JUDGMENT NO. 133 YEAR 2016

In this case, the Court heard various applications from administrative courts challenging the removal, from a decree-law, of a provision permitting the temporary retention in service of certain public sector employees who would otherwise be required to take early retirement in order to ensure generational turnover. The Court rejected the questions as unfounded, holding that the legislation did not breach any legitimate expectation, was not contradictory or unreasonable and did not have a discriminatory effect.

[omitted]

THE CONSTITUTIONAL COURT

[omitted]

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Article 1(1), (2) and (3) of Decree-Law no. 90 of 24 June 2014 (Urgent measures concerning administrative simplification and transparency and to enhance the efficiency of judicial offices), converted with amendments into Article 1(1) of Law no. 114 of 11 August 2014, initiated by the Regional Administrative Court (*Tribunale amministrativo regionale*) for Lombardy by the referral order of 20 November 2014, by the Regional Administrative Court for Emilia-Romagna by the referral order of 27 November 2014, by the Council of State by the referral order of 29 April 2015 and by the Regional Administrative Court for Lazio by the referral order of 17 November 2015, registered respectively as nos. 30, 61 and 144 in the Register of Referral Orders 2015 and no. 19 in the Register of Referral Orders 2016 and published in the Official Journal of the Republic nos. 11, 16 and 33, first special series 2015 and no. 6, first special series 2016.

Considering the entry of appearance by S.P., M.A. and M.S. and the intervention by the President of the Council of Ministers;

having heard the judge rapporteur Silvana Sciarra at the public hearing of 19 April 2016;

having heard Counsel Cecilia Martelli for S. P. and for M.S., Counsel Mario Sanino for M.A. and the State Counsel [*Avvocati dello Stato*] Gianni De Bellis and Ruggero Di Martino for the President of the Council of Ministers.

[omitted]

Conclusions on points of law

1.– By four different referral orders, the third division of the Regional Administrative Court for Lombardy (Referral Order no. 30 of 2015), the first division of the Regional Administrative Court for Emilia-Romagna (Referral Order no. 61 of 2015), the first division of the Council of State (Referral Order no. 144 of 2015) and the first division of the Regional Administrative Court for Lazio (Referral Order no. 19 of 2016) have questioned the constitutionality of Article 1(1), (2) and (3) of Decree-Law no. 90 of 24 June 2014 (Urgent measures concerning administrative simplification and transparency and to enhance the efficiency of judicial offices), converted with amendments into Article 1(1) of Law no. 114 of 11 August 2014 insofar as it provides for the abolition of the institute of the retention in service of civil servants employed by the state governed by Article 16 of Legislative Decree no. 503 of 30 December 1992 (Provisions on the reorganisation of the pension system for private- and public-sector workers, adopted pursuant to Article 3 of Law no. 421 of 23 October 1992), as subsequently amended (paragraph 1), which also lays down transitory provisions (paragraphs 2 and 3).

The provisions invoked have been challenged on the grounds that they breach Articles 33(6) and 77(2) of the Constitution (objection raised only in Referral Order no. 30 of 2015 in relation to paragraph 1), Article 117(1) of the Constitution (objection raised only in Referral Order no. 60 of 2015 in relation to paragraph 2), Articles 81(3) and 97(1) of the Constitution (objection relating to all three paragraphs of Article 1 objection raised in Referral Order no. 144 of 2015 and Referral Order no. 19 of 2016) and finally Articles 3 and 97(2) of the Constitution (objections raised, with different wording, in all three referral orders).

1.1.– Since the contested provisions are the same, as are some of the constitutional parameters invoked and the issues and arguments relied on, the proceedings must be joined and ruled upon by a single judgment.

2.– As a preliminary matter, the question of constitutionality raised by the Regional Administrative Court for Lombardy (Referral Order no. 30 of 2015) concerning Article 1(1) of Decree-Law no. 90 of 2014 with reference to Article 33(6) of the Constitution must be ruled inadmissible, due to the failure to provide adequate reasons to establish that it is not manifestly unfounded (see most recently Order no. 93 of 2016; also Orders no. 112 and no. 52 of 2015).

The referring court in fact limits itself to finding a violation of the autonomy of universities guaranteed by Article 33 of the Constitution due to the abolition of the institute of retention in service. This finding was presented in an incontrovertible manner, without providing any argument as to how such a violation was supposedly caused.

3.– With the sole exception of this indication, there are no other grounds for inadmissibility as regards the objections raised in relation to Article 33 of the Constitution that preclude this Court from examining, on their merits. the other questions raised by the four referral orders mentioned.

3.1.– As regards the relevance of the questions raised by Referral Order no. 30 of 2015 concerning Article 1(1) of Decree-Law no. 90 of 2014, the argumentation of the Regional Administrative Court for Lombardy is not implausible. The referring court draws attention to the fact that retention in service had not yet been ordered, since the request by the applicant university teacher had been rejected. Thus, in order to rule on the legality of the measure by which the Board of Governors of the University of Milan rejected the applicant's request to remain in service, it could not have done anything other than apply precisely the provision abolishing the institute of retention in service.

