Corte costituzionale

ORDER NO. 103 OF 2008

Franco BILE, President

Franco GALLO, Author of the Judgment

ORDER No. 103 YEAR 2008

In this case the Court considered a direct application by the Office of the Prime Minister challenging a Sardinia region law introducing a regional tax on tourist stopovers by aircraft and recreational craft, applicable to natural and legal persons resident outwith the region. The region justified the tax on the grounds that (i) undertakings liable to pay the tax benefited from local services although they did not otherwise contribute to them through local taxation, and (ii) undertakings resident for tax purposes in the region were geographically and economically disadvantages compared to non-island undertakings. The Office of the Prime Minister considered that the tax raised a question of Community law, since the ECJ had already struck down similar provisions to those establishing the stopover tax where found to render the cross-border provision of services more onerous, but it had never considered a case in which the provisions concerned discriminated against undertakings from other regions of a Member State, as well as those from other Member States. It was also argued that the ECJ should be asked whether the exemption from the tax amounted to a state aid unlawful under Community law. The Court accepted the submissions of the Prime Minister's Office, holding that the prerequisites for making a preliminary reference to the ECJ had been satisfied, and that the Court has standing to make a preliminary reference in cases in which it is seized directly.

THE CONSTITUTIONAL COURT

Composed of: President: FRANCO BILE; Judges: GIOVANNI MARIA FLICK, FRANCESCO AMIRANTE, UGO DE SIERVO, ALFIO FINOCCHIARO, ALFONSO QUARANTA, FRANCO GALLO, LUIGI MAZZELLA, GAETANO SILVESTRI, SABINO CASSESE, MARIA RITA SAULLE, GIUSEPPE TESAURO, PAOLO MARIA NAPOLITANO,

makes the following

ORDER

in proceedings concerning the constitutionality of Article 4 of Sardinia Region law No. 4 of 11 May 2006 (Miscellaneous provisions governing matters concerning revenue, reclassification of expenditure and social and development policies), as amended by Article 3(3) of Sardinia Region law No. 2 of 29 May 2007 (Provisions governing the formation of the annual and long-term budget of the Region – Finance Law 2007), commenced pursuant to an appeal by the President of the Council of Ministers of 2

August 2007, deposited in the court registry on 7 August and registered as No. 36 in the register of appeals for 2007.

Whereas Sardinia Region has entered an appearance;

Having heard in the public hearing of 12 February 2008 the *judge rapporteur* Franco Gallo;

Having heard the *Avvocato dello Stato* Glauco Nori for the President of the Council of Ministers and Graziano Campus and Paolo Carrozza, Barristers, for Sardinia Region.

Whereas:

[1] in appeals No. 91 of 2006 and No. 36 of 2007, the President of the Council of Ministers raised against Sardinia Region questions concerning the constitutionality: a) of Articles 2, 3 and 4 of the Sardinia Region law No. 4 of 11 May 2006 (Miscellaneous provisions governing matters concerning revenue, reclassification of expenditure and social and development policies), both in its original form and as amended, respectively, by Article 3(1), (2) and (3) of regional law No. 2 of 29 May 2007 (Provisions governing the formation of the annual and long-term budget of the Region – Finance Law 2007); b) of Article 5 of the aforementioned regional law No. 2 of 2007;

[2] both of the Articles in question provide for and regulate a particular regional tax;

[3] the proceedings which commenced with the aforementioned appeals have been joined in order to be dealt with and decided on together;

[4] insofar as is relevant in the present proceedings, appeal No. 36 of 2007 challenged Article 4 of regional law No. 4 of 2006, as amended by Article 3(3) of regional law No. 2 of 2007, creating a regional tax on tourist stopovers by aircraft and recreational craft;

[5] this challenge, in relation to undertakings, was raised with reference to various constitutional principles, including in particular Article 117(1) of the Constitution, due a breach of the provisions of the EC Treaty concerning the protection of the free provision of services (Article 49), the protection of competition (Article 81 "in combination with Articles 3(g) and 10"), and the prohibition on state aid (Article 87);

[6] the appellant requests that a preliminary reference be made under the terms of Article 234 of the EC Treaty concerning the above points;

[7] in judgment No. 102 of 2008, registered today for the two joined cases, this court ruled on the questions of constitutional legitimacy submitted to it in appeal No. 91 of 2006 and on certain aspects of those submitted in appeal No. 36 of 2007;

[8] in particular, with regard to the regional tax on tourist stopovers by aircraft and recreational craft contested in the latter appeal, the above judgment declared the questions of constitutional legitimacy raised in relation to constitutional principles other than those contained in Article 117(1) of the Constitution to be inadmissible or groundless;

[9] the same judgment also ordered the separation of proceedings concerning the question of the constitutionality of the aforementioned regional tax on tourist stopovers commenced with reference to Article 117(1) of the Constitution and concerning the subjection to taxation of undertakings operating aircraft or recreational craft.

