

# **IT-TRIBUNAL DWAR SERVIZZI FINANZJARJI**

**Pierre Lofaro LL.D. – Chairman**  
**Francis X. Naudi F.I.A., C.P.A., A.M.I.T. – Membru**  
**Carmel L. Farrugia M.Sc. (Econ) Lond, B.Sc., F.C.M.A., F.C.I.S., C.P.A. –Membru**

**Ilum, 22 ta' Marzu 2010.**

**Vito Aufieri**

**Vs.**

**L-Awtorità Ghas-Servizzi  
Finanzjarji ta' Malta**

**Id-deċizjoni tat-tribunal wara l-appell intavolat mis-Sur Vito Aufieri permezz ta' rikors li t-tribunal irċieva fil-11 ta' Ġunju 2009.**

## **L-Appell tas-Sur Vito Aufieri**

1. Ir-rikors ta' l-appell tas-Sur Vito Aufieri jaqra hekk :

“That Supervisory Council of the Malta Financial Authority (sic), in a letter to the applicant dated 19<sup>th</sup> May 2009 has decided not to waive the condition which precludes the same applicant from collecting or holding any money, which condition is currently inserted in his licence to act as a ‘Tied Insurance Intermediary’ on behalf of Middlesea Insurance through Allcare Insurance Agency Ltd.

That the applicant feels aggrieved by this decision and is consequently applying to this board so as reverse and revoke the above mentioned decision under the relevant law and consequently allow the applicant the faculty to collect or hold insurance monies in relation to policies of insurance as he was allowed to do prior to him surrendering his licence on October 2006 and this for the following reasons:

Facts of the Case:

1. That the applicant used to act (recte: as) a Sub-Agent for Rausi Insurance Agency Limited selling policies from an agency in Gozo and Malta as duly authorised by the MFSA;
2. That in the year 2006 Mr Jovin Rausi claimed that Mr Vito Aufieri owed his company a considerable amount of money allegedly coming from the sale of policies which allegedly where (sic) not passed on to his company;
3. That the amounts being requested by Mr Jovin Rausi where (sic) never actually identified and the amounts fluctuated from time to time as in one letter he claimed circa Lm60,000 and in another he claimed Lm12,000;
4. That the applicant has always stated that the monies claimed by Rausi were not due and on the 5<sup>th</sup> of October 2006 the same applicant voluntarily surrendered his sub-agency certificates as he was determined to solve the problem;
5. That in fact, on the 12<sup>th</sup> of April 2006, MFSA officers performed a compliance visit at the premises of the applicant. On the 23<sup>rd</sup> of August 2006 the applicant was asked to prepare a reconciliation exercise by not later than the 15<sup>th</sup> of September 2006 (3 weeks later) so as to see if the claims of Jovin Rausi where (sic) in fact founded;
6. In fact the applicant spent much time and effort (both physical and financial) and with little help from the accounts department of Rausi Insurance my same client managed to finalise the requested reconciliation in time;
7. That this reconciliation actually shows that unless Rausi Insurance Agency Limited has any documentation to show otherwise, the applicant had been actually overcharged for the years covering 2002 to 2005 which documents have never been handed to the applicant;
8. That the applicant was always of the opinion that this situation was brought about because the documents the applicant was handling to the main office of Rausi in Ta' Xbiex were not being taken care of properly by Rausi's employees. In fact proposal forms were being registered

months later from the time of inception. This was brought to the attention of the applicant when clients were complaining of the fact that they were not receiving a renewal notice and their name was not showing in the system;

9. That today over three years have passed and Mr Jovin Rausi has never brought forward any of the requested documentation or any court case so as for him to receive the monies he is claiming;
10. That in view of this the applicant has re-applied for his licence as a 'Tied Insurance Intermediary' and in fact such was issued on the 30th June 2008 however the following statement was included in the enrolment letter: *'Please be advised that until such time that the current dispute which you have with your former insurance principal is resolved, you will not be authorized to collect or hold insurance monies in relation to policies of insurance solicited on the company's behalf.'*

#### **The decision of the competent authority is manifestly unfair**

It is clear that the decision of the authority not to allow the applicant from collecting or holding any insurance monies is based on the fact that Mr Jovin Rausi of Rausi Insurance Agency Limited is claiming that the applicant, during the period of his sub-agency agreement, failed to pass on funds deriving from sales of insurance policies.

