Corte costituzionale

JUDGMENT NO. 68 OF 2011

UGO DE SIERVO, President
SABINO CASSESE, Author of the Judgment

JUDGMENT NO. 68 YEAR 2011

In this case the President of the Council of Ministers challenged legislation enacted by Puglia region concerning the stabilisation of certain categories of worker on the grounds that it led to differences in treatment compared to workers established in other regions and violated the requirement of impartiality of and uniformity in administrative action. The Court found against the region on various grounds, including *inter alia* the failure to comply with the rules on access to public sector employment through public competitions, the breach of fundamental principles applicable to public finances and due to encroachment upon private law.

(omitted)

JUDGMENT

in proceedings concerning the constitutionality of Articles 2(1), (2) and (4), 13, 15, 16(1), (2) and (3), 17, 18, 19(1), (6) and (8), 20, 21(1), (4), (5) and (6), 22(1), 24(1) and (3), 26 and 30 of Puglia Regional Law no. 4 of 25 February 2010 (Urgent provisions on health and social services) initiated by the President of the Council of Ministers by application served on 7-10 May 2010, filed in the Court Registry on 14 May 2010 and registered as no. 77 in the Register of Applications 2010.

Considering the entry of appearance by Puglia Region;

having heard the Judge Rapporteur Sabino Cassese in the public hearing of 8 February 2011;

having heard the State Counsel [*Avvocato dello Stato*] Diana Ranucci for the President of the Council of Ministers and Counsels Massimo Luciani, Luigi Volpe and Luca Alberto Clarizio for Puglia Region.

(omitted)

Conclusions on points of law

1. – By application served on 7 May 2010 and filed on 14 May 2010 (no. 77 of 2010), the President of the Council of Ministers, represented by the State Counsel raised a question concerning the constitutionality of Articles 2(1), (2) and (4), 13, 15, 16(1), (2) and (3), 17, 18, 19(1), (6) and (8), 20, 21(1), (4), (5) and (6), 22(1), 24(1) and (3), 26 and 30 of Puglia Regional Law no. 4 of 25 February 2010 (Urgent provisions on health and social services), due to the violation of Articles 3, 24, 31, 33, 51, 81, 97, 117(2)(l) and (3) and 118 of the Constitution.

In the opinion of the President of the Council of Ministers, the contested provisions violate numerous constitutional principles insofar as they introduce "different more favourable legislation both in terms of the stabilisation of employment and in economic terms which is valid only on a regional level, resulting in differences in treatment compared to equivalent categories of worker established in other regions, including especially Article 97 of the Constitution due to the violation of the principle of the impartiality of administrative action and its uniformity throughout the national territory".

2. – It must be stated that first and foremost there is no longer any matter in dispute with regard to the question concerning Article 19(6) of Puglia Regional Law no. 4 of 2010 relating to staffing structures.

This provision introduced four new paragraphs into Article 1 of Puglia Regional Law no. 27 of 27 November 2009 (Regional health service – Hiring and staffing structures), numbered 1a-1d. Following the application, by judgment no. 333 of 2010, this Court declared Article 1(1), (2), (3) and (4) of Puglia Regional Law no. 27 of 2009 unconstitutional, which meant that the prerequisites upon which paragraphs 1a to 1d of that Article were based, which were introduced by Article 19(6) of Puglia Regional Law no. 4 of 2010, no longer obtained. By Article 10 of Puglia Regional Law no. 19 of 31 December 2010 (Provisions on the formation of the 2011 budget and the 2011-2013 multi-year budget of Puglia Region), the Region then repealed the whole of Article 1 of Regional Law no. 27 of 2009, "implementing the judgment of the Constitutional Court", i.e. judgment no. 333 of 2010. Given the subsequent repeal of the contested provision following the declaration that the provisions upon which it is premised are unconstitutional, there is no longer any matter in dispute.

3. – As a preliminary matter it is necessary to examine the grounds for admissibility of the challenges made by the applicant.

3.1. – First and foremost, the challenges relating to Articles 24 and 31 of the Constitution must be ruled manifestly inadmissible, since these provisions are mentioned in the introductory part of the application, but are not subsequently referred to or accompanied by any argument.

The challenges relating to Article 30 of the contested law insofar as it replaced Article 25(2), (3), (5) and (6) of Puglia Region Law no. 25 of 3 August 2007 (Adjustment and second amendment to the budget for financial year 2007) are also inadmissible since they are not supported by specific reasons. Although the applicant challenges Article 30 as a whole, the arguments provided in support of the challenges are clearly directed at paragraphs 1 and 4 alone of the provision replaced.

3.2. – The objection raised by Puglia Region that the challenges regarding Articles 15, 16(3), 17, 18, 19(8) and 20 of Puglia Regional Law no. 4 of 2010 are inadmissible on the grounds that they are motivated *per relationem* to those averred by the applicant for Article 2(1) of the same Law, and are in any case generic and insufficiently argued, must also be rejected.

The grounds for the challenge to Article 2(1) of Puglia Regional Law no. 4 of 2010 are illustrated in an exhaustive manner by the President of the Council of Ministers at the start of the application. The challenges made are not generic or insufficiently argued. As was made clear in the account of the facts of the case, the violations complained of and the principles invoked are clearly identified (see *inter alia* judgment no. 332 of 2010).