3.2.– There are no grounds for inadmissibility on account of the provision of insufficient reasons to establish relevance for the questions raised in the three other referral orders (Referral Order no. 60 and no. 144 of 2015 and Referral Order no. 19 of 2016). In all three it is asserted – according to argumentation which is not implausible – that the contested measures (compulsory retirement) are based on or are directly provided for in the contested provisions, which must be applied in the respective proceedings, with the result that any ruling that they were unconstitutional would have a knock-on effect on the legality of the aforementioned measures.

Sufficient and plausible reasons have been provided in support of the questions raised concerning Article 1(2) and (3) of Decree-Law no. 90 of 2014 also in relation to the proceedings within which referral orders no. 144 of 2015 and no. 19 of 2016 were made.

Having been called upon to rule on the constitutionality of a measure ordering the compulsory retirement of a state counsel, adopted following the conversion into law of

Decree-Law no. 90 of 2014, the referring courts reasonably consider that they are required to apply the new legislation on retention in service as a whole, in view of the fact that they base their objections to the legislation, as amended by the conversion law, and precisely on the provision that state counsel are to be treated in the same way as public sector employees (paragraph 2) and on the fact that it does not extend the "derogating" transitory provisions applicable to judges, which are laid down in paragraph 3, also to state counsel, as by contrast was the case in the original text of the Decree-Law.

The assertions that the questions are inadmissible owing to the supposed inapplicability of the contested provisions laying down the transitory provisions – which were raised by the State Counsel with specific reference to the objection (asserted in Referral Order no. 144 of 2015 and in Referral Order no. 19 of 2016) alleging that Article 97(2) of the Constitution had been violated on account of the "drastic nature" of the reduction of the period of retention in service (which was introduced only upon conversion into law of Decree-Law no. 90 of 2014 and did not appear in the original text of Decree-Law no. 90 of 2014), in particular for the category of state counsel – may be countered by the same arguments.

3.3.– There is no obstacle to the admissibility of the questions of constitutionality raised by Referral Orders no. 61 and no. 144 of 2015 and Referral Order no. 19 of 2016 due to the fact that the questions were raised during the interim stage of the three proceedings within which the three referral orders were made. It is the settled position of this Court that the *potestas iudicandi* of the referring court cannot be deemed to have been exhausted when the grant of interim relief is grounded, as to the issue of a *prima facie* case, on the fact that the question of constitutionality is not manifestly unfounded. In such an eventuality, the suspension of the effect of the contested provision must be deemed to be provisional and temporary, until the interim proceedings are resumed following the interlocutory constitutionality proceedings (see Judgment no. 83 of 2013; see also recently Judgment no. 200 of 2014).

3.4.– There are also no grounds for inadmissibility in relation to the questions raised by Referral Order no. 144 of 2015 from the Council of State, which was seised on a consultative basis through an extraordinary application to the President of the Republic.

3.4.1.– Following the significant changes that were made to this institute by Article 69(1) of Law no. 69 of 18 June 2009 (Provisions on economic development, simplification, competitiveness and in relation to civil litigation), it has been established that the Council of State has standing to raise questions of constitutionality where it has been seised on a consultative basis through an extraordinary application to the President of the Republic (see Judgment no. 73 of 2014).

3.4.2.– Furthermore, the admissibility of the questions raised by the Council of State by Referral Order no. 144 of 2015 within the proceedings concerning the extraordinary application to the President of the Republic is not affected by the fact that, following opposition by the administrations concerned, the proceedings were transferred to the Regional Administrative Court for Lazio pursuant to Article 48 of Legislative Decree no. 104 of 2 July 2010 (Implementation of Article 44 of Law no. 69 of 18 June 2009 delegating power to the government to reorganise the law on proceedings before administrative courts). Although, as a result of the transfer of proceedings, the administration and the Council of State have been deprived of any decision-making power and the relative proceedings have become subject to a procedural bar, this does not impinge in any way on the order by which the Council of State raised the question

of constitutionality before the proceedings were transferred to the ordinary courts. The prevailing principle in this case is that matters pertaining to the main proceedings (including a procedural bar or their termination) cannot impinge upon constitutional proceedings where the latter have been properly commenced – as is the case here – a principle which is laid down by Article 18 of the supplementary rules on proceedings before the Constitutional Court in the version approved on 7 October 2008. By virtue of that principle, once constitutionality proceedings "have been commenced following a referral order by a lower court, they cannot be influenced by subsequent factual events involving the relationship at issue in the proceedings that gave rise to the referral" (see Judgment no. 274 of 2011) or by the fact that the main proceedings within which the constitutionality proceedings were initiated have been terminated (see most recently Judgment no. 236 of 2015).

