JUDGMENT NO. 20 YEAR 2019

In this case, the Court considered a referral order from an administrative tribunal challenging a provision of a transparency law that imposed a duty to publish fiscal data concerning income, assets, and involvement and shares in companies concerning all managers working for the public administrations, irrespective of their position, and extending to their spouses and relatives up to the second degree. The Court affirmed the admissibility of the questions and its own authority to rule, with *erga omnes* effect, on cases that raise questions of compatibility with both the Constitution and the Charter of Fundamental Rights of the European Union (except where it makes a reference for a preliminary ruling for questions of the interpretation or invalidity of European law). In such cases, the Court specified that its ruling will be based on internal constitutional provisions and European law if applicable, according to whichever system is most appropriate to the specific case. It also stressed the importance of its constitutional interpretation of the fundamental rights guaranteed by the CFR, which allow it to be interpreted in harmony with national tradition, without prejudice to ordinary courts' ability to refer matters to the ECJ. The Court pointed out that the case involved the balancing between two rights: the right to the privacy of personal data, understood as the right to control the spread of information about oneself, and the right of citizens to have free access to the data and information held by the public administrations. It observed that the digital context, which both heightens threats to personal security and increases the ability to provide access and circulate information. The Court used a proportionality test to assess the legislative choice expressed in the challenged provision, pointing out that European law also embraces the principle of proportionality in this context. Examining the evolution of the duty to publish, the Court noted the passage from "accessibility" of information, a regime under which interested parties could request information, to "availability," where information is published, for example online, for the general population. It also noted the legitimate purpose of the provision, which was to grant widespread public oversight on the use of public funds and carrying out of public functions, as an anti-corruption measure. It found that the provision partly failed the test of proportionality in the part in which it placed the duty to publish the full range of data (which formerly applied only to political positions accountable to voters) on all public managers without distinction. The Court found that the indiscriminate application of duties to publish such an extensive quantity of data, which could, depending on the position in question, be irrelevant for the purpose of granting oversight relating to public functions and the use of public funds, was inherently unreasonable, both because it created a confusing and unmanageable quantity of data that private citizens did not have the tools to navigate (failing to meet the requirement that lowering the protection of one right should result in an increase in the protection of another), and because it invited curious digging into the private lives of managers and their families rather than facilitating the correct informing of the public. Nor did the measure meet the requirement of being the least restrictive option. Finally, the provision's application to all managers without distinction was held to be unconstitutional. As a temporary solution, the Court pointed to a classification of managers carried out by the legislator in a provision of a different law.

THE CONSTITUTIONAL COURT

[omitted]

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Article 14(1-*bis*) and (1-*ter*), of Legislative Decree no. 33 of 14 March 2013 (Reorganization of the regulations concerning the right of access to public information and duties of disclosure, transparency, and dissemination of information by the public administrations), initiated by Division One-*quater* of the Regional Administrative Tribunal [*Tribunale amministrativo regionale*, or TAR] for Lazio, with a referral order of 19 September 2017, registered as no. 167 of the 2017 Register of Referral Orders and published in the Official Journal of the Republic no. 48, first special series of 2017.

Considering the appearance of R.A. and others, as well as the intervention of the President of the Council of Ministers;

having heard from Judge Rapporteur Nicolò Zanon during the public hearing of 20 November 2018;

having heard from counsel Micaela Grandi and Stefano Orlandi on behalf of R.A. and others and State Counsel Gianna Galluzzo on behalf of the President of the Council of Ministers.

[omitted]

Conclusions on points of law

1.– The TAR for Lazio, Division One-*quater*, questions the constitutionality of Article 14(1-*bis*) and (1-*ter*) of Legislative Decree no. 33 of 14 March 2013 (Reorganization of the legislation concerning the right of access to public information and the duties of disclosure, transparency, and dissemination of information by the public administrations).

The challenged provisions were inserted into Article 14 of Legislative Decree no. 33 of 2013 by Article 13(1)(*c*) of Legislative Decree no. 97 of 25 May 2016 (Revision and simplification of the provisions on corruption prevention, disclosure, and transparency, correcting Law no. 190 of 6 November 2012 and Legislative Decree no. 33 of 14 March 2013, pursuant to Article 7 of Law no. 124 of 7 August 2015, on the reorganization of the public administrations).

In particular, Article 14(1-*bis*) extends the duty to publish a set of information to all holders of managerial positions in the public administration, irrespective of the basis on which their position was assigned. These duties were already incumbent upon holders of political positions, elected or unelected, at the State, regional, and local levels under aforementioned Article 14(1) of Legislative Decree no. 33 of 2013.

The referring TAR challenges the provision in the part in which it states that the public administrations must disclose, with regard to all managers: remuneration of any and all kinds connected with their fulfillment of that role, covered expenses for business travel, and missions paid for with public funds (Article 14(1)(*c*)); the declarations and attestations in Articles 2, 3, and 4 of Law no. 441 of 5 July 1982 (Provisions for publication of the financial situation of holders of elected positions and of the managerial positions of some authorities), as well as declarations of income subject to the income tax on physical persons and of property rights over real property and moveable assets registered in public registers, company shares, and company quotas, including in relation to non-separated spouses and relatives up to the second degree, where these consent, with a duty to note the absence of consent where applicable (Article 14(1)(*f*)).

Only the final sentence of Article 14(1-*ter*) of Legislative Decree no. 33 of has been challenged, in the part in which it provides that the administration must disclose the total amount of all emoluments received by each manager that are paid out of public resources.

1.1.– The referring Tribunal claims that the specified provisions clash, first of all, with Article 117(1) of the Constitution, in relation to Articles 7, 8, and 52 of the Charter of Fundamental Rights of the European Union (CFR), proclaimed at Nice on 7 December 2000 and adapted at Strasbourg on 12 December 2007, to Article 8 of the European Convention on Human Rights (ECHR), signed in Rome on 4 November 1950, ratified and executed with Law no. 848 of 4 August 1955, to Article 5 of Convention no. 108 for the Protection of Individuals with regard to Automatic Processing of Personal Data, adopted at Strasbourg on 28 January 1981, ratified and executed with Law no. 98 of 21 February 1989, and to Article 6, paragraph 1, letter (*c*), Article 7(*c*), and (*e*), and Article 8, paragraphs 1 and 4 of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995, on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

The referring TAR stresses that these provisions establish principles of proportionality, pertinence, and non-excessiveness in the processing of personal data, principles confirmed, moreover, by the new rules for the protection of personal data under Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), thus defining the supranational frame of reference for all regulation of the relationship between the (private) need for the protection of such data and the (public) need for transparency.

