JUDGMENT NO. 223YEAR 2012

In this case the Court heard numerous referral orders from the ordinary courts, the administrative courts and the court of accounts challenging legislation essentially imposing a pay cut on magistrates by imposing a freeze on automatic pay adjustment mechanisms, along with other rules with the effect of reducing remuneration. The Court struck down the contested legislation as unconstitutional holding *inter alia* that, whilst certain temporary reductions justified by public finances could be justified, the contested provisions went further in rendering the effects of the pay freeze permanent, which undermined the independence of the judiciary vis-a-vis the other branches of state

(omitted)

THE CONSTITUTIONAL COURT

(omitted)

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Articles 9(2), (21) and (22) and 12(7) and (10) of Decree-Law no. 78 of 31 May 2010 (Urgent measures on financial stabilisation and economic competitiveness), converted

with amendments into Law no. 122 of 30 July 2010, initiated by the Regional Administrative Court for Campania, Salerno division, by referral order of 23 June 2011, by the Regional Administrative Court for Piedmont by referral order of 28 July 2011, by the Regional Administrative Court for Veneto by referral order of 15 November 2011, by the Regional Court of Administrative Justice of Trento by referral order of 14 December 2011, by the Regional Administrative Court for Sicily by referral order of 14 December 2011, by the Regional Administrative Court for Abruzzo, Pescara division, by referral order of 13 December 2011, by the Regional Administrative Court for Umbria, by two referral orders of 25 January 2012, by the Regional Administrative Court for Sardinia, by referral order of 10 January 2012, by the Regional Administrative Court for Liguria, by referral order of 10 January 2012, by the Regional Administrative Court for Calabria, Reggio Calabria division, by two referral orders of 1 February 2012, by the Regional Administrative Court for Emilia-Romagna, Parma division, by referral order of 22 February 2012, by the Regional Administrative Court for Lombardy, by referral order of 11 January 2012 and by the Regional Administrative Court for Liguria, by referral order of 10 January 2012, respectively registered as no. 219 and 248 in the Register of Orders 2011 and as nos. 11, 12, 20, 46, 53, 54, 56, 63, 74, 75, 76, 81 and 94 in the Register of Orders 2012 and published in the Official Journal of the Republic nos. 44 and 50, first special series 2011 and nos. 7, 9, 14, 15, 17, 18, 19 and 21, first special series 2012.

Considering the entries of appearance by Allegro Anna and others, Baglivo Antonio and others, Bruni Bruno Francesco and others, Abate Francesco and others, Bruno Eleonora and others, Campo Lucia Anna and others, Angeleri Alessandra and others, Chiappiniello Agostino and others, Anedda Ornella and others, Casanova Cinzia and others, Arena Annalisa and others, Cicciò Giacomo, Interlandi Caterina and others, and the interventions by Abbritti Paolo and the President of the Council of Ministers;

having heard the judge rapporteur Giuseppe Tesauro at the public hearing of 3 July 2012;

having heard Counsel Vittorio Angiolini for Allegro Anna and others, for Baglivo Antonio and others, for Bruni Bruno Francesco and others, for Abate Francesco and others, for Bruno Eleonora and others, for Campo Lucia Anna and others, for Angeleri Alessandra and others, for Anedda Ornella and others, for Casanova Cinzia and others, for Arena Annalisa and others, for Cicciò Giacomo, for Interlandi Caterina and others, Counsel Sandro Campilongo for Chiappiniello Agostino and others, and the State Counsel [*Avvocato dello Stato*] Gabriella Palmieri for the President of the Council of Ministers.

(omitted)

Conclusions on points of law

1.— 15 referral orders have been placed before the Court (order no. 219, 248 of 2011; nos .11, 12, 20, 46, 53, 54, 56, 63, 74, 75, 76, 81 and 94 of 2012), by which the Regional Administrative Courts of Campania, Piedmont, Sicily, Abruzzo, Veneto, Trento, Umbria, Sardinia, Liguria, Calabria, Emilia-Romagna and Lombardy raised questions concerning the constitutionality of: Article 9(22) (all orders – some indicating also paragraph 21), Article 9(2) (only order nos. 46, 53, 54, 73, 74 and 75 of 2012); Article 12(7) (order no. 54 and 74 of 2012); and Article 12(10) (only order no. 54 of 2012) of Decree-Law no. 78 of 31 May 2010 (Urgent measures on financial stabilisation and economic competitiveness), converted with amendments into Law no. 122 of 30 July 2010, with reference to Articles 2, 3, 23, 24, 36, 42, 53, 97, 100, 101, 104, 108, 111, 113 and 117, last paragraph, of the Constitution, the last in relation to Article 6 ECHR.

1.1.— The questions concern in part the same provisions challenged according to arguments which are largely identical, and therefore the proceedings are to be joined for the purposes of settlement by a single ruling.

2.— All of the referral orders under examination, which were issued during the course of proceedings initiated by the ordinary courts, the courts of

accounts and the administrative courts, challenge on various grounds Article 9(22) of the aforementioned Decree-Law (those registered as order nos. 12, 53, 74 and 75 of 2012 in conjunction with paragraph 21); some of them also challenge Article 9(2); order nos. 54 and 74 of 2012 also concern Article 12(7); finally, order no. 54 alone questions the constitutionality also of Article 12(10).

2.1.— The referring courts state that the contested legislation is inferred from the overall provision of paragraphs 21 and 22 of Decree-Law no. 78 of 2010 insofar as a "freeze" on "pay adjustment mechanisms" provided for under the first sentence of paragraph 21 is imposed for magistrates and for all other categories of non-contractualised staff, the applicability of which is extended both to the advance and to the balancing payment (thus with retroactive effect) by the first sentence of Article 22. Moreover, magistrates alone are subject to a reduction increasing over time of the judicial allowance and, again under Article 22, "ceilings" are introduced for the advance for the year 2014.

Questions of constitutionality are raised in relation to that legislation in the first place regarding the overall initiative including both the "freeze on adjustments" and the reduction of the special allowance provided for under Article 3 of Law no. 27 of 19 February 1981 (Remuneration for employees of the judiciary).