3.5.– Similarly, no issues of inadmissibility arise also for the questions raised by Referral Order no. 19 of 2016 by the Regional Administrative Court for Lazio following the transfer of the proceedings originally initiated by means of an extraordinary application to the President of the Republic.

Given the self-standing and independent status of the two remedies (the extraordinary remedy and the judicial remedy) and the fact that they are alternatives to each other, any party other than the applicant may choose the judicial remedy. The Regional Administrative Court thus considers, on the basis of arguments that are detailed and not implausible, that it has been vested with full *potestas iudicandi* and that it is able to raise *ex novo* a question concerning the constitutionality of the objections invoked by the applicant on the basis of its own independent assessment.

4.– Having cleared the field of any grounds for inadmissibility, it is now possible to examine the merits of the questions raised by the four orders mentioned in the headnote.

4.1.– The Regional Administrative Court for Lombardy (Referral Order no. 30 of 2015) objects, as a preliminary matter, to Article 1(1) of Decree-Law no. 90 of 2014 insofar as it abolishes the institute of retention in service also for university teachers and researchers on the grounds that it breaches Article 77(2) of the Constitution by its failure to fulfil the prerequisites of necessity and urgency. The preamble to Decree-Law no. 90 of 2014 is stated to refer to purposes and issues that have no relevance for the matters regulated thereunder, and to take no account of the prerequisites of necessity and urgency requiring the adoption of the contested legislation by means of a decree-law.

4.1.1.– The question is unfounded.

The abolition of retention in service provided for by the contested provision occurred within the context of measures intended to "promote the more rational use of public sector employees", which purpose is expressly referred to in the preamble to the Decree-Law under examination, and thus is not unrelated to the content and the area of law covered by the Decree (see Judgment no. 171 of 2007; see most recently Order no. 72 of 2015). It amounts to an initial act, which is moreover detailed and circumscribed, within a laborious process destined to unfold over a long period of time with the aim of achieving generational turnover within the sector. As such, it is conducive to a "more rational use of public sector employees" and does not contradict the "extraordinary necessity and urgency" of making provision in this area, on which basis the Decree-Law under examination was adopted (see Judgment no. 313 of 2010). These indications are sufficient to preclude the hypothesis – to which the review of the lawfulness of the adoption of a Decree-Law by the Government is limited – of an "evident failure to fulfil

the prerequisite of extraordinary circumstances characterised by a necessary and urgency to make provision" (see Judgment no. 93 of 2011).

4.2.– The Regional Administrative Tribunal for Emilia-Romagna (Referral Order no. 61 of 2015) objects in particular to Article 1(2) of the Decree-Law under examination as amended upon conversion by Law no. 114 of 11 August 2014, insofar as, as a result of the amendment introduced upon conversion, it stipulates "the retention in service of state counsel previously ordered by a formal measure only until 31 October 2014", with "prior notice" of little more than two months. In cancelling any reference to state counsel as pertaining to the category of the beneficiaries of the "derogating" transitory arrangements laid down in paragraph 3 of the original text of Decree-Law no. 90 of 2014, this provision is asserted to violate the proportionality principle and to breach the legitimate expectations which the employee has in the efficacy of administrative measures previously adopted in relation to him/her, thereby violating Articles 1, 2 and 6(1) of Directive 2000/78/EC of 27 November 2000 (Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation), as interpreted by the Court of Justice in its judgment of 6 November 2012 in Case C-286/12, *Commission v. Hungary*, and thus in breach of Article 117(1) of the Constitution.

4.2.1.– The question is unfounded.

The Judgment of the Court of Justice invoked by the referring court is not relevant for the purposes of the constitutional review of the contested legislation. In that ruling, which concerned certain statutory provisions adopted by Hungary that had abruptly and significantly brought forward (from 70 to 62 years of age) the retirement age for judges, prosecutors and notaries public without providing for transitory provisions capable of protecting the legitimate expectations of the persons affected, the Court of Justice held that Directive no. 2000/78/EC, which prohibits discrimination on the grounds of age (Article 6(1)), had been violated on account of the failure to respect the proportionality principle.

The scope of the contested legislation does not coincide with that of the Hungarian legislation, as the contested provision does not alter the retirement age but rather the institute of retention in service.

