JUDGMENT NO. 40 YEAR 2012

In this case the Court considered an application from a public prosecutor objecting to the classification of information as an official secret which was essential in relation to a criminal investigation into suspected offences committed by officials from the Italian intelligence services. The official secret had been raised as a defence by the suspects during questioning, and subsequently confirmed by the President of the Council of Ministers. The Court rejected the application, though in doing so stated in precise terms the extent of protection conferred by the confirmation of status as an official secret.

(omitted)

THE CONSTITUTIONAL COURT

(omitted)

gives the following

JUDGMENT

in proceedings concerning a jurisdictional dispute between branches of state arising following the issue of the notes by the President of the Council of Ministers on 3 December 2009 (no. 50067/181.6/2/07.IX.I) and on 22 December 2009 (no. 52285/181.6/2/07.IX.I), initiated by the judge for the preliminary hearing of the *Tribunale di Perugia* by application served on 14-19 January 2011, filed with the Court Registry on 2 February 2011 and registered as no. 7 in the Register of Jurisdictional Disputes between Branches of State 2010, merits stage.

Considering the entry of appearance by the President of the Council of Ministers;

having heard the Judge Rapporteur Giuseppe Tesauro at the public hearing of 5 July 2011, who was replaced for the purposes of drafting of the judgment by the Judge Giuseppe Frigo;

having heard Counsel Federico Sorrentino for the judge for the preliminary hearing of the *Tribunale di Perugia* and the State Counsels [*Avvocati dello Stato*] Aldo Linguiti and Massimo Giannuzzi for the President of the Council of Ministers.

(omitted)

Conclusions on points of law

1.– The judge for the preliminary hearing of the *Tribunale di Perugia* has initiated a jurisdictional dispute between branches of state in relation to the criminal proceedings against a former director of the SISMI [*Military Information and intelligence service*] (General Nicolò Pollari) and a former contractor and subsequent employee of the same Service (Pio Pompa) against the President of the Council of Ministers in relation to the notes of 3 December 2009 (no. 50067/181.6/2/07.IX.I) and 22 December 2009 (no. 52285/181.6/2/07.IX.I) which confirmed – subject to the terms set out therein – the official secret invoked by the aforementioned Messrs Pollari and Pompa during questioning pursuant to Article 415-bis(3) of the Code of Criminal Procedure.

2.– It is necessary as a preliminary matter to summarise the key elements of the affair which gave rise to the jurisdictional dispute, as stated in the arguments and documentary submissions of the parties.

The trial celebrated before the applicant originated from the search and resulting seizure implemented on 5 July 2006 by the Milan Public Prosecutor, in relation to different proceedings, at the SISMI headquarters in Via Nazionale in Rome, which is stated to be administered by Mr Pompa. On that occasion, an archive was found containing numerous files relating to the lives, activities and political orientations of judges, state functionaries, journalists and members of Parliament and the activities of trade union movements and associations of judges. According to the prosecution, in the light of the documents seized, the purpose of the said collection of information was to discredit by defamation, slander and abuse of office the interested parties, who were deemed to be “hostile” by virtue of their political ideas.

Following the above search and seizure, criminal proceedings were initiated against Mr Pollari and Mr Pompa in relation – insofar as is of interest in these proceedings – to two offences: the first offence was the ongoing aggravated misappropriation of public funds through their joint appropriation of sums of money and material and human resources of the SISMI, and their use for purposes which were patently foreign to the institutional goals of the Service, as are the aforementioned activities involving the

collection and processing of information; the second offence was the ongoing aggravated violation of the right of confidential correspondence through the consultation, again acting jointly, of electronic correspondence relating to a European association of judges (*MEDEL*). Mr Pompa only was in addition charged with the offence provided for under Article 260(3) of the Criminal Code on the grounds that he had been subsequently caught in possession of electronic documents capable of providing information which had been classified as secret in the interest of the State.

After receiving notice that the preliminary investigations had been concluded, the suspects asked that they be questioned pursuant to Article 415-bis(3) of the Code of Criminal Procedure, a request which was granted. During that process, by way of the written statements filed by them, they both disputed the charges brought against them. As regards the misappropriation of public funds, they argued that the documentation seized was owned by Mr Pompa, who had compiled it using his own personal resources – with regard to almost all of the documentation, prior to his hiring as an employee of the SISMI, and in part even before he started working with the Service as a contractor – using information taken from information organs and the internet. With respect to the violation of the right of confidential correspondence, they argued – without prejudice to the above – that the material had been downloaded from internet sites which were freely accessible. However, the suspects added that in order to provide further decisive proof capable of demonstrating irrefutably that the offences alleged were baseless, they would have been forced to disclose information classified as an official secret on the grounds that it related to the "*interna corporis*" of the Service (such as instructions and orders issued by the government and the director to members of the body, Mr Pompa's position within the Service, the resources used to carry on his activities and so on). Consequently, they alleged that this overall body of information and, ultimately, "all of the facts described" in the charge were classified as official secrets. Mr Pompa adopted a similar stance in relation to the offence of possession of information classified as secret in the interest of the State, of which he alone was charged.

In view of the above, the Public Prosecutor asked the President of the Council of Ministers, pursuant to Article 41 of Law no. 124 of 3 August 2007 (Information system to ensure the security of the Republic and new provisions on official secrets), to confirm whether four matters were classified as official secrets, knowledge of which was

considered to be essential in order to conclude the proceedings, that is whether, in the period during which it had been directed by Mr Pollari, the SISMI: a) had "financed in any manner or form, either directly or indirectly, the office in Via Nazionale run by Mr Pompa"; b) had "provided financial remuneration in any manner or form directly or indirectly" to Mr Pompa or Jennj Tontodimamma; c) had "issued orders and instructions" to the same; or d) had finally "issued orders and instructions" to Mr Pompa or to Ms Tontodimamma "to collect information regarding Italian or foreign judges".

