JUDGMENT NO. 58 YEAR 2018

**In this case the Court heard a referral order challenging the constitutionality of a Decree-Law enabling undertakings of strategic national interest to continue operations notwithstanding the seizure of industrial plants by the courts in relation to health and safety offences. After the proceedings had been launched, Parliament repealed the contested provision of the decree-law – by a law converting a *different* decree law – whilst however upholding the validity of any acts carried out whilst it had been in force, and at the same time re-enacting the provision verbatim. The Court struck down the legislation as unconstitutional, holding that the fact that the offending rule was now contained in a different provision to that originally contested was irrelevant, finding that it "impair[ed] the clarity of the law and the intelligibility of the legal order". Regarding the merits of the question, the Court found that "the legislator has not complied with the requirement to strike a reasonable and proportionate balance between all relevant constitutional interests, and thereby acted unconstitutionally in not taking due account of the requirements to protect the health, safety and bodily integrity of workers, when confronted with circumstances that expose them to a risk of death".**

[omitted]

THE CONSTITUTIONAL COURT

[omitted]

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Article 3 of Decree-Law no. 92 of 4 July 2015 (Urgent measures in relation to waste and integrated environmental authorisation, along with the conduct of business by industrial establishments of strategic national interest), initiated by the Preliminary Investigations Judge at the *Tribunale di Taranto* within the criminal proceedings pending against S. R. and others by the referral order of 14 July 2015, registered as no. 67 in the Register of Referral Orders 2017 and published in the *Official Journal* of the Republic no. 20, first special series 2017.

*Considering* the intervention by the President of the Council of Ministers;

*having heard* the Judge Rapporteur Marta Cartabia in chambers on 7 February 2018.

[omitted]

*Conclusions on points of law*

1.– By the referral order of 14 July 2015 (Register of Referral Orders no. 67 of 2017), transmitted to this Court along with the required formalities on 7 February 2017, the Preliminary Investigations Judge of the *Tribunale di Taranto* questions the constitutionality of Article 3 of Decree-Law no. 92 of 4 July 2015 (Urgent measures in relation to waste and integrated environmental authorisation, along with the conduct of business by industrial establishments of strategic national interest).

The contested Article 3 provides in paragraph 1 that: "[i]n order to guarantee the necessary balance between the requirements of continuity of production, the safeguarding of employment, health and safety at work, public health and a healthy environment, as well as the ends of justice, the conduct of business by establishments of strategic national interest shall not be precluded by any seizure order as previously provided for under Article 1(4) of Decree-Law no. 207 of 3 December 2012, converted with amendments into Law no. 231 of 24 December 2012, where the said order relates to suspected offences against the health and safety of workers"; in

paragraph 2 that: "[t]aking account of the significance of the interests to be balanced against one another, in situations falling under paragraph 1 business activity may not be continued for a period in excess of 12 months after the issue of the seizure order"; in paragraph 3 that: "[i]n order to continue the operations of the establishments falling under paragraph 1 without any interruption, the undertaking must draw up within a mandatory time limit of 30 days after the issue of the seizure order a plan specifying additional measures and activities, which may also be provisional, in order to protect workplace health and safety with specific reference to the installation to which the seizure order relates. Notice of the plan drafted shall be given to the prosecuting judicial authority"; in paragraph 4 that: "[t]he plan shall be forwarded to the provincial command of the fire service, the offices of the local health board and the INAIL [National Institute for Insurance against Industrial Accidents] with geographical competence over the respective oversight and control activities, which must guarantee constant monitoring of the production areas seized, including through the conduct of inspections aimed at verifying the implementation of the additional measures and activities specified in the plan. The administrations shall carry out the activities provided for in this paragraph within the ambit of their official powers, using the resources provided for under applicable legislation"; in paragraph 5 that: "[t]he provisions of this Article shall also apply to any seizures ordered prior to the entry into force of this Decree and the time limits provided for under paragraphs 2 and 3 shall start to run from that date".

The referring judge considers that the contested provision violates a variety of constitutional provisions, including in particular Articles 2, 3, 4, 32(1), 35(1), 41(2) and 112 of the Constitution.

More specifically, Article 2 of the Constitution is claimed to have been violated on the grounds that the contested provision allows for the conduct of business activity notwithstanding the presence of installations that are hazardous to life or bodily integrity, and thereby violates fundamental human rights that have been defined as "inviolable" under the Constitution itself.

The principle of equality laid down by Article 3 of the Constitution is claimed to have been violated as the legislator has granted an unjustified privilege to undertakings of strategic national interest in complying with safety standards when compared with other economic operators, in addition exposing workers in those businesses to higher risk factors.

Articles 4 and 35(1) of the Constitution are also claimed to have been violated as the right to work is premised on safe conditions for the performance of work, which the contested legislation is alleged not to guarantee.

