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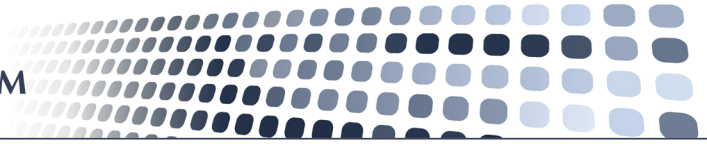
The Constitutional Court turns its look at Europe

by Paolo Fusaro

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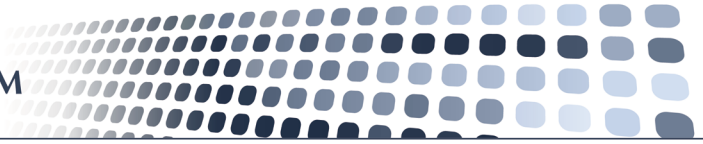


Abstract

With the order of April 15, 2008¹, the Constitutional Court of Italy requested, for the first time, the intervention of the Court of Justice of the European Communities, enabling the mechanism of preliminary deferment in the context of a sentence of constitutionality primarily promoted by the State in relation to the regional law.

Key-words:

Italian Constitutional Court, European Court of Justice, preliminary reference



With the order of April 15, 2008^{II}, the Constitutional Court of Italy requested, for the first time, the intervention of the Court of Justice of the European Communities, enabling the mechanism of preliminary deferment in the context of a sentence of constitutionality primarily promoted by the State in relation to the regional law.

This law^{III} with which the region of Sardinia had introduced a series of so-called “on luxury” taxes had been subjected to the assessment of the Constitutional Court which, with sentence no. 102^{IV} of April 15, 2008, had censured its legitimacy in relation to article 3 paragraph. 1, which featured a regional tax on capital gains of second homes for tourist use, and in relation to article 3 paragraph.2, concerning the regional tax on second homes for tourist use.

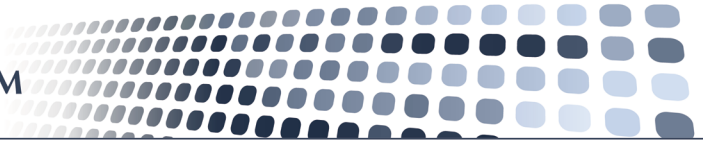
With the same utterance the Court had, moreover, introduced the separation of judgment concerning the question of constitutional legitimacy of article 3 paragraph 3, investing, with this order, the Court of Justice with the question of the compatibility of this last norm with the communitarian regulations.

This regulation established a regional tax on tourist use of aircrafts and pleasure units, applicable to any physical or juridical person having fiscal domicile outside of the regional territory and taking charge of the operation of an aircraft or a pleasure unit.

This tax, which consequently ends up simply being applied to firms not fiscally domiciled in Sardinia, particular affects firms whose activity consists in putting those units at the disposal of a third party, and those who perform operations of air transportation without compensation and, therefore, fall within the communitarian definition of “general business aviation”.

The Region of Sardinia defended itself by affirming that the justification for the tax should be found in the fact that those firms not having a fiscal domicile in the region take advantage of the Region’s public services without participating in its funding, whereas those having their domicile in the territory must sustain higher expenses due to the geographical and financial peculiarities linked to their insularity; the taxation was therefore originated by the need to rebalance the financial situation of “non-resident” subjects in relation to that “resident” subjects, with the additional purpose of guaranteeing better sustainability of regional tourist development.

According to the judges of the Constitutional Court, it seems discriminatory to subordinate the payment of the tax by firms performing the same activity to the sole



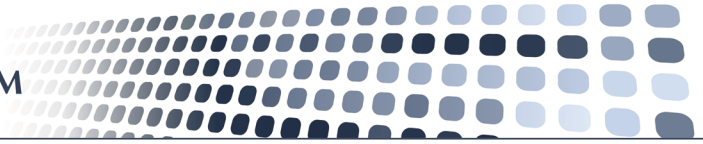
consideration of the fact that they might or might not have fiscal domicile in the regional territory: this would represent a “selective burden” of the costs for firms without fiscal domicile in Sardinia and would have discriminatory and distorting effects on competition, possibly in contrast with the communitarian regulations concerning the free provision of services (art. 49 of the ECT) and with the ban on State subsidies (art. 87).

Putting aside the mechanism through which the communitarian norms stand out as legal sources in the Italian ordinance, it is appropriate to remember that the current art. 117 Const. imposes upon both regional and national legislation the adherence to the “indentures deriving from the communitarian ordinance”.

As reaffirmed in the order of the Constitutional Court, in the case of an appeal proposed primarily by the State having as its object the constitutional legitimacy of a regional law due to incompatibility with the communitarian regulations, these rules act as interjected regulations suitable for integrating, making the parameter for the evaluation of conformity of the regional regulation to art. 117 Const. tangibly operational, with a subsequent declaration of constitutional illegitimacy of the regional regulation considered in contrast with them.

The Constitutional Court has, moreover, revealed that the interpretative solution in this specific case can not be separated from the previous jurisprudence of the Communitarian Court, supposing that this has taken charge, on several occasions, of similar but not identical cases^V to the “landing tax”, verifying the subsistence of a restriction to the free provision of services pursuant to art. 49 ECT, in the case of a specific measure making cross-border services more onerous than comparable national services; in this case, however, the reference was made to the discriminating taxes between national and international flights, between flights with path coverage above or below a specific distance or between domestic and international transportation.

According to the Court, it is therefore necessary to verify whether or not the competitive financial advantage deriving from the exemption from the regional tax of the firms residing in Sardinia falls within the definition of State supply pursuant to art. 87 ECT, considering that this advantage is not linked to the concession of a tax break, but to the minor cost indirectly borne by them in comparison with non-resident firms.



