Corte costituzionale

JUDGMENT NO. 23 OF 2011

UGO DE SIERVO, President

SABINO CASSESE, Author of the Judgment

JUDGMENT NO. 23 YEAR 2011

In this case the Court considered various referrals from the *Tribunale di Milano* concerning criminal proceedings initiated against the President of the Council of Ministers, Silvio Berlusconi. Under the contested (ordinary) legislation, in the event that the Prime Minister or a minister were prosecuted for a criminal offence, the Office of the Prime Minister was entitled to certify an ongoing "legitimate impediment", which required the court to stay proceedings for a period of up to six months. The referring court claimed that, since the trial court was not entitled to conduct any substantive review of the impediment, this amounted to a prerogative that could only be established under constitutional law. The Court accepted the view that the legislation established a prerogative, ruling it partially unconstitutional on the grounds that "when deciding whether to postpone the hearing, it is for the court to assess on the facts not only the actual existence of the impediment, but also its absolute and current nature. With reference to the situation under examination, this implies in particular the power of the court to assess, on a case by case basis, whether the specific commitment averred by the President of the Council of Ministers actually gives rise to an absolute inability … to appear in the proceedings – even when this is theoretically due to powers co-essential to governmental functions".

THE CONSTITUTIONAL COURT

composed of: President: Ugo DE SIERVO; Judges: 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, Giorgio LATTANZI,

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Articles 1 and 2 of Law no. 51 of 7 April 2010 (Provisions governing impediments on appearing in court) initiated by the 1st Criminal Division and 10th Criminal Division of the *Tribunale di Milano*, by referral orders of 19 and 16 April 2010 and by the Judge in charge of preliminary investigations at the *Tribunale di Milano* by referral order of 24 June 2010, respectively registered as

nos. 173, 180 and 304 in the Register of Orders 2010 and published in the *Official Journal of the Republic* nos. 24 and 41, first special series 2010.

Considering the entries of appearance by S.B. and the interventions by the President of the Council of Ministers;

Having heard the Judge Rapporteur Sabino Cassese in the public hearing of 11 January 2011;

Having heard Counsel Niccolò Ghedini and Piero Longo for S.B. and the *Avvocati dello Stato* Michele Dipace and Maurizio Borgo for the President of the Council of Ministers.

The facts of the case

1. – By referral order of 19 April 2010, (no. 173 of 2010), the 1st Criminal Division of the *Tribunale di Milano* raised a question concerning the constitutionality of Article 1(1), (3) and (4) of Law no. 51 of 7 April 2010 (Provisions governing impediments on appearing in court), due to violation of Article 138 of the Constitution.

1.1. – The referring court states that counsel for the accused in the main proceedings averred and documented a legitimate impediment on appearing at the hearing of 12 April 2010, consisting in the commitment of the accused to carry out a journey on official state business in his capacity as President of the Council of Ministers. The court moreover states that, following a request for further dates available in order to continue the proceedings, in accordance with the contested provisions, counsel for the accused requested that proceedings be postponed until 21 July 2010, submitting a certificate from the General Secretary of the Office of the President of the Council of Ministers of an ongoing impediment of the accused referring, by way of example, to various government activities to be carried out during the period falling between 9 April and 21 July 2010.

The lower court states that the public prosecutor objected to the request that proceedings be postponed on the basis of a logical and systematic interpretation of the contested provisions, under which the court would be permitted to assess the absolute nature of the impediment on appearance averred by the President of the Council of Ministers. In particular, according to the interpretation proposed by the public prosecutor, "the mere attestation of an ongoing commitment related to the exercise of

the functions" referred to under the contested legislation "would not preclude the court from ascertaining the actual existence of the accused's absolute impediment on appearance for the period indicated in the certificate". In the alternative, according to the referring court, the public prosecutor averred that the contested provision would be unconstitutional in the event that it were understood as precluding review by the courts of the actual existence of a legitimate impediment of the President of the Council of Ministers.

In the opinion of the lower court, the public prosecutor's interpretation cannot be endorsed since the contested legislation classifies as a legitimate impediment pursuant to Article 420-*ter* of the Code of Criminal Procedure "not only the various competences of ministers provided for by law or regulations", but also the relative "preparatory and consequential activities", as well as any "activity otherwise co-essential to governmental functions" requiring moreover that proceedings be postponed where the Office of the President of the Council of Ministers "certifies that the impediment is ongoing and related" to the conduct of the aforementioned functions.

In the light of these circumstances, the referring court considers that the contested legislation is not limited "to supplementing the provisions laid down by Article 420-*ter* of the Code of Criminal Procedure", by introducing "further instances of legitimate impediments associated with specifically identified situations" and classifying "certain government acts or activities as constituting an impediment as a question of law"; on the contrary, it substantially identifies the entire scope of government activity "(moreover according to a self-certification procedure) as constituting an absolute inability to appear". In the opinion of the lower court, the effect of this is to deprive the court of the right and the duty to ascertain the existence of the impediment with reference to a specific commitment overlapping with the individual hearing. In other words – the referring court continues – the definition of a legitimate impediment contained in the contested legislation is so broad and generic as to amount to an "absolute presumption of an impediment", regarded as a situation associated not with a "contingent fact" but with a "permanent status", with the resulting preclusion of the court's ability to ascertain the "actual existence" of the impediment.

In the opinion of the referring court, the fact that it is impossible to follow the interpretation proposed by the public prosecutor means that the question concerning the constitutionality of the contested legislation is relevant. According to the lower court, this question is not manifestly groundless since, "in introducing a presumption *iuris et de iure* of an ongoing impediment for a long period of time associated with governmental functions, the provisions under examination amount to a provision establishing an exemption from ordinary justiciability and hence a prerogative that must be established under constitutional law".

In fact, in the opinion of the referring court, in establishing *a priori* and in a mandatory fashion that the holding and exercise of public functions always constitute legitimate impediments for significant periods of time, irrespective of any evaluation of the specific case, the contested legislation is tantamount to the "stipulation of a genuine prerogative for the holders of political offices aimed at protecting not only the right to a defence in the proceedings but rather the actual status or function", thereby bringing about "the same situation already considered by the Constitutional Court in judgment no. 262 of 2009". Moreover, according to the lower court, the fact that the contested law expressly indicates its "function as bridging legislation", in view of the subsequent entry into force of consolidated constitutional legislation governing the prerogatives of the President of the Council of Ministers and of ministers, renders explicit "the rationale of pre-empting innovative legislation governing matters that must necessarily be legislated for according to constitutional procedures", thus confirming the violation of Article 138 of the Constitution.

1.2. – The President of the Council of Ministers intervened in the proceedings, represented by the *Avvocatura Generale dello Stato*, requesting that the question of constitutionality raised be ruled groundless.

1.2.1. – According to the *Avvocatura Generale dello Stato*, the lower court mistakenly argues that the contested legislation is unconstitutional on the assumption that it introduces a prerogative in favour of the President of the Council of Ministers and of ministers which, according to settled constitutional case law, could only be done through constitutional legislation. In reality however, according to the state representative, as is also clear from the *travaux preparatoires*, the purpose of the

contested legislation is to "identify through legislation the activities carried out by individuals who occupy public offices of constitutional significance that amount to impediments on appearing in hearings during criminal proceedings in which they are accused". These provisions – the *Avvocatura Generale dello Stato* observes – are therefore aimed at supplementing the general legislation contained in Article 420-*ter* of the Code of Criminal Procedure and at "specifying the governmental acts, or rather activities, that amount to other instances of legitimate impediment". According to the State representative, such legislative specification was necessary in order to adopt the solutions indicated by this Court in relation to the impediments on appearing of Members of Parliament (judgment no. 225 of 2001, which held in particular that the court "is under an obligation to schedule the calendar of hearings in such a was as to avoid clashes with days on which parliamentary organs are in session") for the different situation of legitimate impediments of the President of the Council of Ministers and of ministers whose activities, in contrast to those of parliamentarians, "are conducted according to procedures and time-scales […] that are more heterogeneous and not easily predictable" and are "more subject to change, since they must take account of various occurrences". According to the State representative, the legislation suspected to be unconstitutional is therefore intended to specify, for the purposes also of legal certainty and with the goal of avoiding different interpretations in case law, "situations in which the conduct of governmental activity makes it absolutely impossible for the President of the Council of Ministers or for ministers to appear in court, since it would preclude "the conduct of institutional activities not amenable to delegation".

The *Avvocatura Generale dello Stato* further argues that, in contrast to Law no. 124 of 23 July 2008 (Provisions ordering the suspension of proceedings against the high offices of state), the contested legislation does not "automatically" result in the suspension of proceedings. First and foremost, it is limited to permitting the accused to obtain, "on a case by case basis", the postponement of the hearing. Secondly, the governmental functions capable of justifying the application for postponement have "an express legislative foundation in primary or secondary sources" expressly referred to, or are in any case "adequately determined and easily identifiable given their strictly ancillary nature to those specifically indicated in the reference to the respective

legislative sources" (activities preparatory, consequential or otherwise co-essential to governmental functions). Finally, the court is not deprived of the power to ascertain "the actual existence" of the legitimate impediment, because it could in any case assess "whether the governmental activity averred as a legitimate impediment falls under those provided for under the contested provisions". Therefore, the court is only precluded the power to "review whether the institutional activates indicated" under those provisions constitute "grounds for legitimate impediment … once their existence has been established as a matter of fact": if this were not the case, in the opinion of the *Avvocatura Generale dello Stato*, there would be an inadmissible review by the criminal courts of the political grounds underlying the exercise of the institutional activities of constitutional organs.