The fact that the applicant refers in detail to arguments already set out in the previous pages in order to provide reasons for challenges of an analogous nature do not constitute grounds for inadmissibility. In spite of the fact that the contested provisions differ in content, it is easy to infer the reasons provided in support of the unconstitutionality of the individual provisions. The reasons have not therefore been provided *per relationem*. In contrast to the situation in these proceedings, such a motivation presupposes that a challenge is made in documents other than the application or the referral order in which it is contained (as would be the case for reasons which

referred to another application – judgment no. 40 of 2007 – or to another referral order: see *inter alia* judgments no. 197 and no. 143 of 2010).

4. – On the merits, the challenges made by the President of the Council of Ministers may be subdivided into eight groups, each of which relates to one or more Articles of the contested Law.

5. – The first group of challenges relates to Article 2, and specifically to paragraphs 1, 2 and 4 of the replaced Article 4 of Puglia Regional Law no. 45 of 23 December 2008 (Provisions on healthcare) of Puglia Regional Law no. 4 of 2010. Paragraph 1 provides that "staff working as medical directors of the Regional Health Service (RHS) who have at the relevant time, according to a formal document with a certain date issued by the legal representative of the body, been in service for at least five years in a different discipline from that in which they were hired shall upon request be re-classified according to the discipline in which they have worked, provided that they meet the prerequisites specified" under applicable State legislation. Paragraph 2 provides first that the directors general of the healthcare trusts and the institutes of the RHS shall verify "whether the needs which led to the deployment of the staff in the discipline different from that in which they were hired continue to apply", and secondly that "without prejudice to overall staffing structures, the directors general shall at the same time order that the staffing plans resulting from the change in discipline be modified by allocating the medical director to the vacant post in the new discipline, abolishing the post left vacant in the old discipline, or transforming the post formerly occupied and now left free in the old discipline". According to paragraph 3, medical directors who do not meet the prerequisites specified under paragraphs 1 and 2 are to be reassigned to the performance of the tasks specific to the position to which they were hired. Finally, according to paragraph 4, such reallocation is not to occur for "staff who have been in service for at least five years on 31 December 2010 and who are registered at a school for specialisation for the purpose of fulfilling the prerequisites specified under this Article".

5.1. – In the opinion of the applicant, Article 2(1) of Puglia Regional Law no. 4 of 2010 violates first and foremost Articles 3, 51 and 97 of the Constitution on the grounds that it permits non-tenured medical directors to be re-classified and stabilised in the absence of the peculiar and extraordinary reasons in the public interest which, according

to the case law of the Constitutional Court, could permit an exception to the rule that access to granted by public competition. The provision is also claimed to violate Article 117(3) of the Constitution on two counts: first, in relation to the fundamental principles applicable to the protection of health laid down by Article 15 of Legislative Decree no. 502 of 30 December 1992 (Reform of legislation on healthcare, pursuant to Article 1 of Law no. 421 of 23 October 1992), since the stabilisation provided for under that provision, which is carried out without following the ordinary selection procedures, contrasts with the requirement that medical directors be appointed following a public competition based on professional qualifications and examinations. Secondly, it is claimed to violate Article 117(3) with respect to the fundamental principles underlying the coordination of the public finances pursuant to Article 17(10), (11), (12) and (13) of Decree-Law no. 78 of 1 July 2009 (Anti-crisis measures and extension of the time limits for the participation of Italy in international missions), converted into Law no. 102 of 3 August 2009, since these State provisions – also referred to by Article 2(74) of Law no. 191 of 23 December 2009 (Provisions governing the formation of the annual and long-term budget of the State – "Finance Law 2010") – provide for "new procedures for assessing professional experience acquired through the arrangement of public competitions with a partial reservation of spaces" solely for staff who are not medical directors.

Paragraph 2 is claimed to violate Article 81 of the Constitution since the verification provided for thereunder of the ongoing need for staff in the various disciplines does not amount to a prerequisite for the re-classification of medical directors such that, even if these needs were found not to have been met, they would in any case result in greater financial burdens.

Finally, paragraph 4 is claimed to violate Article 117(2)(l) on the grounds that it permits the re-classification of staff even where they have not met the prerequisites specified under the applicable legislation on competitions, "considering to this effect that the mere registration in a school for specialisation is sufficient, and not the completion of the specialisation course".

5.2. – The question is well founded.

Article 2 of Puglia Regional Law no. 4 of 2010 replaces Article 4 of Regional Law no. 45 of 2008. Article 4 provided that "Medical directors in service in a permanent post

at the offices on the staff of the general management who are functionally answerable to the healthcare directorates of the local health authorities (*aziende sanitarie locali*, or ASL), teaching hospitals and public IRCCS [*Istituti di Ricovero e Cura a Carattere Scientifico*, Research Hospitals providing Inpatient and Care Services] or who have been in service with the healthcare directorate in a hospital for at least three years upon entry into force of this Law shall, upon request, be re-classified as medical directors in the discipline 'Hospital Medical Management' [*Direzione medica di presidio ospedaliero*]".

This Article was ruled unconstitutional by judgment no. 150 of 2010, following the enactment of Puglia Regional Law no. 4 of 2010. This Court held that the provision violated Articles 97 and 117(3) of the Constitution since the provision contemplated situations in which medical directors could be appointed "in the absence of the peculiar and extraordinary reasons in the public interest, as a significant exception to the requirement of a public competition, required both in general terms by Article 97 of the Constitution as well as under specific legislative provisions which, pursuant to Article 117(3), amount to fundamental principles in the area of healthcare". In particular, "the re-classification, upon request, of medical directors in a permanent post in the medical directorates [...] breaches the general rule which may be inferred from Article 15(7) of Legislative Decree no. 502 of 1992, as supplemented by Article 24 of Presidential Decree no. 483 of 10 December 1997 (Regulation laying down procedures to govern competitions for directors in the National Health Service)".

