Corte costituzionale

JUDGMENT NO. 103 OF 2007

Franco BILE, President

Alfonso Quaranta, Author of the Judgment

JUDGMENT No. 103 YEAR 2007

In this case, certain public sector directors challenged a law which provided for the automatic termination of their employment according to the logic of a political "spoils system". The Court held that, against the background of the "contractualisation" of the employment position of directors (i.e. their engagement on fixed-term contracts), it was necessary to provide adequate guarantees in order to uphold "principles of impartiality and the proper conduct of the business of administration". The ability of directors to work efficiently and effectively to achieve the results set for them would be compromised by the contested legislation, which the Court therefore struck down insofar as contrary to "the principle of continuity of administrative action which is closely related to that of the proper conduct of the business of administration".

THE CONSTITUTIONAL COURT

Composed of: President: Franco BILE; Judges: Giovanni Maria FLICK, Francesco AMIRANTE, Ugo DE SIERVO, Romano VACCARELLA, Paolo MADDALENA, Alfio FINOCCHIARO, Alfonso QUARANTA, Franco GALLO, Luigi MAZZELLA, Gaetano SILVESTRI, Sabino CASSESE, Maria Rita SAULLE, Giuseppe TESAURO, Paolo Maria NAPOLITANO,

gives the following

JUDGMENT

In proceedings concerning the constitutionality of Article 3(1)(b) and (7) of law No. 145 of 15 July 2002 (Provisions for the reorganisation of public sector directors and to promote the exchange of experience and interaction between the public and private sectors), lodged pursuant to the referral orders of 14 December 2005, 1 February, 18 January, 1 February, 11 and 3 March 2006 and 4 November 2005 of the *Tribunale di Roma* respectively registered as Nos. 38, 97, 107, 157, 158, 159 and 547 in the register of orders 2006 and published in the Official Journal of the Republic Nos. 8, 15, 16, 22 and 49, first special series 2006.

Considering the entries of appearance by Gaetano Cuozzo, Rossana Rummo, Michele Calascibetta, Claudio De Giuli, Elisabetta Midena, Eugenio Ceccotti, Fabio Iodice, as well as the intervention by the President of the Council of Ministers;

having heard in the public hearing of 6 March 2007 the Judge Rapporteur Alfonso Quaranta;

having heard barristers Vittorio Angiolini, Amos Andreoni and Luisa Torchia for Gaetano Cuozzo, Vittorio Angiolini, Amos Andreoni, Luisa Torchia and Massimo Luciani for Rossana Rummo, Michele Calascibetta, Claudio De Giuli, Elisabetta Midena, Eugenio Ceccotti and Fabio Iodice and the *Avvocato dello Stato* Aldo Linguiti for the President of the Council of Ministers.

The Facts of the Case

1.- By order of 4 November 2005 (r.o. No. 547 of 2006) the *Tribunale di Roma*, during the course of an employment law dispute lodged by Mr Fabio Iodice against the Ministry for Education, Universities and Research (MEUR), raised the issue of the constitutional legitimacy of Article 3(1)(b) and (7) of law No. 145 of 15 July 2002 (Provisions for the reorganisation of public sector directors and to promote the exchange of experience and interaction between the public and private sectors) due to a breach of Articles 1, 2, 3, 4, 35, 70, 97 and 98 of the Constitution.

The lower court found that the appellant concluded a fixed-term contract on 8 January 2001 with the Ministry for Public Education for a period of five years, appointing him to a directional post in a general management office, and in particular the directorship of the regional schools office for the Marche region.

On 24 September 2002, by note No. 11275, the relevant administration intimated to the appellant that he would not be confirmed in that post, "notifying in advance" the conferral of a research appointment for no longer than one year, maintaining the previous remuneration package, applying Article 3(7) of law No. 145 of 2002.

By subsequent note No. 11300 of 25 September 2002, the administration proposed the appointment of another individual to the post previously occupied by the appellant. On the same date the administration proceeded to make all appointments to the remaining

directorship posts of a level equivalent to the position to which the appellant was originally appointed.

The latter appealed pursuant to Article 700 of the Code of Civil Procedure, questioning the constitutionality of the aforementioned provision and requesting that the court order the defendant ministry to reinstate him in his original position.

As an interim measure, the court ordered the administration to assign the appellant to an equivalent role in positions which were vacant or had been assigned on an interim basis on the date when the appeal was filed.

Following an appeal against this decision, the court, sitting as a panel, reversed the above contested interim measure.

In the light of the delay in the issue of the above quashing order, the appellant appealed for the prosecution of merits proceedings, requesting that the constitutionality of Article 3(7) of law No. 145 of 2002 be raised in order to enable the court to order the ministry to reinstate him in his original post, as well also as filing requests “in the alternative”.

He requested in any case that the MEUR be ordered to pay him “the remuneration originally agreed upon up until the natural expiry of 31 January 2006; damages for harm suffered due to the demotion suffered; that the court recognise the right to career opportunities in access to general level directorship appointments, (...) ordering the defendant to reconstitute the plaintiff's career, in addition to compensation for the harm caused through the loss of career opportunities; that the court recognise his right to compensation for harm, to personal and professional redress, as well as his honour, prestige and professional dignity which he quantified at Euro 120.000”.

1.1.- The referring court emphasises, concerning the question of relevance, that the contested Article 3(7) applies to these proceedings.

The contested provision is in fact claimed to prevent the court from accepting the appellant's claims that the administration be ordered to reinstate the appellant in the position originally occupied, as well as the claim for compensation for the harm caused by the early dissolution of the contract concluded between the parties.

The question of the constitutionality of Article 3(1)(b), insofar as it provides for a maximum limit of three years for the duration of the appointments in question, is also stated to be of relevance since “even if Article 3(7) of the above law were to be declared unconstitutional, that provision would in any case prevent the reconstitution of the

terminated relationship, precisely due to the longer duration of the appointments concluded by agreement".

The referring court moreover points out how the normative framework has been further modified following the entry into force of Article 14-*sexies* of decree-law No. 115 of 30 June 2005, converted into law by law No. 168 of 17 August 2005, which reintroduced for the appointments in question a minimum length, set at three years, and increased the maximum length to five years. This provision could not be applied to the case in before the court, nor – the referring court adds – "do different interpretations of the provision, which enable the recognition of the appellant's right to reinstatement in the next round of appointments, appear to be viable. In fact, the provision provides exclusively for the rotation of the positions of directors general".

1.1.1.- As far as the question of 'non-manifest unfoundedness' is concerned, the referring court stresses that "the legislative framework set out above" appears to breach Articles 97 and 98 of the Constitution.

The legislation before the court made the one-off provision for the automatic termination of appointments also for directors general on expiry of the sixtieth day after the entry into force of law No. 145 of 2002. The possibility of automatic conclusion had *de facto* enabled only the government in office "to appoint trusted personnel to be placed in the senior positions of all offices".

"The legislative framework before the court" is also claimed to breach the principle, as recognised by this court in order No. 11 of 2002 and judgment No. 313 of 1996, according to which politicians must deal with the issue of political direction and control through government action, whilst administrative bodies must carry out management and administrative functions through their own staff.

On this point, the lower court finds that Articles 97 and 98 of the Constitution lay down "a comprehensive statute of state employees detached from political influences".

The referring court cites excerpts from order No. 11 of 2002 of this court in which it held that "the legislation governing the employment of directors is characterised by specific guarantees intended to regulate the overall employment relationship of directors general, the stability of which does not necessarily imply stability in individual appointments, which, precisely in order to ensure the proper functioning and efficiency

of the public administration, may be subject to checks on action carried out and results obtained".

The order points out how Article 3(7) makes it possible for the administration not to provide reasons for the failure to reconfirm the appointment and in consequence "to revoke the appointments in an entirely arbitrary manner, with a view to reassigning them to directors considered to be more reliable in their political affiliation".

