JUDGMENT NO. 44 YEAR 2011

In this case the Court considered a direct reference from the President of the Council of Ministers challenging legislation enacted by Campania region concerning environmental matters, including the allocation of EU funding designated for water purification works to the construction of pipes for the discharge at sea of waste water, arguing that the stated purpose of preventing coastal erosion (under regional competence) was merely a pretext. The Court accepted this view and struck down the legislation as unconstitutional on the grounds that the region had infringed the State's jurisdiction over envirionmental law, along with further provisions concerning dog parks and the location of installations for the production of energy from renewable sources.

(omitted)

JUDGMENT

in proceedings concerning the constitutionality of Article 1(12), (16) and (25) of Campania Regional Law no. 2 of 21 January 2010 (Provisions on the formation of the annual and multi-year budget of Campania Region – Finance Law 2010), initiated by the President of the Council of Ministers by an application served on 22-24 March 2010, filed in the Registry on 30 March 2010 and registered as no. 51 in the Register of Applications 2010.

Considering the entry of appearance by Campania Region;

having heard the Judge Rapporteur Alfio Finocchiaro in the public hearing of 25 January 2011;

having heard Counsel Vincenzo Cocozza for Campania Region and the State Counsel [*Avvocato dello Stato*] Antonio Palatiello for the President of the Council of Ministers.

(omitted)

Conclusions on points of law

1. – The President of the Council of Ministers challenged various provisions of Campania Regional Law no. 2 of 21 January 2010 (Provisions on the formation of the annual and multi-year budget of Campania Region – Finance Law 2010) including *inter alia*: the last sentence of Article 1(12), due to violation of Article 117(1) and (2)(e) and (s) of the Constitution, Article 1(16), due to violation of Article 117(1) and (2)(e) and (s) of the Constitution, and Article 1(25), due to violation of Article 117(2)(s) and (3) of the Constitution.

Due to the fact that the questions of constitutionality referred to above are homogeneous in nature, they have been separated from the other questions raised in the application.

2. – As a preliminary matter the Court confirms the order issued at the public hearing, which is annexed to this judgment, ruling inadmissible the entry of appearance by Campania Region, as the "ratification" of the first entry of appearance – which was ordered by Director's Decree no. 231 of 26 March 2010 and effected by the General Affairs and Litigation, Counsel Service [*A.G.C. Avvocatura*] – by the Regional Executive after the expiry of the time limits for the filing of an entry of appearance cannot be considered to have remedying effect.

3. – The last sentence of Article 1(12) of Campania Regional Law no. 2 of 2010 provides that Community funds (resources from the European Regional Development Fund – ERDF) may be used by the Region in order to finance the construction of

underwater pipes along artificial canals with high pollutant content from the Domitio-Flegreo shoreline for the seabed discharge of low flows.

According to the applicant, the provision for the financing implicitly permits such initiatives, which are however incompatible with the intended purpose of the public resources for the construction of works aimed at guaranteeing the correct purification of waste water prior to disposal, thereby breaching the national and Community legislation on water, including in particular Directive no. 2000/60/EC of 23 October 2000 (Directive of the European Parliament and of the Council establishing a framework for Community action in the field of water) and part III of Legislative Decree no. 152 of 3 April 2006 (Provisions concerning environmental matters), and furthermore does not take account of the institutional goals for determining and sharing objectives between the European Community, the State and the Regions aimed at the full implementation of that legislation.

3.2. – The question is well founded.

3.3. – The purpose of the contested provision is to discharge in the high seas, using underwater pipes, waste water from tributary channels along the Domitio-Flegreo stretch of shoreline during low-flow periods. It is evident that, as a provisional remedy pending the completion of projects for the purification of polluted waters, the waste water will not be subject to any treatment prior to disposal.

The legislation governing water discharges, as more generally that providing for the protection of water against pollution, may be classified under environmental law which falls under the exclusive jurisdiction of the State pursuant to Article 117(2)(s) of the Constitution (judgments no. 246 and no. 251 of 2009).

The margin of initiative which national legislation leaves to the regions does not justify any such measure.

The contested provision constitutes a glaring departure both from the Community framework legislation on sea pollution as well as the purposes pursued and the instruments provided for under State environmental protection legislation, such that the arrangements specified by the region cannot be justified, notwithstanding their temporary basis, nor can any association be ascertained between the goals set forth under Article 1(12) (“the provision of a remedy for the occurrence of coastal erosion”), and the technical solution adopted (the discharge on the high seas of the waste water from the channels).