Also Article 32(1) of the Constitution is alleged to have been violated as the legislation under examination jeopardises the life and bodily integrity of the individual-worker, without striking a reasonable balance with other rights at issue.

Once again, the continuation of the business activity of an installation that exposes workers to the risk of death, which is permitted by the contested legislation subject to the sole condition that the business draw up a plan for securing the areas concerned, is not consistent with the constitutional principle laid down by Article 41 of the Constitution, which requires that private economic activity be conducted in such a manner that does not cause harm to safety, freedom and human dignity.

Finally, the continuation of business activity is claimed to result in the perpetuation of a situation that may constitute a criminal offence – at the very least under Article 437

of the Criminal Code and, in the event of a accidents, under Articles 589 and 590 of the Criminal Code – thereby compromising the principle of mandatory prosecution laid down by Article 112 of the Constitution, which must be deemed to apply not only in relation to the power-duty to punish offences but also to the prevention of crime, as manifested through the adoption of real preventive precautionary measures.

2.– As a preliminary matter, it must be pointed out that the President of the Council of Ministers, as represented by the State Counsel [*Avvocatura Generale dello Stato*], has intervened in the proceedings averring that the questions raised are inadmissible due to a "supervening lack of interest" owing to the repeal of the contested provision.

2.1.– In order to assess the objection that the question is inadmissible it is necessary to provide an account of the anomalous web of legislative enactments relating to the provision at issue in these proceedings.

In this regard it must be observed first and foremost that Law no. 132 of 6 August 2015 (Conversion into law, with amendments, of Decree-Law no. 83 of 27 June 2015 laying down urgent measures in relation to bankruptcy, private law and civil procedure and the organisation and functioning of the judiciary), which converted into law *another* Decree-Law, was enacted prior to the expiry of the time limit for the conversion of Decree-Law no. 92 of 2015 containing the provision under examination: one of its provisions (Article 1(2)) repealed the contested Article 3 of Decree-Law no. 92 of 2015 whilst at the same time providing for a safeguard clause concerning any legal effects that had been brought about since its adoption; at the same time, Article 21-*octies* of Decree-Law no. 92 reintroduced the contested provision with exactly the same wording.

Thus, Law no. 132 of 2015 formally repealed whilst at the same time safeguarding and reproducing the legislative content of the contested Article 3 of Decree-Law no. 92 of 2015.

The rule introduced by the contested provision has thus continued to have effect within the legal order without interruption since the entry into force of the contested Decree-Law until the present time, thereby ensuring legislative cover for the continued business operations of the ILVA factory in Taranto, including the blast furnace, notwithstanding the intervening seizure.

2.2.– The objection raised by the State Counsel that the question is inadmissible due to supervening lack of interest is therefore unfounded, considering that the provision at issue in these proceedings has remained on the statute books unchanged and without interruption, albeit embodied within different legislative provisions enacted at different points in time.

This Court has previously asserted that "the rule contained in an act having the force of law that is valid at the time when the existence of the provision itself is relevant for the purposes of seizing the Court, but is no longer in force at the time when the Court passes judgment, will continue to be the object of scrutiny by the Court where the same rule still remains on the statute books – with reference to the same period of time relevant for the proceedings – because it has been reproduced with identical wording or in any case in terms of its essential normative content by another subsequently enacted provision" (Judgment no. 84 of 1996). On that occasion, the Court stressed "the auxiliary and instrumental function of the provision with regard to the rule", specifying that "it is the unchanged persistence of the rule within the legal order that ensures the enduring admissibility of the constitutionality proceedings" (Judgment no. 84 of 1996).

In the case under examination, the legislative technique – according to which, prior even to the expiry of the time limit for converting the original Decree-Law containing it, the provision setting forth the rule at issue in the proceedings (which in fact reappeared in another provision within the same legislative act) was only apparently repealed after the question of constitutionality had been raised and the previous effects of the rule were endorsed – impairs the clarity of the law and the intelligibility of the legal order as a result of the entirely anomalous use of the conversion law. For the purposes of assessing the admissibility of the question raised, it must be noted that the final effect has been to ensure, notwithstanding the enactment of different provisions over time, the full normative continuity of the rule the constitutionality of which is doubted. Therefore, under these circumstances, the successive enactment of different provisions does not negate the enduring relevance of the question of constitutionality raised and does not preclude an examination of the merits of that question by this Court. If this were not the case, it would be possible for the legislator to defer, impede or even prevent the adoption of a judgment by this Court, in contrast with the principle of procedural economy (Judgment no. 84 of 1996) and to the detriment of the full, timely and effective review of the constitutionality of legislation, thereby unacceptably impairing the protection of fundamental rights, especially – as in the case under examination – those concerning the protection of life.