It also underscores how the necessary protection of individuals with regard to the processing and free movement of personal data would be no obstacle to a national regulatory scheme that imposed the collection and disclosure of information related to the wealth and income of public managers, provided, however, that the dissemination of such data, to the extent it precisely and specifically refers to the employees' names, is necessary and appropriate for reaching the objectives of providing correct information to citizens and the sound management of public resources.

The Tribunal claims that the principles inferable from the European provisions are violated by the challenged regulatory scheme, not least of all because of the quantity of data to be disclosed and the way they are to be divulged, considering in particular that, under Articles 7-*bis* and 9 of Legislative Decree no. 33 of 2013, the administrations responsible for the online publication of data may not use filters or other technical solutions that may prevent web search engines from indexing them, or to make them unable to be consulted through them.

1.2.– The referring TAR also alleges that the provisions under Article 14(1-*bis*) and (1-*ter*) of Legislative Decree no. 33 of 2013 likewise contradict Article 3 of the Constitution, on two separate grounds.

In the first place, the principle of equality is allegedly violated by the fact that the duties to publish in question are binding upon all public managers, without distinction. The referring Tribunal observes that the regulatory provision thus equates managerial roles, which, "clearly, are not comparable to one another," in their "genesis, structure, functions, and State powers of reference."

The failure to differentiate between the managerial categories subject to the measure, for example on the basis of the administration they belong to, their classification, the functions they fulfill in the concrete, or the remuneration they receive is allegedly "an indication that the provision in question is not well calibrated," considering the wide range of managerial categories in place in the current system, as well as the associated diversity and broad extent of the segments of administrative power they exercise. According to the calculations of the *Agenzia per la Rappresentanza delle Pubbliche Amministrazioni* [Agency for the bargaining representation of the public administrations, ARAN], the measure implicates more than 140,000 managers, without taking into consideration the effective corruption risk involved in their particular functions, including the amount of public resources assigned to the office overseen by the interested individual.

The referring TAR also alleges that the principle of equality is violated by the fact that the challenged provisions equate public managers with holders of political positions. It underscores that subjecting both holders of public positions and managers to identical duties of disclosure, in light of the varying lengths of time that generally characterize the fulfillment of these two functions, would amount to a particularly invasive measure for the latter group, which would be subjected to the scheme in question for a time period corresponding to the entire duration of their employment relationship. For them it would be, unlike for holders of political positions, on par with a "living condition."

The referring TAR alleges that Article 3 of the Constitution is also violated on the grounds that the challenged regulatory scheme is inherently unreasonable. Online dissemination of an enormous amount of data could involve the risk that the data be altered, manipulated, or reproduced for purposes different from those that motivated their collection and processing, frustrating the need to provide authentic information and, therefore, the need for oversight, two needs which underlie the regulatory scheme.

The same way of disseminating data allegedly fails to pass the test of reasonableness and proportionality, concerning income and asset data (relative not only to managers, but also to their spouses and relatives up to the second degree, where they consent, or a note stating that consent was withheld), which are derived from income statements and are, thus, particularly detailed, without allowing the administrations responsible for publishing the data online to put filters and other technical solutions in place to prevent web search engines from indexing them or making it unable to be consulted through them, as mentioned above.

The referring Tribunal observes, with regard to this, that the "publication of massive quantities of data" does not automatically translate into facilitating a search for the information relevant for a given purpose, above all by individual citizens. On the contrary, it claims, it is plausible that individual citizens do not have access to effective tools for reading and computing superabundant, over-disclosed data.

1.3.– The provisions in question allegedly also contradict Articles 2 and 13 of the Constitution, on the grounds that the inviolable rights of the person and personal freedom are violated by duties to publish that may well work to meet the needs of administrative transparency, but are not suitable to prevent "the dissemination of sensitive data," which are, on the one hand, superfluous for the regulatory scheme's purposes and, on the other, "susceptible to distorting interpretations."

1.4.– Finally, the TAR for Lazio claims to "extend, on [its] own motion, under Article 23 of Law no. 87 of 11 March 1953" the described questions of constitutionality to include Article 14 (1-*ter*) of Legislative Decree no. 33 of 2013, limited only to the last

sentence, that is, to the part in which it provides that the public administrations must publish, on their own institutional websites, the overall amount of the emoluments received by each of their managers financed by public funds.
The referring Tribunal claims, indeed, that the object of the disclosures called for in the last sentence of the provision is an aggregated sum, which contains the information described in paragraph 1(*c*) of Article 14, and may, moreover, overlap entirely with it, in the event that a manager does not receive any emoluments aside from the remuneration for the position conferred upon him or her.
2.– As a preliminary matter, it bears noting that the referring Tribunal is aware of the fact that, since the challenged provisions deal with the on-line publication of income and asset information concerning managers in the public administrations (and their spouses and relatives up to the second degree), what emerges is a personal data processing scenario that falls under the regulatory authority of the law (first of the European Community, and now) of the European Union.
Moreover, the same referral order, alleging that the challenged provisions violate Article 117(1) of the Constitution, indicates rules of European law, primary and secondary, as interposed provisions. Indeed, it alleges that the right to private life, the right to the protection of personal data, and the principles of proportionality and pertinence, under Articles 7, 8, and 52 of the CFR and by Article 6, paragraph 1, letter *c*) and Article 7(*c*) and (*e*) of Directive 95/46/EC, have been violated.
At the same time, it also alleges that the legislative scheme clashes with internal constitutional parameters, claiming that it violates Article 3 of the Constitution on multiple grounds, as well as Articles 2 and 13 of the Constitution.
The referring Tribunal is, moreover, aware of the fact that, in cases like the one under review, the Court of Justice of the European Community (ECJ) – although it held, pursuant to a reference for a preliminary ruling, that Article 6(1)(*c*) and Article 7(*c*) and (*e*) of the aforementioned Directive 95/46/EC contain directly applicable rules – stated that the evaluation of the correct balancing between the right to the protection of personal data and the right to access data held by the public administrations had to be remitted to the referring court. The ECJ thus rejected the idea that said evaluation was definitively accomplished by European-level regulations (Judgment of 20 May 2003 in Joined Cases C-465/00, C-138/01, and C-139/0120, *Österreichischer Rundfunk and others*).
Against this backdrop, the referring TAR holds (at point 17 of the Referral Order) that the challenged domestic provisions are not subject to non-application "due to contradiction with European laws," on the grounds that there is no truly discernible self-executing regulatory scheme at the European level that applies to the present case.
The referring Tribunal states, in particular, that the principles of proportionality, pertinence, and non-excessiveness in the area of personal data processing (protected by European laws, both primary and secondary, which are indicated as interposed parameters) do not present themselves as provisions suitable for application to the present case, but rather as reference "criteria" for "assessing the conformity" of the challenged scheme, demonstrating that this operation is distinct from the mere application or non-application of a rule to the case.
Thus, the referring TAR denies that European law offers a solution to the present case and rejects the option of making a reference for a preliminary ruling, precisely because the Court of Justice, in an analogous case, remitted the evaluation of the correct balancing between two potentially conflicting rights (that of the protection of personal