The arguments contained in judgment no. 150 of 2010 may also apply to Article 2 of the Law contested in this application. In fact, the expression "shall be reclassified [...] according to the discipline in which they have worked", used instead of the formula "re-classified in the directorates", does not amount to a situation different from that already objected to by this Court in judgment no. 150 of 2010. Therefore, the contested provision grants access to posts as medical directors without a competition, in breach of Articles 97 and 117(3) of the Constitution on the protection of health.

5.3. – Article 117(3) of the Constitution is also breached with regard to the coordination of the public finances, since Article 2 of the contested law provides – through paragraph 1 of Article 4 of Puglia Regional Law no. 45 of 2008 as replaced – for the hiring of staff in breach of the fundamental provisions set forth under Sate

legislation. Indeed, the contested provision contemplates the hiring of medical directors who are already in service in a "discipline different from that in which" they were hired, whilst Article 17(10), (11), (12) and (13) of Decree-Law no. 78 of 2009 – referred to by Article 2(74) of Law no. 191 of 2009 – provides that the administrations are permitted to stabilise only non-director staff.

5.4. – The fact that the challenges to Article 2 of Puglia Regional Law no. 4 of 2010 – with regard to paragraph 1 of Article 4 of Puglia Regional Law no. 45 of 2008 as replaced – have been accepted means that Articles 4(2) and (4) are unconstitutional since they contain provisions which apply or are premised on paragraph 1. The remaining grounds for challenge are moot.

6. – The second group of challenges concerns Article 13 of Puglia Regional Law no. 4 of 2010. This Article provides that "Subject to the limit of the vacant posts in the staffing plan and in accordance with the reduction in staff costs imposed by applicable legislation, staff previously working under a permanent contract or appointment with trusts or bodies from the National Health Service who are in post on 31 December 2009 on a fixed-term contract with a trust or body from the Health Service of Puglia Region shall be confirmed in the role within the latter on a permanent basis if they submit an appropriate request for mobility within sixty days of the date of entry into force of this Law".

6.1. – According to the applicant, the provision violates first and foremost Articles 3, 51 and 97 of the Constitution insofar as it *de facto* permits "the use of the institute of mobility in order to hire staff with the healthcare bodies of Puglia Region", violating the principles of reasonableness, impartiality and the proper conduct of the public administration, as well as the principle of recruitment according to public competition. Article 97 of the Constitution is also claimed to have been violated in relation to several fundamental principles set forth under State legislation in relation to public sector employment: Article 30 of Legislative Decree no. 165 of 30 March 2001 (General provisions on the regulation of employment in the public administrations) which, in regulating transfers of staff between different administrations, limits appointment as an official in the administrations in which service is performed solely to staff in with managerial responsibility or who are not officials; Articles 24 and 31 of Legislative Decree no. 150 of 27 October 2009 (Implementation of Law no. 15 of 4 March 2009 on

the optimisation of productivity in public sector employment and the efficiency and transparency in the public administrations) according to which, starting from 1 January 2010, the public administrations must fill available positions through public competitions, with a reservation not exceeding fifty percent for internal staff, in accordance with the provisions governing recruitment.

Moreover, the regional provision is claimed to violate Article 117(2)(l) of the Constitution insofar as it violates the "contractual provisions which regulate the institution of mobility and which permit mobility only with reference to the category, professional profile, discipline and economic position of origin of the employee", with the result that the provision encroaches upon private law.

Finally, Articles 117 and 118 of the Constitution are claimed to have been violated (with reference to the principle of loyal cooperation which inspires the relations between the national health services and the universities) and Article 33 of the Constitution (with reference to the principle of the autonomy of the universities) since, insofar as it relates to the staff of all bodies from the regional health services, including university hospitals, it does not refer to the trusts' charters or the protocols of understanding between the Region and the universities pursuant to Article 3(2) of Legislative Decree no. 517 of 21 December 1999 (Provisions on relations between the National Health Services and the universities, pursuant to Article 6 of Law no. 419 of 30 November 1998) or any understanding with the Rector.

6.2. – The question is well founded.

Insofar as the contested provision refers to the institution of mobility, it provides for the appointment as officials ("*ruolizzazione*") – namely re-classification on a permanent basis in posts within the regional health service – of staff who "already hold a permanent contract or appointment" with bodies from the National Health Service. The provision permits the re-classification of staff and transforms fixed-term employment relations or permanent employment relations for non-official posts (*non di ruolo*) into permanent employment relations for official posts (*di ruolo*). It follows that Article 97 of the Constitution has been violated because the contested provision does not specify the prerequisite of a public competition in order to be re-classified, as well as Article 117(2)(l) of the Constitution on private law, because the provision relates to the institution of mobility, which is governed by collective labour agreements.

The remaining grounds for challenge are moot.

7. – The third group of challenges relates to Article 15 of Puglia Regional Law no. 4 of 2010, pursuant to which "the former voluntary service workers (*lavoratori socialmente utili*, *LSU*) who have already been working on an ongoing basis, according to company plans and subsequent extensions, in the local health authorities and the bodies of the regional health services for at least five years upon entry into force of this Law in the services of rehabilitation, drug addiction, integrated domestic assistance or prevention and other services shall be subject to the stabilisation procedures set forth under Article 30 of Regional Law no. 10 of 2007 and Regional Law no. 40 of 2007 within the limits of the vacant posts within the staffing structure, the costs of which shall be covered out of the budget of each trust or within the context of a review of the staffing levels".