In particular, referral orders nos. 219 and 248 of 2011, and nos. 11, 46, 53, 54, 56, 63, 76, 81 and 94 of 2012 argue that the legislation in question contrasts with Article 104(1) of the Constitution since, by representing the automatic adjustment as an inherent element of the structure of magistrates' pay with the goal of "implementing the constitutional principle of independence", the measure adopted violates the principle according to which the remuneration of magistrates is not "determined at the discretion of the legislature" and should not only be "adjusted" in line with the quantity and quality of the work performed (pursuant to Article 36 of the Constitution), but must also be "certain and constant, and in general not subject to deductions (especially if regular or recurrent)".

This legislation is also claimed to breach Articles 3, 100, 101, 104 and 108 of the Constitution on the grounds that it provides for an unreasonable reduction in magistrates' pay, which is determined according to an automatic statutory mechanism and operates "as a safeguard aimed at guaranteeing the constitutional principle of the autonomy and independence of the judiciary, a value that must be safeguarded also in financial terms", with the consequence that such an initiative would oblige a magistrate (either as an individual or as a corporation) to bring financial claims against the public authorities.

Articles 2 and 3 of the Constitution are also claimed to have been violated (orders nos. 54, 63 and 94 of 2012) on the grounds that those measures, which

are inherently unreasonable, were included in an amendment that lacked any element of solidarity.

3.— In addition to these challenges which, as mentioned above, relate to paragraph 22 considered as a whole, other grounds for challenge argue in addition that the legislation is unconstitutional also with reference to the principle of legitimate expectations and the impartial exercise of judicial office, which is necessary in order to guarantee a fair trial before an independent court, as required under Article 6 of the European Convention on Human Rights.

4.— With specific reference to the mechanism operating the temporary freeze on salary adjustments, the referring courts not only point to the fundamental core of the challenge comprised of the alleged violation of Articles 3, 100, 101, 104 and 108 of the Constitution, but also assert that the legislation under examination did not take account of the case law of this Court, which has held that such initiatives must be "exceptional, ephemeral, non-arbitrary and commensurate with the stated purpose".

5.— As regards the judicial allowance provided for under Article 3 of Law no. 27 of 1981, in the opinion of the referring regional administrative courts, the reductions applied all fulfil the prerequisite developed within the case law of this Court for the classification of certain income as tax income. In particular, the payments are mandatory, being due in the absence of any bilateral contractual relationship between the parties, and are associated with

public expenditure in relation to an economically significant circumstance establishing liability to taxation.

According to the referring courts, the classification under cost reduction is unable to exclude the real status of the measures as taxes.

In view of the above, Article 9(22) is claimed to be unlawful (along with the provision on the "solidarity contribution" laid down in paragraph 2) insofar as, given equal capacity to pay tax, Parliament decided to apply ongoing measures only to a particular and restricted class of taxpayer, in breach of Article 53 of the Constitution.

Articles 3, 23 and 53 of the Constitution are therefore claimed to have been breached since, irrespective of the *nomen iuris* used, the measure adopted amounts to a levy on wealth which is essentially a tax.

The referring courts argue that Article 36 of the Constitution has also been violated since, as the financial remuneration of magistrates is only deemed to be adequate where it is supplemented by the judicial allowance, the reduction of the latter upsets the principle that salaries must be proportionate and adequate, whilst impinging only on the quantitative aspect of remuneration.

The measure is also claimed to violate Article 3 of the Constitution because the percentage reduction of a fixed-rate allowance, which is intended to compensate for the burdens of judicial employment, has a greater affect on magistrates with less seniority, who are known to be deployed in difficult

offices and to be exposed to risks and burdens that are often *de facto* greater than those of older colleagues.

6.— The regional administrative courts for Abruzzo, Umbria and Calabria (referral orders nos. 46, 53, 54, 74 and 75 of 2012) also challenge Article 9(2) of Decree-Law no. 78 of 2010 in relation to the reduction in overall remuneration above EUR 90,000 and above EUR 150,000.

The referring courts argue that this financial initiative cannot be characterised as a pay cut (or rather, as a reduction of financial remuneration), but rather amounts to a tax.

This measure is claimed to violate Articles 3 and 53 of the Constitution as it amounts to a tax levy that affects only the class of public sector workers (which include magistrates), in breach of the principle of "universal taxation". The tax is also claimed to be discriminatory both in relation to the very broad class of “citizens” compared to which, assuming equal economic capacity, public sector employees are discriminated against by virtue of their status, and also compared to the more limited class of “workers”, as public sector employees are discriminated against compared to private sector employees. This discriminatory effect is claimed to be even more evident in the light of the different rules applicable to the solidarity contribution for incomes above EUR 300,000, which is stipulated for other citizens under Article 2 of Decree-Law no. 138 of 13 August 2011 (further urgent measures for financial stabilisation and development), converted with amendments into Article 1(1)

of Law no. 148 of 14 September 2011 which – although it is justified by the same rationale – stipulates a higher threshold, a lower rate, and the tax deductibility from overall income.

7.— The regional administrative courts for Umbria and Calabria (referral orders nos. 54 and 74 of 2012) also challenge Article 12(7) of Decree-Law no. 78 of 2010 which, in permitting the staggered payment of the allowance (up to three annual amounts, depending on the overall amount payable), results in a certain pecuniary loss, if for no other reason by virtue of the failure to pay interest on the amounts for which payment is deferred, in breach of the legislation on pecuniary obligations.

8.— Finally, by referral order no. 54 of 2012, the regional administrative court for Umbria alone challenges Article 12(10) of Decree-Law no. 78 of 2010 which provides that pension contribution years accrued after 1 January 2011 shall be subject to a deduction of 6.91%, but does not remove the rule stipulating a deduction of 2.50% from the employee's total pension contributions on which the departure allowance is based, which is withheld from the fund for the departure allowance, when applied in conjunction with Article 37 of Presidential Decree no. 1032 of 29 December 1973 (Approval of the consolidated text of provisions on pension benefits for the civilian and military employees of the state). The resulting regime is claimed to violate Articles 3 and 36 of the Constitution in that the amount withheld from the employee of 2.50% of the total pension contributions on which the departure

allowance is based results in a reduction in the departure allowance fund, which is illogical also because it is not in any way linked to the quality and quantity of the work performed.

