JUDGMENT NO. 12 YEAR 2018

In this case the Court heard a referral order concerning legislation from 2011 that purported to stipulate an "authentic interpretation" of a provision enacted in 1990 concerning the pension rights of individuals employed by certain banks. At the time the later legislation was enacted, litigation involving the National Institute for Social Security was pending in which, according to the interpretation adopted until that time by the courts, the INPS would have been unsuccessful, whereas, according to the new interpretation imposed by the contested decree-law, the INPS would have been successful. The Court ruled the contested legislation unconstitutional on the grounds that it encroached upon the functions reserved to the judiciary under the Constitution, interfering with the administration of justice in order to influence the outcome to a particular dispute. The Court referred to the case law of the ECtHR according to which retrospective legislation may not be enacted in such cases "save for overriding reasons of general interest", which on the facts did not obtain in this case.

[omitted]

THE CONSTITUTIONAL COURT

[omitted]

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Article 18(10) of Decree-Law no. 98 of 6 July 2011 (Urgent provisions on financial stabilisation), converted with amendments into Law no. 11 of 15 July 2011, initiated by the Employment Division of the Court of Cassation within the proceedings pending between the *Istituto nazionale della previdenza sociale* [National Institute for Social Security] (INPS) and *Fondo pensioni per il personale della ex Cassa di risparmio di Torino - Banca CRT spa* [Pension Fund for the Staff of the former Cassa di risparmio di Torino - Banca CRT spa], by the referral order of 12 April 2016, registered as no. 135 in the Register of Referral Orders 2016 and published in the Official Journal of the Republic no. 33, first special series 2016.

Considering the entries of appearance by the INPS and *Fondo pensioni per il personale della ex Cassa di risparmio di Torino - Banca CRT spa* along with the intervention by the President of the Council of Ministers;

having heard the Judge-rapporteur Silvana Sciarra at the public hearing of 9 January 2018;

having heard Counsel Sergio Preden for the INPS, Counsel Aurelio Gentili for *Fondo pensioni per il personale della ex Cassa di risparmio di Torino - Banca CRT spa* and the State Counsel [*Avvocato dello Stato*] Gabriella Palmieri for the President of the Council of Ministers.

[omitted]

Conclusions on points of law

1.– The Employment Division of the Court of Cassation questions – with reference to Articles 3, 24(1), 102 and 117(1) of the Constitution, the last-mentioned in relation to Articles 6 and 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), signed in Rome on 4 November 1950, ratified and implemented by Law no. 848 of 4 August 1955 – the constitutionality of Article 18(10) of Decree-Law no. 98 of 6 July 2011 (Urgent provisions on financial stabilisation), converted with amendments into Law no. 11 of 15 July 2011, by which the legislator (purportedly) asserted an authentic interpretation of Article 3(2) of Legislative Decree

no. 357 of 20 November 1990 (Provisions on pension arrangements at public credit institutions).

1.1.– In order to understand the reasons for the objections of the referring court, it is necessary to provide a preliminary account of the legislative framework and case law applicable to such matters.

In relation to – and as a consequence of – the so-called privatisation of public credit institutions, Articles 3(3) and (6) of Law no. 218 of 30 July 1990 (Provisions on the restructuring and supplementing of the assets of credit institutions governed by public law) authorised the government to issue decrees with the status of ordinary legislation with the aim, *inter alia*, of regulating, in accordance with the provisions applicable to general mandatory disability, old age and survivors' insurance, the pension provision for the employees in service and retired former employees of public credit institutions who, as at the date of the entry into force of the law, were not subject to or were exempt from the obligation to register with a mandatory general insurance body on the grounds that the relevant matters were governed respectively by Annex T to Article 39 of Law no. 486 of 8 August 1895 (Law on financial and treasury measures) and Article 15 of Law no. 55 of 20 February 1958 (Extension of survivors' benefits and other arrangements in favour of pensioners covered by mandatory disability, old age and survivors' insurance). The institutions affected were, in particular, on the one hand, *Banco di Napoli* and *Banco di Sicilia*, and on the other hand, eight other public credit institutions (*Istituto bancario San Paolo di Torino*, *Cassa di risparmio delle province lombarde*, *Monte dei Paschi di Siena*, *Cassa di risparmio di Torino*, *Cassa di risparmio di Firenze*, *Cassa di risparmio Vittorio Emanuele per le province siciliane*, *Cassa di risparmio di Padova e Rovigo* and *Cassa di risparmio di Asti*).