This institute (originally governed by Article 16 of Legislative Decree no. 503 of 1992, which granted civil servants employed by the state and non-economic public sector bodies a genuine right to remain in service for the period specified) was previously comprehensively altered by Article 72(7) of Decree-Law no. 112 of 25 June 2008 (Urgent provisions on economic development, simplification, competitiveness, stabilisation of the public finances and tax equalisation), converted with amendments into Article 1(1) of Law no. 135 of 6 August 2008, which entirely remodelled it and established its status as a mere interest that could be invoked by an application to that effect to the administration, which was free, "on the basis of its own organisational and functional requirements, to accept the request on account of the particular professional experience acquired by the applicant in certain or specific areas and having regard to the efficient operation of the service" (Council of State, sixth division, judgments no. 2816 of 30 May 2014 and no. 5147 of 24 October 2013). Having been subject to increasingly stringent limits (pursuant to Article 9(31) of Decree-Law no. 78 of 31 May 2010 laying down "Urgent measures on financial stabilisation and economic competitiveness", converted with amendments into Article 1(1) of Law no. 122 of 30 July 2010), this institute was also developed within administrative case law as an exception to the rule

of compulsory retirement, in consideration of general requirements of cost containment (Council of State, sixth division, judgment no. 4104 of 6 August 2013).
The abolition of retention in service thus constitutes the final link within a legislative plan seeking to scale back its scope of operation.
The aims of generational turnover inherent within the legislation under examination fall within the scope of "legitimate labour policy aims", which do not lead to discrimination on the grounds of age according to the Directive cited (Article 6(1)). This has also been the view consistently adopted by the Court of Justice of the European Union, which has recognised broad scope for discretion to national lawmakers (see *inter alia*, Court of Justice, judgment of 21 July 2010 in Joined Cases C-159/10 and C-160/10, *Fuchs* and *Köhler*).
The preparatory works to the conversion law for Decree-Law no. 90 of 2014 demonstrate that access by young persons to public sector employment and expenditure containment are legitimate aims that are capable of offsetting the supposedly drastic nature of the measures adopted, without compromising the protection of legitimate interests.
The referring court's argument is based on the premise that the original text of the Decree-Law adopted on 24 June 2014 gave rise to a legitimate expectation in the retention in service of state counsel until 31 December 2015, which was subsequently violated by the abrupt advancement of the date to 31 October 2014 by the conversion law adopted on 11 August 2014.
Both the "declassification" of the right to retention in service to a mere interest, due to progressively restrictive legislation as confirmed by the case law, as well as the consideration that the provision concerning the extension of retention in service until 31 December 2015 was contained in a Decree-Law (a measure, which is liable to amendment upon conversion, and applicable to extraordinary situations of necessity and urgency), preclude the conclusion that any legitimate expectation of continuation in service until 31 December 2015 could have arisen and that this could have been unlawfully and excessively compromised by the specification of an earlier termination of service.
4.3.– The Council of State (Referral Order no. 144 of 2015) and the Regional Administrative Court for Lazio (Referral Order no. 19 of 2016) raise questions concerning the constitutionality of the first three paragraphs of Article 1, alleging first and foremost due a violation of Article 81(3) of the Constitution.
Whilst the provisions laid down in Article 1 of Decree-Law no. 90 of 2014, as converted, which abolished the institute of retention in service and, through the amendments made upon conversion, expanded the category of public sector employees to which the specific legislation applied, related to the area of pensions and public sector employment, they were not adopted after having carried out all action required in order to guarantee the precise quantification of and credible coverage for the financial burden resulting from them, including specifically the action required under Article 17(3) of Law no. 196 of 31 December 2009 (Law on public accounts and finance).
4.3.1.– The question is unfounded.
This Court has recently had the opportunity to assert that "the principle of detailed financial coverage – laid down by Article 81(3) of the Constitution, as formulated by Constitutional Law no. 1 of 2012 and pursuant to Article 17 of Law no. 196 of 2009 – has the status of a substantive rule, with the result that any provision that entails positive or negative financial consequences must be accompanied by a suitable investigation

followed by a determination of the effects envisaged and their compatibility with available resources" (see Judgment no. 224 of 2014). On this perspective, insofar as it stipulates in Article 17 the prior quantification of the expenditure or the burden as a prerequisite for financial coverage, Law no. 196 of 2009 does so for "the evident reason that coverage cannot be provided for an undefined amount" (see Judgment no. 181 of 2013).

As is apparent from the preparatory works to the conversion law and Study Note no. 57 prepared by the Senate Budgetary Service, which was dedicated to the contested Article 1, these indications have been respected. The adoption of the measures contained in Article 1 of Decree-Law no. 90 of 2014, as converted into law, is accompanied by the technical report required pursuant to Article 17 of Law no. 196 of 2009, which also sets out the detailed framework of financial projections over a period of at least ten years as required under Article 17. It is clearly indicated, in the margin to the table relating to the years 2014-2018, that, after 2018, the charges will gradually decline as a result of the progressive fall in excess disbursements due to the early payment of end-of-service allowances. Moreover, it is apparent from the technical report that the changes made by the conversion law do not have any effect on the charges referred to under Article 1(6) of the Decree-Law. The reduced costs related, with reference to the period indicated, to the failure to abolish retention in service for judges for whom continuing service orders have not been concluded are capable of offsetting the cost increase resulting from the changes affecting state counsel, the representation of which within the context of the reference segment is moreover numerically limited.