These motivations have therefore induced the Constitutional Court to recognise the opportunity of raising the preliminary question of interpretation in front of the Court of Justice, under art. 234 ECT.

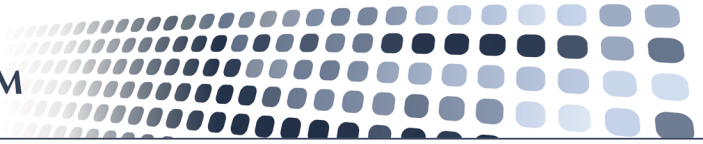
This deferment seems to represent a strong *revirement* with due regard to the position constantly adopted by the Court, which has always excluded, with the exception of an isolated utterance^{VI}, the possibility of availing itself of the preliminary deferment, inhibiting its own power to directly turn to the Court of Luxemburg.

Close examination of Italian constitutional jurisprudence reveals that, in cases of incidental judgments of constitutional legitimacy, every time the judge *a quo* asked the Court to raise the preliminary question before the Court of Justice, the Court has always affirmed that it is up to the judge *a quo* to take charge of turning to the communitarian judge and, subsequently, returned the acts for a new evaluation of the relevance of the question, affirming that it is exclusively up to the judge to request a communitarian regulation, as presupposition or parameter of the question of constitutional legitimacy, causing “certain and reliable” interpretation by turning to the communitarian Court.

This attitude undoubtedly constitutes a pragmatic applicative corollary of the “separation” between the two ordinances that the Court has always held in its utterances on the structure of the respective normative sources, obtained from art. 11 Const., reflecting the dualistic situation between the two different normative systems, which are in distinct contraposition with the assertion of unified and reciprocal integration between each other, advocated by the European Court.

Therefore, it seems necessary to point out that similar orientation lines up with the common position adopted by almost all the Member States, the tangible use of communitarian preliminary deferments originated by internal constitutional organs of justice having only been considerable in the past under initiative of the Belgian *Cour d'arbitrage*, the Land of Assia's *Staatsgerichtshof*, the Austrian *Verfassungsgerichtshof*, and more recently, the Lithuanian Constitutional Court.

In the case examined, however, the explanation provided by the judges of the Court is different, being linked with the functional peculiarity of the Court itself, which essentially exercises a function of constitutional control, of supreme guarantee of the observance of the Republic's Constitution by the constitutional organs of the State and the Regions^{VII}.



These attributions make it impossible to recognise the same “national jurisdiction” referred to by art. 234 ECT in the Constitutional Court, since the latter “cannot be included within the ordinary or special judiciary organs, the differences between the task entrusted to the first without records in the Italian ordinance, and those of the jurisdictional organs, being many and pronounced”.^{VIII}

The setting enunciated above doesn’t seem to be completely denied within order no. 103 of 2008, but only partially corrected under the structural difference between the judgment for constitutional legitimacy of a law promoted either as a collateral or as a primary procedure.

Indeed, the sentence states that the Court, “despite its peculiar position as supreme organ of constitutional guarantee within the domestic rules and regulations”, constitutes a national jurisdiction under art. 234 ECT and, in particular, a single-level jurisdiction, which allows no appeal against its decisions; therefore, according to art. 234 paragraph 3, the Court does not have the power, but rather the obligation to avail itself of the preliminary deferment, in order to avoid the legitimisation of a possible action of responsibility towards Italy, under art. 226 ECT.

Moreover, whereas in the context of an incidental judgment of legitimacy another subject, the judge *a quo*, can enable the mechanism of preliminary deferment replacing the Constitutional Court, in the judgment of constitutionality promoted as a primary procedure, the Court is the only judge called to utter upon the controversy.

As a consequence, the Constitutional Court states that, in the case of a lack of power to turn to the Court of Justice, “the general interest in the uniform application of the communitarian right would be damaged”.

^IWritten by judge Gallo. About this writ we invite to read Pesole Luciana, ‘La Corte Costituzionale ricorre per la prima volta al rinvio pregiudiziale. Spunti di riflessione sull’ordinanza n.103 del 2008’, in *Federalismi. Rivista di diritto pubblico italiano, comunitario e comparato*, available at www.federalismi.it; and Spigno Irene, 2008 ‘La Corte Costituzionale e la vexata questio del rinvio pregiudiziale alla Corte di Giustizia’, available at www.osservatoriosullefonti.it.

^{II} Written by judge Gallo. About this writ we invite to read Pesole Luciana, ‘La Corte Costituzionale ricorre per la prima volta al rinvio pregiudiziale. Spunti di riflessione sull’ordinanza n.103 del 2008’, in *Federalismi. Rivista di diritto pubblico italiano, comunitario e comparato*, available at www.federalismi.it; and Spigno Irene, 2008 ‘La Corte Costituzionale e la vexata questio del rinvio pregiudiziale alla Corte di Giustizia’, available at www.osservatoriosullefonti.it.



III Law of Sardinia May 11 2006, n. 4, as amended by law of Sardinia May 29 2007, no. 2. Published in B.U.R on May 31, no. 18.

IV We invite you to read Marco Calcagno's article "*The Constitutional Court gives new chance to fiscal federalism, but only for special regions?*" in this review.

V Sentences January 11 2007, C-269/05, *Commission vs Repubblica Ellenica*; February 6 2003, C-92/01, *Stylianakis*; 26 June 2001, C-70/99, *Commission vs Portugal*.

VI Sentence April 18 1991, no 168, in *Foro it.* 1992, I, 660, 6.

VII Order December 15 1995, no. 536, in *Foro it* 1996, I, 783; orders July 26 1996, no.319; April 6 1998, no. 108 and no.109.

VIII *Ibidem*