This automatic termination also does not give consideration to the fact that directors general in service on the date of the entry into force of law No. 145 of 2002 would also have been able to pursue "the objectives imposed by the new political authorities" in a professional and competent manner, "even where they were appointed by the previous government".

Again according to the lower court, had it been necessary to give formal notice of dismissal following a formal process, the suspicion would have arisen that, given the possibility of appeal against the notice, the automatic termination of the appointment was introduced with the intention of "guaranteeing that administrative management be assigned to people chosen on the grounds of their political affinities".

On the other hand, in providing for a form of resolution of the relationship not accompanied by any guarantees, Article 3(7) is claimed to contrast with the findings of this court which have "for some time clarified" that "the application of the provisions of the Civil Code to the employment relations of public employees entails not that the public authorities can recede freely from such relationships, but simply that the assessment of the professionalism of directors is carried out on the basis of objective criteria and procedures – accompanied by broad publicity and guarantees of a fair hearing – only on conclusion of which it is possible to recede" (judgment No. 313 of 1996).

The lower court moreover assumes that Articles 1, 2, 4 and 35 of the Constitution have been breached, since "in providing for an unjustified departure from the principle of stability in employment contracts, in both public and private sectors", the contested provision violates the "principles of the free expression of personal professionalism in the workplace and freedom of contract, which can be sacrificed only on pressing and reasonable grounds".

Finally, the court finds that there was “an incompatibility with Article 3 of the Constitution, since the law provides for the termination of the appointment *ex lege* for all directors general, whilst providing for the automatic confirmation of directors in the event of a failure to carry out a timely rotation of appointments” within ninety days of the date of entry into force of law No. 145 of 2002.

1.2.- The President of the Council of Ministers entered an appearance, submitting a written statement in which it in the first place pointed to the irrelevance of the question concerning Article 3(1)(b) of law No. 145 of 2002 which imposed the three year limit on directorship appointments.

Moreover, the tax authorities point out that the above law considerably amended the previous regime applicable to directors pursuant to Article 19 of legislative decree No. 165 of 30 March 2001 (General provisions governing the organisation of employment in the public administration), providing for a stronger link between objectives and directives imparted by the minister and the director general, and providing for the non-renewal of the appointment, or even the dissolution of the employment relationship in the event of a failure to meet objectives or to comply with ministerial directives, whilst under the previous regime the sanction consisted in assignment to other duties and the law provided for the bar on the conferral of director level appointments for a period of no less than two years only in cases of repeated failure to meet objectives or serious disregard for directives.

In the context of the modified legislative framework the respondent argues that there can be no breach of Articles 97 and 98 of the Constitution.

Finally, also the referring court's complaint, proceeding on the assumption that general level directors (to which the contested provision refers) were materially identical to department heads and secretaries general, from which it infers the unreasonableness of the provision stipulating the one-off termination of the appointment for directors general on expiry of sixty days after the entry into force of the law, was also argued to be unfounded.

1.3.- The private party entered an appearance, submitting a written statement in which it reiterates the correctness of the assessment contained in the referral order both concerning the relevance of the question as well as on the merits.

2.- A similar question of constitutional legitimacy was raised by the *Tribunale di Roma* in a referral order of 14 December 2005 (r.o. No. 38 of 2006), during the course of proceedings between Mr Gaetano Cuozzo and the Ministry for Education, Universities and Research in relation to the same provisions (Article 3(1)(b) and (7) of law No. 145 of 2002) indicated in the previous referral order, due to violation of Articles 1, 2, 3, 4, 35, 97 and 98 of the Constitution.

The lower court finds that the appellant had previously presented an interim request, pursuant to Articles 669-*bis* and 700 of the Code of Civil Procedure, in relation to protocol note No. 11278/MR of 24 September 2002, since the MEUR did not order the confirmation of the appellant in the directorship role previously occupied, nor assign him to duties in an equivalent role and with equivalent remuneration.

The appellant therefore requested urgent reinstatement in the post previously occupied, arguing that Article 3(7) of law No. 145 of 2002 was unconstitutional insofar as it provided for the termination of all directorship roles starting from the sixtieth day after the entry into force of the law.

The lower court emphasises the appellant's claim that there was a vice in the contested acts, consisting of derived invalidity stemming from the unconstitutionality of the provision in question due to breach of Articles 1, 2, 3, 4, 70, 97 and 98 of the Constitution.

The interim request was rejected both at first instance and on appeal.

The appellant subsequently filed a request for resignation from the service, “considering himself to have been seriously demoted and to have suffered harm to his professional image”.

The appellant accordingly lodged an ordinary appeal in which he averred that Article 3(7) and Article 3(1)(b) were unconstitutional. In the event of a “favourable” outcome to constitutionality proceedings concerning the above provisions, the appellant requested that the Ministry be ordered to pay compensation for the harm suffered as a result: a) of the dismissal justified on objective grounds; b) of the demotion suffered (also) with the resulting non-material harm; c) of the loss of career opportunities in the access to directorship posts on reaching the age of 67; d) of the harm to his own personal reputation and his professional prestige and dignity following the failure to

confirm him in post without justification; e) of the lower pension contributions obtained.

2.1.- Having stated the above, the referring court notes that the question concerning Article 3(7) of law No. 145 of 2002 was relevant in the proceedings before it, since the acceptance of that question would render the measure terminating the appointment illegitimate, with the resulting impact on the "resolution of the request for compensation".

The question concerning Article 3(1)(b) of the above law was also stated to be relevant insofar as it imposed a maximum length of three years for appointments.

The court moreover emphasises that Article 14-*sexies* of decree-law No. 115 of 2005 – which reintroduced for the appointments in question a minimum length of three years, and increased the maximum length to five years – could not be applied in the case before it. It follows that the question raised is of enduring relevance since the case before the court concerned an "old appointment" for which no minimum length was guaranteed, in contrast to the current provisions of the aforementioned Article 14-*sexies*.

2.1.1.- As far as the issue of non-manifest unfoundedness is concerned, the lower court finds that Articles 97 and 98 of the Constitution had been violated, assuming that the automatic termination would violate "the principles of impartiality and exclusive service of public employees in favour of the Nation".

Furthermore, it would not be reasonable to hold that directors general in service on the date of entry into force of law No. 145 of 2002 had not pursued "the objectives imposed by the new political authorities" in a professional and competent manner, even though "they received the appointment under the previous government".

As regards the violation of Article 3 of the Constitution, it is assumed that the one-off termination of appointments would amount to a less favourable treatment for directors general compared to the rule applicable to all other workers, in both the public and private sectors, who are protected by guarantee mechanisms against the unfounded and unjustified termination of their contract. The court also states that, "whilst the rationale of the derogation from the guarantees for directors lies in the requirement for continuity in decision making, this does not justify identical regimes for directors general and department heads, general secretaries and equivalent figures, since these latter

categories constitute the true link in the chain connecting the political and administrative spheres" (referring to judgment No. 313 of 1996).

Finally, as far as the submissions concerning the violation of Articles 1, 2, 4 and 35 of the Constitution are concerned, the court points out that the unjustified departure from the principle of stability in employment contracts, in both public and private sectors, breaches "the principles of the individual's professional freedom in the workplace and of freedom of contract" which can be sacrificed only on pressing and reasonable grounds.

2.2.- An intervention was made by the President of the Council of Ministers, submitting a written statement containing arguments similar to those submitted in the proceedings concluded by order No. 547 of 2006.

2.3.- The private party entered an appearance, reiterating the relevance of the question and discussing at some length the aspects of continuity between law No. 145 of 2002 and the previous regime, also emphasising how the break with that regime entailed a reduction in the maximum length of appointments and the elimination of the minimum length.