By the contested notes, the President of the Council of Ministers confirmed classification as an official secret in relation to the "direct and indirect manner and forms of funding for the management by Pio Pompa of the SISMI office in Via Nazionale in Rome when the Service was directed by Nicolò Pollari"; to the "direct and indirect manner and forms of remuneration of Pio Pompa and Jennj Tontodimamma, initially contractors and latterly employees of the SISMI directed by Nicolò Pollari"; and in relation to the instructions and orders issued to Mr Pompa and Ms Tontodimamma within the Service. This confirmation that the information was classified as an official secret was justified by the requirements to protect the "*interna corporis*" of the SISMI, with a view to avoidance of disclosure into the public domain of the organisational arrangements and operating techniques of the Service: these were issues which – in the light of the findings of this Court in judgment no. 106 of 2009, and under the terms of applicable legislation, including specifically the Decree of the President of the Council of Ministers of 8 April 2008 – fall within those amenable to protection as official secrets.

In the opinion of the applicant judge, the contested acts – which were to be deemed relevant for the purposes of the measures which he was required to adopt in order to conclude the preliminary hearing – were unlawful on various grounds and, consequently, encroached upon his judicial powers guaranteed under constitutional law.

3.– It must be confirmed first and foremost that the jurisdictional dispute is admissible – as was already ruled by this Court during its initial summary consideration of the case by order no. 376 of 2010 – since the subjective and objective prerequisites for admissibility are met.

With regard to the subjective prerequisites relating to the status of the parties, the applicant judge for the preliminary hearing from the *Tribunale di Perugia* has standing to initiate these proceedings according to the settled case law of the Court, which acknowledges the right of individual judicial bodies to participate in proceedings involving a jurisdictional dispute between branches of state on the grounds that they are competent, by virtue of the position of full independence guaranteed under the Constitution, to provide a definitive statement of the position of the branch of state to which they belong through the ordinary exercise of their functions (with specific reference to the jurisdictional disputes concerning official secrets, see judgment no. 106 of 2009; with regard to standing to act as a respondent, see judgments no. 487 of 2000 and no. 410 of 1998).

Similarly, the President of the Council of Ministers has standing to act as a respondent, as the body competent to provide a definitive statement of the position of the branch of state to which he belongs in relation to the protection, establishment and confirmation of official secrets, not only under Law no. 124 of 2007, but also – as this Court has previously clarified (judgment no. 86 of 1977) – in accordance with the provisions of constitutional law determining his powers (judgment no. 106 of 2009; with regard to standing to file applications, see also judgments no. 487 of 2000, no. 410 and no. 110 of 1998).

As regards the objective prerequisites, the jurisdictional dispute relates to powers guaranteed under constitutional law relating, on the one hand, to the exercise of judicial powers by the judge for the preliminary hearing, and on the other hand the safeguarding of State security through the instrument of official secrets, the protection of which – involving both classification and confirmation – falls within the responsibilities of the President of the Council of Ministers, subject to control by Parliament (judgment no. 487 of 2000). The possibility that a decision confirming an official secret may be the object of a jurisdictional dispute has moreover been expressly provided for under the legislation in force (Article 202(7) of the Code of Criminal Procedure and, insofar as is of interest here, Article 41(7) of Law no. 124 of 2007).

4.– On the merits, the application is groundless.

5.– This Court has already had the opportunity to note the enduring relevance, including after the changes introduced by Law no. 124 of 2007, of the principles laid

down in its prior case law relating to the basis in constitutional law of the institution of official secrets: in endorsing and at the same time delineating the limits of its predominance over the countervailing requirements of judicial scrutiny, these principles are "evidently not pliable or amenable to alteration in the light of possible changes in circumstances brought about by the passage of time" (judgment no. 106 of 2009). These are on the one hand principles around which Parliament specifically intended to harmonise legislation in this area, laid down initially under Law no. 801 of 24 October 1977 (Establishment and regulation of the intelligence and security services and regulation of official secrets) and currently under Law no. 124 of 2007, cited above.

As has been clarified by the Court, the foundation for legitimation of the institution in question may be found exclusively in the requirement to safeguard the supreme interests of the State and the community in that it operates as a "necessary instrument for achieving the goal of the [internal and external] security ... of the State and for guaranteeing its existence and integrity and democratic framework": these are values which are expressed within a complex body of constitutional provisions, including in particular those laid down in Articles 1, 5 and 52 of the Constitution (judgment no. 110 of 1998; from an analogous perspective, see judgments no. 106 of 2009, no. 86 of 1977 and no. 82 of 1976). The definition of the objective prerequisites for official secrets provided in Article 39(1) of Law no. 124 of 2007 (which replaced, with limited amendments, the previously applicable Article 12 of Law no. 801 of 1977) is intended to pursue these requirements in providing that "the acts, documents, information, activities and any other matter the dissemination of which is liable to cause harm to the integrity of the Republic, including in relation to international agreements, the defence of the institutions established by the Constitution as a foundation for the State, the independence of the State from other states and in relation with them, and the military preparation and defence of the State" may be classified as official secrets.

As regards the values referred to as "other values" – which are also of primary constitutional standing – these are "structurally" destined to remain regressive. In particular, its characterisation as an instrument for safeguarding the *salus rei publicae* is due in particular to the fact that official secrets tend to operate as a "bar" on the exercise of judicial powers, including specifically those seeking to establish individual responsibilities for conduct classified by law as an offence. In fact, State security

constitutes an “essential and irrepressible interest of the collectivity, which patently takes absolute predominance over any other, in that it impinges upon […] the very existence of the State”, of which judicial powers constitute only “one single aspect” (judgments no. 106 of 2009, no. 110 of 1998 and no. 86 of 1977).

Within a delicate balancing of the values involved, an official secret may be imposed exclusively in order to “prevent the judicial authorities from acquiring and consequently from using” – either directly or indirectly – “information and evidence which has been classified as secret”. On the other hand, the judicial authorities are not precluded the possibility to pursue investigations in relation to events in respect of which they have received a *notitia criminis* [i.e. a report of a criminal offence] where “they dispose of or may acquire information from other sources […] which are entirely self-standing and independent from the acts and documents classified as secret” (judgments no. 106 of 2009, no. 410 and no. 110 of 1998). Also in this case, these rulings have been duly incorporated into the applicable procedural legislation (Article 202(5) and (6) of the Code of Criminal Procedure and Article 41(5) and (6) of Law no. 124 of 2007).

