JUDGMENT NO. 269 YEAR 2017

In this case, the Court considered two referral orders from a provincial tax commission contesting legislative provisions that granted an independent authority (the AGCM) power to impose a financial levy on a certain set of entrepreneurs, in order to support its operating costs. The levy applied only to entrepreneurs with annual revenue greater than 50 million euros, and placed a maximum limit on the amount of each duty. The underlying proceedings were brought by complainants who had requested reimbursement of duties paid to the AGCM under the levy, but were denied reimbursement. The tax commission argued that the levy violated EU law, and the principles of equality and ability to pay, because it only applied to entrepreneurs and, within that group, only a certain set of entrepreneurs; because it used revenue as a basis for determining ability to pay when, the tax commission alleged, this was not a reliable indicator; and because its maximum limit decreased the percentage owed for the highest-revenue entrepreneurs, establishing a regressive (and not progressive) model of taxation. It further argued that the legislative provisions giving the AGCM authority to impose the levy unduly favored foreign-based companies to the detriment of Italian ones and violated the reservation of taxation to the legislator in that they permitted the AGCM to change the amount of the levy and the method for paying it through its own decision-making procedures, without guidelines established by law. The Court first ruled that the referring tax commission had provided adequate reasoning in support of its own jurisdiction to hear the case, noting that jurisdiction is a question to be determined by the referring judge, and that the Constitutional Court may only find a lack of jurisdiction in the underlying case where such lack is patently manifest. Then, the Court ruled the questions in one of the referral orders inadmissible because the referring tax commission had refused to first address the questions of conflict with EU law brought by the complainant. The Court held that the tax commission had the duty to decide the matter, because the EU laws in question were endowed with "direct effect," and, therefore, the referring judge needed to rule on their applicability in order to make an assessment of whether the challenged provisions did, indeed, apply to the underlying proceedings. The failure to address the question of conflict with EU law, therefore, amounted to a failure to provide reasoning concerning the relevance of the challenged provisions. The same was not true of the other referral order, in which the referring judge argued that EU law was not violated – an argument sufficient for the Court to conclude that the applicability of the challenged provisions to the underlying proceedings was not implausible. The Court then addressed the questions on the merits. After concluding that the levy was tax-related, and that, therefore, the constitutional parameters invoked by the referring tax commission did apply, it ruled that the questions were unfounded. Noting broad legislative discretion in the area of taxation, the Court based its review on the requirement that the provisions not be arbitrary or manifestly unreasonable and disproportionate. The selection of only certain financial players to be subject to the levy was not unreasonable, given that entrepreneurs were a significant focus of the independent authority's activities; the use of revenue amount to identify those entrepreneurs subject to the levy was also not unreasonable, given that income was not the basis of the levy, but rather the volume of business activity on the market; and the maximum ceiling did not violate the principle of progressive taxation (a principle which, the Court noted, applies to

the system as a whole, and not to each individual provision) and was justified by valid reasons intended to protect the independence of the authority, which could otherwise become dependent on duties from the largest financial players. The Court also held that the reservation to the legislator was not violated by the AGCM's ability to make adjustments to the amount of the levy and the method of paying it, since the legislator had provided adequate criteria and the general outline of the regulatory scheme.

[omitted]

THE CONSTITUTIONAL COURT

[omitted]

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Article 10(7-*ter*) and (7-*quater*) of Law no. 287 of 10 October 1990 (Provisions for the protection of competition and the market), added by Article 5-*bis*(1) of Decree-Law no. 1 of 24 January 2012 (Urgent provisions for competition, the growth of infrastructure, and competitiveness), converted, with modifications, by Law no. 27 of 24 March 2012, initiated by the Provincial Tax Commission of Rome [*Commissione tributaria provinciale di Roma*] with referral orders of 2 May and 25 October 2016, respectively registered as no. 208 of the 2016 Register of Referral Orders and no. 51 of the 2017 Register of Referral Orders and published as no. 42 in the Official Journal of the Republic, first special series of 2016, and no. 15 in the first special series of 2017.

Considering the entries of appearance of *Ceramica Sant'Agostino s.p.a* and of *Bertazzoni s.p.a.*, as well as the intervention of the President of the Council of Ministers;

Having heard from Judge-rapporteur Marta Cartabia during the public hearing of 7 November 2017;

Having heard from counsel Massimo Luciani and Massimo Coccia on behalf of *Ceramica Sant'Agostino s.p.a.* and *Bertazzoni s.p.a.* and State Counsel Agnese Soldani and Sergio Fiorentino on behalf of the President of the Council of Ministers.

[omitted]

Conclusions on points of law

1.– With a referral order of 2 May 2016 (R.O. no. 208 of 2016) the Provincial Tax Commission of Rome raised questions concerning the constitutionality of Article 10(7-*ter*) and (7-*quater*) of Law no. 287 of 10 October 1990 (Provisions for the protection of competition and the market), added by Article 5-*bis*(1) of Decree-Law no. 1 of 24 January 2012 (Urgent provisions for competition, the growth of infrastructure, and competitiveness), converted, with modifications, by Law no. 27 of 24 March 2012, in reference to Articles 3 and 53(1) and (2) of the Constitution.