Whereas:

[1] within the ambit of the constitutionality proceedings commenced by the President of the Council of Ministers in appeal No. 36 of 2007, as separated by the above judgment of this court deposited today, the appellant avers that certain interpretative doubts arise in relation to Community legislation as a supplementary element of the principle contained in Article 117(1) of the Constitution;

[2] at this juncture, it is appropriate to sketch out in preliminary form the legislative framework in order to facilitate a greater understanding of the aforementioned interpretative problems;

[3] as regards national legislation:

– 1) Article 11 of the Constitution provides that:

"Italy […] may agree to limitations of sovereignty insofar as necessary to allow for a legal system of peace and justice among nations, provided the principle of reciprocity is guaranteed; it shall promote and encourage international organisations which further such ends.";

– 2) Article 117(1) of the Constitution, invoked as a constitutional principle, provides that:

"Legislative power is vested in the state and in the regions in accordance with the Constitution and subject to the limits imposed by the Community legal order and by international law obligations.";

– 3) Article 8 of constitutional law No. 3 of 26 February 1948 (Special Statute of the Sardinia Region), as amended by Article 1(834) of law No. 296 of 27 December 2006, provides that:

"Regional revenues are comprised:

a) of seven tenths of the proceeds of income tax on natural persons and on the income of legal persons collected in the region;

b) of nine tenths of the proceeds of the stamp duty, taxes on the registration of documents, mortgage taxes, taxes on the consumption of electrical energy and taxes on government concessions collected in the region;

c) of five tenths of the taxes on estates and gifts collected in the region;

d) of nine tenths of the taxes on the manufacture of all products subject to such tax collected in the region;

e) of nine tenths of the amount levied of the fiscal consumer tax on monopoly tobacco products consumed in the region;

f) of nine tenths of the proceeds of value added tax generated in the region, as determined on the basis of the regional consumption of families calculated annually by the central statistics institute [*ISTAT*];

g) of the licence fees on hydroelectric concessions;

h) of levies and taxes on tourism and other taxes which the region may raise by law in accordance with the principles of the state system of taxation;

i) of income deriving from its own property and land;

l) of extraordinary state contributions for particular public works plans and for land requalification;

m) of seven tenths of all fiscal revenues, both direct and indirect, irrespective of their denomination, with the exception of those due to other public authorities.

The revenues due to the region also includes those which, notwithstanding their status as regional tax revenues, accrue in accordance with legislative provisions or for financial requirements to tax offices located outside the region.";

– 4) the contested Article 4 of regional law No. 4 of 2006, as amended by Article 3(3) of regional law No. 2 of 2007, provides that:

"(Regional tax on tourist stopovers by aircraft and recreational craft)

1. Starting from the year 2006, a regional tax on the tourist stopovers by aircraft and recreational craft shall be established.

2. The tax shall apply to:

a) landings in aerodromes within the region of general aviation aircraft for the purposes of Article 743 *et seq* of the Navigation Code intended for the private carriage of persons during the period between 1 June and 30 September;

b) dockings in ports, landing places and mooring points situated within the region and in the equipped mooring fields located in the territorial waters along the coasts of Sardinia of the recreational craft mentioned in legislative decree No. 171 of 18 July 2005 (Maritime Recreational Code) or in any case of craft used for recreational purposes which are longer than 14 metres, measures according to the harmonised EN/ISO/DIS standard No. 8666 pursuant to Article 3(b) of the above legislative decree, for the period falling between 1 June and 30 September.

3. The tax shall apply to natural or legal persons resident for tax purposes outside the region and which operate aircraft in accordance with Articles 874 *et seq* of the Navigation Code, or which operate recreational craft in accordance with Articles 265 *et seq* of the Navigation Code.

4. The regional tax mentioned in sub-section (2)(a) shall be due for every stopover, whilst that mentioned in sub-section (2)(b) shall be due annually.

5. The tax is calculated as follows:

a) euro 150 for aircraft certified for the carriage of up to four passengers;

b) euro 400 for aircraft certified for the carriage of between five and twelve passengers;

c) euro 1.000 for aircraft certified for the carriage of more than twelve passengers;

d) euro 1.000 for boats longer than 14 but shorter than 15.99 metres;

e) euro 2.000 for boats longer than 16 but shorter than 19.99 metres;

f) euro 3.000 for boats longer than 20 but shorter than 23.99 metres;

g) euro 5.000 for ships longer than 24 but shorter than 29.99 metres;

h) euro 10.000 for ships longer than 30 but shorter than 60 metres;

i) euro 15.000 for ships longer than 60 metres.

For sailing craft with an auxiliary motor and for motorsailers the tax shall be reduced by 50 percent.

6. The tax shall not apply to:

a) boats which dock in order to participate in sporting regattas, gatherings of vintage boats, monotype boats and sailing events, including amateur events, the occurrence of which has been communicated in advance by the organisers to the Marine Authority; the Sardinia Autonomous Region Tax Office [*Agenzia della Regione Autonoma della Sardegna per le Entrate*] must be informed of such communication before the landing occurs;

b) recreational craft which remain for the whole year in regional port facilities;

c) technical stopovers, limited to the time necessary to carry out the same.

