Corte costituzionale

ORDER NO. 173 OF 2009

Francesco AMIRANTE, President

Gaetano SILVESTRI, Author of the Judgment

JUDGMENT NO. 173 YEAR 2009

In this case the Court considered certain provisions of the Code of Criminal Procedure which required the destruction of media containing information obtained unlawfully, to be ordered following a pre-trial hearing which the parties do not necessarily need to attend and in which the right to make representations is not fully guaranteed, providing moreover that, for the purposes of the main proceedings, that evidence of the unlawful recordings be discovered in the form of a summary report which simply takes note of the unlawful conduct and lists the persons involved, without however making any reference to the content of the material. Weighing up the various constitutional interests in play, the Court held that "the goal of assuring the inviolable right to the confidentiality of correspondence and of every other means of communication … does not justify the excessive limitation on the rights to a defence and to take court action, as well as on the principle of a fair trial". It therefore ruled the contested provisions partially unconstitutional, holding that, whilst it could not strike down the provisions as unconstitutional *in toto*, it could require that the parties be guaranteed the right to make representations, and that more information be made available to the trial court in order to ensure that the principle of a fair trial was respected .

THE CONSTITUTIONAL COURT

composed of: President: Francesco AMIRANTE; Judges: Ugo DE SIERVO, Paolo MADDALENA, Alfio FINOCCHIARO, Alfonso QUARANTA, Franco GALLO, Luigi MAZZELLA, Gaetano SILVESTRI, Sabino CASSESE, Maria Rita SAULLE, Giuseppe TESAURO, Paolo Maria NAPOLITANO, Giuseppe FRIGO, Alessandro CRISCUOLO, Paolo GROSSI,

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Article 240(3), (4), (5) and (6) of the Code of Criminal Procedure, as amended by Article 1 of decree-law No. 259 of 22 September 2006 (Urgent provisions to reform the legislation governing telephone surveillance), converted into law, with amendments, by law No. 281 of 20 November 2006, commenced by the judge for preliminary investigations of the *Tribunale di Milano* by the

referral order of 30 March 2007, by the judge for preliminary investigations of the *Tribunale di Vibo Valentia* by the referral order of 21 May 2007 and by the judge for preliminary investigations of the *Tribunale di Milano* by the referral order of 13 December 2007, registered respectively as No. 508 in the Register of Orders 2007 and as Nos. 50 and 84 in the Register of Orders 2008, published in the *Official Journal of the Republic* No. 27, first special series 2007 and Nos. 11 and 15, first special series 2008.

Having heard the Judge Rapporteur Gaetano Silvestri in chambers on 22 April 2009.

The facts of the case

1. – The judge for preliminary investigations of the *Tribunale di Milano* raised, by referral order of 30 March 2007 (No. 508 of 2007) – with reference to Articles 24(1) and (2), 111(1), (2) and (4) and 112 of the Constitution – a question concerning the constitutionality of Article 240(3), (4), (5) and (6) of the Code of Criminal Procedure, as amended by Article 1 of decree-law No. 259 of 22 September 2006 (Urgent provisions to reform the legislation governing telephone surveillance), converted into law, with amendments, by law No. 281 of 20 November 2006.

The referring judge is seized of interlocutory proceedings commenced by the public prosecutor, applying the contested provisions, seeking the destruction of the digital media containing information obtained unlawfully, which had been seized and retained by the public prosecutor, with the production for the hearing of paper documents describing the information collected.

The main hearing concerns the associative relationship allegedly established between individuals in various professional spheres: directors and employees of companies from a group operating in the telecommunications sector, directors and employees of private investigation agencies who are or have been members of the *Carabinieri*, the *Guardia di Finanza* [Tax Police], the *Polizia di Stato* [State Police], and the *SISMI* [Military Intelligence and Security Service]. The purpose of the criminal association was the illegal

collection of information concerning various individuals, gained through access to confidential databases by corrupt public officials or the employees of the telecommunications companies as cited above. The data is alleged to have been collected on behalf of the managers of investigation agencies, in view of the remuneration paid to them by those who commissioned the investigative activities.

The offences investigated by the public prosecutor – according to the referring judge – relate to the offence provided for under Article 416 of the Criminal Code, and moreover potentially involve acts of corruption involving conduct contrary to professional duties (Article 319 of the Criminal Code) and the disclosure and use of professional secrets (Article 326 of the Criminal Code).

The hearing in chambers was instigated by the public prosecutor with exclusive reference to the documents concerning four of the numerous persons subject to unlawful investigative activities. The referring judge states that, when opening the hearing, questions concerning the constitutionality of the legislation on the immediate destruction of media containing information obtained unlawfully were raised by the representative of the public prosecutor, by the representatives of three of the four persons involved, and also by the representative of one of the persons under investigation.