The referring Commission stated as a preliminary matter that it was called upon to adjudicate proceedings contesting the denial by the Supervisory Authority for Competition and the Market [*Autorità garante della concorrenza e del mercato*] (hereinafter AGCM) of an application for reimbursement of duties paid by the private party (*Ceramica Sant'Agostino s.p.a.*) for the years 2013 and 2014.

The judge in the pending proceedings, having first determined that jurisdiction was proper due to the tax-related nature of the payment, inverted the review of the questions brought by the Complainant, which had originally asked to dis-apply (*rectius*: to not apply) the regulations imposing the duty due to their alleged noncompliance with the relevant European Union regulations. The judge held that it would be "more consistent

with the overall legal system" to give precedence to an examination of the regulation's compliance with the domestic legal system and with constitutional principles.
According to the referring tax commission, the challenged provision, which, for purposes of ensuring the AGCM's continued operation, provides for the imposition of a levy applying only to entrepreneurs with annual revenue greater than 50 million euros, placing a maximum limit on the amount of each duty (of not greater than 100 times the minimum amount), violates Articles 3 and 53(1) and (2) of the Constitution, in relation to the principles of equality and ability to pay, for a number of reasons. Specifically, these reasons include: its failure to include consumers, the public administration, and financial actors other than entrepreneurs in the financial obligation; its imposition of the duty upon only those entrepreneurs with a turnover greater than 50 million euros; and its use of an amount like revenue as a basis to determine who is subject to the levy, while this should allegedly not be considered representative of one's ability to pay. Furthermore, by setting a maximum limit on the amount of the tax, the provisions allegedly introduce a regressive model of taxation, to the advantage of the largest companies, and in violation of the principle of progressive taxation.
2.– With a referral order of 25 October 2016 (R.O. no. 51 of 2017) the Provincial Tax Commission of Rome raised questions concerning the constitutionality of Article 10(7-*ter*) and (7-*quater*) of Law no. 287 of 1990, added by Article 5-*bis*(1) of Decree-Law (D.L.) no. 1 of 2012, converted, with modifications, by Law no. 27 of 2012, in reference to Articles 3 and 53(1) and (2), and 23 of the Constitution.
The referring commission stated that it was called upon to hear the case brought by *Bertazzoni s.p.a.* challenging the AGCM's denial of its reimbursement request for duties paid under the aforementioned provisions.
It then confirmed that it had jurisdiction over the matter, considering the tax-related nature of the payment, and held that it had first to review the challenged provisions' compliance with European Union law, denying any conflict with the right of establishment (Article 49 of the Treaty on the Functioning of the European Union, TFEU) and with the right to free provision of services (Art. 56 TFEU) alleged by the complainant.
After holding that the provisions did not fail to comply with the law of the European Union, the Tax Commission held that the questions concerning the constitutionality of Article 10(7-*ter*) and (7-*quater*) were relevant and not manifestly unfounded.
In particular, according to the referring commission, the challenged provision violates Articles 3 and 53(1) and (2) of the Constitution, in relation to the principles of equality and ability to pay, for the same reasons described in the prior referral order (R.O. no. 208 of 2016). That is, its failure to include consumers, the public administration, and financial actors other than entrepreneurs in the duty to pay the tax; because it subjects only entrepreneurs with turnover greater than 50 million euros to the levy; and because it uses an amount like revenue as a basis to determine taxability, while this should not be considered representative of one's ability to pay. Furthermore, by setting a maximum limit on the amount of the tax, the provisions allegedly introduce a regressive model that benefits the largest companies, in violation of the principle of progressive taxation.
In the referral order in question, the Tax Commission claims that the challenged provision also creates an unjustified disparity in the treatment of companies, to the advantage of foreign-based companies operating in Italy without permanent establishments in Italy, since they, too, are exempt from the levy, without justification.

Finally, the referring commission alleges that the reservation to the legislator contained in Article 23 of the Constitution has been violated, in that the challenged provision gives the AGCM the authority to create variations in the amount and method of payment of the duty, without having to follow any set criteria.

3.– In light of their identical objects, and the partial overlap of the parameters to which they refer, as well as the arguments used to maintain that these parameters have been violated, the cases must be joined.

4.– As a preliminary matter, it bears noting that the State Counsel's Office [*Avvocatura Generale dello Stato*] has objected that the questions raised in both referral orders are inadmissible for lack of jurisdiction or insufficient reasoning in support of jurisdiction.

According to the defense of the intervening party, in fact, the referring Tax Commission manifestly lacks jurisdiction over this case. In support of this conclusion, it cites Article 133 – and particularly section 1(*l*) thereof – of Legislative Decree no. 104 of 2 July 2010 (Implementation of Article 44 of Law no. 69 of 18 June 2009, granting a mandate to the government for the reorganization of administrative procedures, hereinafter Code of Administrative Procedure), on the basis of which the administrative tribunal has jurisdiction over disputes concerning all measures adopted by certain independent authorities, including the AGCM, the only exception being measures relating to private-sector employment. The Joint Chambers of the Supreme Court of Cassation expressly referred to the jurisdiction of administrative judges in Order no. 19678 of 3 October 2016, including in reference to disputes over provisions regulating levies imposed to sustain the operating costs of the Authority for Communications Safeguards [*Autorità per le Garanzie nelle Comunicazioni*]. By analogy, the objection argues that a measure denying a request for the reimbursement of the tax adopted by the AGCM clearly falls under the administrative jurisdiction, and not under the jurisdiction of the referring tax commission.