Legislative Decree no. 357 of 1990 – the secondary legislation issued under the authority of the parent statute – abolished the exclusive or exemption-based pension regimes of the above-mentioned public credit institutions (Article 5(1)) and, with effect from the salary period in progress on 1 January 1991, brought their employees (current, future and retired) under the mandatory general insurance scheme by requiring them to enrol in the newly created *gestione speciale* [special section] of the *Istituto nazionale della previdenza sociale* (INPS) (Article 1(1) and (2)). It also provided for the parallel transformation of the funds or schemes of former exempted regimes into supplementary funds to mandatory general insurance, and charged them – or, in relation to former exclusive regimes, charged the employers directly – with the function of guaranteeing the overall more beneficial pension provision enjoyed by employees in service or by retired employees on 31 December 1990 (respectively Article 5(2) and Article 4).

In particular, with regard to employees already in receipt of a pension upon the entry into force of Law no. 218 of 1990 (i.e. on 21 August 1990), it was provided that: the *gestione speciale* should take on the burden of covering a share of the pension, determined in accordance with the percentages indicated for each of the abolished regimes in the table annexed to Legislative Decree no. 357 of 1990 (Article 3(2), first sentence); the supplementary funds or the employers should cover the difference between that share – increased as a result of the provisions governing the automatic increases in mandatory general insurance (Article 3(3)) – and the overall more beneficial pension provision to which the pensioners would have been entitled under the exclusive or exemption-based regimes that had been abolished (Articles 3(4) and 4(2)).

Article 3(2) of Legislative Decree no. 357 of 1990, to which the contested provision stipulating an authentic interpretation refers, provides – verbatim – that "The *gestione*

speciale shall take on responsibility, in respect of each recipient of a pension upon the entry into force of Law no. 218 of 30 July 1990, for a share of the pension, which shall be determined in accordance with the percentages indicated in the table annexed to this decree. The share to be covered by the *gestione speciale* for the recipients of pensions granted between the entry into force of Law no. 218 of 30 July 1990 and 31 December 1990 shall be determined in accordance with the legislation applicable to mandatory general insurance for the purposes of establishing the right to and amount of the said pension".

That provision raises an interpretative problem in relation to situations in which the recipients of a pension upon the entry into force of Law no. 218 of 1990 had exercised the right – provided for under some of the abolished exclusive or exemption-based pension regimes – to receive part of the pension as a lump sum upon retirement. In particular, a doubt has arisen as to whether, in such cases, the share imposed on the *gestione speciale* should be determined by applying the percentages indicated in the table annexed to Legislative Decree no. 357 of 1990 on the basis of the amount of the pension actually disbursed by the exclusive or exemption-based regime of origin at the time Law no. 218 of 1990 entered into force (thus without considering the amount previously withdrawn as a lump sum), or the "ideal" or "notional" amount that would have been paid by that regime had the interested party not requested and received the lump sum at the time.

Such an interpretation – which was more favourable for the INPS as it assumed that the *gestione speciale* should not cover, at the percentage rates mentioned, also the share of the pension of the employees of public credit institutions that had previously been capitalised – was endorsed by the INPS itself by Circular no. 104 of 19 April 1991, and was subsequently confirmed by Circular no. 295 of 28 December 1991.

Several years later, the Employment Division of the Court of Cassation endorsed a different interpretation in Judgment no. 1093 of 20 January 2006. Following reasoning that was considered to be consistent with the parent statute, Law no. 218 of 1990 – and in particular with the directional criteria according to which the share of the pension falling to the *gestione speciale* of the INPS should be determined with reference to the "overall pension benefits disbursed" (Article 3(3)(a)) – it inferred the opposite rule from Article 3(2) of Legislative Decree no. 357 of 1990 according to which the *gestione speciale* is required to take on responsibility, at the percentage rates mentioned, also for any share of the pension that may have been liquidated as a lump sum (as it was included in the "overall pension benefits disbursed").

The contested Article 18(10) of Decree-Law no. 98 of 2011 operated within this reference framework. Stipulating the opposite to the position endorsed by the Court of Cassation in Judgment no. 1093 of 2006, it provided that "Article 3(2) of Legislative Decree no. 357 of 20 November 1990 shall be interpreted to the effect that the share of pension benefits as at the date of entry into force of Law no. 218 of 30 July 1990 falling to the *gestione speciale* shall be determined with exclusive reference to the amount of the pension benefits actually paid by the fund of origin as at the aforementioned date, and any share that may have been paid as a lump sum shall be disregarded".