3.- Article 3(1)(b) and (7) was also contested by the *Tribunale di Roma* in the order of 1 February 2006 (r.o. No. 157 of 2006), due to a breach of Articles 1, 2, 3, 4, 35, 36, 70, 97 and 98 of the Constitution, during the course of proceedings initiated by Mr Claudio De Giuli against the Ministry of Health.

As a preliminary matter, the referring court notes that in an appeal pursuant to Articles 669-*octies* and 414 of the Code of Civil Procedure the interested party averred that he had been appointed to the post of Director General of Health Programming on a fixed-term contract concluded on 23 February 2001 and renewed by official conferral of 23 March 2001, which extended the contract until 31 December 2007. Throughout the performance of his duties the appellant did not receive any challenge concerning the non-observance of general directives or the failure to achieve results. Following oral notification by the administration of its intention to appoint him, under the terms of Article 3(7) of law No. 145 of 2002, to a one-year research position, the appellant signed the corresponding contract on 2 October 2002, appending a reservation. The administration "proposed the attribution" of the position of director of the management office previously occupied by the interested party to another functionary and

"illegitimately" made almost all other appointments for the remaining positions involving equivalent directorship roles. Following an urgent appeal pursuant to Article 700 of the Code of Civil Procedure, the *Tribunale di Roma* ordered the Ministry of Health to appoint the appellant to the position of director of the Internal Control Service [*Servizio del controllo interno*] or another equivalent position. The referring court also emphasises that the interested party averred the unconstitutionality of Article 3(7) of law No. 145 of 2002 due to violation of Articles 1, 2, 3, 4, 35, 70, 97 and 98 of the Constitution.

On the basis of the above arguments, the appellant requested the court to order the Ministry of Health to reinstate him in his original post, submitting further requests "in the alternative" as set out in the referral orders.

After having emphasised the overall novelties introduced by law No. 145 of 2002 compared to the previous system, the referring court pointed out that the "new" wording of Article 19 of legislative decree No. 165 of 2001 represents, compared to the formulation previously in force, an element of continuity consisting in the continuing existence of the two fundamental features of fixed-term appointments and the conferral of the same in line with an assessment of the objectives and results obtained. The "significant difference" between the two regimes is found to consist in the lowering of the maximum time limit (from seven to three years) of general level directorship appointments, as well "above all" by the "failure to provide for a minimum length of appointments (previously two years, and now possible even for very limited periods of time, less than one year: in theory even for one single month)".

3.1.- Having recalled the principles set out by the court in order No. 11 of 2002 – the lower court finds the question to be relevant in relation to Article 3(1)(b) cited above, as the principal request submitted by the appellant, which attempted to obtain the complete restoration of the original appointment, also in relation to its duration, may not be acceptable where the maximum three-year limit for appointments "fixed by a mandatory legislative provision passed after conclusion of the original contract and as such capable of modifying the length thereof" was found to be applicable in the case before the court.

Similarly, the supervening Article 14-*sexies* of decree-law No. 115 of 2005, which provides for a minimum length of three years, could not impinge upon that relevance since its non-applicability to proceedings in progress stems in the first place from the

express provisions of sub-section 2 of that Article, and secondly from the general principle of non-retroactivity of the law pursuant to Article 11(1), which contains provisions on the law in general. On the other hand, by introducing the principle of the relative three-year stability of directors, this provision is said to emphasise yet more "the detrimental and unjustified treatment" reserved to the appellant and to other directors general removed *ope legis* from their posts for which no minimum length was provided.

3.1.1.- Regarding the issue of non-manifest unfoundedness, the referring court emphasises that the contested provisions enable the administration to revoke appointments in an arbitrary manner in order to redistribute them "to directors considered more reliable in their political affiliation". Moreover, the directors in question would then find themselves in a weak position, "flowing from the three-year (or even shorter) deadline of the appointment as director, a time limit shorter that the ordinary period in office of the government".

It follows, according to the lower court, that Articles 97 and 98 of the Constitution have been breached, which – by "placing public employees under a duty of impartiality, providing for access as a rule through public competition, the determination of the spheres of competence, duties and responsibilities, the duty of service to the Nation, the prohibition on public employees who are members of Parliament on receiving promotions other than for length of service, and the possibility of restricting membership of political parties – enunciate the general principle that public employees remain isolated from political pressures".

The referring court also mentions judgment No. 193 of 2002, in which this court asserted that the greater stringency of the responsibilities of directors also entails the need to reinforce their position through, amongst other things, the provision of adequate procedural guarantees for the assessment of results and the adherence to ministerial directives.

The referring order asserts that the contested provisions are in contrast with Articles 97 and 98 of the Constitution, since "there is a justified risk that directors general – who are of necessity subject to reconfirmation by the same political authority which appointed them, and with scant possibility of an objective assessment of the results of the management given the absence of a minimum term for the appointment – may be

inclined to seek an improper political 'approval' rather than impartial management in the interests of the proper functioning of the business of administration. In this way essentially, directors cease to act in the service of the Nation, and the constitutional principle of impartiality and the proper functioning of the business of administration is compromised".

Ultimately, the contested provisions would make it possible for "appointments to be made not on the basis of results obtains but of political affinity – defined as trust – between minister and director, without any requirement for the giving of reasons or other procedural guarantees".

Such relationships of affiliation between politicians and directors end up, again according to the referring court, violating the principle of separation between politics and administration which underpin the provisions of the Constitution cited, since "it appears likely that, in order to receive confirmation from the political authorities which appointed him, the director will tend to comply with every request". In this way, "the minister will *de facto* obtain an improper power of management not provided for by law and indeed not balanced out by corresponding responsibilities – administrative, accounting and criminal – which in any case are incumbent upon the director as the person formally responsible in such matters".

Moreover, the referring court points out that if the administration had been "enabled" to review appointments "using ordinary administrative or contractual measures, the director would have been able to take advantage of the protection inherent in such instruments and in particular in those flowing from the general obligation to give reasons for administrative decisions". The different solution adopted by law No. 145 of 1992 "ends up highlighting an improper use of legislation in order to achieve the effects typical of an administrative decision (such as the termination of the appointment as director) with the result of depriving the employee of all protection and breaching Articles 70 and 97(1) and (2) of the Constitution".

The termination *ex lege* of directorship appointments cannot, according to the lower court, even be justified by the need to apply the new provisions governing directors contained in law No. 145 of 2002. Indeed, such a justification "appears to be difficult to reconcile, on the one hand, with the fact (...) of the continuing absence of valid controls on the activities of directors" and on the other hand with the "substantive continuity in

the guidelines relating to the new employment relationship of directors, i.e. mobility (by virtue of the fixed-term nature of appointments and the rotation of duties) and responsibility (through identification of the duties of directors, the exercise of which is subject to assessment, with the result that selection is made on the basis of merit and not length of service) – features which also remain in the new provisions laid down by law No. 145 of 2002"; it must be emphasised that the core feature of the fixed-term nature of directorship appointments remains, both through the reduction of the maximum length and, above all, the repeal of the provision of a minimum length".

In order not to "give rise to any doubts over its constitutionality due to violation of Articles 3, 97 and 98 of the Constitution", the new legislation could therefore have been implemented through a reduction of posts and of contracts to the new maximum length of three years or through a verification of the said appointments and contracts in the light of eventual new programmes or objectives set by the political authorities.

On the other hand, "the absence of a minimum length for directorship appointments and the provision (...) of a shorter maximum length does not appear to allow, as a matter of fact, for a real assessment of the performance of the director who, in the absence of objective criteria, cannot but be chosen on the strength of political affiliation and find himself more exposed – in accordance with the same logic of trust – to a mechanism of repeated short-term appointments".