7.1. – According to the President of the Council of Ministers, the provision violates Articles 3, 51 and 97 of the Constitution since the persons covered by it also include employees who are not eligible for stabilisation according to the State legislation setting out the principles in this area. The provision is also claimed to violate Article 81 of the Constitution on the grounds that, in also permitting stabilisation in cases in which there are no vacant posts, it results in greater unfunded costs, and Article 117(3) of the Constitution on the grounds that it does not offer appropriate guarantees as to the respect for Article 2(71) of Law no. 191 of 2009, which contains a fundamental principle applicable to the coordination of public finances.

7.2. – The question is well founded.

The contested legislation provides for the stabilisation of staff employed by the public administrations though does not provide any indications as to the prerequisites for allowing exceptions to the principle that access be granted by public competition, i.e. due to the special nature of the functions which the staff carry out (judgments no. 267 and no. 195 of 2010 and no. 293 of 2009) or the specific functional requirements of the administration (see most recently judgments no. 67 of 2011 and no. 195 of 2010), thereby violating Articles 3, 51 and 97 of the Constitution.

The legislation also makes provision for the stabilisation of staff which requires a change in staffing structures, thereby violating the cost limits specified for healthcare staff under Article 2(71) of Law no. 191 of 2009, in breach of the fundamental

principles laid down in relation to the coordination of public finances pursuant to Article 117(3) of the Constitution.

Article 81 of the Constitution has also been violated. The application to the regions of the rule that legislative provisions must be funded has been repeated on several occasions by this Court (judgments no. 100 of 2010 and no. 386 and no. 213 of 2008) and has been further confirmed by Article 19(2) of Law no. 196 of 31 December 2009 (Law on public accounting and finance). The mere formula "within the limits of the vacant posts within the staffing structure, the costs of which shall be covered out of the budget of each trust or within the context of a review of the staffing levels" used at the end of the contested provision does not specify funding for the new costs resulting from the stabilisation provided for which is "credible, sufficiently secure, not arbitrary or irrational and in equilibrium with the costs intended to be incurred in future financial years" (judgments no. 100 of 2010 and no. 213 of 2008).

8. – The fourth group of challenges relates to Articles 16(1) and (2), 19(1), 22(1), and 24(1) and (3) of Puglia Regional Law no. 4 of 2010.

In particular, Article 16(1) provides that "In accordance with the statutory provisions on staff costs contained in Article 2(71) of Law no. 191 of 2009 and without prejudice to the provisions set forth under Article 24 of Legislative Decree no. 150 of 27 October 2009 (Implementation of Law no. 15 of 4 March 2009 on the optimisation of productivity in public sector employment and the efficiency and transparency in the public administrations), within public competitions for the purpose of recruitment the local health authorities, the university hospitals and the public IRCCS of the regional health service shall cover the available posts within staffing structures through public competitions, with a reservation not exceeding 50 percent in favour of employees working on fixed-term contracts in service with the same trusts and institutes who, upon entry into force of this Law, have accrued seniority of at least three years over the past five years, which need not have been on a continuous basis". Pursuant to paragraph 2, this provision also applies to employees working on fixed-term contracts with the local health authorities, the university hospitals or public IRCCS in order to carry out dedicated projects.

Article 19 provides that "in accordance with the provisions of Regional Law no. 27 of 27 November 2009 (Regional health service – Hiring and staffing structures), in

order to ensure the full application for the purposes specified under Article 4(5) (Staff recruitment criteria) of Regional Law no. 20 of 30 December 2005 (Provisions on the formation of the 2006 budget and the 2006-2008 multi-year budget of Puglia Region) and the third last paragraph of Regional Council Resolution no. 1657 of 15 October 2007 (Law no. 296 of 27 December 2006, Article 1(565). Stabilisation plan for non-permanent staff in service with the healthcare trusts and public IRCCS pursuant to Article 30 of Regional Law no. 10 of 2007. Criteria for application), the directors general of the Bari and Barletta local health authorities, the "Policlinico" di Bari university hospital, the IRCCS "Giovanni Paolo II" in Bari and the IRCCS "S. De Bellis" in Castellana Grotte shall allocate 10 percent of the vacant category A posts within their own staffing structures for the recruitment of workers placed on mobility by private healthcare facilities in Puglia Region".

Article 22 provides that the local health authorities, the university hospitals and the IRCCS from the regional health service shall be required to ensure that their training offices draw up the annual or multi-year trust training plan (*piano aziendale formativo*, PAF) to be implemented in the following year or years before 30 November.

Finally, Article 24 contains provisions on the appointment of directors general of the local health authorities. In particular, paragraph 1 provides for the establishment of a regional list of candidates who are eligible for appointment as a director general in a trust or institute in Puglia Region's health service. According to paragraph 3, "the Regional Council shall issue an appropriate measure to govern the procedures regulating the issue of public notices intended to update the list referred to under paragraph 1 each year, the methodological criteria applicable to the verification as to whether the prerequisites have been met as specified under Article 3a(4) of Legislative Decree no. 502 of 1992, as amended by Article 8 of Legislative Decree no. 254 of 2000, for the purpose of the inclusion of eligible candidates in the aforementioned list on the basis of qualifications held".

8.1. – The President of the Council of Ministers challenges these provisions insofar as they violate Articles 117 and 118 of the Constitution (with reference to the principle of loyal cooperation which must inspire relations between the national health service and the universities) and Article 33 of the Constitution (with reference to the autonomy of the universities) since, given that they also apply to staff from university hospital

trusts, “they prevent the university from identifying the quota of staff that may fall within its remit, thereby negating the trust’s charter and/or the protocols of understanding between the region and the university pursuant to Article 3(2) of Legislative Decree no. 517 del 1999, or any form of understanding” with the rector.

