Corte costituzionale

JUDGMENT NO. 136 OF 2011

Ugo DE SIERVO, President

Franco GALLO, Author of the Judgment

JUDGMENT NO. 136 YEAR 2011

In this case the Court heard a reference from the Lazio Regional Administrative Court concerning the appointment of the national member of Eurojust. The referring court argued that the decision to appoint, which was made by the Minister of Justice, essentially amounted to a decision relating to the exercise of judicial functions which impinged upon the status of a magistrate, and should as such be reserved to the Supreme Council of the Judiciary. The Court considered the nature and scope of the various functions of the member of Eurojust and, finding that these were not judicial in nature, rejected the question and upheld the legislation as constitutional.

(omitted)

JUDGMENT

in proceedings concerning the constitutionality of Article 2(1) and (2) of Law no. 41 of 14 March 2005 (Provisions implementing Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime), initiated by the Lazio Regional Administrative Court in the proceedings pending between Carmen Manfredda, the Minister of Justice, and others by referral order filed on 21 June 2010, registered as no. 268 in the Register of Orders 2010 and published in the Official Journal of the Republic no. 39, first special series 2010.

Considering the entries of appearance by Carmen Manfredda, the Supreme Council of the Judiciary and Francesco Lo Voi, as well as the intervention by the President of the Council of Ministers;

having heard the Judge Rapporteur Franco Gallo at the public hearing of 8 March 2011;

having heard Counsels Angelo Clarizia for Carmen Manfredda, Massimo Luciani for the Supreme Council of the Judiciary, Salvatore Pensabene Lionti for Francesco Lo Voi and the State Counsel [*Avvocato dello Stato*] Enrico Arena for the President of the Council of Ministers.

(omitted)

Conclusions on points of law

1. – The Lazio Regional Administrative Court questions – with reference to Articles 105 and 110 of the Constitution – the constitutionality of Article 2(1) and (2) of Law no. 41 of 14 March 2005 (Provisions implementing Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime) which, in regulating the appointment of the national member of Eurojust, provide that: a) "The national member seconded to Eurojust shall be appointed by decree of the Minister of Justice out of the judges or magistrates from the public prosecutor's office exercising judicial functions or those not included on the payroll of the judiciary with at least twenty years' service. The magistrate exercising judicial functions shall be placed outwith the payroll of the judiciary" (paragraph 1); b) "Before making the appointment, the Minister of Justice shall first obtain the views of the Supreme Council of the Judiciary on a shortlist of candidates out of which he shall make the appointment, and thereafter request the Council to remove the magistrate appointed from its payroll or, if the magistrate has already been removed from the payroll, shall inform the Supreme Council of the Judiciary of his decision" (paragraph 2).

In the opinion of the referring court, the contested provisions violate the principles invoked in that they grant the Minister of Justice, rather than the Supreme Council of the Judiciary, "the substantive power to choose the national member with Eurojust". According to the lower court in fact, the appointment of that member implies the designation of an ordinary magistrate to carry out activities of a judicial nature which are "essentially typical of those of a magistrate" from the office of the public prosecutor, and hence amounts to a measure which, insofar as it impinges upon the status of the magistrate, the Constitution reserves to the Supreme Council of the Judiciary.

2. – As a preliminary matter, the State Counsel averred that the question concerning Article 2(1) of Law no. 41 of 2005 was inadmissible due to the failure to give reasons as to its non-manifest groundlessness. The State Counsel argues in this regard that the

referring court "did not provide any reason as to why […] appointment by decree of the Minister of Justice should be unconstitutional".

The objection cannot be accepted.

The referring court objects to Article 2(1) of Law no. 41 of 2005 due not to the form of the measure provided for under that provision ("decree of the Minister of Justice"), but rather the exclusive allocation to the Minister – and not to the Supreme Council of the Judiciary – of the substantive power of "appointment". According to the referring court's interpretation, that power is conferred by the combined provisions of paragraphs 1 and 2 of that Article. It follows that the question raised concerns both of the contested paragraphs and that accordingly the referral order has been adequately justified also with respect to Article 2(1).