Therefore, the State representative argues that the contested legislation does not amount to a prerogative or immunity requiring constitutional coverage, as was by contrast asserted by the lower court. On the contrary, it amounts to a legislative provision aimed at "moderating" the general institution of the legitimate impediment which, ultimately: "does not entail exemption form criminal prosecution"; "does not provide for a general and automatic suspension of criminal proceedings"; "has as its only procedural effect the postponement of proceedings until a future hearing upon request by the party"; provides for a reference that "is not permanent" and, in the event of an ongoing legitimate impediment, in any case "cannot exceed six months"; "does not entail an absolute presumption of a legitimate impediment, but only an indication of the classes of institutional activities that may entail a request for the hearing to be postponed in order to protect the right of the accused to a defence that is compatible with the exercise of his own constitutional duties"; "strikes a reasonable balance between the two constitutional values of the exercise of judicial functions and the exercise of political and institutional activities by members of the Government, without causing one to prevail over the other and above all without sacrificing either".

According to the State representative, it cannot be argued that the reference by Article 2 of Law no. 51 of 2010 to subsequent consolidated constitutional legislation governing the prerogatives of the President of the Council of Ministers and of the ministers establishes the status of the provisions of the contested legislation as a

prerogative. In the opinion of the *Avvocatura Generale dello Stato*, this reference "seeks to establish only that it will – rightly – be a constitutional law that regulates the true prerogatives of the members of the Government" whilst, up until that time, "specific provisions of ordinary legislation (such as that under examination) relating to specific aspects of the issue, which can certainly not be brought under the concept of a prerogative, shall remain in force". Moreover, according to the *Avvocatura Generale dello Stato*, the draft constitutional law actually presented (Senate, no. 2180 containing "Provisions ordering the suspension of criminal proceedings against the high offices of state") would be a legislative initiative with an entirely different content to that enacted by the contested legislation. In fact, the draft law would order "the suspension of proceedings against the high offices of State in order to provide an objective protection to the regular conduct of the activities related to that office". On the contrary, Law no. 51 of 2010 provides that an impediment on appearance shall be deemed to subsist "in cases involving the parallel exercise of one or more competences provided for by law or regulations" for high offices, without "suspending the prosecution" or "creating a special legal status for that office", but rather limits itself to ordering the "postponement of the hearing with the resulting suspension of the period for time-barring for the full duration of the postponement".

Finally, according to the *Avvocatura Generale dello Stato*, the legislative choice, "particularly objected to by the lower court", to give the Office of the President of the Council of Ministers the task of ascertaining the ongoing nature and relationship with the conduct of governmental functions of the impediment of the President of the Council of Ministers was on the other hand justified "by the requirement and appropriateness of conferring that delicate task on an body […] other than the President of the Council of Ministers involved in the criminal trial as an accused", whilst it would have been "unreasonable" to leave "the task of self-certifying that the impediment was ongoing in nature" to the latter.

1.2.2. – On 23 November 2010, the *Avvocatura Generale dello Stato* filed a written statement on behalf of the President of the Council of Ministers, reiterating the grounds averred in the intervention and restating the argument that the question of constitutionality raised was inadmissible and groundless.

The State representative argues that the question is inadmissible averring, first and foremost, that the referral order does not specify the facts of the case before it, nor does it specify the offences being prosecuted, and in this way does not permit the Court to assess the relevance of the question without violating the principle of the self-sufficiency of the referral order. Secondly, in the opinion of the state representative, the referring court did not "explain why it was not able to rule on the request to postpone the hearing submitted by counsel for the accused […] since the latter was absolutely unable to attend the aforementioned hearing due to the legitimate impediment consisting in institutional commitments specifically indicated in the certificate issued by the General Secretary of the Office of the President of the Council of Ministers, and which could have been easily ascertained by the court independently of the resolution of the interlocutory constitutional question concerning Article 1(1), (3) and (4) of Law no. 51 of 2010". According to the *Avvocatura Generale dello Stato* therefore, the lower court did not provide any justification regarding the fact that the application by the defence could not be assessed and ruled on in accordance with the provisions laid down by Article 420-*ter* of the Code of Criminal Procedure. Therefore, the question is claimed to have been raised not upon conclusion of the necessary examination of its relevance, but rather "in order to review the constitutionality of a legislative provision without providing evidence of its actual impact on the proceedings in progress".

On the merits, the State representative restates the arguments contained in the intervention, noting that the provisions of Law no. 51 of 2010 do not depart from the logic of Article 420-*ter* of the Code of Criminal Procedure, "for which they specify only some instances of legitimate impediment and therefore do not have the purpose of protecting the public office considered in itself, creating a prerogative or immunity for specific accused persons, but are intended to protect the right to a defence of an accused who is prevented from participating in the trial for a specific period of time (e.g. the day of the hearing) due to a non-deferrable institutional commitment". According to the *Avvocatura Generale dello Stato*, the contested legislation does not introduce any form of immunity, but "specifies (and moreover significantly reduces)" the scope of the institution of the legitimate impediment on appearance already provided for under Article 420-*ter* of the Code of Criminal Procedure. Moreover, according to the State

representative, it cannot be argued that this involves a presumption *iuris et de iure*, under which Law no. 51 of 2010 deprived the courts of any power of assessment with reference to the specific case, since "the court is required to ascertain when the prerequisites provided for under Article 1(1) of the Law are met and to postpone the trial only once it has ascertained the existence of these cases".

1.3. – The individual accused in the main proceedings entered an appearance by writ filed on 5 July 2010, requesting that the question of constitutionality raised be ruled inadmissible or, in any case, manifestly groundless.

1.3.1. – The accused in the main proceedings avers, first and foremost, that the question raised is inadmissible due to the failure to describe the facts at issue in the main proceedings, thereby preventing the Court from fully evaluating their relevance. He claims that, as a matter of procedural law, the obligation on the lower court to provide a detailed description of the facts placed before it for examination has not been diminished, and in any case considers that, even if this argument were accepted, in the case under examination the failure to provide a description of the facts of the case would be so "drastic" as to result in any case in the question being ruled inadmissible. The private party in fact asserts that the referral order: does not clarify to what offences the charge refers, nor where and when they are alleged to have been committed, nor whether complicity with other persons is alleged; does not provide a detailed description of the "subjective prerequisite justifying the application" of the contested provision; and does not indicate the stage of the proceedings being celebrated before the lower court. In the opinion of the accused in the main proceedings, according to the principle of the self-sufficiency of the referral order, this information, of which the Court "must necessarily be aware […] in order to understand the impact that the application" of the contested legislation could have on the main proceedings, could also not be obtained "by reference to the submissions of the other intervener parties or by directly consulting the case file, or even from generally known facts".

The accused in the main proceedings moreover avers as further grounds for inadmissibility that the question raised by the referring court is in actual fact irrelevant, since in order to establish relevance it would be "necessary for the unconstitutional application of the Law were not only the sole possible interpretation but also support

and orient the application that the court was minded to make in the same context". This is claimed not to apply to the case under examination, in which, at the hearing of 12 April 2010, counsel for the accused in the first place averred a legitimate impediment for the same day, consisting in a journey on official state business to Washington D.C. in the United States of America, whilst also submitting a certificate from the Secretary General of the Office of the President of the Council of Ministers establishing an ongoing legitimate impediment until 21 July.

In the light of these circumstances, according to the accused in the main proceedings, the question is irrelevant for two reasons.

First, the question is claimed to have been raised "prematurely prior to the actual need to apply" the contested legislation, given the "existence of the specific legitimate impediment, valid *hic et nunc* for the hearing of 12 April 2010, consisting in a journey on state business to Washington". The accused in the main proceedings clarifies that the certificate from the Office of the President of the Council of Ministers was filed only in order to indicate the dates of 21 and 28 July for the continuation of proceedings, which however the referring court is stated not even to have taken into consideration, by contrast raising immediately – and hence prematurely – the question concerning the constitutionality of the contested legislation.

Secondly, the accused in the main proceedings states that, even if "it were to be held that the mere submission of the certificate […] were equivalent to a request for the provisions to be applied, notwithstanding the existence of a valid legitimate impediment applicable to the day of the hearing in which it was submitted", that certificate is limited to indicating an ongoing legitimate impediment for a period of time of little more than three months, and hence less than the maximum period of six months provided for under the contested legislation. Therefore, that provision was only "partially applied" in the proceedings before the lower court and the question of constitutionality should therefore have been formulated with reference to the legislation that was actually applied, that is legislation resulting in a suspension of hearings for three months, whilst – according to the private party – the lower court "refers in abstract terms to 'significant periods of time' during which the legitimate impediment could be relied on".

On the merits, the accused in the main proceedings considers that the referring court raised the question concerning the constitutionality of the contested legislation on the basis of the mistaken assumption that it introduced a mechanism which, "leaving aside the reference to the *nomen* of legitimate impediment, in reality amounts to a prerogative associated with the constitutional office of the President of the Council of Ministers and must therefore be governed by a source of law with constitutional status".

First and foremost, the fact on which the referring court bases this assumption – namely the alleged provision that the courts will no longer have the power and duty to verify the existence of the legitimate impediment – is denied by the accused in the main proceedings. He in fact observes that "nothing prohibits the court to which the certificate issued by the Office of the President of the Council of Ministers" referred to under the contested legislation is submitted "either from ascertaining its authenticity or requesting […] further clarifications regarding the governmental activity that must be carried out", whilst it is only precluded the ability "to review the governmental activity on the merits, concluding that it is either more or less important or necessary", which would moreover also violate the principle of the separation of powers.