The reconciliation process order (recte: ordered) by the authority showed that the claim of Rausi Insurance Agency was actually unfounded and it resulted that, if anything, it was the applicant who was owed money by Rausi and not vice-versa, and this due to overcharging by the same Rausi Insurance Agency.

Mr Rausi was solicited numerous times to substantiate his claim with the applicant, however this was never done and instead Mr Rausi has claimed various substantial amounts of Maltese Lira without any supporting evidence. Mr Rausi claimed circa Lm60,000 and then reduced his claim to circa Lm12,000 as can be seen from the supporting documentation of this application.

Mr Rausi never sought a judicial remedy in regard to his claim and consequently one wonders the veracity of his claim and this also in the light of the findings of the reconciliation process ordered by the same MFSA.

To prove that the claim brought forward by Mr Rausi is truly unfounded the applicant was also considering opening a Jactitation Suit in court whereby the applicant would ask in this case, Rausi Insurance Agency, to bring forward their action against the applicant within a time period to be decided by the same Court and failing which, Rausi Insurance Agency would be condemned to

perpetual silence on the matter. My client could not file this suit as the time period required by law to open such a suit had lapsed and such case would be futile.

Consequently, in the light of the above it is clear that the condition imposed by the Authority not to collect or hold insurance monies in relation to policies of insurance solicited on the company's behalf is manifestly unfair and it is based on a mere claim which has never been substantiated with any supporting documentation and which has been discredited by a reconciliation process ordered by the same authority and as a consequence my client is suffering damages and reserves the right to proceed according to law.

### **Request**

THE Applicant calls upon this board so as (recte: to) reverse and revoke the above mentioned decision of the Supervisory Council of the Malta Financial Services Authority dated 19<sup>th</sup> May 2009 and consequently allow the applicant the faculty to collect or hold insurance monies in relation to policies of insurance as he was allowed to do prior to his voluntary surrendering of his licence on October 2006 and this under those other conditions it may deem fit and appropriate.”

## **Ir-Risposta ta' L-Awtorità Ghas-Servizzi Finanzjarji ta' Malta**

### **2. L-Awtorità Ghas-Servizzi Finanzjarji ta' Malta wiegbet hekk :**

#### **“1. Preliminary Submissions**

- i) The grounds on which a person may appeal to this Tribunal are limited and are expressly listed in article 50(2) of the Insurance Intermediaries Act. Re-consideration of a prior decision taken by the Authority is not one of these grounds.
- ii) In terms of the said article 50(2) of the Insurance Intermediaries Act, the decision from which the appellant could have appealed was the imposition of a condition concurrently with his enrolment. Article 21(8) of the Malta Financial Services Authority Act (rendered applicable by virtue of article 50(1)(b) of the Insurance Intermediaries Act) provides that an appeal from a decision of the Authority is to be made “...*not later than thirty days from the date the decision or act in question has been notified to the aggrieved person...*”. The enrolment was granted to the appellant on the 30<sup>th</sup> June 2008, while the appellant's appeal was received by this Tribunal on the 11<sup>th</sup> June 2009, almost a year later, and is therefore clearly time-barred.

- iii) Furthermore, article 21 of the Malta Financial Services Authority Act also provides that the question for the determination of the Tribunal shall be whether, for the reasons adduced by the appellant:
  - (a) the competent authority has, in its decision wrongly applied any of the provisions of this Act; or
  - (b) the decision of the competent authority constitutes an abuse of discretion or is manifestly unfair;  
The Authority's discretion may not, so long as it has been exercised properly, be queried by the Tribunal.
- iv) Accordingly, the Authority submits that this appeal is procedurally unsound and invalid and should be rejected.