The referring court also assumes that the contested provisions do not respect the general principle of stable contracts, in violation of Articles 2, 3, 4, 35, 36 and 97 of the Constitution, since the public employer can "annul those contracts to which it is party through legislation, thereby using legislative or contractual instruments at its convenience, whilst the employee remains deprived of protection".

Moreover, the law provides that directors whose appointments have expired be appointed to "equivalent" posts, where such equivalence, according to the referring court, concerns only the remuneration package, "or to research appointments for no longer than one year, on conclusion of which the director, who would *de facto* no longer be eligible for assessment in relation to the attainment of management objectives, would appear to be barred from further operative positions". Such arrangements "could possibly amount to a demotion of the director appointed to the research post, (...) again in violation of Articles 1, 2, 3, 4, 35 and 36 of the Constitution due to breach of the

principles, which also have constitutional status, of freedom of contract and of the professional personality of workers, the violation of which may only be justified by applying criteria of reasonableness, which are however difficult to identify in the case before the court".

Finally, it is assumed that Article 3 of the Constitution has been violated, since there does not appear to be any justification for the distinction between directors general whose appointment has been terminated *ex lege* and on the other hand directors for whom automatic confirmation has been provided in the absence of a timely rotation of appointments, duly motivated and subject to the conditions set out in the national collective bargaining agreement.

3.2.- The President of the Council of Ministers intervened, submitting the arguments already presented in the proceedings concluded by orders Nos. 547 and 38 of 2006.

3.3.- The appellant before the lower court entered an appearance, reiterating the arguments already contained in the referral order.

4.- By order of 11 March 2006 (r.o. No. 158 of 2006), during the course of an employment law dispute commenced by Ms Elisabetta Midena against the Ministry for Education, Universities and Research, the *Tribunale di Roma* raised the question of the constitutionality of Article 3(1)(b) and (7) of law No. 145 of 2002, due to violation of Articles 1, 2, 3, 4, 35, 70, 97 and 98 of the Constitution.

The lower court finds that the appellant concluded, on 8 January 2001 with the then Ministry for Public Education a fixed-term contract for five years concerning the appointment as a director in a general management office, more specifically, director general for international relations.

On 25 September 2002, the administration offered the position previously occupied by the appellant to another functionary. On the same date, the administration made all appointments to the remaining directorship positions of a level equivalent to the position originally occupied by the appellant. The latter then initiated court proceedings, averring the unconstitutionality of Article 3(7) of law No. 145 of 2002 and requesting the court to order the Ministry for Education to reinstate her in her original position, also submitting further requests "in the alternative". In any case she requested the court to order the Ministry to pay the remuneration originally agreed.

4.1.- Having made the above points, the lower court, essentially reiterates the arguments contained in the order of 4 November 2005, as set out above, in support of the relevance and non-manifest unfoundedness of the question.

4.2.- The President of the Council of Ministered intervened also in these proceedings, submitting a written statement. This written statement is identical to that submitted in the proceedings concluded by order No. 547 of 2006.

4.3.- The interested party entered an appearance, making a submission which essentially restates the contents of the documents submitted by the other private parties in relation to the referral orders mentioned above.

5.- The *Tribunale di Roma* referred, in the orders indicated below, a question of constitutional legitimacy of the provisions before the court following the remittal of the file concluded by the Constitutional Court by order No. 398 of 2005 due to the supervening amendments to the legislative framework with the enactment of Article 14-*sexies* of decree-law No. 115 of 2005.

6.- By order of 18 January 2006 (r.o. No. 107 of 2006) the question of the constitutionality of the above provisions, in the light of Articles 1, 2, 3, 4, 35, 97 and 98 of the Constitution, was referred for a second time during the course of proceedings between Mr Michele Calascibetta and the Ministry of Education, Universities and Research.

According to the referring court, the above provision was not applicable to the specific case before it since the appointment of the interested party as director "lapsed precisely as a result" of the above provision.

The lower court accordingly finds that the supervening legislation is not capable of impinging upon the relevance of the question raised, nor on the issue of the non-manifest unfoundedness of the same.

In the opinion of the referring court, the enactment of Article 14-*sexies* of decree-law No. 115 of 2005 makes the unconstitutionality of the contested provisions even clearer, since that provision reintroduced the principle of stability of directorship appointments, previously removed pursuant to Article 3(1)(b) of law No. 145 of 2002 which eliminated the minimum length of two years and reduced the maximum length to three years.

In the light of the above, the lower court assumes that "the judgment of non-manifest unfoundedness already brought before the court with reference to the legislation providing for the automatic termination of directorship appointments, which was made in the absence of any assessment of aptitudes and professional capacity or of the achievement of predetermined objectives and results, must therefore be referred again in its entirety".

A declaration of unconstitutionality of the contested provisions would enable the reinstatement of the appellant in the position as director which was terminated *ex lege*, allowing her to continue until its natural expiry.

6.1.- The President of the Council of Ministers intervened, submitting a written statement materially identical to those submitted in the proceedings which concluded with the previous orders.

6.2.- The private party entered an appearance and pointed out, as a preliminary matter, that the referring court had assessed in detail the *ius superveniens* – i.e. 14-sexies of the aforementioned decree-law No. 115 of 2005 – reaching the conclusion that it was not of any relevance in the principal proceedings.

7.- By a further referral order of 1 February 2006 (r.o. No. 97 of 2006), issued in proceedings between Ms Rossana Rummo and the Ministry for Heritage and Culture, the *Tribunale di Roma* for a second time referred the question of the constitutional legitimacy of Article 3(1)(b) and (7) of the law before this court, in relation to Articles 1, 2, 3, 4, 35, 36, 70, 97 and 98 of the Constitution.

The referring court also assumes here that Article 14-*sexies* of decree-law No. 115 of 2005 does not have an impact on the question of constitutional legitimacy "as previously raised and in particular with reference to Article 3(1)(b)", since on the one hand Article 14-*sexies*(2) itself provides that it does not apply to proceedings in progress, whilst on the other hand the general principle of the non-retroactivity of the law as set out in Article 11(1) of the introductory provisions of the Civil Code prevents any relevance from being given to such intervening legislation.

According to the referring court however, by introducing the principle of the relative three-year stability of directors, the provision before the court heightens the detrimental and unjustified treatment suffered by the appellant for whom the contested legislation provided for the automatic termination of the appointment, regardless of any assessment

of aptitudes and professional capacity, as well as the attainment of predetermined objectives and results.

Moreover, the lower court emphasises that "in providing for a necessary link between the minimum length of three years and five-year maximum for (new) appointments, [Article 14-*sexies*] places itself at odds with the previous legislation characterised by the significant reduction of the maximum length and the absence of a minimum duration of directorship appointments, a focal point of the question of constitutional legitimacy raised due to the effects of the *de facto* so-called precarious employment of public sector directors".

In the light of the above considerations, the lower court concludes that "the questions as posed in the referral order of 30 April 2004 are relevant and not manifestly unfounded".

7.1.- The President of the Council of Ministers intervened, submitting a written statement materially identical to that submitted in proceedings concluded by order No. 107 of 2006.

7.2.- The interested party entered an appearance, making a submission containing arguments similar to those contained in order No. 107 of 2006.

8.- Finally, in proceedings between Eugenio Ceccotti, Engineer, and the Institute for the Development of Professional Training for Workers, the *Tribunale di Roma* referred for a second time by order of 3 March 2006 (r.o. No. 159 of 2006) the question of the constitutional legitimacy of Article 3(7) of law No. 145 of 2002 with reference to Articles 2, 3, 33, 41, 70, 97 and 113 of the Constitution.