1.1. – With a view to motivating his conclusion that the questions raised are relevant and not manifestly groundless, the referring judge sets out the essential features of the procedure regulated by the new text of Article 240 of the Code of Criminal Procedure. In particular, he points out that the public prosecutor must file a request for the destruction of the material containing the information within forty eight hours of its acquisition (sub-section 3), that the court must schedule a hearing in chambers within the next forty eight hours, and no later than ten days after the request (sub-section 4), and that the measure accepting this request, where issued, must be resolved on and read out in the same hearing, and carried out immediately (sub-section 5).

Although it is clear that the sequence must start with a finding with reasonable certainty that the material to be destroyed is of a special nature, the entire structure of the proceedings is testament, in the opinion of the referring judge, to the premature and

preliminary nature of the required action – in accordance moreover with the rationale of the provision – which seeks to eradicate at root the risk of publication of classified information that has been obtained unlawfully.

It is furthermore evident, again according to the referring judge, that procedures for destruction must be initiated also when the confidential information coincides with the subject matter of the criminal conduct to which the main proceedings refer (in the case before the court, the disclosure of professional secrets concerning the said information).

1.2. – The court considers that the contested provisions violate, first and foremost, Article 24(2) of the Constitution, given the illegitimate detriment caused by them to the right to a defence of the individual under investigation or accused within the ambit of the main proceedings.

In particular, the celebration of proceedings behind closed doors governed by Article 240 of the Code of Criminal Procedure – also through the reference to the general model under Article 127 – does not end up ensuring adequate guarantees in relation to the function which the procedure is intended to fulfil, that is the production of evidence, which will be valid at the oral stage, of the unlawful origin of the information contained in the document destined for destruction. The only possibility for the court to consider the facts of the case in greater detail, given also the mandatory rapidity of the procedure, is stated to consist in hearing the parties present, although their attendance is however entirely optional (even as far as the professional representatives and the public prosecutor himself are concerned). In other words, the prior discovery of the prosecution's evidence is subject to a merely contingent hearing in which it is possible to make representations and which is in any case of a summary nature, which ends up causing a further violation of Article 111(1), (2) and (4) of the Constitution.

The referring judge specifies that he does not intend to call into question the legislative choice in favour of the discovery of evidence in advance of the oral stage. However, the forms used for discovery during oral proceedings should also apply to this advance procedure, as occurs for the taking of evidence by special arrangements, in order to

guarantee that the parties are genuinely able to make representations and are fully able to exercise their right to evidence.

However, according to the referring judge, the Constitution is in any event violated as a result of the legislation governing the report in which – pursuant to Article 512(1-*bis*) of the Code of Criminal Procedure – the evidence of the unlawful activities connected with the formation or acquisition of the material for destruction is to be set out. The court is in fact required (Article 240(6) of the Code of Criminal Procedure) to "take note" of the unlawful conduct ascertained along with the relative means, and to list the interested persons, but it is prevented from making any reference "to the content" of the "documents, media and records", and therefore to the information the acquisition of which is alleged to be unlawful.

This means, according to the referring judge, that the merits court cannot directly consider that evidence, and limits the possibility for the accused to defend himself, for example by arguing that the information obtained was not of a confidential nature or that it was not acquired unlawfully. The possibility of confirming such claims would in fact be precluded after the destruction of the medium. Moreover, even if evidence of guilt were obtained, the court would be deprived of the information essential in order to make an adequate quantification of the penalty, which could not disregard the nature of the information obtained.

In essence, in the opinion of the referring judge, "the procedure for destruction is not only a means of bringing forward the discovery of evidence – moreover carried out in a manner which does not guarantee the right to a defence – but also for the advance definitive elimination of the evidence, which is directly detrimental to the right to a defence".

1.3. – The contested legislation has negative implications, with a specific violation of Article 24(1) of the Constitution, also for the person harmed by the offence consisting in the unlawful acquisition of the information. The right to compensation for damages would in fact be prejudiced by the elimination of the evidence necessary in order to document the availability and significance of that right in quantitative terms, which also depends on the nature of the information unlawfully obtained. In short – and considering that the evidence

regarding the basis for the damages claim must be submitted by the plaintiff – precisely that right to confidentiality would be undermined which the contested law seeks to guarantee with the utmost efficacy.

1.4. – The referring judge goes on to claim that Article 112 of the Constitution has been violated on the grounds that the destruction of the evidence would be detrimental to the power-duty by the public prosecutor to prosecute offences involving the unlawful acquisition of the relative information. The "replacement" report required under the legislation, for the reasons indicated above, could in fact prove to be insufficient. The early stage of the destruction compared to the development of the preliminary investigations would on the other hand end up being detrimental to the identification and punishment of all those responsible for the conduct ascertained.

1.5. – The referral order finally claims that there is an "underlying unreasonableness within the legislation concerned compared to the values which it seeks to protect". Essentially, Parliament did not strike a correct balance between the opposing requirements, completely sacrificing in favour of the right to confidentiality the values connected with the making of factual findings, amongst which moreover precisely the protection (through the award of damages) of the right to confidentiality of the injured party is prominent.