## **2. Submissions on the merits**

- i) Without prejudice to the above, the Authority strongly rejects the appellant's claim that its decision to enrol him as a Tied Insurance Intermediary conditionally is based on any third party claims or allegations.
- ii) In fact, in their application to enrol the appellant as a Tied Insurance Intermediary dated 25<sup>th</sup> May 2008 (copy attached and marked as Doc. A), the appellant's new principals Middlesea Insurance plc and Allcare Insurance Agency Ltd had themselves imposed the specific condition that the appellant was not authorized to hold premiums on their behalf. The Authority merely proceeded to further define this condition so as to preclude the appellant from also collecting such premiums.
- iii) In so doing, the Authority acted within its legal powers in terms of article 37(8) of the Insurance Intermediaries Act, which assigns to the Authority the discretion to subject registration or enrolment to "...*such conditions as it may from time to time deem fit to impose.*" This condition was imposed in order to further safeguard consumers in view of the fact that a reconciliation of accounts between the appellant and his ex-principals Rausi Insurance Agency Ltd was still a point of dispute and controversy.
- iv) The Authority's decision to further restrict the appellant's enrolment was communicated to the appellant's new principals Middlesea Insurance plc and Allcare Insurance Agency Ltd by means of a letter dated 23<sup>rd</sup> June 2008, and in turn the appellant's new principals specifically communicated their agreement with this additional restriction by means of e-mails dated 30<sup>th</sup> June 2008 (copy attached and marked as Doc. B).
- v) Moreover, and in addition to the above, it should be noted that following a compliance visit effected by the Authority on the 12<sup>th</sup> April 2006 at the appellant's offices, the Authority expressed its serious concern in writing to the appellant that clients' monies amounting to € 34,940.60 (Lm 15,000) had been deposited in the account of Freight Services Ltd, a company in which the appellant holds shares and acts as director. Furthermore, the Authority's

compliance officers also established that policyholders' monies were not kept separate from the appellant's own monies, notwithstanding the clear instructions of the then principal (Rausi) that policyholders' monies should be deposited directly in the principal's account.

- vi) While this situation was subsequently rectified, the Authority strongly feels that such conduct reflects poorly on the appellant's fitness and properness, and, also more specifically, falls short of the requirements of paragraph 5 of the 1<sup>st</sup> Schedule to Insurance Intermediaries Directive 7 of 1999, the Rules in force at the time. These set out accounts and financial aspects that insurance intermediaries were obliged to respect.
- vii) The Authority therefore submits that, on the merits, and in the light of the facts as outlined above, its decision to impose such a condition in terms of article 37(8) of the Insurance Intermediaries Act is correct, proportionate, legally sound and justified.

Accordingly, and for the reasons explained above, the Authority respectfully asks this Tribunal to reject the appellant's requests, with all legal costs to be borne by the said appellant."

## **L-Appell In Suċċint**

3. L-appellant qiegħed jitlob li dan it-tribunal iregġgħa lura u jirrevoka d-deċiżjoni tal-Kunsill ta' Sorveljanza ta' l-Awtorità għas-Servizzi Finanzjarji ta' Malta (l-Awtorità) datata 19 ta' Mejju 2009 u konsegwentement jippermetti li l-appellant ikollu l-fakoltà li jiġbor u jżomm '*insurance monies*' relatati ma poloz ta' assigurazzjoni kif kien lilu permess qabel ma huwa volontarjament ċeda l-liċenza tiegħu f'Ottubru 2006 u dan taht dawk il-kundizzjonijiet l-oħra li dan it-tribunal jidhirlu xierqa u opportuni.

## **Il-Fatti Saljenti**

4. Il-fatti saljenti li rriżultaw huma s-segwenti:
  - 1) L-appellant, kif debitament awtorizzat mill-Awtorità, kien sotto aġent ta' Rausi Insurance Agency Limited.
  - 2) Fl-2006 inqala disgwid bejnu u Rausi Insurance Agency Limited, liema disgwid għadu sa llum ma ġiex riżolt.

- 3) Fil-5 ta' Ottubru 2006 l-appellant volontarjament ċeda l-liċenza tiegħu *“as he was determined to solve the problem”*<sup>1</sup>.
- 4) *Stante* li d-diżgwid bejn l-appellant u Rausi Insurance Agency Limited baqa ma ġiex riżolt l-appellant reġgħha applika għal liċenza bħal dik li kien ċeda.
- 5) L-Awtorità ħarġitlu din il-liċenza fit-30 ta' Gunju 2008, dan pero bis-segwentu kundizzjoni:

*‘Please be advised that until such time that the current dispute which you have with your former insurance principal is resolved, you will not be authorised to collect or hold insurance monies in relation to policies of insurance solicited on the company’s behalf.*

