JUDGMENT NO. 78YEAR 2012

In this case the Court considered legislation enacted by Parliament stipulating the authentic interpretation of existing legislation, reversing the previous interpretation adopted by the Court of Cassation, whilst also stipulating that certain amounts repayable would no longer be due owing solely to the entry into force of the law. The Court held that, despite its classification as interpretative legislation, the provisions were in actual fact substantive retroactive rules. However, drawing on the case law of the European Court of Human Rights, the Court noted that retroactive legislation was not *ipso facto* unlawful, and could be legal if justified by "compelling reasons of general interest". The Court nevertheless held that, on the facts, the retroactive legislation breached the principles of reasonableness and equality between the parties. Moreover, it also was also unlawful under the ECHR, due to the absence of any compelling reasons of general interest.

(omitted)

THE CONSTITUTIONAL COURT

(omitted)

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Article 2(61) of Decree-Law no. 225 of 29 December 2010 (Extension of time limits provided for under legislative provisions and urgent initiatives in relation to tax and support for businesses and families), converted with amendments into Law no. 10 of 26 February 2011, a paragraph added upon conversion into law, initiated by the Ostuni division of the *Tribunale di Brindisi* by the referral order of 10 March 2011; by the *Tribunale di Benevento* by the referral order of 10 March

2011; by the Maglie division of the *Tribunale di Lecce* by the referral order of 8 April 2011; by the *Tribunale di Potenza* by three referral orders of 13 April 2011; by the *Tribunale di Catania* by the referral order of 26 July 2011; by the *Tribunale di Nicosia* by the referral order of 30 July 2011 and by the *Tribunale di Venezia* by the referral order of 13 April 2011, registered respectively as nos. 145, 166, 167, 221, 222, 223, 247, 252 and 258 in the register of orders 2011 and published in the Official Journal of the Republic nos. 28, 35, 45, 50, 51 and 52, first special series 2011.

Considering the entries of appearance by Banca Monte dei Paschi di Siena S.p.A., as the acquiring company of Banca Antonveneta S.p.A. (formerly Banca Antoniana Popolare Veneta S.p.A.), San Paolo Banco di Napoli S.p.A., C.A., B.A., Unicredit S.p.A., as the acquiring company of Unicredit Banca di Roma S.p.A., Unicredit S.p.A., as the acquiring company of Banco di Sicilia S.p.A. (out of time), Banca Nazionale del Lavoro S.p.A., Banca Carime S.p.A. (out of time) and Banco Popolare soc. coop., as the acquiring company of Banca Popolare di Lodi (out of time), and the interventions by the President of the Council of Ministers;

having heard the Judge Rapporteur Alessandro Criscuolo at the public hearing of 14 February 2012 and in chambers on 15 February 2012;

having heard Counsel Antonio Renato Tanza and Counsel Astolfo Di Amato for C.A., Counsel Antonio Renato Tanza for B.A., Counsel Massimo Luciani and Counsel Giorgio Tarzia for Banca Monte dei Paschi di Siena S.p.A., Counsel Giorgio Tarzia for Banca Nazionale del Lavoro S.p.A., Counsel Massimo Luciani and Counsel Valerio Tavormina for San Paolo Banco di Napoli S.p.A., Counsel Massimo Luciani and Counsel Michele Sesta for Unicredit S.p.A., and the State Counsel [*Avvocato dello Stato*] Maria Letizia Guida for the President of the Council of Ministers.

(omitted)

Conclusions on points of law

1.— By the referral order mentioned in the headnote, the Ostuni division of the *Tribunale di Brindisi* questions – with reference to Articles 3, 24, 101, 102, 104, 111 and 117(1) of the Constitution and the internal limits specified by this Court on the admissibility of a law with interpretative effect – the constitutionality of Article 2(61) of Decree-Law no. 225 of 29 December 2010 (Extension of time limits provided for under legislative provisions and urgent initiatives in relation to tax and support for businesses and families), converted with amendments into Law no. 10 of 26 February 2011 (paragraph added upon conversion into law), which provides as follows: "With regard to banking transactions settled on current accounts Article 2935 of the Civil Code shall be interpreted to the effect that the time-barring period for the rights resulting from entries in the account shall commence on the date of relevant entry. Under no circumstances shall amounts already paid on the date of entry into force of the conversion law for this decree be reimbursed".

In the opinion of the referring court, the contested provision violates the constitutional principles referred to, in the first place, due to a breach of the principle of reasonableness (Article 3 of the Constitution) on the grounds that: 1) there is no specific provision requiring interpretation, which is a mandatory prerequisite for the exercise of legislative powers for interpretative purposes, that is a provision which in itself governs the commencement of the time barring period in relation to individual banking agreements settled on current accounts, as the gap has been filled by interpreting bodies by applying a general rule, specifically Article 2935 of the Civil Code, and the principles that may be inferred from the legislation applicable to individual banking operations, along with principles governing the closure of the relationship of

obligation and *condictio indebiti* [recovery of money paid in the mistaken belief that it was due]; 2) the interpretative solution chosen by the legislature cannot be classified under those that may be legitimately inferred from the overall legislation applicable to the institution since, as was stressed by the Joint Divisions of the Court of Cassation in judgment no. 24418 of 2 December 2010, in accordance with the general principles applicable to performance, unjust enrichment and those governing the purpose of current account agreements, the time barring period should commence: a) upon closure of the account, if no payments were made whilst the account was active, or where the payments (made whilst the account was active) performed the function merely of repaying the overdraft; b) upon payment, in cases involving unauthorised overdrafts or the breach of overdraft limits.