Directive no. 2000/60/EC promotes (Article 1) the protection of territorial and marine waters, and the achievement of the objectives of relevant international agreements, including those which aim to prevent and eliminate pollution of the marine environment, with the gradual cessation of discharges, emissions and losses of hazardous substances with the ultimate aim of achieving concentrations in the marine environment near background values for naturally occurring substances and close to zero for man-made synthetic substances. The minimum prerequisites of the programme of measures to be adopted by the Member States (Article 11) include the taking of all appropriate steps not to increase pollution of marine waters, specifying also (in paragraph 6) that the application of the measures adopted may on no account lead either directly or indirectly to increased pollution of surface waters.

The national legislation in this area provides for protection for waters through complex planning, programming and implementation (Article 56 of Legislative Decree no. 152 of 2006, also known as the “Environmental Code”) with the purpose *inter alia* of protecting territorial and marine waters and achieving the objectives of relevant

international agreements, including those which aim to prevent and eliminate pollution of the marine environment, with the purpose of the cessation or phasing-out of discharges, and under all circumstances the prevention of further deterioration (Article 73). A fundamental instrument for programming, implementation and control is the water protection Plan specifying the minimum environmental quality objectives for bodies of water provided for under the technical provisions of the Environmental Code, which the Region must draw up and update with a view to the progressive achievement of quality objectives (Article 76).

The legislation on discharges is enacted under the Environmental Code requiring compliance with the quality objectives for water bodies, and under all circumstances within the threshold values specified in Annex 5 to Part III of Legislative Decree no. 152 of 2006, which may not be set aside by the Regions (Article 101), subject to a requirement of pre-treatment for the most harmful discharges. The discharge of material in the sea is permitted (Article 109) solely for sediments from the seabed or from brackish water or from uncovered shorelines, inert materials, inorganic geological materials and manufactured items for the sole purpose of the use of organic and inorganic material of marine or brackish origin produced during fishing at sea, in lagoons or in brackish ponds, provided that the environmental compatibility and harmlessness has been demonstrated.

Taking account of this system, the legislation enacted by Campania Region (the water protection plan of which has not been changed since 2007) appears to be entirely detached from the strategy set out on national level.

The stated goal of remedying coastal erosion is most likely a pretext in order to justify the enactment of legislation in an area falling under regional jurisdiction (as the recovery of coastal areas is considered to be: see judgment no. 259 of 2004): the goal is technically impossible to achieve with the measure designated, which has the sole purpose of discharging in the sea stagnant refluent water within shoreline channels during low-flow periods, in clear breach of State environmental protection legislation, which seeks to prevent and eliminate pollution of the marine environment, with the gradual cessation or elimination of discharges.

Ultimately, the provision is unlawful on the grounds that it violates Article 117(1) and (2)(s) of the Constitution.

Since this question has been accepted, the challenge made with reference to Article 117(2)(e) of the Constitution is moot.

4. – Article 1(16) of Campania Regional Law no. 2 of 2010 provides that the municipalities falling within the territory of parks and mountain areas may create dog parks [*aree cinofile*] equipped exclusively for the training of hunting dogs, and specify the facilities which also enable sheepdogs, utility dogs, pet-therapy dogs and search and rescue dogs to be trained. The parks and mountain territories will also be allocated for those uses – in order to re-launch the economy of these territories through dog-related tourism – "as appropriate with the agreement of park management bodies", which will be made available to cooperatives of young persons resident in the municipalities concerned or to agricultural entrepreneurs (including individuals and associates) as well as dog-enthusiast and hunting associations. The provision also enables livestock trials for the purpose of the breeding of hunting and sheep dogs included in the dog register to be carried out in these areas throughout the year.

According to the applicant, the provision is considered to breach Law no. 394 of 6 December 1991 (Framework Law on protected areas), Article 11 of which provides that

every park shall, taking account of its individual circumstances, make provision in its regulations for the exercise of activities permitted within the territory falling within its competence, without prejudice to the prohibition on all activities and works which may compromise the safeguarding of the landscape and natural habitats protected both in respect of their fauna and flora as well as the respective habitats.

4.1. – The question is well founded within the limits specified below.

4.2. – Subject to compliance with the uniform standards specified under State legislation enacted in accordance with its exclusive jurisdiction over environmental law pursuant to Article 117(2)(s) of the Constitution – which is the area of law applicable to protected areas in respect of which Law no. 394 of 1991 lays down fundamental principles (judgments no. 20 and no. 315 of 2010 and no. 366 of 1992) – the region exercises its legislative powers, and in doing so may not depart from those uniform standards, although it may provide for higher standards of protection, provided that this falls within its jurisdiction (judgments no. 193 of 2010 and no. 61 of 2009).