This Court has moreover asserted on the other hand the broadly discretional and purely political nature of the assessment – which falls to be made by the President of the Council of Ministers – of the means which are suitable and necessary in order to guarantee State security, on the basis of which the information to be classified as secret in the supreme interest of the *salus rei publicae* is ascertained. Consequently – and without prejudice to the Court’s powers in relation to jurisdictional disputes – the review of the manner in which the power of classification is exercised is reserved exclusively to Parliament, this being “the natural forum for control of the merits of the most high-ranking and serious decisions of the executive”, and any judicial review of such matters is excluded (judgments no. 106 of 2009 and no. 86 of 1977).

6.– The peculiar aspect of the matter which resulted in the jurisdictional dispute currently before this court lies moreover in the fact that the existence of the official secret was raised by two individuals under investigation during questioning which had been requested by them pursuant to Article 415-bis(3) of the Code of Criminal Procedure. In particular, as recalled above, the suspects – who were SISMI officials at the time they allegedly committed the offences, one as a director and the other as a

contractor and subsequently an employee – asserted that, in order to be able to mount a full defence and to demonstrate irrefutably that the charges brought against them were baseless, they would have been required to disclose information which, by virtue of its status as an official secret, was not amenable to disclosure.

6.1.– In raising the jurisdictional dispute, the applicant judge starts from the interpretative assumption – which was endorsed by the Public Prosecutor when requesting the President of the Council of Ministers to confirm classification – that the factual situation at issue falls within the purview of Article 41 of Law no. 124 of 2007, according to which persons who have been charged or placed under investigation must at present be deemed to fall within the class of individuals eligible to raise the existence of an official secret in their defence.

This interpretative premise – on the basis of which the applicant considers the invocation and confirmation of the official secret during the current procedural stage (namely the preliminary hearing stage) to be relevant – appears in itself to be correct.

6.2.– It is evident that the issue impinges directly on the problem of interference between official secrets and an additional value of primary constitutional standing, as one of the fundamental rights of the individual: that is the right to a defence. Two forms of question are traditionally posed in this regard; these relate on the one hand to the issue as to whether the accused is authorised to disclose circumstances classified as official secrets to the judicial authorities, if this appears necessary in order to avoid an unfair conviction, and on the other hand to the specific effects of any invocation of an official secret.

Prior to the reform under Law no. 124 of 2007, the broad majority opinion in relation to the former issue – the resolution of which evidently conditions the latter issue – was that the question should be answered in the affirmative.

The Court of Cassation held in particular, in relation to the Code of Criminal Procedure from 1930, that the accused did not fall under the class of individuals to whom Article 352 of that Code applied (as amended by Article 15 of Law no. 801 of 1977) which, after subjecting public officials, public sector employees and officials responsible for the provision of public services to a duty to refrain from providing evidence in relation to facts classified as official secrets, made provision – where a relevant declaration had been made – for a procedure involving the consultation of the

President of the Council of Ministers with the goal – if classification as a secret was confirmed and if knowledge of the reserved information appeared to be essential – of securing the issue (as in the present case) of a ruling to dismiss the case due to the existence of an official secret. The Court held that – leaving aside the ambiguous nature of the expression used in the legislation ("should not be questioned") – the inclusion of the provision in a chapter dedicated to witnesses, the reference to evidence in the title and the exclusion for criminal prosecutions for perjury in the event that the classification as secret was confirmed made it clear that the legislation concerned applied solely to individuals who were to be heard as witnesses. Moreover, decisive importance was given to the argument based on the rationale of the provision, which could be discerned specifically in the goal of protecting witnesses – who were released from the obligation to disclose information classified as an official secret – from the risk of being charged with perjury on the grounds of their reticence. However, no such requirement could be discerned in relation to a person questioned as a suspect, as such individuals have broad freedom to state their defence, and even to refuse to respond, without running the risk of being charged with the offence provided for under Article 372 of the Criminal Code, and are only prohibited from making statements which are criminally libellous. Conversely, the accused could on the other hand have made all statements which may have been necessary in order to prove his innocence, even had these involved the disclosure of official secrets, without thereby incurring responsibility for the offence provided for under Article 261 of the Criminal Code, as such actions would still be justified pursuant to Article 51 of the Criminal Code by the exercise of the right to a defence, which is guaranteed as "inviolable" under Article 24(2) of the Constitution (Court of Cassation, 6th Division, judgment no. 5752 of 10 March 1987 - 8 May 1987).

6.3.– According to the settled position, the situation was not changed by the entry into force of the 1988 Code of Criminal Procedure, according to which the conclusion referred to above was in fact required with even greater force, notwithstanding the removal of the reference to witness evidence from the title of the original Article 202 – which re-enacted the provisions of Article 352 of the repealed Code – and the removal from the provision of the rule stipulating the procedural inadmissibility of prosecutions for perjury. In fact, whilst the provision was included in Chapter I of Title II of Book III

of the Code, on witness evidence, which is clearly distinct from Chapter II on the "Examination of the parties", in literal terms however, paragraph 1 of Article 202 imposed on public officials merely the "obligation to refrain from giving evidence", but did not include the parallel ambiguous reference to the prohibition on questioning, whilst paragraphs 2 and 4 contained express and exclusive references to the "witness". Moreover, the fact that in extending certain rules applicable to witnesses to the examination of the accused, Article 209 of the new Code did not refer to Article 202, appeared to be significant.

In view of that legislative provision, the prohibition on the making of statements in relation to facts classified as official secrets – and the special remedy of the discontinuation of any trial which may be related to such secrets pursuant to Article 202(3) – could not therefore have been relied on by the accused (or by the person under investigation). However, these individuals would have continued to enjoy the broadest freedom of action, in accordance with the principle laid down under Article 24(2) of the Constitution (and hence also with that laid down under the amended Article 111(3) of the Constitution insofar as it grants the accused the right to mount a defence and to submit evidence), as he may chose whether to remain silent or to make a statement, including in relation to facts classified as official secrets, or even to furnish proof in support of them. If necessary for the purposes of a defence, disclosure would not under any circumstances be punishable, as it would fall under the justification of the exercise of a right of primary standing.