Article 24(1) and (3) is also claimed to violate Article 4(2) of Legislative Decree no. 517 of 1999 – according to which the director general of the universal hospitals is to be appointed by the region in consultation with the rector – because “the eligible candidates included in the list are those chosen by the region, which thereby limits the ability of the rector to choose, since there is no provision for any form of cooperation with the university in identifying the shortlist of candidates”.

8.2. – The question is well-founded.

Leaving aside any assessment of the constitutionality of the reservation of posts provided for under Articles 16(1) and (2) and 19(1) of Puglia Regional Law no. 4 of 2010 (which has not been challenged), the contested provisions also apply to staff in university hospitals, thereby depriving the universities of the right to identify the quota of staff that may fall within their remit, according to the provisions of Article 3(2) of Legislative Decree no. 517 of 1999. It follows that the autonomy of the universities has been violated (Article 33 of the Constitution) insofar as the contested provisions are not precluded from applying to the staff of university hospital trusts, or do not otherwise contemplate any reference to protocols of understanding between universities and hospitals, nor any other form of understanding with the rector (judgment no. 233 of 2006).

The remaining grounds for challenge are moot.

9. – The fifth group of challenges relates to Articles 16(3), 17, 18, 19(8) and 20 of Puglia Regional Law no. 4 of 2010. These Articles provide for stabilisation measures for healthcare staff, to be achieved through the extension of the procedures already contemplated under regional legislation in favour of specific staff categories: integrated domestic assistance service, rehabilitation and integration into schools (Article 16(3)); healthcare staff in general (Article 18); medical directors “working in the accident and emergency and emergency medicine services” (Article 19); and staff from the regional health agency and plan projects (Article 20). On the other hand, with regard to staff working for the ambulance service [*Servizio emergenza territoriale 118*], provision is

made for stabilisation without any reference to previous regional legislation (Article 17).

9.1. – The applicant challenges these provisions first and foremost due to violation of Articles 3, 51 and 97 of the Constitution on the grounds that by expanding the classes of worker to which the stabilisation measures already provided for apply and extending their effects or introducing new arrangements, they breach the principles of recruitment through public competition and impartiality in administrative action.

The contested provisions are claimed to violate Article 117(3) of the Constitution on two counts: first, with regard to the fundamental principles applicable to healthcare set forth under Article 15 of Legislative Decree no. 502 of 1992 since the stabilisation measures provided for, which apply without any selection procedures, contrast with the requirement that positions as medical directors be filled following a public competition based on professional qualifications and examinations; secondly, with regard to the fundamental principles applicable to the coordination of public finances pursuant to Article 17(10), (11), (12) and (13) of Decree-Law no. 78 of 1 July 2009 (Anti-crisis measures and extension of the time limits for the participation of Italy in international missions), converted into Law no. 102 of 3 August 2009, since these provisions of State law – which are also referred to by Article 2(74) of Law no. 191 of 2009 – provide for "new procedures for assessing professional experience acquired through the arrangement of public competitions with a partial reservation of spaces" solely for non-director staff.

9.2. – The question is well founded.

The contested legislation makes provision for measures to stabilise healthcare staff who have worked under a fixed-term contract and/or appointment, which need not have been for an uninterrupted period, without any public competition. This violates first and foremost Article 117(3) of the Constitution, with reference to the coordination of public finances since the contested provisions expand "the range of individuals who may potentially be subject to stabilisation as defined" under State legislation (judgment no. 179 of 2010).

Furthermore, the provisions on the stabilisation of healthcare staff laid down by the contested legislation do not contemplate any selection procedure, and do not require that the staff have carried out specific functions or that there be any specific requirements

conducive to administration, with the result that they violate the principle of recruitment according to public competition pursuant to Articles 3, 51 and 97 of the Constitution.

The remaining grounds for challenge are moot.

10. – The sixth group of challenges relates to Article 21(1), (4), (5) and (6) of Puglia Regional Law no. 4 of 2010 concerning healthcare staff in prisons. Paragraph 1 authorises the local health authorities "to make provision for a reservation of posts in accordance with applicable legislation permitting access to positions in the trust for non-medical healthcare staff whose contracts have been extended until 30 June 2010" in public competitions to be called in order to fill vacant posts in the multi-professional services or operational units falling under Regional Council Resolution no. 2020 of 27 October 2009 (Decree of the President of the Council of Ministers of 1 April 2008 – Specifications relating to the identification of specific organisational models with reference to the type and size of prisons). Paragraph 4 then provides that "the cost relating to the employment of the staff falling under the previous paragraphs shall not be taken into account for the purposes of the thresholds specified under Article 1(565)(a) of Law no. 296 of 2006 on the grounds that it involves the subsequent transfer of functions for which coverage has been ensured by financial resources as provided for under Article 6" of the Decree of the President of the Council of Ministers of 1 April 2008 (Procedures and criteria governing the transfer to the national health service of healthcare functions, employment relations, financial resources and capital assets and equipment in the area of prison healthcare). Paragraph 5 then provides that "medical staff holding a provisional appointment pursuant to Article 50 of Law no. 740 of 9 October 1970 (Regulations on the categories of healthcare staff employed in prisons not included in the staffing structures of the prison administration) shall be treated as equivalent to medical staff employed on a permanent basis pursuant to Article 3(4) of the Decree of the President of the Council of Ministers of 1 April 2008. Such staff shall be included in a dedicated list until completion established with the relevant local health authority. The healthcare staff falling under this paragraph shall have the same legal and economic entitlements as medical staff employed on permanent contracts, including social security and pension contributions". Finally, paragraph 6 provides that "the contracts of employment for doctors from the supplementary healthcare assistance service and specialist doctors falling under Articles 51 and 52 of Law no. 740 of 1970,

as amended respectively by Articles 4 and 5 of Law no. 26 of 15 January 1991, shall be governed by supplementary regional agreements on general medicine and specialist outpatient services, to be approved after the national collective agreements concluded on 27 May 2009 have been signed, pending specific national negotiations dedicated to prison medicine".

