JUDGMENT NO. 164 YEAR 2017

In this case the Court heard a number of referral orders concerning an amendment to legislation on the civil liability of judges. The Court dismissed most of the questions as inadmissible due to their irrelevance, not having been raised within liability proceedings against a judge. The sole question that was deemed to be relevant was dismissed as unfounded, essentially on the grounds that the requirement to protect the autonomy and independence of the judiciary could be satisfied in various ways, and that the specific choice regarding this matter fell to Parliament.

[omitted]

THE CONSTITUTIONAL COURT

[omitted]

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Articles 2(1)(a), (b) and (c), 3(2) and 4 of Law no. 18 of 27 February 2015 (Provisions on the civil liability of judges) and Articles 2(2) and (3), 4, 7, 8(3) and 9(1) of Law no. 117 of 13 April 1988, no. 117 (Compensation for damages caused during the exercise of judicial functions and the civil liability of judges), as amended by Law no. 18 of 2015, initiated by the *Tribunale di Verona* by the referral order of 12 May 2015, by the *Tribunale di Treviso* by the referral order of 8 May 2015, by the *Tribunale di Catania* by the referral order of 6 February 2016, by the *Tribunale di Enna* by the referral order of 25 February 2016 and by the *Tribunale di Genova* by the referral order of 10 May 2016, registered respectively as no. 198 and 218 in the Register of Referral Orders 2015, and as no. 113, 126 and 130 in the Register of Referral Orders 2016 and published in the Official Journal of the Republic no. 40 and 43, first special series 2015 and no. 23 and 27, first special series 2016.

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

having heard the Judge Rapporteur Franco Modugno in chambers on 9 November 2016.

[omitted]

Conclusions on points of law

1.– This Court has been requested to rule on a complex body of questions of constitutionality, which have been described in detail above, all relating to the rules concerning the civil liability of judges following the amendments introduced by Law no. 18 of 27 February 2015 (Provisions on the civil liability of judges) to the previously applicable provisions of Law no. 117 of 13 April 1988 (Compensation for damages caused during the exercise of judicial functions and the civil liability of judges).

2.– Since the object and the problems raised are identical, the questions must be joined for resolution by a single judgment.

3.– As a preliminary matter it is first necessary to examine the objection by which the State Counsel has contested the admissibility, due to lack of relevance, of all of the questions raised by the referral orders from the *Tribunale di Verona* (no. 198 of 2015), the *Tribunale di Treviso* (no. 218 of 2015), the *Tribunale di Catania* (no. 113 of 2016) and the *Tribunale di Enna* (no. 126 of 2016).

In the various interventions, counsel for the President of the Council of Ministers has stressed, on the basis of similar if not identical arguments, that the referring courts are not required to apply directly the provisions the constitutionality of which is questioned, with the result that their relevance in the proceedings before the referring courts is

asserted “only theoretically and on a contingent basis”. According to the State Counsel, the contested provisions could be of significance exclusively in the event “that the judge were to make a mistaken ruling either wilfully or through gross negligence” and thus in a case in which the “future measure were manifestly flawed”. However, in such an eventuality, this could be remedied by the same judge who issued the ruling or by the judge hearing the appeal, having regard to the nature of the action for liability, which presupposes that the remedy available has already been attempted. Consequently, the impact on the peace of mind of the judge is claimed to be entirely absent, as is by contrast hypothesised by the referring courts.

In any case – since it is an indispensable prerequisite for an action for compensation that the measure must be irrevocable pursuant to Article 4 of Law no. 117 of 1988 − the grounds for unconstitutionality alleged could only become significant after all instances of any interlocutory proceedings have been exhausted, with a “legal order that has become final”, which by contrast has not been adopted in the proceedings in question. This means that assertion made by the referring courts that the questions are relevant is essentially theoretical, being rooted simply in the mere “risk of a mistaken assessment of the findings made in the case”: there is in fact asserted to be no correlation “between the rule to be applied and the solution to the contested issue”, so much so that in some of the referral orders, the “risk associated with the decision” is simply postulated, as the problems in question rather relate simply to decision-making and could be resolved on the basis of elementary and ordinary rules of law and pursuant to a prudent assessment of the proceedings.

The State Counsel goes on to observe that, within the questions of constitutionality raised, the questions were found to be relevant on the basis of the alleged disturbance caused to the judge by the possibility that the State might bring a recourse action against him: such an action in turn was merely contingent and would be dependent upon another damages action being brought against the State due to liability resulting from a judicial ruling resulting from an “error committed by the judge”. On account of such a hypothetical chain, the relevance of the questions of constitutionality raised could, however, only be justified by the very “dangerousness […] of the judicial function” which was considered, in any case and under all circumstances, to impinge upon the proper conduct of the proceedings and hence on the status of the judge.