Since the action required under Article 17 of Law no. 196 of 2009 has been taken, the calculations carried out in relation to spending and the forecasts made do not appear to be implausible (see Judgment no. 214 of 2012), with the result that the requirement of financial coverage has not been excluded.

4.4.– A further ground for unconstitutionality asserted by the Council of State and the Regional Administrative Court for Lazio in relation to the provisions introduced in Article 1(1), (2) and (3) consists in the breach of Article 97(1) of the Constitution and the criterion of cost coverage introduced thereunder by Constitutional Law no. 1 of 20 April 2012 (Introduction into the Constitution of the principle of a balanced budget), a criterion previously provided for under Law no. 241 of 7 August 1990 (New provisions on administrative procedure and the right of access to administrative documents), which imposes an unavoidable constraint on the capacity and spending conditions of the public administrations in order to ensure that they do not exceed the resources actually available.

Study Note no. 57 prepared by the Senate Budgetary Service is moreover asserted to demonstrate that this constitutionally significant criterion would be violated were one to compare the costs resulting from the abolition of retention in service with the savings to be allocated to the hiring of new staff.

4.4.1.– Also this question must be ruled unfounded.

The introduction into the Constitution of Article 97 ("The public administrations, acting in accordance with EU law, shall ensure that a balanced budget is achieved and that the public debt is sustainable") by Constitutional Law (amendment of the Constitution) no. 1 of 2012 coincided with the introduction of the requirement for public administrations to ensure a balanced budget. This amounts to the "criterion of cost coverage" according to which the action of the public administration must pursue its own objectives, guaranteeing proper administration and impartiality with a minimum outlay of

resources. This criterion, as is moreover noted by the referring courts themselves – albeit in relation to the objection alleging a breach of Article 81(3) of the Constitution – is congruent with a "balanced budget" over the economic cycle. Thus, its assessment cannot be constrained to a limited period of time, but must be carried out with reference to a sufficiently extended period of time, so as to enable the achievement of objectives within a scenario of a sustainable debt and a trend towards "harmony" between income and expenditure.

According to the preparatory works, the objective pursued by the abolition of the institute of retention in service is to "promote generational turnover within the area of public sector employment and to promote cost savings with the reduction of salary costs resulting from the replacement of older workers, who are normally entitled to higher salaries, with newly hired staff who therefore cost less". This result is expected over the long term, in spite of the fact that the initial application of the measures showed that it is difficult to strike a balance between on the one hand the increased costs resulting from the earlier payment of pensions and end of service allowances and on the other hand the corresponding savings resulting from the cessation of employment. As has been indicated in the technical report, which projects the progressive fall in charges associated with the new legislation to start in 2018, the implementation of the measures under examination appears to be capable of facilitating the achievement of savings from the cessation of employment that will be able to free up new resources for the desired generational turnover over a longer period of time.

4.5.– All of the referring courts assert that Article 97(2) of the Constitution has been violated.

The Regional Administrative Court for Lombardy objects to Article 1(1) of the Decree-Law under examination insofar as it abolishes the institute of retention in service also for university teachers and researchers.

It asserts that the need to implement generational turnover is not balanced against the requirement, associated with the proper conduct of administrative activity, to retain – moreover for a short period of time – teachers who are capable of giving a positive contribution due to their special experience acquired, in accordance with the statements of principle made in Judgment no. 83 of 2013.

The Regional Administrative Court for Emilia-Romagna asserts that the choice made by the legislator in Article 1(2) of the Decree-Law, as amended by the conversion law, to reduce "the retention in service of state counsel previously ordered by a formal measure only until 31 October 2014" is unbalanced and disproportionate. It is asserted not only to fail to take account of the negative repercussions that could result for the principle of the proper conduct of the public administration, but also not to allow for any generational turnover, considering that the drastic reduction in the period of continuing service until 31 October 2014, which was adopted in August and only upon conversion of Decree-Law no. 90 of 2014, would not have made it possible to launch the competitive procedures to recruit new state counsel within the minimum time-scale necessary.