10.1. – According to the applicant, Article 21(1) of Puglia Regional Law no. 4 of 2010 violates Article 97 of the Constitution on the grounds that it does not specify the percentage level of the reservation or delineate the area in a rigorous manner, thereby placing obstacles in the way of access to employment by any interested party. Article 21(4) is claimed to violate Article 81 of the Constitution on the grounds that it does not take account of the fact that "the costs incurred for such staff shall be lower than those resulting from the re-classification in consideration of the different remuneration paid to the two categories of staff", thereby creating unfunded financial commitments. Finally, paragraphs 5 and 6 are claimed to violate Article 117(2)(l) and 81 of the Constitution due to the fact that they violate Article 4(3) – or more correctly Article 3(4) – of the Decree of the President of the Council of Ministers of 1 April 2008, according to which, following their transfer to the healthcare trusts, the staff concerned shall continue to remain subject to the legislation set forth under Law no. 740 of 1970 until the expiry of the contract concerned and, if they are employed under a fixed-term contract (such as in the case under examination) expiring before 31 March 2009, that contract shall be extended for a period of twelve months only, which encroaches upon private law and results in costs not covered by the resources provided for under the Decree of the President of the Council of Ministers of 1 April 2008.

10.2. – The questions are well founded.

The contested legislation concerns healthcare staff in prisons and provides first that public competitions be held subject to a reservation of posts rigorously defined, and secondly that medical staff holding a provisional appointment be treated as equivalent to medical staff employed on a permanent basis.

Article 21(1) of Puglia Regional Law no. 4 of 2010 makes generic provision for a reservation of posts, although it is not "delineated in a rigorous manner", and therefore violates Article 97 of the Constitution (judgment no. 100 of 2010).

Article 21(4) does not specify any financial coverage whatsoever for the hiring of the staff concerned, and accordingly violates Article 81 of the Constitution (judgment no. 100 of 2010).

In providing that medical staff holding provisional appointments be treated as equivalent to those employed on a permanent basis, including for pension purposes, Article 21(5) provides for the transformation of provisional relationships into definitive relationships. Paragraph 6 provides that doctors from the supplementary healthcare assistance service be treated as equivalent to specialist doctors falling under Articles 51 and 52 of Law no. 740 of 1970 on the one hand and general and specialist outpatient doctors on the other hand, thereby encroaching upon matters falling to the area of collective agreements. Since the provision for equivalent treatment set forth under the contested provisions applies to relationships under private law, including for pension purposes, it violates Article 117(2)(l) of the Constitution on private law.

11. – The seventh group of challenges relates to Article 26 of Puglia Regional Law no. 4 of 2010, amending Article 17 (Provisions on healthcare expenditure) of Regional Law no. 1 of 12 January 2005 (Provisions on the formation of the 2005 budget and the 2005-2007 multi-year budget of Puglia Region), replacing paragraphs 6, 7 and 8 and introducing paragraph 8a. These provisions stipulate that the remuneration of directors general, healthcare directors and administrative directors in healthcare bodies and institutes be increased and supplemented.

11.1. – The applicant challenges Article 26 of Puglia Regional Law no. 4 of 2010 due to violation of Article 81 of the Constitution on the grounds that it could "give rise to the payment of remuneration exceeding the maximum thresholds provided for under [...] State legislation, thereby creating a difference in treatment compared to other regions and greater costs for Puglia Region".

11.2. – The question is well founded.

In providing that that the remuneration of directors general, healthcare directors and administrative directors in healthcare bodies and institutes be increased and supplemented, the regional legislation results in greater unfunded costs, thereby violating Article 81 of the Constitution. According to the settled case law of this Court, laws establishing new or higher expenses must contain an "express indication" of the relative means of coverage (see *inter alia*, judgments no. 100 of 2010, no. 386 and no.

213 of 2008, no. 359 of 2007 and no. 9 of 1958), and regional legislation is not exempt from that obligation (see *inter alia*, judgments no. 100 of 2010, no. 386 and no. 213 of 2008 and no. 16 of 1991).

The regional provision also violates the principle that remuneration should be reduced, which may be inferred from Article 61(14) of Decree-Law no. 112 of 12 July 2008 (Urgent measures to provide for economic development, simplification, and competitiveness, the stabilisation of public finance and tax equalization), converted into Law no. 133 of 6 August 2008, pursuant to which "Starting from the date of appointment or of the renewal of appointments, the overall remuneration due to directors general, healthcare directors, administrative directors, and the remuneration due to the members of the boards of statutory auditors of local healthcare trusts, hospital trusts, university hospitals, research hospitals providing inpatient and care services and institutes for veterinary preventive medicine shall be reduced by 20 percent compared to the relevant amount on 30 June 2008".