In conclusion, the prerequisite of relevance is asserted to be based only on postulated and “hypothetical psychological conditioning”, with the paradoxical consequence that any amendment of Law no. 117 of 1988 would become relevant within disputes of all types (civil, criminal and administrative), “with effects that distort the proper operation of the entire judicial system, which would moreover be at odds with principles of Italian constitutional law and EU law on the efficacy of judicial protection”.

3.1.– The objection that the questions are inadmissible is well founded, for the reasons set out below.

3.2.– In the four referral orders, the referring courts assert – leaving aside the specific complexity or difficulty in reaching a decision in the individual proceedings underway, which need not be considered in these proceedings − that whilst the questions of constitutionality raised do concern some of the provisions introduced by Law no. 18 of 2015, they are directly relevant in the respective interlocutory proceedings as that legislation “actually and immediately gives rise to potential liability” for them as judges, “which may result in liability proceedings” (citing the referral order of the *Tribunale di Verona*, no. 198 of 2015). This is because the legislation “impinges in a

general manner on the judge's freedom to assess the facts and evidence according to law, and therefore also the assessment which the judge is required to make in these proceedings" (see the referral order of the *Tribunale di Treviso*, no. 218 of 2015). In other words, it must not be excluded that any decision that may be adopted "may be contested if the facts and evidence are considered to have been misrepresented", thus establishing gross negligence under the terms of the legislation, as now amended, on the civil liability of judges (see for example the referral order of the *Tribunale di Catania*, no. 113 of 2016).

Whilst they set out the simple and mere "potential" emergence of civil liability for the State (along with the subsequent potential recourse action against the judge) in relation to the measures adopted within the proceedings before the referring court, these assertions are used as justification for the relevance of the various questions of constitutionality by means of the reference, contained in all of the aforementioned referral orders, on which they moreover dwell at length, to the findings made in Judgment no. 18 of 1989.

The referring courts in fact note that – having been requested to review certain questions of constitutionality raised in relation to the legislation on the civil liability of judges contained in Law no. 117 of 1988, and when confronted with the objection that they were inadmissible on the grounds that they were not relevant, which was made also in that case by the State Counsel − in that ruling, this Court ruled such an objection unfounded.

It was noted, in this regard, that in establishing that the question of constitutionality proposed must be such that "the proceedings cannot be concluded unless it is resolved", Article 23 of Law no. 87 of 11 March 1953 (Provisions on the establishment and functioning of the Constitutional Court) "implies as a rule that relevance must be strictly related to the applicability of the contested provision within the proceedings before the referring court". However, it was asserted that "also provisions which, whilst not directly applicable to the proceedings before the referring court, pertain to the status of the judge, the composition of the court and in general the guarantees and duties applicable to the judge's actions must be considered to have an impact on the proceedings", and that therefore "were such provisions to be unconstitutional, this would end up having an impact on all of the proceedings pending before the judge whose status, composition, guarantees and duties they regulate: in a nutshell, the 'protection' for the performance of the function, within which duties are associated with rights".

According to the referring courts, these assertions are further corroborated – for the purpose of establishing the relevance of the current questions of constitutionality – by the fact that the new legislation on civil liability resulting from the amendments introduced by Law no. 18 of 2015 has expanded the scenarios in which the State and the judge may incur liability, introducing *inter alia* the "misrepresentation of the facts and of the evidence". Accordingly, at least the related provisions as amended to that effect (that is, Articles 2(3) and 7(1) of Law no. 117 of 1988) would have an immediate impact on all proceedings currently underway.

Moreover, only the *Tribunale di Verona* and the *Tribunale di Enna* assert that the findings contained in Judgment no. 18 of 1989 were implicitly referred to by this Court in Judgment no. 237 of 2013.

3.3.– Starting from an examination of this last argument, it must be noted that the position stated by the two referring courts is mistaken.

In fact, within the proceedings concluded by Judgment no. 237 of 2013, this Court was requested to rule on the constitutionality of provisions concerning the abolition of various judicial offices: the constitutionality proceedings thus related to the power of *ius dicere* of the referring courts, which was directly and immediately dependent upon the contested provisions. It is stated that there can therefore be no doubt – according to the ordinary rule laid down by Article 23 of Law no. 87 of 1953 – as to the relevance of the questions of constitutionality raised, "as any judge may indeed apprise this Court *in limine litis* with the constitutional review of legislative provisions that establish or preclude its power to rule upon particular proceedings" (Order no. 258 of 2016), since that capacity falls within its "power-duty to verify the proper constitution of the adjudicatory body, also having regard to the constitutionality of the provisions that govern it" (Judgment no. 71 of 1975).

3.4.– As regards the reference made by all referring courts to Judgment no. 18 of 1989 as justification for the relevance of the questions of constitutionality raised within these proceedings, this is not relevant.