The objection is unfounded.

The case law of this Court has consistently held (see, among many, Judgments no. 269 of 2016, 154 of 2015, 116 of 2013, 279 of 2012, 41 of 2011, 81 of 2010, 94 of 2009, and 241 of 2008) that jurisdiction is a requirement related to whether the underlying proceedings were legitimately instigated, an assessment that is reserved for the referring judge, due to the principle of the independence of the constitutional decision from the technicalities of the pending proceedings. For this reason, lack of jurisdiction may only be found in those cases in which it is patently manifest, such that it leaves no room for doubt. However, where the referring tribunal has explicitly accounted for the existence of its own *potestas judicandi* in a not implausible way, this Court's investigation of the jurisdiction question must cease.

In light of these principles it bears pointing out that, in the case at bar, the alleged lack of jurisdiction can be considered neither patent nor manifest. The referring tax commission acknowledged the tax-related nature of the duty in question, providing thorough reasoning on the issue of jurisdiction and citing Judgment no. 256 of 2007 of the Constitutional Court, which dealt with analogous levies imposed by other independent authorities. The referring judges deduced that they had jurisdiction on the basis of the tax-related nature of the levy, relying on the principle of generality of the tax jurisdiction, which principle has been upheld in the case law of the Joint Chambers of the Supreme Court of Cassation (among the most recent judgments see, for example, no. 8870 of 3 May 2016). According to this case law, the jurisdiction of tax tribunals extends to all disputes concerning monetary levies of any category and kind, and is comprehensive and

exclusive, including, in addition to proceedings concerning challenges to the provision of the levy, also any proceedings concerning the legitimacy of all the related procedural measures. Moreover, this Court too has acknowledged an indissoluble bond between tax-related matters and the tax jurisdiction (Judgment no. 64 of 2008), and the referring judges hold that breaking this bond would violate the principles found in Article 102 of the Constitution concerning pre-established "natural forum."

It is precisely because of the general nature of tax jurisdiction, and its character as a constitutional guarantee concerning pre-established "natural forum," that the referring judges have held that Article 133 of the Code of Administrative Procedure should be interpreted to mean that it falls to the administrative jurisdiction to take all measures expressive of the institutional function but not those which pertain to levies imposed for the funding of the authority itself (nor, obviously, to measures in the area of labor matters, as Article 133 specifically states).

This thorough reasoning, which lacks any patent defects and is developed in an overall coherent way, even addressing and answering arguments to the contrary, leads to the conclusion that the judges in the pending proceeding adequately performed the duty of providing reasons for their own jurisdiction, according to the rules laid down by the case law of this Court.

Nor is the referring commission's argument refuted by the decision by the Joint Chambers of the Supreme Court of Cassation cited by the President of the Council of Ministers, intervening in this case (Order no. 19678 of 3 October 2016). This is because, first, as a general matter, according to this Court's case law (Judgment no. 236 and 119 of 2015), a contrary decision made by the Joint Civil Divisions of the Supreme Court of Cassation in an analogous case to that in which the question is raised (or even in the same case) is not sufficient to cast doubt on the plausibility of the reasoning adopted by the referring judge concerning jurisdiction. Moreover, in the present case, the cited decision by the Supreme Court of Cassation is restricted to denying the tax-related nature of the duty imposed by another independent authority (the Authority for Communications Safeguards), without making a decision of any kind concerning duties owed to the AGCM. Furthermore, in other cases dealing with other duties, the Joint Civil Divisions of the Supreme Court of Cassation applied the principle of the general jurisdiction of the tax commissions over tax-related matters (for example in Judgment no. 16693 of 6 July 2017, on duties imposed on members of obligatory road consortiums). Thus, the isolated decision put forward by the State Counsel's Office in opposition to the conclusion espoused by the referring judges does not suffice to highlight a clear and patent lack of jurisdiction or to generate doubts about the plausibility of the reasoning adopted in the referral order concerning the jurisdiction of the tax commission.

5.– By contrast, the questions raised by the Provincial Tax Commission of Rome in its referral order of 2 May 2016 (R.O. no. 208 of 2016) must be declared inadmissible, but on other grounds.

In that referral order, the referring tax commission explicitly states that it had to invert the order of its review of the issues objected to by the complainant – these were, first of all, a request to dis-apply (*rectius*: not apply) the provisions imposing the levy for their alleged violation of the relevant European Union regulations – considering it to be "more consistent with the overall legal system" to first assess the regulations' compliance with internal constitutional principles.

The Provincial Tax Commission of Rome, in its second referral order (R.O. no. 51 of 2017) – unlike and in direct opposition to what it held in its first order (R.O. no. 208 of 2016) – actually describes how this Court has already had the opportunity to state that contradiction with European Union Law, "concerning the effectiveness of the provision that is the object of the constitutional challenges, goes to the relevance of the questions; therefore, any judge, in raising them, must address it under Article 23 of Law no. 87 of 11 March 1953, or the questions will be inadmissible (Orders no. 269, 79, and 8 of 1991, 450, 389, and 78 of 1990, and 152 of 1987)" (Order no. 244 of 1994, then cited by, among many, Order no. 38 of 1995 and no. 249 of 2001).