2. – By the referral order of 21 May 2007 (No. 50 of 2008), the judge for preliminary investigations of the *Tribunale di Vibo Valentia* raised – with reference to Articles 24, 111(1), (2) and (4) and 112 of the Constitution – a question concerning the constitutionality of Article 240(3), (4), (5) and (6) of the Code of Criminal Procedure, as amended by Article 1 of decree-law No. 259 of 2006, converted into law, with amendments, by law No. 281 of 2006.

The referring judge is seized of interlocutory proceedings commenced by the public prosecutor, in accordance with the contested provisions, for the destruction of the material concerning the information obtained illegally. In the case before the Court, this concerns the digital medium containing sound documents, allegedly relating to conversations held by a person of female sex within the cabin of her own motor vehicle. According to the challenges made by the public prosecutor, the conversations were recorded by the use of a

bug placed in the vehicle by the husband of the interested party. The latter had threatened to make the contents of the conversations registered publicly available unless the woman agreed not to pursue the separation procedure initiated by herself and to waive payment of the monthly sum already awarded to her by the competent courts.

The main proceedings therefore concern the offences contained in Article 615-*bis* (unlawful interferences in private life) and Articles 56 and 629 (attempted extortion) of the Criminal Code. The digital support indicated was submitted during the course of the preliminary hearing of the injured party, to whom it had been made available by the accused through an intermediary. After its acquisition, the investigating police authorities verified its content, and confirmed that it concerned barely intelligible conversations, including conversations between more than two persons, against a background of strong traffic noises. Accordingly, the public prosecutor commenced the interlocutory proceedings regulated by the contested provisions.

During the course of the hearing in chambers however, the public prosecutor asked that a question of constitutionality be referred in relation to the procedure commenced, and the representatives of the injured party and of the accused substantially adhered to the request.

2.1. – Regarding the question of relevance, the referring judge observes first and foremost that the material, the destruction of which is requested, constitutes the material evidence of the offence [*corpo del reato*] pursuant to Article 615-*bis* of the Criminal Code, as well as the means for carrying out the offence of attempted extortion. However, the referring judge raises a different problem regarding the effective applicability of Article 240 of the Code of Criminal Procedure to the facts at issue in the proceedings.

The question arises due to the wording of the contested provision, which requires the destruction "of documents, media and records concerning data and the contents of conversations or communications relating to telephone and electronic messages illegally created or obtained". The letter of the law, according to the referring judge, does not include communications between persons in the same place, and could not be stretched up to the point of concluding that the specification as regards the use of telephone or electronic instruments relates only to the "data", with the result that the reference to "conversations or

communications" would also extend to cases involving the exchange of communications recorded in the place where they occur.

However, again according to the referring judge, the legislation also applies to the case before it by analogy, which Article 14 of the preliminary provisions to the Civil Code precludes only for criminal laws or exceptional laws. The contested provisions do not fall under either of these two cases. An exceptional law in particular should be regarded as a provision which, given the general regulation of a given phenomenon, introduces for certain cases an "interruption of the resulting logic" of that legislation. In the case before it, according to the referring judge, there is no rule of general scope with regard to which the contested provisions may operate as an exception.

2.2. – A first ground of unconstitutionality is identified by the referring judge in the violation of the right of the person under investigation to a defence. Although the procedure in chambers should culminate in the discovery of evidence concerning the unlawful acquisition of the data, a procedural model with simplified form is adopted, which does not contemplate findings on initiative by the parties or by the judge and does not stipulate any requirement that the representative of the accused participate. In essence, the procedure seeks to emulate that applicable to the taking of evidence by special arrangements, without however also applying to the advance procedure the forms and guarantees typical of the oral proceedings, hence violating Article 24(2) and Article 111(1), (2) and (4) of the Constitution.

On the other hand, the report which the court is required to draw up must necessarily not contain any description of the information obtained unlawfully, and is therefore not amenable for a full verification of the facts, which will be irredeemably precluded after the destruction of the medium to which the procedure refers.

Precisely this fact, according to the referring judge, is sufficient to establish the parallel violation of Article 112 of the Constitution, given that the premature and irredeemable elimination of the evidence of the offence would contradict the principle of the mandatory prosecution of the offence. Essentially, the procedure regulated by the contested provisions is not directed at ascertaining the responsibility of the person under investigation, with the

result that the necessary evidence would no longer be available at the stage during which this finding it to be made. Therefore, the contested legislation does not strike a reasonable balance between the requirement to protect confidentiality and the interest, of constitutional status, in prosecuting offences.

Finally, in the opinion of the referring judge, Article 24(1) of the Constitution has also been violated in relation to the right of the injured party to obtain compensation for the harm suffered, since the destruction of the evidence is detrimental to the possibility to document in court the basis for the relative claim. In this case, this judgment is the same as that which ascertains the criminal responsibility of the accused, since the victim of the unlawful recording joined the proceedings as a private party and objected, not by chance, to the application of rules which should however protect her right to confidentiality.

