Italian Constitutional Court

Legal summary

Judgment No 105/2024

ECLI:IT:COST:2024:105

THE GOVERNMENT MAY AUTHORIZE THE CONTINUED OPERATION OF UNDERTAKINGS SEIZED IN CONNECTION WITH ENVIRONMENTAL CRIMES FOR UP TO 36 MONTHS IF THEY ARE OF STRATEGIC ECONOMIC INTEREST

In Judgment No 105/2024, the Constitutional Court declared that a provision setting forth an obligation for criminal courts to authorise the operation of an industrial plant of strategic economic interest, in spite of its seizure in connection with environmental offences, **violated Articles 2, 9, 32 and 41(2) of the Italian Constitution** because it failed to specify a time limit for such obligation.

When an undertaking under judicial seizure is of national strategic interest, the government must be allowed to assess the multiple interests affected by the judicial order and authorise the operation of the plant, subject to the safeguard measures necessary to limit its harmful effects on the environment and public health.

However, the constitutionality of this mechanism hinges on its exceptional nature. The government's authorisation for continued operation must be limited to the time needed for the undertaking to align its operation with applicable environmental and health standards. Therefore, the Court decided that **the government's authorisation should not exceed 36 months**.

Main proceedings

Various oil refineries located in the province of Siracusa, Sicily, direct their industrial waste to IAS, a local biological treatment facility that also processes municipal wastewater.

In May 2022, the judge for preliminary investigations of the Criminal Court of Siracusa (the "**referring court**") ordered the provisional seizure of the IAS treatment facility as part of the proceedings for various alleged crimes, including aggravated environmental disaster.[1] The referring court appointed an administrator to oversee the management of the facility and, in August 2022, ordered the phase-out of industrial wastewater treatment.

In December 2022, Decree Law No 187/2022[2] required undertakings deemed essential to national strategic interests to ensure the continuous refining of hydrocarbons. In January

[1] As provided for in Article 452-*quater* of the Criminal Code.

[2] Decree Law No 187/2022 of 5 December 2022 on urgent measures to protect the national interest in strategic economic sectors.

2023, Decree Law No 2/2023 added paragraph 1-*bis*.1 (the "**challenged provision**") to Article 104-*bis* of the Rules implementing the Code of Criminal Procedure, regulating specifically undertakings of strategic national interest placed under judicial seizure. The new paragraph mandated criminal courts to authorise the continued operation of such undertakings under the conditions to be established in a subsequent executive order aimed at reducing environmental and health-related risks arising from their activity.

In February 2023, the government designated a local refinery as an undertaking of strategic national interest and deemed IAS, which processed the refinery's industrial wastewater, essential for maintaining its operation. As a result, IAS itself was deemed to fall within the scope of Decree Law No 2/2023 and the challenged provision.

In September 2023, the Government issued the order establishing the measures which IAS must adopt while continuing its operations.

The referring court argued that the challenged provision compelled it to authorise IAS's continued operation and considered that this obligation significantly restricted its powers to order and enforce precautionary measures other than those established by the executive order. Consequently, it stayed proceedings and referred the matter to the Constitutional Court (the "**Court**"), asserting that the challenged provision violated the Italian Constitution (**IC**).

Complaints

The referring court argued that the challenged provision forced it to authorise IAS's continued operation, frustrating its prior seizure and phase-out orders and preventing any judicial assessment of the impact of the undertaking's operation. This, the referring court contended, severely restricted its ability to impose and enforce precautionary measures against environmental harm.

Specifically, the referring court alleged that the provision violated **Articles 2 (Right to life), 9 (Environmental protection)** and **32 (Right to health) IC**, as it compelled courts to authorise the operation of facilities seized during the investigation over environmental offences – despite prior judicial findings that their activities posed environmental and health risks. It also invoked **Article 41(2) IC (Freedom of private economic enterprise)**, which prohibits private businesses from harming social interests, including public health and the environment.

Decision of the Court

The Court ruled that the challenged provision **violated Articles 2, 9, 32 and 41(2) IC**, because it did not provide that the judicial authorisation based on the executive order must not exceed 36 months.

Reasons for the decision

Preliminarily, the Court agreed with the referring court's interpretation of the challenged provision. Ordinarily, courts can assess the public impact of the continued operation of a seized plant and either impose safeguards or deny authorisation when risks to environment

and public health cannot be mitigated. However, under the challenged provision, once the government had designated a facility as strategic and identified appropriate safeguard measures through an executive order, courts are bound to authorise its further operation – even if they deemed the governmental safeguards insufficient to protect those public interests.