9.— As a preliminary matter, in the proceedings initiated pursuant to referral order no. 54 of 2012, the intervention *ad adiuvandum* by Paolo Abbritti, an ordinary magistrate who intervened in proceedings before the lower court by a submission that was filed only after the referral order, and hence when those proceedings had already been stayed, must be ruled inadmissible .

According to the settled case law of this Court, "only the parties to the main proceedings and third parties vested with a qualified interest that is directly related to the substantive right averred in the proceedings, and not simply governed, in the same manner as any other, by the contested provision or provisions, are entitled to intervene in interlocutory proceedings before the Constitutional Court" (see on all points judgments no. 304, no. 293 and no. 199 of 2011; and no. 151 of 2009).

According to the said principle, since in the present case it cannot be concluded, taking account of the time when the intervention occurred in the main proceedings and the failure by the regional administrative court to rule on it, that Paolo Abbritti attained the status of a party in the proceedings before the lower court, the intervention by him in the proceedings before this

Court must be ruled inadmissible (see judgment no. 220 of 2007 and order no. 393 of 2008).

9.1.— Again as a preliminary matter, with regard to the proceedings initiated pursuant to referral orders nos. 46 and 53 of 2012, the question relating to Article 9(2) of Decree-Law no. 78 of 2010 must be ruled manifestly inadmissible.

In particular, after stating that the challenges related to the deductions resulting from the application of Article 9(22), the Regional Administrative Court for Abruzzo concludes by asserting that the challenges asserted against that provision applied "all the more so" to the levy provided for under paragraph 2 on the grounds that it directly impinges upon the applicants' salaries.

Analogously, the Regional Administrative Court for Umbria (referral order no. 53 of 2012) states that the applicants object to the lack of any automatic pay rise and the reduction of the judicial allowance due to them. It goes on to assert that it the question concerning the constitutionality of Article 9(22) is relevant and not manifestly groundless, yet in conclusion also challenges the provision contained in paragraph 2 on the reduction in overall remuneration above EUR 90,000 and above EUR 150,000.

In both cases, since that aspect of remuneration had not been referred to in the grounds for challenge raised by the parties to the proceedings, the question of constitutionality is manifestly inadmissible in that it was raised in relation

to a provision that the referring court is not required to apply in the proceedings before it (see, *inter alia*, referral orders nos. 256 of 2009 and no. 265 of 2008).

10.— An analogous conclusion must be reached in relation to the questions raised by the Regional Administrative Courts for Umbria and for Calabria in relation to Article 12(7) concerning the arrangements for payment of the departure allowance.

In particular, according to the lower courts, the question is relevant because the said provision must certainly be applied upon termination of the applicants' service, whenever that occurs. However, neither of the referring courts states that it has been seized of an application by a magistrate who has retired on any grounds after 30 November 2010, and to whom the provision has been applied. Due to the lack of any detriment and of a current interest to sue, it is evident that the referring courts are not required to apply the contested provision. Moreover, magistrates in service have not been stated to suffer any direct detriment other than payment by instalment, which will be applied to them upon retirement on the grounds of age, on the day after their seventieth birthday or on that specified in the measure of appointment, or due to length of service or due to resignation.

Therefore, this question must also be ruled manifestly inadmissible.

11.— On the merits, the questions relating to Article 9(22) of Decree-Law no. 78 of 2010, raised with reference to the violation of Articles 3, 100, 101, 104 and 108 of the Constitution, are well-founded.

11.1.— The provision stipulates that, for staff falling under Law no. 27 of 1981, " the advances for the years 2011, 2012 and 2013 and the balancing payment for the three-year period 2010-2012 shall not be paid, and shall not be eligible for recovery"; and that "for the three-year period 2013-2015, the advance pertaining to the year 2014 shall be equal to that stipulated for the year 2010 and the balancing payment for the year 2015 shall be determined with reference to the years 2009, 2010 and 2014". Finally, the same paragraph provides that paragraphs 1 and 21, second and third sentence, shall not apply to the aforementioned staff.

11.2.— The adjustment mechanism for the salaries of ordinary magistrates and magistrates from the Council of State, the Court of Accounts, the military courts, State Counsels and Public Prosecutors is provided for under Articles 11 and 12 of Law no. 97 of 2 April 1979 (Provisions on the legal status of magistrates and the remuneration of ordinary and administrative magistrates, magistrates from the military courts and state counsels), as replaced by Article 2 of Law no. 27 of 1981. These provisions stipulate that the salaries of magistrates shall be automatically adjusted every three years by a percentage equal to the average of the increases of the salary items, excluding the special supplementary allowance, obtained by other public sector employees

(belonging to the state administrations, the autonomous state companies, the universities, the regions, the provinces and municipalities, hospitals and social security funds). The percentage is calculated by the Central Institute for Statistics by comparing the ratio between the overall average financial remuneration paid in the last year of the reference three-year period and the average financial remuneration from the last year of the previous three-year period, and takes effect from 1 January following the reference period. The order to calculate that percentage is issued before 30 April of the first year of each three-year period by decree of the President of the Council of Ministers acting in concert with the Minister of Justice and the Minister for the Economy and Finance. On the basis of this measure, on 1 January of the second and third year of each three-year period, salaries are increased by way of an advance on the three-year adjustment for each year, with reference in all cases to the salary applicable on 1 January of the first year, by 30 percent of the percentage variation occurring in the remuneration of public sector employees during the previous three-year period, followed by a balancing payment with effect from 1 January of the following three-year period.

11.3.— In view of the above, it should be pointed out that, despite the lack of precision in the contested legislation, which considers 2012 as an advance payment year, the referring courts correctly concluded that the legislation does not leave any doubts as to the manner in which it is to be applied, as it

imposes in any case a freeze on payments, irrespective of whether they are due as an advance or a balancing payment.