data and that of access to data held by the public administrations) to a domestic court. Instead, it decided to raise questions of constitutionality concerning the provisions before it, holding that the evaluation of the balancing in question must necessarily fall to this Court.

2.1.– As framed above, the questions of constitutionality raised are admissible, on the specific grounds just examined.

This Court (in Judgment no. 269 of 2017) has already explained that the principles and rights laid down in the CFR largely overlap with the principles and rights guaranteed by the Italian Constitution (and by other Member States' constitutions), and that the former, therefore, amounts to "a part of Union law that is endowed with particular characteristics due to the typically constitutional stamp of its contents." It added that, without prejudice to the principles of primacy and of the direct effect of European Union law, it is necessary to consider the specific nature of situations in which, in an area of European-level importance, a law that impacts the fundamental rights of the person raises doubts concerning both its conformity with the Constitution and its compatibility with the CFR.

It concluded that in those cases (except for references for a preliminary ruling for questions on the interpretation or invalidity of European Union law, pursuant to Article 267 of the Treaty on the Functioning of the European Union (TFEU), as modified by Article 2 of the Treaty of Lisbon of 13 December 2007 and ratified by Law no. 130 of 2 August 2008) this Court's opportunity to intervene with *erga omnes* effect must be preserved, by virtue of the principle that places centralized review for constitutionality at the bedrock of the constitutional architecture (Article 134 of the Constitution), specifying that, in these cases, the Constitutional Court will make a judgment in light of internal constitutional provisions, and, if applicable, European ones as well (per Articles 11 and 117(1) of the Constitution), in accordance with whichever system is most appropriate to the specific case.

This orientation should be confirmed in the present case as well, in which principles and fundamental rights enshrined in the CFR intersect with principles and fundamental rights guaranteed by the Constitution, as explained below.

Moreover, among the interposed provisions concerning the alleged violation of Article 117(1) of the Constitution, the referring Tribunal, in addition to relying on CFR provisions, also refers to the principles of proportionality, pertinence, and non-excessiveness in the processing of personal data, provided for in particular in Article 6(1)(c) and Article 7(*c*) and (*e*) of Directive 95/46/EC.

This does not lead to any modification of the orientation described.

The principles laid out by the directive are marked, indeed, by a singular connection with the relevant provisions of the CFR, not only in the sense that they provide it with detail or implement it, but also in quite the opposite sense that they constituted the "model" for those rules and, therefore, they can be used as evidence of their nature, as expressed in the Explanations Relating to the Charter of Fundamental Rights. The "Explanation on Article 8 – Protection of personal data" states that, "[t]his Article has been based on Article 286 of the Treaty establishing the European Community and Directive 95/46/EC of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data […], as well as on Article 8 of the ECHR and on the Council of Europe Convention of 28 January 1981 for the Protection of Individuals with regard to Automatic Processing of Personal Data, which has been ratified by all the Member

States. […] The above-mentioned Directive and Regulation [(EC) no. 45/2001 of the European Parliament and of the Council] contain conditions and limitations for the exercise of the right to the protection of personal data."

2.2.– The admissibility of the questions raised, on the specific grounds now under examination, is also supported in light of the fact that the challenged legislative scheme, which extends the duties to publish data already in place for other subjects to all managers in the public administrations, operates – as mentioned above – in a space in which fundamental rights are connected (and sometimes even in visible tension with) with one another, rights and principles, which are contemporaneously protected both by the Constitution and by European law, both primary and secondary.

On the one hand, there is the right to the privacy of personal data, as a manifestation of the fundamental right to the inviolability of the private sphere (Judgment no. 366 of 1991), which relates to the protection of human life in its many facets. This right is referenced in the Italian Constitution (Articles 2, 14, and 15 of the Constitution) and has been recognized, in relation to many regulatory areas, in the case law of this Court (Judgments no. 173 of 2009, 372 of 2006, 135 of 2002, 81 of 1993, and 366 of 1991), and which receives specific protection under various European laws and conventions cited by the referring Tribunal. In the present day, it is characterized particularly as the right to control the movement of information concerning oneself, and it enjoys protections at the European level in the form of rules for evaluating the legitimacy of the collection, processing, and sharing of personal data. These consist of the aforementioned principles of proportionality, pertinence, and non-excessiveness, by virtue of which exceptions to and limitations on the protection of the privacy of personal data must operate within the limits of strict necessity, since it is essential to identify the measures that have the least possible impact on the fundamental right, while contributing to meeting the legitimate objectives underlying the collection and processing of the data.

On the other hand, and with equal import, are the principles of public access and transparency, which apply not only to all the relevant aspects of public and institutional life, as a corollary of the democratic principle (Article 1 of the Constitution), but also, pursuant to Article 97 of the Constitution, to the sound functioning of the administration (Judgments no. 177 and 69 of 2018, and no. 212 of 2017), and, for the part that is specifically relevant here, to the data that it possesses and controls. These principles, in domestic legislation, today tend to become, in terms of entitlements, a right of citizens to have access to data held by the public administration, as laid out in Article 1(1) of Legislative Decree no. 33 of 2013. In European law, the same inspiration led the right of access to documents held by the European authorities to be inserted among the "Provisions Having General Application" of the Lisbon Treaty, making the right of access to data a general principle of European law (Article 15(3)(1) TFEU and Article 42 CFR).