- 6) Il-liċenzja b'din il-kundizzjoni giet komunikata mill-Awtorità lill-Middlesea Insurance p.l.c u Allcare Insurance Agency Ltd permezz ta' ittra datata 2 ta' Lulju 2008 (Doc. Z1). Da parti tagħha Middlesea Insurance p.l.c. għarrfet lill-appellant bil-liċenzja mahruġa lilu mill-Awtorità kif soġġetta għall-imsemmija kundizzjoni permezz ta' ittra datata 9 ta' Lulju 2008 (Doc. Z2)<sup>2</sup>.
- 7) L-appellant beda jipprova jipperswadi, dejjem mingħajr suċċess, lill-Awtorità sabiex tneħħilu din il-kundizzjoni. Hekk, per eżempju, fit-28 ta' Novembru 2008, l-Awtorità kitbet lill-appellant fejn qaltu

*‘Reference is made to your letter dated 16<sup>th</sup> November 2008.*

*The contents of your letter have been given due consideration. The Authority is however not aware of any new circumstances which elicit the removal of the condition to which your enrolment in the Tied Insurance Intermediaries List to act as Tied Insurance Intermediary for and on behalf of Middlesea Insurance plc through Allcare Insurance Agency Ltd has been subjected*<sup>3</sup>.

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<sup>1</sup> Ara l-paragrafu 4 taht l-intestatura ‘Facts of the case’ tar-rikors ta’ l-Appell, liema rikors ġie riprodott *in toto* fil-paragrafu 1 *supra*.

<sup>2</sup> Id-Dokumenti Z1 u Z2 ġew esibiti mill-Awtorità man-nota ta’ sottomissjonijiet tagħha tas-27 ta’ Novmbru 2009.

<sup>3</sup> Din l-ittra giet esibita mill-appellant mar-rikors ta’ l-appell.

- 8) Ittra simili, din id-darba datata 19 ta' Mejju 2009, reġghet intbaghtet mill-Awtorità lill-appellant. Fiha ntqal hekk:

*'Reference is made to your email message of the 12<sup>th</sup> May 2009.*

*The Supervisory Council has thoroughly considered the issues raised in your email of the 12<sup>th</sup> May 2009. The Supervisory Council has directed me to inform you that no new circumstances have come to its attention that merits a waiver of the condition to which your enrolment in the Tied Insurance Intermediaries List to act as Tied Insurance Intermediary, for and on behalf of Middlesea Insurance plc through Allcare Insurance Agency Ltd has been subjected.*

*You should endeavour to arrange a meeting with your ex-principal so as to try to resolve this matter to the satisfaction of both parties concerned.*

*You may wish to provide a copy of this letter to the person / entities that were copied with your email of the 12<sup>th</sup> May 2009<sup>4</sup>.*

- 9) Huwa proprju minn din l-aħħar deċiżjoni illi l-appellant qiegħed jappella.

### **L-Eċċezzjonijiet Preliminari ta' L-Awtorità**

5. Il-partijiet qablu li t-tribunal għandu l-ewwel jiddeċiedi l-eċċezzjonijiet preliminari sollevati mill-Awtorità<sup>5</sup>.
6. In linea preliminari l-Awtorità appellata eċipiet:
- a) Illi din id-deċiżjoni tagħha mhijiex appellabbli għaliex ma tinkwadrax ruħha f'xi waħda miċ-ċirkostanzi kkontemplati fl-artikolu 50(2) ta' l-Att dwar l-Intermedjarji fl-Assigurazzjoni (Kap. 487).
  - b) Illi l-appell sar *fuori termine stante* li għaddew aktar "minn tletin jum mid-data li d-deċiżjoni jew l-azzjoni fil-kwistjoni tkun

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<sup>4</sup> Din l-ittra giet esibita mill-appellant mar-rikors ta' l-appell.

<sup>5</sup> Ara f'dan ir-rigward, *inter alia*, il-verbal tas-seduta ta' l-lum stess.