Moreover, the provision concerned is claimed to violate the principles of reasonableness and equality, and thus also Article 3 of the Constitution because: 1) through an ad hoc provision, it introduces a rule which impairs the procedural remedies available to customers of the banking system and thereby guarantees an unjustified privilege to the banks, resulting in an inadmissible difference in treatment between two classes of person; 2) it introduces a cut-off date for the commencement of the time-barring period which differs not only from the only point in time (account closure) which is consistent with the purpose of banking agreements settled on current accounts (including in particular, credit facility agreements), but also from the legislation governing individual contractual forms featuring aspects that are similar to the accounts at issue in these proceedings (such as a agency and deposit accounts, the time barring period for rights deriving from which commences upon expiry of the agreements), thereby creating an inadmissible difference in treatment between contractual forms which are equivalent in functional terms; 3) the contested paralysis of the substantive and procedural powers intended to protect users of the banking system is claimed to apply only in respect of amounts already

paid upon entry into force of the conversion law for Decree-Law no. 225, thus unjustifiably encroaching upon the right to recover amounts unduly paid of individuals who made payments before that cut-off date.

The contested provision is also claimed to breach: 1) Article 24 of the Constitution, with reference to the principle of the irreducible status of judicial relief, since the first part of the provision purports to commence the time barring period from a factual circumstance, namely entry in the account, which cannot be known by the customer, whilst the second part – on the basis of a possible interpretation, which moreover (in the opinion of the referring court) may be precluded if the provision is construed in line with the Constitution – is claimed to introduce a prohibition on the recovery of amounts unduly paid by the customer to the bank on the date of entry into force of the conversion law for Decree-Law no. 225 of 2010; 2) Articles 101, 102 and 104 of the Constitution, with regard to the integrity of the powers reserved to the judiciary under constitutional law, whereby it is necessary to establish "whether the rule contained in the contested provision actually fulfils the prerequisites applicable to primary legislation, which must be general and abstract in nature, or whether it is intended to impact upon a matter *sub iudice* to the benefit of one of the parties to the proceedings"; 3) Article 111 of the Constitution, with regard to the principle of a fair trial, and specifically that of equality of arms, since the contested provision, which is backed up by an express provision for retroactive effect, would end up – if nothing else, in the event that more than ten years have already passed since the undue recordings by the bank – procedurally thwarting the claims brought by persons who had initiated legal action for unjust enrichment.

Finally, the provision concerned is claimed to violate Article 117(1) of the Constitution owing to a violation of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) on the right to a fair trial since, against the backdrop of significant litigation and a

ruling by the Court of Cassation unfavourable to the banks, the national legislature interfered with the administration of justice, ascribing to the provision interpreted with a meaning that is beneficial to one of the parties to the trial, in the absence of any "compelling reasons of general interest", as set out in the case law of the European Court of Human Rights.

2.— By the referral order mentioned in the headnote, the *Tribunale di Benevento* questions the constitutionality of Article 2(61) of Decree-Law no. 225 of 2010, converted with amendments into Law no. 10 of 2011 (paragraph added by the said conversion law), with reference to Articles 3, 24, 41, 47 and 102 of the Constitution.

According to the lower court, if the first sentence of the contested provision "were to be interpreted to the effect that the ten-year time-barring period (of the action for unjust enrichment) commences not from the date on which the current account was closed – as was confirmed recently by the Joint Divisions of the Court of Cassation in judgment no. 24418 of 2010 – but from the date of each individual entry in the account", it would violate Article 3 of the Constitution due to the unreasonable nature of the provision itself, on the grounds that it would have breached the internal limits on the admissibility of interpretative provisions and, in general, on the retroactive effect of laws since: 1) there was no interpretative doubt as to the commencement of the time-barring period for the rights flowing from the entry of current account transactions because the case law of the Court of Cassation has been settled in this regard, as was most recently reasserted by the Joint Divisions of the Court (judgment no. 24418 of 2010); 2) although it is classified as interpretative, the provision in question is *de facto* innovative in nature as it contrasts with the rules applicable to and legal nature of current account transactions as laid down by Articles 1852-1857 of the Civil Code, and with the general principle under Article 2935 of the Civil Code on the commencement of time-barring periods, "considering that the literature and the case law have at all times

considered that since banking credit agreements involving repeated performance on multiple occasions are, as unitary contracts, the source of a single legal relationship, even if it is structured into a range of performative acts, and it is only in the final account that the amounts payable to and receivable by the parties are definitively ascertained and rendered enforceable".

Furthermore, Article 3 of the Constitution is claimed to have been violated on the grounds of unequal treatment and a breach of the principle of equality, in the eventuality that "the contested provision is also applied to the past and to pending proceedings".

Moreover, the provision in question: a) breaches Articles 41 and 47 of the Constitution, frustrating the principle that the savings of families and businesses are to be protected, and hence entrepreneurial freedom, because it would have a negative effect on the legitimate expectations of families and businesses to obtain repayment of considerable amounts that were unduly registered by the counterparty as part of a current account relationship and collected in breach of the provisions on public order (such as the prohibition on compound interest); b) risks also jeopardising the right of the banks to obtain repayment of amounts loaned to current account holders under a current account overdraft, if recorded more than ten years before the formal request for repayment or payment of the final account closure balance; c) violates Article 24 of the Constitution since, were it to be applied also retroactively and to proceedings that are pending, it would prevent persons vested with rights from obtaining judicial relief since, although the rules on time-barring are substantive in nature, they would generate effects on a procedural level, given their extinguishing effect; and d) violates Article 102 of the Constitution because, were it to be applied also retroactively and to proceedings that are pending, "it would entail an justified encroachment on the prerogatives of the judiciary".