1.2.– In raising the questions concerning the constitutionality of that provision, the Court of Cassation states that it has been called upon to rule on the appeal filed by the INPS against the *Fondo pensioni per il personale della ex Cassa di risparmio di Torino - Banca CRT spa* (hereafter also referred to as the Fund) against Judgment no. 82 of the Turin Court of Appeal, filed on 1 February 2010, by which that court dismissed the

appeal by the INPS and decided to accept the position stated by the Court of Cassation by Judgment no. 1093 of 2006 and accordingly to uphold the decision of the *Tribunale di Torino* ordering the Institute to reimburse to the Fund (it must be presumed, in the percentage amount specified in the table annexed to Legislative Decree no. 357 of 1990) the share of the pension disbursed by it as a lump sum upon retirement.
The referring court considers the questions to be relevant in the proceedings before it since, considering the interpretative status and hence retroactive effect of Article 18(10) of Decree-Law no. 98 of 2011 – which was enacted whilst proceedings were pending before the Court of Cassation – according to its previous finding in Judgment no. 1093 of 2006, "the declaration … [that the legislation is] unconstitutional would entail the dismissal of the appeal […] filed by the INPS, taking account of the absence of any other decisions with contrary effect and the consistency of the legislative text with the criteria laid down by the parent statute".
According to the referring court, the contested Article 18(10) is unconstitutional on two grounds.
It is argued that it violates first and foremost Articles 3, 24(1) and 102 of the Constitution because, in view of the consolidated case law stipulating otherwise, it cannot be considered that it was necessary in order to resolve a situation of uncertainty concerning the application of the provision interpreted or to endorse a possible variant in the meaning of its original wording. This is argued to result in a breach of the limits on the retroactive effect of legislation as identified by this Court, which are necessary in order to safeguard the fundamental values of legal culture, such as the principle of reasonableness, the protection of legitimate expectations, legal consistency and certainty and respect for the functions reserved to the judiciary under the Constitution.
The contested provision is, secondly, claimed to violate Articles 24(1), 102 and 117(1) of the Constitution, the last-mentioned in relation to Article 6 ECHR because, insofar as its subjective scope is "de facto" limited to the *Fondo pensioni per il personale della ex Cassa di risparmio di Torino - Banca CRT spa* and hence intended to alter the "legal status [of that] single […] addressee, moreover whilst litigation is ongoing in parallel between this body and the INPS", with the purpose – as expressly declared in the "accompanying report to the draft legislation tabled in the Chamber of Deputies" – of conditioning the outcome of that litigation by releasing the Institute from the related financial burden, it is claimed to encroach upon the functions reserved to the judiciary under the Constitution, interfering in the administration of justice with the aim of influencing the outcome to a particular dispute.
2.– It must be noted as a preliminary matter that, within its entry of appearance in the proceedings, the *Fondo pensioni per il personale della ex Cassa di risparmio di Torino - Banca CRT spa* argued that further interposed provisions had been violated in addition to those indicated in the referral order, including in particular Article 14 ECHR and "Protocol no. 12".
Those objections relate to questions that were not raised by the referring court, and are therefore inadmissible. According to the settled case law of this Court, "the object of interlocutory constitutionality proceedings is limited to the provisions and to the parameters stated in the referral order; therefore, it is not possible to consider further questions or aspects of constitutionality invoked by the parties in excess of the limits indicated in the referral orders, including those averred but not endorsed by the referring court as well as those that seek to subsequently expand or alter the content of those

orders (*inter alia*, Judgments no. 96 of 2016; no. 231 and no. 83 of 2015)" (Judgment no. 29 of 2017; to the same effect, Judgment no. 250 of 2017).

3.– Due to the absence of any relationship of logical and legal priority between the questions raised, this Court may examine the second question first, namely that by which the referring court objects that the contested Article 18(10) of Decree-Law no. 98 of 2011 encroached upon the functions reserved to the judiciary under the Constitution, interfering with the administration of justice in order to influence the outcome to a particular dispute.

That question is well founded.

3.1.– It has been the settled position of this Court that, whilst (without prejudice to the special protection reserved to the criminal law under Article 25(2) of the Constitution) the legislator is not permitted to enact retroactive legislation – whether setting out an authentic interpretation or making new provision with retroactive effect – with reference to the functioning of the judiciary, it cannot be permitted to "resolve specific disputes through litigation […], violating the principles governing relations between the legislature and the judiciary concerning the protection of rights and legitimate interests" (Judgment no. 94 of 2009, section 7.6 of the *Conclusions on points of law*; see also Judgments no. 85 of 2013 and no. 374 of 2000).

Again with regard to the relationship between retroactive legislation and the exercise of judicial powers, this Court has also observed that the constitutional principle of equality between the parties is violated "whenever the state legislator enacts into law a *ius singulare*, which results in an imbalance between the two positions in play" (Judgment no. 191 of 2014, section 4 of the *Conclusions on points of law*; also followed in Judgment no. 186 of 2013).