The Sardinia Autonomous Region Tax Office shall adopt an express regulation, indicating the procedures for certification of the grounds for exemption.

7. The tax shall be paid:

a) on landing for the aircraft mentioned in sub-section (2)(a);

b) within 24 hours of arrival of the recreational craft in the ports, landing places, mooring points and fields situated along the coasts of Sardinia;

in accordance with procedures which shall be stipulated by a regulation of the Sardinia Autonomous Region Tax Office.

8. The collection of the tax may be delegated by the Sardinia Autonomous Region Tax Office through:

a) the conclusion of special conventions with third parties;

b) the conclusion of special conventions with individuals which manage the airports, ports, landing places, mooring points and fields located along the regional coasts, which shall include the recognition of a premium equal to 5 percent of the tax collected.

9. The individual operators mentioned in sub-section 8 which adhere to the collection convention shall ensure, in accordance with the procedures contained in the Sardinia Autonomous Region Tax Office regulation, the payment to the Regional Treasury of the tax received, less any eventual premiums due to them. The aforementioned regulation shall also govern the characteristics of any modules required and shall specify the information which must be contained in the same in order to identify the recreational craft.

10. The operators of port and airport facilities which adhere to the conventions mentioned in sub-section 8 shall be responsible for verifying the correct observance of

the obligation to pay the tax. Before 31 October of each year they shall present to the regional government office with jurisdiction over revenue matters an administrative statement of account of the sums collected according to the procedures laid down by resolution of the Regional Council.

11. The operators of airports, ports, landing places, mooring points and fields situated along the regional coasts shall communicate to the Regional Office for Tourism, Craftwork and Trade, for statistical purposes, the movements registered in their respective facilities. The Regional Office for Tourism, Craftwork and Trade shall in due course pass a measure governing the manner of transmission of the information necessary for statistical inquiries.";

– 5) Articles 265, 266, 272-274, 743-746 and 874-876 of the Navigation Code provide as follows:

"Article 265

(Ship operator's declaration)

Whoever operates a ship must make a prior declaration of his status as ship operator to the office where the ship or barge is registered.

Where the operator is not also the owner, the declaration may be made by the owner where it is not made by the ship operator.

Where the operation is undertaken by co-owners through the creation of a ship operating company, the formalities contained in Articles 279 and 282(2) have the same value as the ship operator's declaration.";

"Article 266

(Ship operator's declaration for ships authorised for internal navigation)

Where the operation concerns a ship authorised for internal navigation, the annotation in the deed of concession or of authorisation for the service of transport or towing in the register in which the ship is included has the same value as the ship operator's declaration.";

"Article 272

(Presumption of status as ship operator)

In the absence of a ship operator's declaration duly made public, the ship operator is assumed to be the owner until evidence is provided to the contrary.";

"Article 273

(Appointment of ship's captain)

The ship operator appoints the captain of the ship and may relieve him of his command at any time.";

"Article 274

(Ship operator's liability)

The ship operator is liable for acts carried out by the crew and the obligations undertaken under contract by the ship's captain in matters concerning the ship and its cargo.

Notwithstanding the above, the ship operator has no liability for any failure by the captain to comply with the duty of assistance and rescue provided for under Articles 489 and 490, nor with other duties imposed by the law on the captain as the person responsible for the cargo.";

"Article 743

(Concept of aircraft)

Aircraft means any machine intended for the airborne carriage of persons or things.

Remotely piloted airborne vehicles, defined as such by special legislation, by National Civil Aviation Authority [*Ente Nazionale per l'Aviazione Civile*] regulations and, for military vehicles, by decree of the Ministry of Defence, shall also be treated as aircraft.

Distinctions between aircraft, in accordance with their special characteristics and with their use, may be established by the National Civil Aviation Authority through its own regulations and, in any case, by special legislation in this area.

The provisions of the first book of the second part of the present Code shall not apply to apparatus built for sporting or recreational flight which fall within the limits indicated in the annex to law No. 106 of 25 March 1985.";

"Article 744

(State aircraft and private aircraft)

State aircraft include military aircraft and those owned by the state which are used for institutional purposes by the police, customs authorities, fire service, Department for Civil Defence or otherwise in the service of the state.

All other aircraft are private.

Unless provided to the contrary in international conventions, state aircraft shall also be treated as private for the purposes of international air navigation, with the exception of those used by the military, customs authorities, police or fire service.

All aircraft used by public or private individuals, including on an occasional basis, for activities pertaining to the protection of national security shall be treated as state aircraft.";

"Article 745

(Military aircraft)

Military aircraft include those classified as such by special laws, and in any case those designed by manufacturers according to military construction characteristics and which are intended for military use.