3. – On the merits the question is groundless.

The referring court raises its objections following a precise argumentative structure. It interprets: a) Article 105 and 110 of the Constitution as reserving to the Supreme Council of the Judiciary, and not to the Minister of Justice, effective decision making power in relation to measures which, in allocating functions typical of the ordinary judiciary to ordinary magistrates, impinge upon their status; b) the contested provisions as reserving to the Minister of Justice the actual decision on the appointment of the Italian member of Eurojust; and c) the legislative framework applicable to Eurojust, to the effect that the national member at that body be granted (as a member of the body or as a member endowed with "judicial powers" to be exercised within the territory of the State) functions which are "essentially typical of a magistrate" from the office of the public prosecutor. The referring court concludes by asserting that the appointment of the Italian member by the Minister, rather than by the Supreme Council of the Judiciary, breaches the principles invoked because it constitutes an "allocation" within the meaning of Article 105 of the Constitution of a magistrate from the office of the public prosecutor to exercise investigative functions inherent in his role.

These interpretative assumptions must be examined individually.

4. – The interpretative assumption contained in letter a) of section 3 that the decision concerning the allocation of ordinary magistrates who perform their functions within the Italian judicial system is essentially vested in the Supreme Council of the Judiciary is consistent with this Court's settled interpretation of the principles invoked.

In fact, it has held that the measures provided for under Article 105 of the Constitution in relation to ordinary magistrates – whether they exercise judicial or investigative functions – fall within the purview of the Supreme Council of the Judiciary, even if they are adopted in the form of a decree by the Head of State countersigned by the Minister or, in the cases provided for by law, by decree of the Minister (see *inter alia* judgment no. 168 of 1963). It is sufficient in this regard to reiterate the findings made in judgment no. 142 of 1973, according to which the autonomy of the judicial order, to which Article 104(1) of the Constitution refers, "indicates […] the different arrangements which the Constitution reserves, and wishes be reserved, with regard to the legal status of magistrates from the judiciary, both by expressly guaranteeing them tenure, pursuant to and subject to the conditions specified in Article 107(1) and also by removing them from any dependence on bodies from the executive, including with regard to matters concerning their status as such. An essential aspect of that autonomy, and hence of the independence itself of magistrates when performing their duties which it is intended to reinforce on an institutional level, consists in the powers allocated to the Supreme Council under Articles 105, 106 and 107 of the Constitution, which must be deemed to include any measure which may directly or indirectly impinge upon that autonomy".

5. – In adopting the interpretation set forth in letter b) of section 3, the referring court argues that, according to the Italian law implementing the European Decision, the "substantive power to choose the national member at Eurojust" is vested in the Minister of Justice, i.e. insofar as it is for the latter to choose the member from a shortlist of candidates – prepared by the Minister herself, according to the practice followed until that time – after acquiring a mandatory, but non-binding, opinion of the Supreme Council of the Judiciary in relation to the candidates.

This interpretation is correct because it complies with the literal wording and rationale of Article 2(1) and (2) of Law no. 41 of 2005, which not only expressly grant the Minister of Justice the power to "appoint" the national member at Eurojust, but also specify that this power is to be exercised after having acquired the "assessments" provided by the Supreme Council of the Judiciary on a shortlist of candidates, thus highlighting that the appointment is the outcome of a choice made by the Minister. Moreover, neither the referring court nor the parties to the main proceedings, nor indeed the practice the hitherto followed in applying Law no. 41 of 2005, has ever cast doubt

on the fact that the national member at Eurojust is to be appointed in substantive terms by the Minister.

