JUDGMENT NO. 176 YEAR 2012

In this case the Court heard a referral order objecting to legislation providing for the payment of extra funds to under-developed regions on the grounds that it imposed the resulting financial burden on the richer regions rather than the state. The Court upheld the application, finding that since the excess financial burdens were to be absorbed by the budgets of the remaining regions, which were subject to strict spending limits, the effect was to encroach upon the financial autonomy of the regions (it being immaterial that the secondary legislation setting out specific arrangements had not yet been enacted). The Court held that whilst "under current legislation, compliance with the principle that action may only be taken in accordance with general rules by no means prevents the adoption of equalising initiatives in favour of economically weaker areas ... [,] this may only be achieved according to standardised legislative and procedural arrangements that do not breach Article 119 of the Constitution".

(omitted)

THE CONSTITUTIONAL COURT

(omitted)

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Article 5-bis of Decree-Law no. 138 of 13 August 2011 (Further urgent measures for financial stabilisation and development), converted with amendments into Law no. 148 of 14 September 2011, initiated by Tuscany Region, Veneto Region and the autonomous Sardinia Region by separate applications served on 14-18 and 15

November 2011, filed in the Court Registry on 17, 23 and 24 November 2011 and registered as nos. 133, 145 and 160 in the Register of Applications 2011.

Considering the entries of appearance by the President of the Council of Ministers;

having heard the judge rapporteur Aldo Carosi at the public hearing of 19 June 2012;

having heard Counsel Massimo Luciani for the autonomous Sardinia Region, Counsel Marcello Cecchetti for Tuscany Region, Counsel Luigi Manzi for Veneto Region and the State Counsel [*Avvocato dello Stato*] Paolo Gentili for the President of the Council of Ministers.

(omitted)

Conclusions on points of law

1. — Three applications have been brought before this Court for examination, filed respectively by Tuscany Region (application no. 133 of 2011), Veneto Region (application no. 145 of 2011) and the autonomous Sardinia Region (application no. 160 of 2011) raising questions concerning the constitutionality of numerous provisions of Decree-Law no. 138 of 13 August 2011 (Further urgent measures for financial stabilisation and development), converted with amendments into Law no. 148 of 14 September 2011.

Having reserved for separate judgments the decisions regarding challenges to different provisions of Decree-Law no. 138, these proceedings will resolve the questions relating to Article 5-bis.

This provision, which was introduced upon conversion and placed under the heading "Development of the regions covered by the convergence objective and implementation of the Plan for the South", stipulates in

paragraph 1 that expenditure in accrued and cash terms incurred annually by each of the five regions included within the "convergence objective" (Basilicata, Calabria, Campania, Puglia and Sicily) may, as regards the national co-financing of Community funds for structural purposes and otherwise development and cohesion resources falling under Article 4 of Legislative Decree no. 88 of 31 May 2011 (Provisions on additional resources and special initiatives to remove economic and social imbalances pursuant to Article 16 of Law no. 42 of 5 May 2009), exceed the expenditure limits imposed by the internal stability pact. Paragraph 2 provides that, in order to safeguard balanced public finances, the Ministry of the Economy and Finance shall adopt a decree, acting in concert with the Minister for Relations with the Regions and Territorial Cohesion and after consulting the Permanent Assembly for Relations between the State, the Regions and the Autonomous Provinces of Trento and Bolzano before 30 September of each year, which shall specify the financial limits applicable to the implementation of paragraph 1 and the arrangements governing the allocation to the State and the remaining regions of the relative excess costs, and shall under all circumstances guarantee compliance with the overall limits laid down by the stability pact and the public finance objectives for the relevant year.

