Corte costituzionale

JUDGMENT NO. 80 OF 2011

Ugo DE SIERVO, President
Giuseppe FRIGO, Author of the Judgment

JUDGMENT NO. 80 YEAR 2011

In this case the Court heard a challenge to legislation which permitted "proceedings relating to measures involving a deprivation of freedom to be conducted in public", including specifically those before the Court of Cassation. The Court considered the status of the Nice Charter, and held that it only applied to cases in which an issue of Union Law already arose, and did not set forth general standards to be applied to all legal disputes across the board. On the merits, the Court dismissed the complaint on the grounds that "for the purposes of verifying compliance with the principle of publicity, it is necessary to consider the national judicial proceedings as a whole" and not just proceedings at one specific instance, and that the right to request a public hearing before the trial court was sufficient to ensure compatibility of Italian law with the ECHR.

(omitted)

JUDGMENT

in proceedings concerning the constitutionality of Article 4 of Law no. 1423 of 27 December 1956 (Preventive measures against persons representing a danger to public safety and public morality) and Article 2b of Law no. 575 of 31 May 1965 (Provisions against Italian and foreign mafia-related criminal organisations), initiated by the Court of Cassation in the criminal proceedings pending against D.P.E. by the referral order of 12 November 2009, registered as no. 177 in the Register of Orders 2010 and published in the *Official Journal of the Republic* no. 24, first special series 2010.

Considering the entry of appearance by D.P.E.;

having heard the Judge Rapporteur Giuseppe Frigo in the public hearing of 25 January 2011;

having heard Counsel Alfredo Gaito for D.P.E.

(omitted)

Conclusions on points of law

1. – The second criminal division of the Court of Cassation questions the constitutionality of Article 4 of Law no. 1423 of 27 December 1956 (Preventive measures against persons representing a danger to public safety and public morality) and Article 2b of Law no. 575 of 31 May 1965 (Provisions against Italian and foreign mafia-related criminal organisations) with reference to Article 117(1) of the Constitution insofar as they "do not permit proceedings relating to measures involving a deprivation of freedom to be conducted in public".

The lower court bases its objections on the finding of the European Court of Human Rights that, in order to ensure compliance with the principle that judicial proceedings be held in public, enshrined under Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, the persons involved in proceedings relating to measures involving a deprivation of freedom must "at least be granted the opportunity to request a public hearing before the specialist divisions of the trial courts and the appeal courts" (judgment of 13 November 2007, *Bocellari and Rizza v. Italy*).

The referring court also states that, according to the most recent case law of the Constitutional Court, the provisions of the ECHR, as interpreted by the Strasbourg Court, amount to "interposed rules" for the purposes of compliance with Article 117(1) of the Constitution, with the consequence that, should the court find that there is a contrast which cannot be remedied through interpretation between a national provision and a provision of the Convention, it cannot set aside the national provision, but must subject it to constitutional review in relation to Article 117(1).

In this case, it is claimed not to be possible to interpret the contested provisions in a manner that is compatible with the Constitution, given their unequivocal nature, providing that the procedure in which preventive measures are applied is to be conducted at all instances in chambers (and therefore not in public). Moreover, the prerequisites are not met for extending by analogy the situation regulated by Article 441(2) of the Code of Criminal Procedure on expedited procedures.

Therefore, the conclusion that the contested provisions violate Article 117(1) of the Constitution insofar as they do not grant the interested party the "minimal" guarantee required by the European Court, namely the right to request that the proceedings be conducted in public, is claimed to be inevitable.

Besides, that right should be granted not only in relation to the merits proceedings, but also in proceedings before the Court of Cassation, and it cannot be objected in relation to this argument that proceedings before the Court of Cassation were not mentioned in the aforementioned judgment of the European Court. Whilst the Strasbourg Court has indeed asserted on several occasions that the right to a public hearing may be refused in relation to matters that concern exclusively questions of law, it has nonetheless also specified that the failure to hold a public hearing during proceedings beyond first instance may only be justified if a public hearing was guaranteed at first instance.

On the other hand, once a choice regarding the procedure is granted to the party, there is no reason why the option concerned may only be exercised "at the trial court", and not "also in subsequent stages of the proceedings".

2. – After the referral order this Court ruled in judgment no. 93 of 2010 that the provisions subject to review were unconstitutional due to violation of the same principle invoked by the referring court, "insofar as they do not permit proceedings before the trial court and the court of appeal relating to the application of preventive measures to be conducted in public, if requested by a party" (the challenges made by the lower court must be deemed to be limited to proceedings before the trial court and the court of appeal).