*giet notifikata lill-persuna aggravata*” – artikolu 21(8) ta’ l-Att dwar l-Awtorità għas-Servizzi Finanzjarji ta’ Malta (Kap. 330).

c) *Di piu*, skond l-istess artikolu 21(9) tal-Kap. 330:

‘It-talba għad-deċizzjoni tat-Tribunal għandha tkun, għar-raġunijiet miġjuba mill-appellant –

- a) jekk l-awtorità kompetenti tkunx, fid-deċizzjoni tagħha, applikat hazin xi waħda mid-disposizzjonijiet ta’ dan l-Att; jew
- b) jekk id-deċizzjoni ta’ l-awtorità kompetenti tikkostitwix abbuż ta’ diskrezzjoni jew tkunx ingusta manifestament:

Iżda d-diskrezzjoni ta’ l-awtorità kompetenti ma tistax, sakemm tkun giet eżerċitata b’mod xieraq, tkun mistoqsija mit-Tribunal’.

## **Id-Disposizzjonijiet tal-Liġi rilevanti**

7. Id-disposizzjonijiet rilevanti tal-liġi sabiex jiġu determinati dawn l-eċċezzjonijiet preliminari huma s-segwenti:

a) Is-sub-artikoli (2) u (3) ta’ l-artikolu 50 ta’ l-Att dwar l-Intermedjarji fl-Assigurazzjoni (Kap. 487) li jgħidu:

‘(2) Bla ħsara għad-disposizzjonijiet ta’ dan l-artikolu, kull persuna jew kumpannija li tħossha aggravata b’deċizzjoni ta’ l-awtorità kompetenti –

- (a) li tirrifjuta li tirregistra jew tiskrivi applikant taht l-artikolu 13 jew 41;
- (b) li timponi xi kondizzjoni fuq, jew sussegwenti għal, registrazzjoni u iskrizzjoni taht l-artikolu 13 jew 37;
- (c) li tħassar l-isem ta’ persuna mir-Registru ta’ l-Aġenti, mir-Registru tal-*Managers* jew mir-Registru tal-*Brokers* jew ta’ persuna iskritta mil-Lista ta’ l-Aġenti, mil-Lista tal-*Managers* jew mil-Lista tal-*Brokers* taht l-artikolu 16;

- (d) li tirrifjuta li tirrestitwixxi l-isem ta' persuna fir-Registru ta' l-Aġenti, fir-Registru tal-*Managers* jew fir-Registru tal-*Brokers* jew ta' persuna iskritta fil-Lista ta' l-Aġenti, fil-Lista tal-*Managers* jew fil-Lista tal-*Brokers* taht l-artikolu 18(2);
- (e) li tirrifjuta li tirreġistra xi *underwriting agreement* taht l-artikolu 32;
- (f) li tħassar l-isem ta' persuna mil-Lista ta' l-Intermedjarji Marbuta fl-Assigurazzjoni skond l-artikolu 40(3)(b);
- (g) li tehtieg kumpannija awtorizzata taht l-Att dwar il-Kummerċ ta' l-Assigurazzjoni li tħassar l-isem ta' persuna mir-Registru tal-Kumpanniji għall-Intermedjarji Marbuta fl-Assigurazzjoni ta' xi kumpannija taht l-artikolu 41;
- (h) li toħroġ xi avviż jew tagħmel xi ordni taht l-artikolu 44A;
- (i) li timponi penali amministrattiva dwar infrazzjonijiet kif jista' jiġi ordnat taht l-artikolu 3,

tista' tappella kontra d-deċiżjoni lit-Tribunal li jkollu l-kompetenza esklużiva li jisma' appelli fuq il-ħwejjeġ imnizzlin f'dan is-sub-artikolu.

- (3) Appell taht dan l-artikolu jista' jsir biss fuq il-baži ta' xi waħda minn dawn li ġejjin:
  - (a) l-awtorità kompetenti tkun applikat hażin xi waħda mid-disposizzjonijiet ta' dan l-Att; jew
  - (b) id-deċiżjoni ta' l-awtorità kompetenti tikkostitwixxi abbuż ta' diskrezzjoni jew li tkun manifestament iġusta, iżda d-diskrezzjoni ta' l-awtorità kompetenti ma tistax, la darba tkun giet eżerċitata b'mod xieraq, tkun mistħarrġa mit-Tribunal.

b) Is-subartikolu (8) ta' l-artikolu 21 ta' l-Att dwar l-Awtorità għas-Servizzi Finanzjarji ta' Malta (Kap. 330)<sup>6</sup> li jgħid:

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<sup>6</sup> Reż applikabbli għall-Kap. 487 permezz ta' l-artikolu 50(1)(b) ta' l-istess Kap. 487.