2.3.– In view of the fact that, as was asserted in Judgment no. 84 of 1996 (and as most recently reiterated by Judgment no. 44 of 2018), the Constitutional Court "considers norms, but issues rulings concerning provisions", it is necessary to clarify the specific provisions to which the outcome of the constitutional review must apply, in the light of the particular sequence of legislative enactments relating to the provision at issue in the proceedings.

In this respect, the present case is different from that ruled upon in Judgment no. 84 of 1996, cited above. In that case the Court held that the question could be "transferred", albeit "in a figurative sense", to the provision that conveyed the effects of the rule into the legal order at the time of the judgment. That case involved the reiteration of decree-laws following the expiry of the time limit for their conversion, each of which reiterated the effects previously brought about, according to a practice that was shortly afterwards censored by the Court in Judgment no. 360 of 1996. Accordingly, in Judgment no. 84 of 1996 the Court ruled on the provision reiterating the effects of an unconverted decree-law.

In the case that has been brought before the Court in these proceedings, on the other hand, the original provision was only apparently repealed prior to the expiry of the time limit for its conversion, by legislation that at the same time endorsed any legal effects brought about over the intervening period, and thus before the original contested Decree-Law was annulled with retroactive effect, thus becoming inapplicable in the proceedings before the referring judge. Furthermore, in contrast to other cases, the provision apparently repealed was in fact at the same time transposed into another provision of the very same law that provided for its repeal. The procedure followed by the legislator was thus tortuous and entirely anomalous: it does not in fact involve either a simple failure to convert the decree-law or a genuine repeal, or even repeal followed by the enactment of different provisions. In this case, masquerading under the guise of a repeal, the enactment of different legislative provisions over time conceals (through the improper use of the conversion law) the effective continuity of the normative content which, having been originally laid down in the "repealed"

initial provision, remains in force thanks to the reiteration of its effects and will continue to apply into the future by virtue of the article that re-enacts it. Against this legislative backdrop, the provision at issue in the proceedings has remained on the statute books by virtue of an inseparable combination of closely interrelated provisions. Thus, the constitutional review must inevitably extend to all of the provisions considered in terms of their combined effect, that is Article 3 of Decree-Law no. 92 of 2015 and Articles 1(2) and (21-*octies*) of Law no. 132 of 2015.

3.– On the merits, the question is well founded.

3.1.– The contested provision stated that "the conduct of business by establishments of strategic national interest shall not be precluded by any seizure order […] where the said order relates to suspected offences against the health and safety of workers" (Article 3(1)). It was adopted with the stated aim of "guarantee[ing] the necessary balance between the requirements of continuity of production, the safeguarding of employment, health and safety at work, public health and a healthy environment, as well as the ends of justice" (Article 3(1)) and seeks to apply in continuity with the previous legislation on the conduct of business within industrial establishments of strategic national interest contained in Decree-Law no. 207 of 3 December 2012 (Urgent provisions on the protection of health, the environment and employment in the event of crises affecting industrial establishments of strategic national interest), converted with amendments by Law no. 231 of 24 December 2012. That legislation, which is explicitly referred to in the opening paragraph of the provision under examination, was the object of Judgment no. 85 of 2013 of this Court, and it is in the light of the principle laid down therein that the present question of constitutionality must be examined.

In that judgment, this Court held that "the continuation of production by businesses that have been seized shall be deemed to be lawful, provided that […] any rules that limit, circumscribe or direct the continuation of such activity are complied with" in accordance with a recovery road map – set out in this case in the new integrated environmental authorisation – that seeks to strike a balance between all interests and rights protected under the Constitution, including the right to health, the right to a healthy environment and the right to work.

In fact, it cannot be asserted that the legislator is precluded in abstract terms from taking action to safeguard continuity of production within sectors that are strategic for the national economy and in order to guarantee the respective employment levels, by providing that any preventive seizures ordered by the judicial authorities during the course of criminal trials shall not prevent the continuation of business activity; however, this can only be done through a reasonable balancing operation between the constitutional values in play.

In order to be reasonable, the balancing operation must be carried out without giving rise to the "expansion without limitation [of one of the rights] … [that] would thereby become dominant over the other legal interests recognised and protected under the Constitution, which as a body constitute an expression of the dignity of the individual" (Judgment no. 85 of 2013). The balancing operation must therefore comply with the canons of proportionality and reasonableness so as not to enable either the absolute prevalence of any one of the values involved, or the complete sacrifice of any of them, in such a manner that unitary, systematic and non-fragmented protection is guaranteed at all times for all of the constitutional interests involved (Judgments no. 63 of 2016 and no. 264 of 2012).