Military aircraft are authorised for navigation, certified and registered in the registers of military aircraft by the Ministry of Defence.";

"Article 746

(Aircraft equivalent to state aircraft)

Without prejudice to the provisions of Article 744(4), the Ministry for Infrastructure and Transport may, through a measure of its own, declare to be equivalent to state aircraft such aircraft which, notwithstanding the fact that they are owned and operated by private individuals, are authorised to provide a non-commercial state service.

Such measures shall stipulate the limits to and procedures for the declaration of equivalence and shall indicate the category of state aircraft to which they refer.

The declaration of equivalence renders applicable the provisions governing the relevant category as well as any other provisions mentioned in the measure.

A decree of the President of the Council of Ministers has specified the criteria and procedures for the conferral of the classification of government flight on the flight activity carried out in the interest of the public authorities and institutions.";

"Article 874

(Operator's declaration)

Whoever takes on the operation of an aircraft shall make a prior declaration to the National Civil Aviation Authority, in the form and according to the procedures set out in Articles 268-270.

Where the operator is not also the owner, the declaration may be made by the owner where the operator does not do so.";

"Article 875

(Public nature of the declaration)

The declaration by the operator shall be transcribed in the National Register of Aircraft and annotated on the certificate of registration.

The annotation on the certificate of registration shall be made by the competent authority of the place in which the aircraft is situated or towards which it is directed, pursuant to notification by the office which holds the National Register of Aircraft.

In the event of a discrepancy between the transcription in the register and the annotation on the certificate of registration, the contents of the Register prevail.";

"Article 876

(Presumption of operation)

In the absence of a declaration by the operator duly made public, the owner is presumed to be the operator until evidence is provided to the contrary.";

– 6) Articles 58 and 59 of presidential decree No. 600 of 29 September 1973 (Common provisions governing the assessment of taxes on income) provide as follows:

"Article 58

(Tax residence)

For the purposes of the application of the taxes on income, every person is considered to be resident for tax purposes in a municipality of the Italian state, in accordance with the following provisions.

Natural persons who are resident in Italy are resident for tax purposes in the municipality of the civil registry in which they are registered. Non-resident natural persons are resident for tax purposes in the municipality in which the income was produced or, if the income was produced in more than one municipality, in the municipality in which the greatest income was produced. Italian citizens resident abroad due to a service relationship with the public administration, as well as those who are resident pursuant to Article 2(2-bis) of the consolidated law on taxes on income, approved by presidential decree No. 917 of 22 December 1986, are resident for tax purposes in the municipality in Italy where they were last resident.

Legal persons are resident for tax purposes in the municipality in which their registered office is located or, in its absence, their administrative offices; in the absence also of the latter, they are resident for tax purposes in the municipality where a secondary office or business establishment is located, or in the absence thereof in the municipality in which they prevalently carry on their activity.

All documents, contracts, reports and declarations which are presented to the tax offices must specify the municipality of tax residence of the parties, along with their addresses.

Any grounds for the variation of tax residence become effective from the sixtieth day after the day in which they occurred.";

"Article 59

(Tax residence established by the tax authorities)

Notwithstanding the provisions of Article 58, the tax authorities may establish the tax residence of a natural or legal person in the municipality in which the person carries on in a continuous manner his principal activity or, for legal persons, in the municipality in which the administrative office is located.

Where justified by particular circumstances, the tax authorities may allow the taxpayer, pursuant to an application containing reasons, to be resident for tax purposes in a municipality other than that provided for under Article 58.

The provincial revenue officer or the Finance Minister has jurisdiction to exercise the option mentioned in the preceding sub-sections, depending upon weather the measure entails a change in the tax residence within the same province or to a different province.

The measure is in any case definitive, must contain reasons and shall be notified to the interested party; its effects shall begin as of the tax period following that in which it was notified.";

– 7) Articles 1, 2 and 3 of legislative decree No. 171 of 18 July 2005 (Maritime Recreational Code and implementation of directive 2003/44/EC, pursuant to Article 6 of law No. 172 of 8 July 2003), provide as follows:

"Article 1

(Purpose and extent of application)

1. The provisions of the present legislative decree apply to recreational navigation.

2. For the purpose of the present Code, recreational navigation means that carried out in territorial and internal waters for sporting or recreational purposes and which is not undertaken for profit.

3. Insofar as not provided for in the present Code, recreational navigation shall be governed by the laws, regulations and reference uses or, in their absence, by the provisions of the Navigation Code, approved by royal decree No. 327 of 30 March 1942, and the respective implementing legislation. For the purposes of the application of the provisions of the Navigation Code, recreational boats shall be treated as equivalent to ships and barges with gross tonnage no greater than ten tons for mechanically propelled boats and no greater than twenty five tons for all other cases, even if the boat exceeds this tonnage, up to a maximum of twenty four meters.";

"Article 2

(Commercial use of recreational craft)

1. A recreational craft is used for commercial purposes when:

a) it is subject to rental or hire contracts;

b) it is used for the professional teaching of recreational navigation;

c) it is used by diving and underwater training centres as a support unit for individuals diving for sporting or recreational purposes.