Since, as this Court recalled in the first place – and it is important to reiterate it here, with reference to the observations which will be made below – as of judgments no. 348 and no. 349 of 2007, it has been the settled case law of the Constitutional Court that the provisions of the ECHR – as interpreted by the European Court of Human Rights, specifically established in order to interpret and apply the Convention (Article 32(1) of the Convention) – supplement as "interposed rules" the constitutional principle expressed in Article 117(1) of the Constitution insofar as it requires that national legislation comply with the requirements resulting from "international law obligations" (judgments no. 317 and no. 311 of 2009 and no. 39 of 2008). Within this perspective, where there is an issue as to a possible contrast between the national rule and a provision of the ECHR, the ordinary courts must verify first and foremost whether it is possible to interpret the former in accordance with the Convention, and may use all interpretative instruments available to them. If this exercise is unsuccessful – since it

cannot remedy the situation simply by setting aside the national provision in breach – the court must make a declaration of incompatibility and refer a question to the Constitutional Court with reference to the above principle of constitutional law. Once it has been seized with the reference, whilst it is not able to review the interpretation of the ECHR by the European Court, the Constitutional Court will in turn be entitled to verify whether, interpreted in this manner, the Convention provision – which is in any case still located on a sub-constitutional level – conflicts with any other provisions of the Constitution: this is the "exceptional hypothetical case in which the Convention provision will not be able to supplement the principle of constitutional law considered".

On this basis, this Court accordingly held that Article 4(6) and (10) of Law no. 1423 of 1956 specifically provide – with rules that also apply to the pecuniary measures to combat the mafia provided for under Article 2b of Law no. 575 of 1965 (paragraph one of which refers to the procedures regulated by the 1956 Law) – that proceedings relating to the application of preventive measures are to be conducted "in chambers" both at first instance and in appeal proceedings before the court of appeal, and therefore "not in public" according to the general provisions of Article 127(6) of the Code of Criminal Procedure on proceedings in chambers.

It is also stated that these legislative arrangements have been criticised on various occasions by the Strasbourg Court on the grounds that they contrast with the principle that judicial proceedings be held in public enshrined by Article 6(1) ECHR, pursuant to which "everyone is entitled to a fair and public hearing […] by an independent and impartial tribunal established by law" (judgment of 13 November 2007 in *Bocellari and Rizza v. Italy*, which was followed in judgments of 8 July 2008 in *Perre and others v. Italy*, 5 January 2010 in *Bongiorno v. Italy*, and 2 February 2010 in *Leone v. Italy*). The European Court reasserted in this regard that the public nature of judicial proceedings protects individuals who are on trial against secret justice that is far from any public scrutiny, and also constitutes an instrument which preserves trust in the courts, thereby contributing to the implementation of the goal of Article 6 of the Convention: that is a fair trial. As is attested by the exceptions provided for under the second part of the provision, this does not impose an absolute prohibition on the judicial authorities on creating exceptions to the principle that proceedings be conducted in public: however, a hearing that is held entirely or partially behind closed doors must in any case be "strictly

required by the circumstances of the case". Certain exceptional circumstances relating to the nature of the questions to be considered – such as for example the "highly technical" nature of the dispute – may in actual fact justify as exception from the requirement of a public hearing. However, in most cases in which the Strasbourg Court has reached that conclusion in relation to proceedings before "civil" judicial authorities called upon to rule on the merits, the applicant had in any case had the opportunity to request that the case be discussed in a public hearing. On the other hand, the situation is different both at first instance and on appeal when a "merits" procedure is conducted behind closed doors in accordance with a general and absolute provision which does not enable the person on trial to exercise that right, since such a procedure could not be considered to be compatible with Article 6(1) of the Convention.

As regards the case under discussion, the Strasbourg Court – in response to the points raised by the Italian Government – did not object to the claim that proceedings involving the application of preventive measures (including in particular pecuniary measures) may be highly technical in that that are aimed at the "control of finances and capital movements", or that they may involve "higher interests, such as the protection of the private life of minors or third parties indirectly affected by the financial control". However, this does not mean that the "stakes in play" in those procedures can be disregarded, as they have a direct and significant effect on the personal and pecuniary situation of the person on trial. This means that, for the purposes of the implementation of the guarantee set forth in the Convention provision, it must be regarded as essential "that the persons […] involved in a procedure relating to the application of preventive measures are at least be granted the opportunity to request a public hearing before the specialist divisions of the trial courts and the appeal courts".