6. – The interpretative assumption contained in letter c) of section 3, which plays a central role in the overall argument adopted by the lower court, is on the other hand baseless. Indeed, contrary to the assumption of the referring court, the functions of the national member at Eurojust cannot be regarded as equivalent to the judicial functions "essentially typical of those of a magistrate" from the office of the public prosecutor.

In order to arrive at this conclusion it is necessary to identify the functions which the European Decision and the implementing legislation attribute to Eurojust and to its members, considering the latter as members of the body and as authorities exercising "judicial powers" within the State territory. Once these functions have been identified, it will be necessary to assess whether they can be regarded as equivalent to judicial functions which a magistrate from the office of the public prosecutor exercises within our legal system and whether consequently the national provisions governing the allocation of those functions apply, including in particular those which the Court of Cassation imposes as guarantees for the independence of the judiciary (including Article 105 of the Constitution).

It should be specified in this regard that the limits of the *thema decidendum* require that the examination be limited to the provision applicable in the main proceedings (the original text of "Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime"; Law no. 41 of 2005), without considering the European legislation cited by the parties but not yet implemented, that is: a) Decision 2009/426/JHA of 16 December 2008 (Council Decision 2009/426/JHA of 16 December 2008 on the strengthening of Eurojust and amending Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime), for which the deadline for implementation granted to the Member States will expire on 4 June 2011; and b) Article 85(1) of the Treaty on the Functioning of the European Union, according to which "the European Parliament and the Council, by means of regulations", which have not as yet been adopted, "shall determine Eurojust's structure, operation, field of action and tasks".

In view of the above, it is now necessary to examine in the first place the provisions of European law, and subsequently the national provisions implementing the former.

6.1. – Starting from the European Union legislation, it should be pointed out that Eurojust is a body of the Union vested with legal personality, established by Decision 2002/187/JHA of 28 February 2002, which provides that the body is composed of national members seconded by each Member State "in accordance with its legal system, being a prosecutor, judge or police officer of equivalent competence" (Article 2(1)). The functions of Eurojust may be exercised through a College comprised of national members (Article 10(1)), or through the individual members of the college acting on behalf of Eurojust. The decision to establish Eurojust does not grant that body any adjudicatory function or provide that it carry out activity conducive to the exercise of judicial functions by other supranational bodies. By contrast, it provides that Eurojust shall adopt as reference bodies the investigative or adjudicatory bodies from the individual States and shall contact those offices in order to promote coordination of investigations and prosecutions, submit non-binding requests and operate as an auxiliary to cooperation (Articles 5, 6 and 7). In contrast to the judicial bodies currently provided for under European Union or international law, Eurojust thus operates in a manner ancillary to the operations of the judicial authorities of the Members States, requesting the latter to carry out more effectively and coordinate the "fight against serious crime".

In addition to allocating the aforementioned functions to Eurojust as a supranational body, Article 9(3) of the Decision provides that each State "shall define the nature and extent" of further powers (defined as "judicial") which it "grants" its national member. As is observed in note no. 9404/02, JAI, Eurojust 16, issued by the General Secretariat of the Council of the European Union on 14 June 2002, these powers are exercised by the national member within the territory of the State "on behalf of his own State".

For the purposes of constitutional review, the fact that Article 2(1) of the European Decision provides that the "secondment" of members to Eurojust must occur "in accordance" with the legal system of each State is of particular significance.

It follows from the ancillary nature of the tasks of Eurojust to the activities of State judicial authorities, the reference to "judicial powers" which may be granted to the national members within their respective territories, as well as the reference to national legal systems for the "secondment" of national members that it is necessary to ascertain whether the functions granted to Eurojust and to its members include those elements which, under the Italian constitutional order, enable the functions exercised by the

public prosecutor to be classified as judicial – and not administrative – thereby justifying the provision guaranteeing autonomy and independence, that is the exercise of prosecutions and the activity conducive thereto.