3. – By the referral order of 13 December 2007 (No. 84 of 2008), the judge for preliminary investigations of the *Tribunale di Milano* raised – with reference to Articles 24(1) and (2), 111(1), (2) and (4) and 112 of the Constitution – a question concerning the constitutionality of Article 240(3), (4), (5) and (6) of the Code of Criminal Procedure, as amended by Article 1 of decree-law No. 259 of 2006, converted into law, with amendments, by law No. 281 of 2006.

The referring judge is seized of a request for discontinuation formulated by the public prosecutor in proceedings for perjury (Article 372 of the Criminal Code), relating to statements made by the director of a large multinational company in civil proceedings which an employee of the company had instigated challenging his own dismissal. In objecting to acceptance of the request for discontinuation pursuant to Article 410 of the Code of Criminal Procedure, this employee related amongst other things of vexatious conduct by the company, which was pursued up to the point of carrying out unlawful investigations into his private life.

According to the referring judge, the investigations in question were commissioned from one of the investigative agencies involved in the proceedings in which referral order No. 508 of 2007 was issued (see above, § 1). Within the context of these proceedings, again

according to the referring judge, a dossier concerning the employee, subsequently dismissed, was discovered and seized.

The referring judge states that it rejected an initial request for discontinuation, ordering that further inquiries be carried out, one of which consisted in the acquisition of the dossier commissioned by the defendant company in the employment law proceedings mentioned above. The public prosecutor followed up these requests, however stating that it was legally impossible to obtain the documents containing the information illegally collected against the opponent to the request for discontinuation.

In fact, this information – again according to the indications subsequently adopted by the referring judge – was obtained by corrupting public officials. The relative media containing the material was therefore subject, pursuant to Article 240(2) of the Code of Criminal Procedure, to an absolute prohibition on use and reproduction, including the activities necessary in order to "decant" and assess the evidence in the proceedings underway before the referring judge.

The court goes on to state that at this stage it held a new hearing in chambers, "in order to examine the situation", and that during the course of this hearing the public prosecutor and the accused argued that the request for discontinuation should be accepted, whereas the injured party requested a measure for "compulsory charging" with regard to the possible offence of perjury. However, neither of the two solutions would be "satisfactory". On the one hand in fact, the evidence of the *mens rea* for perjury was not as things stood adequate. It could however be supplemented, in the light of the information contained in the dossier (the referring judge himself states moreover that the director called to give evidence in the employment law proceedings regarding circumstances relevant to the performance of the employee dismissed had been hired by the company after the conclusion of the "espionage activities").

At this stage, having taken note that the question concerning the constitutionality of Article 240 of the Code of Criminal Procedure (see above, § 1) had been raised in the proceedings concerning the illegal acquisition of information (conducted by another judge

from the same office), the referring judge asserts that within the ambit of the procedures for discontinuation before it, it is "necessary to take similar action".

3.1. – The questions of constitutionality are raised, in essence, by making a summary of the remedy sought and the arguments which characterise referral order No. 508 of 2007.

Turning to the case before it, the referring judge points out in particular the violation "of the rights of the complainant and the opponent to the request for discontinuation". In fact, the perjury proceedings are "related" to those concerning the unlawful gathering of information, and the "testimony and individual conduct" of the person under investigation could be "illuminated and better understood precisely by disposing of a complete knowledge of the very disturbing episodes which preceded it, that is the unlawful 'spying' against the employee subsequently dismissed". The victim of the unlawful investigative activities could suffer a detriment, from the standpoint of the protection of his respectability, due to the failure to obtain detailed knowledge of the information obtained against him, since the relative medium could have been reproduced and distributed to third parties prior to the seizure.

For these reasons, the question concerning the constitutionality of Article 240 of the Code of Criminal Procedure is also relevant in the procedures before the referring judge. In particular, "although it appears to be of more direct relevance, due to the characteristics of the case under examination, with reference to the possible violation of Article 24(1) of the Constitution, and therefore of the rights of the injured parties", the question should be raised for all the issues already mentioned in referral order No. 508 of 2007, due to their alleged "inseparability".

Conclusions on points of law

1. – By the three referral orders mentioned in the headnote, the judges for preliminary investigations of the *Tribunale di Milano* and the *Tribunale di Vibo Valentia* raise questions concerning the constitutionality of Article 240(3), (4), (5) and (6) of the Code of Criminal

Procedure, as amended by Article 1 of decree-law No. 259 of 22 September 2006 (Urgent provisions to reform the legislation governing telephone surveillance), converted into law, with amendments, by law No. 281 of 20 November 2006.

The provisions are contested insofar as they provide that the media containing data unlawfully obtained regarding telephone or electronic communications, or information illegally collected, must be destroyed on conclusion of a hearing in chambers celebrated by the judge for preliminary investigations, and that a report of this must be drawn up taking note "of the fact that unlawful surveillance or detention or acquisition has occurred", as well as "of the procedures and means used in addition to the individuals concerned", and which however may not contain any "reference to the contents" of the documents, media and records concerning the information collected.