11.4.— On the merits, it must be recalled that, when ruling on questions relating to provisions on remuneration and rules governing pay increases for magistrates, also and above all with reference to the economic and financial measures that have delayed or otherwise regulated the operation of pay increases over time, this Court has held in general that the independence of the judiciary is also achieved through "the provision of guarantees relating to the status of the members of its various bodies regarding, *inter alia*, not only career progression but also financial remuneration" (see judgment no. 1 of 1978).

Judgment no. 238 of 1990 outlined the function of the triennial pay rise and of mechanisms for reassessing magistrates' pay, asserting that "In accordance with the constitutional principle of the independence of the judiciary, which must be safeguarded also in financial terms, (…) by avoiding *inter alia* their being required to make regular claims against other branches of state, in enacting Article 2 Parliament made provision for an automatic mechanism for the adjustment of magistrates' pay which, given the current configuration of the breadth of its terms of reference, constitutes a suitable guarantee for this purpose".

Subsequently, judgment no. 42 of 1993 reiterated the fact that a characteristic of the automatic adjustment system is the guarantee of a regular

pay increase, which is assured by law, on the basis of a mechanism that constitutes an " inherent element of the structure of magistrates' pay", the rationale for which consists in the implementation of "constitutional principle of the independence of the judiciary, which must be safeguarded also in financial terms (…) by avoiding *inter alia* their being required to make regular claims against other branches of state". On that occasion, the Court also reasserted that "given the current configuration of the breadth of its terms of reference", the mechanism provided for under Article 2 "constitutes a suitable guarantee for this purpose". The same principle was recently asserted in relation to the regulations governing the special duties allowance (see order no. 137 and no. 346 of 2008).

Thus, according to the unequivocal case law of the Constitutional Court, there is a link between those provisions and the principles of constitutional law mentioned above, in the sense that there is a mechanism with mandatory status – notwithstanding that its content is not required under constitutional law – that detaches salary increases from collective bargaining rounds, and in any case operates in such a manner as to avoid arbitrary interference of one branch of state with another. It should also be added that these principles are also supported by the *travaux preparatoires* of the Constituent Assembly, which indicate that the absence of a specific indication of the financial independence of the judiciary did not entail the exclusion of that aspect from the overall conditions necessary in order to give effect to its autonomy and

independence (reports of the works of the Assembly, 6 November 1947, in the afternoon session; 20 November 1947, in the afternoon session; 26 November 1947, in the morning session; 7 November 1947, in the afternoon session; 13 November 1947, in the morning session; 14 November 1947, in the morning session; 21 November 1947, in the afternoon session; and 11 November 1947, in the afternoon session).

Besides, the specific nature of that legislation is also a consequence of the fact that, within the organisation of a constitutional state, the judiciary performs a function that is vested in it directly under the Constitution. For this reason, in adopting an mechanism providing for automatic increases in magistrates' pay, on the basis of these constitutional principles the law safeguarded the autonomy and independence of the judiciary from any form of interference that could, albeit potentially, impair that function through a requirement for contractual negotiations. Under that constitutional arrangement therefore, the relationship between the state and the judiciary, as an autonomous and independent branch, goes beyond that of a mere employment relationship under which the contracting party-employer can at the same time be a party to and regulate that relationship.

11.5.— Following previous budgetary measures imposing temporary exceptions to those mechanisms for determining pay increases, enacted in particular during the serious recession in 1992, this Court stated the limits

within which such measures may be deemed to comply with the principles summarised above.

In particular, on the assumption that Decree-Law no. 384 of 19 September 1992 (Measures on pension provision, healthcare and public sector employment, and tax provisions), converted with amendments into Law no. 438 of 14 November 1992, had been enacted at a very delicate time for the economic and financial life of the country, which was characterised by the need to re-balance the public finances, order no. 299 of 1999 asserted that "owing to such stringent requirements, Parliament imposed sacrifices, which were at times considerable, on all (judgment no. 245 of 1997) and that provisions of that nature may be deemed to be compatible with the principle laid down in Article 3 of the Constitution (on the grounds both that they do not violate the principle of substantive equality and that they are not unreasonable), provided that such sacrifices are exceptional, temporary, non-arbitrary and commensurate with the purpose set". In particular, the rulings specified that, whilst this measure "is extreme, it does not however violate any of the principles specified in that the sacrifice imposed on public sector employees by Article 7(3) has been limited to one year; similarly, the prohibition on the conclusion of new collective agreements provided for under Article 7(1) is also limited in time, and therefore that provision imposed a sacrifice with a duration that is not unreasonable (see judgment no. 99 of

1995) and which is not allocated between different categories of individual in an unreasonable manner".

Again with reference to Decree-Law no. 384 of 1992, it was also stressed that the “freeze” provided for thereunder, the entirely exceptional nature of which was evident, took effect only in the year considered and was limited to blocking disbursements due to the need to rebalance the budget (see judgment no. 245 of 1997), which were deemed to deserve protection, provided that the measures adopted were not arbitrary (see judgments no. 417 of 1996, no. 99 of 1995 and no. 6 of 1994).

11.6.— The pay increase mechanism for magistrates may therefore, under certain circumstances, be subject to statutory limitations, in particular when the initiatives that affect it are adopted against the backdrop of analogous sacrifices imposed not only on public sector workers (through a freeze on wage bargaining mechanisms – on the basis of which ISTAT calculates the average increase to be awarded) but also on all taxpayers through related measures, including taxes.

Where the gravity of the economic situation and the forecast that it will not be overcome sooner than the period of time considered require action to be taken to alter pay increases, even within a context of general pay restraint within public sector employment, such initiatives may not suspend the wage guarantees beyond the period necessary as a result of the requirements to rebalance the budget.

In the present case, the limits set out within the case law of this Court have been unreasonably breached.

11.7.— In the first place, the contested legislation set aside the decision previously implemented by the Decree of the President of the Council of Ministers of 23 June 2009 setting the increase with effect from 1 January 2009, which thus affected the balancing payment for 2012. Therefore, the observation that, in relation to this aspect, the adoption of a measure solely for workers from the judiciary exceeds the objective of "restraining" wage dynamics and by contrast has entailed a genuine reduction of amounts previously awarded on the basis of the rules governing pay rises is of decisive significance.