Finally, the Council of State and the Regional Administrative Court for Lazio object that Article 97(2) of the Constitution has been violated by Article 1(1), (2) and (3) of Decree-Law no. 90 of 2014, as converted into law, insofar as, by repealing Article 16 of Legislative Decree no. 503 of 1992, it is stipulated that state counsel shall be retained in service beyond the retirement age until 31 October 2014, and in the alternative does not

set the date for termination of the period of retention in service of state counsel at 31 December 2015.
The drastic reduction compared to the original text of the period of retention in service, which was introduced only upon conversion of Decree-Law no. 90 of 2014, in particular for the category of state counsel who were previously due to continue in service for five years, is asserted to have a negative impact on the efficient operation of the service of the state counsel and to run contrary to its organisational and functional requirements. This measure is alleged to have deprived the administration of special human resources which cannot be easily located within a short space of time, and to thwart the legitimate expectation of employees in legal certainty as it makes provision regarding substantive circumstances based on previous legislation and measures that have already been issued and taken effect.
4.5.1.– The questions referred to are unfounded.
The development of the legislation in the area of retention in service has resulted – as noted above – in the recognition of the "right of the administration, to accept the request [for retention in service] on account of the particular professional experience acquired by the applicant in certain or specific areas and in order to ensure the efficient operation of the service" (Article 72(7) of Decree-Law no. 112 of 2008). This right has been progressively subjected to increasingly stringent limits associated with cost containment requirements (Article 9(31) of Decree-Law no. 78 of 2010) with a view to reducing the number of beneficiaries of retention in service (see Judgment no. 83 of 2013), in line moreover with the case law of the administrative courts, which have held that there is no individual right to remain in service but rather a mere interest, the discretionary assessment of which falls to the administration (see recently Council of State, sixth division, judgment no. 239 of 22 January 2015).
This Court specified some time ago that the rule providing for retention in service beyond the pensionable age (Article 16 of Legislative Decree no. 503 of 1992) "has exceptional status" (see Order no. 195 of 2000) also because it entails "the burden of remuneration for active service and ancillary charges, which are in general greater […] than those associated with newly hired staff" (see again Order no. 195 of 2000). In addition, "the proper conduct of administrative activity cannot by any means be dependent upon the continuation in service of staff who have reached the retirement age, subject exclusively to a request by the employee, as an absolute right", considering that "the continuation of service beyond the retirement age is not always indicative of an increase in organisational efficiency" (see again Order no. 195 of 2000).
On the basis of the positions stated by this Court, it must be asserted that none of the objections made with reference to Article 97(2) of the Constitution, either with reference to the "ordinary" arrangements (paragraph 1) or to transitory arrangements (paragraphs 2 and 3), is well founded.
The abolition of retention in service has represented the completion of a process previously launched in order to facilitate, over time, generational turnover and to enable cost savings, including in relation to the university administration, in accordance with the principles of the proper conduct and efficiency of the administration and without any violation of legitimate expectations, in line with the evolution of the law and with the case law of the Court of Justice (see *inter alia* judgment of 7 June 2005 in Case C-17/03, *VEMW and others v. Directeur van de Dienst uitvoering en toezicht energiea*).
The references by the Regional Administrative Court for Lombardy in Referral Order no. 30 of 2015 to Judgment no. 83 of 2013, in which this Court accepted the question of

constitutionality raised on the grounds of unequal treatment between university staff and other public sector employees and the violation of the requirement of the proper conduct of the public administration, are not relevant. In that case, only universities were precluded any margin for the autonomous assessment of organisational and functional requirements. The case subject to review in these proceedings concerns legislation of a general nature, which does not discriminate between public administrations in relation to legislation that is ordinarily applicable and entirely removes the already limited scope for retention in service.

As regards the transitory arrangements (paragraphs 2 and 3) for state counsel, reference is made to the observations made in relation to the alleged violation of Article 117(1) of the Constitution (see above section 4.2.1.). The realisation of the objective of generational turnover will not be immediate as it presupposes preparatory work in order to hold recruitment procedures. These procedures could not have been arranged during the short period of time falling between the early termination of employment of state council (brought forward from 31 December 2015 to 31 October 2014) and their effective termination (August 2014 - October 2014).

It must be added that, for the reasons set out above (see page 25 lines 8-16), there has been no violation of the legitimate expectation as a result of the drastic advancement of termination of service.

4.6.– All of the referring courts assert specific challenges to the effect that the legislation is unreasonable also with reference to Article 3 of the Constitution.

The Regional Administrative Court for Lombardy objects to Article 1(1) on the grounds that it lays down unreasonable provisions, which breach the legitimate expectations of the public at large in legal certainty, considering that the requirement to achieve generational turnover cannot be adduced as the sole rationale for legislation that does not allow the administration to make a discretionary assessment concerning the prerequisites for retention in service, having regard also to its own organisational and functional requirements and taking account of the fact that the sudden and arbitrary abolition of the institute of retention in service will thwart the legitimate expectation placed by public sector employees in the continuation of their employment.

The Regional Administrative Court for Emilia-Romagna by contrast asserts that the transitory arrangements laid down by Article 1(2) following the conversion into law of Decree-Law no. 90 of 2014 violate the principle of legitimate expectations due to the failure to comply with the requirements of reasonableness and equality, with particular reference to state counsel. The legitimate expectation in a reasonable period of retention in service for such workers, which had previously arisen on account of measures stipulating continuing service guaranteed until 31 December 2015, also within the new provisions contained in Decree-Law no. 90 of 2014, is claimed to have been entirely thwarted by compulsory retirement starting from 31 October 2014, which was only ordered in August upon conversion of the aforementioned Decree-Law by Law no. 114 of 11 August 2014.