Finally, if the second sentence of the contested provision "were to be interpreted to the effect that, for banking transactions settled through a current account, each of the parties may refrain from repaying amounts paid prior to 27 February 2011 – the date of entry into force of the conversion law no. 10 of 2011 – even if they were not due", this would violate the constitutional provisions cited above, as well as the principles of elementary logic, as the provision would unreasonably stipulate that any person (including a bank) who had paid amounts prior to 27 February 2011 under a relationship settled in a current account could not "under any circumstances" obtain their return from his debtor.

3.— By the referral order mentioned in the headnote, the Maglie division of the *Tribunale di Lecce* raised a question concerning the constitutionality of Article 2(61), cited above, with reference to Articles 3, 23, 24, 47, 111 and 117(1) of the Constitution.

In the opinion of the referring court, the first sentence of the contested provision violates Article 3 of the Constitution, with regard to the principle of unreasonableness and a breach of the principle of legitimate expectations, since: 1) if the time-barring for an action for unjust enrichment is made to commence from the date of entry in the account, this would vest the act of making the entry with a resolutive effect which it cannot have, as payment has not been made, in contrast with the position stated by the Court of Cassation in judgment no. 24418 of 2010; 2) on the other hand, were the provision to be interpreted as referring to actions seeking a ruling that the contractual provision on the basis of which the entry was made was void, this would amount to a provision of an exceptional nature that lacked any justification whatsoever, as it is a general principle, which cannot be subject to any exceptions, that a nullity action cannot be time-barred; 3) the provision is also claimed to violate all of the internal limits on the admissibility of interpretative provisions and the retroactive effect of the law, as it introduces

an unjustified exception from the general principle laid down by Article 2935 of the Civil Code, and breaches the legitimate expectations of savers brought about by existing law and consolidated case law on the expectation to obtain repayment of any amount unlawfully debited by the banks, thereby undermining legal certainty and systemic coherence.

Moreover, the provision in question is claimed to violate Articles 24 and 111 of the Constitution because: a) it permits the bank, by making an entry in the account, to pre-constitute evidence of the date on which the time-barring period commenced, thus subverting the general principles applicable to evidence laid down by Articles 2709 et seq of the Civil Code and Article 634 of the Code of Civil Procedure; b) it vests the bank itself with a power of attestation, which contrasts with the private law status of credit institutions; and c) it enables one of the parties to enjoy a privileged position in relation to the establishment of evidence, in contrast with the requirement that the defence in court proceedings be conducted adequately and with equality of arms between the parties in dispute.

Once again, Article 47 of the Constitution is claimed to have been breached in that the contested provision introduces privileged rules for the banks, which are thus detrimental for individual savers, as is Article 117(1) of the Constitution, in relation to Article 12 of the Treaty on the Functioning of the European Union, since by introducing rules that are patently favourable to the banks and unfavourable to consumers, the said provision breaches the fundamental principle according to which particular protection must be afforded to consumers as the weaker contracting party in relations with businesses, with a view to achieving a necessary rebalance in the equilibrium that would otherwise have existed.

As regards the second sentence of the contested provision, in the opinion of the referring court it is open to two potential interpretations: either “amounts already paid” are to be taken to refer to amounts already entered in

the account, or that expression is to refer to amounts that were determined at the time the account was closed and, as the case may be, also paid.

The contested provision is claimed in any case to violate Articles 3, 24 and 111 of the Constitution because: 1) it irrationally establishes a principle that repayment is not due owing merely to the fact of the entry into force of the law, without any requirement relating to public order; 2) the rights of the parties resulting from a potential calculation error of the nullity of the clauses on the basis of which the calculations were carried out are cancelled in an equally irrational manner; 3) the provision is unreasonably retroactive and impinges upon legal interests which have already been established, albeit not yet upheld by the courts; 4) through its retroactive application, the provision weakens the trust of private individuals in the law; and 5) the principle of legal certainty is also violated.

Finally, the contested provision is claimed to violate Article 23 of the Constitution because it would have a substantial appropriative effect against a person who has fallen victim to a mistaken entry or an entry made under the terms of a void clause, and also to violate Article 117(1) of the Constitution in relation to Article 1 of the First Additional Protocol to the ECHR, as interpreted by the European Court of Human Rights, in the sense that the concept of "possessions" can include both actual possessions as well as pecuniary possessions, including receivables, in relation to which the applicable could claim to have at the very least the "legitimate hope" of obtaining effective enjoyment of a property right, whilst the provision concerned entails an unjustified appropriation of a credit right.

4.— By the referral order mentioned in the headnote, the *Tribunale di Nicosia* questions the constitutionality of the provision under examination, limited to the second sentence of the provision, with reference to Articles 3, 24, 102 and 117(1) of the Constitution.