In view of these indications, this Court accordingly concluded that the contested provisions violate Article 117(1) of the Constitution in this respect, since it cannot be the case that a Convention provision, as interpreted by the European Court, "may contrast with the relevant protections offered by our Constitution". In fact, according to the settled case law of the Court, even though there is no reference to it in the Constitution, "the public nature of proceedings, especially criminal proceedings, is a deeply rooted principle within a democratic legal system grounded on popular sovereignty, with which the administration of justice must comply since – pursuant to

Article 101(1) of the Constitution – it is legitimated through that sovereignty" (see *inter alia*, judgments no. 373 of 1992, no. 69 of 1991 and no. 50 of 1989). On the other hand, whilst it must be specified that the principle in question "does not have absolute status, and may be set aside where justified on particular grounds", this is only however justified if these grounds are "objective and rational" (judgment no. 212 of 1986) and, within criminal trials, if they are "associated with the requirement to protect interests of significance under constitutional law" (judgment no. 12 of 1971).

This Court has also held that it is not practicable to interpret the contested provisions in accordance with the Convention, based in this case on the application by analogy of Article 441(3) of the Code of Criminal Procedure, whereby expedited procedures – which are normally discussed in chambers – are held in public if requested by all of the accused. Indeed, "the prerequisites legitimating that interpretation [are not met], both because the recourse to an analogy presupposes the recognition of a legislative gap, which is not the case where there is a specific provision with contrary effect" (Article 127(6) of the Code of Criminal Procedure), "and also given the marked structural and functional differences between the procedures concerned (expedited procedures and proceedings relating to preventive measures)".

3. – However, the Constitutional Court's above ruling did not fully satisfy the referring court's requests. Indeed, the question of constitutionality currently placed before this Court for review is broader than the question decided in judgment no. 93 of 2010, even though it also embraces that question in that it unequivocally relates to preventive measures during all instances of the proceedings: that is, not only in merits proceedings but also during proceedings before the Court of Cassation.

For the purposes of the decision, it is therefore necessary to separate the challenges from one another.

As far as the question concerning the non-public nature of hearings relating to preventive measures during the merits stage, this question is inadmissible due to the supervening removal of the disputed rule. The provision challenged in this respect – that is, the rule which does not permit the interested parties to request that proceedings relating to preventive measures be held in public before the trial courts and the appeal courts – was already in fact removed from Italian law by the above judgment of unconstitutionality with effect *ex tunc* (see *inter alia*, orders no. 306 and no. 78 of 2010

and no. 327 and no. 82 of 2009). This ground for inadmissibility renders moot the other, which also applies, resulting from the lack of relevance of the question in the proceedings before the lower court, since it is not stated in the referral order that the interested party, an appellant to the Court of Cassation, filed any application during the previous stages of the proceedings requesting that they be held in public.

4. – As regards the prohibition on the conduct in public of proceedings before the Court of Cassation, the question – which was not examined in judgment no. 93 of 2010 – is by contrast undoubtedly relevant in the main proceedings. In fact, it is decisive for the decision by the referring section on the appellant's request that the appeal to that court be held in public.

Article 4(11) of Law no. 1423 of 1956 in effect provides that appeals to the Court of Cassation relating to preventive measures are also to be heard "in chambers". This provision applies in conjunction with Article 611 of the Code of Criminal Procedure, according to which the Court of Cassation is to conduct proceedings in chambers above all "in the cases specifically provided for by law", in addition to – as a general rule – "when it must decide on any appeal against measures which were not issued in open court, except judgments issued pursuant to Article 442". Absent any other legislative provision, appeals relating to preventive measures are to be treated according to the "non-attended" procedure in chambers governed by Article 611 of the Code of Criminal Procedure. Notwithstanding the general provisions of Article 127 of the Code of Criminal Procedure, this provision does not contemplate "participation by counsel for the defence", and is rather based on exclusively written representations.

5. – As regards the scrutiny of the merits of the question, the problem – which was specifically brought to the attention of this Court by the private party – regarding the effects of the entry into force in the meantime of the Treaty of Lisbon of 13 December 2007 amending the Treaty on European Union and the Treaty establishing the European Community, which was ratified and implemented by Law no. 130 of 2 August 2008, is however of preliminary significance.