2. The use for commercial purposes of recreational boats and ships shall be annotated in the relevant register, with an indication of the activity carried out and of the owners or operators of the craft, whether individual firms or undertakings, which carry out the above commercial activities along with the details of their registration in the register of companies of the competent chamber of commerce, industry, craftwork and agriculture. The details of the annotation shall be noted on the navigation licence.

3. Where the activities mentioned in sub-section 1 are carried out with recreational craft flying flags of one of the Member States of the European Union, the operator shall present to the maritime or internal navigation authorities with jurisdiction over the place in which the craft is ordinarily based a declaration containing the characteristics of the craft, the operator's right to use the craft, as well as the details of the insurance policy covering the persons on board and for liability under tort towards third parties, as well as the security certification in its possession. A copy of the declaration, stamped and endorsed by the above authorities, shall be held on board.

4. The recreational craft mentioned in sub-section (1)(a) may be used exclusively for the activities for which they are authorised.";

Article 3

(Recreational craft)

1. The constructions intended for recreational navigation are termed:

a) recreational craft: means any construction of any type and with any means of propulsion intended for recreational navigation;

b) recreational ship: means any motor craft longer than twenty four metres, measures according to the harmonised EN/ISO/DIS standard No. 8666 concerning the measurement of pleasure dinghies and boats;

c) recreational boat: means any motor craft longer than ten metres and shorter than twenty four metres, measured according to the harmonised standards mentioned under letter (b);

d) recreational dinghy: means any oared craft or recreational motor craft equal to or shorter than ten metres, measured according to the harmonised standards mentioned under letter (b).";

[4] *as far as the Community law normative framework is concerned*, in addition to the EC Treaty mentioned by the appellant:

– 1) Article 2 of Commission Regulation (EC) No. 2096/2005 of 20 December 2005, laying down common requirements for the provision of air navigation services, provides as follows:

"(Definitions)

1. For the purposes of this Regulation the definitions contained in Regulation (EC) No. 549/2004 shall apply.

2. In addition to the definitions referred to in paragraph 1 the following definitions shall apply:

a) "aerial work": shall mean an aircraft operation in which an aircraft is used for specialised services such as agriculture, construction, photography, surveying, observation and patrol, search and rescue or aerial advertisement;

b) "commercial air transport": shall mean any aircraft operation involving the transport of passengers, cargo or mail for remuneration or hire;

[…]

d) “general aviation”: shall mean any civil aircraft operation other than commercial air transport or aerial work; […].”;

– 2) point 11) of the annex to Regulation (EC) No. 2320/2002 of the European Parliament and of the Council of 16 December 2002 on common rules in the field of aviation security contains the following definition:

“11) “General aviation”: any scheduled or unscheduled flight activity not offered or available to the general public.”;

– 3) Article 2(l) of Council Regulation (EEC) No. 95/93 of 18 January 1993 on common rules for the allocation of slots at Community airports contains the following definition:

“*l*) “business aviation” shall mean that sector of general aviation which concerns the operation of use of aircraft by companies for the carriage of passengers or goods as an aid to the conduct of their business, where the aircraft are flown for purposes generally considered not for public hire and are piloted by individuals having, at a minimum, a valid commercial pilot license with an instrument rating.”;

[5] regarding the admissibility, in proceedings before this court concerning the constitutionality of certain regional laws in which the court has been seized directly, of the invocation of Community law provisions as supplementary elements of the constitutional principle contained in Article 117(1) of the Constitution, the court finds that the admissibility results from the particular nature of such proceedings;

[6] on this matter, it should be pointed out that by ratifying the Community treaties Italy became part of the Community legal order, that is an autonomous legal order integrated into and coordinated with the national legal system, and at the same time also transferred, pursuant to Article 11 of the Constitution, the exercise of legislative powers (at national, regional or autonomous province level) in the areas specified in the Treaties;

[7] the provisions of the Community legal order are binding on Parliament to various degrees, the only limit being the inviolability of the fundamental principles of the constitutional order and the inviolable rights of man guaranteed by the Constitution (see, *inter alia*, judgments Nos. 349, 348 and 284 of 2007; No. 170 of 1984);

[8] in proceedings before the Italian courts, this obligation operates in various ways, depending on whether the proceedings are pending before the ordinary courts or before the Constitutional Court where it has been seized directly;

[9] in proceedings pending before the ordinary courts, the latter is precluded from applying national laws (including regional laws) where it considers that they are incompatible with Community provisions with direct effect;

[10] in matters concerning the interpretation of the relevant Community law provisions that is necessary in order to ascertain the conformity of the national provisions with the Community legal order, the courts make, where necessary, a preliminary reference to the Court of Justice of the European Communities pursuant to Article 234 of the EC Treaty;

