JUDGMENT NO 260 YEAR 2021

In this case the Court heard a referral order from the Court of Verona questioning the constitutionality of Article 18(5) of Legislative Decree No 101 of 10 August 2018 on adapting domestic law to the EU General Data Protection Regulation. That article provided for the interruption of the running of the statute of limitations as regards collecting penalties imposed at the outcome of certain data protection infringement proceedings not yet concluded at the time of entry into force of the delegated legislation at issue.

The referring court challenged the provision on the basis that it violated the Constitution in two respects, firstly, Article 76 on the limits to delegated law and, secondly, Article 3 on equality,

On the one hand, the Court held that the first question was unfounded since Article 76 of the Constitution afforded the government a certain latitude in exercising its delegated legislative power especially when adapting national law to complex EU law, a margin of appreciation that had not been exceeded in the present case.

On the other hand, the Court held that second question was well founded since the challenged provision clashed with Article 3 of the Constitution insofar as it violated the principle of reasonableness and the canon of proportionality. While extending limitation periods could be justified in exceptional circumstances, that was not the case here because the legislation had already provided for mechanisms to ease the burden on the Data Protection Authority stemming from the new data protection rules without the need to also resort to adjusting limitation periods. The challenged provision went too far to the detriment of other competing interests worthy of protection. Moreover, the interruption of the running of time in the present case did not sit well with the established *rationale* for such a measure.

Therefore, the Court declared that the challenged provision was unconstitutional.

[omitted]

THE CONSTITUTIONAL COURT

[omitted]

gives the following

JUDGMENT

in the proceedings concerning the constitutionality of Article 18(5) of Legislative Decree No 101 of 10 August 2018 on "Provisions for the adaptation of national legislation to the provisions of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)", initiated by the Court of Verona, Second Civil Division, in the proceedings between L. P. and the Data Protection Authority [*Garante per la protezione dei dati personali*] and another, with the referral order of 9 November 2020, registered as No 28 in the Register of Referral Orders 2020 and published in the Official Journal of the Republic No 10, first special series 2021.

[omitted]

after deliberation in chambers on 23 November 2021.

[omitted]

Conclusions on points of law

1.– By referral order of 9 November 2020, registered as No 28 in Register of Referral Orders 2021, the Court of Verona, Second Civil Division, has raised questions

concerning the constitutionality of Article 18(5) of Legislative Decree No 101 of 10 August 2018 on "Provisions for the adaptation of national legislation to the provisions of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)", with reference to Articles 3 and 76 of the Constitution.

2.– Article 18(5) of Legislative Decree No 101/2018 provides, in particular, that "[t]he entry into force of this decree shall determine the interruption of the limitation period regarding the right to collect the sums due under this article, referred to in article 28 of Law No 689 of 24 November 1981".

3.– From the point of view of relevance, the referring court observes that in the case before it the petitioner has pleaded the statute of limitations in respect of the receivable owed to a public authority (in this case, the Data Protection Authority) in the form of an administrative fine. The referring court asserts that should the challenged provision be declared to be unconstitutional, the plea as to the expiry of the statute of limitations would have to be upheld.

The referring court states that the enforceable claim arose through the conversion, by operation of law, of the act communicating the infringement into an order-injunction, ninety days after the entry into force of Legislative Decree No 101/2018 (which occurred on 19 September 2018), without L. P. having filed new pleadings within the following sixty days.

The referring court states that the expiry of the limitation period, which would have occurred on 8 July 2019 in the absence of the interruption of the running of time by operation of law, thus fell on a date subsequent to when the enforceable claim arose but before service of the demand for payment on 8 December 2019.

Both reasons would dictate that the plea as to the expiry of the statute of limitations be upheld in the main proceedings were it not precisely for the impediment constituted by the interruption of the running of time by operation of law contemplated by Article 18(5) of Legislative Decree No 101/2018.

4.– As for the non-manifest groundlessness of the question posed with reference to Article 76 of the Constitution, the referring court takes the view that Law No 163 of 25 October 2017 (Delegation of power to the government for the transposition of European directives and the implementation of other acts of the European Union - European Delegation Law 2016-2017) does not contain any time-related provision capable of enabling the government to introduce provisions intended to extend the limitation period for fines imposed by the Data Protection Authority prior to the application of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016.