It must be stressed here that the context to the interlocutory constitutional proceedings within which the findings were made by this Court in that judgment was clearly different. In that case, in fact, the principal core of the various questions raised by the different courts (ordinary, administrative and tax courts), which queried the constitutionality of the first law on the civil liability of judges, was centred – in order to establish the relevance of the questions – on the fact that the various proceedings involved the application of the legislation laid down by Article 16 of Law no. 117 of 1988 (subsequently declared partially unconstitutional by Judgment no. 18 of 1989), which introduced – into civil proceedings (Article 131 of the Code of Civil Procedure) and into criminal proceedings (Article 148 of the Code of Criminal Procedure) – the possibility for dissenting comments from decisions made by a bench of judges due to the resulting ramifications which the legislation had precisely in the area of civil liability.

Moreover, the very structure and composition of the court was an issue – and the Court's findings regarding this matter are reiterated in these proceedings − due to the assertion by one of the referral orders that the "contribution to the decision" within a bench of judges in civil proceedings could not be distributed equally between the rapporteur and the other members of the bench, as the other members could not be "required to examine the case file, owing to the massive volume of work faced by the courts" and that consequently, this different internal "functional" status should also be reflected by a different level of liability. This perspective led this Court to reiterate, by contrast, and precisely in relation to the structure and function of such a court, that "the decision issued by a bench of judges is a unitary act, to which all of the individual members contribute in a similar manner and in accordance with the same duties" (Judgment no. 18 of 1989).

Another referral order was submitted by the specialist division for drug addiction, with mixed composition, which raised a question of constitutionality in relation to the liability of the lay members of the panel.

Finally, it was observed in the referral order containing the questions raised by a tax court, that these questions related "to the constitution of the court", with the result that the question was relevant since, "were the contested provisions to be unlawful, the decision of the tax court would be void", also in this case invoking the issue of the

participation of lay members in the work of the court (as was also mentioned in the question raised by an honorary *praetor*).
The reasons adopted by this Court may be readily apparent from its review, in those proceedings, of the admissibility of the questions of constitutionality (reasoning that was later simply referred to in Judgment no. 243 of 1989, adopted shortly afterwards). In fact, in keeping with the significance of the procedural rules then at issue in the various proceedings before the referring courts, it based its reasoning on the issues relating to the "status of the judge", "its composition, and in general [the] guarantees and [the] duties relating to his actions": these aspects, which were ontologically significant within the context of the relative proceedings – before the ordinary, special, administrative or tax courts – were those that gave rise to the questions. In other words, the questions concerning the civil liability of judges were relevant at that time as they were directly related to issues pertaining to the structure of the body and to the hypothesised functional "distinctions" within them, and hence to their very composition.
3.5.– This was a profoundly different scenario from that which is now before this Court and which, in itself, is able to establish a clear distinction between these rulings – which are relevant to the specific facts of those cases – and the others which this Court has been requested to adopt in relation to the relevance of the questions currently under examination.
In fact, in relation to the questions currently before this Court, the Court is required to verify whether there is a necessary relationship of "functional dependence" between the proceedings before the referring courts and the issue raised by the question of constitutionality: according to the settled case law of this Court, such an issue must have preliminary status, which means that it must be impossible to resolve the proceedings without first resolving this preliminary issue.
However, in the light of these preliminary comments and taking account of the assertions made by the referring courts themselves with a view to establishing relevance, it must be inferred that the questions were formulated by the referring courts without any consideration as to whether they have a direct impact on the autonomy and independence of judges that is of such a nature as to condition the *ius dicere* on a structural and functional level, but have referred exclusively to the manner in which that function is performed. Nor does it find that these arrangements may cause various forms of disturbance to the psychological state of a particular judge, according to principles which have moreover been reiterated in the case law of this Court – both before and after Judgment no. 18 of 1989.
It has in fact been held that there can be no relationship of preliminary status, which is required in order to establish the relevance of the question, by virtue of a mere reference by the referring court to psychological disturbance and to his own peace of mind when passing judgment due to the usage of "security restraints" when transferring accused persons in custody, "as this can obviously not establish a subjective psychological situation such as that alleged by the judge, given that first and foremost it results from provisions that are entirely extraneous to the subject matter of the main trial" (Judgment no. 147 of 1974).
In the same way, it has also been held that, with regard to any generic judgment concerning the competence of the Court of Auditors, questions seeking to assert an alleged impairment of the peace of mind and freedom to pass judgment of the judges on that court resulting from the allegedly "overly wide discretionary" nature of the powers

granted to the President of that Court over the allocation of functions and over promotions cannot be considered to be relevant: the complaints related in fact to provisions which would not have been applied by the referring court, reflecting "only potential and not actual violations of constitutional guarantees" (Judgment no. 19 of 1978).

Moreover, the more recent questions seeking to object within ordinary proceedings to the provision for remuneration to justices of the peace and the members of tax panels on the basis of each trial successfully concluded have not been accepted as relevant: it was alleged that this system exerted psychological conditioning on the actions of those judges, and thus impaired their independence and impartiality, inducing them to choose not the solutions that were considered to be the most correct but rather those that made it possible to resolve a greater number of cases within a shorter period of time, also permitting the claimant or the defendant to benefit them financially by filing separate applications or appeals rather than cumulative applications or appeals. Similar questions have also in fact been found to lack relevance where they relate to provisions that did not need to be considered at all for the purposes of the decision in the disputes brought before the referring courts (see, *inter alia*, Orders no. 421 of 2008, no. 180 of 2006 and no. 326 of 1987).