6.1.1. – In particular, as regards Eurojust as a supranational body, it should be observed that Articles 6, 7 and 9 of the European Decision grant it, insofar as it relevant for our present purposes: a) the power to request that measures be adopted by the competent authorities of the Members States concerned, although such requests are not binding for the said authorities; b) the provision of assistance to national authorities (information, and the coordination of inquiries and prosecutions upon request by the aforementioned authorities); c) "support" functions where expressly provided for in respect of investigations or prosecutions involving the competent authorities of one single Member State; and d) a right of "access to the information contained in the national criminal records or in any other register of his Member State in the same way as stipulated by his national law in the case of a prosecutor, judge or police officer of equivalent competence" (Article 9(4)).

These powers and functions do not fall under the judicial functions typical of those of magistrates from the office of the public prosecutor.

First and foremost, with reference to the requests addressed to the competent national authorities, the fact that they are non-binding means that they are not characterised by the features typical of the autonomous exercise of investigative judicial functions, but rather amount to an expression of powers ancillary to the exercise of the said functions, which continue to be reserved on an exclusive basis to the national judicial authorities.

Moreover, as regards the activities of "assistance", "cooperation", "support" or "coordination" carried out by Eurojust for the national authorities in relation to investigations and prosecutions, the generic nature of these terms as well as the fact that such operations are not characteristic of judicial action mean that they are to be classified as administrative activities. In particular, as regards the function of "coordination" – contrary to the assertions of the applicant in the main proceedings – it is qualitatively different from the task of coordination of a judicial nature granted in Italy to the National Anti-Mafia Prosecutor pursuant to Article 371-bis of the Code of Criminal Procedure. It is sufficient in this regard to stress that, when carrying out

"coordination", Eurojust does not dispose of powers similar to those – which are more far-reaching – of the National Prosecutor who may: a) temporarily appoint magistrates from the National Anti-Mafia Directorate and from the district anti-mafia directorates; b) issue specific instructions to district prosecutors "which must be complied with in order to avoid or resolve disputes concerning the procedures according to which coordination of investigative activities is to be achieved"; c) hold meetings with "the district prosecutors concerned in order to resolve disputes which, notwithstanding the specific instructions issued, have arisen and prevented the promotion or effective operation of coordination"; and d) transfer to himself "by order supported by reasons […] the conduct of inquiries relating to any of the offences provided for under Article 51(3a) if the meetings called in order to promote or achieve effective cooperation have been unsuccessful and such coordination has not been possible" (Article 371a(3)(b), (f), (g) and (h) of the Code of Criminal Procedure).

Finally, with reference to the judicial information which may be inferred from public registers, it has already been observed that according to the European Decision, the national member of Eurojust may access it "in the same way as stipulated by his national law in the case of a prosecutor, judge or police officer of equivalent competence" (Article 9(4)). However, it should be pointed out that the possibility of accessing such information directly – which has been appropriately limited to eligible individuals in order to prevent the uncontrolled dissemination of information – does not in itself amount to the exercise of a judicial function, nor is it characteristic of such functions, but constitutes solely a useful aid to the prosecuting administrative or judicial authority. This is confirmed by the fact that various national legal systems (including precisely Italian law, according to Article 118 of the Code of Criminal Procedure) also grant non-judicial authorities access to the aforementioned information on a more or less broad scale, without thereby altering the administrative nature of the activities carried out by them.

6.1.2. – As regards the powers of the member of Eurojust as an authority exercising powers within the territory of the State, pursuant to Article 9(3) of the Decision: "Each Member State shall define the nature and extent of the judicial powers it grants its national member within its own territory. It shall also define the right for a national member to act in relation to foreign judicial authorities, in accordance with its

international commitments". According to this provision, it may be concluded that the States may grant such powers at their discretion, as the verb "define" must be understood as providing that it is for the State to determine whether any "judicial powers" are granted, and if so their extent. The Decision – which according to the provisions of Article 34(2) of the Treaty on European Union, as in force from 1 February 2003 until 30 November 2009, applicable *ratione temporis* to this case, is binding but does not have direct effect – accordingly leaves the choice over whether or not to grant judicial powers to the national members to the individual Member States upon implementation.