Finally, the Council of State and the Regional Administrative Court for Lazio challenge the first three paragraphs of Article 1 on the grounds that the legislation laid down therein is unreasonable. Although it has the stated aim of favouring generational turnover within the public administrations, this provision allegedly violates the rule contained in Article 3 of Decree-Law no. 90 of 2014 imposing a bar on the hiring of new staff, the requirement for authorisation for the hiring of new staff pursuant to

Article 35(4) of Legislative Decree no. 165 of 2001, and the provisions on turnover laid down therein.

4.6.1.– The questions are unfounded.

As far as the alleged unreasonableness of the ordinarily applicable and transitory arrangements is concerned, which are considered to violate the legitimate expectations of the public at large in legal certainty, reference must be made here to the observations made above in relation to the alleged violation of Article 97(2) of the Constitution (see section 4.5.1.).

As regards the supposed contradictory nature of the contested legislation vis-à-vis other provisions contained in the same Decree-Law (Article 3, imposing a bar on the hiring of new staff, is purported to contradict the supposed pursuit of generational turnover through the abolition of retention in service), it is necessary first and foremost to focus on the effective content of that Article.

Entitled "Simplification and flexibility within turnover", it seeks to "ration" the hiring of new staff over the period 2014-2018. In 2014, the power to hire staff is subject to the restriction that expenditure not exceed 20 percent of that for the tenured staff who ceased to work during the previous year. That restriction is reduced over subsequent years in order to enable the full "release" of the hiring of new staff in 2018.

This legislation is thus consistent with the objective of generational turnover underlying the abolition of retention in service, as part of a programme structured over time.

The rationale of Article 1 of Decree-Law no. 90 of 2014 is to favour policies of generational turnover to counter the economic crisis. The positive effects expected from the abolition of retention in service are linked to the need to achieve progressive savings from the departure of staff which, within the context of the turnover regime, would free up the resources available in order to hire new staff.

The compulsory retirement of staff who have previously benefited from retention in service would immediately free up resources in order to initiate new recruitment procedures and the subsequent hiring of new staff.

4.7.– Further objections have been made in relation to Article 3 of the Constitution on account of the unreasonable difference in treatment between similar situations and the unreasonable identical treatment of different situations.

In particular, the Regional Administrative Court for Emilia-Romagna, the Council of State and the Regional Administrative Court for Lazio object to Article 1(1), (2) and (3) due to the unreasonable difference in treatment between, on the one hand, state counsel and, on the other hand, judges of the ordinary courts, the administrative courts, the Court of Auditors and the military courts who at the time of entry into force of Decree-Law no. 90 of 2014 fulfilled the prerequisites laid down by Article 16 of Legislative Decree no. 503 of 1992, for whom retention in service is guaranteed until 31 December 2015.

Only the Council of State and the Regional Administrative Court for Lazio object that Article 1(1), (2) and (3) unreasonably subjects to identical treatment state counsel, the retention in service of whom was envisaged for five years beyond the retirement age, and public sector employees in general, for whom such treatment was stipulated for two years in view of the objective of guaranteeing the proper operation and efficiency of the administration, taking account of the fact that, in percentage terms, the number of employees leaving service will vary significantly between public sector employees in general and state counsel.

4.7.1.– The questions are manifestly unfounded.

It must be stated that paragraph 3 provided, in the version originally contained in Decree-Law no. 90 of 2014, that "[i]n order to safeguard the proper functioning of judicial offices, judges of the ordinary courts, the administrative courts, the Court of Auditors and the military courts and state counsel shall be retained in service until 31 December 2015 or until the expiry of their contracts if earlier". The provision intended to safeguard the retention in office of state counsel until 31 December 2015, even if such measures had not already been ordered, was removed upon conversion of Decree-Law no. 90 of 2014, whilst it by contrast remained for judges. Thus, as a result of the amendments made upon conversion, the efficacy of retention in service ended early for state counsel, on 31 October 2014, as for public sector workers as a whole.