Moreover, according to the accused in the main proceedings, the "right of the court to enter into the merits of whether the legitimate impediment is well founded" would not be "so co-essential with the very nature of the institution" as also to prevent "a situation in which an excuse was classified at the outset as justified under ordinary legislation, regarding which the court may only verify whether or not the statutory prerequisites obtain" from being classified as a legitimate impediment (rather than a constitutional prerogative). Arguing by analogy, the accused in the main proceedings considers that Parliament cannot be precluded from enacting ordinary legislation "setting out a list of debilitating illnesses in relation to which the courts would be required to acknowledge that an accused suffering from them had a legitimate impediment", with an entitlement "to order that inquiries be carried out into the authenticity of the certificate", but without "reviewing the reasonableness of the legislative choice to include one illness rather than another in that list". In fact, such legislation "would not negate the existence of a legitimate impediment" for an accused

"suffering from one of the illnesses provided for under legislation, transforming that fact into a prerogative for that type of invalid".

Accordingly, in the opinion of the accused in the main proceedings, in ruling that the contested legislation does not provide for a situation involving a legitimate impediment, the referring court is claimed to be arguing on the basis of a mistaken legal assumption and, consequently, to be invoking an irrelevant principle of constitutional law (Article 138 of the Constitution), since "nobody can seriously doubt that a specification by Parliament of some cases of legitimate impediment may and must occur under ordinary legislation". Parliament must – the accused in the main proceedings continues – strike a reasonable balance between the constitutional values in play (the right to a defence, the mandatory nature of criminal prosecutions and the reasonable length of trials) which will be subject to review by the Constitutional Court. However, the referral order completely fails to consider the issue of the "reasonableness of the actual balance of interests struck" by the contested legislation, by contrast remaining "anchored to the prejudice regarding the 'prerogative for the holders of political offices aimed at protecting not only the right to a defence in the proceedings but rather the actual status or function".

The argument that the contested legislation introduces a constitutional prerogative is claimed to be further contradicted, in the opinion of the private party, by its temporary nature: legislation intended "to take effect at most for eighteen months after publication" could not in fact "establish a constitutional prerogative, unless it is considered that constitutional prerogatives can expire".

Nor moreover can the argument asserting a constitutional prerogative draw support from the fact that the contested legislation "pre-announces a constitutional reform" of the prerogatives of the President of the Council of Ministers and of ministers. According to the accused in the proceedings before the lower court, this argument adopted by the referring court "considers in an entirely arbitrary manner the contents" of the contested legislation to be equivalent to the future constitutional legislation. According to the accused in the main proceedings, in enacting consolidated constitutional provisions regulating the prerogatives of members of the Government, the latter may also regulate "the interaction between the aforementioned prerogatives and

[…] institutions provided for under ordinary legislation […] such as legitimate impediment". However, this does not mean that the contested provisions intend to "pre-empt under ordinary legislation the effects of a constitutional reform". On the other hand, according to the private party, they pursue the goal of "regulating in an extremely balanced manner an interim period between the absolute lack of legislation dealing with the possible difficulties that the President of the Council of Ministers and ministers may encounter in defending themselves effectively in a criminal trial in which they are accused and the approval of a constitutional law redefining the status of these offices".

The balanced nature of the weighing of interests under the contested transitional legislation is claimed, according to the accused in proceedings before the lower court, to be established by the following additional facts. First, the legislation provides for the suspension of the period for time-barring, with the result that the effect of the legitimate impediment is for "the procedural situation simply to be frozen without any detrimental effect in substantive terms". Secondly, the specific application of this legislation in proceedings before the lower court would presumably make it possible to strike a fair balance between the interests in play, given that the accused in the main proceedings has rarely exercised the right to invoke a legitimate impediment, thereby enabling 83 hearings to be held. Finally, the maximum period permitted under the contested provisions over which the trial may be postponed is just six months, which is a very shorter period of time compared to the period of suspension caused as a result of the referral of the question to the Constitutional Court of the question of constitutionality raised by the lower court.

1.3.2. – On 22 November 2010, the accused in the main proceedings filed a written statement in which he restated the argument that the question of constitutionality should be ruled groundless. In the written statement the private party sets out the history of the proceedings before the lower court relating to the celebration of hearings and the requests for postponement up until 19 April 2010, with the stated goal of permitting this Court "to assess the reasonableness of the decision made by the *Tribunale di Milano* when confronted with an application for postponement accompanied by an indication of possible dates on which to hold subsequent hearings". It is stated to be clear from the history of the main proceedings that "the defence rigorously interpreted the canons of

interpretation applied" by the Court "in order to identify the concept of loyal cooperation in the proceedings, agreeing upon dates, not raising spurious impediments, and permitting hearings to be held even when the accused was unable to attend if his participation was not objectively necessary". Moreover, in observations filed also in respect of proceedings initiated by referral orders nos. 180 and 304 of 2010, the private party argues that the postponements requested due to legitimate impediment were always limited and respected the work of the court and that the certificates provided were always much shorter than the maximum time limit of six months. In conclusion therefore, according to counsel for the accused in the main proceedings, it would have been sufficient to apply the canons set out under Article 420-*ter* of the Code of Criminal Procedure in order to be able to continue the trials.

2. – By referral order of 16 April 2010 (no. 180 of 2010), the 10th Criminal Division of the *Tribunale di Milano* raised a question concerning the constitutionality of Articles 1 and 2 of Law no. 51 of 2010, due to violation of Articles 3 and 138 of the Constitution

2.1. – The referring court states that on 14 April 2010, in proceedings in which the accused was charged with the offence provided for under Articles 110, 319, 319-*ter* and 321 of the Criminal Code, counsel for the accused in the main proceedings sent an advance copy by fax of a request to postpone the hearing of 16 April (a date that had been set by the court in the previous hearing of 27 February 2010, along with the subsequent hearings of 30 April, 7 May, 12 May and 29 May 2010), averring a legitimate impediment consisting in the commitment to chair the meeting of the Council of Ministers called for the same day. The referring court states that, during the course of the hearing of 16 April, counsel for the accused in the main proceedings submitted a copy of the agenda of the meeting of the Council of Ministers (dated 14 April 2010) and displayed the original, submitting a copy, "of the certificate of the General Secretary of the Office of the President of the Council of Ministers relating to the ongoing nature of the legitimate impediment associated with the conduct of the business of government" pursuant to the contested Law. The lower court moreover states that the public prosecutor requested that the application for postponement be rejected, averring that the impediment was not absolute in nature in the light of the items placed on the agenda of

the meeting of the Council of Ministers of 14 April 2010 and the fact that the impediment arose after the schedule for the hearings agreed upon had been set, whilst counsel for the defence of the accused reasserted the relevance of the items placed on the agenda of the meeting of the Council of Ministers, and therefore the absolute nature of the impediment.

According to the referring court, in order to rule on the application for postponement and the continuation of oral proceedings, it is "indispensable" to ascertain as a preliminary matter whether, under the terms of the contested legislative provisions and in accordance with the very nature of the "general institution" of legitimate impediment pursuant to Article 420-*ter* of the Code of Criminal Procedure, the court "retains… the power and duty to verify whether the impediment actually exists", by "a factual review to be carried out on a case by case basis and according to the specific facts of each case". According to the referring court, the contested legislation deprives the court of that power of assessment. In fact, it does not contain a "presumptive [..] regulation […]" of the institution "with reference to specific factual situations" that is "consistent […] with the generally applicable system set out under Article 420-*ter*". In the opinion of the lower court, Article 1(1) of Law no. 51 of 2010 "set out […] a list" of legitimate impediments that also include "preparatory and consequential activities, as well as […] any "activity otherwise co-essential to governmental functions". The "generic nature" of that formulation is claimed to limit the ability of the court to assess whether there actually is an impediment with regard to an individual hearing, which was reinforced by the provisions of Article 1(4), according to which "the court shall postpone the trial following the submission of certification attesting that the impediment is ongoing and associated with the conduct of the business" of government. The referring court concludes from the above that, under the terms of the contested legislation, "the postponement is imposed by generically asserted grounds not amenable to review by the courts and is tantamount to an automatic ground for the postponement of oral proceedings that is out of all proportion with the protection of the right to a defence, for which provision is made for the institution of legitimate impediment for non-appearance". Nor according to the referring court is it possible to interpret the contested Law in any other manner that would be capable of "safeguarding the review

by the ordinary courts of the nature of the impediment and its ongoing nature": indeed, such an interpretation "would result in a substantive failure to apply the new law" and would be at odds with the Parliament's intention, as expressly stated under Article 2 of the contested Law, which provides that "the new provisions shall apply in order to permit the President of the Council of Ministers and ministers to carry out the functions conferred upon them by the Constitution and under legislation in a untroubled manner".

In the light of these facts, the referring court considers that although the procedural mechanism provided for under the contested legislation is classified as a legitimate impediment, it in reality amounts to a "new prerogative" "associated with the exercise of the constitutional offices of President of the Council of Ministers and the ministers", and amounts to a "ground for suspension of the trial". However – the lower court observes – such a prerogative cannot be established under ordinary legislation, since "it creates an exception to the principle of the equality of all citizens before the law and the courts". Its source must necessarily be contained in constitutional law, as held by this Court in judgment no. 262 of 2009 and as is moreover recognised under the contested legislation itself, which is temporary in nature and is intended to apply in advance the effects of a constitutional law setting out consolidated provisions governing the prerogatives of the President of the Council of Ministers and of the ministers.