The referring court considers that the contested provision violates: a) Article 3 of the Constitution on the grounds of unreasonableness because it allows or precludes the repayment of an amount unduly received on the basis of a temporal marker, thereby providing for different treatment without reasonable justification between relations settled on current accounts and relations settled on offsetting accounts [*conto corrente ordinario*] or amounts which have accrued on another basis; b) Article 24 in that, by stipulating that repayment shall no longer be due of amounts already paid prior to entry into force of the conversion law, it *de facto* precludes judicial relief for the right (both of the current account holder and the credit institution) to repayment of amounts that were not owed, thereby exercising a retroactive effect on the right to effective judicial relief in relation to individual legal rights; c) Article 102 of the Constitution since, given its retroactive effect, the provision breaches the rules on the powers of the judiciary, impinging upon orders to repay amounts unduly paid and on proceedings that are still pending; and d) Article 117(1) in relation to Article 6 ECHR, as the right to a fair trial, as interpreted by the European Court of Human Rights, since the contested provision, which is intended to apply retroactively to rights that have already accrued under the terms of the previous legal rules, would interfere with individual proceedings or particular types of dispute which are already pending to the benefit of one of the parties, in the absence of compelling reasons of general interest.

5.— By the referral order mentioned in the headnote, the *Tribunale di Venezia* raised a question concerning the constitutionality of Article 61(2), with reference to Articles 3, 24, 47, 101, 102, 104, 111 and 117(1) of the Constitution.

The referring court states with regard to the first sentence of the contested provision [that] "if it were to be interpreted to the effect that the ten-year time barring period (of the action for unjust enrichment) commences not from the

date on which the current account was closed – as was confirmed recently by the Joint Divisions of the Court of Cassation in judgment no. 24418 of 2010 – but from the date of each individual entry in the account", and to the second sentence of the contested provision [that] "if it were to be interpreted to the effect that, for banking transactions settled through a current account, each of the parties may refrain from repaying amounts paid prior to 27 February 2011 – the date of entry into force of the conversion law no. 10 of 2011 – even if they were not due" and, with regard to both sentences, "in the event that the (twofold) new provision were held to be applicable tout court also to the questions under examination", that the contested provision would violate Article 3 of the Constitution on the grounds that it is unreasonable because: 1) in exceeding the internal limits on the admissibility of interpretative provisions, it would create an exception to Article 2935 of the Civil Code, standing in stark contrast to the position within the case law in this area, which was confirmed by the Joint Divisions of the Court of Cassation in judgment no. 24418 of 2010; and 2) the provision itself would operate as an "exception" from Article 2033 of the Civil Code and would depart without adequate justification from the general provisions of the legal order and, by excluding the right to repayment, annulling the rights of the weaker contracting party under a current account relationship.

Moreover, the provision in question is claimed to violate: a) Article 3 of the Constitution with reference to the principle of equality because the exclusion of an action seeking repayment of amounts unduly paid prior to the date of entry into force of the conversion law would give rise to an unjustified encroachment on the right to recover amounts unduly paid by those who made payment before the aforementioned cut-off date, but not also for those who are still in the aforementioned legal position; b) Articles 24 and 111 of the Constitution, with reference to the inderogable principle of the efficacy of judicial relief and the right to a fair trial; c) Articles 101, 102 and 104 of the

Constitution, with regard to the inviolability of the functions reserved under constitutional law to the judiciary; d) Article 47 of the Constitution, because the retention of amounts unduly and illegally withheld from the savings of private individuals would imply a serious violation of the principle of protection for savings; and e) Article 117(1) of the Constitution in relation to Article 6 ECHR because, in altering with retroactive effect to the detriment of the interested parties certain statutory provisions granting rights, the infringement of which gave rise to court action, which was still pending at the time of the amendment, amounts to interference with the administration of justice that is not supported by compelling reasons of general interest.

6.— By the three referral orders of analogous content mentioned in the headnote, the *Tribunale di Potenza* questions the constitutionality of the legislation cited above with reference to Articles 3 and 24 of the Constitution.

The referring court considers that the contested provision violates the internal limits on the admissibility of a law stipulating an authentic interpretation and the retroactive effect of legislation on the grounds of the principles of unreasonableness and the breach of legitimate expectations (Article 3 of the Constitution) since: 1) there was no interpretative doubt with regard to the commencement of the time-barring period for rights resulting from the recording of current account transactions because, by judgment no. 24418 of 2010 the Joint Divisions of the Court of Cassation recently reasserted that, in relation to standard current account contracts, the ten-year time-barring period for actions for unjust enrichment (for example, due to the nullity of the clause providing for the capitalisation of interest) commences, where the payments made by the account holder during the term of the relationship were allocated as capital repayments, from the date of settlement of the closing balance for the account in which the interest not payable was registered; 2) the legislative diktat according to which the time-barring period for the right to repayment of the amount unduly paid should commence from

the date on which the interest deducted was entered in the account, thereby attributing the effect of payment to the making of the said entry, introduced an entirely innovative concept, which lay outwith the possible interpretative variants of pre-existing legislation, having regard also to the outcome of the aforementioned judgment of the Court of Cassation; and 3) should the application of the contested provision extend also to pending proceedings, the principle of the legitimate expectations of the parties vis-a-vis the application of a consolidated position regarding the time-barring period would also be violated, as a result of a genuine overruling of the previous position through legislation.

Article 3 of the Constitution is also claimed to have been violated on the grounds of reasonableness and equality because the failure to repay amounts already paid prior to the date of entry into force of the conversion law leads to an unjustified difference in treatment between debtors who paid amounts prior to the entry into force of the law and debtors who paid similar amounts at a later date.

Finally, Article 24 of the Constitution is claimed to have been violated since, by rendering impossible the repayment of amounts paid prior to the date of its entry into force, the provision in question prevents the holders of a right from enforcing it through the courts.

7.— By the referral order mentioned in the headnote, the Belpasso division of the *Tribunale di Catania* raised a question concerning the constitutionality of the provision challenged above by the previous referral orders, with reference to Articles 3, 24, 41, 47 and 102 of the Constitution, submitting arguments identical to those contained in the referral order of the *Tribunale di Benevento* (section 2 above), to which reference is made.