Moreover, the generality of the above statement could lend itself to misunderstandings, necessitating the delineation of the limits within which the judge in the pending proceedings must provide a prior judgment of noncompliance with European Union law in order for the questions raised to be admissible, particularly if that noncompliance is the object of a specific request on the part of the complainant.

In particular, this specification comes alongside decisions by this Court which only seemingly appear to deny the assumption above (for example Judgment no. 197 of 2014, 245 of 2013, and 127 and 120 of 2010) and which, on the contrary, involve cases that must be carefully distinguished from the present one.

5.1.– It bears pointing out, first of all, that noncompliance with European Union Law impacts the applicability of the challenged rule to the pending proceeding – and, in consequence, also impacts the relevance of the questions of constitutionality that are raised concerning it (see, most recently, Order no. 2 of 2017) – only when the European rule is endowed with direct effect. This Court's holdings in this area are relevant, and state that, "in conformity with the principles affirmed in the 9 March 1978 Judgment by the European Court of Justice (ECJ), case C-106777 (*Simmenthal*) and in the successive cases handed down by this Court, particularly in Judgment no. 170 of 1984 (*Granital*), when it comes to provisions of European Union Law that have direct effect, it falls to the ordinary national judge to evaluate the compatibility of the challenged internal rules with European law, making use – where necessary – of a reference for a preliminary ruling to the ECJ. Then, in case of noncompliance, the national judges are to see to it that the European rule is applied in place of the national one. In situations of noncompliance with a European rule lacking in direct effect – a noncompliance potentially confirmed by recourse to the Court of Justice – and where it is impossible to resolve the incompatibility through interpretation, the common judge must raise the question of constitutionality, leaving it to this Court to assess whether or not a violation exists that cannot be resolved through interpretation and, potentially, to strike down the law that fails to comply with European law (see Judgments no. 284 of 2007, 28 and 227 of 2010, and 75 of 2012)" (Order no. 207 of 2013).

Therefore, where an internal law clashes with a European Union rule, the judge – after having failed in every attempt to bridge the gap on an interpretative basis or, when applicable, through reference for a preliminary ruling – directly applies the European Union provision endowed with direct effects. This satisfies, at one and the same time, the primacy of European Union law and the principle that judges are subject only to the law (Article 101 of the Constitution), which must be understood to mean the kinds of laws that the constitutional system itself obliges them to observe and apply.

Conversely, when an internal legal provision conflicts with European Union rules that do not have direct effect, it is necessary to raise a question of constitutional legitimacy, the determination of which is the exclusive purview and competence of this Court, without

previously determining the grounds on which the internal provision conflicts with European law. In such cases, it falls to this Court to judge the law, both in reference to European parameters (concerning this case law, in judgments when the Court is seized directly, see, for example, Judgment no. 197 of 2014, in the part in which it holds that "the assessment of the challenged rule's compliance with the internal regulatory scheme comes prior to the review of its compliance with European-level principles (Judgments no. 245 of 2013 and 127 and 120 of 2010)."

5.2.– A clarification is in order in light of the transformations of European law and the system of its relationships to national legal systems after the Treaty of Lisbon entered into force, modifying the Treaty on European Union and the Treaty establishing the European Community and certain related measures, signed at Lisbon on 13 December 2007, ratified and executed by Law no. 130 of 2 August 2008 (Ratification and execution of the Treaty of Lisbon which modifies the Treaty on European Union and the Treaty establishing the European Community and certain related measures, with final act, protocols, and declarations, signed at Lisbon on 13 December 2007), which, among other things, gave legally binding effect to the Charter of Fundamental Rights of the European Union, proclaimed on 7 December 2000 and incorporated in Strasbourg on 12 December 2007 (hereinafter EUCFR), making it equal to the Treaties (Article 6(1) of the Treaty on European Union).

Granted the principles of the primacy and direct effect of European Union law as consolidated in both European and constitutional case law, it bears considering that the aforementioned Charter of Rights is a part of Union law that is endowed with particular characteristics due to the typically constitutional stamp of its contents. The principles and rights laid out in the Charter largely intersect with the principles and rights guaranteed by the Italian Constitution (and by other Member States' constitutions). It may therefore occur that the violation of an individual right infringes, at once, upon the guarantees enshrined in the Italian Constitution and those codified by the European Charter, as recently occurred in reference to the principle of the legality of crimes and punishments (European Court of Justice, Grand Chamber, Judgment of 5 December 2017, case C-42/17, M.A.S., M.B.).

Therefore, violations of individual rights posit the need for an *erga omnes* intervention by this Court, including under the principle that places a centralized system of the constitutional review of laws at the foundation of the constitutional structure (Article 134 of the Constitution). The Court will make a judgment in light of internal parameters and, potentially, European ones as well (per Articles 11 and 117 of the Constitution), in the order that is appropriate to the specific case, including for the purpose of ensuring that the rights guaranteed by the aforementioned Charter of fundamental rights are interpreted in a way consistent with constitutional traditions, which are mentioned in Article 6 of the Treaty on European Union and by Article 52(4) of the EUCFR as relevant sources in this area. Other national constitutional courts with longstanding traditions have followed an analogous line of reasoning (see, for example, the decision of the Austrian Constitutional Court, Judgment U 466/11-18; U 1836/11-13 of 14 March 2012).