After the applications were filed, Article 32(4)(n) was introduced into Law no. 183 of 12 November 2011 laying down "Provisions on the formation of the annual and multi-year budget of the State (Stability Law 2012)", which excluded from the regional stability pact any "expenditure paid out of the fund for development and social cohesion on a national co-financing basis with Community funds for structural goals and out of the resources identified in accordance with the provisions of Article 6-sexies of Decree-Law no. 112 of 25 June 2008, converted with amendments into Law no. 133 of 6 August 2008, on a subordinate basis and within the limits laid down by the Decree of the Minister of the Economy and Finance issued pursuant to Article 5-bis(2)

of Decree-Law no. 138 of 13 August 2011, converted with amendments into Law no. 148 of 14 September 2011".

1.1. — According to Tuscany Region, the contested provision violates Article 119(3) of the Constitution on the grounds that it introduces a form of solidarity between regions outwith existing equalisation arrangements, as conceived under the said constitutional provision and the consistent implementing legislation contained in Law no. 42 of 5 May 2009 (Governmental authorisation in relation to tax federalism, implementing Article 119 of the Constitution). The provision is also argued to breach Article 119(5) of the Constitution by establishing a mechanism to cover expenditure for investments intended to promote the development of certain regions which are borne by others, whilst the constitutional provision stipulates that the charges necessary in order to remove economic and social imbalances and to promote economic growth of less developed regions must be borne by the state.

Moreover, Article 16 of Law no. 42 of 2009 is also argued to specify in paragraph 1(a) and (e) that the special contributions be used according to objectives and criteria defined in agreement with the Joint Assembly, notwithstanding which they must still be covered out of the state exchequer.

1.2. — According to Veneto Region, Article 5-bis violates Article 119(3) and (5) of the Constitution on the grounds that it establishes the principle of full financial responsibility for each local-government body in relation to the functions vested in it, and provides for only two forms of equalisation, both to be funded by the state: the equalisation fund provided for under Article 119(3) of the Constitution, which is not subject to any restrictions as to its usage, and the "additional resources" and "special measures" in favour of specific municipalities, provinces, metropolitan cities and regions to "promote economic development along with social cohesion and solidarity, (...) to remove economic and social imbalances, (...) to foster the effective exercise of

the rights of the person or (...) to achieve goals other than those pursued in the ordinary implementation of their functions" pursuant to Article 119(5) of the Constitution. The contested provision is also claimed to violate Article 5 of the Constitution by introducing a system that generates unjustified privilege and inequality in favour of less "virtuous" regions based on a mere presumption of "structural inferiority". This is claimed to result in a heightening of the legal and financial difference between situations within the different regional settings.

1.3. — The autonomous Sardinia Region considers that Article 5-bis violates Article 3 of the Constitution with regard to the principle of equal treatment in that it treats in a different manner various regions and areas of the country – such as Sardinia itself – which have analogous and no less serious problems of social and economic development, and on the grounds of reasonableness since, with the goal of bridging structural inequalities between different areas of the country, a greater burden is imposed on regions such as the applicant, which the state itself has considered in its "national plan for the South" to deserve particular social and economic support.

Also according to Sardinia, the contested provision violates Article 119(3) and (5) of the Constitution since, in imposing the economic and financial burden pertaining to initiatives provided for under the "convergence objective" upon excluded regions, which are nevertheless also in a state of social and economic underdevelopment, it aggravates inequalities between backward regions and areas of the country with regard to development conditions, which breaches the principle of equalisation and social cohesion and solidarity provided for thereunder.

1.4. — The arguments of the State Counsel focus on the supposed goal of the contested provision of coordinating public finances, having been enacted with reference to the principles enshrined under Article 117(3) and 119(2) of the Constitution.

The provision is claimed to pursue the goal of the containment of public expenditure and debt restructuring, and the regions are also required to cooperate in the pursuit of these objectives.

According to the State Counsel, the limits invoked by the applicants on the adoption of systems of inter-regional solidarity as introduced by Article 5-bis cannot be found to lie in Article 119 of the Constitution, according to its settled interpretation by the Constitutional Court.

The state representative also objects that Article 5-bis does not introduce a new type of fund compared to that provided for under Article 119 of the Constitution, but was rather enacted as a consequence of the mandatory status of the financial balances stipulated when determining the internal stability pact.