According to the private party, the changes introduced by that Treaty (which entered into force on 1 December 2009) entailed a change in the classification of the provisions of the ECHR within the system of sources, which was such as to render the conception of "interposed rules" mentioned above obsolete. In the light of the new text of Article 6

of the Treaty on European Union, these provisions are claimed to have become an integral part of Union law. This means that – at least in cases such as that currently under discussion – the ordinary courts (therefore including the lower court) are entitled to set aside the provisions of national law held to be incompatible with the Convention, without any requirement to initiate constitutional review. In fact, the conceptualisation of relations between Community law and national law as distinct and self-standing systems followed in the settled case law of this Court in accordance with Article 11 of the Constitution (according to which Italy "agrees to limitations of sovereignty where they are necessary to allow for a legal system of peace and justice between nations, provided the principle of reciprocity is guaranteed") is claimed to be of significance in this respect. On this account, the provisions enacted by a Community source should be directly applied in Italian law, but do not form part of the system of national sources and, if endowed with direct effect, prevent the national court from applying any national legislation considered to be incompatible with it (see *inter alia*, judgments no. 125 of 2009, no. 168 of 1991 and no. 170 of 1984). Besides, the provisions of the ECHR could not be denied direct effect, especially where – as in the case under examination – there has already been a judgment by the European Court of Human Rights holding that Italy has breached the Convention due to a specific "structural" defect within the national legislative system.

Although when submitting his conclusions, the private party requested that the contested provisions (and, consequently, also other provisions) be declared unconstitutional, it is evident that, were the above argument to be correct, the question should be ruled inadmissible, since the contested provision would be one that it is now for the ordinary court – and no longer this Court – to ascertain and resolve (see *inter alia*, on the contrast between national law and Community law with direct effect, judgments no. 284 of 2007 and no. 170 of 1984). Therefore, the problem highlighted by the private party has preliminary status with respect to the analysis of the merits of the question.

5.1. – It must therefore be recalled in this regard that Article 6(2) of the Treaty on European Union, as in force on 30 November 2009, provided that the "Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms […] and as they result from the

constitutional traditions common to the Member States, as general principles of Community law".

On the basis of that provision – implementing a position which had been followed by the Court of Justice since the 1970s – neither the ECHR nor the "constitutional traditions common to the Member States" (sources external to Union law) take on significance as such, but insofar as they are drawn from "general principles of Community law" which the Union was required to respect. Thus, at least from a formal point of view, there was only one source of protection for fundamental rights within the European Union, namely the "general principles of Community law", whilst the ECHR and the "constitutional traditions common to the Member States" only performed an ancillary role as instruments identifying those principles.

Consistently with this view, this Court has specifically held that the "classification […] of the fundamental rights contained in the ECHR as general principles of Community law" – first by the Court of Justice, and subsequently also in Article 6 of the Treaty – cannot lead to the conclusion that the principle set forth in Article 11 of the Constitution applies to the ECHR, thereby entailing a right and a duty for the ordinary courts to set aside national laws which contrast with the Convention (judgment no. 349 of 2007). In fact, the assertion that Article 11 of the Constitution cannot come into consideration in relation to the ECHR, "such that, with reference to the specific Convention provisions under examination, no limitation on national sovereignty can be identified" (judgment no. 188 of 1980, referred to in judgment no. 349 of 2007, cited above), could not be considered to have been called into question by that classification for three reasons.

This is first because "the Council of Europe – which oversees the system for the protection of human rights governed by the ECHR and the activity of interpreting the latter through the Court of Human Rights in Strasbourg – is a legal, functional and institutional reality that is separate from the European Community created by the Treaty of Rome of 1957 and the European Union created by the Maastricht Treaty of 1992" (judgment no. 349 of 2007).

Secondly, since the "general principles of Community law, observance of which is ensured by the Community court", are inspired by the constitutional traditions common to the Member States and the ECHR, "they are of significance exclusively in cases to

which that right is applicable: first and foremost Community acts, then national acts implementation Community law, and finally the national derogations from Community law allegedly justified by the requirement to respect fundamental rights (judgment of 18 June 1991 in Case C-260/89 *ERT* [1991] ECR I-2925)". This is because "the Court of Justice […] has held that it has no such jurisdiction with regard to national legislation lying outside the scope of Community law (judgment of 4 October 1991 in Case C-159/09 [sic., should read C-159/90] *Society for the Protection of Unborn Children Ireland* [1991] ECR I-4685, and judgment of 29 May 1998 in Case C-299/05 [sic., should read C-299/95] *Kremzow* [1991] ECR I-2629)".