The provision is stated first and foremost to violate Articles 24(2) and 111(1), (2) and (4) of the Constitution. In fact, although the procedure required under the contested provisions is directed at the destruction of the evidence of the offence concerning the unlawful acquisition of information, and although it must be concluded by the drawing up of a report to be read out in open court, it is held in chambers in the presence only of the parties and their representatives (which is not mandatory), without any possibility for more detailed inquiries, and therefore with only a contingent exercise of the right to a defence and to make representations.

The same constitutional principles are claimed to have been violated also on different grounds: the destruction of the media containing the information obtained unlawfully, and the parallel absence of references to the subject matter and nature of these communications in the report to be read out in open court are stated to be detrimental to the right to a defence and the right to evidence of the individual accused of the unlawful collection of information, preventing a verification of the confidential nature of the information and, in any case, their acquisition by unlawful means.

The legislation is moreover claimed to violate Article 24(1) of the Constitution, since the destruction of the media concerned, and the parallel absence of references in the report to be read out in open court to the subject matter and nature of the information unlawfully

obtained are stated to be detrimental to the right to the right of the injured party to take court action to obtain compensation for the damages suffered.

Finally, the principle enshrined in Article 112 of the Constitution is claimed to have been violated, since the elimination of the evidence of the offence consisting in the unlawful acquisition of information would be detrimental to the effective exercise of the prosecution of that offence, also with reference to factors which are significant for the quantification of the penalty in the event of a conviction.

2. – As a preliminary matter, given the substantive identity of the questions raised by the referring judges, it is appropriate to order that the relative proceedings be joined.

3. – The question raised by the judge for preliminary investigations of the *Tribunale di Vibo Valentia* (No. 50 of 2008) is inadmissible.

The referring judge has made adequately clear the fact that the case placed before him for judgment does not involve the surveillance of telephone or electronic communications, but the unlawful recording of conversations between persons who are present (disregarding moreover the problem of the criminal law classification of surveillance carried out by private individuals within the cabin of vehicles, the classification of which as private residences has for some time been controversial). In particular, the referring judge observed that Article 240 of the Code of Criminal Procedure – that is the provision which delineates the subject matter of the procedure regulated by the provisions set out immediately below – refers to "data and contents" concerning communications relating to "telephone and electronic messages", and has concluded that the provision does not cover the recording of conversations carried out without the assistance of technical means of transmission. This opinion, which reflects the literal wording of the contested provision, was discussed in detail during the course of the parliamentary debate which resulted in the approval of law No. 281 of 2006 and is moreover shared by many of the scholars who have commented on the legislation under examination.

However, precisely adopting the conclusion reached by the referring judge, the Court finds that the question raised is irrelevant, since the material examined in the proceedings before the referring judge does not fall within the ambit of the documents that may be

subjected to the destruction procedure. In particular, the Court does not accept the assumption that the list contained in Article 240(2) of the Code of Criminal Procedure may be extended by analogy, according to the provisions of Article 12 of the preliminary provisions to the Civil Code. Interpretation by analogy is precluded, amongst other things, pursuant to Article 14 of the provisions cited above, for so-called exceptional laws. It may easily be understood, even without engaging in a detailed discussion of the provisions governing the use in court proceedings and the destination of the objects seized, that the procedure involving the immediate destruction of the materials in question constitutes, for a variety of reasons, an exception from provisions of a general nature.

When the prerequisites for the return of the object seized to its legitimate holder are not satisfied, the duration of the so-called freezing of evidence coincides with the duration of the relative criminal proceedings (Article 262 of the Code of Criminal Procedure), except in certain situations which, in turn, are exceptions from a general rule. These anonymous documents (with the arrangements governing which the 2006 legislation sought to bring the legislation contested before this Court into line) are destroyed only after five years, unless they constitute the material evidence of the offence or were otherwise taken from the accused, in which case they are placed on the case file (Article 240(1) of the Code of Criminal Procedure and Article 5 of the regulation implementing the Code of Criminal Procedure, approved by ministerial decree No. 334 of 30 September 1989).

It must therefore be reiterated that the contested legislation is of an exceptional nature and as such must be applied through rules established according to a narrow interpretation. It follows from this that the referring judge is not required to apply the provisions that are suspected by him to be unconstitutional. Therefore, the question raised is inadmissible due to lack of relevance.

4. – A similar conclusion must be reached with regard to the question raised by the judge for preliminary investigations of the *Tribunale di Milano* in referral order No. 84 of 2008.

It is in fact clear that the referring judge must not in any way apply the contested provisions, since the judge is not presiding over interlocutory proceedings governed by Article 240(3) *et seq* of the 240 Code of Criminal Procedure.