3.2.– As far as the review of retroactive legislation is concerned, this Court has repeatedly asserted that the principles of national constitutional law are consistent with those laid down in the ECHR (among many judgments, see Judgment no. 191 of 2014). When called upon to decide whether the State has violated the right of applicants to a fair trial through the introduction of retroactive legislation, the European Court of Human Rights (ECtHR) has consistently held that, as a matter of principle, the legislator is not prohibited from regulating the rights resulting from applicable legislation in the area of civil law by enacting new provisions with retroactive effect. It has clarified that "the principle of the pre-eminence of the right and concept of a fair trial enshrined in Article 6 preclude interference by the legislator in the administration of justice with the aim of influencing the judicial outcome to a dispute save for overriding reasons of general interest", and went on to add that "the requirement of equality between the parties implies an obligation to offer to each party a reasonable opportunity to present its own case without finding itself in a situation of clear disadvantage compared to the other party" (see, among many, judgments of 25 March 2014 in *Biasucci and others v. Italy*, paragraph 47; of 14 January 2014 in *Montalto and others v. Italy*, paragraph 47; and of 7 June 2011, *Agrati and others v. Italy*, paragraph 58).

In order to verify the compatibility of retroactive provisions with Article 6 ECHR, the ECtHR usually refers to certain elements, which are considered symptomatic of a distorted use of legislative powers. These include the method and timetable followed by the legislator (*inter alia*, judgment of 11 December 2012, *Tarbuk v. Croatia*, paragraph 40). It may therefore be relevant that the State or a public administration is a party to the trial (among many judgments, see judgment of 24 June 2014, *Azienda agricola Silverfunghi sas and others v. Italy*, paragraph 77). The foreseeability of the legislative

intervention may also be relevant (among many judgments, judgments of 24 June 2014, *Cataldo and other v. Italy*, paragraph 50; *Tarbuk v. Croatia*, paragraph 53; of 27 May 2004, *OGIS-Institut Stanislas, OGEC St. Pie X et Blanche de Castille and others v. France*, paragraph 72; and of 23 October 1997, *National & Provincial Building Society, Leeds Permanent Building Society and Yorkshire Building Society v. United Kingdom*, paragraph 112). The ECtHR has also focused on the adoption of provisions in parallel with a particular development in the litigation, taking account also of its stage (*inter alia*, see judgments in *Azienda agricola Silverfunghi sas and others v. Italy*, paragraph 77 and *Tarbuk v. Croatia*, paragraph 54). The time when the legislation is enacted is also symptomatic, if many years have passed before the legislator has decided to intervene (among many judgments, judgment of 15 April 2014, *Stefanetti and others v. Italy*, paragraph 42).

3.3.– In the case under examination, although the legislation adopted by the government in Article 18(10) of Decree-Law no. 98 of 2011 was enacted in the form of a formally abstract rule, it is clearly intended to affect the outcome of a dispute pending between the *Fondo pensioni per il personale della ex Cassa di risparmio di Torino - Banca CRT spa* and the INPS in a manner favourable to the public social security body.

The legislator's intention to affect the outcome to this specific dispute is confirmed by various factors.

The time when the supposedly authentic interpretation was enacted indicates that, although the interpretative problem relating to Article 3(2) of Legislative Decree no. 357 of 1990 arose immediately after it entered into force, the contested Article 18(10) of Decree-Law no. 98 of 2011 was issued by the government almost twenty-one years later. At that point in time, an appeal was pending before the Court of Cassation, which had been brought by the INPS in 2010 against the judgment by which the Turin Court of Appeal had upheld the decision against the Institute at first instance on the basis of the only precedent of the Court of Cassation mentioned. Had it been followed, this precedent would have led to an outcome to the dispute that would have been definitively unfavourable to the social security body.

The intention of the legislator to influence the outcome to that dispute is clearly confirmed by the assertions contained in the technical report on the draft bill on the conversion into law of Decree-Law no. 98 of 2011 (S. 2814). According to the judgment of the Turin Court of Appeal, which has been challenged in the main proceedings, the INPS was ordered to pay a sum of money to the *Fondo pensioni per il personale della ex Cassa di risparmio di Torino - Banca CRT spa*. The report mentioned above expressly states that the interpretative provision is intended to confirm the interpretation adopted within the administrative practice of the INPS. The interpretation concerning the determination of the share of the "existing pension benefit" to be borne by the *gestione speciale* of the INPS sought to avoid a situation in which, due to the ongoing litigation, the liability of the social security body would increase by a figure exactly corresponding to the aforementioned amount, which had not been considered within the budgeting for the public finances under applicable legislation. It may be added that the *Fondo pensioni per il personale della ex Cassa di risparmio di Torino - Banca CRT spa* is the only party cited in the technical report.