2.2. – The President of the Council of Ministers intervened in the proceedings, represented by the *Avvocatura Generale dello Stato*, requesting that the question of constitutionality raised be ruled inadmissible in relation to Article 3 of the Constitution, and in any case groundless in relation both to Article 3 and to Article 138 of the Constitution.

2.2.1. – As regards the alleged violation of Article 3 of the Constitution, the *Avvocatura Generale dello Stato* avers as a preliminary matter that the question is manifestly groundless on the grounds that "the referring court did not set out the grounds establishing the aforementioned violation". On the merits, the State representative considers that the contested provisions provide for "different treatment for the holders of the offices specified thereunder that is fully compatible with the necessary prerequisites of reasonableness and proportionality", since these provisions are intended to strike – with specific reference to a situation in which a President of the

Council of Ministers on trial is under a legitimate impediment – "a reasonable balance between the two requirements, both with constitutional status, of expedited proceedings and the functional integrity of the constitutional organ". Moreover, according to the *Avvocatura Generale dello Stato*, it cannot be concluded that the violation of Article 3 of the Constitution results from an unlawful differentiation between the position of the President of the Council of Ministers and that of the ministers, since the contested legislation refers to both offices.

On the other hand, as regards the alleged violation of Article 138 of the Constitution, the *Avvocatura Generale dello Stato* avers that the challenge is groundless on the basis of arguments verbatim identical to those submitted in its intervention in the proceedings initiated by referral order no. 173 of 2010.

2.2.2. – On 23 November 2010, the *Avvocatura Generale dello Stato* filed a written statement on behalf of the President of the Council of Ministers, restating the arguments contained in the intervention in support of the inadmissibility and groundlessness of the question of constitutionality raised. The State representative submitted further observations relating to the manifest inadmissibility and groundlessness of the question, on the basis of arguments verbatim identical to those submitted in its intervention in the proceedings initiated by referral order no. 173 of 2010.

2.3. – By writ filed on 5 July 2010, the accused in the main proceedings entered an appearance, requesting that the Court rule the question of constitutionality raised inadmissible, or in any case manifestly groundless.

2.3.1. – The accused in the main proceedings avers first and foremost that the question raised is inadmissible due to the failure to describe the facts at issue in the main proceedings, thereby preventing the Court from fully evaluating their relevance. In particular, in the opinion of the accused in the main proceedings, the referral order contains a "laconic indication of the offences provided for in the Criminal Code with which the accused was charged and the time and place of the [conduct falling under the] counts of the charge" and does not provide a detailed description of the "subjective requirement that legitimates the application" of the contested provision, nor of the stage that the proceedings in progress before the lower court have reached. The accused in the

main proceedings argues that, according to the principle of the self-sufficiency of the referral order, this information, of which the Court "must necessarily be aware in order to be able to give a ruling", could not be obtained "by reference to the submissions of the other intervener parties or by directly consulting the case file, or even from generally known facts".

The accused in the main proceedings moreover avers as further grounds for inadmissibility that the question raised by the referring court is actually irrelevant. In order to establish relevance it would be "necessary that the unconstitutional application of the Law were not only the sole possible interpretation but also support and orient the application that the court was minded to make in the same context". This is claimed not to obtain in the case under examination in which, at the hearing of 16 April 2010, the counsel for the accused in the first place averred a legitimate impediment for the same day, consisting in the parallel meeting of the Council of Ministers, whilst also submitting a certificate from the Secretary General of the Office of the President of the Council of Ministers establishing an ongoing legitimate impediment until 21 July 2010.

In the light of these circumstances, according to the accused in the main proceedings, the question is irrelevant for two reasons.

First, the question is claimed to have been raised "prematurely prior to the actual need to apply" the contested legislation, given the "existence of the specific legitimate impediment, valid *hic et nunc* for the hearing of 16 April 2010, the date of the parallel meeting of the Council of Ministers". The accused in the main proceedings clarifies that the certificate from the Office of the President of the Council of Ministers was filed only in order to indicate the dates of 21 and 28 July for the continuation of proceedings, which however the referring court is stated not even to have taken into consideration, by contrast raising immediately – and hence prematurely – the question concerning the constitutionality of the contested legislation.

Secondly, the accused in the main proceedings states that, even if "it were to be held that the mere submission of the certificate […] were equivalent to a request for the provisions to be applied, notwithstanding the existence of a valid legitimate impediment applicable to the day of the hearing in which it was submitted", that certificate is limited to indicating an ongoing legitimate impediment for a period of time of little more than

three months, and hence less than the maximum period of six months provided for under the contested legislation. Therefore, that provision was only "partially applied" in the proceedings before the lower court and the question of constitutionality should therefore have been formulated with reference to the legislation that was actually applied, that is legislation resulting in a suspension of hearings for three months, whilst the lower court "refers in abstract terms to 'significant periods of time' during which the legitimate impediment could be relied on".

On the merits, the private party argues that the question of constitutionality raised by the referring court with reference to Article 138 of the Constitution is manifestly groundless for the reasons provided on the basis of arguments verbatim identical to those submitted in its intervention in the proceedings initiated by referral order no. 173 of 2010.

With regard on the other hand to the alleged violation of Article 3 of the Constitution, the private party observes that "the referral order contains no evaluation whatsoever of the *tertium comparationis* […] or to the reasonableness of the balancing of interests struck" by the contested legislation.

As regards the first issue, it is argued that the referral order does not clarify in respect of which individuals the contested legislation "creates unequal treatment: whether compared to an ordinary citizen, or other State officials, or a President of the Council of Ministers and ministers protected by true constitutional immunity".

As regards the second issue, it is observed that the lower court limits itself to asserting that the contested procedural mechanism is "the cause for an automatic ground for the postponement of oral proceedings that is out of all proportion with the protection of the right to a defence", without however submitting any other argument "in order to give substance and content to the alleged lack of proportion" and above all without considering the temporary and transitional nature of the contested legislation, which is liable to have a significant impact on the assessment of the reasonableness of the balancing of interests struck by it.

2.3.2. – On 22 November 2010, the accused in the main proceedings filed a written statement in which he restated the argument that the question of constitutionality should be ruled groundless. In particular, the private party sets out the history of the

proceedings before the lower court relating to the celebration of hearings and the requests for postponement, submitting the same arguments as those contained in the written statement relating to the proceedings initiated by referral order no. 173 of 2010.

3. – By referral order of 24 June 2010 (no. 304 of 2010), the Judge in charge of preliminary investigations at the *Tribunale di Milano* raised a question concerning the constitutionality of Article 1 of Law no. 51 of 2010, due to violation of Article 138 of the Constitution.

3.1. – The referring judge states that, pursuant to the contested legislation, counsel for the accused in the main proceedings filed an application for postponement of the preliminary hearing until 27 July 2010, submitting a certificate issued by the Secretary of the Office of the President of the Council of Ministers intimating an ongoing impediment until the aforementioned date associated with the business of government that the accused is called upon to perform in his capacity as the current President of the Council of Ministers. The referring judge asserts first and foremost that, following receipt of the application for postponement, the public prosecutor requested that a calendar of hearings be scheduled for September and October and counsel for the defence of the accused stated his willingness to attend, however specifying that "any scheduling of hearings must in any case take account of future institutional commitments of his client, which as things stand cannot be determined".

The referring judge considers that, for the purposes of the decision on the application for postponement of the preliminary hearing, it will be necessary as a preliminary matter to ascertain whether, in the light of the contested legislative provision, "the judge retains the power provided for under Article 420-*ter* of the Code of Criminal Procedure to review on a case by case basis whether the legitimate impediment may be deemed to be absolute for the entire period during which it is asserted and, as such, constitute legitimate grounds for the application to postpone the hearing". To this end, in the opinion of the referring judge, the contested law must be interpreted taking account of the Law's "rationale" specified in Article 2, namely of regulating "the prerogatives of the President of the Council of Ministers and of the ministers in order to permit the untroubled conduct of the functions conferred upon them […] pending enactment of a law with constitutional status that will implement

consolidated and definitive arrangements". In the light of this fact, the referring judge considers that, "when confronted with a certificate issued by the Government in which indiscriminate references are made to the non-deferrable institutional commitments contained in the diary of the President of the Council of Ministers for a specific period of time, without any precise reference to their nature, frequency and duration, the judge is prevented from carrying out any review regarding the absolute nature of the impediment thus represented".

However, a legislative classification of this nature, that was binding on the courts, as an "ongoing legitimate impediment associated with the business of government" would, in the opinion of the referring judge, in practice translate into a "kind of temporary exemption from criminal jurisdiction intended to continue for the full term during which the government office is held". This exception from the ordinary juridical arrangements would amount to a prerogative in favour of the members of a constitutional body that, according to the findings of this Court, can only be introduced by a constitutional law. Moreover – the referring judge continues – "in stipulating its temporary nature" Article 2 itself of the contested Law "appears to be mindful of the requirement that the consolidated framework of the prerogatives of the members of the Council of Ministers be implemented according to the mechanism provided for under Article 138 of the Constitution". Therefore, the alleged violation of this latter constitutional provision induces the referring court, having found the matter to be relevant and not manifestly groundless, to raise *ex officio* a question concerning the constitutionality of the contested legislation which, as a piece of ordinary legislation, cannot "pre-empt the effects of a law with constitutional status, not even for a limited period of time".

3.2. – The President of the Council of Ministers intervened in the proceedings, represented by the *Avvocatura Generale dello Stato*, requesting that the question of constitutionality raised be ruled inadmissible, or in any case groundless.