6.4.– However, the legislation in this area was significantly amended with regard to the issue at interest in these proceedings by Law no. 124 of 2007. In fact, whilst the amended Article 202 of the Code of Criminal Procedure did not change the fact that the provision applied exclusively to witnesses, it was however accompanied by a parallel provision, located outwith the Code (Article 41 of Law no. 124 of 2007) which, in largely reiterating its general framework, was not subject to limits as to its application depending on the procedural status of the individual making a declaration, neither in systematic nor in literal terms.

In fact, the new provision – which was enacted following a broad debate in Parliament, which is testament to the fact that Parliament was well aware of the matter at issue in this case – stipulated indiscriminately that "public officials, public sector

employees and officials responsible for the provision of public services shall be prohibited from making statements in relation to matters classified as official secrets" (paragraph 1, first sentence). This provision – which as a substantive principle is however superfluous, since the disclosure of an official secret amounts to a criminal offence, irrespective of the status of the disclosing party (Article 261 of the Criminal Code), and thus amounts to conduct prohibited in itself – was in actual fact destined, according to Parliament's intentions, to have a strictly procedural effect, as is clear from the following provision in the second sentence of paragraph 1 in which it is stated that, at any stage of criminal proceedings "without prejudice to the provisions of Article 202 of the Code of Criminal Procedure, […] if an official secret has been invoked, the judicial authorities shall inform the President of the Council of Ministers, in his capacity as the national authority responsible for security, in order to enable him to adopt any appropriate decisions which fall to him".

Article 41 thus replicates the contents of the amended Article 202 of the Code of Criminal Procedure in relation to the procedure for consultation of the President of the Council of Ministers and the relative effects (paragraphs 3 to 8), with the exception of a single difference, which is not negligible. Indeed, when an official secret is invoked, the judicial authorities are required to seek confirmation from the President of the Council of Ministers not in every case – as provided for under the Code – but only where "the matter classified as secret [is deemed to be] essential in order to conclude the trial" (paragraph 2). It is therefore necessary to conduct a review of "essentiality" prior to requesting confirmation, in addition to the further post-confirmation review required prior to any ruling to dismiss the case (Article 41(3) of Law no. 124 of 2007, in parallel with the provisions of Article 202(3) of the Code of Criminal Procedure for witnesses).

As was held by this Court *obiter dicta* (judgment no. 106 of 2009), in enacting the provision under consideration Parliament established a general scope for the obligation on public officials to refrain from disclosing information classified as an official secret during court proceedings by a rule which – when detached from a specific *sedes materiae* – due to its generic formulation, is also capable of including the accused and a person under investigation, notwithstanding the lack of any express references to such parties. In effect, the fact that the provision uses the verb to "make statements" ("shall be prohibited from making statements"), which is generally used by the Code of

Criminal Procedure in relation to information provided by individuals other than the accused (including specifically witnesses, technical experts appointed by the court or the parties or the investigating police, whilst on the other hand in the language of the Code the accused "declares", "asserts" or "responds") does not appear to be capable of rebutting this conclusion. Given the broad scope of the rule in question – which is directed at the broad class of individuals who may be heard in a capacity other than as a witness – it was in fact plausible for Parliament to use the term "make statements" in its common everyday meaning, as a reference to any form of presentation of facts made by any party.

From a teleological point of view on the other hand, it must be observed that the legislation in force prior to the enactment of Law no. 124 of 2007 – as interpreted according to the majority opinion – in practice allowed the accused to strike a balance between the individual right to a defence and the supreme interest of the security of the Republic, in granting him an ability to choose, which moreover required him alone to bear the "costs" of any choice in favour of the latter value. In fact, by disclosing the secret, the accused could obtain an acquittal, to the detriment of national security; on the other hand, if he chose to remain silent, whilst upholding national security he would expose himself to the risk of an unfair conviction.

However, the arrangement considered above – within which the individual's defence requirements predominated in all instances over those relating to the protection of national security whenever the accused did not consider that he could accept the aforementioned risk – was not even capable of ensuring robust protection for the other public interest in play, namely the proper exercise of criminal jurisdiction. In fact, the person holding proof of innocence may not have been the accused himself, but a qualified witness presented by the defence, who would in any case have been under an obligation to refrain from giving evidence. Consequently, in such an eventuality, the secret information could have been disclosed by the accused when presenting his defence arguments and asserting the relative evidence, whilst not however enabling criminal justice to follow its ordinary course, as it would in any case be necessary to issue a ruling to dismiss the case pursuant to Article 202(3) of the Code of Criminal Procedure following confirmation of the fact that the evidence requested in support of the said position was an official secret.

The new Article 41 of Law no. 124 of 2007 alters the terms of the balancing operation. In fact, whilst on the one hand the accused is included amongst the parties vested with the power and duty to invoke an official secret, at the same time, he is released – where he acts in a manner compatible with the requirement to protect national security – from the risk of an undue finding of criminal responsibility. In other words, the State requires – with a view to its "self-preservation" – that also the individual on trial remain silent in relation to matters classified as official secrets, by requiring the court to make a procedural ruling which does not entail any negative findings for the accused (a ruling to dismiss the case), without prejudice to a review of its "essentiality" by the court.

7.– Therefore, having ascertained that also accused persons and suspects are currently entitled to invoke a official secret, it is not necessary to address at this stage the further issue invoked by the applicant judge in his written statement: that is to determine whether – and under what terms – the new legislation is nonetheless "permeable" to the application of the defence provided for under Article 51 of the Criminal Code where the individuals in question violate the prohibition on the disclosure of official secrets when exercising their right to a defence (a solution which is in effect supported by certain indications contained in the *travaux preparatoires* relating to Law no. 124 of 2007). However, the eventuality referred to above did not obtain in the case under examination and is thus not of any significance for the purposes of the decision in the present jurisdictional dispute.