3.6.– More generally, it must however be acknowledged that a system that does not guarantee adequate institutional protection to judges would in turn be highly at odds with the rigorous requirement of legality by which judges are bound as a matter of constitutional law.

Within the constitutional architecture of the judicial system, the judge in fact appears to perform a peculiar role, as it cannot be excluded *a priori* that provisions that are not directly applicable within the trial may have an evident and immediate impact on the constitutional guarantees afforded to the judiciary, thereby conditioning the activity of the judiciary itself. However, this presupposes that such an impact – in terms of its quality, intensity and the unequivocal and evident nature of its direction, along with the immediacy and extent of its effects – is such as to lead to actual interference with the conditions of independence and impartiality in deciding, aside from any consideration that could involve any "psychological disturbance" of the individual judge.

Moving beyond this perspective, for the purposes of the issue of relevance, it is also necessary to verify whether the provision that allegedly interferes with the judge's status does or can compromise his independence and impartiality in relation to the specific issue brought before him for examination and the specific resulting decision to be adopted within the proceedings before the referring court. These prerequisites have not been considered in the questions currently before this Court, in the light of the reasons as to the relevance provided by the referring courts in relation to the current legislation on the civil liability of judges.

3.7.– To conclude regarding this matter, all of the questions raised by the referral orders from the *Tribunale di Verona* (no. 198 of 2015), the *Tribunale di Treviso* (no. 218 of 2015), the *Tribunale di Catania* (no. 113 of 2016) and the *Tribunale di Enna* (no. 126 of 2016) must be ruled inadmissible on the grounds that they are irrelevant.

4.– The grounds for inadmissibility highlighted above do not by contrast apply to the referral order from the *Tribunale di Genova* (no. 130 of 2016), as the only one out of those under examination that was issued within compensation proceedings brought against the State pursuant to Law no. 117 of 1988.

4.1.– The State Counsel has argued that the questions raised by that order are inadmissible on different grounds.

Under Article 5 of Law no. 117 of 1988 as previously in force – which was repealed by the contested Article 3(2) of Law no. 18 of 2015 – the judge investigating a claim for damages resulting from the exercise of judicial powers was required to summon the parties to appear before the court at the initial hearing in order to carry out a preliminary assessment as to whether the prerequisites for the action were met, whether it had been brought within the applicable two-year time limit and in order to establish that it was not manifestly unfounded (known as the "admissibility filter").

In this case, the investigating judge acted as specified above, on the assumption that, given the lack of any transitory provisions, the "filter" mechanism must still be deemed to be applicable to damages claims brought after the entry into force of the law enacting the reform, but for any unlawful act committed previously, such as that at issue in the main proceedings.

However, the referring court considers that it is required to follow the opposing indications provided in the case law of the Court of Cassation (including in particular judgment no. 25216 of 15 December 2016 of the third civil division of the Court of Cassation), according to which – since its effect is procedural and not substantive – the abolition of the "filter" applies to all proceedings initiated after the entry into force of Law no. 18 of 2015 (including those relating to unlawful acts committed previously): a fact that requires the court to remit the case file to the investigating judge for the proceedings to be continued according to the ordinary arrangements. For this reason, the questions raised, which seek to challenge solely and specifically the removal of the "filter", are considered to be relevant.

The President of the Council of Ministers objects that the referring court, which was apprised of the decision by the investigating judge pursuant to Article 189 of the Code of Civil Procedure, could in any case have resolved the dispute, irrespective of the prior examination of the claim according to the filter mechanism. On the other hand, the referral order also acknowledges that some of the various objections to the admissibility of the damages claim that were raised by the defendant in the proceedings before the referring court could prove to be well founded. Therefore, in the opinion of the State Counsel, the court should have verified in advance whether the case could be ruled upon, examining the preliminary questions notwithstanding the mistaken remittal of the case by the investigating judge on the basis of the legislation as previously in force.

4.2.– The objection raised by the counsel for the intervener is unfounded.

Even if a reason for the inadmissibility of the claim were immediately discernible, the questions would in any case relate to the procedural arrangements applicable to the verification, which the repealed Article 5 regulated according to ad hoc rules. As things currently stand, these rules are no longer applicable and the referring court is seeking to restore them through a declaration that the provision with repealing effect is unconstitutional.

In fact, according to the repealed legislation, the court should have ruled sitting in chambers within 40 days, rather than in an ordinary hearing concerning the merits of the case (with the possibility of discussion within a public hearing pursuant to Article 275 of the Code of Civil Procedure), and should have ruled the claim inadmissible by order supported by reasons (and not by a judgment), which could be challenged not according to the ordinary arrangements but in accordance with those provided for under Article 739 of the Code of Civil Procedure for measures issued in chambers.