In relation to the *ius superveniens* Article 14-*sexies* of decree-law No. 115 of 2005, the lower court points out that it did not raise any question concerning Article 3(1)(b), and that it does not contest the absence of a minimum length for appointments (reintroduced by the amendment) and the inadequacy of the maximum length (raised by the amendment), "having found that the former were irrelevant in proceedings (because the claimant had a five-year appointment under the "old regime" and complains of its termination '*ex lege*', invoking the rights which flowed from that contract up until its expiry and compensation for harm caused by its early unlawful termination); and that the latter were manifestly unfounded".

The court adds that the reintroduction of a minimum length for appointments does not apply to the case before it, both on account of the express provision of Article 14-

sexies(2), and also because this aspect does not concern the position of the appellant who, prior to the entry into force of law No. 145 of 2002, had been appointed for a duration equal the current legal maximum, which however terminated automatically by law, pursuant to the provisions of Article 3(7) of the above law.

8.1.- The President of the Council of Ministers intervened, submitting a written statement similar to that of the written statements submitted in the other proceedings concerning the same provision.

8.2.- The interested party entered an appearance, submitting a written statement of resistance.

9.- Shortly before the public hearing, the *Avvocatura generale dello Stato* submitted a single written statement for all proceedings, reiterating certain aspects of the arguments already contained in the act of intervention.

9.1.- The private parties in proceedings before the lower courts also submitted additional written statements.

Findings on points of law

1.- With the seven referral orders mentioned above, the *Tribunale di Roma* raised questions of the constitutional legitimacy of Article 3(1)(b) and (7) of law No. 145 of 2002 (Provisions for the reorganisation of public sector directors and to promote the exchange of experience and interaction between the public and private sectors) due to violation of Articles 1, 2, 3, 4, 33, 35, 36, 41, 70, 97, 98 and 113 of the Constitution.

In the first place, the referring courts contest Article 3(7) insofar as it provides for the automatic termination of general level directorship appointments on the sixtieth day after the entry into force of the law. The various lower courts hold this question to be relevant using substantively similar arguments, since the contested provision is found to preclude acceptance of the requests for reinstatement in the original posts occupied by the appellants, or the requests for compensation resulting from the early termination of the employment relationship.

With the exception of referral order No. 159 of 2006, the referring courts assume that the question concerning Article 3(1)(b) is also relevant insofar as – by amending Article 19(2) of legislative decree No. 165 of 30 March 2001 (General provisions governing the organisation of employment in the public administrations) – it reduced the maximum

length of the directorship appointments in question from seven to three years. It is argued in fact that, even if sub-section 7 were to be declared unconstitutional, the reduction of the above deadline would prevent reinstatement in the positions terminated for the period of time originally agreed or would have an impact upon the amount of compensation due, given the greater length of the appointments agreed upon under contract. In particular, in order No. 157 of 2006, it is asserted that "the three-year limit of the maximum length of the appointment, fixed by a mandatory legislative provision passed after conclusion of the original contract" is as such capable also of modifying the duration of the latter.

2.- Since the above proceedings concerned substantially similar questions, they must be joined in order to be considered together.

3.- As a preliminary matter, it is necessary to verify whether, and to what extent, the questions of constitutionality raised by the referring courts are admissible.

It is in the first place necessary to examine orders Nos. 97, 107 and 159 of 2006, with which the referring courts submitted the questions concerning the constitutionality of the provisions mentioned above in the light of order No. 398 of 2005, in which this court remitted to them the case files following the entry into force of Article 14-*sexies* of decree-law No. 115 of 30 June 2005 (Urgent provisions to ensure the proper functioning of certain sectors of the public administration), introduced into the implementation law No. 168 of 17 August 2005, which reintroduced for the appointments in question a minimum length set at three years, and raised the maximum length from three to five years. In particular, this court held in the above order that "the supervening amendment of one of the contested provisions – even though the new time limits do not apply to directorship appointments to general management offices vacated before the expiry of the contracts of the individual directors by operation of the contested automatic termination – amounts in any case to a significant change in the overall legislative framework on which all the referring courts have based their arguments concerning the non-manifest unfoundedness of the questions regarding the contested provision, i.e. Article 3(7) of law No. 145 of 2002".

In resubmitting the above questions – and after having emphasised that the aforementioned Article 14-s*exies* is not relevant in reaching a decision in the respective

proceedings – the lower courts referred, either expressly or implicitly, to the grounds contained in the previous referral orders.

3.1.- The questions as submitted are inadmissible.

The case law of this court is in fact consistent in asserting that questions motivated merely *per relationem* cannot be introduced into incidental constitutionality proceedings, as the referring court must clearly state in each referral order the reasons why it considers the question raised to be relevant and not manifestly unfounded, by way of a self-standing motivation, which cannot be substituted by a reference to the contents of other orders, even where they have been passed by the same court in the same proceedings (see, *inter alia*, referral orders No. 33 of 2006 and Nos. 364 and 141 of 2005).

3.2.- Secondly, the questions raised by the referring court in orders Nos. 38, 158 and 547 of 2006 in relation to Article 3(1)(b) must be declared inadmissible since they do not contain any arguments concerning the non-manifest unfoundedness of the same. It is clear from the wording of the above referral orders that the lower courts only claim that Article 3(7) contrasts with the constitutional principles mentioned, omitting to explain the reasons which would also justify the striking down of the provisions contained in paragraph (1)(b) of the same article.

3.3.- Finally, it remains to be established whether the question of the constitutionality of Article 3(1)(b) raised by order No. 157 of 2006 can be considered admissible.

The examination of the contested provision must be carried out point by point, both with reference to the failure to set a minimum length for directorship appointments, as well as in relation to the reduction of the maximum length from seven to three years.

The question is inadmissible from both points of view.

As far as the first aspect is concerned, it should be remembered that the referring court is not called upon in the proceedings before it to apply the provision insofar as it does not lay down a minimum length of the directorship appointment at the time conferred on the appellant. Nor can the reference to this court be justified by the fact that the lower court considers it possible to derive arguments from the provision itself in order to establish the non-manifest unfoundedness of the question concerning Article 3(7), which however the referring court is called upon to apply and which is thus certainly relevant in these proceedings.

Also in relation to the second aspect, the question of the constitutionality raised with reference to Article 3(1)(b), insofar as it reduces from seven to three years the maximum length of appointments for directors general, cannot be considered admissible. There are two reasons for this: first, because the referring court has not given sufficient reasons concerning the non-manifest unfoundedness of the question, specifically indicating the reasons why the reduction of the length of the appointment to only three years should be considered to be unconstitutional; secondly, because it omitted to consider a possible interpretation which made it possible to give the provision before the court, introduced by law No. 145 of 2002, only *ex post* effectiveness, that is commencing from the date of the entry into force of the law with the consequent application of the original duration of contracts previously concluded. Ultimately, on the basis of this possible non-literal interpretation, the new maximum limit to the length could apply only for appointments made after the entry into force of law No. 145 of 2002.

4.- In the light of the above considerations, this court accordingly finds that the examination on the merits of the complaints submitted must be limited only to the question of the constitutional legitimacy of Article 3(7) of the above law raised by the *Tribunale di Roma* in order Nos. 38, 157, 158 and 547 of 2006.

5.- The question is well-founded.

In order to locate the problem raised by the referring courts within the context of the new legislation governing public sector directors, it is necessary to examine the relevant aspects of the overall legislative development which has occurred in the sector in question and, in particular, the relationship between politics and the administration.

In relation to this issue, it is necessary to start from the so-called “first privatisation” of directorship posts, in order to ascertain how the aspects of the functional division of competence between the political level and the bureaucratic level and how structural issues concerning the source of regulation of the employment relationship of directors have presented themselves through time, as well as the manner in which directorship positions are regulated. In other words, it is necessary to examine how the relationship between politicians and directors, as far as their respective functions are concerned, has in actual fact been regulated and how the 'contractualisation' of the service relationship, the introduction of the principle of fixed-term appointments as well, finally, as the

provision, which is relevant for our present purposes, of the automatic termination *ex lege* of appointments had any effect on it.