The challenges of the referring judge are focused, in essence, on the preclusion on access to evidence gathered in a different proceedings. However, due to the prohibition on its use and in any case the inability to make copies of the material seized, this preclusion is imposed by Article 240(2) of the Code of Criminal Procedure, a provision which the referring judge did not contest. By contrast, he sought to reiterate arguments regarding the procedure for the destruction of the media containing the investigations allegedly carried out against the opponent, that is procedural provisions which, from the judge's perspective, are entirely irrelevant. The question of the rights and guarantees assured to the victim of the presumed unlawful acquisition of information has a reason to arise only in the interlocutory proceedings seeking an order for the destruction of the relative media, and this applies for any result which may follow as a factual consequence of the acceptance of the relative request.

5. – The question concerning constitutionality raised by the judge for preliminary investigations of the *Tribunale di Milano* by referral order No. 508 of 2007 is well founded, subject to the limits specified below.

5.1. – The grounds for the referring judge's challenges to the provisions at issue in these proceedings are based on the presumed unreasonable imbalance between the protection granted to the right to confidentiality and that assured to the right to a defence, to the right to take court action and to the principles of a fair trial and the mandatory nature of the criminal action. When striking a balance between the above fundamental rights and principles, Parliament is argued to have sacrificed almost entirely the latter in favour of the former. It is from this consideration that the referring judge infers the remedy sought in the referral order, consisting in the request for a declaration that the contested provisions are unconstitutional.

5.2. – The premise of the referring court may be accepted only in part, precisely due to the requirement, underscored by the same, to maintain within the legislation concerned a correct balance between fundamental rights and principles.

It must be pointed out as a preliminary matter that the legislation covered by this question was approved in order to provide a remedy to an increasingly widespread and worrying phenomenon involving the violation of confidentiality, resulting from the uncontrolled distribution in the media of personal data and information, both resulting from legally authorised collection and surveillance operations, as well as – more seriously, and as is the case in the proceedings before the Court – those carried out other than through the exercise of any legitimate power by public officials or by private individuals motivated by different goals, which in any case do not justify the intrusion into the private life of individuals.

Parliament's concern was to prevent the due compliance with the provisions which require that the case file be made public from resulting in further damage for the victims of the unlawful interferences who, in addition to having suffered undue intrusions into their personal sphere, would remain exposed for a long period of time to the risk that the fruits of the unlawful information and surveillance activity could become an instrument for defamatory and de-legitimising campaigns against them. The danger appears to be heightened due to the observation, based on common experience, that under current legislative and organisational conditions, an adequate preservation of the confidentiality of the records stored with the judicial authorities is not guaranteed, as unfortunately the frequent “leaks” of information and documents show.

The intention to prevent these possible abuses led Parliament to introduce exceptional legislation compared to the ordinary arrangements on the conservation of the material evidence of the offence: the documents, media and records concerning data and the contents of conversations and communications relating to telephone and electronic messages illegally created and obtained must be destroyed, by order of the judge for preliminary investigations, as early as possible within the ambit of very rapid interlocutory proceedings which must precede the closure of the preliminary investigations.

6. – This Court considers that the goal of assuring the inviolable right to the confidentiality of correspondence and of every other means of communication, protected by Articles 2 and 15 of the Constitution (*inter alia*, judgments No. 366 of 1991, No. 81 of 1993, No. 463 of 1994 and No. 372 of 2006), to which must be added the further fundamental right concerning the private life of citizens in its various aspects, does not justify the excessive limitation on the rights to a defence and to take court action, as well as on the principle of a fair trial. The excessive limitation derives from the fact that the interlocutory proceedings, in which the destruction of the material seized is sought as described above, are structured according to the procedural model pursuant to Article 127 of the Code of Criminal Procedure, whereby it contemplates the possibility to make representations only on a contingent basis.

Accordingly, Article 240(5) of the Code of Criminal Procedure refers to the obligation on the court to hear only the parties "who have appeared", thereby turning the tendency for the procedure to have a summary nature into an incontrovertible fact.

It should be added that the measure by which the judge orders the destruction of the material evidence of the offence (leaving aside the questionable absence of any right to challenge the order) has the result, due to the fact that it is materially enforced immediately, that any violation of the rights of the parties due to flaws in the procedure by which the parties may make representations becomes irreparable.

6.1. – The irreparable nature of any violations of the rights of the parties is not offset by the replacement of the documents, records and media physically eliminated by the report pursuant to Article 240(6) of the Code of Criminal Procedure, since the prohibition on including in the report any reference to the contents of those documents, media and records and the express limitation on the description of the "procedures and means" by which the material was obtained mean that, during later stages of the procedure, it will be extremely difficult for the accused to exercise the right to a defence, for the injured parties to exercise their right to compensation and for the public prosecutor to bring a prosecution.