4.7.1.1.– It is clearly apparent from the preparatory works to the law to convert Decree-Law no. 90 of 2014 that the exceptional transitory arrangements laid down in paragraph 3 were adopted with reference to the need to avoid the "attendant possible critical issues for the proper operation of judicial offices" resulting from the abrupt termination of the service of a significant number of employees. The rationale underlying that provision is thus inherent exclusively in the organisation of the offices and has no relationship with status as a judge. Thus, the equivalence alleged between counsel and judges in relation to their legal treatment is not relevant in these proceedings. Similarly, the multiplication of the tasks assigned to state counsel (media-conciliation pursuant to Article 5 of Legislative Decree no. 28 of 4 March 2010 on the "Implementation of Article 60 of Law no. 69 of 18 June 2009 on mediation aimed at the conciliation of civil and commercial disputes"; the transfer of proceedings to arbitral tribunals pursuant to Article 1 of Decree-Law no. 132 of 12 September 2014 laying down "Urgent measures on de-judicialisation and other initiatives to process the backlog of civil litigation", converted with amendments into Article 1(1) of Law no. 162 of 2014; assisted negotiation pursuant to Article 2 of Decree-Law no. 132 of 2014) can also not be attributed to requirements of "the proper functioning of judicial offices", which justified the introduction of the exceptional transitory arrangements for judges (which were extended further for specific categories).

The objection of an unreasonable difference in treatment evidently lacks any foundation, considering the indisputably heterogeneous nature of the situations compared, in line with the settled case law of the Constitutional Court (see *inter alia* Judgments no. 178 of 2015, no. 215 of 2014 and no. 340 of 2004).

4.7.1.2.– Also the allegedly unreasonable equal treatment – as regards the transitory arrangements on retention in service – of state counsel and public sector employees as a whole proves to be manifestly unfounded.

The referring courts (the Council of State and the Regional Administrative Court for Lazio) assert that the difference in treatment originally contemplated under Decree-Law no. 90 of 2014 for state counsel and all other public sector employees should have been maintained "in view of the objective of guaranteeing the proper conduct and efficiency of the administration, taking account of the fact that, in percentage terms, the number of employees leaving service will be significantly different for state counsel than for employees as a whole". This argument, which has been formulated in assertive terms, does not enable this Court to identify any unreasonable aspect in the equal treatment stipulated for state counsel and "public sector employees as a whole" as regards the transitory provisions governing retention in service. The fact that the number of state counsel who leave service is different from the number of "public sector employees as a whole" who also leave service is not an indication of an evident difference in the

situations under comparison, since the category of public sector employees is indicated generically, without any illustration of the reasonable justifications underlying the supposed difference in treatment.

ON THESE GROUNDS

THE CONSTITUTIONAL COURT

hereby,

1) rules that the question concerning the constitutionality of Article 1(1) of Decree-Law no. 90 of 24 June 2014 (Urgent measures concerning administrative simplification and transparency and to enhance the efficiency of judicial offices), converted with amendments into Article 1(1) of Law no. 114 of 11 August 2014 with reference to Article 33(6) of the Constitution by the Regional Administrative Court for Lombardy by Referral Order no. 30 of 2015, is inadmissible;

2) rules that the questions concerning the constitutionality of Article 1(1) of Decree-Law no. 90 of 2014, converted with amendments into Article 1(1) of Law no. 114 of 2014, raised with reference to Article 3 – alleging that the legislation is unreasonable – and Articles 77(2) and 97(2) of the Constitution by the Regional Administrative Court for Lombardy by Referral Order no. 30 of 2015, are unfounded;

3) rules that the questions concerning constitutionality of Article 1(2) of Decree-Law no. 90 of 2014, converted with amendments into Article 1(1) of Law no. 114 of 2014, raised with reference to Article 3 – alleging that the legislation is unreasonable – and Articles 97(2) and 117(1) of the Constitution – the last-mentioned in relation to Articles 1, 2 and 6(1) of Directive 2000/78/EC of 27 November 2000 (Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation) – by the Regional Administrative Court for Emilia-Romagna by Referral Order no. 61 of 2015, are unfounded;

4) rules that the questions concerning constitutionality of Article 1(1), (2) and (3) of Decree-Law no. 90 of 2014, converted with amendments into Article 1(1) of Law no. 114 of 2014, raised with reference to Article 3 – alleging that the legislation is unreasonable – and Articles 81(3) and 97(1) and (2) of the Constitution by the Council of State and the Regional Administrative Court for Lazio by Referral Order no. 144 of 2015 and al Referral Order no. 19 of 2016, are unfounded;

5) rules that the question concerning constitutionality of Article 1(2) of Decree-Law no. 90 of 2014, converted with amendments into Article 1(1) of Law no. 114 of 2014, raised with reference to Article 3 of the Constitution – alleging an unreasonable difference in treatment – by the Regional Administrative Court for Emilia-Romagna by Referral Order no. 61 of 2015, is manifestly unfounded;

6) rules that the question concerning constitutionality of Article 1(1), (2) and (3) of Decree-Law no. 90 of 2014 converted with amendments into Article 1(1) of Law no. 114 of 2014, raised with reference to Article 3 of the Constitution – alleging an unreasonable difference in treatment – by the Council of State and the Regional Administrative Court for Lazio by Referral Order no. 144 of 2015 and Referral Order no. 19 of 2016, is manifestly unfounded.

Decided in Rome at the seat of the Constitutional Court, *Palazzo della Consulta*, on 19 April 2016.