Moreover, as a result of Article 32(4)(n) of Law no. 183 of 2011, the regime allowing for exceptions from the requirements of the stability pact was extended to all regions in receipt of resources paid out of the sources contemplated under Article 5-bis of the Decree-Law, provided that the arrangements laid down in the Ministerial Decree provided for under paragraph 2 of that Article are complied with. According to the President of the Council of Ministers, as a result of the provisions of Article 32(4)(n) of the Stability Law for 2012, the question should be considered to have been superseded.

2. — In the light of the arguments referred to above, it is necessary as a preliminary matter to order that, given their objective connection and the substantive overlap between the objections raised, the three applications be joined for decision in a single judgment.

3. — Again as a preliminary matter, the applications must be ruled admissible with reference to the principle invoked as laid down in Article 119 of the Constitution.

Article 2(1) of Constitutional Law no. 1 of 9 February 1948 (Provisions on proceedings before the Constitutional Court and guarantees on the independence of the Constitutional Court) provides that "If a region considers that a law or another act having the force of a law of the Republic encroaches upon the sphere of jurisdiction allocated to it under the Constitution, the regional executive may resolve to initiate proceedings before the Constitutional Court within 30 days of the publication of the law or of the act having the force of law". Article 32 of Law no. 87 of 11 March 1953 (Provisions on the establishment and functioning of the Constitutional Court) provides that "a question concerning the constitutionality of a law or another act having the force of state law may be initiated by any region that considers that the law or act encroaches upon the sphere of jurisdiction allocated to the region by the Constitution or under constitutional law". Article 127(2) of the Constitution provides that "A Region may question the constitutional legitimacy of a State or regional law or measure having the force of law before the Constitutional Court".

The objections raised by the applicants against the provision under examination must be examined in the light of the aforementioned provisions: it is clear from Article 127(2) that their standing to seize the Court is strictly rooted in the goal of safeguarding the allocation of jurisdiction laid down by the Constitution. In the case under examination, the sphere of jurisdiction that has been encroached upon is not specified with reference to the division provided for under Article 117 of the Constitution; by contrast, the infringement of financial autonomy under Article 119 of the Constitution is alleged, which has repercussions on the exercise of regional powers.

It follows that the existence of a specific and tangible interest to sue consisting in the direct and immediate utility that the applicant may actually obtain if the application is accepted must also be verified against that backdrop. In fact, with regard to the alleged violation of Article 119 of the

Constitution, this Court has already had the opportunity to conclude that there is no "abstract capacity of the contested legislation to impinge upon the financial autonomy of the regions" (judgment no. 216 of 2008). Moreover, that case - in which the question was ruled inadmissible - related to an initiative "implemented using resources from general taxation, with the result that were those provisions to be struck down" – given the lack of a national health fund intended exclusively to finance healthcare expenditure – "it would not entail the redistribution of excess resources to all regions" (judgment no. 216 of 2008).

In contrast to the previous case, in the case under examination, whilst not averring a specific infringement of any powers falling under Article 117 of the Constitution, the applicant regions complain of a specific detriment caused by the limitation of the resources available in relation to the exercise of their powers, and not the compatibility of that limitation with the principles laid down in Article 119 of the Constitution.

This is a consequence of the automatic consequences of the application of the contested provision, which entail both the conservation on a precautionary basis, pending the issue of the ministerial decree, of the funds due from the contributor regions, as well as the deduction of amounts to offset the sum due after the decree has become fully operational.

It may therefore be concluded that the questions raised with reference to Article 119 of the Constitution must be deemed to be admissible in that they establish a link between the breach of jurisdiction and the principle of constitutional law at issue (see judgment no. 216 of 2008).

4. — The questions relating to Article 5-bis of Decree-Law no. 138 of 2011, converted into Law no. 148 of 2011, raised with reference to Article 119 of the Constitution, are well founded as specified below.