In view of the fact that the government had been delegated power to enact rules for the purpose of adapting the national legal system to the provisions of Regulation (EU) 2016/679 and the fact that the Regulation applies only to events occurring after 25 May 2018, the referring court disputes that the powers delegated to the government include the authority to legislate for infringement proceedings for matters not covered by EU regulation.

5.– Again on the issue of non-manifest groundlessness, the referring court identifies several grounds for conflict with Article 3 of the Constitution.

Above all, it is claimed that Article 18(5) of Legislative Decree No 101/2018 would result in an unreasonable disparity in treatment with respect to multiple terms of comparison. First, the referring court contends that there is discrimination with respect to infringements for which the limitation period had already expired before the entry into

force of Legislative Decree No 101/2018; second, it maintains that there is further discrimination with respect to infringements committed before the application of Regulation (EU) 2016/679 and not yet communicated by the Data Protection Authority; and, third and finally, the referring court alleges that there is discrimination with respect to infringements committed when the EU regulation in question was in force. The referring court observes that the five-year limitation period provided for in Article 28 of Law No 689 of 24 November 1981 (Amendments to the criminal system) would apply to such infringements, whereas solely for communicated infringements the proceedings in relation to which had not yet concluded as of the date of application of Regulation (EU) 2016/679, the limitation period would be "five years from the entry into force of the law plus the time already elapsed between the date of the infringement and the date of entry into force of Article 18 of Legislative Decree No 101/2018".

The referring court also considers that Article 3 of the Constitution has been violated, since the interruption of the running of the statute of limitations by operation of law would undermine "on the basis of a provision of a retroactive nature ... without any apparent valid reason, [the] expectation that the right will be extinguished by virtue of the inaction of the holder".

The referring court adds that "the statute of limitations is ... also instrumental in ensuring the right of the obligor to defend itself in court, since, after a certain lapse of time from the date of the event giving rise to the right, it may be difficult or impossible for the party to adduce the proof in support of its defence".

The referring court then raises the issue of a contrast with the principles of proportionality and reasonableness, again from the standpoint of a violation of Article 3 of the Constitution.

It is argued that the challenged provision "allows the Data Protection Authority to remain inactive in exercising its right for a further period of up to five years after the entry into force of Article 18 of Legislative Decree No 101/2018, without that inertia being justified by the existence of factual obstacles to the exercise of the right to collect the sums". On the contrary, it is claimed that Article 18(1) of Legislative Decree No 101/2018 designs a mechanism to simplify the procedure, so that there would be no procedural burden on the Data Protection Authority such as to justify and render the interruption of the running of the statute of limitations by operation of law compliant with the principle of proportionality.

The referring court alleges that the challenged provision is also manifestly unreasonable, because "under Articles 2943 and 2944 of the Civil Code – referred to in Article 28 of Law No 689/1981, which in turn is referred to in Article 166 of the Personal Data Protection Code as per the wording in force at the time – the running of the statute of limitations is interrupted by court proceedings and, for receivables, any act notifying the obligor of its default as well as any acts whereby the obligor acknowledges the right of another person". Conversely, "the situation of pure stasis [of an administrative procedure would not be] even remotely comparable to an act of exercise of the right or an act of acknowledgment by the person liable for the debt". Accordingly, the referring court is of the view that it would be "wholly unreasonable, in relation to the ordinary rules on acts interrupting the running of the statute of limitations, to link an interruption of the limitation period to the mere existence of infringement proceedings".

[omitted]

The question is unfounded.

7.1.– Article 13 of Law No 163/2017 delegated the government the power to adopt one or more legislative decrees in order to adapt the national regulatory framework to the

provisions of Regulation (EU) 2016/679.