The State representative avers first and foremost that the question of constitutionality raised is inadmissible "due to its specific irrelevance". In fact, the *Avvocatura Generale dello Stato* observes that, as is clear from the referral order itself, the application for postponement of the preliminary hearing due to the certified

impediment of the accused was not opposed by any party, including the public prosecutor, who requested that a calendar of hearings be scheduled for September and October. In this context, in the opinion of the State representative, the referring judge should as a preliminary matter have assessed the application for postponement pursuant to the general provision contained in Article 420-*ter* of the Code of Criminal Procedure and, only in the event that this provision was held to be inapplicable, verify the applicability of the more specific contested provision. However, according to the *Avvocatura Generale dello Stato*, the referring judge proceeded – on a "theoretical" basis "without providing any indication as to the relevance of the provision with reference to the procedure in question" – to raise a question concerning the constitutionality of the contested provision, which is accordingly inadmissible.

On the merits, the *Avvocatura Generale dello Stato* avers that the question raised is groundless on the basis of arguments verbatim identical to those submitted in its intervention in the proceedings initiated by referral order no. 173 of 2010. In particular, the State representative argues that the contested legislation cannot amount to a constitutional prerogative. In fact, it was intended to supplement the arrangements governing the general procedural institution of legitimate impediment, which may indeed be regulated under ordinary legislation since it "applies irrespective of the nature of the activity establishing the legitimate impediment, [is] of general application and accordingly does not depart from ordinary judicial arrangements".

3.3. – The individual accused in the main proceedings entered an appearance by writ filed on 26 October 2010, requesting that the question of constitutionality raised be ruled inadmissible or, in any case, manifestly groundless.

3.3.1. – The accused in the main proceedings avers, first and foremost, that the question raised is inadmissible due to the failure to describe the facts at issue in the main proceedings, thereby preventing the Court from fully evaluating their relevance. In particular, in the opinion of the accused in the main proceedings, it is claimed that the referral order does not specify the offences charged and the time and place of their commission, nor does it provide a detailed description of the "subjective prerequisite justifying the application" of the contested provision or indicate the stage of the proceedings being celebrated before the lower court. In the opinion of the accused in the

main proceedings, according to the principle of the self-sufficiency of the referral order, this information, of which the Court "must necessarily be aware in order to be able to issue a ruling", could not be obtained "by reference to the submissions of the other intervener parties or by directly consulting the case file, or even from generally known facts".

The accused in the main proceedings moreover avers as further grounds for inadmissibility that the question raised by the referring court is irrelevant on the facts. The private party argues in this regard, supplementing the imprecise description allegedly contained in the referral order, that in the case under examination, at the hearing of 24 June 2010 counsel for the defence of the accused first averred a legitimate impediment for that day, consisting in the parallel meeting of the Council of Ministers and the subsequent departure for an international summit in Canada, and secondly submitted the certificate issued by the General Secretary of the Office of the President of the Council of Ministers attesting the ongoing legitimate impediment until 27 July 2010.

In the light of these circumstances, according to the accused in the main proceedings, the question is irrelevant for two reasons.

First, the question is claimed to have been raised "prematurely prior to the actual need to apply" the contested legislation, given the "existence of the specific legitimate impediment, valid *hic et nunc* for the hearing of 24 June 2010, consisting in the meeting of the Council of Ministers and the journey on State business to Canada". The accused in the main proceedings clarifies that the certificate from the Office of the President of the Council of Ministers was filed only in order to indicate the dates of 21 and 28 July for the continuation of proceedings, which however the referring court is stated not even to have taken into consideration, by contrast raising immediately – and hence prematurely – the question concerning the constitutionality of the contested legislation.

Secondly, the accused in the main proceedings states that, even if "it were to be held that the mere submission of the certificate […] were equivalent to a request for the provisions to be applied, notwithstanding the existence of a valid legitimate impediment applicable to the day of the hearing in which it was submitted", that certificate is limited to indicating an ongoing legitimate impediment for a period of time of little more than

one month, and hence less than the maximum period of six months provided for under the contested legislation. Therefore, that provision was only "partially applied" in the proceedings before the lower court and the question of constitutionality should therefore have been formulated with reference to the legislation that was actually applied, that is legislation resulting in a suspension of hearings for one month, whilst – according to the private party – the referring judge "refers in abstract and imprecise terms to 'a kind of temporary exemption from criminal jurisdiction intended to continue for the full term during which the government office is held'".

On the merits, the private party argues that the question of constitutionality raised by the referring judge is manifestly groundless for the reasons provided on the basis of arguments verbatim identical to those submitted in its intervention in the proceedings initiated by referral order no. 173 of 2010.

3.3.2. – On 22 November 2010, the accused in the main proceedings filed a written statement in which he restated the argument that the question of constitutionality should be ruled groundless. The private party sets out the history of the proceedings before the lower court relating to the celebration of hearings and the requests for postponement, submitting the same arguments made in the written statements relating to the proceedings initiated by referral orders no. 173 and 180 of 2010.

Conclusions on points of law

1. – By three different referral orders from the 1st Criminal Division (no. 173 of 2010), the 10th Criminal Division (no. 180 of 2010) and the Judge in charge of preliminary investigations (no. 304 of 2010), the *Tribunale di Milano* raised a question concerning the constitutionality of Law no. 51 of 7 April 2010 (Provisions governing impediments on appearing in court). In particular, the 10th Division challenged the entire text of Law no. 51 of 2010, whilst the Judge in charge of preliminary investigations challenged only Article 1, and the 1st Division only paragraphs 1, 3 and 4 of that Article.

All of the referral orders raise a question concerning the constitutionality of the above legislation on the grounds that it introduces a prerogative in favour of the holders of governmental office through ordinary legislation, in contrast with the principle of equality laid out under Article 3 of the Constitution and with Article 138 of the Constitution. These constitutional provisions are both expressly indicated as principles

that have been violated in the referral order of the 10th Division and are also implicitly invoked in conjunction with one another the other two referral orders, although the text of these orders refers only to Article 138 of the Constitution. Moreover, the 10th Division challenged Law no. 51 of 2010 also with reference to Article 3 of the Constitution, considered in isolation, on the grounds of reasonableness.

1.1. – Law no. 51 of 2010 regulates the legitimate impediment for non-appearance in hearings, pursuant to Article 420-*ter* of the Code of Criminal Procedure, by the President of the Council of Ministers (Article 1(1)) and ministers (Article 1(2)) in their capacity as accused persons. In particular, pursuant to Article 1(3) of that Law, where requested by one of the parties the court shall postpone the trial until a subsequent hearing when the prerequisites for a legitimate impediment specified under paragraph 1 (for the President of the Council of Ministers) and paragraph 2 (for ministers) of the Law are met. Under the terms of this legislation, a legitimate impediment consists in "the parallel exercise of one or more of the powers provided for under laws or regulations and in particular pursuant to Articles 5, 6 and 12 of Law no. 400 of 23 August 1988, as amended, Articles 2, 3 and 4 of Legislative decree no. 303 of 30 July 1999, as amended, and the internal regulation of the Council of Ministers contained in the Decree of the President of the Council of Ministers of 10 November 1993, published in *Official Journal* no. 268 of 15 November 1993, as amended, the relative preparatory and consequential activities, as well as any activity otherwise co-essential to governmental functions". Moreover, Article 1(4) of the Law provides that "if the Office of the President of the Council of Ministers certifies that the legitimate impediment is ongoing and related to the conduct of the functions provided for under this Law, the court shall postpone the trial until a hearing to be held after the period specified, which may not exceed six months". Article 1(5) of Law no. 51 of 2010 clarifies that "the relevant period for time-barring shall remain suspended for the full duration of the postponement". This legislation applies "also to criminal proceedings in progress, at any stage, state or instance on the date of entry into force of" the Law (Article 1(6)) and "until the date of entry into force of the constitutional law laying down consolidated regulations of the prerogatives of the President of the Council of Ministers and the ministers, as well as legislation implementing the procedures governing participation by

these parties in criminal proceedings and, in any case, no later than eighteen months after the date of entry into force of this Law, without prejudice to the cases provided for under Article 96 of the Constitution, in order to permit the President of the Council of Ministers and the ministers to carry out the functions conferred upon them by the Constitution and under legislation in an untroubled manner" (Article 2).

1.2. – The referring judges consider, in particular, that the contested legislation specifies the activities that amount to a legitimate impediment of the holder of governmental office by generic and indeterminate formulae and deprives the court of the power to assess on the facts the inability to appear associated with the specific commitment averred, above all in the event of an ongoing impediment, for which the accused may obtain postponement according to a "self-certification mechanism" of a legitimate impediment. In the opinion of the referring court, this amounts to an "absolute presumption of an impediment" associated with the permanent status" of the office holder, or in any case a prerogative or immunity of the holder which, as held by the Constitutional Court in judgment no. 262 of 2009, cannot be introduced through ordinary legislation.

The *Avvocatura Generale dello Stato* and counsel for the defence of the accused in the main proceedings argue that the contested legislation is not unconstitutional, observing in particular that it is intended to "supplement" the ordinary procedural provisions contained in Article 420-*ter* of the Code of Criminal Procedure by "specifying" the governmental activities that amount to a legitimate impediment from appearing in court.

2. – Due to their objective connection, the proceedings must be joined for discussion and resolution in a single judgment.

3. – As a preliminary matter it is necessary to examine the issues relating to the admissibility of the questions raised.