On the other hand, were the claim to have been considered admissible, the court should have ordered the continuation of the trial and the transmission of the case file to the body responsible for disciplinary action (a provision which has also been repealed).
There is therefore no doubt that the questions are relevant.
5.– However, whilst they are admissible, the questions raised in the referral order from the *Tribunale di Genova* (no. 130 of 2016) are unfounded.
5.1.– The referring court raises multiple doubts concerning the constitutionality of Article 3(2) only of Law no. 18 of 2015 which, as mentioned above, in repealing Article 5 of Law no. 117 of 1988, removed the "filter of admissibility" for damages claims brought against the State.
The *Tribunale di Genova* considers as a preliminary matter that the removal of the mechanism described above cannot have a "pertinent" justification in the reference to the rulings "of the Strasbourg Court" or those of the Court of Justice of the European Union, which are asserted to be based not on the "liability of the individual judge but (on) that of the state", with the consequence that these decisions "do not require any amendment of Law no. 117/1988 in procedural terms".
In view of this fact, the referring court considers that the contested provision violates first and foremost Article 111 of the Constitution on the grounds that it contrasts with the principle that trials must be of reasonable duration. In fact, the "filter" mechanism is asserted to pursue the common interest both of the private individual who considers his interests to have been violated as well as of the State, as the party potentially liable, in any inadmissibility of the damages claim being declared as quickly as possible according to an expedited procedure. In the absence of such a mechanism, the time-scale for the ruling is by contrast that for ordinary proceedings, which have an "excessive and unreasonable length".
The contested provision is also alleged to violate Article 3 of the Constitution on the grounds of both unequal treatment and unreasonableness. Specifically, the abolition of the "filter" provided for thereunder is asserted to be at odds with the increasingly widespread recourse made by the legislator to mechanisms of this type, and in particular with the introduction of "simplified inadmissibility rulings" in relation to ordinary appeals: these institutes are comparable to the action provided for under Law no. 117 of 1988, which often takes the form of a "trial concerning the trial" (the referring court refers to the provisions of Articles 348-*bis* and 348-*ter* of the Code of Civil Procedure concerning ordinary appeals and to Articles 360-*bis* and 375(1) no. 1 and 5 of the Code of Civil Procedure concerning appeals to the Court of Cassation).
In addition, the contested repeal is argued to breach the principle of a fair trial – thereby constituting a further violation of Article 111 of the Constitution − also within the proceedings in which the harmful act is alleged to have occurred. By immediately sifting out liability actions that are inadmissible or manifestly unfounded, the procedural mechanism abolished is asserted to perform an essential function in protecting the peace of mind of the judge, averting the risk of so-called "'defensive' jurisprudence", namely that the court may relinquish its position of independence and impartiality and take the decisions that appear to it to be less "risky".
This would also constitute a violation of the principles that the judge must be subject only to the law (Article 101 of the Constitution) and of the autonomy and independence of the judiciary (Article 104 of the Constitution), in the light of the assertions contained in the case law of the Constitutional Court according to which the existence of a "filter" that shelters the judge from vexatious or intimidatory claims should be considered to be

indispensable in order to safeguard the corresponding values (citing Judgments no. 468 of 1990, no. 18 of 1989 and no. 2 of 1968).
Finally, the contested provision is asserted to violate the principle of a court established by law (Article 25 of the Constitution). In fact, given the lack of any "filter" mechanism, the judge would have an incentive to exercise his power to intervene in the compensation proceedings provided for under Article 6 of Law no. 117 of 1988, as there is no longer any clear distinction between an examination of the grounds for the admissibility of the claim and an examination of the merits: thus, in becoming a party to those proceedings, the obligation to recuse himself from the original trial would be engaged pursuant to Article 51(1), no. 3 of the Code of Civil Procedure. In any case, the judge could consider the prerequisites for voluntary recusal to have been met. Consequently, the bringing of a liability action could amount to an indirect way of removing a case from its proper court established by law.
5.2.– Moving on from the initial reference by the referring court to the decisions of the Court of Justice of the European Union, it must be recalled that a strong impulse in favour of the reform introduced by Law no. 18 of 2015 came precisely from the principles asserted by said Court of Justice in relation to the obligation of the Member States to compensate damages caused to individuals by violations of Community law (now EU law) committed by national judicial bodies (including courts of last resort). Some of the limitations provided for under Law no. 117 of 1988 have been found to be incompatible with these principles (ECJ, Grand Chamber, judgment of 13 June 2006 in Case C-173/03, *Traghetti del Mediterraneo spa*), so much so as to result in infringement proceedings, in which the Court of Justice ruled against Italy (ECJ judgment of 24 November 2011 in Case C-379/10, *European Commission v. Italian Republic*).
Within the context of these principles, those relating to the "justiciability" of the damages claim brought by the injured party are of particular relevance in this case.
Starting from the renowned judgment in the *Köbler* case (judgment of 30 September 2003 in Case C-224/01, *Gerhard Köbler*), the Court of Justice has in fact held that "[…] it is on the basis of rules of national law on liability that the State must make reparation for the consequences of the loss and damage caused, with the proviso that the conditions for reparation of loss and damage laid down by the national legislation must not be less favourable than those relating to similar domestic claims and must not be so framed as to make it in practice impossible or excessively difficult to obtain reparation".
This assertion – which has been constantly reiterated in subsequent judgments (see, *inter alia*, Court of Justice of the European Union, Grand Chamber, judgment of 13 March 2007 in Case C-524/04, *Test Claimants in the Thin Cap Group Litigation*; Court of Justice of the European Union, judgment of 25 November 2010 in Case C-429/09, *Günter Fuß*; Court of Justice of the European Union, judgment of 9 September 2015 in Case C-160/14, *João Filipe Ferreira da Silva and Brito and others*) – covers both the "principle of equivalence" and the "principle of effectiveness", which have thereby been elevated to necessary elements of all national laws on State liability for the consequences of losses caused by judicial rulings adopted in breach of European law.
According to the Court of Justice's own original terminology, the "principle of equivalence" requires that the conditions laid down under national legislation on damages claims against the State on the grounds of civil liability resulting from the violation of European law by a court ruling must not be "less favourable" than those governing analogous claims relating to internal matters, that is, other "normal" damages