6.- As is known, law No. 421 of 23 October 1992 (Authorisation of the Government to rationalise and amend regulations governing matters in relation to health, public sector employment, social security and territorial finance) at the time authorised the government to make provision "by one or more decrees, without prejudice to the limits related to the pursuit of the general interests which the organisation and action of public administrations pursue, to bring back the employment relationship of employees of the state administration or of other bodies mentioned in Articles 1(1) and 26(1) of law No. 93 of 29 March 1983 under the regulation of civil law, regulating through individual and collective contracts" (Article 2(1)(a)).

This authorisation was implemented through legislative decree No. 29 of 3 February 1993 (Rationalisation of the organisation of the public administration and amendment of the provisions governing public sector employment, in accordance with Article 2 of law No. 421 of 23 October 1992) which, in relation to the structural issues governing the relationship, provided for the so-called privatisation of public sector employment and, with the exception of certain sectors, moved beyond the traditional publicly dominated regime, providing for the application of the private law employment regime (Article 2(2)), "considered to be more suitable for adherence to the requirements of flexibility in the management of the personnel affected by the reform" (judgment No. 313 of 1996).

This process also affected directors: however, Article 2(4) of the aforementioned legislative decree No. 29 of 1993, in its original version, expressly excluded "directors general" from the 'contractualisation' of the employment relationship.

The 1993 reform in fact laid down a variegated regime for directors which drew inspiration from the different nature of the sources regulating the relationship.

In particular, Article 21 of the above legislative decree provided that directors general be appointed "by decree of the President of the Republic, pursuant to discussion in the Council of Ministers, acting on a proposal of the competent minister" and that the appointment be conferred on individuals who fulfil the requirements contained in Article 21.

The "access to the qualification* of director" must occur "by public competition including examinations" organised by the individual administrations, or through selective training course-competitions at the National School for Public Administration [*Scuola superiore della pubblica amministrazione*] (Article 28).

Once they have "qualified" as a director, directors general in service with the relevant administration were to be appointed – by decree of the relevant minister, having consulted the President of the Council of Ministers – to "directorship positions in the offices of each state administration, including autonomously organised administrations, at general management level" (Article 19(2)). The same procedure was also to be used to make "inspector, consultant, study and research appointments at general management level" (Article 19(2)).

As regards non general directors on the other hand, the law before the court provided for their appointment – by decree of the minister acting on a proposal of the relevant director general – to "directorship positions in the offices of each state administration, including autonomously organised administrations, at management level", with the possibility of making appointments to inspector, consultant, study and research posts "at management level" (Article 19(3)).

As far as the choice of directors is concerned, Article 19(1) provides that "the nature and characteristics of the programmes to be carried out, the aptitude and professional capacity of each individual director, as well as results previously achieved, applying as a rule the criterion of rotation of appointments" must be taken into account.

6.1.- Regarding the issue of the relationship between politics and administration, law No. 421 of 1992, as is known, authorised the government to regulate: "the separation between the tasks of political leadership and administrative direction; the assignation to directors – within the ambit of the programming choices for the objectives and directives imparted by the person responsible for the body – of autonomous decision making, oversight and control powers, including in particular the management of financial resources through the adoption of suitable accounting techniques, the management of human resources and the management of material resources; this is

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* Translator's note: Italian law distinguishes between the qualification as a director and the actual appointment to a specific position as a director, the firmer being a prerequisite for the latter.

necessary in order to ensure that the activity of the subordinate offices provides value for money and timely responses to the public interest" (Article 2(1)(g)(1)).

The law implementing this authorisation, Article 3(2) of legislative decree No. 29 of 1993, provided that directors shall be responsible for "financial, technical and administrative management, including the adoption of all measures which place the administration under an obligation to an external body, with autonomous powers over expenditure, the organisation of human and material resources and general control powers", specifying their responsibility for management and for the corresponding results.

Article 14(1) of the same legislative decree provides that it is a matter for the minister, who may also act on the basis of a proposal by directors general, periodically and in any case annually, within sixty days of approval of the budget: a) to define the objectives and programmes to be carried out, to indicate priorities and impart the necessary general directives for administrative action and management; b) to assign a quota share of the administration's budget to each general management office in proportion to its financial resources and pertaining to the general or specific proceedings falling under the responsibility of the office, as well as costs for personnel and material resources apportioned to the same.

Article 14(3) also provides moreover that "acts falling under the competence of directors may only be overridden by the minister in the presence of special reasons of necessity and urgency, which must be specifically indicated in the quashing order".

7.- The legislative innovations introduced in 1997-1998 on the one hand completed on a structural level the process of 'contractualisation' of the employment relationship of directors, amending the relevant aspects of previous legislation also in relation to the manner in which directorship duties are performed; on the other hand, on a functional level, they accentuated the division between political-administrative activity and management tasks.

In particular, Article 11(4) of law No. 59 of 15 March 1997 (Authorisation for the Government to confer functions and tasks on the regions and local authorities for the reform of the Public Administration and administrative simplification) provides that "the private law regime governing the employment relationship be extended also to directors general and equivalent posts within the state administrations" (letter *a*) and

that the government comply with “the principles contained in Articles 97 and 98 of the Constitution as well as the guidelines set out in Article 2 of law No. 421 of 23 October 1992, starting from the principle of the separation between the tasks and responsibilities of the political leadership and the tasks and responsibilities of administration directors”.

The aforementioned legislative authorisation was implemented by legislative decrees No. 80 of 31 March 1998 (New provisions governing organisation and employment relationships in the public administrations, jurisdiction over employment law disputes and administrative jurisdiction, implementing Article 11(4) of law No. 59 of 15 March 1997), and No. 387 of 29 October 1998 (Additional provisions supplementing and amending legislative decree No. 29 of 3 February 1993, as amended, and legislative decree No. 80 of 31 March 1998) which amended various parts of legislative decree No. 29 of 1993.

7.1.- The above delegated decrees extended the regime of 'contractualisation' to directors general, who are therefore no longer counted amongst those employees who however continue to be regulated, as an exception from the rule of privatisation, by the previous public law regime (see the new Article 2(4) of legislative decree no. 29 of 1993).

The 1998 reform moreover provided for “access to the qualification of director” exclusively pursuant to a “competition involving exams” followed by the conclusion of the employment contract (Article 28), as well as the inclusion of the individuals thereby selected in the “single register of directors” held by the Presidency of the Council of Ministers and divided into two bands (Article 23); each state administration should have consulted this register when making the relative appointments, thereby resulting in the appointment to a particular office.

In particular, Article 19 of legislative decree No. 29 of 1993, as amended by the aforementioned decrees, provided for three types of directorship function, listed in decreasing order of relevance and of greater cohesion with the political authorities.

In the first place, the law provides for “appointments of ministerial general secretaries, appointments of directors to organisations internally structured into general management offices and those of an equivalent level”: the directorship posts in question are “top-level”, and are conferred on first level directors from the single register by

decree of the President of the Republic, pursuant to discussion in the Council of Ministers, acting on a proposal by the competent minister (Article 19(3)).

The law then provides for "the appointment of directors of general management offices", conferred by decree of the President of the Council of Ministers, acting on a proposal by the competent minister, on "band one [directors] from the single register or, for no more than one third, on directors of the single register itself" by fixed-term appointment, on persons in possession of specific professional qualities (sub-section 4). The provisions contested before this court involve this type of appointment.

Finally, the law provides the appointment of directors of other management offices, conferred "by the director of the general management office on the directors assigned to his office" (sub-section 5).

The same criteria for selecting individuals for appointment have remained substantially unchanged, also as regards the applicability of the criterion of rotation (Article 19(1)), with the qualification that Article 2103 of the Civil Code is not applicable.

