JUDGMENT NO. 111 YEAR 2017

In this case the Court heard a reference from employment proceedings in which a female worker had objected to a rule that required her to retire earlier than the date on which a male worker in her position would be obliged to retire. The Court ruled the question inadmissible on the grounds that the referring court could simply have disapplied the discriminatory provision on the grounds that it breached directly applicable EU law. Alternatively, were it to consider that a question regarding the interpretation of EU arose, it should have referred a reference for a preliminary ruling to the CJEU.

[omitted]

THE CONSTITUTIONAL COURT

[omitted]

gives the following

JUDGMENT

in proceedings concerning the constitutionality of the combined provisions of Article 24(3), first sentence, of Decree-Law no. 201 of 6 December 2011 (Urgent provisions on the growth, equity and consolidation of the public accounts), converted with amendments into Law no. 214 of 22 December 2011, as interpreted by Article 2(4) of Decree-Law no. 101 of 31 August 2013 (Urgent provisions to pursue rationalisation objectives in the public administrations), converted with amendments into Law no. 125 of 30 October 2013 and Article 2(21) of Law no. 335 of 8 August 1995 (Reform of the compulsory and complementary pension system), initiated by the *Tribunale di Roma* in the proceedings pending between A. C. and the Ministry of Cultural Heritage and Activities and Tourism by the referral order of 7 April 2016, registered as no. 207 in the Register of Referral Orders 2016 and published in the Official Journal of the Republic 42, first special series 2016.

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

having heard the Judge Rapporteur Silvana Sciarra in chambers on 5 April 2017.

[omitted]

Conclusions on points of law

1.– The *Tribunale di Roma*, sitting as an employment court, questions, with reference to Articles 3, 11, 37(1) and 117(1) of the Constitution – Article 11 of the Constitution in relation to Article 141 (more correctly: Article 157) of the Treaty on the Functioning of the European Union (TFEU) and Article 21 of the Charter of Fundamental Rights of the European Union (CFREU) and Article 117(1) of the Constitution in relation to Article 2 of "Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)" – the constitutionality of the combined provisions of Article 24, comma 3 (more correctly: 24(3), first sentence) of Decree-Law no. 201 of 6 December 2011 (Urgent provisions on the growth, equity and consolidation of the public accounts), converted with amendments into Law no. 214 of 22 December 2011, as interpreted by Article 2(4) of Decree-Law no. 101 of 31 August 2013 (Urgent provisions to pursue rationalisation objectives in the public administrations), converted with amendments into Law no. 125 of 30 October 2013 and Article 2(21) of Law no. 335 of 8 August 1995 (Reform of the compulsory and complementary pension system).

The first of these provisions identifies the workers to whom the legislation in force prior to the pension reform laid down by Article 24 of Decree-Law no. 201 of 2011 is to

remain applicable *ratione temporis*. The second constitutes an authentic interpretation of the first, and clarifies the interim regime applicable, specifically, to workers employed by the public administrations. The third lays down the legislation in force prior to the reform mentioned, as applicable to female workers registered with the exclusive pensions regime for public sector employees. These provisions stipulate in particular that: "Any worker who, by 31 December 2011, has fulfilled the age and contribution history requirements provided for under the legislation in force prior to the entry into force of this Decree for establishing the right to access and to commence receipt of an old-age pension or a length of service pension, shall be entitled to receive a pension according to that legislation and may request certification of that right from the body with which he or she is registered" (Article 24(3), first sentence, of Decree-Law no. 201 of 2011). That provision "shall be interpreted to the effect that the accrual to a worker employed by the public administrations of any right to a pension before 31 December 2011 shall mandatorily entail the application of the rules on eligibility and commencement of payments in force prior to the entry into force of the aforementioned Article 24" (Article 2(4) of Decree-Law no. 101 of 2013. "With effect from 1 January 1996, as of their sixtieth birthday, female workers registered according to exclusive arrangements with the mandatory general insurance body for disability, old age and survivors may receive a pension in accordance with the rules provided for under the relevant regulations governing old-age pensions or retirement on the grounds of age. With effect from 1 January 2010, the age threshold of sixty years for such female workers, as provided for under the first sentence of this paragraph, and the age threshold of sixty years pursuant to Article 1(6)(b) of Law no. 243 of 23 August 2004, as amended, shall be increased by one year. […]" (Article 2(21) of Law no. 335 of 1995).