Thirdly and finally, "the relationship between the ECHR and the legal systems of the Member States is a relationship that is closely regulated by each national legal system … since there is no common competence attributed to (or exercised by) the Community institutions regarding such matters" (judgment no. 349 of 2007).

5.2. – Moreover, Article 6 of the Treaty on European Union was significantly amended by the Treaty of Lisbon, from an unequivocal perspective of reinforcing the mechanisms for protecting fundamental rights.

In fact, the new Article 6(1) provides that the "Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties". Article 6 goes on to provide – insofar as is of interest here – in paragraph 2 that "[t]he Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms", concluding in paragraph 3 with the provision that "[f]undamental rights, as guaranteed by the […] Convention […] and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law".

Therefore, in the light of the new provision, the protection of fundamental rights within the European Union results (or will result) from three distinct sources: in the first place, the Charter of Fundamental Rights (the "Nice Charter"), which the Union "recognises" and which "shall have the same legal value as the Treaties"; secondly, the ECHR, as a consequence of the Union's accession to it; and finally the "general principles" which – according to the schema of Article 6(2) of the Treaty as previously

in force – include the rights enshrined in the ECHR itself and those resulting from the constitutional traditions common to the Member States.

This therefore amounts to a system for protection which is much more complex and detailed that the previous system, in which each component is called upon to perform its own specific function. The recognition that the Nice Charter has the same legal standing as the Treaties aims, in this case, to improve fundamental rights protection within the ambit of the Union system, anchoring it in a written, precise and detailed text.

Although the Charter "reaffirms", as is stated in recital five of the preamble, the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States and the ECHR, the maintenance of an autonomous reference to "general principles, and indirectly, to those common constitutional traditions and the ECHR, it is also justified – not only in view of the incomplete acceptance of the Charter by some of the Member States (see in particular the Protocol to the Treaty of Lisbon on the application of the Charter of Fundamental Rights of the European Union to Poland and the United Kingdom) – by the goal of securing a certain level of flexibility within the system. It is thus necessary to prevent the Charter from "crystallising" fundamental rights, preventing the Court of Justice from identifying new rights as a result of the evolution of the sources indirectly referred to.

In turn, the announced accession of the European Union to the ECHR will reinforce the protection of human rights, authorising the Union as such to subject itself to an international control system with regard to the respect for such rights.

5.3. – With reference to situations such as that which is of significance in this case, it is not possible to infer the solution proposed by the private party from any of the sources of protection mentioned above.

First and foremost, it is not possible to infer any argument to this effect from the proposed accession by the European Union to the ECHR, for the simple reason that such accession has not yet occurred.

Leaving aside any other possible consideration, the provisions of the new Article 6(2) of the Treaty therefore remain without effect. The detailed identification of these effects will obviously depend upon the specific procedures according to which accession is completed.

5.4. – As regards the reference to the ECHR contained in Article (3) – according to which the fundamental rights guaranteed by the Convention "and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law" – this is, as mentioned above, a provision which reiterates the schema of the previous Article 6(2) of the Treaty on European Union, thereby evoking a form of protection which existed prior to the Treaty of Lisbon.

Accordingly, all of the considerations made by this Court in relation to the earlier legislation as to the fact that, in matters to which Union law does not apply (such as in the case placed before this Court), it is not possible to conclude that Article 11 of the Constitution applies to the ECHR from the classification of the fundamental rights recognised in the Convention as "general principles" of Community law (now Union law) still remain valid. The changes made to that legislation – including in particular the replacement of the term "shall respect" (contained in the old text of Article 6 of the Treaty) with the expression "shall constitute" – are not in actual fact capable of undermining the validity of that conclusion. As was stressed in judgment no. 349 of 2007, the previous case law of the Court of Justice – which the ruling under examination is intended to implement – was already settled in concluding that the fundamental rights set forth by the ECHR and the constitutional traditions common to the Member States form an "integral part" of the general principles of Community law whose observance the Community Court ensures (see *inter alia* the judgment of 26 June 2007 in Case C-305/05 *Bar Associations v. Council* [2007] ECR I-5305, paragraph 29).