8.— The nine referral orders, which have been summarised above, all raise questions of constitutionality relating to the same provision (Article 2(61) of Decree-Law no. 225 of 2010, converted, with amendments, into Law

no. 10 of 2001 – paragraph added upon conversion), submitting analogous or identical arguments.

Therefore, the relative proceedings must be joined for resolution by a single judgment.

9.— In relation to the referral order from the Ostuni division of the *Tribunale di Brindisi*, the defendant credit institute (Banca Monte dei Paschi di Siena, s.p.a., as the entity that acquired Banca Antoniana Popolare Veneta s.p.a., subsequently Banca Antonveneta s.p.a.) averred that the question was manifestly inadmissible due to a failure to give reasons as to its relevance, because the referring court is claimed to have asserted its objections to the two rules comprising the provision under discussion without distinction, and because – notwithstanding that it was based on judgment no. 24418 of 2010 of the Joint Divisions of the Court of Cassation, which concerned a contract for a current account overdraft – it failed to distinguish between ordinary current accounts and current accounts with overdraft facilities, between the recording of a withdrawal and the recording of a deposit, and between payments by which the current account holder "paid back" the unauthorised overdraft and payments made out by which the bank increased the loan facility, and failed to provide any information relating to the right invoked by the claimant in the main proceedings in support of his claim to restitution.

In addition, the lower court is alleged to have failed to make any reference to the classification of the recordings in respect of which action could be taken to recover amounts unduly paid, had a loan facility settled through a current account been granted, and had payments been made by the current account holder.

The State Counsel, which intervened in the proceedings on behalf of the President of the Council of Ministers, also argued that the question was inadmissible because the court failed to assess its relevance, and limited itself to "engaging in abstract considerations concerning the constitutionality of the

contested provision, without however explaining in what manner its application could have a concrete effect on the outcome of the case pending before it". In particular, the referring court is claimed to have invoked the principles on unjust enrichment laid down by the Joint Divisions of the Court of Cassation (judgment no. 24418 of 2010), which principles were supposedly infringed by the contested interpretative provision, whilst however failing to demonstrate its assertions, neglecting to specify whether the claim brought in the main proceedings could be accepted on the basis of those principles in such a way as to establish the relevance for the purposes of its decision of the subsequently enacted legislation which, in stipulating a different start date for the time-barring period, is claimed to have precluded the action for unjust enrichment. Moreover, the lower court is claimed to have read the provision under examination in a confused and un-nuanced manner, without drawing the necessary distinction between its various provisions.

The aforementioned objections are groundless.

In its description of the facts of the main proceedings, the referring court states as follows: "By writ of summons served on 18 April 2005, Mr C. S. initiated legal proceedings against Banca A.P.V. s.p.a., requesting the re-calculation of the balance on current account no. 2741/R opened on 11 April 1994 until the date of the last transaction on 29 December 1998; in particular, he asked that the figures be recalculated taking account of the now consolidated case law on the nullity of the quarterly capitalisation of interest owed and the maximum overdraft fee, and that the bank be ordered to return the amount unduly paid.

After entering an appearance in the proceedings, the defendant bank disputed the claimant's objections and claims, arguing that the claim should be rejected in its entirety and arguing in opposition, on a preliminary basis, that the quarterly capitalisation of interest was lawful, and hence so too the objection of time-barring".

The lower court goes on to state that it had commissioned a technical expert's report for the purpose of recalculating the balance; that in the report filed by the technical expert, the balance had been recalculated "in accordance with the criteria laid down in the order commissioning the technical expert's report"; that it had considered the case to be mature for decision but that, following the entry into force of Article 2(61) of Law no. 10 of 2011 converting Decree-Law no. 225 of 2010, it had concluded that the prerequisites were met for the referral of a question concerning the constitutionality of that provision and observed, on the issue of relevance "for the purposes of the *thema decidendum*", that "the allegedly interpretative nature of the same, along with the objection of time-barring raised by the defendant" without doubt precluded its application in the specific case.

As may be seen, the referring court provided a concise but sufficient statement on the relevance of the question in the present case. It identified the transaction (current account contract), specifying the period of time during which it was operational, clarified the object of the claim actioned by the claimant (objective unjust enrichment owing to the nullity of the clause on the quarterly capitalisation of interest owed and the maximum overdraft fee, thereby specifying the right invoked in support of the claim), emphasised the objection of time-barring raised by the defendant credit institute and, as it was required to rule on that objection, considered it necessary to subject to constitutional review the subsequently enacted provision which, owing to its effect on the start date for the time-barring period for banking transactions settled on current accounts, evidently also impinges upon the results of the recalculation of the balance by the technical expert "in accordance with the criteria laid down in the order commissioning the technical expert's report". This may moreover be clearly inferred from the lower court's assertion that, since it must rule on the objection of time-barring, it cannot avoid an examination of the contested provision.

As regards the argument that the lower court adopted arguments that refer indiscriminately to both sentences comprising Article 2(61), thereby rendering the argument inherently contradictory and devoid of reasons, it must be observed that the supposed contradiction does not exist, because the content of the individual challenges enables the provision objected to in each instance to be identified whilst, with regard to the alleged failure to give reasons, reference must be made to the considerations set out above.

10.— The bank and the state representative assert a further ground for inadmissibility, which is asserted to lie in the fact that the referring court failed to attempt to interpret the provision in a manner compatible with constitutional law. Reference is made in this regard to several recent judgments of the merits courts which, when applying that interpretation, rejected the question of constitutionality before this Court.