In order to understand the reasons for the objections made by the referring court it is necessary first and foremost to make three premises. The first is that, pursuant to Article 24(3), first sentence, of Decree-Law no. 201 of 2011, the application of the pensions legislation valid prior to the entry into force of that decree – in place of the "new" rules introduced by it – is dependent upon the fact that the female worker fulfils the age and length of service prerequisites provided for under the legislation previously applicable for the purposes of eligibility for a pension and the commencement of pension payments by 31 December 2011. The second is that, according to the authentic interpretation laid down by Article 2(4) of Decree-Law no. 101 of 2013, the application of the previous legislation is mandatory for employees of the public administrations who had accrued any right whatsoever to a pension as at 31 December 2011. The third premise is that, pursuant to Article 2(21) of Law no. 335 of 1995, as at the same date of 31 December 2011, female public sector workers accrued the right to an old-age pension at the age of sixty-one years, as against the age of sixty-five required for the receipt of the same pension by male workers.

On the basis of these premises, the *Tribunale di Roma* observes that, where the prerequisites for eligibility for such a pension relating to age for insurance purposes and contribution history purposes have been fulfilled, whilst female public sector workers who reached the age of sixty-one prior to 31 December 2011, thereby accruing the right to an old-age pension, are mandatorily subject to the legislation applicable prior to the entry into force of Decree-Law no. 201 of 2011, on the other hand- male public sector workers of the same age – who have not by that date reached the age threshold (of sixty-five) required for eligibility for the same right – are subject to the "new" legislation contained in Article 24 of Decree-Law no. 101 of 2011. The referring court stated its

objections on this basis. Whilst under the legislation applicable prior to the entry into force of Decree-Law no. 201 of 2011, including in particular the "systemic" rule laid down by Article 4(1) of Presidential Decree no. 1092 of 29 December 1973 (Approval of the consolidated text of provisions on pension benefits for the civilian and military employees of the State), female public sector employees are required to retire "at the age of sixty-five", again in the view of the referring court, under the "new" pension legislation, male public-sector workers in a similar situation must by contrast retire at the age of sixty-six (which was subsequently increased to sixty-six years and three months with effect from 1 January 2013 and to sixty-six years and seven months with effect from 1 January 2016).

In the opinion of the referring court, the contested legislation thus violates the parameters invoked above "insofar as […] it provides for the retirement at the age of 65 of female workers who have fulfilled the prerequisites for receipt of a pension by virtue of having reached the age of 61 and having accumulated twenty years of contributions on or before 31 December 2011, whereas male workers in identical employment circumstances will retire at the age of 66 years and three months/seven months".

In consideration of the treatment of female public sector workers, which is considered to be less favourable than that of male workers with regard to the retirement age, the referring court asserts that four parameters of constitutional law have been violated. The contested legislation is claimed to violate: Article 3 of the Constitution, which enshrines the principle of equality before the law without distinction on the grounds of sex; Article 37(1) of the Constitution, which establishes the principle of equal pay for equal work by men and women; Article 11 of the Constitution, considering the contrast both with Article 157 TFEU, according to which "Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied" (paragraph 1), and with Article 21 CFREU, which prohibits "any discrimination based on any ground such as sex"; Article 117(1) of the Constitution, in view of the violation of Article 2 of Directive no. 2006/54/EC insofar as it defines "direct discrimination" as a situation "where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation" (paragraph 1, letter a).

2.– As a preliminary matter, it is necessary to examine the objection made by the representative of the President of the Council of Ministers according to which the questions raised are inadmissible on the grounds that the referring judge "erroneously found the question to be relevant".

The objection is unfounded.