Moreover, for our present purposes, the applicant's further argument that, in accordance with the provisions of Article 41 of Law no. 124 of 2007, it is not in any case sufficient for the accused to aver the existence of evidence of his innocence which is not specified in any further detail, and which cannot be discovered on the grounds that it is an official secret – thus asserting the defence of an official secret, as in the present case, in relation to the charge as a whole – thereby obliging the court to dismiss the case, is not conclusive. This is because, if this were the case, the assertion of an official secret would end up transforming itself – inadmissibly – "into a kind of general defence at all times available to officials from the Intelligence Services". On the other hand, a ruling of procedural inadmissibility is premised – again according to the arguments of the applicant – "at the very least on '*prima facie* evidence', that is the

delineation of the scope of the secret within the context of a defence which is unequivocal and non-contradictory": these are conditions which – it is presumed – do not obtain in the present case, given that the invocation of an official secret in relation to the "principal" defence argument submitted by the accused is substantially irreconcilable with the logical impossibility that the facts alleged to be secret would be capable of establishing the innocence of both parties.

In this regard, it must however be noted that the Court has not been called upon in the present proceedings to ascertain whether the official secret was invoked by the suspects in an appropriate manner which is commensurate with their requirements, or to determine what impact the confirmation of the secret will have on the outcome of the criminal proceedings, as those are matters which fall to be assessed by the judicial authorities. On the contrary, the object of review is solely the decisions to confirm the secret which were actually adopted by the President of the Council of Ministers, with regard to their alleged capacity to infringe the constitutional powers of the applicant judge.

As noted above, Article 41(2) of Law no. 124 of 2007 provides that, if an official secret is invoked as a defence, the judicial authorities must consult the President of the Council of Ministers if – and only if – knowledge of the facts alleged to have been classified as an official secret appears to be "essential" for the outcome to the proceedings. The provision for a selective preliminary review of this nature – which is not required under Article 202 of the Code of Criminal Procedure in cases in which a witness has invoked an official secret – appears to be justifiable also in logical terms precisely in consideration of the special position of the accused or suspect who, in contrast to a witness, has a direct personal interest in the proceedings which may under certain circumstances act as an spur for the spurious allegation of the existence of an official secret with the goal of avoiding a ruling establishing his responsibility, or even simply of slowing down the proceedings.

In the present case – following the assertion by the suspects of the existence of an official secret with a particularly broad scope – when carrying out the aforementioned review, the public prosecutor asked the President of the Council of Ministers to confirm the existence of the official secret with regard solely to four specific circumstances, which were in fact regarded as "essential" in order to reach a verdict in the trial. The

review by this Court must focus on the answer provided to that request, and not the scope of the official secret as originally alleged by the suspects.

At the same time, it is evident that the assessment of "essential status", which is made on a preliminary basis by the representative of the prosecution, is not binding upon the judge when called upon to verify – prior to confirmation of the official secret – whether the prerequisites have been met for a ruling to dismiss the case pursuant to Article 41(3) of Law no. 124 of 2007. At that stage, the judge may therefore establish, acting in full autonomy, whether the circumstances classified as official secrets must be deemed in actual fact to be essential – taking account of the overall body of further evidence which has been or may be lawfully discovered and the scope of the official secret alleged – in order to reach a verdict in the trial, specifically with a view (potentially) to demonstrating the inaccuracy of the relevant conduct, that the accused played no part in it or the availability of any justificatory defence.

On the other hand, it is equally evident that the review of "essential status" which is a necessary prerequisite to the adoption of a ruling to dismiss the case takes on a different weight depending upon the status of the particular parties making statements during the trial, who are currently entitled to assert the existence of an official secret. In cases involving witnesses, who are required to answer the specific questions put to them truthfully, it is necessary to assess specifically what contribution the knowledge of the circumstances asserted as evidence could provide to establishing facts and responsibilities; on the other hand, in cases involving the accused – who is under no obligation to tell the truth and who, as in the present case, could assert the existence of an official secret irrespective of any specific questions put to him during questioning or examination – this review, which must be conducted with reference to the exercise of the right to a defence, is inevitably structured differently. In this regard, there is no doubt that the recognition of the impact of the official secret on the right to a defence cannot be left to its mere attestation by the individual on trial – who has an interest in the recognition of that status – but must be based on an account of the situation which is adequately persuasive in nature. Where the official secret is an essential part of the right to a defence, this will constitute a fact which must also be proven pursuant to Article 187(2) of the Code of Criminal Procedure – in proceedings in which the other interested parties have the right to make representations – in order to establish the applicability of

the relevant procedural rules, albeit subject to restrictions necessarily related to the requirement that secret information not be disclosed indirectly, which mean that the relative review will be broadly based on presumptions. This is therefore the appropriate framework within which aspects such as the coherence and plausibility of the accused's account may also be taken into account, considered in relation to his overall defence arguments and those of his co-accused in an analogous position.

However, all of the above concerns an investigation which falls to the judicial authorities, and does not impinge upon the legitimacy of the decision to confirm the official secret. When making that decision, the President of the Council of Ministers by no means rules on the issue as to whether the secret information is actually capable of providing decisive proof of the innocence of the individual who raised their status as an official secret – an assessment which does not fall to the President of the Council of Ministers – but only the capacity of that information to harm national security, if disclosed. Thus, it is not possible to refer in this respect – as the applicant does – to the unlawful "backing" provided by the President of the Council of Ministers for a defence strategy based on a premise which is claimed to be at odds with the requirement to avoid the creation of an "escape route" from criminal responsibility which may be used at will by officials from the intelligence services. The relevance of the official secret for the facts at issue in the proceedings is asserted by the accused, and not the President of the Council of Ministers (except in the situation provided for under Article 66(2) of the provisions implementing the Code of Criminal Procedure, which is not relevant in this case), and it is exclusively for the court to assess that relevance.

8.– In view of the above, it is therefore necessary, as a matter of logical priority, to examine the challenge brought by the applicant in his written statement in asserting – with regard to the first three points of the request by the public prosecutor – that the confirmation of the official secret by the President of the Council of Ministers was illegitimate "as the result of an incorrect identification of the object of the request".