The territory of the parks, including both national and regional parks, may indeed be regulated by the region in respect of the matters falling under Article 117(3) and (4) of the Constitution, provided that it respects the minimum level of safeguards for natural heritage, which are to be regarded as binding upon the regions (judgment no. 232 of 2008).

The State legislation applicable to protected areas, which furthers the essential purposes of nature protection by subjecting parts of the territory to special protection, manifests itself not only through the limitations on the conduct of hunting (judgment no. 315 of 2010), which indubitably includes the training of hunting dogs (judgments no. 350 of 1991 and no. 165 of 2009), but also in the provision of policy and management instruments in order to assess whether the activities carried on in the parks meet with the protection requirements of fauna and flora (judgment no. 387 of 2008).

Article 11 of Law no. 394 of 1991, which was correctly identified in the application as an interposed provision, reserves the regulation of compatible activities within the boundaries of the protected territory to the park regulation, which is adopted by the park authority and approved by the Minister of the Environment, after obtaining the opinion of the local authorities, and in any case subject to agreement with the regions. The provisions contained in the Regulations must comply with the parameters set forth by the Law, which include a prohibition not only on capture, killing and harming but also on the "disturbance of animal species" (paragraph 3(a)), operating within an integrated conception of natural habitat, which is protected in accordance with Community law obligations, which stipulate a prohibition on "disrupting protected animal species, in particular during the stages of the reproductive cycle or during hibernation, wintering and migration" (Article 8(d) of Presidential Decree no. 357 of 8 September 1997, Regulation implementing Community Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora).

The conduct of activities which – notwithstanding their relationship with requirements of local economic development – according to the contested legislation lead to a particular influx of people and animals into the park territory is to be subject to technical regulation by the body responsible for the protected area (judgment no. 108 of 2005), in accordance with a procedure which also requires the cooperation of the regions and the local authorities. The regional legislation aimed at the conduct of activities which, by making provision for the training of dogs, not limited to hunting dogs, and for livestock trials, end up having an impact on the natural habitat, does not

appear to respect the environmental protection standards provided for under State legislation.

Compliance with the standards of protection is also required in relation to the regional parks – the scope of the contested provision appears to general – which may be regulated under regional legislation (Article 22(d) of Law no. 394 of 1991) subject to compliance with the principles set forth in Article 11: these principles include the prohibitions which the State law stipulates as essential conditions for the very existence of special nature conservation areas, as well as the requirement that the park management body bear responsibility for the promotion of initiatives intended to promote the economic, social and cultural growth of the resident communities, operating in a coordinated manner with those of the regions and the local authorities (Article 25(3)).

On the other hand, pursuant to Article 1(16) of the Campania Regional Law, the creation of dog parks is reserved directly to the municipalities, subject to the merely contingent cooperation ("as appropriate with the agreement") of park management bodies (on the requirement for agreement over matters relating to nature protection, see judgments no. 437 of 2008 and no. 378 of 2007).

Ultimately, the provision is unconstitutional due to violation of Article 117(2)(s) of the Constitution, with regard solely to its application to the territories falling within the parks, but not also to mountain areas.

Since the question has been accepted, the challenge formulated with reference to Article 117(2)(e) of the Constitution, which was moreover not supported by reasons on this point, is moot.

5. – Article 1(25) of Campania Regional Law no. 2 of 2010 stipulates that power stations producing energy from renewable sources may not be located at a distance of less than five hundred linear metres from winegrowing areas for DOC [*denominazione di origine controllata*, controlled designation of origin] or DOCG [*denominazione di origine controllata e garantita*, controlled and guaranteed designation of origin] brands, and at a distance of less than one thousand linear metres from agri-tourism businesses located within such areas.

According to the applicant, the provision identifies areas which are not eligible for the establishment of installations for the production of electricity from renewable sources, in breach of Article 12(10) of Legislative Decree no. 387 of 29 December 2003 (Implementation of Directive 2001/77/EC on the promotion of electricity produced from renewable energy sources in the internal electricity market). According to the applicant, the correct establishment of installations (including in particular wind turbines) in countryside locations is a matter for guidelines adopted by the Joint Assembly, acting on a proposal by the Minister for Productive Activities, and in concert with the Minister for the Environment and Territorial Protection and the Minister for Cultural Heritage and Activities. The contested provision is therefore claimed to encroach upon the State's jurisdiction over environmental protection pursuant to Article 117(2)(s) of the Constitution, as well as Article 117(3) on the grounds that it contrasts with the fundamental principles of State legislation on the production, transport and national distribution of energy.

5.1. – The question is well founded.