In the case that came before it in those proceedings, this Court rejected the question of constitutionality in Judgment no. 85 of 2013, holding that the legislator had struck a reasonable and proportionate balance in drawing up the legislation laid down in Article 1(4) of Decree-Law no. 207 of 2012. In such cases, in fact, the continuation of business activity was conditional upon compliance with specific limits set out in administrative measures relating to the integrated environmental authorisation, and was backed up by legislation providing for specific controls and sanctions.

3.2.– On the other hand, in the case that has now come before this Court, the legislator has not complied with the requirement to strike a reasonable and proportionate balance between all relevant constitutional interests, and thereby acted unconstitutionally in not taking due account of the requirements to protect the health, safety and bodily integrity of workers, when confronted with circumstances that expose them to a risk of death.

In fact, under the legislation at issue in the proceedings, the continuation of business activity is conditional exclusively upon the unilateral presentation of a "plan" by the very same private party whose property has been seized by the judicial authorities, without any form of involvement by other public or private persons or bodies.

The legislator allows a time limit of thirty days for presenting the plan, which moreover may also be provisional: there is thus a complete lack of any requirement for immediate and timely measures capable of promptly rectifying the danger to the bodily integrity of workers. That shortcoming is all the more serious in consideration of the fact that, during that thirty-day period, it is expressly permitted to continue business operations "without interruption", with the result that the installations affected by the preventive seizure may continue to operate without any modifications pending the presentation of the plan, and hence without even adopting the plan. The only effective time limit is laid down in paragraph 2, which provides that business activity cannot continue for a period of time in excess of twelve months after the issue of the seizure order.

As regards its content, the plan must stipulate "additional measures and activities, which may also be provisional", and are not defined in any greater detail, even by way of a reference – which would nonetheless have been possible – to legislation on health and safety at work. The lack of any reference to specific legislative provisions in the area of health and safety at work or to other organisational and preventive models deprives the legal order of any tangible and effective ability to respond to any violations that might be committed during the ongoing operations.

There is no provision for any involvement of public authorities in the preparation of the plan, which need only be informed at a later stage. Such notification takes the form of a mere communication-notice, as far as the prosecuting judicial authority is concerned (Article 3(3)), and involves the grant of a generic power of monitoring and inspection to the INAIL, the local health board and the fire service; moreover, that power is limited to monitoring consistency between the additional measures indicated in the plan and those actually adopted by the undertaking, with the result that it is ambiguous and unclear whether they have any active power to intervene (Article 3(4)).

3.3.– Considering these characteristics of the contested provision, it is clear that, in contrast to the case from 2012, the legislator has ended up excessively privileging the interest in continuing production activity, entirely disregarding the inviolable constitutional rights associated with the protection of health and life itself (Articles 2

and 32 of the Constitution), an inseparable corollary of which is the right to work in a safe and non-hazardous environment (Article 4 and 35 of the Constitution).
The sacrifice of those fundamental values protected by the Constitution leads this Court to find that the contested legislation does not respect the limits that the Constitution imposes on business activity which, under Article 41 of the Constitution, must be conducted at all times in such a manner that does not cause harm to safety, freedom and human dignity. The prompt removal of any factors that constitute a hazard for the health, bodily integrity and life of workers is in fact a minimum and indispensable prerequisite for the compliance of production activity with constitutional principles, which are at all times focused first and foremost on the basic requirements of the individual.
In this regard, this Court has moreover already held that Article 41 of the Constitution must be interpreted to the effect that it "expressly limits protection for private freedom of economic initiative where this jeopardises the 'health and safety' of workers" (Judgment no. 405 of 1999). Moreover, it is a settled position within the case law of the Constitutional Court that also the constitutional provisions set forth in Articles 32 and 41 of the Constitution require employers to pay the utmost attention to the protection of the health and safety and physical integrity of workers (Judgment no. 399 of 1996).
4.– Holding all further issues moot and having clarified the specific provisions to which the effects of the constitutional review will apply for the reasons set out in section 2.3 above, it is necessary to declare unconstitutional Article 3 of Decree-Law no. 92 of 2015 and Articles 1(2) and (21-*octies*) of Law no. 132 of 2015.
*Having regard to* Articles 26(2) of Law no. 87 of 11 March 1953 and Article 9(1) of the supplementary rules on proceedings before the Constitutional Court.

ON THESE GROUNDS

THE CONSTITUTIONAL COURT

*declares* unconstitutional Article 3 of Decree-Law no. 92 of 4 July 2015 (Urgent measures in relation to waste and integrated environmental authorisation, along with the conduct of business by industrial establishments of strategic national interest) and Articles 1(2) and (21-*octies*) of Law no. 132 of 6 August 2015 (Conversion into law, with amendments, of Decree-Law no. 83 of 27 June 2015 laying down urgent measures in relation to bankruptcy, private law and civil procedure and the organisation and functioning of the judiciary).
Decided in Rome at the seat of the Constitutional Court, *Palazzo della Consulta*, on 7 February 2018.