The assertions contained in that report unequivocally confirm that Article 18(10) of Decree-Law no. 98 of 2011 not only resolves the dispute pending between the Institute and the *Fondo pensioni per il personale della ex Cassa di risparmio di Torino - Banca CRT spa* in favour of the INPS – subject obviously to the effects of this Court's decision

concerning the questions of constitutionality – but also that the influence on those specific proceedings in actual fact constituted its main objective.
The aspects set out above also refute the argument – proposed both by the INPS and by the President of the Council of Ministers – that the contested Article 18(10) of Decree-Law no. 98 of 2011 could be justified by the need to re-establish an interpretation that is more closely aligned with the original intention of the legislator and thereby to remedy a technical flaw within the provision interpreted, namely Article 3(2) of Legislative Decree no. 357 of 1990.
With regard to the ground for challenge under examination, both the INPS and the State Counsel's Office have also argued that any intention to affect the outcome to the proceedings before the referring court could be excluded by the fact that, in clarifying the criteria for determining the share of the pension to be borne by the *gestione speciale* pursuant to Article 3 of Legislative Decree no. 357 of 1990, Article 18(10) lays down general and abstract provisions applicable to "all credit institutes (in total 10) mentioned in the schedule" to that decree and which is "intended to apply to all Funds that [provide for] lump sum payments […], without any exception" (according to the entry of appearance by the INPS). However, the position of the *Fondo pensioni per il personale della Cassa di risparmio Vittorio Emanuele per le province siciliane* was resolved by Judgment no. 1093 of 2006 of the Court of Cassation. Neither the INPS nor the State Counsel has indicated any funds (or schemes) of former exemption-based regimes other than the *Fondo pensioni per il personale della ex Cassa di risparmio di Torino - Banca CRT spa* that, in providing for the right to withdraw part of the pension as a lump sum, are involved in any dispute with the INPS with a view to obtaining a refund of the percentage specified in the schedule to Legislative Decree no. 357 of 1990. It must therefore be confirmed that, although Article 18(10) of Decree-Law no. 98 of 2011 lays down a formally abstract rule, it furthers the aim not of resolving a broader dispute but of influencing, in favour of the INPS, the outcome of a specific dispute between the INPS and the *Fondo pensioni per il personale della ex Cassa di risparmio di Torino - Banca CRT spa*.
The State Counsel asserts that the contested provision seeks to "guarantee the equilibrium between the resources available and the pension benefits disbursed, in accordance with both Article 3 of the Constitution […] and with the limitation imposed by Article 81(4) of the Constitution" and was adopted "for the […] purpose of excluding […] onerous effects, very large in magnitude, that would be liable to compromise the equilibrium within the public finances and the commitments made by Italy towards the European Union in relation to the containment of expenditure on pensions". It must however be noted that the costs of the dispute with the *Fondo pensioni per il personale della ex Cassa di risparmio di Torino - Banca CRT spa* – including both that in progress, relating to the period between 1 January 1991 and 31 December 2007 (amounting to 45 million euros, as is apparent from the judgment of the Turin Court of Appeal), as well as any dispute that may be brought by the Fund for the subsequent period – are not liable to have a significant impact on the sustainability of the pension system and on the equilibrium within the public finances. On the other hand, the ECtHR has held that a measure of a financial nature cannot constitute an overriding reason of general interest where its impact is minor in scale (judgment of 11 April 2006, *Cabourdin v. France*, paragraphs 37 and 38).
3.4.– Thus, in terms of the constitutional parameters and the interposed Convention provision, the principles concerning relations between the legislator and the judiciary,

along with the provisions guaranteeing effective judicial protection for the rights of all, have been violated with regard to the aspect under examination, as asserted.

4.– Article 18(10) of Decree-Law no. 98 of 6 July 2011 must therefore be declared unconstitutional with reference to Articles 24(1), 102 and 117(1) of the Constitution, the last-mentioned in relation to Article 6 ECHR.

5.– The further ground for unconstitutionality averred by the Court is therefore moot.

ON THESE GROUNDS

THE CONSTITUTIONAL COURT

declares that Article 18(10) of Decree-Law no. 98 of 6 July 2011 (Urgent provisions on financial stabilisation), converted with amendments into Law no. 111 of 15 July 2011, is unconstitutional.

Decided in Rome at the seat of the Constitutional Court, *Palazzo della Consulta*, on 9 January 2018.