6.1.3. – It has therefore been demonstrated that – contrary to the argument adopted by the referring court – the European Decision does not grant any typically judicial power to the supra-national body, nor does it require the individual Member States to grant their national members "judicial powers" to be exercised in their respective territories.

6.2. – Turning now to an examination of national legislation, it should be noted that, when implementing Council Decision 2002/187/JHA, Law no. 41 of 2005 did not grant judicial powers either to Eurojust or to its member as an authority exercising powers within the national territory. Indeed, according to the declarations made in the report accompanying the draft government bill (Records of the Chamber of Deputies, 16th Legislature, no. 4293), Parliament on the one hand acknowledged that the powers of Eurojust as a supra-national body "differ significantly and inherently from those of to issue directions and intervene directly […] granted under the terms of Italian law to the National Anti-Mafia directorate", whilst on the other hand seeking to circumscribe the powers of the Italian member of Eurojust to a merely administrative sphere ("has not considered it appropriate to grant […] judicial powers").

6.2.1. – With regard to the supra-national legal order, the implementing law grants its Italian member, as a member of the college, powers essentially corresponding to those specified under the European Decision which, for the reasons set out above, are not equivalent to those of a magistrate from the office of the public prosecutor (section 6.1.1.).

In particular, as regards judicial information, it should be pointed out that: a) first and foremost, access to such information by the national member of Eurojust is not

direct, but is conditional upon a decision by the competent judicial authority, which may reject the relative request, by order subject to appeal to the Court of Cassation (Article 7(1) and (2) of Law no. 41 of 2005); b) secondly, as noted above, under Italian law (as also under European Union law), the right to access judicial information is not a characteristic feature of judicial powers, even in cases in which it is reserved to the public prosecutor (such as for the register of suspects); and c) thirdly, as mentioned above, that power is not always reserved to the judicial authorities, with the consequence that its granting to the national member at Eurojust would not in itself be sufficient in order to classify the functions performed by that member as judicial. Indeed, Article 118(1) of the Code of Criminal Procedure also grants the Interior Minister – i.e. an authority which without any doubt whatsoever cannot be classified as judicial – the power to obtain "copies of the case files of criminal proceedings and written information relating to their content which is considered indispensable in order to prevent crimes for which arrest is mandatory for those apprehended *in flagrante*, notwithstanding the prohibition set forth in Article 329", as well as authorisation "to access directly the register provided for under Article 335".

6.2.2. – As regards the powers which the member of Eurojust is to exercise within Italy, it has been noted (section 6.2.) that – in exercising the right granted to it under European Union law referred to in section 6.1.2 – Parliament preferred to implement the Council's Decision to the effect that this authority was not granted any "judicial power" within the territory of the State. This arrangement is consistent with the ability of the Minister of Justice to issue directions to the national member, through the Head of Department for judicial affairs, relating to the exercise of his functions (Article 2(3) of Law no. 41 of 2005). Such directions would evidently be incompatible with a finding that the national member of Eurojust has the status of a judicial authority vested with autonomy and independence guaranteed under the Constitution.

7. – In view of the finding, on the basis of the argumentation set out above, that the functions of Eurojust and of the national members are not judicial in nature, the principal premise upon which the challenge formulated by the referring court is based no longer obtains, and accordingly the question of constitutionality raised is groundless.

ON THOSE GROUNDS

THE CONSTITUTIONAL COURT

rules that the question concerning the constitutionality of Article 2(1) and (2) of Law no. 41 of 14 March 2005 (Provisions implementing Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime), raised with reference to Articles 105 and 110 of the Constitution by the Lazio Regional Administrative Court by the order referred to in the headnote, is groundless.

Decided in Rome, at the seat of the Constitutional Court, *Palazzo della Consulta*, on 6 April 2011.

(omitted)