Secondly, in ordering not only pay restraint but also a reduction of the amount already due for 2012, it prevented any recovery of that freeze by imposing a "ceiling" for the 2015 balancing payment, which is determined with reference to the years 2009, 2010 and 2014, which thus excludes the 2011-2013 three-year period and has an irreversible effect.

The setting of a "ceiling" on the advance on the pay rise relating to 2014 and of a "ceiling" on the balancing payment for 2015, which is moreover not related to the budgetary requirements that led to the adoption of the measure, in fact amounts to a further unlawful breach of the time limits of the emergency initiative enacted by Parliament for the 2011-2013 three-year period. As this legislation is liable to render permanent the effects of the pay

freeze only for the classes of worker affected by that freeze, it thereby violates Article 3 of the Constitution and the constitutional principles referred to above enacted in order to uphold the autonomy and independence of the judiciary. In fact, the legislation under examination leads to an unjustified difference in treatment between the category of magistrates and that of contractualised public sector workers which, in contrast to the former, are subjected to limitations on their contractual arrangements only for one three-year period.

Moreover, the legislation in question not only has the potential to cover a period of time that is longer than the budgetary requirements identified, but is also only apparently limited over time, if the previous analogous measures affecting pay rise mechanisms are considered, in particular with reference to Article 1(576) of Law no. 296 of 27 December 2006 (Provisions on the formation of the annual and multi-year budget of the State – Finance Law 2007), which reduced the payment of the pay rise accrued.

Within that context, the fact that, as they are precluded the ability to engage in contractual bargaining, magistrates should only receive contractual pay after a delay of three years (subject to the payment of advances) cannot enable a further detriment to be caused exclusively to them, consisting not only in the failure to award a pay rise for the previous three-year period, but also the ineligibility to benefit from public sector wage bargaining increases after the three-year freeze. In this sense, the contested legislation not only breaches the constitutional limits laid down by the case law of this Court,

which classified as extreme a measure applied for one year only, but also extends beyond the financial effect intended, by transforming a guarantee mechanism into a reason for unreasonable discrimination.

Ultimately, the contested legislation breaches the limits on pay restraint to the detriment of one single category of public sector employee.

11.8.— Article 9(22) of Decree-Law no. 78 of 31 May 2010 must therefore be ruled unconstitutional insofar as it provides that the advances for the years 2011, 2012 and 2013 and the balancing payment for the three-year period 2010-2012 shall not be paid for the staff falling under Law no. 27 of 19 February 1981 and shall not be eligible for recovery and that for the three-year period 2013-2015, the advance pertaining to the year 2014 shall be equal to that stipulated for the year 2010 and the balancing payment for the year 2015 shall be determined with reference to the years 2009, 2010 and 2014 for such staff; and insofar as it does not preclude the application of the first sentence of paragraph 21 to the said staff.

12.— The question concerning the constitutionality of Article 9(22) of Decree-Law no. 78 of 2010 insofar as it reduces the allowance provided for under Article 3 of Law no. 27 of 19 February 1981, raised with reference to Articles 3 and 53 of the Constitution, is well founded.

12.1.— To start with, it should be pointed out that the case law of this Court initially defined that allowance as a payment related to the "official duties performed by magistrates" (see order no. 57 of 1990).

Subsequently, judgment no. 238 of 1990 further clarified that, since the "special" allowance concerned is dependent upon the special status of magistrates, it forms part of their ordinary remuneration, which is subject to self-standing regulations. However, according to the Court, this component is necessarily related to the specific performance of their duties in that it is expressly related to the particular "burdens" that magistrates "encounter when carrying out their work", which moreover entails a commitment without pre-determined temporal limits. Its payment is therefore strictly related to the actual provision of service (see judgment no. 407 of 1996 and order no. 106 of 1997).

With regard to the payment of that allowance in the event of the mandatory absence of a magistrate from work, the Court reasserted the special status of that salary element, both from the viewpoint of the rules on payment and pay rises as well as that of its special rationale rooted in the constitutional principle of autonomy and independence (see orders no. 346 of 2008, no. 137 of 2008 and no. 290 of 2006).

For the purposes of the decision, it is therefore necessary to take account of the fact that, whilst this allowance has over time been regarded also as an ordinary element of remuneration, it has not lost its special status resulting from the fact that it is intended to compensate a variety of burdens that are inseparably linked to the manner in which the functions performed by magistrates are exercised.

12.2.— In view of the above, as a preliminary matter it is necessary to establish the legal status of the deduction provided for under the contested provision, which provides that the allowance"due... during the years 2011, 2012 and 2013 shall be reduced by 15% for the year 2011, 25% for the year 2012 and 32% for the year 2013".

12.3.— This Court does not find that the provision under examination stipulates a mere gradual reduction of the allowance.

First, the formula used by the legislation does not leave any scope for doubt as to the fact that the allowance will continue to perform its original function of compensating the special burdens associated with the official duties performed by magistrates. In fact, the “reduction” is not relevant for pension purposes and thus does not amount to a pay cut but rather an extraordinary three-year levy at increasing rates.

Secondly, to restrict the financial measure under examination to the domain of salary would be contradictory, given that those specific burdens that it is intended to compensate should be reduced correspondingly during the period considered, which however is evidently not the case. Moreover, this interpretative option would lead to an equally unreasonable conclusion in that it would impute to Parliament an intention to reduce a salary element relating to an arrangement under which, rather than favouring a direct application of organisational systems and the provision of resources that ensure that magistrates are not affected financially by the said burdens, the public

administration considered it more beneficial to allocate a share of them to magistrates by way of specific financial redress, which is thus exempt from taxation other than that already levied on such amounts by way of a withholding tax.

On the other hand, as this is a salary element provided in accordance with the principles of the autonomy and independence of the judiciary, its reduction would in itself – in addition to the failure to increase it – result in a further violation of the Constitution.

Indeed, having excluded its classification as a mandatory levy *sine causa*, it must be concluded that, despite the literal reference to a "reduction" and to "contain[ing] ... spending", the reduction to which the question of constitutionality relates amounts to a tax, as it evidently constitutes a compulsory monetary payment imposed through an act of authority with expropriating effect, with the intention of assisting public spending. In other words, the rationale of the contested provision is to procure resources for the exchequer.