12. – The eighth and ninth group of challenges relate to Article 30 of Puglia Regional Law no. 4 of 2010, which replaces in its entirety Article 25 of Puglia Regional Law no. 25 of 3 August 2007 (Adjustment and second amendment to the budget for financial year 2007) concerning the use of staff from contractor companies and service companies. It provides in particular that the Region, regionally controlled bodies, trusts and service companies in Puglia Region must make provision in calls for tender, notices and under all circumstances in the contractual terms and conditions regulating the award of services that "staff already used by the previous undertaking or company to win the tender be hired on permanent contracts as well as a guarantee that existing financial and contractual conditions will be maintained, if more favourable" (Article 25(1)). The rules set forth under Article 25 of Puglia Regional Law no. 25 of 2007, as amended by Article 30 of Puglia Regional Law no. 4 of 2010, "shall apply on a proportional basis to the quantity of service contracted out" (Article 25(2)).

Pursuant to paragraph 3, "the restrictions set forth under paragraphs 1 and 2, supplementing the provisions of Regional Council Resolution no. 2477 of 15 December 2009 (Amendments and supplements to Regional Council Resolution no. 745 of 5 May 2009 – Criteria and procedures governing the activation of in-house provision – Guidelines applicable to the establishment, activation and administration of service

companies for healthcare trusts and public bodies forming part of the Puglia Regional Health Service), must also apply to activities constituting one of the frontline tasks of healthcare protection, including the necessary support activities of contractor companies". Moreover, the provisions of paragraph 1 also apply "in the event that services have been contracted out to service companies established by the Region, public bodies or healthcare trusts of Puglia Region and between service companies established by the Region, public bodies or healthcare trusts of Puglia Region, subject to the staffing requirements which are in actual fact to be allocated to the provision of the service contracted out" (paragraph 4). Paragraph 5 provides that Article 25 of Puglia Regional Law no. 25 of 2007 shall not apply to directors, but shall apply to the "partners of employment cooperatives without management duties, provided that they have expressly waived or transferred their interests in the cooperative before they are employed by the new company; in any case, partners falling under the previous paragraph shall only be employed after the employees of the cooperative have been employed". Paragraph 6 provides on the other hand that "the service provided by volunteers from charitable associations which have concluded agreements with the healthcare trusts in relation to the ambulance service must be assessed within the ambit of public tender procedures for the recruitment of staff to the ambulance service".

12.1. – In the opinion of the applicant, Article 30 of Puglia Regional Law no. 4 of 2010 violates Article 97 of the Constitution on the grounds that it permits the unlawful employment of individuals originating from cooperative undertakings or companies within regional companies, trusts or public bodies, in breach of the principle of recruitment according to public competition as well as State legislation – Article 18 of Decree-Law no. 112 of 2008 and Article 19 del Decree-Law no. 78 of 2009 – which requires "compliance with public staff selection procedures also by public companies to which services have been awarded, as well as the compliance by the latter with the staff cost reduction measures specified by the controlling administrations".

According to the tone of the challenges raised, it is clear that the applicant does not intend to challenge Article 30 of Puglia Regional Law no. 4 of 2010 in its entirety, but rather solely paragraphs 1 and 4. In fact, the President of the Council of Ministers challenges on the one hand the legislative amendment made by the contested provision, which is claimed to have introduced a general rule that staff formerly used by the

previous successful tenderer be hired “permanently” (paragraph 1), whilst on the other hand objects to the application of that mechanism, which does not allow for any selection procedure, in cases involving the direct award of services to “service companies established by the Region, public bodies or healthcare trusts of Puglia Region and between service companies established by the Region, public bodies or healthcare trusts of Puglia Region” (paragraph 4). In the opinion of the applicant, the combined provisions of these paragraphs violates Article 97 of the Constitution, as well as Article 18 of Decree- Law no. 112 of 2008.

12.2. – The question is well founded as specified below.

The contested provision replaces Article 25 of Puglia Regional Law no. 25 of 2007. As originally enacted, that Article provided that “Without prejudice to the provisions of collective labour agreements, if more favourable, the Region, regionally controlled bodies, trusts and service companies in Puglia Region must make provision in calls for tender, notices and under all circumstances in the contractual terms and conditions regulating the award of services that staff already used by the previous successful tenderer be hired, and the maintenance of existing financial and contractual conditions”.

Therefore, as previously in force, Article 25 of Puglia Regional Law no. 25 of 2007 applied the “social clause” (also known as the “protection” or social “safeguard” clause, or also as the “social absorption clause”), a rule which applies in the event that the tender contract is terminated and transferred to other tenderer undertakings or companies, and pursues the goal of ensuring continuity of the service and employment if the successful tenderer changes. This “clause”, which was already contained in Article 26 of Royal Decree no. 148 of 8 January 1931 (Coordination of the legislation making legal provision to govern collective labour agreements with the legislation on the legal and financial conditions of staff employed on the railways, trams and inland waterway transport operating under licence), has not only been provided for under collective agreements and recognised in case law, but is also stipulated in specific State legislative provisions: for example, Article 63(4) of Legislative Decree no. 112 of 13 April 1999 (Reform of the national collections service, implementing the delegation provided for under Law no. 337 of 28 September 1998), Article 29(3) of Legislative Decree no. 276 of 10 September 2003 containing the “Implementation of delegations to enact legislation on employment and the labour market, pursuant to Law no. 30 of 14

February 2003" and, with reference to contracts with the public administrations, Article 69 of Legislative Decree no. 163 of 12 April 2006 (Code of public works contracts, public supply contracts and public service contracts implementing directives 2004/17/EC and 2004/18/EC).