[11] in cases, such as the present, which are pending before the Constitutional Court, the latter having been seized directly by the state, and which concern the constitutionality of a regional provision due to incompatibility with Community law, the latter "function as interposed norms capable of supplementing the principle used to assess the conformity of the regional legislation with Article 117(1) of the Constitution" (judgments No. 129 of 2006; No. 406 of 2005; No. 166 and No. 7 of 2004), or more precisely give specific form to the general principle contained in Article 117(1) of the Constitution (as clarified in general in judgment No. 348 of 2007), resulting in a declaration of unconstitutionality of the regional provision judged to be incompatible with the Community law provisions in question;

[12] regarding regional laws, these two different ways in which Community law provisions operate mirror the differing characteristics of proceedings: the ordinary courts must apply the law, and its conformity with the Community legal order must in the first instance be assessed by the court seized; on the other hand, in proceedings before the Constitutional Court of which it has been seized directly, the assessment of such conformity occurs, pursuant to Article 117(1) of the Constitution, in proceedings concerning its constitutional legitimacy, which means that where it is not found to be compatible the Court does not proceed to set aside the law, but rather declares it to be unconstitutional with *erga omnes* effect;

[13] accordingly, the acceptance of EC law as a supplementary element to the principle of constitutionality is a necessary prerequisite for the introduction of

proceedings concerning the constitutionality of a regional law which is considered to be in breach of the Community legal order;

[14] therefore, the complaint in question is admissible, because the Community provisions have been invoked in the present constitutionality proceedings as a supplementary element to the principle of constitutionality contained in Article 117(1) of the Constitution;

[15] as regards the limits within which Community law may be taken into consideration as a supplementary element to the principle of constitutionality invoked in the present proceedings, it should be pointed out that, in accordance with the combined provisions of Articles 23, 27 and 34 of law No. 87 of 11 March 1953 – according to which, in proceedings in which the Constitutional Court has been seized directly, it may declare legislative provisions to be unconstitutional, subject to the limits of the constitutional principles and grounds of unconstitutionality indicated in the appeal – this court may examine exclusively the violations averred by the appellant concerning Articles 49, 81, "in conjunction with Article 3(g) and (10)", and 87 of the EC Treaty;

[16] *regarding the applicability of the contested provision to undertakings*, it should be pointed out that Article 4 of regional law No. 4 of 2006, as amended by Article 3(3) of regional law No. 2 of 2007 (with effect from 31 May 2007, pursuant to Article 37 of the latter law) creates, starting from the year 2006, a "regional tax on tourist stopovers by aircraft and recreational craft" applicable during the period falling between 1 June and 30 September to natural or legal persons resident for tax purposes outside the region and which operate an aircraft or recreational craft (subject to the following exceptions: a) boats which come to Sardinia to participate in sporting regattas, gatherings of vintage boats, monotype boats and sailing events, including amateur events, the occurrence of which has been notified to the Marine Authority in advance by the organisers; b) technical stops by aircraft and boats, limited to the time necessary to carry out the same; c) for recreational craft which remain in regional port facilities for the whole year);

[17] under the terms of the same article, the tax is due: 1) for every landing in regional aerodromes of general aviation aircraft intended for the private carriage of persons, according to categories determined in relation to the number of passengers which such aircraft are authorised to transport; 2) annually, for the docking in ports,

landing places and in mooring points situated within the region and in the equipped mooring fields located in the territorial waters along the coasts of Sardinia of recreational craft within the meaning of the Maritime Recreational Code (legislative decree No. 171 of 18 July 2005) and, in any case, of craft used for recreational purposes, classified according to length, starting from 14 metres;

[18] accordingly, the aforementioned regional tax on stopovers also applies to undertakings not resident for tax purposes in Sardinia which operate recreational craft (or in any case craft which are used for recreational purposes) and, in particular, to undertakings whose business activity consists in making the said craft available to third parties;

[19] the tax also applies to undertakings operating "general aviation aircraft […] intended for the private carriage of persons", that is (as held in the above judgment of this court deposited today) to undertakings which carry on air transport operations (different from "aerial work") without remuneration and, therefore, within the ambit of "general business aviation", defined by the aforementioned Article 2(l) of Regulation (EEC) No. 95/93 as an general aviation activity carried out by the operator, with transport without remuneration for reasons pertaining to its own business activity;

[20] *regarding the preliminary references proposed concerning the interpretation of Community law*, this court considers it opportune to make a preliminary reference to the Court of Justice of the EC pursuant to Article 234 of the EC Treaty exclusively in relation to the violations of Articles 49 and 87 of the EC Treaty, reserving for subsequent proceedings any decision on the alleged violation of Article 81 "in combination with Articles 3(g) and 10";

[21] as regards the non-manifest groundlessness of the above preliminary questions with reference to the application of the regional tax on tourist stopovers on undertakings which are not resident for tax purposes in Sardinia, insofar as it subjects such undertakings to taxation, the contested provision appears to discriminate between undertakings which, even through they carry on the same activities, are not required to pay the tax due to the sole fact of being resident for tax purposes in the region;