5.2. – Absent guidelines approved by the Joint Assembly, the regions are not permitted to impose limits on the possibility to construct installations for the production

of energy from renewable sources in particular areas of the regional territory (see judgments no. 119 and no. 344 of 2010, no. 166 and no. 382 of 2009).

The legislation relates to the area of law over which legislative jurisdiction is shared regarding the "production, transportation and distribution of energy", in which the regions are bound by the principles laid down under State legislation (see judgments no. 124, no. 168, no. 332 and no. 366 of 2010).

The provision in paragraph 9 of Article 12 of Legislative Decree no. 387 of 2003 that the previous paragraphs (including paragraph 7) are to apply, irrespective of the provisions of paragraph 10 (namely the issue of State guidelines) does not legitimate regional legislation on the matters covered by those provisions, in particular to the effect of prohibiting the construction of installations for the production of energy from renewable sources in particular areas of the regional territory.

Paragraph 9 has the effect that the regions may under all circumstances authorise installations, irrespective of the regulations applicable to the procedure, which paragraph 10 stipulates require approval by the Joint Assembly, acting on a proposal by the Minister for Productive Activities, and in concert with the Minister for the Environment and Territorial Protection and the Minister for Cultural Heritage and Activities. In making provision for construction in agricultural areas, paragraph 7 stipulates that account must be taken of requirements to support the agricultural market and to promote local food and agricultural traditions, the protection of biodiversity and the rural landscape. These are requirements which must be considered during the inquiry stage prior to the issue of the single authorisation within the overall assessment of the various interests to be considered by the Services Assembly, but not also of the values which the region may protect on its own initiative on a preventive basis – as specified under regional legislation – to the detriment of the need to promote the greatest dissemination of renewable energy installations.

In conclusion, the first sentence of Article 1(25) of Campania Regional Law no. 2 of 2010 is unconstitutional, due to violation of Article 117(3) of the Constitution, whilst the second sentence is a provision with self-standing content which is merely of a financial nature.

ON THOSE GROUNDS

THE CONSTITUTIONAL COURT

rules that the entry of appearance by Campania Region is inadmissible;

declares that the last part of Article 1(12) of Campania Regional Law no. 2 of 21 January 2010 (Provisions on the formation of the annual and multi-year budget of Campania Region – Finance Law 2010) is unconstitutional;

declares that Article 1(16) of Campania Regional Law no. 2 of 2010 is unconstitutional, with regard solely to the territories falling within State and regional parks;

declares that the first sentence of Article 1(25) of Campania Regional Law no. 2 of 2010 is unconstitutional.

Decided in Rome at the seat of the Constitutional Court, *Palazzo della Consulta*, on 7 February 2011.

(omitted)

ANNEX:

ORDER READ OUT AT THE PUBLIC HEARING OF 25 JANUARY 2011

ORDER

Having found that Campania Region entered an appearance in these proceedings on the basis of the director's decree of the Coordinator of the Counsel Service for Campania Region, and hence without a resolution by the Executive;

that this entry of appearance has already been ruled inadmissible in relation to the other grounds of appeal ruled on by this Court in a separate judgment (no. 331 of 2010);

that in the aforementioned judgment this Court asserted the principle that, in constitutionality proceedings in which the Court is seized directly, the entry of appearance – in addition to the filing of the application – must be resolved upon by the Regional Executive, in accordance with the provisions of Article 32(2) of Law no. 87 of 11 March 1953 (Provisions on the establishment and functioning of the Constitutional Court), with which Article 51 of the Statute (Law no. 6 of 28 May 2009 containing the Statute of Campania Region) has complied;

that, during the intervening period, Campania Region filed a resolution by the Executive, dated 30 December 2010, approving the resolution of the aforementioned service head and requested in the public hearing that it be permitted to participate in discussion;

that pursuant to the last paragraph of Article 32 of Law no. 87 of 11 March 1953, the time limits for the entry of appearance in proceedings before the Constitutional Court, including both interlocutory proceedings and those in which the Court is seized directly, must be regarded as mandatory (see judgments no. 364 of 2010, no. 160 of 2006 and no. 397 of 2005);

that accordingly a resolution adopted by a merely administrative body must be regarded as void *ab initio* on the grounds that it is incapable of having any effect whatsoever, including that of suspending the mandatory period for the entry of appearance;

that, due to this mandatory status, the adoption by the Executive of a resolution purportedly "approving" the entry of appearance resolved upon by the body with no competence to do so could only have effects if adopted before expiry of the mandatory time limits for the entry of appearance.

ON THOSE GROUNDS

THE CONSTITUTIONAL COURT

rules that the entry of appearance by Campania Region is inadmissible.