actions which may be brought by individuals against the State in relation to other matters.
The "principle of effectiveness" then requires that the procedural mechanisms under national law must not be structured in such a manner as to make it impossible or excessively difficult to obtain compensation.
5.3.– Whilst the assertion of these principles does not directly and specifically require the abolition of the so-called "admissibility filter" contemplated under Article 5 of Law no. 117 of 1988, it has led to a considerable change in the reference legislative framework in the area of the civil liability of the State and of judges, and has inevitably ended up inspiring and permeating the reform enacted in this area by Law no. 18 of 2015. The legislator has held in this regard that, on the one hand, a liability action brought against the State for damages resulting from a judicial ruling is not equivalent to a damages action brought against the State in other areas that do not provide for a similar "filter" and on the other hand that, by halting damages actions against the State largely during the preliminary stage, experience in the application of Law no. 117 of 1988 showed that private individuals who had suffered damage had not been guaranteed effective compensation. It is hardly necessary to stress in this regard that the reform could evidently not be limited solely to violations of European law, other than at the price of causing an unreasonable difference in treatment compared to situations arising out of the violation of a provision of national law, which also cause harm to private individuals.
As has been asserted by this Court on various occasions, in the area under examination it is necessary to strike a delicate balance between two countervailing interests: on the one hand, the interest of the individual who has been unlawfully harmed by a court ruling in obtaining redress for the detriment suffered, given that "a law that denied a private individual who has been harmed by a judge any right to claim against the State would be unjust" (Judgment no. 2 of 1968); on the other hand, the need to safeguard the judiciary against potential conditioning in order to protect the independence and impartiality of the judiciary "as the special nature of judicial functions and the nature of the measures adopted by the judiciary indicate that the liability of judges should be subject to conditions and limits, especially in view of the constitutional provisions specifically enacted in relation to the judiciary (Articles 101 and 113) in order to protect the independent and autonomous exercise of its functions" (Judgment no. 26 of 1987).
This balance has also been struck by Law no. 18 of 2015, which enacted the reform, fundamentally by drawing a clearer distinction between the civil liability of the State towards the injured party − of which the European institutions emphatically urged the expansion − and the civil liability of the individual judge. In enacting the reform, the legislator thus sought to move beyond a situation in which the objective and subjective scope of the liability of the State and of the judge coincide entirely and, within that perspective, considered it necessary to expand the scope of the former regardless of the more limited boundaries for the latter, thereby toning down the mechanical and automatic effect of a finding of liability against the State within recourse proceedings against the judge.
The legislative choice to abolish the so-called "admissibility filter" was made within that context of a new legislative balance − the terms of which have been left to the discretion of the legislator, subject to the limits of reasonableness − having been found to be conducive to the new legislative framework, especially if considered in the light of the principles asserted by the Court of Justice of the European Union as recalled above.

In fact, as a matter of constitutional law, in order to strike a balance between the countervailing interests mentioned above, it is not necessary to provide for a preliminary assessment of the admissibility of the claim brought against the State as an indispensable instrument for protecting the autonomy and independence of the judiciary. This requirement may in fact be satisfied by the legislator through other means, such as by the enactment of Law no. 18 of 2015, which first maintained the prohibition on direct actions against judges and clearly separated the two forms of liability (that of the State and that of the judge); second, laid down self-standing and more restrictive prerequisites for establishing the liability of the individual judge, which may be engaged on a recourse basis if and only if the State is unsuccessful in the damages action; and third, maintained a limit on the extent of the recourse action. This is sufficient in order to counter the prospected danger that the abolition of the procedural mechanism under examination may undermine the "peace of mind of the judge", along with the drift towards a "defensive jurisprudence", a hypothesis which evidently disregards the high level of scholarship inherent within any judicial function. Whether this will be capable of precluding the risk – which is the opposite of that found under the previous framework regarding the substantial "irresponsibility" of judges – of the potential abuse of the damages action is however a question that only the implementation of the new legislation over time will be able to clarify.