Moreover, all of this plays out within a framework of constructive and loyal cooperation between the various systems of safeguards, in which the constitutional courts are called to enhance dialogue with the ECJ (see, most recently, Order no. 24 of 2017), in order that the maximum protection of rights is assured at the system-wide level (Article 53 of the EUCFR).

On the other hand, the emergence of the guarantees found in the EUCFR and those provided by the Italian Constitution can generate competing legal remedies. In light of this, for cases of "double prejudice" [*doppia pregiudizialità*] – i.e. disputes that may give rise to questions of constitutionality and, simultaneously, questions of compliance with Union law – the ECJ has, in turn, affirmed that Union law "does not preclude" the overriding character of the constitutional determination that falls under the competence of the national constitutional courts, provided that the ordinary judges are free to submit to the ECJ "any question that it considers necessary, at whatever stage of the proceedings it considers appropriate, even at the end of an interlocutory procedure for the review of constitutionality;" and "to adopt any measure necessary to ensure the provisional judicial protection of the rights conferred under the European Union's legal order;" to disapply, at the conclusion of the interim judgment of constitutionality, the national legislative provision at issue which has survived constitutional scrutiny, whenever, on other grounds, they consider it to conflict with Union law (see, among others, European Court of Justice (Fifth Chamber), 11 September 2014, C-112/13 *A v. B and others*; European Court of Justice (Grand Chamber), 22 June 2010, C-188/10, *Melki* and C-189/10, *Abdeli*).

In keeping with this line of reasoning, this Court holds that, where a law is the object of doubts concerning the rights enshrined in the Italian Constitution or those guaranteed by the Charter of Fundamental Rights of the European Union in those contexts where EU law applies, the question of constitutionality must be raised, leaving in place the possibility of making a referral for a preliminary ruling for matters of interpretation or of invalidity of Union law, under Article 267 TFUE.

5.3.– Having clarified this point, it must be added that, in the present case, the referring tax commission points out that the complainants inferred not that the fundamental rights enshrined in the EUCFR were violated, but rather that the right of establishment and the free provision of services within the European Union, found in the provisions of the Treaties (Articles 49 and 56 TFEU), have been violated, and that they invoked the direct effect of these freedoms (for an analogous situation see Judgment no. 111 of 2017). Thus, this matter does not fall under the cases mentioned above, in which non-application inevitably becomes a form of unacceptable non-centralized constitutional review of the laws. Thus, the referring commission had the duty to decide the question in order to assess the applicability of the internal law in the proceedings brought before it.

The referral order, however, not only failed to dedicate any consideration to the alleged violation of European Union law, but, on the contrary, expressly stated that it had to defer any such consideration until the outcome of this Court's decision on the constitutional questions framed in reference to internal parameters. In so doing, the referral order says nothing about the applicability of the challenged provisions in the underlying proceedings and, therefore, lacks reasoning concerning their relevance. Thus, the questions of constitutionality raised by the referral order registered as R.O. no. 208 of 2016 are inadmissible.

5.4.– These grounds for inadmissibility do not apply to the other referral order (R.O. no. 51 of 2017), in which the Provincial Tax Commission of Rome conversely held that it was necessary to first decide the parties' request not to apply the challenged provisions because of their alleged violation of the freedom of establishment (Article 49 TFEU) and of the freedom to provide services (Article 56 TFEU). The Provincial Tax Commission denied that the challenged dispositions conflicted with the freedoms guaranteed by European Union law due to the fact that, on the basis of the case law of the ECJ, freedom

of establishment cannot be invoked by an Italian company, headquartered in Italy, against an Italian law, while the free provision of services is not inhibited by the levying of duties intended to finance the independent regulatory authorities, as long as these duties are earmarked exclusively to cover the agency's costs and are proportionate, objective, and transparent (see, ECJ 18 July 2013, in the cases No. from C-228/12 to C-232/12 and from C-254/12 to C-258/12), as in the present case.

This is sufficient for purposes of this Court's review of relevance, provided that the referring Commission's reasoning concerning the applicability of the challenged provisions in the underlying judgment is not implausible.

6.– The State Counsel's Office also points to another ground for inadmissibility, concerning the alleged violation of the reservation to the legislator found under Article 23 of the Constitution, mentioned only in the referral order registered as R.O. no. 51 of 2017, in relation to the challenged provisions in the part in which they grant the AGCM the ability to alter the measure of and method with which to pay the duties, without establishing predetermined criteria that must be followed.

These grounds allegedly fail to meet the relevance requirement, in that the Authority has, it is argued, always used this power in order to lower the duties; therefore, a decision to review the question could not have any effect on the pending proceedings, which involve forming a judgment on a matter of reimbursing a duty that has been already paid, a duty which, without the Authority's resolution, would have been even larger.

The objection is unfounded.

The referring tax commission observes that the question of constitutionality concerns the regulatory provision that offers a legal basis to the measure imposing the duty and to the resolution to deny the reimbursement request, the striking down of which has been requested in the pending proceedings. Therefore, if, hypothetically, this question were to be accepted for review, both the provisions imposing the levy and the foundation for denying the reimbursement request would no longer be legitimate. For this reason, the referring Commission claims that the question concerning Article 23 of the Constitution is also relevant, advancing arguments that are not implausible.