The applicants object to the infringement of their prerogatives by the provision, with specific regard to financial autonomy, since the contested

provision entails an aggravation of their accounts and the resulting adjustment to their detriment of the respective stability pacts.

This argument is effectively confirmed both by the clause requiring no change to the overall spending limits laid down under the aforementioned provision as well as the consideration that this clause may be complied with only if those "greater burdens" are reallocated between the state and the "remaining regions". This results in a specific impairment of the sphere of financial autonomy of the remaining regions.

The objections raised by the State Counsel in this regard, who argues that the decree due to be issued by the Ministry of the Economy will be decisive in providing for a fair allocation of the sacrifice and moreover precludes any actually existing detriment at the present time, are not relevant. In fact, Article 5-bis(1) defers to that Decree, provided for under paragraph 2, the power to set the conditions, the financial limits applicable to its implementation and the arrangements for allocating the relative greater charges between the state and the remaining regions.

However, the provision stipulates that the Decree must guarantee compliance with the overall limits specified under the Law with respect to the contribution by the state and the regions to the achievement of public finance objectives for the relevant year. Therefore, were the Decree to be adopted it would not in any sense resolve either the question relating to the failure to respect the principles applicable to equalisation arrangements contained in Article 119 of the Constitution, and subsequent implementing legislation, or the question of the financial detriment that results from the setting aside of regional resources and their usage for solidarity purposes. In fact, the adoption of the Decree – irrespective of how it may be framed – would not prevent the infringement since, even though provision for the agreement of the Joint Assembly has been made, the latter would in any case be requested by the state to reach agreement on a draft decree which, according to Article 5-bis,

must under all circumstances contain a proposal for the allocation of excess costs between the state and the regions. In this respect, whilst the legislative provisions on the one hand stipulate that the Decree shall set the conditions and financial limits applicable to eligibility for the exceptional arrangements, on the other hand it subjects these aspects to the the requirement of no change to the overall limits of the contribution by the state and the regions. It follows that the mechanism set forth under the legislation will in any case entail greater costs and that these costs will be borne both by the state and the applicant local government bodies.

Even if the Decree were not adopted it would not resolve the issue. In fact, Article 17 of Law no. 196 of 31 December 2009 (Law on public accounts and finance – which lays down rules specifying the mandatory principle of a balanced budget set forth in Article 81(4) of the Constitution – provides, in relation to new or increased financial burdens such as those introduced by the contested Article 5-bis, that the state must adopt immediate safeguarding measures (according to the combined provision of paragraphs 1 and 12) to offset the effects associated with the new burdens ("The safeguard clause must under all circumstances guarantee that the burden is matched by relative coverage at the same point in time"). In this case these measures must inevitably consist in reductions to cost authorisations pertaining to ordinary financial relations between the state and the regions that are required to contribute to the solidarity mechanism. In fact, the safeguard clause set forth in paragraph 12 is defined by Parliament as "effective and automatic", and thus consequently entails the setting aside of resources on a precautionary basis as soon as the provision stipulating the greater costs has entered into force.

Moreover, as regards the failure to adopt the Decree, this Court has had the opportunity to reiterate — on an analogous occasion — that "this fact is not however capable of subsequently depriving the applicant region of an

interest to sue. In fact, absent the repeal of the contested provisions, and in any case given their continuing applicability, the state will continue to be authorised to activate that prerogative on the basis of the contents and according to the mechanisms set forth in the legislation currently under review, which the region objects to as invasive" (judgment no. 451 of 2006).

A literal and systemic analysis of the contested provision thus leads to the conclusion that it is not limited to authorising spending out of funds that supplement Community funds as an exception to the terms of the stability pact, but rather imposes the financial consequences of that provision on the state and the other regions, with the purpose of ensuring compliance with the clause requiring no change to overall limits. It is precisely this "call for solidarity", which is objected to by the applicants, that has the effect of rendering the exception set forth in Article 5-bis(1) specifically viable and amenable to implementation, thereby imposing the related burdens not only on the state but also on the other regions.

