JUDGMENT NO. 131 YEAR 2020

In this case, the Court heard an application from the President of the Council of Ministers questioning the constitutionality of Umbria Regional Law No. 2 of 11 April 2019, Article 5(1)(b) of which, in connection with community cooperatives, sought to regulate the methods of implementation of the co-planning, co-design and accreditation provided for by Article 55 of the Third Sector Code. The Government alleged that the regional law encroached upon the exclusive legislative powers of the State under Article 117(2)(l) of the Constitution insofar as it broadened the range of third-sector bodies, exhaustively defined by national law, entitled to actively participate in the national planning of measures of social utility. The Court settled the question by way of interpretation, ruling that the participation envisioned by Article 55 of the Third Sector Code, referred to by the regional law, applied not to all community cooperatives but solely to those that also fulfilled the requirements to be classified as third-sector bodies.

[omitted]

THE CONSTITUTIONAL COURT

[omitted]

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Article 5(1)(b) of Umbria Regional Law No. 2 of 11 April 2019 (Rules on community cooperatives), initiated by the President of the Council of Ministers with an application served on 17-20 June 2019, filed with the Court Registry on 19 June 2019, registered as No. 70 in the Register of Applications 2019 and published in the Official Journal of the Republic No. 32, first special series, 2019.

Having regard to the entry of appearance filed by the Umbria Region;

after hearing Judge Rapporteur Luca Antonini in accordance with Articles 1(a) and (c) of the Decree issued by the President of the Court on 20 April 2020, remotely, without oral argument, on 20 May 2020;

after deliberation in chambers on 20 May 2020.

[omitted]

Conclusions on points of law

1.- By means of the above-mentioned application, the President of the Council of Ministers, represented and defended by the State Counsel's Office, has raised – with reference to Article 117(2)(l) of the Constitution – a question concerning the constitutionality of Article 5(1)(b) of Umbria Regional Law No. 2 of 11 April 2019 (Rules on community cooperatives).

The regional law under examination considers community cooperatives as cooperatives that "also in order to combat depopulation, economic decline and urban social degradation, pursue the general interest of the community in which they operate, promoting the participation of citizens in the management of collective goods or services, as well as in the enhancement, management or collective acquisition of goods or services of general interest" (Article 2).

Further to the above-mentioned regional law, in order to obtain recognition as a community cooperative, a cooperative society must establish its headquarters and operate in one or more of the Region's municipalities, as well as make provision in its by-laws or regulations whereby persons belonging to the relevant community can be involved in the cooperative, can attend members' general meetings and may be

appointed to the board of directors. In fact, such cooperatives “have as their purpose the creation of advantages in favour of a defined territorial community to which the founders belong or elect as their own within the framework of initiatives supporting economic development, cohesion and social solidarity aimed at strengthening the integrated production system and enhancing the resources and vocations of the territory and local communities as well as encouraging the creation of employment opportunities” (Article 1).

Provision is also made for the setting up by the Regional Executive of a regional register of community cooperatives (Article 3) as well as measures aimed at supporting the development process of the cooperatives in question, consisting of subsidised loans, capital grants and incentives for the creation of new jobs (Article 4).

Article 5, headed “Tools and methods of liaison”, provides in paragraph 1 thereof that *inter alia*, the Region, “recognising the high social value and public purpose of cooperation in general and community cooperatives in particular [...] *b*) shall regulate the methods of implementation of the co-planning, co-design and accreditation provided for by Article 55 of Legislative Decree No. 117 of 3 July 2017 (Third Sector Code, pursuant to Article 1(2)(b) of Law No. 106 of 6 June 2016) and the forms of involvement of community cooperatives and shall adopt specific model agreements governing relations between community cooperatives and public authorities operating in the regional context”.

1.1.- The applicant maintains that the challenged Article 5(1)(b) conflicts with the national legislation cited by it on the basis that the former provides for the involvement also of community cooperatives in planning, design and accreditation activities, whereas Article 55 of Legislative Decree No. 117 of 3 July 2017, setting out the “Third Sector Code, pursuant to Article 1(2)(b) of Law No. 106 of 6 June 2016” (hereinafter, CTS), limits any such involvement to third-sector bodies [*enti del Terzo settore*] (ETS) as identified by Article 4 of the decree itself, which bodies do not include community cooperatives. The applicant claims that the provision allowing for the involvement of community cooperatives would imply, “in substance, their equivalence to third-sector bodies which, on the contrary, as listed exhaustively, are the only entities entitled on foot of relevant national legislation to actively participate in the national planning of measures of social utility”.

The applicant maintains that in so doing, the regional law broadens the range of third-sector bodies, identified and regulated by national law and private law, thus encroaching upon matters of civil law, a field that falls within the exclusive competence of the State pursuant to Article 117(2)(l) of the Constitution.