The Court referenced its previous 2013 ruling on the continued operation of the Ilva steelmaking plant in Puglia, which had also been seized in the course of criminal proceedings.[3] In that case, the Court upheld the constitutionality of the "Ilva decree",[4] which authorised the plant's continued operation under strict environmental safeguards, finding that it struck a reasonable balance between the constitutional right to health and the concerns about the employment of the plant's workforce. In particular, following a favourable re-examination of the environmental impact assessment by the Ministry of the Environment, the Ilva decree authorised the plant's operation for a maximum period of 36 months, during which Ilva was expected to remove the harmful externalities of its activities. The Court deemed this solution balanced, even though it deprived the criminal court of the power to stay the plant's operation or devise new safeguards.

In this case, the Court started from a similar assumption: urgency and national security considerations may justify the government's direct specification of safeguards to mitigate negative externalities on public health and the environment and, at the same time, secure the plant's operation. In this context, the powers of criminal courts may be temporarily limited.

The referring court invoked, here, the new constitutional provisions on the protection of the environment introduced by a 2022 reform.[5] Article 9 IC recognises now the environment as encompassing biodiversity and ecosystems, and distinguishes it from natural landscape and human health, which were already recognised as protected interests by the Italian Constitution. Additionally, Article 9 IC explicitly requires all public authorities to protect the environment for the benefit of both present and future generations. Finally, Article 41(2) IC prohibits private businesses from causing environmental harm.

Bearing in mind the wording and spirit of the recent constitutional amendments, the Court reviewed the challenged provision by focusing on three key differences between it and the "Ilva decree":

1. the challenged provision did not specify which governmental authority was responsible for defining safeguard measures;
2. it failed to outline any clear administrative process for establishing these measures;
3. it lacked a maximum duration of the authorisation.

[3] Constitutional Court, Judgment No 85/2013.

[4] Decree-law No 207/2012 of 3 December 2012 on urgent measures to protect public health, the environment and employment in the event of crisis of industrial undertakings of national strategic interest.

[5] Constitutional Law No 1/2022 of 11 February 2022 on the amendment of Articles 9 and 41 on environmental protection.

The Court found that the first issue did not render the provision unconstitutional, as the responsibility for defining the safeguards necessarily rests with the authority that designates the undertaking as being of strategic national interest – namely, the Prime Minister.

Regarding the absence of procedural instructions for the definition of safeguards set out in the executive order, the Court ruled that this regulatory gap does not make the provision unconstitutional. A constitutionally oriented interpretation of the challenged provision is sufficient to conclude that the government's indication of safeguards must necessarily adhere to due process standards of transparency and participation, in line with Italy's obligations under EU[6] and international law.[7] Additionally, the governmental authorisation must be supported by adequate reasoning, consistent with the statutory requirements applicable to all administrative acts.

Finally, the constitutionality of the mechanism set forth in the challenged provision hinges on its limited duration. The continued operation of the seized plant, motivated by its strategic importance for the national economy and local employment, must only be authorised for the period strictly necessary to implement environmental mitigation measures and complete the required environmental processes, including the re-examination of existing environmental impact assessments.

For these reasons, the absence of a time limit rendered the challenged provision unconstitutional. To address the regulatory gap, the Court found that a non-renewable 36-month time limit – consistent with a provision to that effect in the Ilva decree – must be added to the provision. Within this period, the undertaking must resolve the issues that led to the court-ordered seizure and brings its operation into compliance with the applicable national and EU standards of environment and health protection.

Type of proceedings	Constitutional review by referral order
President of the Court	Augusto Antonio Barbera
Judge rapporteur	Francesco Viganò

[6] In particular, Directive (EU) 2010/75 of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control) provides for the principle of an "integrated approach to prevention and control of emissions", the inclusion in all permits of "all the measures necessary to achieve a high level of protection" and the principle of "effective public participation in decision-making" in accordance with the Århus Convention of 25 June 1998 on access to information, public participation in decision-making and access to justice in environmental matters.

[7] In particular, the principle of public participation has been confirmed by the European Court of Human Rights, which derived it from the positive obligations under Article 8 of the European Convention on Human Rights, on the right to private life. See ECtHR (GC), judgment of 9 April 2024, *Case of Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* (Application No 53600/20) para. 539.

Composition of the Court	Augusto Antonio Barbera (President), Franco Modugno, Giulio Prosperetti, Giovanni Amoroso, Francesco Viganò, Luca Antonini, Stefano Petitti, Angelo Buscema, Maria Rosaria San Giorgio, Filippo Patroni Griffi, Marco D'Alberti, Giovanni Pitruzzella, Antonella Sciarrone Alibrandi
Delivery of the judgment	13 June 2024
Challenged provisions	Article 104-*bis*, paragraph 1-*bis*.1, of the Rules implementing the Code of Criminal Procedure