The rights to privacy and to transparency clash, above all in the new digital scene: a context in which, on the one hand, personal rights may be threatened by unchecked sharing of information but, on the other, it is precisely broader circulation of data that may best allow each person to communicate and gain information.

Therefore, the referring TAR is correct to point out the specific nature of the kind of review that must be applied to the legislative scheme it has been asked to apply, and to underscore that this review must be carried out by the Constitutional Court.

2.3.– The "first word" that this Court, per the explicit request of the referring Tribunal, shall pronounce on the challenged legislative scheme is, thus, more than justified by the constitutional import of the question and of the rights at stake.
The case remains that ordinary courts may refer any question they deem necessary concerning the same scheme to the Court of Justice of the European Union for a preliminary ruling.
In general, the supervening value of the guarantees set down by the CFR with respect to those of the Italian Constitution generates more legal remedies, enriches the tools for protecting fundamental rights, and, by definition, denies any restriction.
This Court must, therefore, express its own evaluation, above all in light of domestic constitutional provisions, on provisions which, like those at issue here, while remaining subject to regulation by European law, touch on principles and fundamental rights enshrined in the Italian Constitution and recognized by constitutional case law. One purpose of this is to make its own contribution to rendering effective the possibility, discussed in Article 6 of the Treaty on European Union (TEU), signed at Maastricht on 7 February 1992, entered into force on 1 November 1993, that the corresponding fundamental rights guaranteed by European law, and in particular by the CFR, be interpreted in harmony with the constitutional traditions common to the Member States, also mentioned by Article 52(4) of the CFR as relevant sources.
3.– Passing now to the merits of the questions raised in reference to Article 14(1-*bis*) of Legislative Decree no. 33 of 2013, the referring TAR alleges that the provision also clashes with several domestic constitutional provisions.
This Court, which has authority to determine the order in which to address the challenges (Judgments no. 148 and 66 of 2018), has decided to give priority to considering the questions of constitutionality raised in relation to Article 3 of the Constitution, brought up both on the grounds that the provision violates the principle of reasonableness, and on the grounds that it violates the principle of equality.
As mentioned above, this matter concerns the balancing between two rights: the right to the privacy of personal data, understood as the right to control the spread of information about oneself, and the right of citizens to have free access to the data and information held by the public administrations.
In evaluations of this kind, the judgment of reasonableness on legislative choices utilizes the so-called test of proportionality, which "requires an assessment as to whether the provision under review, along with the arrangements stipulated for its application, is necessary and capable of achieving legitimately pursued objectives by requiring that the measure chosen out of those most appropriate is the least restrictive of the rights in play and imposes burdens that are not disproportionate having regard to the pursuit of those objectives" (Judgment no. 1 of 2014, more recently cited by Judgments no. 137 of 2018, 10 of 2016, 272 and 23 of 2015, and 162 of 2014).
In the specific area in question, moreover, European case law follows the same interpretive coordinates.
3.1.– The CJEU has repeatedly confirmed that the requirements of democratic control cannot override individuals' fundamental right to privacy, since the principle of proportionality must always be respected, said principle having been dubbed a cornerstone of the protection of personal data. Exceptions to and limitations of the protection of personal data must, therefore, work within the limits of strict necessity, and before resorting to them, first the measures that effect the least possible violation of said fundamental right for individuals, and which, at the same time, effectively

contribute to achieving the conflicting objectives of transparency, to the extent that they are legitimately pursued, must be postulated (Judgments of 20 May 2003, in the Joined Cases C-465/00, C-138/01 and C-139/01, *Österreichischer Rundfunk and others*, and Judgment of 9 November 2010, in the Joined Cases C-92/09 and 93/09, *Volker und Markus Schecke and Eifert*).

In the latter case, in particular, the Court affirmed that no automatic priority may be conferred on the objective of transparency over the right to the protection of personal data (point 85).

The European legislator, influenced by the case law of the CJEU, launched a broad process of revision of the regulatory framework in the area of protection of personal data, concluding in the adoption of a single regulatory *corpus* of a general nature, in the form of Regulation no. 2016/679/EU. The Regulation entered into force after the facts occurred which gave rise to the constitutional questions at issue here, but was given due consideration by the referring Tribunal. It lays down the fundamental rules for the processing of personal data, a concept which also includes transmission, dissemination, or otherwise making data available (Article 4(1)(2)).

The principles which must govern data processing are enshrined in Article 5(1) of the aforementioned regulation (which contains a regulatory scheme that substantially overlaps with the one outlined in Article 6 of Directive 95/46/EC, mentioned above). The most significant of these are the limitation of the allowable purposes of data processing (letter *b*) and "data minimization," which amounts to the need to acquire only data that is adequate, pertinent, and limited to what is strictly necessary for processing purposes (letter *c*).

Again, a reference to the necessary balance between rights is found in the preamble to Regulation no. 2016/679/EU (recital no. 4), which states that, "[t]he right to the protection of personal data is not an absolute right; it must be considered in relation to its function in society and be balanced against other fundamental rights, in accordance with the principle of proportionality."

In conclusion, the European regulatory scheme, while recognizing a broad margin for autonomous regulation and specifying details to the Member States, with regard to certain types of data processing (including processing specifically linked to the exercise of the right of access to information: Article 86 of the Regulation), it imposes the principle of proportionality of the processing on them. This, as mentioned previously, is the core of the CJEU case law in this area.

In light of all of the above, the scrutiny surrounding the balancing point identified by the legislator on the issue of the publication of income and asset data pertaining to administrative managers must be carried out in keeping with the domestic constitutional provision cited by the referring Tribunal (Article 3), as supplemented by the principles of European extraction. These entail the duty for national legislation to respect the criteria of necessity, proportionality, purpose limitation, pertinence, and non-excessiveness in the processing of personal data, even in light of the need to guarantee, to the greatest extent tolerable, the publication of data held by the public administration.