1.2.- Contesting the allegation [of unconstitutionality], the respondent argues that the definition of a community cooperative laid down by the regional legislator makes clear the social nature of the aims pursued by that type of company, which is regulated by many Regions but not by the State.

In support of its contention that the application is unfounded, the respondent refers to the list of ETS contained in Article 4 CTS and, in particular, “social enterprises, including social cooperatives”. It maintains that, in actual fact and in any case, community cooperatives fall within the definition of social enterprise set forth in Article 1 of Legislative Decree No. 112 of 3 July 2017, on “Revision of the law on social enterprise, pursuant to Article 1(2)(c) of Law No. 106 of 6 June 2016”, since that status is afforded to all private bodies, including those established as companies, which, in accordance with the provisions of the aforementioned Decree, “conduct, on a stable

and principal basis, a non-profit business activity of general interest for civic, solidarity and social utility purposes, adopting responsible and transparent management methods and encouraging the widest possible involvement of workers, users and other stakeholders in their activities".

2.- The question is unfounded for the reasons explained hereunder.

2.1.- Of central importance in the State's application is the content of Article 55 CTS, which the challenged regional provision seeks to apply to an entity, i.e. a community cooperative, that does not qualify as an ETS.

It is therefore worth dwelling on this national legislative provision.

The latter, in paragraph 1, states that public administrative authorities, in the exercise of their powers of planning and organising at local level measures and services in sectors of activity of ETS, shall ensure their active involvement "through forms of co-planning and co-design and accreditation, implemented in compliance with the principles of Law No. 241 of 7 August 1990, as well as the rules governing specific proceedings and in particular those relating to the area's social planning".

In the paragraphs that follow, the above provision specifies that:

"2. Co-planning is aimed at the identification, by the proceeding public authorities, of the needs to be met, the measures necessary for this purpose, the authority for their implementation and the resources available.

3. Co-design is aimed at devising and possibly implementing specific projects for services or measures aimed at satisfying defined needs, in the light of the planning tools referred to in paragraph 2.

4. For the purposes referred to in paragraph 3, the identification of the third-sector bodies with which to pursue the partnership also takes place through forms of accreditation, in compliance with the principles of transparency, impartiality, participation and equal treatment, subject to the setting, by the proceeding public authority, of the general and specific objectives of the measure, its duration and essential characteristics, as well as the criteria and methods for the identification of the partner bodies".

The aforementioned Article 55, which opens Title VII of the CTS, regulating relations between ETS and public administrative authorities, is therefore one of the most significant instances of giving effect to the principle of horizontal subsidiarity enshrined in Article 118(4) of the Constitution.

Indeed, the wording of that latter constitutional provision expressly sets out, in the Constitution, the systemic implications deriving from the recognition of the "deep sociality" that characterises the human being (Judgment No. 228 of 2004) and its possibility to accomplish "positive and responsible action" (Judgment No. 75 of 1992): dating back in time, moreover, relationships of solidarity have been at the root of a dense network of free and independent mutuality that, linked to the various cultural approaches of our tradition, has deeply affected the social, cultural and economic development of our country. Even before the public welfare systems came to light, the creativity of individuals was expressed in a multiplicity of forms of association (mutual aid societies, charitable works, mounts of piety, etc.) which were able to provide assistance, solidarity and education to those who, in the most difficult moments of our history, remained excluded.

In the above-mentioned constitutional provision, endorsing the original sociality of mankind (Judgment No. 75 of 1992), it was therefore decided to go beyond the idea that only public-sector action is intrinsically suitable for undertaking activities of

general interest, and it was recognised that such activities can, on the other hand, also be pursued by an “independent initiative of citizens” which, in line with those expressions of solidary society, is still strongly rooted in the community fabric of our country.

Thus, an area of organisation of “social freedoms” (Judgments Nos. 185 of 2018 and 300 of 2003) has been identified which is not attributable either to the State or to the market, but to those “forms of solidarity” which, as expressions of a relationship of reciprocity, must be included “among the founding values of the legal system, recognised, together with the inviolable rights of man, as the basis of the social coexistence normatively prefigured by the Constituent Assembly” (Judgment No. 309 of 2013).

In expressly implementing, in particular, the principle set out in the last paragraph of Article 118 of the Constitution, Article 55 CTS achieves for the first time in general terms a real proceduralisation of subsidiary action – through structuring and extending a perspective that had already been foreshadowed, but limited to innovative and experimental intervention in the social sphere – initially in Article 1(4) of Law No. 328 of 8 November 2000 (Framework law for the implementation of the integrated system of social intervention and services) and later in Article 7 of the Decree of the President of the Council of Ministers of 30 March 2001 (Guidance and coordination in relation to systems for entrusting the operation of personal services pursuant to Article 5 of Law No. 328 of 8 November 2000).