7.– It is therefore necessary to examine the questions raised with Referral Order no. 51 of 2017 on the merits, in reference to Articles 3, 23, and 53(1) and (2) of the Constitution, taking as their object Article 10(7-*ter*) and (7-*quater*) of Law no. 287 of 1990, added by Article 5-*bis*(1) of Decree-Law no. 1 of 2012, converted, with modifications, by Law no. 27 of 2012.

7.1.– The rules the constitutionality of which is called into question significantly renovated the system for financing the AGCM, which was previously based on four separate sources, these being: transfers from the State (with duties levied through the general tax system and imposed, therefore, on all citizens); a "solidarity fund" funded by the other independent authorities; contributions levied on companies that were required to communicate mergers; and a percentage part of the sanctions imposed under the rules dealing with consumer protection.

This structure was the result of a layering of regulatory changes that took place over time, for the purpose of providing the Authority with additional resources alongside the transfers of funds from the State. In particular, starting with Law no. 266 of 23 December 2005 (Provisions for the formation of the annual and multi-year budget of the State – Finance Law 2006), a system of requiring contributions from companies obliged to notify the Authority of mergers (a so-called "filing fee"). In the years that followed, with Decree-Law no. 207 of 30 December 2008 (Extension of the deadlines set by legislative

provisions and urgent financial provisions), converted, with modifications, by Law no. 14 of 27 February 2009, the possibility was introduced to finance the non-continuous and non-obligatory costs of the Authority with a portion of the revenue from fines imposed for unfair commercial practices. That same year, Article 2(241) of Law no. 191 of 23 December 2009 (Provisions for the formation of the annual and multi-year budget of the State – Finance Law 2010) established a temporary mechanism for transferring resources laterally between independent regulatory authorities for the three-year period 2010-2012, which, among other things, benefitted the AGCM.

7.2.– For purposes of reinforcing the independence of the Authority from any constraints held over from the preexisting mixed financing system (constraints that could come from a variety of actors – political, economic, and financial), aforementioned Article 5-*bis* of D.L. no. 1 of 2012, converted, with modifications by Law no. 27 of 2012, introduced a new system of financing, based on obligatory duties imposed on mid-size and large companies.

More precisely, the aforementioned provision inserted section 7-*ter* into Article 10 of Law no. 287 of 1990, providing that the burdens associated with the operations of the Authority tasked with safeguarding free competition in the marketplace shall be supported by means of duties imposed on corporate enterprises with a total revenue greater than fifty million euros, in the measure of 0.08 per thousand of turnover as shown on the most recently approved balance sheets, and a ceiling capping the maximum amount of the duty (which cannot exceed one hundred times the established minimum). With the introduction of this new form of financing, starting in 2013 (Article 10(7-*quater*)), all the previous sources were eliminated, including the filing fee that had applied to companies obliged to notify the Authority of a merger. The same section, 7-*quater*, then establishes that, beginning in 2014, "payment of the duty shall be made, by 31 July of each year, directly to the Authority in the manner determined by the Authority itself through its own decision-making procedures." Furthermore, "[p]otential variations in the amount and method of payment of the duty may be adopted by the Authority itself through its own decision-making procedures, within the maximum limit of 0.5 per thousand of the revenue appearing on the balance sheet approved prior to the adoption of the decision. The maximum threshold for the duty found in section 7-*ter* still applies."

8.– The referring tax commission has raised two sets of questions.

The first alleges the violation of Articles 3 and 53(1) and (2) of the Constitution: the limitation of the range of subjects obligated to pay the duty – which is only required of corporate enterprises with revenue greater than fifty million euros, with the establishment of a maximum cap on the amount of the duty – allegedly amounts to an unjustified discrepancy in treatment, in violation of the principles of ability to pay and progressive taxation.

The second set of issues leads the referring Commission to allege that, by providing the possibility for the AGCM, by means of its own decision-making, to change the amount of the financial obligations imposed, which would therefore come from a sub-legislative source, the provisions violate the reservation of the ability to impose financial obligations to the legislator, which is found in Article 23 of the Constitution.

9.– The first group of questions, raised in relation to Articles 3 and 53(1) and (2) of the Constitution, takes, as an underlying assumption, the tax-related nature of the duty regulated by the contested provisions.

Therefore, a preliminary matter that must be addressed is to determine the nature of the financial contribution, in order to verify if it may be considered a tax for the purposes of the guarantees found in Articles 3 and 53 of the Constitution.

9.1.– On this matter it bears noting that constitutional case law has consistently held that, "tax must satisfy three inderogable prerequisites: the legal provisions must be predominantly aimed at securing a (definitive) financial reduction for the taxpayer; the reduction must not entail the alteration of a reciprocal relationship; and the resources associated with a financially significant condition establishing liability to taxation, and resulting from the said reduction, must be intended to support public spending" (Judgment no. 70 of 2015). That is, it must involve "a 'forced levy intended to contribute to public spending which is imposed on a taxpayer on the basis of a specific indication of capacity to pay tax' (see Judgment no. 102 of 2008). This indication must establish the fitness of each person to be subject to an obligation to pay tax" (again, Judgment no. 70 of 2015).

9.2.– However, the levy owed to the AGCM on the basis of Article 10(7-*ter*) and (7-*quater*) is not justified by any negotiated relationship with the independent regulatory Authority, but constitutes a financial obligation imposed by law for the benefit of that Authority, which is provided with enforcement powers that allow it to compel payment. Therefore, it has the character of being forced, and is completely independent of any bilateral agreement with the Authority, to which it is owed regardless of whether the payer has been the addressee of its powers or has benefited from its operations.