This objection is also groundless.

Leaving aside the fact that the fact that a number of judgments have been adopted by the merits courts is not sufficient to establish "living law" [i.e. the uniform and settled interpretation of the law], it must be pointed out that, as this Court has already asserted, the unequivocal tone of the provision marks out the boundary beyond which an attempt at a constitutionally compatible interpretation must be replaced by constitutional review (see judgment no. 26 of 2010, section 2, Conclusions on points of law; judgment no. 219 of 2008, section 4, Conclusions on points of law).

The terms of the provision in the case under examination are unequivocal. The first sentence states that, with regard to banking transactions settled on current accounts (the reference is to Article 1852 of the Civil Code), Article 2935 of the Civil Code shall be interpreted to the effect that the time-barring period for the rights resulting from entries in the account shall commence on the date of relevant entry (the principle must be deemed to refer to all rights resulting from entries in the account, given the absence of any distinction in

the legislation). The second sentence provides that any amounts already paid prior to the date of entry into force of the law converting Decree-Law no. 225 of 2010 are not under any circumstances to be repaid; this legislative provision is also clear in the sense manifested by the literal meaning of its wording (Article 12 of the provisions on the law in general), which is to render unrecoverable any amounts already paid (evidently within the context of the relationship referred to in the first sentence) prior to the date of entry into force of the conversion law.

This is therefore the legislative context within which the referral order was made. It is not open to an interpretation in a manner compatible with constitutional law, as will be made clear by the considerations set out in relation to the merits of the question. Therefore, the supposed ground for inadmissibility is misconstrued.

11.— The question is well founded.

Article 2935 of the Civil Code provides that "The time-barring period shall commence on the date on which the right may be exercised". It is a provision that is general in scope, from which it may be inferred that the prerequisite for time-barring is the failure to exercise the right vested in the entitled party. The elastic formula used by the legislation may be accounted for by the requirement to adapt it in line with the specific arrangements of the wide variety of relations of out which individual rights subject to time-barring may arise.

However, the principle posited by the said Article applies where there is no specific legislative ruling on the commencement of the time-barring period. In fact, there are numerous instances in the Civil Code, in other codes and in special legislation in which the law determines the start date for the time-barring period with reference to particular circumstances or events. In some of these cases, the express indication of the start date constitutes a specific application of the principle laid down by Article 2935 of the Civil

Code, whilst in others, the start date provided for by law constitutes an exception from the general principle that the period for time-barring should commence from the time when it is legally possible to exercise the right (by contrast, mere factual impediments are not relevant).

Within this framework, before the legislation containing the contested provision was enacted, the merits courts had adopted a settled position (albeit with minority backing) that the time-barring period for right to recover amounts unduly paid in relation to banking transactions settled on current accounts commenced from the time the amount debited was entered in the account since, whilst a current account contract is deemed to constitute a unitary relationship, its nature as an ongoing contract and the relevance of the individual performative acts justify this conclusion.

In particular, from the time they are entered, debit and credit entries have the effect of altering the balance in quantitative terms, and thereby impinge upon the amount that may be demanded by the current account holder pursuant to Article 1852 of the Civil Code.

This position was opposed - again within the case law of the merits courts - by a position with far greater majority support, according to which the time-barring period for the right to recover amounts unduly paid should commence from the definitive termination of the relationship, considering the unitary nature of a banking current account contract, which gives rise to a single legal relationship, albeit one structured into a variety of performative acts: the series of deposits and withdrawals, credits and debits, is said to entail only quantitative variations to the original position established between the bank and the client, and it is only with the closure of the account that the credits and debits of the parties may be established on a definitive basis and the amounts unduly withheld by the credit institute may be recovered.

It does not appear that any objections were raised regarding the issue under examination within the case law of the Court of Cassation prior to

judgment no. 24418 of 2 December 2010 delivered by the Joint Divisions of the Court of Cassation. In fact, it asserted, in line with the majority position within the merits courts, that the ten-year time-barring period for claims relating to amounts unduly withheld by the bank as interest on a current account overdraft commences from the definitive closure of the account, as a unitary contract which gives rise to a single legal relationship, albeit one structured into a variety of performative acts, and it is thus only with the closure of the account that the credits and debits of the parties may be established on a definitive basis (see Court of Cassation, first civil division, judgment no. 10127 of 14 May 2005, and first civil division, judgment no. 2262 of 9 April 1984).

By the aforementioned judgment no. 24418 of 2010 (which was allocated to the Joint Divisions owing to the particular importance of the questions raised: Article 374(2) of the Code of Civil Procedure), having regard to the case before it for examination (contract for a current account overdraft), the Court of Cassation endorsed the conclusion reached in the previous case law of the same court and thus asserted the following principle of law: "If, after closure of a banking overdraft facility agreement settled on a current account, the current account holder takes action seeking a ruling that the clause providing for the payment of capitalised interest is void and ordering repayment of the amount unduly paid on this basis, the ten-year time-barring period to which such an action for unjust enrichment is subject commences from the date on which the closing balance of the account in which the undue interest was registered is redeemed, provided that the payments made by the current account holder during the term of the relationship performed the sole function of repaying the principal".