Article 55 CTS, in fact, tasks public bodies with ensuring, “in compliance with the principles of Law No. 241 of 7 August 1990 as well as the rules governing specific procedures and in particular those relating to area social planning”, the active involvement of ETS in the planning, design and organisation of measures and services, in the sectors of activities of general interest defined by Article 5 CTS.

This is because ETS are identified by the CTS as a limited set of legal persons with specific characteristics (Article 4), aimed at “pursuing the common good” (Article 1) and undertaking “activities of general interest” (Article 5) on an individual non-profit basis (Article 8), subject to a public registration system (Article 11) and to strict controls (Articles 90 to 97).

These elements are therefore treated as the keystone of a new collaborative relationship with public bodies: according to the specific provisions of the legislation governing the sector and in line with the provisions of the CTS itself, and in order to make administrative action more effective in the sectors of activities of general interest defined by the CTS, ETS are recognised as possessing a specific aptitude to participate together with public bodies in the attainment of the general interest.

As ETS are representative of the “solidarity society”, they moreover often constitute a widespread local network of proximity and solidarity, sensitive in real time to the needs that stem from the social fabric. Thus, they are able to provide the public body with both valuable information (otherwise achievable in a longer timeframe and with organisational costs at its own expense) and an important organisational and intervention capacity. That often produces positive effects, both in terms of saving resources and increasing the quality of services provided in favour of the “society of need”.

In these terms, an avenue of shared management that is an alternative to profit and the market is established between the public bodies and the ETS by virtue of Article 55: “co-planning”, “co-design” and “partnership” (which can also lead to forms of “accreditation”) are configured as phases of a complex process, expression of a different

relationship between the public sector and the private social sector, which is not simply based on a synallagmatic relationship.

The model devised by Article 55 CTS, in fact, is not based on the payment of prices and fees by the public sector to the private sector but on a convergence of objectives and the combining of public and private resources for planning and designing, in common, services and measures aimed at raising the levels of active citizenship, cohesion and social protection, in accordance with a relationship that goes beyond mere utilitarian exchange.

Moreover, also on foot of the recent Directives 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts, and on the basis of relevant case law of the Court of Justice of the European Union [hereafter, CJEU] (in particular CJEU, Fifth Chamber, judgment of 28 January 2016, in Case C-50/14, *CASTA and others*, and CJEU, Fifth Chamber, judgment of 11 December 2014, in Case C-113/13, *Azienda sanitaria locale n. 5 "Spezzino" and others*, which tend to blunt the conflictual dichotomy between the values of competition and those of solidarity), European Union law maintains the possibility for Member States to develop, in relation to activities with a strong social dimension, an organisational model informed not by the principle of competition but by that of solidarity (provided that non-profit organisations contribute, under conditions of equal treatment, in an effective and transparent manner to the pursuit of social objectives).

2.2.- The specific model of sharing the public function envisaged by Article 55 is, however, exclusively reserved to bodies that fall within the definition set out in Article 4 CTS, further to which the third sector consists of bodies that take specific typified organisational forms (voluntary organisations, social promotion associations, philanthropic bodies, mutual aid societies, association networks, social enterprises and social cooperatives) and other "atypical" bodies (incorporated or unincorporated associations, foundations and bodies governed by private law other than companies) that pursue, "on a non-profit basis, [...] civic, solidarity and social utility purposes through the performance, exclusively or principally, of one or more activities of general interest in the form of voluntary action or the free provision of money, goods or services, or mutuality or the production or exchange of goods or services", and which are "registered in the single national third sector register".

Bodies that do not fall within that legal definition cannot enjoy the same forms of involvement envisaged for ETS by Article 55 CTS: there is a close connection between the ETS qualification requirements and the contents of the regulations governing their involvement in the public function.

In fact, the original and innovative (in its current breadth) form of collaboration that is established through the instruments outlined by Article 55 CTS requires, from the private bodies that can participate therein, a strict guarantee of the shared interests to be pursued and hence their effective "third-party nature" (verified and assured through specific legal requirements and related controls) with respect to the market and the profit-making purposes that characterise it.

2.3.- Therefore, subject to what will be explained below, the applicant's complaint that there has been an infringement of State competence in civil law matters is pertinent. In effect, should the challenged provision seek to involve also all forms of community cooperatives in the activities covered by Article 55 CTS, that would mean – as the

applicant points out – that those cooperatives would be unduly equated with ETS, "which, on the other hand, as listed exhaustively, are the only entities entitled, according to the relevant national legislation, to participate actively in the State's planning of measures of social utility".

In its Judgment No. 185 of 2018 this Court, in fact, specified that the State's competence in matters of "civil law" typically encompasses not only the specific conformation and organisation of the ETS, but also the definition of the "essential rules of correlation with public authorities".