Furthermore, the levy relates to an economic assumption, since it is proportional to the volume of revenue that is taken as an indicator of ability to pay.

Finally, concerning the requirement that the levies be destined for public expenditure, it bears recalling that this Court has already held that this requirement was met in a similar case that concerned the Supervisory Authority of Public Works [*Autorità di vigilanza sui lavori pubblici*], where it stated that the "levies, since they constitute resources […] for the functioning of a body like the Authority, which is intended to carry out a supervisory role over public works […], fall under the category of State tax revenue, the chief requirements of which they meet" (Judgment no. 256 of 2007). In this case, the levy is earmarked to finance expenses relating to the functioning of the AGCM in relation to the services that it is institutionally ordained to perform, in the complex and essential function of safeguarding the rules of the market for the protection of free competition, rooted in public interests with constitutional value within the meaning of Articles 3 and 41 of the Constitution.

Thus the necessary conclusion is that all the non-derogable requirements necessary for granting constitutional recognition of the tax-related nature of the levy in question have been met.

9.3.– It bears pointing out that the financial obligation here under review is an exceptional form of levy. Indeed, it cannot be placed under the category of "taxes," in the sense that it concerns financial obligations that are due regardless of whether the Authority's activity has specifically involved the individual subject placed under obligation, and regardless of whether that activity is characterized as a divisible service, but regards the administrative activity in terms of advantages enjoyed or costs caused by the payer. Thus, the levy in question differs from taxes in the strict sense.

10.– Having clarified that the constitutional parameters mentioned – Articles 3 and 53 of the Constitution – are pertinent due to the tax-related nature of the levy, on the merits the questions raised with regard to these parameters must be declared unfounded.

10.1.– It is, first of all, necessary to bear in mind that "the legislator is entitled to broad discretion in relation to the various purposes which underlie the activity of taxation" (Judgment no. 240 of 2017), limited only by the requirements of that it be neither arbitrary nor manifestly unreasonable and disproportionate. In light of this perspective, consistently reiterated in the case law of this Court, the legislator's choice to impose the levy in question exclusively on companies characterized by their significant presence on the markets due to a specific structure and because they have significant economic dimensions cannot be held to be constitutionally illegitimate. Indeed, it is these very companies which, on the basis of the *id quod plerumque accidit*, are the principal addressees of the Authority's activities and are, therefore, responsible for the large part of the related costs. In light of this reasoning, the legislative selection of the companies obliged to pay the levy is neither arbitrary nor unreasonable. This legislative choice is also not affected by the fact that the AGCM's activities may sometimes address companies that are not obliged to pay the levy, like so-called under-threshold entrepreneurs, public administrations, companies without permanent establishment in Italy, and consumers. At the level of effectiveness, the antitrust Authority is chiefly concerned with the economic activities of mid-size and large entrepreneurs and this suffices to demonstrate that the regulatory scheme under review is not manifestly unreasonable.

10.2.– Nor is the option to refer to a predetermined revenue amount (fifty million euros) an unreasonable choice to delimit the addressee entrepreneurs who must pay the levy. The referring Commission holds that revenue is not an indicator of wealth, since overall financial accounts could close at a loss despite high revenues. Therefore, the legislator allegedly selected an inappropriate parameter for expressing ability to pay, making the levy in question unconstitutional for this reason.

This challenge erroneously assumes that the levy under review amounts to a form of tax on the income of certain legal persons. But this is not the case. Indeed, the levy in question does not take an income as its *causa impositionis*, but intends to distribute the economic burden related to the provision of a public service (protection of competition and the functioning of the market) among the entities that are the reason the Authority guaranteeing fair competition exists and who actually draw the large part of its activities. In this sense, revenue, which measures turnover, does not (and could not) express either the measure of an income to be affected, or the measure of the company's profitability (understood as the ability to meet its production costs).

It bears repeating that, according to the well-established case law of this Court, the legislator enjoys broad discretion to identify "the individual factors indicative of ability to pay which, as one's suitability for a given tax liability, may be derived from any indicator of wealth and is not limited to individual income" (Judgment no. 156 of 2001). In the exercise of this broad ability to choose, the legislator has determined that the levy applies only to those entrepreneurs with revenue higher than a certain threshold amount; it is not unreasonable that the operating costs of the Authority responsible for the correct functioning of the market should fall upon companies characterized by a significant presence on the relevant markets and endowed with considerable influence on the flow of economic activity corresponding thereto.

This is clearly not a solution required by the Constitution; nevertheless, the chosen criteria are neither arbitrary nor unreasonable and, as such, do not violate Articles 3 and 53(1) and (2) of the Constitution.

10.3.– As for the alleged violation of the principle of progressive taxation, it is, first of all, necessary to reiterate that, according to a line of reasoning that is often repeated in constitutional case law (for example in Judgments no. 21 of 1996 and 158 of 1985), the principle of progressiveness refers to the tax system as a whole, and not to each individual duty.