3.1. – The objections raised by the 10th Division (no. 180 of 2010) and by the Judge in charge of preliminary investigations (no. 304 of 2010) of the *Tribunale di Milano* must be ruled inadmissible insofar as they refer to Article 1(2), (5) and (6) as well as Article 2 of Law no. 51 of 2010. The questions concerning the constitutionality of Article 1(2) of the contested Law are not relevant in the proceedings before the lower

court, in which that provision cannot apply, since it refers exclusively to ministers and not to the President of the Council of Ministers, that is to the office held by the accused in the main proceedings. The questions concerning the constitutionality of Article 1(5) and (6) of Article 2 of Law no. 51 of 2010 are inadmissible since these provisions are not in any way covered by the objections contained in the grounds for the referral orders.

3.2. – The Court also dismisses the objections raised by the *Avvocatura Generale dello Stato* and by counsel for the private party averring the inadmissibility of the questions of constitutionality relating to Article 1(1), (3) and (4) of Law no. 51 of 2010.

3.2.1. – Counsel for the private party and the *Avvocatura Generale dello Stato* aver first and foremost, in respect of all three proceedings, that the description made by the lower courts of the facts placed before them for examination is insufficient and contains gaps. The contested shortcomings are stated to consist, in particular, in the failure to specify the types of offence to which the charge relates, the place and date on which the relevant acts were committed, any questions of complicity with other persons, the subjective prerequisite justifying the application of the contested provision and the stage of the proceedings being celebrated before the lower courts.

The objection is groundless.

It must first be noted that the referral order from the 10th Division of the *Tribunale di Milano* (no. 180 of 2010) contains all of the information that is alleged to be lacking. Secondly, the other two referral orders (no. 173 and no. 304 of 2010) specify the subjective prerequisite justifying the application of the contested legislation (namely the fact that the accused holds the office of President of the Council of Ministers) and clarify that the referral has been requested in respect of a "hearing" ordered during the course of a criminal trial. Finally, an indication as to the type, place and date on which the offences charged were committed is not a necessary element in assessing the relevance of the question raised, since the contested legislation provides that it is applicable to all criminal trials, including those in progress, without distinction based on the characteristics of the offence committed, other that in cases involving the application of Article 96 of the Constitution, clearly precluded both by the referring court and the private party himself.

3.2.2. – The *Avvocatura Generale dello Stato* further avers that the referring court should as a preliminary matter have assessed the application for postponement of the hearing pursuant to the general provisions contained in Article 420-*ter* of the Code of Criminal Procedure and, only in the event that this provision was held to be inapplicable should it have assessed the applicability of the more specific contested provision. In the opinion of the State representative, the question is therefore irrelevant because the court could have resolved it notwithstanding contested provision.

The objection is groundless.

In applying only Article 420-*ter* of the Code of Criminal Procedure, the court could not have disregarded the contested legislation, which regulates the facts placed before it for examination. In the light of the common procedural arrangements, the court could have postponed the hearing, recognising that it was absolutely impossible for the accused to appear due to the specific institutional commitment averred; however, in that case the postponement would in any case have been possible subject to the outcome of the court's examination, which the referring court states it is not able to carry out due to the enactment of the more specific legislation, which it has challenged precisely for that reason.

3.2.3. – Counsel for the defence of the private party goes on to aver that the questions are inadmissible due to the irrelevance on the facts of the question raised. It is observed in this regard that in the proceedings before the lower court, the President of the Council of Ministers averred both a specific impediment for the date of the hearing, as well as an ongoing impediment certified by the Office of the President of the Council of Ministers. According to counsel for the accused in the main proceedings, the specific impediment was raised in order to obtain a postponement of the specific hearing in respect of which it was submitted, whilst the certificate regarding the ongoing impediment was filed only for the purpose of identifying the dates on which the proceedings could be continued. Consequently, in the opinion of the private party, the referring judges should have first assessed the specific impediment for the purposes of postponing the hearing, and only subsequently "reviewed whether or not the application for postponement for the additional period specified according to the procedures proceeded for under the Law under discussion was well founded". On the contrary,

according to counsel for the accused, the lower courts raised the question concerning the constitutionality of the contested legislation immediately, and therefore "prematurely prior to the actual need to apply" it.

The objection is groundless.

First, it should be observed that the court is not required to apply the contested legislation only when an ongoing impediment is averred by the accused by a certificate issued by the Office of the President of the Council of Ministers, as provided for under Article 1(4) of Law no. 51 of 2010, but also when a specific individual commitment is averred, which the court must assess on the basis of Article 1(1) and (3) of the same Law. Accordingly, the latter are provisions in respect of which the question of constitutionality raised must in any case be regarded as relevant. Moreover, the certificate issued by the Office of the President of the Council of Ministers, filed in the proceedings before the lower court, in reality also covers the day of the hearing to which the application for postponement refers. Therefore, it is not relevant in the main proceedings solely for the purposes of scheduling subsequent hearings, but also for the purposes of the postponement of the specific hearing during which it was filed. It follows that, with regard to the issue under consideration, the question of constitutionality is relevant both for Article 1(1) and (3) of Law no. 51 of 2010 as well as paragraph 4 of the same Article.

3.2.4. – Counsel for the accused also goes on the aver that the questions raised are inadmissible due to their lack of relevance, asserting that, in the proceedings before the lower court, the certificate issued by the Office of the President of the Council of Ministers was limited to specifying an ongoing impediment for a period of time shorter than the maximum period of six months provided for under the contested legislation. In the light of this, according to counsel for the accused, the contested legislation was "partially applied" and the question of constitutionality should consequently have been formulated in relation to the legislation that was actually applied, resulting in the suspension of the proceedings for the period of time indicated in the certificate and not for that theoretically specified by the Law. On the contrary, counsel for the accused argues that the lower court "refer[red] in abstract terms to 'significant periods of time' during which the legitimate impediment could be relied on".

The objection is groundless.

The referring court questions the constitutionality of the contested legislation insofar as it permits the accused to aver an ongoing impediment for a "significant period of time". This formula covers both the maximum period of six months provided for under the legislation in abstract terms as well as the shorter, but nonetheless significant, period covered by the certificate which was actually submitted in the main proceedings, which clearly amounted to an application of the contested provision in this case.

3.2.5. – Finally, both the *Avvocatura Generale dello Stato* as well as counsel for the accused aver that the question concerning the constitutionality of the contested legislation raised by the 10th Division of the *Tribunale di Milano* (no. 180 of 2010) with reference to Article 3 of the Constitution on the grounds of reasonableness is inadmissible. It is objected in particular that the lower court did not "set out the grounds establishing the aforementioned violation" and that "the referral order contains no evaluation whatsoever of the *tertium comparationis* […] or to the reasonableness of the balancing of interests struck" by the contested legislation.

The objection is groundless.

First, the referring court justifies its objection of unreasonableness, observing that "the postponement [of the hearing] is required on grounds generically indicated and not amenable to review by the courts and is tantamount to an automatic ground for the postponement of oral proceedings that is out of all proportion with the protection of the right to a defence, in respect of which for which provision is made for the institution of legitimate impediment for non-appearance". Secondly, the arguments on the basis of which the referring court asserts that Articles 3 and 138 of the Constitution have been violated, including in particular the general and automatic nature of the presumptions of a legitimate impediment introduced by the contested legislation, also establish its unreasonableness. Moreover, in this last case no requirement to specify a *tertium comparationis* arises.

4. – In order to rule on the merits of the questions raised by the referring court, it is necessary as a preliminary matter to frame the general problem of the legitimate impediment of a holder of an office provided for under constitutional law in the light of the principles governing this issue as asserted by this Court.

4.1. – In this regard, it is first and foremost the judgments assessing the constitutionality of provisions ordering the suspension of proceedings against the high offices of State (judgments no. 262 of 2009 and no. 24 of 2004) that are of significance. This Court held that an absolute presumption of a legitimate impediment for the occupant of governmental office as a general and automatic mechanism introduced under ordinary legislation is unconstitutional in that it is intended to protect that individual by establishing an exemption from the ordinary procedural arrangements, and accordingly to create a prerogative, in breach of Articles 3 and 138 of the Constitution. According to the reasoning followed in judgment no. 262 of 2009, such a presumption amounts to an exemption from and dis-application of the general rules governing proceedings which, in particular, permit "the procedural position of the member of a constitutional organ [to be treated differently] only insofar as strictly necessary, without any automatic and general mechanism".

It is then necessary to consider the judgments issued concerning jurisdictional disputes initiated by the Chamber of Deputies against the judiciary regarding the failure by the latter to recognise the legitimate impediments of the accused consisting in the latter's participation in parliamentary business (judgments no. 451 of 2005, no. 284 of 2004, no. 263 of 2003 and no. 225 of 2001). This Court has clarified that the position of a parliamentarian who is accused of a criminal offence "is not subject to special constitutional guarantees" and "the general rules governing criminal trials" are fully applicable to him (judgment no. 225 of 2001). However, it did assert that when applying these general procedural rules, the courts must exercise their power to "assess the impediments averred" by parliamentarians accused of a criminal offence, "tak[ing] account not only of the requirements relating to activities within their own remit, but also of the constitutionally protected interests of other branches of State" (judgment no. 225 of 2001), therefore striking a "reasonable balance between the dual requirements […] of an expedited trial and the functional integrity of Parliament" (judgment no. 263 of 2003), in particular scheduling "the calendar of hearings in such a manner as to avoid overlaps with the days on which parliamentary bodies are in session" (judgment no. 451 of 2005). Therefore, the exceptional rules cannot apply, though the ordinary

arrangements must be applied according to the principle of loyal cooperation between branches of State.