Therefore, if, on the one hand, the regional legislator is empowered, within the scope of the activities falling within its own competence, to flesh out in more detail the implementation of the provisions of Article 55 CTS having regard to local factors, on the other hand, it cannot alter the essential rules of the forms of active involvement in the relations between ETS and public entities.

2.3. 1.- However, it should be noted that Umbria Regional Law No. 2 of 2019 does not, in any of its provisions, expressly classify community cooperatives as ETS.

According to Article 1 of the challenged regional law, the Region's recognition and promotion of the role and function of community cooperatives is carried out "in compliance with Articles 45, 117 and 118(4) of the Constitution and national legislation", of which the CTS and Legislative Decree No. 112 of 2017 on social enterprise are necessarily pertinent here.

Rather, when referring in general terms to cooperative societies, Article 2 of the regional law leaves it up to the founders to choose which subtype to adopt within the common cooperative society form: in essence, whether to set up a social cooperative within the meaning of Law No. 381 of 8 November 1991 (Rules on social cooperatives), a cooperative for mainly mutuality purposes, within the meaning of Articles 2512 to 2514 of the Civil Code, or a cooperative whose by-laws do not include the non-profit clauses referred to in Article 2514 of the Civil Code.

It follows that community cooperatives, precisely by virtue of national legislation, can: a) be formed as social cooperatives and, pursuant to Article 1(4) of Legislative Decree No. 112 of 2017, "acquire by right the status of social enterprises"; or b) be classified as social enterprises insofar as they comply with the constitutive requirements provided for by Legislative Decree No. 112 of 2017 – among which, above all, the absence of profit-making purposes – and are enrolled in the relevant section of the register of enterprises, thereby demonstrating that they comply with the rules governing social enterprises because for that type of ETS, fulfilment of the aforementioned formality "meets the requirement of enrolment in the single national third sector register" (Article 11(3) CTS).

In both cases, the challenged Article 5(1)(b) of Umbria Regional Law No. 2 of 2019 does not entail any alteration to the provisions of Article 55 CTS: community cooperatives will in fact be classified as social enterprises and therefore as ETS.

If, by contrast, community cooperatives are otherwise formed (because the by-laws do not include the non-profit clause as per Article 2514 of the Civil Code) or classified (because cooperatives do not maintain that they have acquired the status of social enterprise), the forms of active involvement governed by Article 55 of the CTS do not apply to them, contrary to what the applicant argues, that the obvious social aims pursued by community cooperatives would always mean that they fall within the scope of social enterprises.

However, the challenged provision can be interpreted in a way that does not

contradict this conclusion, since – in addition to providing for the adoption of "specific model agreements governing relations between community cooperatives and public administrative authorities operating in the regional context" – it entrusts the Region with a twofold task: that of regulating "the methods of implementation of the co-planning, co-design and accreditation provided for by Article 55 [CTS] and the forms of involvement of community cooperatives".

The use of the conjunction "and" in the last part of the above-mentioned sentence confirms an interpretation whereby the regulation of the methods of implementation of the matters set out in Article 55 CTS is kept separate from that of the forms of involvement that community cooperatives, as such (i.e. when they do not qualify as ETS), may have with public entities: since the conceptual scope of the two systems can be traced back to different sources, they are not assimilated in terms of legal regime.

In conclusion, this interpretation enables one to rule out the infringement alleged by the applicant, because the challenged provision does not imply any equivalence between an entity falling outside the third sector and those who fall within it. In fact, that provision makes it possible to regulate: a) the ways in which Article 55 CTS is implemented, with regard to the ETS, as defined by national legislation (and hence also community cooperatives which, according to the above-mentioned legislation, are such); b) the forms of involvement of community cooperatives, which are classified "only" as such (and not also as ETS) and which cannot be involved with the same tools and methods reserved by the national law to ETS under the said Article 55 CTS.

In line with the considerations made so far, it goes without saying that the model agreements, referred to in the challenged provision and to be adopted by the Region, are necessarily different, in terms of prerequisites and contents, from the forms of involvement typically regulated for ETS. This is because if they concern community cooperatives that cannot be classified as ETS, the contractual relationship with the public body is on a different basis from that entered into by the former.

ON THESE GROUNDS

THE CONSTITUTIONAL COURT

declares unfounded, on the grounds set out in the reasoning, the question of unconstitutionality of Article 5(1)(b) of Umbria Regional Law No. 2 of 11 April 2019 (Rules on community cooperatives), raised by the President of the Council of Ministers, with reference to Article 117(2)(l) of the Constitution, with the application indicated in the headnote.

Decided in Rome, at the seat of the Constitutional Court, *Palazzo della Consulta*, on 20 May 2020.

Signed by: Marta CARTABIA, President
Luca ANTONINI, Author of the Judgment