The case law of this Court has been settled in specifying that a tax must satisfy three inderogable prerequisites: the legal provisions must be predominantly aimed at securing a (definitive) financial reduction for the taxpayer; the reduction must not entail the amendment of a reciprocal relationship (in this case, of a salary element of an employment relationship attributable to a "non-contractualised" public sector employee); and the

resources associated with a financially significant circumstance establishing liability to taxation resulting from the said reduction are intended to assist public spending.

When considered together, these three prerequisites referred to above are met by the measure under examination, given that the judicial allowance is remunerative in nature and its reduction for the purposes of "containing expenditure in public sector employment" (as stated by the title to the contested Article 9) constitutes the stated and predominant intention of Parliament. Moreover, the contested measure did not even alter the figure of the judicial allowance because, as specified above, the temporary reduction of the level of that allowance by several percentage points was not accompanied either by a parallel reduction in pension obligations and contributions or a reduction in the workload that the allowance is intended to compensate. Finally, the absence of an express indication of the intended purpose of the additional resources secured by the State does not preclude the possibility that they may be intended to assist public spending and, in particular, to stabilise the public finances, as it is standard practice for Parliament to refrain from stipulating any intended use different from the generic “contribution to public expenditure”, which may be inferred from Article 53 of the Constitution, in relation to the proceeds of taxation. In the present case, this intended use may also be inferred from the title itself of the Decree-Law: "Urgent measures on

financial stabilisation and economic competitiveness", in accordance with the general goals of the taxes.

12.4.— Having concluded that the measure under examination amounts to a tax, it must also be stated that it is not immune from the objections raised by all referring courts that it is unconstitutional with reference to Articles 3 and 53 of the Constitution.

The tax concerned impinges upon a specific item of employment income, which forms part of an overall employment income that has already been taxed under conditions of equality with other recipients of employment income; it therefore introduces an element of discrimination – without any justification – solely to the detriment of the particular class of non-contractualised public sector worker who receives the judicial allowance. In fact, assuming equal capacity to pay tax on employment income, its application affects that category of worker more seriously. Were it possible to disregard that albeit decisive consideration, the provision for this special tax would nonetheless entail an unjustified difference in treatment in relation to the allowances received by other public sector employees, who are not subject to any additional tax levy during the same tax periods. It is important to stress that the unequal treatment referred to is even more unjustified in that it is precisely the function of the judicial allowance referred to above of compensating the activities of magistrates that offset the serious organisational shortcomings within the structure of the judiciary that calls for

the most scrupulous respect by Parliament for the principles of reasonableness and equality.

12.5.— Therefore, Article 9(22) of Decree-Law no. 78 of 2010 must be declared unconstitutional insofar as it provides that the special allowance provided for under Article 3 of Law no. 27 of 1981 due to the staff mentioned in that Law during the years 2011, 2012 and 2013 shall be reduced by 15% for the year 2011, 25% for the year 2012 and 32% for the year 2013.

The further challenges are moot.

13.— The question concerning the constitutionality of Article 9(") of Decree-Law no. 78 of 2010, raised with reference to Articles 3 and 53 of the Constitution, is also well founded.

13.1.— The provision, insofar as it is challenged, stipulates that "with effect from 1 January 2011 and until 31 December 2013, the overall financial remuneration of individual employees, including those with the grade of director, provided for under the respective regulations of the public administrations included in the consolidated income statement for the public administration, as identified by the National Institute for Statistics (ISTAT) pursuant to Article 1(3) of Law no. 196 of 31 December 2009 that exceed EUR 90,000 gross per annum shall be reduced by 5% with regard to the part exceeding the aforementioned threshold up to EUR 150,000, and by 10% with regard to the part exceeding EUR 150,000".

13.2.— In order to reach a decision regarding this question it is also necessary, as a preliminary matter, to ascertain whether the contested provision imposes a mere reduction in remuneration, which impinges upon on the content of the employment relationship of public sector employees (as is asserted by the State Counsel), or introduces a genuine tax levy (as is asserted by the referring regional administrative courts).

13.2.1.— As has been observed above, this Court has asserted on various occasions that, irrespective of the *nomen iuris* attributed to it by Parliament, when assessing whether a definitive financial deduction amounts to a tax, it is necessary to interpret the substantive legislation which provides for it in the light of the criteria laid down in the case law of the Constitutional Court which are deemed to be characterise the unitary notion of a tax: that is the mandatory nature of the payment, the lack of a reciprocal relationship between the parties and the link between that payment and public expenditure, having regard to an economically significant circumstance establishing liability to taxation (see *inter alia* judgments no. 141 of 2009, no. 335 and no. 64 of 2008, no. 334 of 2006 and no. 73 of 2005). A tax thus amounts to a "coerced levy intended to contribute to public spending which is imposed on a taxpayer on the basis of a specific indication of capacity to pay tax" (judgment no. 102 of 2008), which indication must establish the fitness of that person to be subject to an obligation to pay tax (see judgments no. 91 of 1972, no. 97 of 1968, no. 89 of 1966, no. 16 of 1965 and no. 45 of 1964).

13.2.2.— In view of the above it must be concluded that the contested provision (which commences with the same opening statement and is based on the same rationale as the solidarity contribution pursuant to Article 2(2) of Decree-Law no. 138 of 13 August 2011 laying down "Further urgent measures for financial stabilisation and development", converted with amendments into Law no. 148 of 14 September 2011, the status of which as a tax is beyond doubt) fulfils all of the characteristics of a tax levy indicated above.

In the first place, a financial reduction has been provided for through an act of authority (a "reduction" of financial remuneration), with no consideration to the intention of the person suffering it with regard to the existence, amount, time and manner of that reduction.