The circumstances under discussion – regarding which the public prosecutor had requested confirmation of the secret by notes of 27 October and 19 November 2009 – concerned specifically the question as to whether, during the period in which it was directed by General Pollari, the SISMI: a) had "financed in any manner or form either directly or indirectly the office in Via Nazionale in Rome which was administered by

Pio Pompa"; b) had "provided financial remuneration in any manner or form directly or indirectly" to Mr Pompa or Ms Tontodimamma; or c) had "issued orders or instructions" to these individuals.

According to the applicant, the President of the Council of Ministers, distorting the terms of reference of the request, confirmed the official secret in relation to circumstances other than those specified which were not relevant for the purposes of the criminal proceedings. In fact, the President of the Council of Ministers stated in relation to the first two points his decision to confirm the secret in relation to the "manner" and "forms" of financing for the office in Via Nazionale and the remuneration of Mr Pompa and Ms Tontodimamma, whereas by contrast the request had related exclusively to their existence (to the "whether" and not the "how"). Analogously, as regards the third point, it may be inferred from the reasons provided in the decision to confirm the official secret that the President of the Council of Ministers intended to classify as secret the instructions and orders issued by the SISMI as regards their content, whilst disregarding the fact that, also in this case, the request had only been "whether" Mr Pompa and Ms Tontodimamma had received orders and instructions from the Service during the period considered.

It must however be pointed out as a general point in this regard that where, following a request to confirm the status of a particular item of information as an official secret, the President of the Council of Ministers confirms it in relation to different information which is not essential for the purposes of the proceedings underway, this does not automatically establish this as grounds for the illegitimacy of the confirmation, which may be challenged by the courts by initiating a jurisdictional dispute before the Constitutional Court. In fact, the case under consideration did not involve any encroachment on the constitutional powers of the judiciary, since the confirmation of the status as an official secret of information different form that to which the request related is tantamount, on the facts, to the failure to confirm the status of that information as an official secret, thus engaging the applicability of Article 41(4) of Law no. 124 of 2007 (according to which "if the President of the Council of Ministers does not confirm status as an official secret within thirty days of service of the request, the judicial authorities shall discover the information and continue with the procedure").

In the present case, the public prosecutor's request that the status of the information as an official secret be confirmed – within the terms in which it had been formulated – in reality appeared to be capable of referring, as regards the first two points, both to the existence of the funding and remuneration in question as well as the arrangements applicable to them (which were invoked in this case by the formula "in any manner or form, either directly or indirectly"). The fact that the President of the Council of Ministers upheld the assertion of an official secret as to the *quomodo*, but not also the existence in itself of financing, means that the "bar" on the exercise of the judicial powers resulting from confirmation operates only in relation to the former.

An analogous consideration must be made in relation to the third point where, in response to a request referring generically to the fact that the SISMI had issued orders or instructions to Mr Pompa and to Ms Tontodimamma, the President of the Council of Ministers upheld its status as a state secret, adducing reasons which made it clear that the requirement of confidentiality related to the contents of the orders and instructions ("also the directions and orders which are issued within the Service may constitute an *interna corporis* requiring protection if their disclosure would bring to light, as in the case under examination, issues relating to organisational, technical and operational arrangements which it is appropriate should remain undisclosed").

9.– The above considerations may also be used in order to exclude the further ground for unconstitutionality of the contested acts in this respect which is associated, supposedly, with the fact that – with reference to the three points considered – the request that the status of the information as an official secret be confirmed related to information which was publicly available, and hence not amenable for classification. Specifically – according to the applicant – the fact that the flat in Via Nazionale from which the documents which gave rise to the trial were seized was a SISMI office (and was hence financed by it) was a matter of public knowledge, and it was also publicly known that Mr Pompa and Ms Tontodimamma were employees of the Service (who thus received both remuneration and orders and instructions), so much so that their respective statuses ("initially contractors and subsequently employees") were reiterated in the very notes confirming the status of the information as an official secret.

Leaving aside any other consideration, the rule that the legality of the contested acts is to be assessed not on the basis of the content of the request for confirmation of status

as an official secret but rather of the response is conclusive in relation to this point. In the present case – according to the applicant's own account – the confirmation by the President of the Council of Ministers that the information was an official secret did not relate to the facts which are asserted to be commonly known (the generic existence of funding, remuneration and instructions: in other words, the existence of these arrangements), but to other facts (the procedures for the former and the contents of the latter) which are not commonly known.

10.– As regards the further grounds for challenge – which apply to the decision to confirm the status of the information as a whole as an official secret (and hence also, with regard to the part relating to point four of the request, which the applicant deems to be of crucial importance for the purposes of the proceedings underway, regarding the fact as to whether Mr Pompa and Ms Tontodimamma had received orders or directions "to collect information regarding Italian or foreign judges") – the Perugia judge argues that the information classified as secret in the present case falls outwith the class of information amenable to protection as an official secret under Article 39(1) of Law no. 124 of 2007 and the Decree of the President of the Council of Ministers of 8 April 2008, which were also referred to in the contested decisions. In fact, it is argued that the possibility that information relating to the issue of funding, orders and instructions by the intelligence services directed at the conduct of activities which are patently extraneous to the institutional goals of the services, such as those with which the accused have been charged in this case, may constitute an official secret must be excluded at root in this case. This is both in the light of the provisions of Article 26 of Law no. 124 of 2007 – which prohibits officials from the intelligence and security services, under threat of serious criminal penalties, from establishing or using information collected for any non-official purposes – and of Article 17 of the Law – which, in making provision for a defence available to officials from the intelligence services who engage in conduct constituting a criminal offence, subjects its applicability to the prerequisite that such conduct be indispensable for the institutional purposes of the bodies of origin.

However, the applicant's view is based on an incorrect premise: namely that the official secret, confirmed by the President of the Council of Ministers by the contested decisions, relate directly to the illegal acts which the accused are alleged to have

committed, whereas it by contrast concerns information – albeit related in some way to the facts at issue in the proceedings – the dissemination of which was deemed to be liable to expose the organisational and operational arrangements of the services to undue publicity.

The fact is entirely clear with regard to the confirmation of the secret status of the manner and procedure of the financing of the office in Via Nazionale and the remuneration of Mr Pompa and Ms Tontodimamma, information which – as mentioned above – the applicant himself does not however deem to be essential for the purposes of reaching a verdict in the trial.