Having said this, it should be pointed out that appointment for a "fixed-term" has been provided for in relation to all of the above appointments, pursuant to the express wording of Article 19(2) as amended, thereby introducing on a legislative level the principle of the fixed-term nature of appointments which "last for no less than two years and no more than seven years and are renewable". The same provision specified that this duration was to be defined by agreement along with the purpose and the objectives to be achieved.

As far as the expiry of the appointment is concerned, the law provided, in the absence of reconfirmation, for the "designation as available" of the interested party within the single register. In particular, according to Article 19(10), "directors who have not been granted responsibility over management offices occupy, at the request of the governing bodies of the interested administrations, inspector, consultant, study and research posts or other specific posts provided for by the regulations".

The law also provides for the termination of the appointment as a measure following a finding of liability on the part of the director. Prior to the amendments introduced by law No. 145 of 2002, Article 21 in fact provided that "negative results in the activity of administration and management or the failure to reach targets" would entail "the revocation of the appointment (...) and the assignation to other duties". Article 21(2)

also provided that "in the event of a serious failure to comply with instructions given by the competent body or repeated negative assessments (...), the director, following written notification allowing for a right of response, may be excluded from appointment to additional directorship posts equivalent to that which was terminated for a period not shorter than two years". Finally, the law provides for a third type of measure "in the most serious cases" falling under the situations mentioned immediately above, in which the administration may rescind the employment contract, according to the provisions of the Civil Code and collective bargaining agreements.

7.2.- As far as the functional mechanics of the managerial capacities of directors and their relationship with the political authorities is concerned, it must be pointed out that legislative decrees Nos. 80 and 387 of 1998, which also amended in part Articles 3 and 14 of legislative decree No. 29 of 1993, "reinforced the principle of the distinction between the political-administratively oriented function of government bodies and the management and administrative executive function of directors" (order No. 11 of 2002).

In particular, in contrast to the previous wording, Article 3 contains a detailed list of the acts falling under the competence of government bodies, attributing to directors a general and residual competence.

Article 14 cited above then clearly prevents the minister from "revoking, reforming, reserving or attributing to himself or otherwise adopting measures or acts falling under the competence of directors", thereby expressly recognising that the relationship between politics and the administration can no longer be fully conceptualised in terms of hierarchy, but rather of functional coordination and collaboration between the two levels.

8.- The normative framework described above – subsequently consolidated in legislative decree No. 165 of 2001 – in essence laid down an articulated regulatory model for directors.

In summary, it can be stated that the above structural reform of 1997-1998 completed the implementation of the process of the 'contractualisation' of the employment relationship of directors and definitively introduced the principle of the fixed-term nature of appointments in relation to the assignment to a particular office.

The legislation before the court, concerning the employment of directors – based on the contract of service against which the relationship in question is situated – accordingly

resulted in the definitive passage from one conception of directorship understood as a status, or a moment in the development of the career of public officials, to another conception of directorships which was functional in nature.

Regarding the question of competences, Parliament – abandoning the model centred exclusively on the principle of ministerial responsibility, which as a rule precluded autonomous and external assignments to administrative bodies – relied on the distinction between power of a political-administrative nature and the management activity carried on by directors. This net distinction has on the one hand broadened directors' competences, the exercise of which must be assessed giving consideration in particular to the results "of administrative and management activity" (Article 5 of legislative decree No. 286 of 30 July 1999 on the "Reorganisation and reinforcement of mechanisms and instruments for monitoring and assessing the costs, returns and results of the activity carried on by the public administrations, pursuant to Article 11 of law No. 59 of 15 March 1997"); on the other hand, and in consequence, it entailed greater rigour in the assessment of the responsibility of directors (judgment No. 193 of 2002), which presupposes an effective assessment system in relation to planned objectives.

Analysing the elements of possible interference between the functional aspect of the division of tasks and the structural aspect concerning the regulation of the relationship, this court has already taken the opportunity to assert – albeit with reference non-general directors, but with reasoning which may be extended also to their immediate superiors – that the 'contractualisation' of directors provided for does not imply that the public administration is able to recede freely from the relationship (judgment No. 313 of 1996). If this were the case, it is in fact clear that a close fiduciary relationship would be created between the parties, which would not enable directors general to carry out their own management activity in an independent and impartial manner.

The logical consequence of this is that, in spite of the fixed-term nature of the appointment, even the assignment to a particular office must be accompanied by specific guarantees on a structural level, which presuppose that it is regulated in such a manner as to ensure continuity in administrative action and a clear functional distinction between political-administrative and management tasks. This enables directors general to carry out their own activities – for the duration and within the limits of the length of the appointment determined in advance – in accordance with the principles of

impartiality and the proper conduct of the business of administration (Article 97 of the Constitution). Against this background, as this court has already had the opportunity to hold (judgment No. 193 of 2002 and order No. 11 of 2002), it is therefore indispensable that adequate procedural guarantees be provided for in the assessment of results and adherence to ministerial directives when deciding whether to adopt an eventual measure terminating the appointment due to a finding of responsibility on the part of the director.

9.- Law No. 145 of 2002 containing the contested provisions is located against this background.

This law, as far as the service relationship is concerned, reinstated access to the qualification through competition involving exams and selective training courses/competitions and abolished the single register, making provision for directors within each state administration.

As regards the assignment to a particular office, Article 19 of legislative decree No. 165 of 2001, as amended by law No. 145 of 2002 cited above, set out the relevant criteria for the conferral of the appointment, providing that consideration be given "to the nature and characteristics of the predetermined objectives, as well as the aptitudes and professional capacities of the individual director, assessed also in the light of the results obtained with reference to the objectives set in the annual directive and in other guidance documents issued by the minister" (sub-section 1); in addition, the reference contained in the previous wording of the same provision to the application "as a rule" of the "criterion of the rotation of appointments" was eliminated.

Moreover, Article 19(2) provides that the "measure conferring the appointment", and not the corresponding contract, identifies "the object of the appointment and the objectives to be attained, with reference to the priorities, plans and programmes determined by the governing body in its own guidelines and to eventual amendments of the same which occur during the course of the relationship, as well as the duration of the appointment, which must be related to predetermined objectives and which in any case may not exceed", for the appointment of general level directors – those relevant for our present purposes – "the upper limit of three years"; the negotiation phase deals exclusively with the determination of the corresponding remuneration.

As far as the criteria for ascertaining the responsibility of directors are concerned, and the resulting measures which may be taken, the new version of Article 21 of legislative

decree No. 165 of 2001 provides that "the failure to meet targets or to comply with directives" – assessed using the systems and guarantees set out in the aforementioned Article 5 of legislative decree No. 286 of 1999 – entail "a block on the renewal of the same directorship appointment". Article 21 also provides that "in more serious cases, the administration may in addition revoke the appointment, making the director available for one of the posts mentioned in Article 23, or rescind the employment contract in accordance with the terms of the collective bargaining agreement".

9.1.- It is therefore clear in the light of the above arguments that the grounds on which the referring courts averred that Article 3(7) of law No. 145 of 2002 was unconstitutional insofar as it provides that general level directorship appointments "shall terminate on the sixtieth day after the entry into force" of the law are well-founded.

On this matter it should in the first place be clarified that the aforementioned sub-section 7 provides for the regulation of the assignment to a particular office through two different transitory mechanisms in place on the date of the entry into force of the law, depending on whether the directorship appointments were for a general or non-general level.

In relation to the latter, which are not in dispute, the law provides that they be subjected within ninety days of the entry into force of the above law to a revisory and redistributory assessment, "according to the criterion of rotation", specifying that "on expiry of that time limit, the appointments are regarded as confirmed where no measure has been adopted".