In delimiting and conforming the exercise of the delegated power, Article 13(3) referred, first of all, to Article 32 of Law No 234 of 24 December 2012 (General rules on the participation of Italy in the formation and implementation of European Union legislation and policies). These provisions sets forth the general principles and guiding criteria to be followed when transposing EU acts into domestic law. In particular, among those general criteria is one whereby "for the purposes of a better coordination with rules in force for the individual sectors affected by the legislation to be implemented, the necessary amendments to the rules themselves shall be introduced, including through the reorganisation and simplification of the law with an express indication of the repealed provisions, without prejudice to the procedures subject to administrative simplification or the matters subject to delegation" (Article 32(1)(b)).

Again Law No 163/2017, in Article 3(3)(c) thereof, in providing for specific guiding principles and criteria, has also given the delegated legislator a broad mandate to "coordinate the existing provisions on the protection of personal data with the provisions laid down in Regulation (EU) 2016/679".

Finally, those normative indications must be placed within the framework of well-settled constitutional case-law in accordance with which "Article 76 of the Constitution does not preclude the delegated legislator from enacting rules that represent a coherent development and completion of the choices expressed by the delegating legislator, since the former's function cannot be limited to a mere linguistic scan of the provisions established by the latter" (Judgments No 133/2021 and No 212/2018). In essence, the delegated legislator enjoys a "margin of appreciation in the implementation of the delegation of power, provided that its *rationale* is respected and that the delegated legislator's activity fits coherently into the overall regulatory framework of reference" (Judgments No 59/2016; in this vein, Judgments No 146/2015, No 98/2015 and No 119/2013).

In cases where the delegation of power concerns the adaptation of national legislation to supranational sources in the context of the reorganisation of a complex matter, the recognition of this margin of appreciation is all the more felt, within the hermeneutic boundaries of the coherent development and completion of the indications provided by the delegating legislator (Judgments No 10/2018, No 146/2015 and No 229/2014). This is undoubtedly the case of the adaptation of the Personal Data Protection Code to a detailed and highly innovative body of rules, such as Regulation (EU) 2016/679, which furthermore affects a pre-existing 'code', already transposing previous EU acts (in a similar vein, see Judgment No 100/2020).

7.2.– In the wake of the content of the criteria governing the delegated legislation, the *rationale* of Law No 163/2017 and this Court's precedents in relation to Article 76 of the Constitution, it must be held that, when adapting a particularly complex act like Regulation (EU) 2016/679 to the national legal system, the delegated legislator could well, in addition to supplementing and introducing appropriate links with the new rules with immediate direct effect, also coordinate the latter with the pre-existing rules by means of provisions intended to regulate the transition from one to the other.

On the above grounds, the question of constitutionality raised with reference to Article 76 of the Constitution must be considered unfounded.

8.– Turning now to the examination of the issues raised with reference to Article 3 of the Constitution, the question relating to the violation of the principle of reasonableness and the canon of proportionality by Article 18(5) of Legislative Decree No 101/2018 is well founded.

The examination of those aspects calls for a brief reconstruction of the legal framework within which the challenged provision fits.

9.– Article 18(5) of Legislative Decree No 101/2018 provides, with effect from its entry into force, for the interruption by operation of law of the limitation period in relation to infringement proceedings, which, on the date of application of Regulation (EU) 2016/679, had been commenced but not yet culminated in the adoption of an order-injunction. The proceedings in question are those subject to – prior to the 2018 reform – the rules laid down by Legislative Decree No 196 of 30 June 2003 embodying the "Personal Data Protection Code, containing provisions for the adaptation of the national legal system to the provisions of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC".

By virtue of Article 166 of Legislative Decree No 196/2003, again as per the wording prior to the 2018 reform, those proceedings are governed by Law No 689 of 1981 and consist of two phases. The first is the investigation stage, which ends either with immediate notification of the infringement or service of the particulars of the infringement, pursuant to Article 14 of Law No 689 of 1981. The second is the decision-making stage preliminary to the issuing of an order-injunction or to the dropping of the case.

In order to conclude this second stage, the public authority must in general comply with no other time limit than the five-year limitation period laid down in Article 28 of Law No 689 of 1981.