- (8) Appell magħmul skond id-disposizzjonijiet tas-subartikolu (9) lit-Tribunal għandu jsir bil-miktub fejn jiġi spjegat ċar il-motiv għal dak l-appell sa mhux iktar tard minn tletin jum mid-data li d-deċiżjoni jew l-azzjoni fil-kwistjoni tkun giet notifikata lill-persuna aggravata, u t-Tribunal għandu jittratta kull kwistjoni quddiemu bl-akbar urġenza u għandu jagħti d-deċiżjoni tiegħu minghajr dewmien.

## **Konsiderazzjonijiet tat-Tribunal**

8. Minn eżami akkurat ta' dawn id-disposizzjonijiet it-tribunal jasal għall-konklużjoni illi l-eċċezzjonijiet preliminari ta' l-Awtorità jimmeritaw li jiġu milqugħa.
9. Is-sub-artikoli (2) u (3) ta' l-artikolu 50 tal-Kap. 487 jillimitaw iċ-ċirkostanzi li fihom persuna jew kumpannija li tħossha aggravata b' deċiżjoni ta' l-Awtorità tista tappella lil dan it-tribunal. Appell jista jiġi ntavolat biss fil-każijiet elenkati fis-sub-artikolu (2) u *di piu* dan biss fuq il-bażi ta' dak li hu kkontemplat fis-sub-artikolu (3). Il-każ ta' l-appellant ma jinkwadrax ruħu fl-ebda waħda miċ-ċirkostanzi kontemplati fis-subartikolu (2) ta' l-artikolu 50 tal-Kap. 487, liema ċirkostanzi la jistgħu jiġu imgebbda u l-anqas imtawla. L-argument ta' l-appellant illi s-sub-artikolu (3) għandu jinqara b' mod indipendenti mis-sub-artikolu (2) fis-sens li jista jsir appell minn kull deċiżjoni ta' l-Awtorità f'każ li tkun applikat hażin xi waħda mid-disposizzjonijiet tal-Kap. 487 jew li d-deċiżjoni tagħha tikkostitwixxi abbuż ta' diskrezzjoni jew tkun manifestament ingusta huwa fil-fehma ta' dan it-tribunal infondat. Dan għaliex huwa ċar illi s-sub-artikolu (3) huwa intrinsikament marbut u jirreferi biss għas-sub-artikolu (2) fis-sens li l-kompetenza ta' dan it-tribunal mhijiex biss limitata għall-każijiet elenkati fis-sub-artikolu (2) iżda tali limitazzjoni tkompli terġa tiġi limitata b'dak li jiddisponi s-sub-artikolu (3).
10. Dwar il-kwistjoni jekk l-appell giex intavolat fil-hin jew le, it-tribunal jinnota illi l-kundizzjoni lamentata mill-appellant giet imposta f'Gunju 2008 u giet komunikata lilu f'Lulju ta' l-istess sena. L-appellant ma appellax a bażi tar-rimedju provdut lilu bl-artikolu 50(2) (b) tal-Kap.487 iżda għazel minflok li jitlob lill-Awtorità, u dan għal diversi drabi, sabiex tneħhi il-kundizzjoni *de quo*. L-Awtorità kull darba u dejjem għall-istess

raġuni ċaħdet it-talba, inkluż fl-aħħar okkażżjoni permezz ta' l-ittra datata 19 ta' Mejju 2009 li a bażi tagħha gie intavolat dan l-appell.

11.L-artikolu 21(8) tal-Kap. 330 huwa ċar fis-sens li jgħid li appell lil dan it-tribunal għandu jiġi ntavolat “*sa mhux iktar tard minn tletin jum mid-data li d-deċiżjoni jew l-azzjoni fil-kwistjoni tkun giet notifikata lill-persuna aggravata*”. Din id-disposizzjoni tiġi reża bla ebda effett jekk persuna / kumpannija aggravata ma tappellax mill-ewwel u jiġi ammess appell intavolat fi żmien tletin ġurnata minn meta l-Awtorità tiċhad talba għal rikonsiderazzjoni tad-deċiżjoni originali tagħha.

Deċide

12.Għal dawn ir-raġunijiet it-tribunal, wara li jilqa l-eċċezzjonijiet preliminari ta' l-Awtorità appellata, jirrespingi l-appell tas-Sur Vito Aufieri bl-ispejjeż kontra tiegħu.