However, this finding also applies to the contents of the orders and directions issued to the aforementioned Mr Pompa and Ms Tontodimamma, both as to their personal details and also with specific regard to any orders or directions "to collect information regarding Italian or foreign judges". Indeed, it must be pointed out in this respect that the requests to confirm the status of the information as an official secret – and, in parallel with these, the confirmations – were framed in generic and blanket terms, without any reference either to the interested parties (or the criteria according to which they could be identified) or above all to the purposes for which the information at issue was collected. It is therefore not permissible to "interpret" the contested acts to the effect of attributing to the President of the Council of Ministers the intention to classify as secret *omisso medio* the information constituting the *thema demonstrandum* in the trial from which the dispute originates: that is, with regard to the compilation – within the ambit of the SISMI and using its material and human resources – of files on judges and other individuals considered to originate "from the opposite political grouping" to the governing majority, with the specific objective of using the material collected in order to "delegitimise" the said individuals through defamation, slander and abuse of office.

The applicant's argument thus falls, and hence a binary choice is to be made: either no such directions to the effect mentioned above were issued, and hence there is no secret requiring protection, or such directions were indeed issued, but then would "by definition" not be amenable for protection as an official secret on the grounds that they related to "deviant" activity of the intelligence services. The argument is not in fact relevant with regard to the contents of the decisions to confirm the status of the

information under discussion as an official secret given that – also as regards the response provided in relation to point four of the request – these decisions do not relate to the question as to whether or not directions were issued to that effect, but have a more generic object, which does not include references evoking the "non institutional" status of the activity in question (and in fact presuppose the opposite).

Moreover, this Court has already had the opportunity to assert that information eligible for protection as an official secret may also include that relating to the orders and directions issued by the director of the intelligence service (in this case, the SISMI, now the AISI [*Internal Intelligence and Security Agency*]) to the members of that organisation: this is not only – as is asserted in the application – where there is a need to "maintain the credibility of the Service vis-à-vis its international relations and with related bodies" (a hypothesis which does not apply in this case), but also (and more generally) in relation to the "requirement for discretion" – adduced in the decisions challenged in these proceedings – "which must protect the *interna corporis* of each Service, protecting its organisational and operational arrangements from adverse publicity" (judgment no. 106 of 2009). This requirement may also arise in relation to other internal procedures – such as, in the present case, those relating to the financing of operational bases and the payment of remuneration to external contractors and employees – the disclosure of which is liable to be detrimental to the proper functioning of the services. The operative and organisational arrangements of the services are moreover invoked – as the applicant judge himself acknowledges – at various points of the list of the "reference material" for information eligible for classification as an official secret annexed to the Decree of the President of the Council of Ministers of 8 April 2008 (including in particular points 6, 7 and 8): a list which moreover only provides examples (Article 5 of the Decree).

11.– Contrary to the assertions of the applicant, no contradiction can by contrast be discerned between the classification of certain actions as offences under Italian law – specifically, certain acts committed by officials from the services for non-institutional purposes – and the acknowledgement that, following the decision to confirm the classified status of the information relating to the "*interna corporis*" of the services, it may not be possible to establish the aforementioned actions in court (see by analogy, judgment no. 106 of 2009).

In fact, as mentioned above, the fact of classification as an official secret, duly confirmed by the President of the Council of Ministers, prevents the courts from discovering and using classified information either directly or indirectly, but does not prevent them from acting on the basis of self-standing information which is independent from the above.

Moreover, where the source of the secret evidence is essential and no other evidence is available – with the resulting applicability of the provisions which require the court to issue a ruling to dismiss the case due to the existence of an official secret (Articles 202(3) of the Code of Criminal Procedure and 41(3) of Law no. 124 of 2007) – there is no scope for any contradiction. This outcome – which is expressly provided for by law – in fact results from nothing other than the fact that the interest in national security – which official secrets are intended to pursue – predominates over the requirement for judicial investigation.

12.– The applicant asserts at various stages of the written statement – without moreover engaging in any further argument – that the illegal activity involving the collection and processing of information in relation to which the accused have been charged is situated "on the boundary with constitutional subversion".

It must however be excluded that the rule could apply in the case under examination whereby "information, documents or objects relating to facts […] aimed at the subversion of the constitutional order may not under any circumstances be classified as official secrets": this rule is laid down by Article 39(11) of Law no. 124 of 2007 but – as has been held on repeated occasions by this Court (judgment no. 86 of 1977, and judgments no. 106 of 2009 and no. 110 of 1998) – is an expression of a limit which is inherent within such matters, as an official secret cannot operate as an obstacle on the investigation of facts aimed at undermining those very same values which it is intended to uphold.

In order for that limit to apply it is not in effect sufficient that the fact at issue in the proceedings lie "on the boundary" with constitutional subversion, but it is necessary that it cross that boundary. There is no indication this case in the wording of the charge that this occurred in this case. Since the offence provided for under Article 26(3) of Law no. 124 of 2007 cannot be of any significance, as a provision which entered into force after the events at issue in the proceedings, the accused have been charged – with regard to

the activity in question – with an offence against the public administration involving the improper use of public resources (misappropriation of public funds), aggravated solely by the purpose of the commission of further offences (Article 61(2) of the Criminal Code), but not also by the purpose of subversion of the democratic order (Article 1(1) of Decree-Law no. 625 of 15 December 1979 laying down "Urgent measures on the protection of the democratic order and public security", converted with amendments into Law no. 15 of 6 February 1980). Moreover, this Court has already noted that – in line with the case law of the Court of Cassation – a fundamental prerequisite for subversive activity is that it be aimed "at undermining and disrupting the overall structure of democratic institutions" (judgment no. 106 of 2009), a characteristic which does not appear to be present in the criminal activity at issue in this case, notwithstanding its gravity.