The complaints advanced by the referring courts are centred, as mentioned above, exclusively on the other part of sub-section 7, which provides that "general level directorship appointments" shall terminate automatically on the sixtieth day after the date of entry into force of the law.

It must therefore be reiterated, when determining the extent of the application of the contested legislation, that the question before the court does not concern the position of directors who have received "top-level" appointments, that is those involving more intense interaction with political authorities (general secretary, department head and other equivalent roles).

The procedures for terminating these appointments are contained in Article 19(8) of legislative decree No. 165 of 2001, also amended by law No. 145 of 2002. The new legislation provides, once it becomes fully operative, *inter alia* that the aforementioned appointments "shall terminate ninety days after the vote of confidence in the government".

9.2.- Accordingly, the contested provision – which provides for an automatic termination mechanism (the so-called one-off spoils system) *ex lege* and generally applying to general level directorship appointments on expiry of the sixty day deadline following the entry into force of the law before the court – violates Articles 97 and 98 of the Constitution.

In fact, formulated in these terms and given the absence of procedural guarantees – insofar as it provides for the automatic termination of the assignment to a particular office still in existence prior to the expiry of the pre-set deadline – the above provision violates the constitutional principles mentioned above and in particular the principle of continuity of administrative action which is closely related to that of the proper conduct of the business of administration. The recent laws reforming the public administration, discussed above, indeed provided for a new activity model to measure the respect for the requirements of effectiveness and efficiency in the light of the results which the director must pursue, within the limits of the general directives imparted by the political authorities, having at his disposal an adequate period of time fixed in accordance with the characteristics of the individual directorship position and the overall context in which it is located. It is therefore clear that the provision of an early termination *ex lege* of the relationship in existence prevents the director's activities from being carried on in accordance with the activity model described above.

For the reasons set out above, the termination of the appointment legitimately conferred on the director as considered by this court, may occur only pursuant to a finding of liability on the part of the director where specific prerequisites have been satisfied and following procedures which guarantee certain rights and are subject to detailed regulation (judgment No. 193 of 2002).

In the light of the principles affirmed in the constitutional case law referred to above, the existence of a procedural setting in which there may be an exchange of views between the parties must of necessity be guaranteed, in the context of which on the one

hand the administration presents the reasons – concerning both the manner in which the duties were previously carried out, as well as the predetermined objectives of the new government – why it considers that it cannot consent to the continuation until the expiry under contract; on the other hand the director is guaranteed the right to present a defence, illustrating the results of his own performance and of the organisational capacities implemented in order to comply with the objectives imposed by the political authorities and set out in the relevant contract.

The existence of a prior assessment phase is essential also in order to ensure, in particular following the entry into force of law No. 241 of 7 August 1990 (New provisions governing administrative proceedings and the right of access to administrative documents), as amended by law No. 15 of 11 February 2005, the respect for the principles of procedural fairness, which require the adoption of a decision with reasons which, notwithstanding its legal status as part of public or private law, at any rate is open to judicial review. This is also necessary in order to guarantee – through the presentation of the reasons for the decision taken by the political authorities – transparent and verifiable choices which can enable the continuation of the business of management in line with the constitutional principle of the impartiality of administrative action. This principle lies at the basis of the very functional distinction of tasks between political and administrative bodies, and that is between government action – which is normally tied to the priorities of the political forces which constitute the majority – and administrative action, which in implementing the political desires of the majority is on the other hand required to act without political bias and therefore in the "exclusive service of the Nation" (Article 98 of the Constitution), in the pursuit of the public goals imposed by the legal order (on this point, albeit with reference to legislation different from that before the court, see judgment No. 453 of 1990, as well as judgment No. 333 of 1993).

It cannot be concluded, as argued by the *Avvocatura dello Stato*, that the provision in question, given its transitory nature, is justified by the requirement to enable the implementation of the reform introduced by law No. 145 of 2002 through a well-balanced passage from one system to the other.

As emerged from the analysis previously carried out, although this law amended the previous legislation, it maintained substantially unchanged in its characteristic aspects

the overall system founded on the choice of directors in accordance with objective criteria, the fixed-term nature of the appointment, as well as the mechanisms for terminating the appointment in the presence of particular responsibility on the part of the director. This makes it clear that the contested provision – in contrast to the findings of this court, when confronted with different facts, in judgment No. 233 of 2006 concerning a law on regional directors (Article 2(1) of Abruzzo Region law No. 27 of 12 August 2005) made in order to "render the new legislation immediately operative" – does not have any transitional role in enabling the creation of an innovative system for public sector directors and their relations with the political authorities, thus permitting a gradual and harmonious transition from one regulation of the directors' functions to another.

Accordingly, following an overall balancing of the values at issue, the choice of Parliament cannot be justified by the requirement of permitting the immediate application of the provisions on directors as amended by law No. 145 of 2002, especially bearing in mind that the executive nature of the legislative instrument requires an even stricter scrutiny or the non-arbitrary and reasonable nature of the choices are concerned (see *inter alia* judgment No. 153 of 1997). Moreover, if the end pursued had effectively been that of permitting the implementation of the reform passed by the above law, this would in the first place fail to explain why Parliament imposed the automatic *ex lege* and one-off termination only of general level directorship appointments and not also of the other appointments for which, as mentioned above, an assessment mechanism different from those in place on entry into force of the law is provided for; secondly, in the same way the adoption of a termination measure *ex lege* not commensurate with the intended objective would not be justified.

The absence of a minimum length for directorship appointments, even though the relevant provision – or this aspect thereof – does not fall within the ambit of this court's scrutiny for the reasons set out above, is an indication that the role of director may be turning into a precarious position, which (where the length is excessively short) is hard to reconcile with an adequate system of guarantees for directors that is capable of ensuring an impartial, efficient and effective management of the business of administration.

And it is not without significance that Article 14-*sexies* of decree-law No. 115 of 2005, subsequently reintroduced the minimum length of appointments.

9.3.- Article 3(7) of law No. 145 of 2002 must therefore be declared unconstitutional due to breach of Articles 97 and 98 of the Constitution, insofar as it provides that the aforementioned appointments shall terminate on the sixtieth day after the entry into force of the present law, and for the duration of this period the occupants of the posts shall perform exclusively ordinary administrative duties".

The other complaints submitted by the referring courts are moot.

on those grounds

THE CONSTITUTIONAL COURT

hereby,

1) declares that Article 3(7) of law No. 145 of 15 July 2002 (Provisions for the reorganisation of public sector directors and to promote the exchange of experience and interaction between the public and private sectors) is unconstitutional insofar as it provides that "the aforementioned appointments shall terminate on the sixtieth day after the entry into force of the present law, and for the duration of this period the occupants of the posts shall perform exclusively ordinary administrative duties";

2) declares that the questions of the constitutional legitimacy of Article 3(1)(b) and (7) of the aforementioned law No. 145 of 2002, raised by the *Tribunale di Roma* with referral orders r.o. Nos. 97, 107 and 159 of 2006, with reference to Articles 1, 2, 3, 4, 33, 35, 36, 41, 70, 97, 98 and 113 of the Constitution are inadmissible;

3) declares that the questions of the constitutional legitimacy of Article 3(1)(b) of the aforementioned law No. 145 of 2002, raised by the *Tribunale di Roma* in referral orders r.o. Nos. 38, 157, 158 and 547 of 2006 with reference to Articles 1, 2, 3, 4, 35, 36, 70, 97, 98 of the Constitution are inadmissible.

Decided in Rome, at the seat of the Constitutional Court, *Palazzo della Consulta*, on 19 March 2007.

Signed:

Franco BILE, President

Alfonso QUARANTA, Author of the Judgment

Gabriella MELATTI, Registrar

Deposited in the court registry on 23 March 2007.

The Registrar

Signed: MELATTI