No such forms of assistance may be established either on the basis of Article 119 of the Constitution or Law no. 42 of 2009, or even under Legislative Decrees no. 68 of 6 May 2011 (Provisions on the tax autonomy of the regions governed by ordinary statute and the provinces, and specification of standard costs and needs within the healthcare sector) or no. 88 of 2011.

The contested provision cannot under any circumstances be classified under the scenario provided for under Article 119 of the Constitution since the said provision and the implementing legislation are explicit in stipulating that initiatives for the purpose of equalisation and those based on solidarity must guarantee additional resources over and above those procured in relation to the exercise of normal functions and that those resources must originate from the state.

This Court has had the opportunity to assert that "state initiatives grounded on differentiation between regions that seek to remove economic and social

imbalances must comply with the arrangements set forth under Article 119(5) of the Constitution and may not alter the general requirements governing the containment of public expenditure, which must be uniform" (judgment no. 284 of 2009). This results in the implicit recognition of the principle that the scenarios and procedures relating to regional equalisation must comply with general rules, which was characteristic the legislative choice of "vertical" equalisation made during the reform of Title V of the Constitution by Constitutional Law no. 3 of 18 October 2001 (Amendments to Title V of Part II of the Constitution).

Under current legislation, compliance with the principle that action may only be taken in accordance with general rules by no means prevents the adoption of equalising initiatives in favour of economically weaker areas. However, this may only be achieved according to standardised legislative and procedural arrangements that do not breach Article 119 of the Constitution, some of which have already been approved by this Court (see judgments no. 71 of 2012, no. 284 and no. 107 of 2009, no. 216 of 2008, no. 451 of 2006 and no. 37 of 2004).

Whilst contribution to the public financing objectives is a mandatory duty of all bodies from the public sector *lato sensu*, which the regions too must also assume through a proportionate bearing of the overall burdens resulting from public finance initiatives (see *inter alia*, judgment no. 52 of 2010), the equalisation of economic imbalances on regional level must comply with the procedures set forth under the Constitution, such that their impact on the consolidated accounts of the public administrations may be addressed, and as the case may be redistributed, through the structurally mandated use of instruments instruments permitted under current financial and accounting legislation.

5. — The constitutional review also inevitably involves Article 32(4)(n) of Law no. 183 of 2011 which, whilst not subject to challenge, confirms and

reinforces the mechanism provided for under Article 5-bis by extending to all regions the facility originally limited to those covered both by the "convergence objective" and the "National Plan for the South", thus resulting in an increase of charges incumbent upon the regions called upon to act out of solidarity. In consideration of the inseparable functional connection between the contested provision and the subsequently enacted provision, which reiterates and amplifies the aspects objected to above, the unconstitutionality of the former must be extended as a matter of consequence to the latter pursuant to Article 27 of Law no. 87 of 1953 (see *inter alia* judgment no. 131 of 2012).

6. — The other questions raised with reference to Articles 3 and 5 of the Constitution are moot.

ON THOSE GROUNDS

THE CONSTITUTIONAL COURT

having reserved to separate judgments the decisions on the remaining questions of constitutionality raised by Tuscany, Veneto and Sardinia regions by the applications referred to in the headnote objecting to Decree-Law no. 138 of 13 August 2011 (Further urgent measures for financial stabilisation and development), converted with amendments into Law no. 148 of 14 September 2011;

hereby,

1) rules that Article 5-bis of Decree-Law no. 138 of 2011, converted with amendments into Law no. 148 of 2011, is unconstitutional;

2) rules that consequently – pursuant to Article 27 of Law no. 87 of 11 March 1953 – Article 32(4)(n) of Law no. 183 of 12 November 2011 laying down "Provisions on the formation of the annual and multi-year budget of the State is unconstitutional. (Stability Law 2012)" is unconstitutional.

Decided in Rome at the seat of the Constitutional Court, Palazzo della Consulta, on 2 July 2012.

(omitted)