Therefore, the consideration that the principles in question are of significance exclusively in relation to the matters to which Community law (now Union law) is applicable, and not also to matters regulated by national legislation alone, still remains valid.

5.5. – However, this last point can also be applied to the remaining source of protection, that is the Charter of Fundamental Rights, the equivalence of which with the Treaties is claimed by the private party to have resulted in an indirect "treatification" of the ECHR, in the light of the "equivalence clause" contained in Article 52(3) of the Charter. According to that provision (included in Title VII, to which Article 6(1) of the Treaty expressly refers as a basis for the interpretation of the rights, freedoms and principles in the Charter), insofar as the Charter "contains rights which correspond to

rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention" (without prejudice to the possibility of "Union law providing more extensive protection"). Consequently – again according to the private party – the rights provided for under the ECHR which have a "corresponding provision" within the Nice Charter (such as, in this case, the right to a public hearing, set forth in Article 47 of the Charter in terms identical to Article 6(1) of the Convention) should also now be deemed to be protected under European Union law.

Leaving aside any further considerations, it should moreover be observed that – in an analogous manner to the Union's accession to the ECHR (Article 6(2), second sentence, of the Treaty on European Union; Article 2 of the Protocol to the Treaty of Lisbon on accession) – when amending the Treaty the Member States sought to avoid as far as possible that the allocation to the Nice Charter of the "same legal value as the Treaties" might have an effect on the division of competences between the Member States and the Union.

In fact, the first sentence of Article 6(1) of the Treaty provides that "[t]he provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties". This provision is mirrored by Declaration no. 1 annexed to the Treaty of Lisbon, in which it is reasserted that "[t]he Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined by the Treaties".

The same principles are moreover already expressly endorsed by the Charter of Rights, Article 51(1) of which (also included in Title VII) provides that "The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law". Moreover, paragraph 2 also makes provision identical to that in Declaration no. 1.

This evidently means that the Charter cannot constitute an instrument for protecting fundamental rights beyond the competences of the European Union, as has moreover been repeatedly asserted by the Court of Justice, both before (see most recently the order of 17 March 2009 in Case C-217/08 *Mariano* [2009] ECR I-35) as well as after the entry into force of the Treaty of Lisbon (judgment of 5 October 2010 in Case C-

400/10 PPU *McB* [2010] ECR I-0000; and the order of 12 November 2010 in Case C-399/10 [sic., should read C-339/10] *Krasimir and others* [2010] ECR I-000).

A prerequisite for the applicability of the Nice Charter is therefore that the case placed before the court for examination is governed by European law – insofar as it concerns acts of the Union and national acts and conduct implementing Union law, or justifications adopted by a Member State for a national measure which would otherwise be incompatible with Union law – and not simply national legislation with no link with Union law.

In this case – which concerns the application of personal and pecuniary measures *ex ante* or *praeter delictum* – this prerequisite is not met. Moreover, the private party himself has failed to establish any type of connection between the *thema decidendum* in the main proceedings and European Union law.

5.6. – In the light of the above considerations, the Court must therefore conclude that, in cases such as that at issue in the main proceedings, the court cannot consider itself entitled to set aside *omisso medio* the national provisions considered to be incompatible with Article 6(1) ECHR, as hypothesised by the private party.

Conversely, the principles asserted in this regard by this Court starting from judgments no. 348 and 349 of 2007 remain entirely valid. Moreover, these principles have also been repeatedly reasserted by the Court even after the entry into force of the Treaty of Lisbon (judgments no. 1 of 2011 and no. 196, no. 187 and no. 138 of 2010), including in relation to the question at issue in this case (judgment no. 93 of 2010).

6. – On the merits, the question relating to the failure to hold proceedings before the Court of Cassation in public is groundless.

6.1. – As was already noted by this Court in judgment no. 93 of 2010 (paragraph 2 of the Conclusions on points of law) and as also held in the predominant case law of the Court of Cassation, which is consciously contested in the referral order, the principle asserted by the Strasbourg Court in the decisions underlying the objection that the provision is unconstitutional refer exclusively to proceedings before trial courts and the courts of appeal, and do not make any reference to proceedings before the Court of Cassation.