4.– For purposes of carrying out review along these lines, it is useful to recall the regulatory evolution that led to the adoption of the challenged provision.

4.1.– Legislative Decree no. 97 of 2016 marks the endpoint of an evolutionary process that led to the affirmation of the principle of administrative transparency, which allows for widespread access to the information and the data held by the public administrations.

Law no. 241 of 7 August 1990 (New rules on administrative procedure and the right of access to administrative documents), as modified over time, for purposes of eliminating the traditional screen of administrative secrecy, regulated the right of access to administrative documents, forming it into a tool intended to protect people who have an interest in such a right, as against acts and measures by the public administration that have a bearing on their subjective sphere.

Thus a model of transparency was inaugurated, never to be abandoned, based on "accessibility," in which the data held by the public administration is not published, but may be accessed by subjects with an interest in it by means of certain procedures, based on the request for access and the acceptance or denial of the request by the administration.

This system was then supplemented, however, through progressive regulatory modifications, by a regime of "availability," on the basis of which all the data in the public administration's possession, except for data expressly excluded from the law, must mandatorily be made public and, therefore, made available to the general population.

In connection with this, Legislative Decree no. 150 of 27 October 2009 (Implementation of Law no. 15 of 4 March 2009, on optimizing the productivity of public work and the efficiency and transparency of the public administrations) offers a first definition of transparency, "understood as total accessibility, including through the tool of publication on the institutional websites of the public administrations […]" (Article 11(1)).

This form of transparency no longer focuses on administrative procedures, acts, and documents, but rather on the "information" relative to the administrative organization and the use of public resources, with particular reference to the remuneration of the managers and of those who hold political-administrative positions.

This model is confirmed by Law no. 190 of 6 November 2012 (Provisions for the prevention and suppression of corruption and illegality in the public administration), with which administrative transparency is elevated to the level of a principle-floodgate against the spread of corruption.

Nonetheless, the so-called "anticorruption law," in view of possible tensions between the needs of transparency, manifested in the forms of "total access" and protection of individual privacy, establishes general limits on the publication of information, which must indeed be done "in compliance with the provisions in the area […] of the protection of personal data" (Article 1(15)), and issued a mandate to the Government to adopt a legislative decree to reorganize the regulatory scheme concerning the duty to publish (Article 1(35)).

The Government exercised its mandate with its approval of Legislative Decree no. 33 of 2013, Article 1 of which describes purposes that repeat the ones laid out in Article 11(1) of Legislative Decree no 150 of 2009 (which was simultaneously repealed): in particular, the total access to information concerning the organization and activities of the public administrations, still guaranteeing the protection of personal data, now also intends to "favor diffuse forms of oversight concerning the pursuit of institutional functions and the use of public resources."

Finally, we reach the approval of Legislative Decree no. 97 of 2016, in which, despite reaffirming that transparency is understood as "total access," the legislator adjusts the reference to "information concerning the organization and activities of the public administrations," substituting it with a reference to "data and documents held by the

public administrations (Article 2 of Legislative Decree no. 97 of 2016, modifying Article 1(1) of Legislative Decree no. 33 of 2013)."
Moreover, the same update further extended the goals pursued through the principle of transparency, adding the purpose of "protecting the rights of citizens" and "promoting the participation of interested parties in administrative activities."
4.2.– How the aforementioned purposes of the regulations on transparency are pursued is of utmost importance, including for purposes of the present judgment.
On the basis of the general provisions of Legislative Decree no. 33 of 2013, the public administrations go forward adding the documents, information, and data subject to the duties to publish, which corresponds to anyone's right to immediately and directly access the sites without authorization or identification (Article 2(2)), to their institutional websites (in a designated section entitled "Transparent Administration").
All the documents, information, and data subject to mandatory disclosure are public, and anyone has the right to access them, free of charge, and to use and re-use them (Article 3(1)).
The public administrations may not use filters and other technical solutions that may to prevent search engines from indexing and perform searches within the "Transparent Administration" section (Article 9).
The duties to publish personal data that is "ordinary," as opposed to sensitive data and data related to legal proceedings (the latter two, as such, being exempt from the duties to publish), thus entail their dissemination through institutional websites, as well as their processing in such a way as to allow them to be indexed and searched through web search engines, as well as their reuse, in compliance with the principles on processing of personal data. In particular, the public administrations take actions to render irrelevant personal data unreadable (Article 7-*bis*(1)).
Thus, these methods of publication favor the broadest availability of the data held by the public administrations, including personal data. Concerning personal data, only sensitive data and data pertaining to legal proceedings are exempt from publication, by virtue of their sensitive nature, while for all other kinds of data the duty remains in place, and applies to whichever administration is interested at the time, to make data that is "not pertinent" for purposes of the regulations on transparency indecipherable.
It bears noting that, at issue in the present judgment on constitutionality, is a provision in which, on the contrary, the legislature made an evaluation, *ex ante* and once and for all, of the pertinence, with respect to those purposes, of the disclosure of certain personal data concerning the income and assets of the administrative managers and their close relatives. Therefore, it was the legislator to mandate the dissemination of the data described in letters *c*) and *f*) of section 1 of Article 14 of Legislative Decree no. 33 of 2013, making managers subject to the duty to publish under challenged section 1-*bis*, according to the methods just described.
This Court is, thus, tasked with deciding whether, and to what extent, this legislative choice fails to pass the test of proportionality, as described above.
5.– Framed in this way, the question is partly well founded, in the ways explained below, in alleging the violation both of the principle of reasonableness and the principle of equality, with limited application to the duty imposed on all holders of managerial positions, without any distinction between them, to publish the declarations and certifications described in Article 14(1)(*f*) of Legislative Decree no. 33 of 2013.
5.1.– In its original version, Article 14(1) of Legislative Decree no. 33 of 2013 required the relevant administrations to publish a series of documents and information, but this

obligation only applied to holders of political positions at the State, regional, and local levels. The documents and information to be published, in relation to these, were (and remain): a) the act of nomination or appointment, with an indication of the duration of the appointment or the elective mandate; b) the curriculum vitae; c) remuneration of any kind connected with the assumption of the position and the covered business travel expenses and missions financed with public funds; d) data related to the assumption of other roles, connected with public or private organizations, and the relative remuneration in whatever form it is received; e) any and all other roles financed with public funds and an indication of the remuneration due; f) the documents provided for under Article 2 of Law no. 441 of 1982, namely, for present purposes, a declaration concerning property rights to real property and assets in public registers, company shares and company quotas, and any exercise of the functions of an administrator or internal auditor of a company, as well as a copy of the last statement of income subject to income tax (*imposta sui redditi delle persone fisiche*, IRPEF), with obligations that extend to non-separated spouses and relatives up to the second degree, provided they consent and with the requirement that any lack of consent be specified.