4.2. – In the light of these principles, for the purposes of assessing the constitutionality of the contested legislation, a relevant issue involves establishing whether – notwithstanding its temporary nature – the latter amounts to an exception from the ordinary procedural arrangements, and specifically those provided for under Article 420-*ter* of the Code of Criminal Procedure. It provides the terms of reference for the assessment as to whether, in creating an exception from the ordinary procedural arrangements, the contested legislation introduces a prerogative through ordinary legislation, the regulation of which is however reserved to the Constitution, thereby violating the principle of the equality of all citizens before the courts and hence breaching Articles 3 and 138 of the Constitution. The contested legislation will therefore be ruled unconstitutional if and insofar as it alters the essential features of the ordinary procedural arrangements. According to the latter, an impediment averred by an accused cannot be generic and the postponement by the court cannot be automatic. With regard to the former aspect, the accused is obliged to specify the impediment, and may aver as such a precise and specific commitment, but not part of his own activity specified generically or considered as a whole. With regard to the latter aspect, when deciding whether to postpone the hearing, the court must assess the specific impediment averred on the facts.

5. – Insofar as the complaints by the lower court relate to the provisions of Law no. 51 of 2010 considered overall, although these provisions are justified by a common rationale, the contested legislation is nonetheless not uniform in structural terms.

Indeed, it is comprised of several elements, each of which is likely to be classified in self-standing terms from the standpoint of its consistency with procedural law and, therefore, is also liable to be assessed differently under constitutional review. The constitutionality of the three different paragraphs of Article 1 of Law no. 51 of 2010 to which the objections of the referring courts refer must be conducted separately: paragraph 1, which specifies the functions of the President of the Council of Ministers that constitute a legitimate impediment; paragraph 3, which regulates the postponement of the hearing by the court where the circumstances specified under the previous

paragraphs obtain; and paragraph 4, which regulates cases of ongoing impediment certified by the Office of the President of the Council of Ministers.

5.1. – Article 1(1) of Law no. 51 of 2010 provides as follows: "The President of the Council of Ministers shall be under a legitimate impediment, pursuant to Article 420-*ter* of the Code of Criminal Procedure, from appearing in hearings in criminal proceedings in which he is accused of a criminal offence, in cases involving the parallel exercise of one or more of the powers provided for under laws or regulations and in particular pursuant to Articles 5, 6 and 12 of Law no. 400 of 23 August 1988, as amended, Articles 2, 3 and 4 of Legislative decree no. 303 of 30 July 1999, as amended, and the internal regulation of the Council of Ministers contained in the Decree of the President of the Council of Ministers of 10 November 1993, published in *Official Journal* no. 268 of 15 November 1993, as amended, the relative preparatory and consequential activities, as well as any activity otherwise co-essential to governmental functions"

Insofar as they relate to this provision, the questions raised by the referring court are groundless for the reasons specified below.

In the opinion of the referring court, rather than identifying certain rigorously and mandatorily limited situations involving an impediment of the President of the Council of Ministers, the contested legislation establishes an absolute presumption of a legitimate impediment relating to a broad and indeterminate series of functions ultimately coinciding with the entire scope of activity of the holder of the governmental office.

There is no doubt that, were it to be interpreted in this manner, the provision under examination would be unconstitutional on the grounds that it does not comply with ordinary procedural arrangements, and therefore violates Articles 3 and 138 of the Constitution for the reasons specified by this Court in judgment no. 262 of 2009. However, a legislative provision cannot be ruled unconstitutional only when it is not possible to attribute it a meaning that is compatible with the Constitution – i.e., in the case under examination, if it is not possible to draw it within the ambit of the ordinary arrangements and interpret it in accordance with the general procedural institute provided for under Article 420-*ter* of the Code of Criminal Procedure.

This is possible in view of the fact that Article 1(1) of Law no. 51 of 2010 expressly refers to Article 420-*ter* of the Code of Criminal Procedure as well as the fact that, in enacting the contested provision, Parliament appears to have intended to introduce – as is suggested by the *travaux preparatoires* – a "mere interpretative provision within the context of the application of a procedural rule" (report of parliamentary business, Chamber of Deputies, plenary session of 25 January 2010, and Senate of the Republic, 347th public morning plenary session of Tuesday 9 March 2010).

As argued by counsel for the accused, both in written statements and during the public hearing, the contested provision "does not entail an absolute presumption of legitimate impediment" and "does not impose any automatic procedures". It introduces a criterion aimed at providing direction to the judge when applying Article 420-*ter* of the Code of Criminal Procedure, and specifically paragraph 1 of that Article, by identifying in theoretical terms the classes of governmental powers significant to that end. Therefore, Parliament appears to have implemented and developed a ruling by the Court of Cassation, according to which the activities of the holder of a governmental office that are "co-essential to functions typical of the Government" constitute a legitimate impediment pursuant to Article 420-*ter* of the Code of Criminal Procedure (judgment of the Court of Cassation, 6th Criminal Division, judgment no. 10773 of 9 February 2004 – 9 March 2004). This expression has been carried over into Article 1(1) of Law no. 51 of 2010 and has been elevated to a feature characterising all instances of legitimate impediment provided for under that provision, as is demonstrated by the fact that activities co-essential to governmental functions are placed at the end of the text of the provision and that the adverb "otherwise" introduces a link between the prerequisite of co-essentiality and the governmental functions provided for under laws and regulations (indicated both generically and specifically). The Court therefore holds that, according to this criterion imposed by Parliament, the classes of activity classified in theoretical terms as constituting a legitimate impediment for the President of the Council of Ministers are only those that are co-essential to governmental functions, whether provided for by law or under regulations (and in particular under the legislative sources expressly cited in the contested provision), as well as those preparatory (i.e.

specifically directed at) and consequential (i.e. directly resulting and strictly related) thereto.

This kind of legislative criterion is compatible with the essential features of the ordinary procedural arrangements. The contested provision does not permit the President of the Council of Ministers to aver as an impediment the generic duty to exercise the functions provided for thereunder, as it is still necessary according to the logic of Article 420-*ter* of the Code of Criminal Procedure for the accused to specify the nature of the impediment, averring a precise and detailed commitment falling under the situations specified [under the legislation]. This naturally applies also for "preparatory and consequential" activities, in respect of which it must be considered that the requirement to specify, still incumbent upon the accused, relates both to the main impediment (the exercise of a coessential power), as well as an ancillary impediment (preparatory or consequential activity). In other words, the President of the Council of Ministers must specify a precise and detailed commitment that is of a preparatory or consequential nature compared to another precise and detailed commitment that is associated with a power co-essential to governmental functions provided for by law or regulation.

Moreover, it cannot be concluded that the criterion imposed by Parliament is unreasonable or disproportionate, since it is based on the findings of case law and does not cover the full extent of the office holder's activities, but only the powers that may be classified as co-essential to governmental functions.

Finally, compared to the legislation already contained in Article 420-*ter* of the Code of Criminal Procedure, this legislative criterion has the effect of clarifying the scope of the ordinary procedural institution in cases in which it must be applied in respect of impediments consisting in the exercise of governmental functions. On the one hand, according to the legislative criterion, the courts will not recognise non-specific political commitments as legitimate impediments, namely those not related to powers that are co-essential to governmental functions, even where provided for by law or regulation. On the other hand, if an impediment falling under those types of powers is averred, the court will not be able to reject its significance on a theoretical level,

notwithstanding its power – of which it is not deprived by the legislation under examination – to assess the specific impediment averred on the facts.

The Court therefore finds that the questions of constitutionality raised are groundless insofar as they relate to Article 1(1) of Law no. 51 of 2010, since that provision may be interpreted in accordance with Article 420-*ter*(1) of the Code of Criminal Procedure.

5.2. – Article 1(3) of Law no. 51 of 2010 provides that: "If requested by one of the parties, the court shall postpone the trial until a subsequent hearing where the prerequisites specified under the previous paragraphs are met".

Insofar as they relate to this provision, the questions raised by the lower courts are groundless for the reasons specified below.

Article 1(3) of the contested Law regulates the powers of the court relating to the establishment of a legitimate impediment for the purposes of the resulting postponement of the hearing in respect of which this impediment is averred. It is necessary to establish whether the arrangements laid down by that provision comply with the corresponding regulation contained in Article 420-*ter*(1) of the Code of Criminal Procedure, according to which the court shall postpone the hearing when "it is established that the absence is due to the inability to attend due to unforeseeable circumstances, *force majeure* or another legitimate impediment". In other words, the contested provision must be deemed to be constitutional, provided that, in relation to the specific cases involving an impediment of the holder of governmental office, it does not deprive the court of the powers to assess the impediment averred, which have been granted to the court under the terms of ordinary procedural arrangements.

The *Avvocatura Generale dello Stato* and the private party have argued that the contested legislation does not deprive the court of the power to assess the impediment provided for under Article 420-*ter*(1) of the Code of Criminal Procedure. The court is argued to retain both the power to assess the evidence of the actual existence of an impediment, as well as the power to ascertain that the impediment "falls under the cases provided for" pursuant to the provisions of paragraphs 1 and 2 of the contested Law. On the other hand, the court is claimed not to have any further control powers, irrespective of Law no. 51 of 2010. In fact, the principle of the separation of powers is claimed to

prevent the judge from being able to "review the merits of the governmental activities", assessing "the political grounds underling the exercise" of the activities of President of the Council of Ministers, an appointment which should above all be acknowledged as having a "new outlook" since it is occupied by a "person who has directly obtained the trust of and been appointed by the people". These assertions correctly account for the effects of Article 1(3) of Law no. 51 of 2010, whilst they are not equally correct in grasping the scope of Article 420-*ter*(1) of the Code of Criminal Procedure, the constitutional position of the President of the Council of Ministers and the principle of the separation of powers.