Against the backdrop of these rules, there are the transitional provisions of Article 18(5) of Legislative Decree No 101/2018, which, through the automatic interruption of the running of the statute of limitations, makes the time that has already elapsed between communication of the infringement and the entry into force of Legislative Decree No 101/2018 irrelevant in law.

Contemporaneously, in the face of the running of time afresh, the person originally informed of the infringement, without having received any new communication, sees a new procedural phase open up: he or she may pay at a reduced rate the communicated but not definitively established penalty or may submit new defence pleadings. Failing which, the original measure is converted by operation of law into an order-injunction, without the obligation of further notice.

10.– It emerges from the regulatory framework outlined above that the challenged provision – by means of the automatic interruption, i.e. with the running of a new five-year period – ends up statutorily extending the period laid down in Article 28 of Law No 689 of 1981, in respect of which this Court has already recently expressed criticism (Judgment No 151/2021).

It is up to the legislator's discretion to precisely set a time limit for the issuing of the measure concluding the infringement proceedings. That said, the aforementioned judgment held that the length of the limitation period "lasting five years and susceptible to interruption, renders it incapable of guaranteeing, in itself, the legal certainty of the alleged offender's position and the effectiveness of his or her right of defence, which require that there be a short time between the establishment of the wrongdoing and the imposition of the penalty". In fact, "the setting of a time limit for the conclusion of the proceedings that is not particularly long after the time when the wrongdoing is established and communicated, enabling the alleged offender to effectively contest the penalty, guarantees an effective exercise of the right of defence protected by Article 24 of the

Constitution and is consistent with the principle of efficiency and [of] impartiality of public administration".

The reasons for the conflict with the effectiveness of the protection of the private party, already highlighted by this Court with reference to Article 28 of Law No 689/1981, are clearly accentuated by an interruption of the said five-year limitation period mandated by law during the time that the public authority has displayed inertia.

In particular – as noted in the referral order – "the statute of limitations is [...] also instrumental in ensuring the right of the obligor to defend itself in court, since, after a certain lapse of time from the date of the event giving rise to the right, it may be difficult or impossible for the party to adduce the proof in support of its defence". This means that the automatic interruption of the five-year limitation period, which in itself already renders the relationship between private parties and public authorities excessively unbalanced, results in an intolerable weakening of the private party's interests.

The Data Protection Authority may take steps to collect the sums owed on the basis of the order-injunction issued by operation of law or, in the event that the private party submits new defence pleadings pursuant to Article 18(4) of Legislative Decree No 101/2018, it may issue the order-injunction. The order-injunction may be issued even after a period of five years from the sole act served on the person concerned: thanks to the interruption, another five years are added to the time that has already elapsed from the communication of the infringement to the date of entry into force of Legislative Decree No 101/2018. Conversely, private parties, having complied with the thirty-day time limit for contesting the administrative fine, may have to defend themselves, again within thirty days after service of the demand for payment or service of the order-injunction, more than five years after service of the act informing them of the infringement. No other communication, in fact, is required from the Data Protection Authority in the meantime, not even with reference to the options granted to private parties by the first paragraphs of Article 18 and the consequences arising for those who do not avail themselves of those options.

11.– The above scenario discloses a clear violation of the principle of reasonableness and the canon of proportionality.

In particular, regarding this second aspect, there would appear to be no reason in support of the challenged provision that could justify such an intense level of impairment of the private party's position.

The need to cope with the increased burden on the Data Protection Authority arising from the entry into force of Regulation (EU) 2016/679 cannot serve as a justification. In order to achieve such an objective, the law already envisages a simplified administrative procedure providing for the outcome of an order-injunction by operation of law. That mechanism considerably eases the burden on the Data Protection Authority and thus makes it unreasonable to interrupt the running of the statute of limitations.

In other words, if the need to cope with the excessive administrative workload stemming from the entry into force of Regulation (EU) 2016/679 is the *rationale* behind the decision to design a simplified administrative procedure, by contrast the interruption of the running of the statute of limitations is a further unjustified prerogative of the Data Protection Authority.