The referring court states that it was apprised of a claim brought by a female employee of the Ministry of Cultural Heritage and Activities and Tourism who had already reached the age threshold and fulfilled the prerequisites relating to insurance and contribution history for receiving an old-age pension on 31 December 2011 and that this worker, who had been retired at the age of sixty five, had sought recognition of her right to remain in service until the age of sixty six years and three months, corresponding to the higher age applicable for the retirement of male workers of the same age who have the same insurance and contribution history.

The referring court went on to hold that the acceptance of the claim was precluded by the contested provisions, which required that the claimant retire at the age of sixty-five.

As regards this first issue, in the light of the literal wording of these provisions, the referring court did not make an implausible assessment in finding that, precisely in view

of their combined provision, since the claimant in the proceedings before the referring court had fulfilled the age and length of service and contribution history prerequisites for an old-age pension on 31 December 2011 – and since she had not yet exercised the right to draw that pension – she would be forced to retire in accordance with the rules laid down by the body with which she is registered, and accordingly at the age of sixty five pursuant to Article 4(1) of Presidential Decree no. 1092 of 1973. For this reason, it was impossible to accept her request that she remain in service until the age of sixty-six years and three months, which was presumed to apply to the retirement of a male public sector worker in a similar situation.

Taking account of the case law of this Court regarding the adequacy of reasons as to the relevance that are not implausible (see most recently, Judgments no. 203, no. 200 and no. 133 of 2016), the State Counsel's objection that the questions are inadmissible and therefore must be rejected.

3.– The questions are however inadmissible for the reasons illustrated below. It must be considered as a preliminary matter that, in raising the questions relating to the violation of Articles 11 and 117(1) of the Constitution, the referring court raised the prospect of a violation of provisions of EU law, some of which undoubtedly have direct effect.

In particular, the principle of equal pay for men and women, which has been enshrined in the Treaty of Rome since the establishment of the European Economic Community as a core principle of the common market and as one of the "social objectives of the Community, which is not merely an economic union" (Court of Justice, judgment of 8 April 1976 in Case C-43/75, *Gabrielle Defrenne v. Sabena*, paragraphs 7 to 15), has been held by the Court of Justice to be binding for public and private persons, as it is intended to prevent discriminatory practices that are harmful to free competition and breach workers' fundamental rights. The direct effect of that principle, which was enshrined in the *Defrenne* judgment (paragraphs 4 and 40) and has been reiterated over the years by the CJEU (see *inter alia* judgments of: 27 March 1980 in Case C-129/79, *Macarthys LTD v. Wendy Smith*, paragraph 10; 31 March 1981 in Case C-96/80, *J.P. Jenkins v. Kingsgate LTD*, paragraphs 16 to 18; 7 February 1991 in Case C-184/89, *Helga Nimz v. Freie und Hansestadt Hamburg*, paragraph 17), establishes an obligation for the national courts to set aside any provision of national law that conflicts with EU law. The Court of Justice has also clarified that the direct effect of the principle of equal pay cannot be undermined by any implementing legislation, whether on national or Community level (see the judgments cited in *Defrenne*, paragraphs 61/64, and *Jenkins*, paragraph 22).

This principle has subsequently been consolidated through the evolution of the normative framework: the Union "shall promote... equality between women and men" (Article 3(3) of the Treaty on European Union) and shall confirm such a commitment in its "activities" (Article 8 TFEU).

Also Article 21 CFREU prohibits "any discrimination based on any ground such as sex", whilst Article 23 of the Charter provides that "[e]quality between men and women must be ensured in all areas, including employment, work and pay". Both of these provisions may therefore be invoked as this case involves the implementation by the State of EU law, in accordance with its respective competences (Article 51(1) CFREU).

In finding that the contested legislation violates Article 157 TFEU, also in the light of the CJEU case law cited recognising direct effect to that provision, the referring court should have disapplied the provisions that conflicted with the principle of equal treatment, subject as the case may be to a preliminary reference if considered necessary

in order to question the Court of Justice regarding the correct interpretation of the relevant provisions of EU law, and therefore to resolve any residual doubts regarding the existence of the conflict (see Judgments no. 226 of 2014, no. 267 of 2013, no. 86 and no. 75 of 2012, no. 227 and no. 28 of 2010, no. 284 of 2007; orders no. 48 of 2017 and no. 207 of 2013). Once it has been embarked upon, this process would have rendered superfluous the invocation of the breach of constitutional law through interlocutory constitutionality proceedings. Article 157 TFEU, which is directly applicable by the national court, requires it to comply with EU law, with the result that the contested legislation is inapplicable within the main proceedings and all of the questions raised are irrelevant.