Originally, these transparency obligations were directed at holders of positions ultimately justified by popular consensus, which explains the reason underlying such obligations: to permit citizens to verify whether the members of the representative political and government bodies at the State, regional, and local levels, starting from the moment they assume their roles, benefit from income and asset increases, including through their spouse or close relatives, and to see whether those increases are consistent with respect to the remuneration they receive for their various official roles.

The amendment brought about by Legislative Decree no. 97 of 2016 added five new paragraphs to Article 14 of Legislative Decree no. 33 of 2013, including the challenged one, which, for present purposes, extends the aforementioned duties of publication to the holders of management positions of any kind, including those appointed as an act of discretion by one of the political bodies without public selection procedures.

In this way, all of administrative management was removed from the disclosure regime instituted by Article 15 of Legislative Decree no. 33 of 2013 (which provided, for administrative managers, that only the remuneration they received, under any form, must be disclosed) and added to the orbit of the much more stringent transparency obligations that originally applied only to persons in positions of a political nature.

5.2.– In the name of important objectives of transparency in the exercise of public functions, and with a view toward transforming the public administration into a "glass house," the legislator may well grant tools of free access to pertinent information to anyone, "for purposes of protecting the rights of citizens, promoting the participation of interested persons in administrative activities, and fostering diffuse forms of oversight on the pursuit of institutional functions and on the use of public resources" (Article 1(1) of Legislative Decree no. 33 of 2013).

The fact remains, however, that the pursuit of these purposes must take place through the provision of duties to publish data and information, an awareness of which is reasonably and effectively linked to the exercise of oversight, both on the proper pursuit of institutional functions, and on the proper use of public resources.

For this reason, the questions of constitutionality raised in relation to the obligation imposed on all holders of managerial positions to publicize the data described at letter *c*) of Article 14(1) of Legislative Decree no. 33 of 2013, that is, the remuneration of any

kind linked with the assumption of their role, as well as the covered business travel expenses and missions financed through public funds, are unfounded.
The scheme in place before the update effected by Legislative Decree no. 97 of 2016 already envisaged the publication of the remuneration, in whatever form it may take, relative to managerial positions, precisely to facilitate the possibility of diffuse oversight on the part of the very recipients of the offerings and services provided by the administration, who are thus placed in the conditions to be able to assess, even on the grounds in question, how public resources are being used.
The regime of full access of this data is proportionate with respect to the ends pursued by the regulatory scheme on administrative transparency, and, in consequence, the alleged violation of Articles 3 and 117(1) of the Constitution, the latter in connection with all the cited interposed provisions, must be rejected.
Indeed, what is at issue here is allowing oversight, in a diffuse form, over the use of public resources and to allow for an assessment of the congruity – with respect to the results attained and the services offered – of those used for the remuneration of the individuals responsible, at every level, for the sound functioning of the public administration.
As concerns the remaining constitutional provisions referenced by the referring Tribunal (Articles 2 and 13 of the Constitution), even leaving aside the brevity of the reasoning used to support the challenges, it is unclear how the publication of such data could pose a threat to the safety or freedom of the interested parties, with resulting harm to their personal dignity. Indeed, at issue is the publication of remuneration or reimbursed expenses directly connected with the fulfillment of the managerial role.
It follows that the issues raised in reference to Articles 2 and 13 of the Constitution are also unfounded.
5.3.– The duties to publish indicated in letter *f*) of Article 14(1) of Legislative Decree no. 33 of 2013 are subject to a different conclusion, to the extent that paragraph 1-*bis* of the same Article lays them down, without any distinction, upon all holders of managerial roles.
It is now required, in their case as well as for holders of political positions, general publication of declarations and attestations containing data related to income and assets (both belonging to them and belonging to their close relatives) other than the remuneration and payment linked with their managerial duties.
In the first place, this data is not necessarily directly connected with carrying out the role entrusted to them. Rather, it offers an analytical representation of the personal financial circumstances of the interested parties and their closest relatives, without these transparency obligations being justified by citing the need to or the appropriateness of making an accounting to citizens of every aspect of one's financial and social situation, as is done in the case of persons in political positions, for purposes of maintaining the fiduciary relationship that fuels popular consensus during the fulfillment of their mandate.
Counsel for the State, in its briefs, defends the challenged provisions, stressing that, in reference to holders of managerial positions, the legislator has correctly adopted "broad and stringent" measures for purposes, above all, of opposing the phenomenon of corruption in the public administration, particularly in light of the many warnings about it that have come from the relevant international organizations as well as from the European Union itself, as well as the international reports that have labeled Italy one of