Secondly, the provision stipulates that the resources made available by the "reduction" in financial remuneration shall accrue to the State, without drawing any distinction between the different classes of public sector employee, and in particular between state-employed and non-estate employed public sector workers. It follows that the financial measure under examination cannot constitute a new regulation of the reciprocal relationship between employer and employee because the State has no grounds to alter the remuneration under employment relationships to which it is not a party through the provision under examination. In other words, non-state public bodies (irrespective of whether they are local government bodies) do not

derive any financial benefit in their capacity as employers from the aforementioned "reduction", but act as "tax withholding bodies" for income tax, retaining the amounts specified under the contested provision and arranging their "direct payment" to the treasury on behalf of the “taxpayers” employed by them (pursuant to Articles 1(b) and 3 of Presidential Decree no. 602 of 29 September 1973 laying down "Provisions on the collection of income tax"). Moreover, the continuing applicability of pension obligations to the amount prior to the "reduction" (third sentence of the contested paragraph 2: "The reduction […] is not relevant for pension purposes") constitutes further definitive demonstration of the fact that the temporary reduction in salary in reality amounts to a levy on the public sector worker and not a modification (which is moreover unilateral) of the essence of the employment relationship which, according to the principle of reasonableness, should necessarily have resulted in a corresponding change to those obligations. The position would not be any different for “non-contractualised” public sector employees, for whom a change to remuneration would necessarily have required a legislative change. In fact, it is evident that the unitary status of the legislation laid down by the contested provision (which, as noted above, does not distinguish between the different classes of public sector worker and relates to the "overall pay", including also salary items and allowances paid to the same person by different public administrations) and the continuing application in any case of the pension obligations to the amount prior to the

"reduction" preclude the conclusion that the contested provision introduced new, temporary and partial rules for the employment relationship only for non-contractualised state employees. The only special feature for state employees (whether contractualised or not) lies in the fact (which is not relevant for these proceedings) that the levy is imposed by the State by an amount "directly withheld" pursuant to Articles 1(a) and 2 of Presidential Decree no. 602 of 1973.

Third, there is a link between the levy and public spending since Parliament itself asserts that the contested provision meets with the stated rationale of allocating the resources freed up by the cut in the overall pay of public sector workers to the State budget in order to achieve the objectives agreed upon with the European authorities within the time-scale specified, that is a balanced budget and a reduction in public debt.

Fourth, the economically significant circumstance establishing liability to taxation with reference to which the levy has been provided for is evidently the overall employment income earned by the public sector employee between 1 January 2011 and 31 December 2013. The very fact that the arrangements on the application of the measure applied by the Ministry of the Economy and Finance include back-pay relating to the current year and to previous years along with fixed and ancillary remuneration in the gross amount paid over the course of the year means that the measure is related to the income from public

sector employment, which is used in order to calculate the tax due, rather than the employee's remuneration.

It must therefore be concluded that, despite the literal wording of the provision under examination, the legislation cannot be regarded as a pay cut, as is asserted by the State Counsel, when in his written statement he discerns the requirement for the intervention in the suggestion from the (outgoing and newly appointed) presidents of the ECB (the central bank for the single European currency) contained in a letter to the Italian Government.

It is by contrast a special tax imposed solely on public sector employees.

13.3.— Having found that the levy imposed by the contested provision is a tax, it is necessary to assess its compatibility with the principles invoked.

13.3.1.— It must be recalled in this regard that, according to the case law of this Court, "the Constitution by no means requires uniform taxation according to criteria that are identical and proportional for all types of tax levy, but by contrast requires an inseparable link with capacity to pay tax, within the context of a system inspired by the principles of progressive taxation, as a further manifestation within the specific field of taxation of the principle of equality, which is related to the task of removing *de facto* financial and social obstacles to the freedom of and equality between people, within a spirit of political, economic and social solidarity (Articles 2 and 3 of the Constitution)" (see judgment no. 341 of 2000). Therefore, the review that is conducted by the Court in relation to the violation of the principles laid

down by Article 53 of the Constitution, as a manifestation of the fundamental principle of equality pursuant to Article 3 of the Constitution, consists in a "judgment as to whether or not the legislature has made reasonable use of its discretionary powers in relation to taxation with the goal of verifying the internal coherence of the structure of taxation with the circumstance establishing liability to taxation, and that the scale of taxation is not arbitrary (see judgment no. 111 of 1997).

In the present case, even if it is assumed that legislative discretion in this area was exercised correctly, the contested provision clearly breaches Articles 3 and 53 of the Constitution. The introduction of a special tax – albeit one that is transitory and exceptional – relating solely to the employment income of the employees of the public administrations included in the consolidated income statement of the public administration violates the principle of equal taxation, assuming an equal level of financially significant circumstances establishing liability to taxation. This violation is clear for two different reasons.

First, assuming an equal level of employment income, the levy is unjustifiably limited only to public sector employees. Second, although (by Article 3 of Decree-Law no. 138 of 2011) Parliament requested the solidarity contribution (which undoubtedly amounts to a tax) of 3% on annual income above EUR 300.000.00 with the goal of securing resources for financial stabilisation, it unexpectedly chose, for the same purposes, to impose solely on public sector employees the further special tax levy challenged. Therefore,

in the case under examination, the unreasonableness does not lie in the scale of the contested levy, but its unjustified limitation to a certain class of taxpayer. Furthermore, the fact that the "solidarity" rationale for the various initiatives is substantially identical itself leads to the conclusion that the different treatment reserved to public sector employees is unreasonable and arbitrary, which moreover presaged a budgetary result which could have been very different, and more favourable for the State, had Parliament complied with the principle of equality and economic solidarity, which could also have been achieved by shaping a "universal" tax in a different manner. Indeed, the exceptional nature of the economic situation which the State must confront is undoubtedly such as to allow Parliament also to rely on exceptional instruments, as part of the difficult task of balancing the satisfaction of financial interests against the guarantee of services and protection to all persons who require it. However, even in these circumstances, the task of the State is to guarantee respect for the fundamental principles of the constitutional order, which is certainly not indifferent to the economic and financial reality, although equally cannot permit exceptions from the principle of equality, on which the constitutional order is based.

In conclusion, the tax imposed results in an unreasonable discriminatory effect.