It should be observed that Article 1(3) of Law no. 51 of 2010 subjects the postponement of the hearing by the court exclusively to a two stage test. When verifying whether "the prerequisites specified under the previous paragraphs are met", the court should in fact limit itself to ascertaining, first, that the commitment averred by the accused as an impediment really does exist as a question of fact, and secondly that it is attributable to powers co-essential to governmental functions provided for under laws or regulations (or which preparatory or consequential in nature thereto). However, these findings do not constitute the full extent of the powers to assess the impediment, which are exercised by the court in accordance with the general provisions provided for under Article 420-*ter*(1) of the Code of Criminal Procedure. According to this legislation in fact, when deciding whether to postpone the hearing, it is for the court to assess on the facts not only the actual existence of the impediment, but also its absolute and current nature. With reference to the situation under examination, this implies in particular the power of the court to assess, on a case by case basis, whether the specific commitment averred by the President of the Council of Ministers actually gives rise to an absolute inability (including in the light of the necessary balancing operation against the constitutionally significant interest in celebrating the trial) to appear in the proceedings – even when this is theoretically due to powers co-essential to governmental functions pursuant to the contested Law – on the grounds that they are objectively non-deferrable and necessarily coincide with the hearing for which postponement is requested. However, no provision is made under the contested legislation for this power to assess the actual impediment, which is an essential feature of the ordinary arrangements

governing the legitimate impediment, nor may it be inferred through interpretation, given that the provision concerned does not expressly refer to Article 420-*ter* of the Code of Criminal Procedure and lays down legislation that, on this point, replaces and does not supplement that contained in the previous provision in the Code of Criminal Procedure. Therefore, the absence of this feature means that Article 1(3) of Law no. 51 of 2010 constitutes an exception from the ordinary arrangements. For the grounds already set out above, this means that the provision breaches constitutional law, and must therefore be ruled unconstitutional insofar as it does not provide that the actual impediment may be assessed.

Moreover, it cannot be held that, in the event that the impediment consists in the conduct of governmental functions, the exercise of such a power in itself violates the prerogatives of the President of the Council of Ministers, or breaches the principle of the separation of powers. It should be pointed out first and foremost that electoral legislation, on the basis of which citizens select the "head of the political party" or the "head of the coalition", does not amend the conferral on the President of the Republic of the power to appoint the President of the Council of Ministers, provided for under Article 92(2) of the Constitution, nor the constitutional position of the latter. Irrespective of this, when the court assesses on the facts the impediment consisting in the exercise of governmental functions according to the ordinary procedural rules applicable in the trial, it remains within the confines of its judicial function and does not carry out a review of the merits of the executive activity, nor more generally does it encroach on the sphere of competence any other branch of State.

Besides, it is indeed the case that in similar situations the exercise of judicial powers has an indirect impact on the activities of the governmental office holder, which the court is obliged to reduce as much as possible, taking account of the accused's duty to perform the public functions conferred upon him. Therefore, the principle of the separation of powers is not violated by the provision for the power of the court to assess the actual impediment but only, if at all, by its improper exercise, which must abide by the principle of loyal cooperation. This principle has two-way effect, in the sense that it also concerns the President of the Council of Ministers, the scheduling of the commitments of whom is in turn liable to have an impact on the conduct of judicial

functions, since they may translate into corresponding grounds for legitimate impediment. Therefore, the findings made by this Court with reference to the legitimate impediment of members of Parliament also applies to situations involving the head of Government, all the more so since, in contrast to the latter, the President of the Council of Ministers has the power to programme a significant share of the commitments that may amount to a legitimate impediment (judgments no. 451 of 2005, no. 284 of 2004, no. 263 of 2003 and no. 225 of 2001). Effect must be given to the requirement of loyal cooperation through procedural solutions aimed at coordinating the respective schedules. On the one hand, the court must schedule the hearings taking account of the commitments of the President of the Council of Ministers associated with powers so-essential to governmental functions and which are in actual fact absolutely non-deferrable. On the other hand, the President of the Council of Ministers must schedule his commitments taking account, out of respect for the judicial branch, of the interest in expedited proceedings against him and reserving adequate space in his diary for that purpose.

The Court therefore concludes that the questions of constitutionality raised by the referring court in relation to Article 1(3) of Law no. 51 of 2010 on the grounds that the provision does not provide for the power of the court to assess the actual impediment averred pursuant to Article 420-*ter*(1) of the Code of Criminal Procedure are well founded.

5.3. – Article 1(4) of Law no. 51 of 2010 provides that: "If the Office of the President of the Council of Ministers certifies that the legitimate impediment is ongoing and related to the conduct of the functions provided for under this Law, the court shall postpone the trial until a hearing to be held after the period specified, which may not exceed six months".

The questions raised by the lower court are well founded insofar as they relate to that provision.

In contrast to those laid down by Article 1(1) and (2), the provision under examination does not refer directly to Article 420-*ter* of the Code of Criminal Procedure and introduces into Italian law a peculiar form of legitimate impediment consisting in the exercise of governmental functions, characterised by the ongoing nature of the

impediment and its certification by the Office of the President of the Council of Ministers. However, these aspects amount to a modification, and not a supplement or application, of the provisions governing the general institution provided for under Article 420-*ter* of the Code of Criminal Procedure. Therefore, it amounts to a provision establishing an exception to the ordinary procedural arrangements, introducing a prerogative in favour of the office holder, in contrast with Articles 3 and 138 of the Constitution.

In the first place, contrary to the provisions of Article 420-*ter*(1) of the Code of Criminal Procedure, Article 1(4) of Law no. 51 of 2010 provides that, rather than averring a detailed impediment relating to a specific hearing, the accused may aver an ongoing impediment relating to all hearings that may be scheduled, or are likely to be scheduled, within a specific time interval, which may not exceed six months. (However, the provision does not prohibit the certificate of an ongoing impediment from being renewed upon expiry.) In this way, the provision under examination precludes, at least in part, the obligation to specify the impediment that is incumbent upon the accused pursuant to Article 420-*ter*(1) of the Code of Criminal Procedure. In fact, it permits the latter to aver as an impediment the generic duty to carry out governmental functions within a specific period of time. This means that it is impossible for the court to verify the existence and substance of a specific individual impediment. Moreover, it cannot be concluded that the certificate of the Office of the President of the Council of Ministers must specify, day by day, all of the commitments which render the accused's presence in the hearing absolutely impossible for the period of time considered. Such an interpretation of the provision would render moot the provision for a specific form of ongoing impediment and, moreover, was not followed when applied by the Office of the President of the Council of Ministers, the certificates of which in the cases at issue in the main proceedings summarised and merely gave examples of some of the commitments of the President of the Council of Ministers occurring during the period of time considered.

Secondly, it must be observed that the wording of the provision under examination associates the effect of the postponement of the trial for the duration of the ongoing impediment with the certification issued by the Office of the President of the Council of

Ministers. It is provided in fact that the court shall postpone the trial not when it "is established" but "if the Office of the President of the Council of Ministers certifies" that the legitimate impediment is ongoing and related to the conduct governmental functions. In this way, the postponement is an automatic consequence of the certificate, and the provision removes the filter of assessment by the court and, more generally, an independent and impartial assessment, since the issue of the certificate is delegated to an organisational structure which, by virtue of his office, is used by the very same individual averring the impediment concerned.

For all of the above reasons, Article 1(4) of Law no. 51 of 2010 produces effects equivalent to those of a temporary suspension of the trial associated with the fact of holding an office, namely a prerogative established in favour of the office holder. Therefore, it amounts to an unconstitutional legislative provision.

ON THOSE GROUNDS

THE CONSTITUTIONAL COURT

hereby,

declares unconstitutional Article 1(4) of Law no. 51 of 7 April 2010 (Provisions governing impediments on appearing in court);

declares unconstitutional Article 1(3) of Law no. 51 of 2010, insofar as it does not provide that the court may assess the legitimate impediment averred on the facts, pursuant to Article 420-*ter*(1) of the Code of Criminal Procedure;

rules that the questions concerning the constitutionality of Article 1(2), (5) and (6) and of Article 2 of Law no. 51 of 2010 raised with reference to Articles 3 and 138 of the Constitution by the 10th Criminal Division of the *Tribunale di Milano* and by the Judge in charge of preliminary investigations at the same Court by the referral orders mentioned in the headnote are inadmissible;

rules that the questions concerning the constitutionality of Article 1(1) of Law no. 51 of 2010 raised with reference to Articles 3 and 138 of the Constitution by the 1st Criminal Division and the 10th Criminal Division of the *Tribunale di Milano* and by the Judge in charge of preliminary investigations at the same court by the referral orders mentioned in the headnote are groundless since that provision is to be interpreted in accordance with Article 420-*ter*(1) of the Code of Criminal Procedure.

Decided in Rome, at the seat of the Constitutional Court, *Palazzo della Consulta*, on 13 January 2011.

Signed:

Ugo DE SIERVO, President

Sabino CASSESE, Author of the Judgment

Maria Rosaria FRUSCELLA, Registrar

Filed in the Court Registry on 25 January 2011.

The Registrar

Signed: FRUSCELLA