the countries in which the perception of corruption is highest (to be understood, also, as a lack of transparency).
This justification is plausible, but not conclusive.
State Counsel also rightly recalls that, by virtue of the many clauses guaranteeing protection of personal data under Legislative Decree no. 33 of 2013, the public administrations, in requiring their managers to transmit the data now under discussion for purposes of institutional disclosure, permit the blacking out of sensitive information and information relating to legal proceedings, as well as information deemed irrelevant for the intended purposes relating to transparency.
The authority which employs the appellants in the pending proceedings took these precautionary steps, having been asked to black out, in the income statement intended for publication, some data that was considered to be "in excess:" fiscal code; the choice of allocation of the eight and five per thousand of IRPEF; the sum of health expenses; the recapitulation of expenses; and the declarant's handwritten signature.
Nonetheless, an evaluation must be carried out to see whether and to what degree – excluding these operations of preventive skimming, even if imposed by law – indiscriminate access to the remaining, and still extensive, range of information and personal data relating to assets and income contained in the documents being published is necessary and proportionate to the ends pursued by the legislation on transparency.
Now, the challenged provision does not respond to the two conditions required by the test of proportionality: the imposition of obligations that are not disproportionate with respect to the ends pursued, and the choice of the measure that is least restrictive of the conflicting rights.
Thus, the indiscriminate imposition of the duty to publish a declaration containing an indication of all income subject to IRPEF, as well as property rights over real property and tangible assets registered in public registries, company shares and company quotas, and the exercise of the functions of administrator or internal auditor of a company (with obligations extending to non-separated spouses and relatives up to the second degree, provided these consent, and, in any case, requiring a statement noting the fact in the case that consent is denied) upon all holders of managerial positions violates Article 3 of the Constitution, first of all on the grounds of its intrinsic unreasonableness.
5.3.1.– The duty to publish in question is, first of all, disproportionate with respect to the chief end pursued here, that of fighting corruption in the public administration.
The provision requires the publication of a very considerable amount of personal data, considering the persons implicated: about 140,000 relevant persons (not counting spouses and relatives up to the second degree), according to calculations by ARAN, cited by the Data Protection Authority (in the opinion it issued on 3 March 2016 on the draft legislative decree that, following Government approval as Legislative Decree no. 97 of 2016, introduced the challenged provision).
The referring TAR is not wrong in pointing to the risk, associated with this volume of data, of frustrating the requirement of authentic information and, therefore, that of having oversight concerning the pursuit of institutional functions and the use of public resources, which form the basis of the laws on transparency.
Indeed, the publication of such massive quantities of data, in no way facilitates the search for information that is most relevant for set purposes (in our particular case, for purposes of having authentic information, for aims that include countering corruption) without the use of powerful processing tools, which it is not reasonable to suppose individual citizens have at their disposition.

On these grounds, the provision under review ends up being in contrast with the principle that, "the balance struck cannot result in a lower level of protection for a fundamental right without the counterweight of a corresponding increase in protection for other interests of equal standing" (Judgment no. 143 of 2013). In the present case, the undeniable constriction of the right to the protection of personal data does not correspond, *prima facie*, to a comparable increase in the protection of either the countervailing right of citizens to be correctly informed, nor the public interest in preventing and opposing corruption.

Quite to the contrary, the very authority responsible for fighting corruption, like the one responsible for the protection of personal data, points out that there is a risk of generating "haziness due to confusion," due precisely to the unreasonable failure to select, at the start, the information most appropriate for the pursuit of the legitimate objectives pursued.

The selfsame particular publication methods imposed by Legislative Decree no. 33 of 2013 also aggravate the disproportionate nature, already disproportionate in and of itself, of the duty to publish the data under discussion, to the extent it extends to the entire class of public managers.

The indexing and free searchability of the personal data published on the web, with the help of widely used search engines, is not consistent with the purposes of fostering a correct awareness of the conduct of public managers and of the ways in which public resources are being used. Rather, these forms of disclosure risk allowing the "random" retrieval of personal data, promoting, moreover, forms of research that are solely inspired by the need to satisfy mere curiosity.

This risk has been underscored in the case law of the European Court of Human Rights [ECtHR]. In light of the advancements of information technology and the increasing possibilities for personal data processing thanks to automation, the ECtHR has remarked on the close relationship between the protection of private life (Article 8 ECHR) and the protection of personal data, interpreting the latter, too, as the protection of personal autonomy from excessive meddling on the part of private and public subjects (ECtHR, Grand Chamber, judgments of 16 February 2000, *Amann v. Switzerland*, and 6 April 2010, *Flinkkilä and others v. Finland*).

In a landmark decision (judgment of 8 November 2016, *Magyar v. Hungary*), the Grand Chamber of the ECtHR observed that the interest underlying access to personal data for public interest purposes may not be reduced to "thirst for information" about the private lives of others ("The public interest cannot be reduced to the public's thirst for information about the private life of others, or to an audience's wish for sensationalism or even voyeurism", § 162).

5.3.2.– Likewise, under the second prong, that of necessarily choosing the measure that is least restrictive of the fundamental rights potentially in contrast with one another, the challenged provision fails to pass the proportionality test.

There are undoubtedly alternative solutions to the one here under review, as many as there are imaginable models and techniques for adequately balancing the opposing needs of privacy and transparency, both of which are worthy of adequate validation, and neither of which may be subjected to excessive restriction.

Some of these solutions (which are favored, incidentally, in other European systems) have been mentioned by the referring Tribunal. For example, the predetermination of income thresholds that must be exceeded in order to trigger the duty to publish; the dissemination of anonymous data; the publication, by name, of information released

gradually by bracket; and the simple registry of personal statements with the competent oversight authority.
This final solution, moreover, was the one adopted prior to Legislative Decree no. 97 of 2016, in the context of a regulatory scheme (Article 13(1) and (3) of Presidential Decree no. 62 of 16 April 2013, containing a "Regulation establishing a code of conduct for public employees, in compliance with Article 54 of Legislative Decree no. 165 of 30 March 2001," and still in force today), which requires holders of managerial positions to provide the administrations to which they belong with information about their income and assets, with the duty to update it annually, which would not, however, be made public (except upon authorized request) and, in any case, would not be disclosed by the methods provided in Legislative Decree no. 33 of 2013 and described above.
It is not for this Court to indicate the best solution for balancing the contradicting rights, since the choice of the tool considered to be most suitable falls within the broad discretion of the legislator.
Nevertheless, it is necessary to note, even at this stage (and in anticipation of a comprehensive revision of the regulatory scheme) that there is a clear disproportion in the existing regulatory mechanism with respect to the pursuit of the legitimately pursued ends, at least inasmuch as it applies, without any differentiation, to the entire class of persons who hold managerial positions.
5.4.– The challenged provision, as repeatedly stressed above, does not make any distinction within the category of administrative managers, binding them all to the duty to publish the specified data. The legislator does not envisage any differentiation relating to the relative level of decision-making or managerial power. And yet, it is clear that this level must necessarily have an influence on both the seriousness of the risk of corruption (which the provision itself, we may safely assume, is intended to prevent) and the resulting need for transparency and information.
Anticorruption legislation itself assumes distinctions among holders of managerial positions: Article 1(5)(*a*) of Law no. 190 of 2012, in fact, requires the central public administrations to define and submit a corruption prevention plan to the *Dipartimento della Funzione Pubblica* [Department of Civil Service], which provides, "an evaluation of the varying levels of exposure of the officials to the risk of corruption" and indicates "the organizational interventions intended to prevent that risk."
Against this backdrop, the referring Tribunal's repeated emphasis on the absence of any differentiation among managers clashes, at once, with the principle of equality and, again, with the principle of proportionality, which ought to guide every balancing operation between opposing fundamental rights.
Therefore, the legislator should have made distinctions relating to the degree to which each public position is exposed to the risk of corruption and to the sphere of the exercise of the related functions, accordingly providing for differentiated levels of invasiveness and completeness of the income- and asset-related information to publish.
With regard to holders of managerial positions, the National Anticorruption Authority (*Autorità Nazionale Anticorruzione*, ANAC), in its report no. 6 of 20 December 2017, suggested to the Parliament and the Government to make a regulatory modification effecting a graduated ranking of duties to publish, directly relating to the role, responsibilities, and post held by the managers.
Since, on the contrary, the challenged provision contains no such ranking, it violates Article 3 of the Constitution.