Compared to the position stated in previous rulings, judgment no. 24418 of 2010 added that, when a legal act that may be defined as payment (consisting in performance by one party with the resulting pecuniary transfer

to the other party) is performed with respect to the relationship concerned, and the *solvens* disputes its legality, arguing that there is no basis for it in law, and thus seeks to recover the amount unduly paid, the period for time-barring commences on the date on which the undue payment was made. However, this only applies in cases involving an act with redemptive effect, that is for a payment into an overdrawn account that is not associated with any grant of credit for the current account holder, or a payment intended to cover an overdraft in excess of the facility limits (known as unauthorised overdrafts).

In particular, with reference to the present case (involving an action for unjust enrichment brought by the client of a bank, who alleges that the clause providing for the quarterly capitalisation of interest is void), the Court of Cassation did not accept the argument of the appellant bank which purported to identify the start date for the time-barring period as the date on which each individual interest item unlawfully charged to the current account holder was entered in the account. In fact, "The entry in the account of such an item entails an increase in the current account holder's debt, or a reduction in the credit facility available to him, but on no account consists in a payment under the terms specified above: this is because it does not entail any redemptive act by the current account holder in favour of the bank. Once he has realised the unlawful nature of the deduction from the account, from the time of entry in the account the current account holder may naturally take action seeking to annul the legal basis for the deduction and, consequently, to rectify the account balance in his favour. Moreover, if the account is associated with the granting of a credit facility, he may do so with a view to recovering a higher credit facility within the overdraft limits granted to him. However, he may not take action to recover a payment which has not as such been made by him".

Therefore, as noted above, leaving aside the correction relating to payments with redemptive effect, the aforementioned judgment of the Joint Divisions of the Court of Cassation confirms the position under that court's

previous case law, which is in turn in keeping with the majority view adopted by the merits courts.

12.— Article 2(61) of Decree-Law no. 225 of 2010, converted with amendments into Law no. 10 of 2011, was enacted against this backdrop.

The provision is comprised of two sentences: as mentioned above, the first provides that "With regard to banking transactions settled on current accounts Article 2935 of the Civil Code shall be interpreted to the effect that the time-barring period for the rights resulting from entries in the account shall commence on the date of relevant entry".

The provision is classified as having interpretative effect, and therefore has retroactive effect, as is moreover clear from its wording which applies it to legal situations resulting from current account contractual relations that have not yet been concluded on the date of its entry into force.

This court has already asserted that, whilst the prohibition on the retroactivity of legislation (Article 11 of the provisions on the law in general) is a fundamental value of legal culture, it does not received privileged protection in Italian law under Article 25 of the Constitution (see judgments no. 15 of 2012, no. 236 of 2011 and no. 393 of 2006). Therefore – in accordance with that provision – Parliament may enact retroactive legislation, including legislation specifying an authentic interpretation, provided that the retroactivity is adequately justified by the requirement to protect principles, rights and interests of constitutional standing, which also amount to "compelling reasons of general interest" pursuant to the European Convention on Human Rights and Fundamental Freedoms (ECHR).

The provision resulting from a law specifying an authentic interpretation may not therefore be regarded as unconstitutional where it is limited to allocating a meaning to the provision interpreted that is already contained within it, and which is recognisable as one of the possible readings of the original text (see *inter alia* judgments no. 271 and no. 257 of 2011, no. 209 of

2010 and no. 24 of 2009). In such cases in fact, the interpretative law has the purpose of clarifying "situations of objective uncertainty within the legislation" resulting from "an unresolved debate the case law" (judgment no. 311 of 2009) or of "re-establishing an interpretation that is more in keeping with the original legislative intention" (again, judgment no. 311 of 2009) in order to protect legal certainty and the equal status of private individuals, i.e. principles of predominant constitutional interest. Alongside this characteristic, this Court has identified a series of general limits on the retroactive effect of legislation with a view to safeguarding not only principles of constitutional law but also other fundamental values of legal culture, which have been laid down in order to protect the addressees of the provision and the legal order itself, including: the requirement to respect the general principle of reasonableness, which is reflected on the prohibition on the introduction of unjustified differences in treatment; the protection of the legitimate expectations of individuals as a principle inherent within the rule of law; the consistency and certainty of the legal order; and respect for the functions reserved under constitutional law to the judiciary (judgment no. 209 of 2010, cited above, section 5.1 of the Conclusions on points of law).

In view of the above, it must be pointed out that, with its retroactive effect, the contested provision violates in the first place the general requirement that the law be reasonable (Article 3 of the Constitution).

Indeed, it made provision in relation to Article 2935 of the Civil Code notwithstanding the absence of any situation of objective uncertainty within the legislation because, with the exception of an entirely minority view within the case law of the merits courts, a majority position had already established itself within the case law as to the start of the time-barring period for banking transactions settled on current accounts, which had been endorsed by the Court of Cassation, according to which the start-date for the commencement

of the said period was designated as the date on which the contractual relationship was ended or redemptive payment was made.

Moreover, the solution adopted by Parliament in enacting the contested provision cannot by any measure be regarded as a possible variant in meaning of the original text of the provision subject to interpretation.

As noted above, the provision posits a rule of general application that the time-barring period is to commence on the day on which the right (which has already arisen) may be legally enforced, in accordance with the rationale of the institution, which postulates a failure to act on the part of the right holder, and with the purpose of reserving any findings on this issue to the courts, taking account of the specific circumstances of each individual case. By contrast, the contested provision intervenes with retroactive effect in relation to banking transactions settled on current accounts, providing that the date on which the time-barring period commences is the date of entry in the current account of the rights resulting from that entry.