[22] in fact, for undertakings which are not resident for tax purposes in Sardinia – in relation both to the broad market for the commercial use of recreational craft, as well as the narrower market of undertakings which directly carry on the business air

transport of persons without remuneration – it could be argued that the application of the contested regional tax would give rise to a selective increase in the cost of the services provided, which is relevant for the purposes of Community law both as a restriction on the free provision of services (Article 49 of the EC Treaty), as well as a state aid to undertakings which are resident for tax purposes in Sardinia (Article 87 of the EC Treaty), with effects which are discriminatory and distort competition;

[23] however, it could by contrast be argued – as the respondent Region contends – that the provisions of Community law invoked by the appellant are not a bar to the taxation only of undertakings not resident for tax purposes in Sardinia, because when such undertakings make the stopover, they benefit, as do undertakings resident in the region for tax purposes, from regional and local public services, whilst, in contrast to the latter, they do not participate in the financing of such services through the payment of taxes already in existence;

[24] according to the region, this justification for the regional tax is reinforced by a further argument based on the need to compensate, through the taxation of undertakings not resident in Sardinia for tax purposes, the higher costs borne by undertakings resident for tax purposes in the region, due to the geographical and economic characteristics related to the insular nature of the region;

[25] the two above justifications are not based on requirements of sustainable regional tourist development or the need to adjust the economic situation of "non resident" individuals compared to that of "resident" individuals;

[26] according to this court, the same justifications do not on the other hand take into account either the fact that the region's insular nature does not in itself appear to be a factor capable of inflating the costs borne by the undertakings in relation to tourist stopovers nor above all of the fact that the involvement – through the application of the contested tax – of businesses not resident for tax purposes in Sardinia in the additional costs created by tourism may not on the facts be sufficient to circumvent the Community law principle of non-discrimination and, in consequence, fall beyond the application of the related provisions of the EC Treaty on the freedom to provide services and the prohibition on state aid;

[27] this principle in fact applies generally in the internal legal order and provides protection to "non resident" undertakings – in competition matters and

concerning fundamental economic freedoms – the extent of which is a matter not for the rules of national law, but of Community law as interpreted by the Court of Justice of the EC with reference also to "infra-state bodies" which, like the respondent region, enjoy statutory, legislative and financial autonomy (Case C-88/03, *Portuguese Republic v. Commission* [2006] ECR I-7115);

[28] the European Court of Justice has on various occasions considered situations similar to the contested stopover tax, finding there to be a restriction on the free provision of services where the particular measures in question rendered the cross-border provision of services more onerous than comparable national provision (Case C-269/05, *Commission* v. *Hellenic Republic* [2007] ECR I-4, p. 6; Case C-92/01, *Stylianakis* [2003] ECR I-1291; Case C-70/99, *Commission* v. *Portugal* [2001] ECR I-4845);

[29] however, the cases examined by the Court of Justice are not materially similar to that at issue in the present proceedings, because they concern taxes which discriminate between national flights and international flights, or between flights above and below a certain distance or, again, between domestic and international transport and, accordingly, such judgments do not take directly into consideration a possible discrimination – relevant albeit only in theory for Community law – between undertakings with or without tax residence in a particular region of a Member State;

[30] as regards the averred breach of Article 87 of the EC Treaty, the issue also arises as to whether the economic competition advantage accruing to undertakings "resident" in Sardinia from their exemption from the regional tax on stopovers falls within the ambit of a state aid, given that such an advantage does not flow from the granting of a tax reduction, but indirectly from the lower costs borne by it compared to "non resident" undertakings (analogous to the case, materially similar on certain points, examined by the ECJ in Case C-53/00, *Ferring SA* [2001] ECR I-9067);

[31] the aforementioned interpretative problem is clearly distinct from the assessment of the compatibility of the measure of assistance with the common market, which falls under the exclusive jurisdiction of the European Commission, subject to control by the Community courts;

[32] there is therefore a doubt over the correct interpretation – amongst those possible – of the Community law provision invoked which makes a preliminary

reference to the Court of Justice pursuant to Article 234 of the EC Treaty necessary in order for the latter to ascertain: a) whether Article 49 of the Treaty must be interpreted as a bar on the application of the contested provision only to undertakings resident for tax purposes outside Sardinia and which operate aircraft used by the same for the transport of persons when carrying out "general business aviation" activities (that is the transport without remuneration on grounds pertaining to its own business activity); b) whether, insofar as it provides that the regional tax on tourist stopovers by aircraft applies only to undertakings resident for tax purposes outside Sardinia and which operate aircraft used by the same for the transport of persons when carrying out general business aviation activities, the contested provision constitutes – within the meaning of Article 87 of the Treaty – a state aid to undertakings carrying on the same activity which are resident for tax purposes in Sardinia; c) whether Article 49 of the Treaty must be interpreted as a bar on the application of the contested provision only to undertakings resident for tax purposes outside Sardinia and which operate recreational craft, the business activity of which consists in making such craft available to third parties; d) whether, insofar as it provides that the regional tax on tourist stopovers by recreational craft applies only to undertakings resident for tax purposes outside Sardinia and which operate recreational craft, the business activity of which consists in making such craft available to third parties, the contested provision constitutes – for the purposes of Article 87 of the Treaty – a state aid for undertakings which carry on the same activities and which are resident for tax purposes in Sardinia;

