appeal of Bologna, a single judge presiding, with the Referral Order indicated in the headnote, are unfounded.

Decided in Rome, at the seat of the Constitutional Court, *Palazzo della Consulta*, on 9 January 2020.

Signed:

Aldo CAROSI, President

Mario Rosario MORELLI, Author of the Judgment