It must be noted in this regard that it is not accurate to assert (and it has not been argued) that this expression should be taken to refer solely to the rights to object on the basis of the paper entry and hence to rectify or cancel entries relating to acts or transactions that have been held to be void or were based on calculation errors. If this were the case, the provision would be redundant because the current account holder could act at any time seeking a ruling – by an action not subject to time-barring (Article 1422 of the Civil Code) – that the basis for the unlawful recording is void and, consequently, the rectification in his favour of the account balance. However, actions for unjust enrichment are not exempt from time-barring (Article 1422 of the Civil Code), but are subject to a ten-year time barring period.

As noted above, due to the broad wording of the contested provision, it must be asserted that the class of "rights resulting from recording" must be deemed to include also the rights to recover amounts that were not due (such

as those resulting for example from capitalised interest or interest otherwise not owed, from maximum overdraft fees and so on, taking account of the fact that, as is stated in the referral order by the *Tribunale di Brindisi*, the current account relationship concerned was concluded prior to the entry into force of Legislative Decree no. 342 of 4 August 1999 amending Legislative Decree no. 385 of 1 September 1993 (Consolidated text of laws on banking and credit). However, the repayment of objectively unduly paid amounts postulates a payment (Article 2033 of the Civil Code) which, having regard to the manner in which the current account relationship operates, can often only be ascertained upon closure of the account (Court of Cassation, Joint Divisions, judgment no. 24418 of 2010, cited above).

It follows that the establishment by the retroactive provision of the start of the time-barring period at the time of the recording in the account is tantamount to recognising it at a moment different from that at which the right may be exercised in accordance with Article 2935 of the Civil Code.

Therefore, far from expressing an interpretative solution out of the meanings attributable to Article 2935 of the Civil Code, the contested provision creates a distinct exemption from it, introducing a new rule compared to the previous text, moreover without any reasonable justification.

On the contrary, the retroactive effect of the exception renders the current account relationship asymmetrical because, by back-dating the start date for the time-barring period, it ends up unreasonably reducing the period of time available for the exercise of rights resulting from the relationship, and in particular causing detriment to the legal position of current account holders who, within the legal context prior to the entry into force of the contested provision, initiated actions aimed at securing the recovery of amounts unlawfully debited.

Article 3 of the Constitution has thus been violated because, in applying the legislation laid down therein retroactively, the contested provision does

not respect the general principles of equality and reasonableness (judgment no. 209 of 2010).

13.— Article 2(61) of Decree-Law no. 225 of 2010 (first sentence), converted with amendments into Law no. 10 of 2011 is unconstitutional also for a further reason.

It is well known that, starting from judgments no. 348 and 349 of 2007, the case law of this Court has been settled in holding that the provisions of the ECHR – as interpreted by the European Court of Human Rights, which was specifically established in order to interpret and apply its provisions – supplement as "interposed rules" the rule of constitutional law laid down by Article 117(1) of the Constitution insofar as the latter requires that national legislation comply with the requirements resulting from obligations under international law (see *inter alia* judgments no. 1 of 2011; no. 196, no. 187 and no. 138 of 2010; on the enduring validity of that position also after the entry into force of the Lisbon Treaty, see judgment no. 80 of 2011).

The European Court of Human Rights has held on various occasions that, whilst as a matter of principle nothing prevents Parliament from regulating rights established by applicable legislation in private law matters by new rules with retroactive effect, the principle of the primacy of law and the concept of a fair trial enshrined by Article 6 of the Convention preclude any interference by the legislature in the administration of justice with the goal of influencing the judicial outcome to a dispute, in the absence of compelling reasons of general interest (see *inter alia* European Court, judgment of the second section of 7 June 2011, *Agrati and others v. Italy*; judgment of the second section of 31 May 2011, *Maggio v. Italy*; judgment of the fifth section of 11 February 2010, *Javaugue v. France*; and judgment of the second section of 10 June 2008, *Bortesi and others v. Italy*).

There is therefore scope - albeit limited - for the enactment of legislation with retroactive effect (subject to the limits laid down by Article 25 of the

Constitution) if justified by "compelling reasons of general interest", the assessment of which falls first and foremost to the national legislature and to this Court, with reference to principles, rights and interests of constitutional standing, within the ambit of the margin of appreciation recognised in the case law of the ECHR to the individual national legal systems (see judgment no. 15 of 2012).

In the case under examination, as is clear from the considerations set forth above, there is no indication as to which compelling reasons of general interest are capable of justifying the retroactive effect. It follows that the principle of constitutional law set forth in Article 117(1) of the Constitution, in relation to Article 6 of the European Convention, as interpreted by the Strasbourg Court, has been violated.

Therefore, Article 2(61) of Decree-Law no. 225 of 2010, converted with amendments into Law no. 10 of 2011 (paragraph introduced upon conversion into law), must be ruled unconstitutional. The declaration of unconstitutionality also extends to the second sentence of the provision ("Under no circumstances shall amounts already paid on the date of entry into force of the conversion law for this decree be reimbursed"), as it is a provision that is strictly related to the first sentence, and hence shares its fate.

14.— All other grounds raised in the referral order by the *Tribunale di Brindisi* and the other referral orders mentioned in the headnote are moot.

ON THOSE GROUNDS

THE CONSTITUTIONAL COURT

hereby,

rules that Article 2(61) of Decree-Law no. 225 of 29 December 2010 (Extension of time limits provided for under legislative provisions and urgent initiatives in relation to tax and support for businesses and families), converted with amendments into Law no. 10 of 26 February 2011, is unconstitutional.

Decided in Rome at the seat of the Constitutional Court, *Palazzo della Consulta*, on 2 April 2012.

(omitted)