[33] *the preliminary questions of interpretation are relevant* because: a) the interpretation requested from the Court of Justice is necessary in order for this court to pass judgment, since the interpretative questions mentioned have arisen in constitutionality proceedings in which the court has been seized directly; b) this court has already held to be groundless the arguments of unconstitutionality submitted by the appellant in relation to questions other than those covered by the present order for the reasons set out in judgment No. 102 of 2008, deposited today, and therefore the constitutional legitimacy of the contested provision cannot be examined with reference to Article 117(1) of the Constitution without an examination of its conformity with Community law;

[34] regarding the existence of the conditions necessary in order for this court to make a preliminary reference to the European Court of Justice on the interpretation of Community law, it should be pointed out that, albeit in its particular role as supreme constitutional guarantor of the national legal order, the Constitutional Court amounts to a national court within the meaning of Article 234(3) of the EC Treaty and, in particular, a court of first and last instance (since – pursuant to Article 137(3) of the Constitution – its decisions are not subject to appeal): therefore, in constitutionality proceedings in which the court is seized directly, it has the right to make a preliminary reference to the European Court of Justice;

[35] in these types of constitutionality proceedings, in contrast to those concerning an incidental appeal, this Court has the sole right to pass judgment on the dispute;

[36] in consequence, were it not possible to make a preliminary reference in accordance with Article 234 of the EC Treaty in constitutionality proceedings where the court has been seized directly, the general interest in the uniform application of Community law, as interpreted by the Court of Justice of the European Communities, would be harmed.

Whereas judgment No. 102 of 2008 of this court, deposited today, which in the ambit of proceedings commenced by the aforementioned appeal No. 36 of 2007, ordered the separation of proceedings concerning the question of the regional tax on tourist stopovers by aircraft and recreational craft – governed by Article 4 of regional law No. 4 of 2006, as amended by Article 3(3) of regional law No. 2 of 2007 – as well as the subjection to taxation of undertakings operating aircraft or recreational craft.

Considering Article 234 of the EC Treaty and Article 3 of law No. 204 of 13 March 1958.

on those grounds

THE CONSTITUTIONAL COURT

orders that a preliminary reference be made to the Court of Justice of the European Communities containing the following questions concerning the interpretation of Articles 49 and 87 of the EC Treaty:

a) whether Article 49 of the Treaty must be interpreted as requiring a bar on the application of a provision, such as Article 4 of the Sardinia Region law No. 4 of 11 May 2006 (Miscellaneous provisions governing matters concerning revenue, reclassification of expenditure and social and development policies), as amended by Article 3(3) of Sardinia Region law no. 2 of 29 May 2007 (Provisions governing the formation of the annual and long-term budget of the Region – Finance Law 2007), according to which the regional tax on tourist stopovers by aircraft applies only to undertakings resident for tax purposes outside Sardinia and which operate aircraft used by the same for the carriage of persons when carrying out general business aviation activities;

b) whether, insofar as Article 4 of the Sardinia Region law No. 4 of 2006, as amended by Article 3(3) of Sardinia Region law No. 2 of 2007, provides that the regional tax on tourist stopovers by aircraft applies only to undertakings resident for tax purposes outside Sardinia and which operate aircraft used by the same for the transport of persons when carrying out general business aviation activities, consists – for the purpose of Article 87 of the Treaty – of a state aid to undertakings which carry on the same activity with tax domicile in Sardinia;

c) whether Article 49 of the Treaty must be interpreted as a bar on the application of a provision, such as that contained in Article 4 of Sardinia Region law No. 4 of 2006, as amended by Article 3(3) of Sardinia Region law No. 2 of 2007, according to which the regional tax on tourist stopovers by recreational craft applies only to undertakings resident for tax purposes outside Sardinia which operate recreational craft and the business activity of which consists in making such craft available to third parties;

d) whether, insofar as Article 4 of Sardinia Region law No. 4 of 2006, as amended by Article 3(3) of Sardinia Region law No. 2 of 2007, provides that the regional tax on tourist stopovers by recreational craft applies only to undertakings resident for tax purposes outside Sardinia, which operate recreational craft and the business activity of which consists in making such craft available to third parties, constitutes – within the meaning of Article 87 of the Treaty – a state aid to undertakings carrying on the same activity which are resident for tax purposes in Sardinia;

stays proceedings pending the resolution of the above preliminary reference;

orders the immediate transmission of a copy of the present order, together with the case file, to the registry of the Court of Justice of the European Communities.

Decided in Rome, at the seat of the Constitutional Court, *Palazzo della Consulta*, on 13 February 2008.

Signed:

Franco BILE, President

Franco GALLO, Author of the Judgment

Giuseppe DI PAOLA, Registrar

Deposited in the Court Register on 15 April 2008.

The Director of the Registry

Signed: DI PAOLA