In reference to the present case, it bears keeping in mind that the absence of progressiveness and the presence of a maximum threshold for the total duty are consistent with the ultimate purpose of the levy in question, which is not to introduce a new form of income tax, but rather to make the entities that chiefly concern the Authority's supervisory activities contribute to funding it. This system corresponds to two reasonable, equitable requirements: the need to contain the economic burden falling upon individual players and the need to avoid a situation in which some operators become the Authority's "super-funders," resulting in the *de facto* compromise of its independence. In particular, establishing a maximum ceiling for the duty was intended to correct an issue that emerged in reference to the former system, which provided for a duty imposed on entities upon communication of mergers, and for which there was no maximum limit to the amount. The new system introduced the limit for the purpose of sheltering the Authority from any risk that the controller could be "captured" by a controllee. In the absence of any such limit, the largest companies – especially the hegemonic ones on the market and, therefore, the same ones regarding which the need for independent monitoring is most keenly felt– could become the chief financers of the Authority, creating a relationship of financial subordination susceptible to influencing supervisory operations even through mere delayed payment of the monies owed.

The distribution of the Authority's funding according to criteria that, by imposing the burden to contribute starting from certain minimum revenue amounts, increase the amount by a fixed percentage, up to a maximum amount that cannot be surpassed, prevents the creation of a small circle of hegemonic financers. In this respect, the system designed by the legislator is, therefore, not only compatible with the constitutional principles found in Articles 3 and 53 of the Constitution, but actually respond to the requirements of reasonableness.

11.– The referring Commission alleges that the reservation to the legislator enshrined in Article 23 of the Constitution has been violated in that the contested provisions, and particularly Article 10(7-*quater*) grant the AGCM the ability to make, by its own decision-making, variations in the amount and method of payment of the levy, and the law does not fix the appropriate criteria for guiding this exercise of regulatory power.

This question, too, is not founded.

Here it bears recalling that – as the Constitutional Court has recently reiterated (Judgments no. 69 of 2017 and no. 83 of 2015) – the reservation to the legislator in Article 23 of the Constitution has a relative quality: as a result, the law, although it cannot limit itself to granting regulatory power through a "blank rule," respects the reservation when it provides sufficient directive criteria and traces the general lines of the regulatory scheme. Concerning financial obligations, respect for the reservation under Article 23 of the Constitution translates into the legislator's duty to fully indicate the subject and the object of the financial obligation, while the complementary and supplementary work of the public administration must be confined to the quantitative specifications (and sometimes the qualitative ones as well) of that financial obligation: without leaving room for potential choices that are entirely free and, therefore, potentially arbitrary, by that public administration, but within what has been provided by

the legislator – considered in the overall regulatory framework in that area taken as a whole – there are rational and adequate criteria for the concrete identification of the burden imposed on the individual in the public interest (see, most recently, Judgment no. 69 of 2017, which exemplifies a longstanding line of reasoning). This Court, applying these principles in the aforementioned judgment no. 69 of 2017, recently held that a similar (but broader) regulatory power, which had been granted to the Transport Authority [*Autorità per i trasporti*], was constitutional.

In this case, section 7-*quater* of contested Article 10 provides, for the years following 2013, that potential variations in the amount and method of payment of the levy established in the previous section 7-*ter* may be adopted by the same Authority by its own decision-making, within the maximum limit of 0.5 per thousand of revenue as shown on the balance sheet approved prior to the adoption of the decision, and without alteration to the maximum threshold amount provided in section 7-*ter*. The contested provision, therefore, establishes the following: the subject and object of the financial obligation; the amount of the duty for 2013 and, for the following years, the establishment of quantitative limits on the exercise of the power to vary the amount of the duty, imposing a limit on the maximum percentage by which it may vary (of 0.5 per thousand of revenue as shown on the balance sheet approved prior to the adoption of the decision); and the absolute limit, applicable in all cases, of the maximum ceiling amount established directly by the legislator.

The variation power is intended to contain the duty within the limits necessary to cover the actual operating costs of the entity, derived from the balance sheet. The administration's discretion must be oriented to this purpose, and, in actual fact, it has been.

In light of all these regulatory elements, it must be held that the regulatory scheme under review meets all the conditions required by the reservation to the legislator in Article 23 of the Constitution.

ON THESE GROUNDS

THE CONSTITUTIONAL COURT

having joined the judgments,

1) *declares* that the questions concerning the constitutionality of Article 10(7-*ter*) and (7-*quater*) of Law no. 287 of 10 October 1990 (Provisions for the protection of competition and the market), added by Article 5-bis(1) of Decree-Law no. 1 of 24 January 2012 (Urgent provisions for competition, the growth of infrastructure, and competitiveness), converted, with modifications, by Law no. 27 of 24 March 2012, raised by the Provincial Tax Commission of Rome in reference to Articles 3 and 53(1) and (2) of the Constitution, with a referral order of 2 May 2016 (R.O. no. 208 of 2016), are inadmissible;

2) *declares* that the questions concerning the constitutionality of Article 10(7-*ter*) and (7-*quater*) of Law no. 287 of 1990, added by Article 5-*bis*(1) of Decree-Law no. 1 of 2012, converted, with modifications, by Law no. 27 of 2012, raised by the Provincial Tax Commission of Rome in reference to Articles 3, 23, and 53(1) and (2) of the Constitution with a referral order of 25 October 2016 (R.O. no. 51 of 2017) are unfounded.

Decided in Rome, at the seat of the Constitutional Court, *Palazzo della Consulta*, on 7 November 2017.