Moreover, a restriction on the right to make representations within the ambit of a procedure which, due to the fact that it culminates in the destruction of the material

evidence of the offence, significantly impinges on the subsequent celebration of the trial, amounts in itself to a violation of the principles of a fair trial imposed by Article 111 of the Constitution. The same restriction also engenders, as an inevitable consequence of the first ground for unconstitutionality, an excessive limitation on the rights to a defence and to take court action, as well as the efficient exercise of the prosecution. On the basis of this consideration, the constitutional review must take note of the combined effect of the provision which limits the ability to make representations in the interlocutory proceedings concerned and that which requires that a report must be drawn up, the contents of which – as will be seen better below – are too sparse.

During the course of the parliamentary debates which preceded the approval of the contested provisions it was pointed out that, as a result of the fact that the contents of the report were too limited, a "impossible burden of proof" was being introduced which the parties would not be able to satisfy. In this regard, it must be remembered that this Court has asserted and reiterated in its case law that it the theoretical provision for the right to a defence (and more generally the rights of the parties to the trial) is not sufficient, and that it is however necessary that its effective exercise be guaranteed (*inter alia*, judgments No. 212 of 1997, No. 62 of 2008 and No. 20 of 2009). The fact that, as a result of legislative provisions, there are serious difficulties in the normal exercise of the right of the parties obtain and submit evidence impinges upon the effectiveness of that right and, in the light of the principles asserted in the case law cited, is unacceptable under constitutional law.

6.2. – On the other hand, the pressing requirement to give the fundamental right to confidentiality a more intense protection than that, which has proved to be insufficient, of the recent past means that particular methods for treating evidence which are able to reconcile all the fundamental rights and principles caught up in the delicate matter may be considered not to be unreasonable. There are various ways of striking a balance between the aforementioned rights and principles and it is not a matter for this Court, but rather for Parliament, to identify possible solutions within the ambit of the legislation governing criminal trials. In these proceedings the evaluations which the Court is called upon to express are necessarily limited to the subject matter of the question and within this context

a point of equilibrium must be sought between the various and potentially opposing requirements – all of which are constitutionally protected – that come into consideration. Different and better equilibria may be identified by Parliament – which is vested with lawmaking powers not conferred on this Court – provided that it respect the rights and principles evoked in this judgment.

Starting from this premise, the Court finds that the complete invalidation of the provisions contested by the referring judge would not be capable of restoring the equilibrium modified by that legislation. Indeed, one imbalance would end up being replaced by another since, as stated above, the procedural rules applicable to the trial and the uncertainty over the maintenance of confidentiality over the records stored with the judicial authorities would expose the victims to the danger of disclosure contrary to the minimum level of protection of the confidentiality of persons under a liberal and democratic legal order, where the requirements of justice must be granted adequate procedural instruments for their realisation, without however excessively and pointlessly sacrificing the rights of the blameless victims of serious interferences in their private life, moreover on the grounds that such arrangements seek to protect precisely their interests.

Were sufficient precautions to be introduced into the procedural order which were sufficient to prevent the public nature of the oral stage from inevitably resulting in the publication of all the evidence (as for example currently occurs in cases in which the Code of Criminal Procedure requires a hearing behind closed doors), and were moreover there reasonable certainty that the storage of the materials relating to unlawful interferences in communications and in private life were accompanied by effective organisational measures and governed by rigorous provisions on the traceability of the movements of the material and the identification of the subjects institutionally responsible, even on the basis of *culpa in vigilando*, then drastic safeguard measures such as those introduced by the contested provisions might not be regarded as indispensable. Within the current climate of uncertainty over the effective nature of the protection of the right to confidentiality, it is not possible purely and simply to cancel the provisions which require the destruction of the documents, media and records that have been unlawfully obtained. It is necessary to ensure

that these provisions respect as far as possible both the constitutionally required equilibrium as well as the rationale underlying those provisions.

7. – The result sketched out above may be achieved by breaking the link established by Article 240(4) of the Code of Criminal Procedure between the special procedure regulated by sub-sections 3 *et seq* of that article and Article 127 of the Code of Criminal Procedure, since the reference to that provision imposes on the procedure itself the limitations on the right to make representations which are characteristic of the general model of proceedings behind closed doors. Besides, Parliament itself clearly demonstrated its intention to enact legislation intended to permit the discovery of one source of evidence before the subsequent stages of the trial. It follows that this goal must be pursued in accordance with the principles of a fair trial, the right to a defence and to take court action and the effective exercise of the prosecution, which manifest themselves in a rigorous requirement that the parties be guaranteed the right to make representations, such as that contained in Article 401(1) and (2) of the Code of Criminal Procedure, which regulate the hearing for the taking of evidence by special arrangements. This legislation must naturally extend to an aspect of the proceedings such as that at issue in this case, due to the constitutional principles laid down by Articles 24(1) and (2), 111(1), (2) and (4) and 112 of the Constitution.

The right to make representations is an irreplaceable guarantee within the procedural order of a state governed by the rule of law, and the potential increase in workload – in proceedings involving multiple parties – must be confronted with appropriate organisational and case management measures, and certainly not with the unreasonable infringement of rights guaranteed by the Constitution.