The disapplication of provisions of national law, which is in no sense equivalent to their repeal, derogation, lapse or annulment on the grounds of invalidity (see Judgment no. 389 of 1989), is in effect one of the obligations incumbent upon the national courts, which are bound to comply with EU law and to guarantee the rights arising under it, subject to the sole limit of compliance with the fundamental principles of the constitutional order and of inalienable human rights.

4.– It must be added that the complexity of the issue, as is apparent from the contested provisions and from the legislative framework within which they operate, could indeed have led the referring court to make a preliminary reference in order to ascertain whether the national legislation was in actual fact incompatible with the right to effective equality of treatment for male and female workers.

Within that perspective, rather than starting from the assumption that the retirement age for public sector workers had been increased to sixty-six as of 1 January 2012 by Article 24 of Decree-Law no. 201 of 2011, the referring court could very well have considered that, as is specified by authentic interpretation laid down by Article 2(5) of Decree-Law no. 101 of 2013, that age limit would continue to be sixty-five for both men and women, as the "systemic limit" laid down by Article 4(1) of Presidential Decree no. 1092 of 1973 for the retirement of civil servants.

Nevertheless, a public sector worker who has reached the age of sixty five but has not fulfilled the prerequisites relating to age (or length of contributions) for entitlement to a pension may, according to Article 2(5) of Decree-Law no. 101 of 2013, ask that he or she remain in service beyond the retirement age until the eligibility age for an old-age pension has been reached, and thus for male workers in an analogous situation to that of the claimant in the proceedings before the referring court until the age of sixty-six years and three months.

The fact that the termination of the employment relationship occurs at different pensionable ages for men and women could imply discrimination against the latter and a potential breach of EU law (Court of Justice, judgments of 26 February 1986 in Case C-262/84, *Vera Mia Beets-Proper v. F. Van Lanschot Bankiers NV*, paragraphs 34-35, and of 18 November 2010 in Case C-356/09, *Pensionversicherungsanstalt v. Christine Kleist*, paragraph 46).

Secondary European law, including in particular Directive no. 2006/54/EC – which the referring court only refers to, simplistically, solely for the definition of direct discrimination – specifies moreover that provisions that violate the principle of equal treatment must include those based on sex for "fixing different retirement ages" (Article 9(1)(f), included within Chapter 2 on "Equal treatment in occupational social security schemes") and that any discrimination on grounds of sex in relation to "employment and working conditions, including dismissals, as well as pay as provided for in Article

141 of the Treaty" is prohibited (Article 14(1)(c), which is by contrast included within Chapter 3 on "Equal treatment as regards access to employment, vocational training and promotion and working conditions").

ON THESE GROUNDS

THE CONSTITUTIONAL COURT

rules inadmissible the questions concerning the constitutionality of the combined provisions of Article 24(3), first sentence, of Decree-Law no. 201 of 6 December 2011 (Urgent provisions on growth, equity and the consolidation of the public accounts), converted with amendments into Law no. 214 of 22 December 2011, as interpreted by Article 2(4) of Decree-Law no. 101 of 31 August 2013 (Urgent provisions to pursue rationalisation objectives in the public administrations), converted with amendments into Law no. 125 of 30 October 2013 and Article 2(21) of Law no. 335 of 8 August 1995 (Reform of the compulsory and complementary pension system), raised by the *Tribunale di Roma* with reference to Articles 3, 11, 37(1) and 117(1) of the Constitution, Articles 11 and 117(1) of the Constitution, in relation to Article 157 of the Treaty on the Functioning of the European Union, Article 21 of the Charter of Fundamental Rights of the European Union and Article 2 of "Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)", by the referral order mentioned in the headnote.

Decided in Rome at the seat of the Constitutional Court, *Palazzo della Consulta*, on 5 April 2017.