5.4.– Moreover, the conclusions reached above are not inconsistent, nor less incompatible, with the previous assertions made by this Court in relation to this issue, as mentioned by the referring court.

The referring court invokes certain arguments contained in Judgments no. 2 of 1968 and above all no. 18 of 1989 and no. 468 of 1990.

However, it may easily be noted that the oldest of these judgments limited itself to asserting in generic terms, as mentioned above, the need to provide for "conditions and limits" on the liability of the judge, having regard to the legislative situation at that time (which provided for direct civil liability on the part of the judge, limited to cases involving wilful wrongdoing, fraud, extortion and denial of justice, and rendered the damages action conditional upon authorisation by the Ministry of Grace and Justice: see the original Articles 55, 56 and 74 of the Code of Civil Procedure). Whilst this is an assertion of paramount and immutable validity, it is at most neutral with regard to the current *thema decidendum*.

The assertions concerning the supposed "constitutional significance" of the filter are rather contained in Judgment no. 18 of 1989, cited above, and above all Judgment no. 468 of 1990. In the former of these judgments, this Court held that "the provision for proceedings to review the admissibility of the claim (Article 5 of the Law cited) provides an adequate guarantee to the judge against the bringing of "manifestly unfounded" actions which may disturb his peace of mind, at the same time preventing the mischievous fulfilment of the prerequisites for abstention and recusal". Judgment no. 468 of 1990 then asserted the argument that a "'filter' was indispensable to guarantee the independence and autonomy of the judiciary".

If properly considered within their historical and normative context as well as the specific circumstances that gave rise to them, these assertions however prove to be of much less decisive value compared to that attributed to them within the arguments of the referring court.

The assertion – contained in Judgment no. 18 of 1989 − concerning the "adequate guarantee" resulting from the prior admissibility proceedings in the event that

manifestly unfounded or vexatious actions are brought does not by any means constitute the only and constitutionally mandated solution for ensuring that a system of civil liability does not structurally impair the autonomy and independence of the judiciary by "disturbing the peace of mind" of the judge. It has already been pointed out that, within a changed historical and normative context, the legislator has struck that balance between the countervailing values – in different ways, although not in a manner that is objectionable on the grounds of unreasonableness – which was performed by the procedural mechanism under examination according to Law no. 117 of 1988, which has now been repealed by the contested provision. This is in particular the case if it is considered in addition that, by Judgment no. 18 of 1989, in which it also followed the argumentation cited, this Court also held unfounded the question concerning the constitutionality of "Law no. 117 of 13 April 1988 in its entirety". In those proceedings, the doubt had been raised in relation to "the provision for such liability *per se*", as the referring court at the time considered that the very introduction of legislation concerning the civil liability of judges for gross negligence compromised "the impartiality of the judiciary by providing the parties with an instrument for exerting pressure that was capable of influencing judicial decisions". This established the precise importance which the reference to the "adequate guarantee" offered by the filter took on in that decision.

Similarly, also the assertion made in Judgment no. 468 of 1990 – that a "filter" was indispensable "in order to guarantee the independence and autonomy of the judiciary" − takes on a different connotation compared to that proposed by the referring court as a solution required under the Constitution. In fact, it is important to recall the absolutely singular circumstances that gave rise to that assertion: namely the extension of the filter mechanism to damages actions brought in relation to events prior to its entry into force, as such actions could be brought directly against the judge – albeit significantly limited by the stringent prerequisites under the repealed Article 55 of the Code of Civil Procedure. It is as if to say that the reference to the "indispensable" nature of a filter "in order to guarantee the independence and autonomy of the judiciary" related to a system conceived according to this model, which is entirely different from the current system, which does not provide for any form of direct liability on the part of the judge.

In the light of the above, the questions raised by the *Tribunale di Genova* with reference to the principles of the independence and autonomy of the judiciary and the independence and impartiality of the judge pursuant to Articles 101, 104 and 111 of the Constitution must therefore be considered unfounded.

5.5.– Furthermore, the question of constitutionality raised by the referring court in relation to Article 3 of the Constitution based on the purported unreasonableness inherent within the removal of the admissibility filter and the violation of the principle of equality vis-à-vis "simplified inadmissibility rulings", which have been introduced by the legislator in relation to ordinary appeals, is unfounded.