Contrary to the assertions of the referring court, the failure to mention proceedings before the Court of Cassation is particularly significant – in that it takes on a value *ad*

excludendum – if it is considered that the European Court was requested to rule on proceedings concerning preventive measures which had passed through all stages before the national courts, including the Court of Cassation (given the prerequisite for the eligibility of proceedings before the Strasbourg Court, namely the exhaustion of all domestic remedies: Article 35(1) ECHR). And whilst it may be true that in the case at issue in the judgment of 13 November 2007 in *Bocellari and Rizza v. Italy*, the applicants had complained only of the failure to hold proceedings in public during the merits stages, the complaints were not however limited in an analogous manner in the cases examined in the later judgments on this matter (judgment of 8 July 2008 in *Perre and others v. Italy*, judgment of 5 January 2010 in *Bongiorno v. Italy* and judgment of 2 February 2010 in *Leone v. Italy*).

Moreover, the restrictive approach adopted in relation to the situation of interest here reflects the European Court's general position on the applicability of the principle of publicity in relation to appeal proceedings. This position is expressed specifically in the assertion whereby, for the purposes of verifying compliance with the principle of publicity, it is necessary to consider the national judicial proceedings as a whole. This means that, provided that hearings were held in public at first instance, the lack of an analogous public hearing at second or third instance may well be justified by the particular characteristics of the proceedings concerned.

In this case, appeal proceedings dedicated exclusively to the treatment of questions of law may meet the prerequisites of Article 6(1) of the Convention, notwithstanding the failure to provide for a public hearing before the court of appeal or the Court of Cassation (see *inter alia*, judgment of 21 July 2009 in *Seliwiak v. Poland*, Grand Chamber judgment of 18 October 2006 in *Hermi v. Italy*, judgment of 8 February 2005 in *Miller v. Sweden*, judgment of 25 July 2000 in *Tierce and others v. San Marino*, judgment of 27 March 1998 in *K.D.B. v. Netherlands*, judgment of 29 October 1991 in *Helmers v. Sweden*, and judgment of 26 May 1988 in *Ekbatani v. Sweden*). In fact, the value of an immediate control *quisque de populo* on the conduct of procedural activities, which is made possible by free access to the hearing – one of the instruments which guarantees the correctness of the administration of justice – may be appreciated specifically according to a classic, long-standing and well-established principle when the court is called upon to hear evidence, especially witness testimony, or otherwise

ascertain or reconstruct the facts of the case. On the other hand, it is largely diminished when the court is only required to resolve questions concerning the interpretation of legislative provisions.

Consequently, it must be considered that the introduction, by judgment no. 93 of 2010 of this Court, into proceedings concerning preventive measures of the right of the interested party to request a public hearing before the trial court (at first instance) and the courts of appeal (court of second instance, although it has competence to re-examine questions of fact, or even to discover or re-hear evidence itself) is sufficient in order to guarantee compliance of our legal order with the ECHR, without any need to extend the aforementioned right to proceedings before the Court of Cassation.

6.2. – The argument submitted by the private party during the oral discussion in order to rebut that conclusion according to which, following the enactment of Law no. 46 of 20 February 2006 (Amendments to the Code of Criminal Procedure concerning the removal of the power to appeal against acquittals) which amended – by extending – the grounds for appeal to the Court of Cassation based on the failure to hear decisive evidence and, above all, incorrect reasoning (Article 606(1)(d) and (e) of the Code of Criminal Procedure), proceedings before the Court of Cassation can no longer be regarded as a mere review of legality, is not convincing.

Even setting aside the point relating to the nature of the implications of that legislative reform (which is still disputed), the argument in defence of this position is in any case not relevant in this case, because appeals to the Court of Cassation in proceedings relating to measures involving a deprivation of freedom are only permitted on the grounds of "the violation of the law" (Article 4(11) of Law no. 1423 of 1956, referred to by Article 3b(2) of Law no. 575 of 1965) which, due to settled case law, means that the ability to rely on a failure to give reasons remains limited only to cases in which the justification was inexistent or merely apparent, and may be classified as a violation of the duty on the appeal court to give reasons for its order required under Article 4(9) of Law no. 1423 of 1956.

6.3. –The further argument by the referring court and the private party, according to which once the party is granted a choice over the procedure, there is no reason why it should only be possible to request a public hearing during the merits stages and not – even for the first time – in proceedings before the Court of Cassation – also taking

account of the requirement to provide for "corrective mechanisms which make it possible for hearings to be held subsequently in public, after this has been first refused or simply not requested, raising the question for the time only before the Court of Cassation" – can also not be endorsed.