6.– At the same time, this Court cannot neglect to consider that a declaration of unconstitutionality that is limited to striking down the challenged provision's reference to the data indicated in Article 14(1)(*f*), would fail to take into account some constitutional principles that are worthy of protection.

There are transparency- and disclosure-related requirements that may not unreasonably be applied to subjects who have been given management positions of particular importance.

As State Counsel has observed, "it is precisely the fact that one is permanently in the service of the public administrations, with top-ranking management functions" that justifies the open regime, characterized by maximum transparency, for managers of public affairs.

Thus arises the need to identify which holders of managerial roles may be subject to the application of the provision, without the restriction of the protection of personal data occurring without an adequate justification, in violation of the principle of proportionality.

It is clear, in this regard, that the multiplicity of possible ways of classifying ranks and functions within the category of public managers, including in relation to the varying nature of the administrations to which they belong, prevents there from being selection that follows constitutionally mandatory criteria.

Indeed, this Court cannot, by means of "manipulative" rulings, be the one to re-design the overall, necessarily diversified, landscape of addressees of the duties relating to transparency and the methods for implementing them.

This falls to the legislator, in its discretion, and the Constitutional Court, in strict compliance with the limits on its capacity to intervene, cannot take its place.

Given this framework, it remains necessary to assure the guarantee of a minimum core of protection for the right to administrative transparency in relation to the personal data indicated by the challenged provision, in anticipation of the indispensible, comprehensive new action in this area by the legislator.

Therefore, Article 19 of Legislative Decree no. 165 of 30 March 2001 (General rules on labor regulations for employment by the public administrations), where it lists the positions with managerial functions, in paragraphs 3 and 4, contains regulatory indications that offer a provisional solution for the purposes described above.

These paragraphs identify two particular categories of managerial positions, those of the General Secretary of Ministries and of management of the various structures within them in general management offices (paragraph 3) and those with a management function of a general level (paragraph 4).

The competences that fall to the subjects that hold these positions, as listed in the preceding Article 16 of Legislative Decree no. 165 of 2001, illustrate that they carry out activities in connection with the bodies responsible for making political decisions, with which the legislator assumes the existence of a fiduciary relationship, to the extent that these positions are, by requirement, conferred upon nomination by the relevant minister.

Assigning these managers highly important duties (proactive, organizational, relating to management of human and material resources, and relating to expenditure) makes it not unreasonable, in the current context, to keep the duties to publish under discussion here with regard to those who fulfill such duties.

As mentioned previously, this Court must necessarily limit itself to eliminating the most clearly unreasonable aspects of the challenged provision, temporarily safeguarding the needs for transparency and access that are, *prima facie*, indispensible.

It falls to the legislator's responsibility, in the context of the urgent overall revision of the matter, both to potentially provide, for the same holders of managerial roles specified under Article 19(3) and (4), less invasive disclosure methods than the ones currently provided for by Legislative Decree no. 33 of 2013, and to satisfy the corresponding needs of transparency in relation to other types of managerial positions, in relation to all the public administrations, both at the State level and not.

In conclusion, Article 14(1-*bis*) of Legislative Decree no. 33 of 2013 must be declared unconstitutional, for violation of Article 3 of the Constitution, in the part in which it requires the public administrations to publish the data described in Article 14(1)(*f*) of that legislative decree with regard to all holders of managerial positions, irrespective of the basis on which their position was assigned, including those conferred by discretionary appointment by a political body without public selection procedures, rather than only for holders of the managerial positions described in Article 19(3) and (4) of Legislative Decree no. 165 of 2001.

All of the other grounds for alleged unconstitutionality are absorbed.

[omitted]

ON THESE GROUNDS

THE CONSTITUTIONAL COURT

1) *declares* that Article 14(1-*bis*) of Legislative Decree no. 33 of 14 March 2013 (Reorganization of the regulations concerning the right of access to public information and duties of disclosure, transparency, and dissemination of information by the public administrations) is unconstitutional, in the part in which it requires the public administrations to publish the data described in Article 14(1)(*f*) of the same legislative decree for all holders of managerial positions, irrespective of the basis on which their position was assigned, including those appointed as an act of discretion by one of the political bodies without public selection procedures, rather than only for holders of the managerial positions described in Article 19(3) and (4) of Legislative Decree no. 165 of 30 March 2001 (General rules on labor regulations for employment by the public administrations).

[omitted]

3) *declares* that the questions of constitutionality of Article 14(1-*bis*) of Legislative Decree no. 33 of 2013, in the part in which it requires the public administrations to publish the data described in Article 14(1)(*c*) of the same legislative decree for holders of managerial roles irrespective of the basis on which their position was assigned, including those appointed as an act of discretion by one of the political bodies without public selection procedures, in reference to Articles 2, 3, 13, and 117(1) of the Constitution, the last in relation to Articles 7, 8, and 52 CFR, Article 8 ECHR, Article 5 of Strasbourg Convention no. 108 of 1981, as well as Article 6(1)(c), Article 7(c), and (e), and Article 8(1) and (4) of Directive 95/46/EC, raised by Division One-*quater* of the TAR for Lazio with the Referral Order indicated in the Headnote, to be unfounded.

Decided in Rome, at the seat of the Constitutional Court, Palazzo della Consulta, on 23 January 2019.