On the other hand, even if the recipient of the penalty were to avail of the option to file new defence pleadings pursuant to Article 18(4) of Legislative Decree No 101/2018, this would only bring the proceedings back to the realm of normality, which – as a rule – would see the Data Protection Authority having to address the private party's grounds for opposition.

In any event, it cannot be held that the interruption of the running of the statute of limitations was necessary to enable the procedural stage designed by the first paragraphs of Article 18 of Legislative Decree No 101/2018. On the contrary, in its discretion, the legislator could well have relied on concepts other than the interruption, apt to facilitate the Data Protection Authority without disproportionately affecting the position of private parties.

This Court itself, in various proceedings, has justified exceptional provisions extending time limits, but it has done so in circumstances where the challenged provisions were not contrary to Article 3 of the Constitution (Judgments No 356/2008 and No 375/2002). What was involved were provisions laid down in relation to the assessment of taxes, for which the public authority is subject to a time limit entailing lapse [*decadenza*] and not only to the statute of limitations [*prescrizione*], and which, moreover, had established an exceptional and limited extension of time for the performance of very complex tasks.

On the contrary, in the case of the challenged provision, the legislator, in violation of the principle of proportionality, did not select, from among the available options, the one best suited to achieving the purpose determining the least sacrifice (Judgments No 218/2021, No 202/2021, No 148/2021, No 119/2020, No 179/2019 and No 20/2019).

Rather than availing itself of options relating to time limits that were proportionate to the objective pursued, it resorted to an invasive option in the form of the interruption of the running of the statute of limitations referring, through reference to Article 28 of Law No 689 of 1981, to the rules as applied in the civil sphere.

However, interruption is based on two types of circumstances with a *rationale* totally unrelated, if not contrary, to that underlying Article 18(5) of Legislative Decree No 101/2018, which thus further emphasise its unreasonableness rather than constituting a justification therefor.

The first group of circumstances that entails the interruption of the running of the statute of limitations is related to the exercise of the right by its holder, i.e. with the cessation of inertia. On the contrary, as pointed out above, the prerequisite for the interruption of the running of the statute of limitations referred to in Article 18(5) of Legislative Decree No 101/2018 is precisely inertia on the part of the Data Protection Authority, which has not acted to complete the administrative procedure.

The second group of circumstances, which also provides a basis for interruption of the running of the statute of limitations in the civil sphere, relates to unequivocal acts and conduct acknowledging the right by the party against whom it may be enforced. Conversely, in the challenged Article 18(5) there is no trace of any possible acknowledgement of the Data Protection Authority's right by the private party in respect of whom the obligation to pay the penalty has not yet been established. The private party is simply waiting for an administrative measure that will respond to its objections. Nor is any weight to be attached to the possible conduct described in the first paragraphs of Article 18, which is subsequent to the interruption by operation of law and thus definitely incapable of justifying it. In any event, what is at issue is anodyne behaviour that cannot be equated with implied conduct especially since the private party did not receive any communication informing it of the consequences of its actions or omissions.

The unreasonable discrepancy between the interruption of the running of the statute of limitations by operation of law and the *rationale* underlying that legal institution of private law, to which Article 18(5) of Legislative Decree No 101/2018 expressly refers, coupled with the lack of a reasonable justification in support of an incisive measure like the interruption of the statute of limitations, confirm that the measure provided for in

Article 18(5) of Legislative Decree No 101/2018 violates the principle of reasonableness and the canon of proportionality.

ON THESE GROUNDS

THE CONSTITUTIONAL COURT

(1) *declares* that Article 18(5) of Legislative Decree No 101 of 10 August 2018 on "Provisions for the adaptation of national legislation to the provisions of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)" is unconstitutional;

(2) *declares* unfounded the question of the constitutionality of Article 18(5) of Legislative Decree No 101/2018 raised, with reference to Article 76 of the Constitution, by the Court of Verona, Second Civil Section, in the referral order mentioned in the caption.

Decided in Rome, at the seat of the Constitutional Court, *Palazzo della Consulta*, on 23 November 2021.

Signed by: Giancarlo CORAGGIO, President

Emanuela Navarretta, Author of the Judgment