The Strasbourg Court has had the opportunity to assert in this regard that the principle that a public hearing is not required during the stages of the appeal which are intended to treat only questions of law (or which otherwise concern matters the specific characteristics are best suited for written proceedings) also applies when no public hearing is held at first instance because the interested party has waived his right either explicitly or implicitly by failing to make the relative request. In fact, it is normally more convenient in the interest of a correct administration of justice to hold a public hearing at first instance, rather than only before the appeal court (judgment of 8 February 2005 in *Miller v. Sweden*, judgment of 12 November 2002 in *Dory v. Sweden*, judgment of 12 November 2002 in *Lundevall v. Sweden* and judgment of 12 November 2002 in *Salomonsson v. Sweden*). This evidently contrasts with the right which it is argued should be granted to the party to determine, at his discretion, whether a public hearing should be held in proceedings relating to preventive measures before the merits courts or the Court of Cassation.

As far as the alleged requirement to provide for "corrective mechanisms" for the violations of the principle of publicity committed during the merits stages is concerned, it should be observed first and foremost that no such violation appears to have occurred in this case. Indeed, as mentioned above, it does not appear that the interested party submitted any request that the proceedings be held in public before the trial court or the court of appeal. Nor can it be objected that no such application could have been validly made, since the contested provisions stipulated at the time that the proceedings should be conducted in chambers, without any alternative. It is easy to respond that the interested party could indeed already have requested a public hearing during the merits stage, at the same time averring the unconstitutionality of the provisions applicable to such matters, as was done – successfully – in the proceedings in which the question resolved by judgment no. 93 of 2010 was raised. The Court of Cassation has also reached a similar conclusion, holding that the failure to hold proceedings relating to preventive measures at the merits stage in public cannot have any procedural

consequence if the interested parties did not request at that stage that the proceedings be held in public (Court of Cassation, judgment no. 17229 of 22 January 2009 – 23 April 2009, and Court of Cassation, judgment no. 46751 of 18 November 2008 – 17 December 2008).

Moreover, it must be added that even had Article 6(1) ECHR been violated in the proceedings before the lower court, this would not by any means be remedied by the fact that the appeal to the Court of Cassation was held in public. The indications contained in the case law of the Strasbourg Court are also specific on this point, having repeatedly clarified that the conduct of appeal proceedings in public with limited scope to cognise the case – in particular because review by the higher courts is limited only to questions of law (as is the case before the Court of Cassation) – is not sufficient in order to make up for the failure to hold proceedings before the lower court in public (judgment of 14 November 2000 in *Riepan v. Austria*). This is precisely because the examination by the Court of Cassation does not cover the aspects of the case in relation to which the requirement that hearings be held in public is most acutely felt, such as the taking of evidence, the examination of the facts and the assessment of the proportionality between the offence and the sentence (on this matter, see judgment of 10 February 1983 in *Albert e Le Compte v. Belgium*, judgment of 23 June 1981 in *Le Compte, Van Leuven and De Meyere v. Belgium* and, more recently, Grand Chamber judgment of 11 July 2002 in *Göç v. Turkey*).

7. – On the basis of the above considerations, the question raised must therefore be ruled inadmissible insofar as it relates to proceedings before the merits courts, and groundless insofar as it relates to proceedings before the Court of Cassation.

ON THOSE GROUNDS

THE CONSTITUTIONAL COURT

1) *rules* that the question concerning the constitutionality of Article 4 of Law no. 1423 of 27 December 1956 (Preventive measures against persons representing a danger to public safety and public morality) and Article 2b of Law no. 575 of 31 May 1965 (Provisions against Italian and foreign mafia-related criminal organisations), insofar as

they do not permit proceedings before the trial court and the court of appeal relating to measures involving a deprivation of freedom to be conducted in public, if requested by a party, raised by the Court of Cassation with reference to Article 117(1) of the Constitution by the referral order mentioned in the headnote, is inadmissible;

2) *rules* that the question concerning the constitutionality of Article 4 of Law no. 1423 of 1956 and Article 2b of Law no. 575 of 1965, insofar as they do not permit an appeal to the Court of Cassation relating to measures involving a deprivation of freedom to be discussed in a public hearing, if requested by a party, raised by the Court of Cassation with reference to Article 117(1) of the Constitution by the referral order mentioned in the headnote, is groundless.

Decided in Rome, at the seat of the Constitutional Court, *Palazzo della Consulta*, on 7 March 2011.

(omitted)