8. – The second factor which contributes to the combined effect of unconstitutionality – discussed in paragraph 6 – must be identified in the insufficient capacity of the replacement report, as regulated by the contested Article 240(6) of the Code of Criminal Procedure, to represent the facts on the basis of which the merits court will make its assessment. The referring judge bases one of the grounds averred in support of the unconstitutionality of that provision on the fact that it introduces a kind of advance procedure destined to condition

unduly the judgment of the merits court. It must be pointed out that the reading of this provision leads to different conclusions.

The law requires that the report concerned take note "of the fact that unlawful surveillance or detention or acquisition has occurred of documents, media or records", above all in consideration of the fact that the report must document the conclusions of the parties. The report cannot have any evaluative force other than that strictly limited to the decision to destroy the material and, in its concurrent (and primary) function of "replacement" evidence for the material evidence of the offence, cannot exercise any conditioning effect on the decision to be taken within the ambit of the main proceedings.

It is precisely the necessarily descriptive nature of the replacement report which requires that it not be limited to containing data relating to the "procedures and means" used by the individuals concerned, but must also contain all the indications necessary to inform the court and the parties in the subsequent proceedings of the facts on the basis of which they may make evaluations regarding the alleged unlawful nature of the conduct charged to the accused. The simple description of the procedures and means used in order to collect the information may not be sufficient in order to permit an adequate subsequent review by a court, in proceedings where the parties may make representations, as to whether or not the conduct of the accused was lawful. During the merits proceedings, neither the accused, nor the injured parties, nor the public prosecutor dispose of objective information sufficient to support their respective positions, defences or charges. This is because it is constitutionally necessary to broaden the descriptive scope of the report in question, including in it also those facts which characterised the activity involving the surveillance, detention and acquisition of the material for which the public prosecutor has requested the instigation of the interlocutory proceedings at issue. The merits court must be able to dispose of all elements necessary in order to evaluate, without any conditioning deriving from the decision taken in the interlocutory proceedings, and in a context in which the parties are able to make representations, whether or not the charges brought by the public prosecutor are well founded.

The inclusion in the report of the description of the circumstances relating to the allegedly unlawful activity mentioned above covers, where necessary, only the basic information concerning the nature and formal characteristics of the documents, media and records (excluding, pursuant to sub-section 6, all references to the information contained in them) from which, when cross-checked against the circumstances regarding the place, time and context in which they were obtained, it is possible to infer evidence regarding the lawfulness of the accuseds' conduct.

The correctness and objective nature of the replacement report will be guaranteed by the fact that it is drawn up in a procedure where the parties are able to make representations. The risk that during the course of those proceedings an unlawful disclosure of confidential information – presumed to have been obtained unlawfully – may occur is mitigated by the prohibition on making copies in any form of such information, laid down by Article 240(2) of the Code of Criminal Procedure; the judicial authorities and the directors of those offices will be responsible for preventing any violation of this prohibition.

For the reasons set out above, the court finds that it must accept only partially the question of constitutionality raised by the referring judge in order to restore a correct equilibrium between the constitutional principles evoked. It need hardly be repeated that the equilibrium thereby achieved is not the only one absolutely possible, but is the only one that may be obtained taking into account the legislation enacted and the constitutional limits placed on interventions by this Court.

ON THOSE GROUNDS

THE CONSTITUTIONAL COURT

hereby,

declares that Article 240(4) and (5) of the Code of Criminal Procedure is unconstitutional insofar as it does not provide, when regulating the procedures by which the parties may make representations, for the application of Article 401(1) and (2) of the Code;

declares that Article 240(6) of the Code of Criminal Procedure is unconstitutional insofar as it does not exclude from the prohibition on the making of references to the contents of documents, media and records, when drawing up the report provided for under that provision, the circumstances relating to the activity of the discovery, acquisition and collection of those documents, media and records;

rules that the question concerning the constitutionality of Article 240(3), (4), (5) and (6) of the Code of Criminal Procedure, raised by the judge for preliminary investigations of the *Tribunale di Vibo Valentia*, with reference to Articles 24, 111(1), (2) and (4) and 112 of the Constitution, by the referral order mentioned in the headnote (No. 50 of 2008), is inadmissible;

rules that the question concerning the constitutionality of Article 240(3), (4), (5) and (6), Code of Criminal Procedure, raised by the judge for preliminary investigations of the *Tribunale di Milano*, with reference to Articles 24(1) and (2), 111(1), (2) and (4) and 112 of the Constitution by the referral order mentioned in the headnote (No. 84 of 2008), is inadmissible.

Decided in Rome, at the seat of the Constitutional Court, *Palazzo della Consulta*, on 22 April 2009.

Signed:

Francesco AMIRANTE, President

Gaetano SILVESTRI, Author of the Judgment

Giuseppe DI PAOLA, Registrar

Filed in the Court Registry on 11 June 2009.

The Director of the Registry

Signed: DI PAOLA