Article 25(1) of the contested legislation introduces an instrument which is different from the "social clause" since it is not limited to providing for the ongoing employment of staff already hired, but requires the automatic and generalised "employment on a permanent basis" of the staff formerly "used" by the previous undertaking or company to win the tender. Paragraph 4 of that Article then applies this automatic mechanism also "in the event that services have been contracted out to service companies established by the Region, public bodies or healthcare trusts of Puglia Region and between service companies established by the Region, public bodies or healthcare trusts of Puglia Region".

In this way, the contested legislation requires that the new undertaking or company to win the tender "hire on a permanent basis", rather than "use", the staff from the previous undertaking or company to win the tender, and also extend this obligation, without providing for any selection procedure, to companies under public control or full public ownership. This amounts to a violation of Article 97 of the Constitution (judgment no. 267 of 2010) and the interposed legislation laid down by Article 18 of Decree-Law no. 112 of 2008, as amended by Article 19(1) of Decree-Law no. 78 of 2009 on the recruitment of staff to companies in which the public sector holds an equity interest. In fact, Article 18(1) of Decree-Law no. 112 of 2008 provides that "companies under full public ownership managing local public services shall pass resolutions adopting criteria and procedures to govern staff recruitment and the distribution of appointments in accordance with the principles set forth under Article 35(3) of Legislative Decree no. 165 of 30 March 2001". Article 18(2) of Decree-Law no. 112 of 2008 provides that other companies under public control or full public ownership which do not provide local public services – as is the case for operations in the healthcare sector – "shall pass resolutions adopting criteria and procedures to govern staff recruitment and the distribution of appointments in accordance with the principles – including those resulting from Community law – of transparency, publicity and impartiality".

As was argued by the State Counsel, in providing for staff to be hired under permanent contracts rather than the use of staff from the previous undertaking or company to win the tender, Article 30 of Puglia Regional Law no. 4 of 2010 violates Article 97 of the Constitution and the interposed legislation referred to with regard to the "impartiality of administrative action and its uniformity throughout the national territory", as well as with regard to the proper conduct of the public administration. This violation has occurred both due to the lack of any transparent, public and impartial criteria regulating the recruitment of staff by companies under public control or full public ownership, and also because the increased charges resulting from the obligation imposed on the successful tenderer to hire "on a permanent basis" the staff formerly used impinges – including in cases in which the successful tenderers are entirely private undertakings or companies – upon the principles of legality and the proper conduct of the public administration as the tendering authority due to the failure to comply with the provisions of the "social clause", a more limited opening up of the services to competition and greater costs, considering that the obligation extends beyond the period during which the service is awarded under tender.

Without prejudice to the application of the "social clause" *stricto sensu* to the cases specified under the contested provisions, in accordance with the terms laid down under applicable legislation and collective agreements and for the duration of the award of the service, Article 30 of Puglia Regional Law no. 4 of 2010 must be declared unconstitutional with regard to Article 25(1) of Puglia Region Law no. 25 of 2007 as replaced in respect of the words "on a permanent basis" only, and with regard to Article 25(4) insofar as it provides for the stabilisation of staff from the previous undertaking or company to win the tender, without any form of selection.

ON THOSE GROUNDS

THE CONSTITUTIONAL COURT

declares that Articles 2 – with regard to Article 4(1), (2) and (4) of Puglia Regional Law no. 45 of 23 December 2008 (Provisions on healthcare) as replaced – 13, 15, 16(3),

17, 18, 19(8), 20, 21(1), (4), (5) and (6) and 26 of Puglia Regional Law no. 4 of 25 February 2010 (Urgent provisions on health and social services) are unconstitutional;

declares that Articles 16(1) and (2), 19(1), 22(1) and 24(1) and (3) of Puglia Regional Law no. 4 of 2010 are unconstitutional insofar as they do not provide for any exemption for staff from university hospitals, or otherwise to not provide for any reference to protocols of understanding between the universities and hospital trusts or any form of understanding with the rector;

declares that Article 30 of Puglia Regional Law no. 4 of 2010 is unconstitutional – with regard to Article 25(1) of Puglia Regional Law no. 25 of 3 August 2007 (Adjustment and second amendment to the budget for financial year 2007) as replaced – in respect of the words "on a permanent basis" only, and is also unconstitutional with regard to Article 25(4) insofar as it provides for the stabilisation of staff from the previous undertaking or company to win the tender without any form of selection;

rules that there is no longer any matter in dispute with reference to the proceedings concerning Article 19(6) of Puglia Regional Law no. 4 of 2010 initiated by the President of the Council of Ministers by the application referred to in the headnote;

rules that the questions concerning the constitutionality of Articles 2 – with regard to Article 4(1), (2) and (4) of Puglia Regional Law no. 45 of 2008, as replaced – 13, 15, 16(1), (2) and (3), 17, 18, 19(1), (6) and (8), 20, 21(1), (4), (5) and (6), 22(1), 24(1) and (3), 26 and 30 of Puglia Regional Law no. 4 of 2010, initiated by the President of the Council of Ministers with reference to Articles 24 and 31 of the Constitution by the application referred to in the headnote, are manifestly inadmissible;

rules that the questions concerning the constitutionality of Article 30 of Puglia Regional Law no. 4 of 2010 – with regard to Article 25(2), (3), (5) and (6) of Puglia Regional Law no. 25 of 2007, as replaced – initiated by the President of the Council of Ministers with reference to Article 97 of the Constitution by the application referred to in the headnote, are manifestly inadmissible.

Decided in Rome, at the seat of the Constitutional Court, *Palazzo della Consulta*, on 23 February 2011.

(omitted)