Indeed, the entirely different scope within which the comparison proposed by the referring court operates – comprising Articles 348-*bis* and 348-*ter* of the Code of Civil Procedure, in relation to ordinary appeals, and Articles 360-*bis* and 375(1), no. 1 and 5 of the Code of Civil Procedure in relation to appeals to the Court of Cassation – renders the objection unfounded. The mere "logical communality" invoked by the referring court is evidently not sufficient to establish a parallel on a normative level between – and hence to render comparable − simplification measures intended to avoid litigation which have been created by the legislator in the area of civil appeals and the repealed

mechanism of the "admissibility filter", which applied to proceedings at first instance, the general rules of which do not contemplate similar mechanisms. This is moreover the case irrespective of the different purposes of the institutes and the discretion available to the legislator when making choices in the area of civil procedure, the limit applicable to which – of manifest unreasonableness – has not been breached in the case under examination, either in absolute terms or "comparatively".

5.6.– The objection that Article 3(2) of Law no. 18 of 2015 violates the principle of a court established by law (Article 25 of the Constitution), which according to the referring court supposedly occurs because the fact that proceedings are pending against the State in parallel with the main proceedings – which is facilitated by the removal of the "admissibility filter" – would induce or even oblige the judge in the latter proceedings to recuse himself in the event that he became involved in the proceedings brought against the State is also unfounded.

Leaving aside the consideration that the very same situation currently mooted by the referring court could well have arisen also when the repealed mechanism was in force, it is sufficient to note that, according to the case law of the Court of Cassation (joint divisions, Judgment no. 16627 of 22 July 2014), the fact that damages proceedings are pending against the State does not constitute a reason for the judge that adopted the measure to recuse himself or to be recused. As has recently been asserted by the Court of Cassation (joint civil divisions, judgment no. 13018 of 23 June 2015), this is not the case even if the judge becomes involved in such proceedings: there is not, in fact, any direct relationship between the party and the judge under which the latter could owe any claim – even potentially – to the former.

5.7.– Finally, the question concerning Article 111 of the Constitution, regarding the breach of the principle of the reasonable length of trials, is also unfounded.

In justifying this doubt concerning the constitutionality of the legislation based on the argument that, having abolished the preliminary filter, the time-scale for the issue of a ruling on admissibility is by contrast that operative within ordinary proceedings, the duration of which is "excessive and unreasonable", the referring court does not consider that this doubt should for this very reason apply to all ordinary civil proceedings unless they are preceded by preliminary mechanisms for assessing the claim similar to that contemplated under the repealed Article 5 of Law no. 117 of 1988. This has the effect of revealing the evident logical precariousness of the referring court's argumentative premise, with the result that the question proposed by it is unfounded.

5.8.– In conclusion, all of the questions of constitutionality concerning Article 3(2) of Law no. 18 of 2015 raised by the *Tribunale di Genova* must be ruled unfounded.

ON THESE GROUNDS

THE CONSTITUTIONAL COURT

hereby,

1) rules that the questions concerning the constitutionality of Articles 2(1)(a), (b) and (c), 3(2) and 4 of Law no. 18 of 27 February 2015 (Provisions on the civil liability of judges) and Article 9(1) of Law no. 118 of 13 April 1988 (Compensation for damages caused during the exercise of judicial functions and the civil liability of judges), as amended by Article 6 of Law no. 18 of 2015, raised with reference to Articles 3, 24, 25(1), 81(3), 101(2) and 111(2) of the Constitution by the *Tribunale di Verona* by the referral order mentioned in the headnote, are inadmissible;

2) rules that the questions concerning the constitutionality of Articles "4 and/or 7", 7 and 8(3) of Law no. 117 of 1988, as amended or replaced by Law no. 18 of 2015 and

Article 3(2) of Law no. 18 of 2015, raised with reference to Articles 3, 25, 101, "101 et seq", 104 and 113 of the Constitution by the *Tribunale di Treviso* by the referral order mentioned in the headnote, are inadmissible;
3) rules that the questions concerning the constitutionality of Articles 4(3), 7, 8(3) and 9(1) of Law no. 117 of 1988, as amended or replaced by Law no. 18 of 2015 and Article 3(2) of Law no. 18 of 2015, raised with reference to Articles 3, 24, 28, 101, 111 and "101-113" of the Constitution by the *Tribunale di Catania* by the referral order mentioned in the headnote, are inadmissible;
4) rules that the questions concerning the constitutionality of Article 2(2) and (3) of Law no. 117 of 1988, as replaced by Article 2(1)(b) and (c) of Law no. 18 of 2015, raised with reference to Articles 101(2), 104(1), 107(3) and 134 of the Constitution by the *Tribunale di Enna* by the referral order mentioned in the headnote, are inadmissible;
5) rules that the questions concerning the constitutionality of Article 3(2) of Law no. 18 of 2015, raised with reference to Articles 3, 25, 101, 104 and 111 of the Constitution by the *Tribunale di Genova* by the referral order mentioned in the headnote, are unfounded.
Decided in Rome at the seat of the Constitutional Court, *Palazzo della Consulta*, on 3 April 2017.