13.4.— Consequently, Article 9(2) of Decree-Law no. 78 of 2010 must be ruled unconstitutional insofar as it provides that, with effect from 1 January

2011 and until 31 December 2013, the overall financial remuneration of individual employees, including those with the grade of director, provided for under the respective regulations of the public administrations included in the consolidated income statement for the public administration, as identified by the National Institute for Statistics (ISTAT) pursuant to Article 1(3) of Law no. 196 of 31 December 2009 (Law on accounts and public finance) that exceed EUR 90,000 gross per annum shall be reduced by 5% with regard to the part exceeding the aforementioned threshold up to EUR 150,000, and by 10% with regard to the part exceeding EUR 150,000;

14.— The question concerning the constitutionality of Article 12(10) of Decree-Law no. 78 of 2010, raised with reference to Articles 3 and 36 of the Constitution, is also well founded.

First and foremost, the interpretative premise of the Regional Administrative Court for Umbria is correct as regards the description of the legislative framework, since the failure to provide for an express exclusion of the continuation of the levy in relation to employees cannot result in the application of an argument from silence, albeit in order to pursue an interpretation based on the Constitution. In fact, the continuation of the levy under discussion not only results from the theoretical compatibility of the new regime with the legislation laid down in Presidential Decree no. 1032 of 1973, but is also supported by the fact that Article 12(10) does not by any means lay down basic legislation on pension benefits to employees of the State that is

capable of replacing, by way of amendment, Presidential Decree no. 1032 of 1973, as was moreover concluded by the Administration upon application.

In view of the above, it should be pointed out that until 31 December 2010 the legislation required the public sector employer to set aside a total of 9.60% of 80% of gross salary, applying a levy on the employee of 2.50%, again calculated on the basis of 80% of salary. Therefore, the differing previous legislation provided for an amount to be set aside which was determined with reference to a lower calculation base and, in view of the higher departure allowance, called for the employee levy under discussion.

By contrast, under the new arrangements governing the institution laid down by the contested provision, the percentage set aside is calculated on the entire salary, with the result that the maintenance of the employee levy – moreover without an "exemption band" – causes a reduction in pay and, at the same time, a reduction in the level of the departure allowance accrued over time.

In view of the extension of the regime provided for under Article 2120 of the Civil Code (applicable to the calculation of the departure allowance) to pension contribution years accrued after 1 January 2011, the contested provision unreasonably results in the application of a rate of 6.91% to the entire salary, without at the same time excluding the employee levy of 2.50% from the employee's total pension contributions on which the departure allowance is based, which is withheld from the fund for the departure

allowance, in conjunction with Article 37 of Italian Presidential Decree no. 1032 of 29 December 1973.

In permitting the State to reduce the amount set aside, which is unreasonable in that it is not related to the quality and quantity of the work performed and because – at equal salary – results in unjustifiably more detrimental treatment for public sector employees compared to private sector employees, who are not subject to the levy by the employer, the contested provision thereby violates Articles 3 and 36 of the Constitution.

14.1.— Therefore, Article 12(10) of Decree-Law no. 78 of 2010 must be ruled unconstitutional insofar as it does not preclude the application against employees of the levy equal to 2.50% of total pension contributions provided for under Article 37(1) of Presidential Decree no. 1032 of 1973.

ON THOSE GROUNDS

THE CONSTITUTIONAL COURT

hereby,

1) rules that the intervention in the proceedings initiated pursuant to order no. 54 of 2012 by Abbritti Paolo is inadmissible;

2) declares that Article 9(22) of Decree-Law no. 78 of 31 May 2010 (Urgent measures on financial stabilisation and economic competitiveness), converted with amendments into Law no. 122 of 30 July 2010, is unconstitutional insofar as it provides that the advances for the years 2011, 2012 and 2013 and the balancing payment for the three-year period 2010-2012 shall not be paid for the staff falling under Law no. 27 of 19 February 1981 (Remuneration for employees of the judiciary) and shall not be eligible for recovery and that, for the three-year period 2013-2015, the advance pertaining to the year 2014 shall be equal to that stipulated for the year 2010 and the balancing payment for the year 2015 shall be determined with reference to the years 2009, 2010 and 2014 for such staff; and insofar as it does not preclude the application of the first sentence of paragraph 21 to the said staff;

3) declares that Article 9(22) of Decree-Law no. 78 of 2010 is unconstitutional insofar as it provides that the special allowance provided for under Article 3 of Law no. 27 of 1981 due to the staff mentioned in that Law during the years 2011, 2012 and 2013 shall be reduced by 15% for the year 2011, 25% for the year 2012 and 32% for the year 2013;

4) declares that Article 9(2) of Decree-Law no. 78 of 2010 is unconstitutional insofar as it provides that, with effect from 1 January 2011 and until 31 December 2013, the overall financial remuneration of individual

employees, including those with the grade of director, provided for under the respective regulations of the public administrations included in the consolidated income statement for the public administration, as identified by the National Institute for Statistics (ISTAT) pursuant to Article 1(3) of Law no. 196 of 31 December 2009 (Law on accounts and public finance) that exceed EUR 90,000 gross per annum shall be reduced by 5% with regard to the part exceeding the aforementioned threshold up to EUR 150,000, and by 10% with regard to the part exceeding EUR 150,000;

5) declares that Article 12(10) of Decree-Law no. 78 of 2010 is unconstitutional insofar as it does not preclude the application against the employee of the levy equal to 2.50% of total pension contributions provided for under Article 37(1) of Presidential Decree no. 1032 of 29 December 1973 (Approval of the consolidated text of provisions on pension benefits for the civilian and military employees of the state);

6) rules that the question concerning the constitutionality of Article 9(2) of Decree-Law no. 78 of 2010 raised, in the proceedings initiated pursuant to referral order nos. 46 and 53 of 2012, by the Regional Administrative Courts for Abruzzo and Umbria is manifestly inadmissible;

7) rules that the question concerning the constitutionality of Article 12(7) of Decree-Law no. 78 of 2010 raised, in the proceedings initiated pursuant to

referral order nos. 54 and 74 of 2012, by the Regional Administrative Courts for Umbria and Calabria is manifestly inadmissible;

Decided in Rome at the seat of the Constitutional Court, *Palazzo della Consulta*, on 8 October 2012.

(omitted)