13.– The considerations set out above also imply that the further ground for challenge asserting the alleged irreconcilability of the acts alleged – specifically in relation to the charge of misappropriation of public funds – with the principles asserted in relation to public spending by a series of constitutional rules (Articles 3, 81, 97, 100 and 103 of the Constitution), arguing that a control, including through the courts, should at all times be guaranteed with reference to these principles over the use of resources allocated to public officials – including those who are members of the intelligence services – and in particular their use for purposes compatible with those which the said officials are required to pursue, is groundless.

Irrespective of any comparison between the principles of constitutional law invoked – which have been disputed by the respondent – the consideration that the principle of the supreme interest of the security of the Republic, as protected through official secrets, should prevail over that of the proper exercise of judicial powers (and in this case, of criminal jurisdiction, at issue in this case) does not recede – given its justified foundation – for the sole reason that this case involves a finding of responsibility relating to the improper management of public resources is decisive in this regard.

The requirement of discretion in relation to the manner in which funds allocated to the intelligence services are used – given the special nature of the tasks allocated to them – is moreover given particular consideration by Article 29 of Law no. 124 of 2007 – as invoked by the applicant in support of his argument – which provides, precisely in

order to comply with that requirement, for special forms of control over the management of the costs of the services, as exceptions compared to the ordinary arrangements. In particular, provision has been made that, in contrast to the position for "ordinary" costs, "reserved costs" are to be included exclusively in the budget but not in the final accounts (paragraph 3(a)), and are to be subject to a separate quarterly report and a final annual report, both to the President of the Council of Ministers (paragraph 3(f)), along with a half-yearly statement on the "essential features of management" to the *COPASIR* [Parliamentary Committee for Control of the Intelligence and Security Services and State Secrets] (paragraph 3(g)), which thus amounts to purely political control. This demonstrates that, within the context of the legislation regulating the operation of the services, a situation in which an official secret is liable to impinge upon judicial review of the allocation of financial resources may not be regarded by any means as anomalous.

14.– The applicant finally objects to the fact that the President of the Council of Ministers in any case filed to clarify in the decision confirming the status of the information as an official secret, "supported by appropriate justification", the "reasons why the protection of the '*interna corporis*' should prevail over any other interest protected under constitutional law". Such indications must by contrast be deemed to be indispensable in the light of the current legislative framework – which is supposedly inspired by an "increasing reconciliation of the goals of official secrets with [the] other fundamental interests protected under the Constitution" – and the "proportionality principle" asserted by this Court in judgment no. 86 of 1977, according to which it is once again necessary to strike "a reasonable balance between the means and the ends" in relation to such matters. Within this perspective, the protection of the requirements of discretion in relation to the organisational and operational arrangements of the services could not be indiscriminate – especially where the criminal conduct of officials from the security services is at issue – but would continue to be conditional upon the actual predominance in the specific case of the interests in order to safeguard which official secrets are granted a predominant position over other interests protected under constitutional law, including the interest in the correct administration of justice. On that basis, the applicant therefore invites the Court to verify "compliance with the limits which establish the invocation/confirmation of status as an official secret within a

constitutionally defined and acceptable framework": this is on the basis of the argument that, in proceedings involving a jurisdictional dispute, the Court must be deemed to be allowed – in contrast to the criminal courts – "to review the correct exercise of discretionary powers" vested in the President of the Council of Ministers in this area "in the light of constitutional principles and their correct balancing".

The objection raised by the State Counsel that the challenge is inadmissible due to its "generic" nature, in that it is not clear on the basis of which principle of constitutional law the Court should carry out the review requested, is groundless. From the applicant's perspective, the principles which should come into consideration are evidently, on the one hand, those which offer a constitutional foundation for official secrets, and on the other hand those which uphold the exercise of judicial powers.

On the merits however, the applicant's view cannot be endorsed.

In fact, as noted above, the position stated in the previous case law of this Court (judgment no. 86 of 1977) must continue to apply in this regard – even following the entry into force of Law no. 124 of 2007 – that is that the assessment of the President of the Council of Ministers as to the means which are necessary or useful in order to guarantee the security of the Republic is, due to its purely political and broadly discretionary nature, subject exclusively to parliamentary review, as Parliament is the institutional forum "for the review on the merits of the most senior and serious decisions of the executive" (judgment no. 106 of 2009). It has been stipulated precisely for this purpose that the President of the Council of Ministers must give notice to the *COPASIR* of all instances in which status as an official secret is confirmed, "specifying the essential reasons for such a decision", and that where it considers the assertion that the information amounts to an official secret to be groundless, the said parliamentary Committee must report to each of the Houses in order to enable the necessary assessments to be made (Articles 40(5) and 41(9) of Law no. 124 of 2007).

In fact, in a jurisdictional dispute which the judicial authorities may initiate against the President of the Council of Ministers in accordance with the express provisions of Article 202(7) of the Code of Criminal Procedure and Article 41(7) of Law no. 124 of 2007, "the Court is called upon to assess whether or not the prerequisites for an official secret invoked and confirmed in accordance with recognised procedures have been fulfilled, and not to make its own assessment on the merits of the reasons […] for the

official secret; this last judgment is reserved, as mentioned above, to the political authorities, namely Parliament" (judgment no. 106 of 2009).

This does not alter the fact that the reason stated in favour of confirmation of the secret, including in relation to the judicial authorities, must in any case be necessary (judgment no. 86 of 1977): this is moreover expressly required under applicable legislation (Article 202(5) of the Code of Criminal Procedure and Article 66(2) of the provisions implementing the Code of Criminal Procedure and, insofar as is of interest in the present case, Article 41(5) of Law no. 124 of 2007). However, this is required within a context which is different from that surmised by the applicant judge, and which is at the same time distinct from the reasons provided to Parliament, as is also clear from the fact that Parliament regulated in an independent and self-standing manner the statement of the reasons in favour of classification as an official secret before the two authorities, namely the judiciary and Parliament (whilst, had this not been done, it would have been sufficient to require the transmission to the parliamentary committee of a copy of the measure previously sent to the judge upon conclusion of the consultancy procedure). The requirement to state reasons to the judicial authorities in the manner stated above is not intended to enable a review of the manner in which the power to classify information as an official secret was actually exercised (which as mentioned above is precluded to the courts), but rather to justify in a consistent and plausible manner – with regard to relations between the branches of state – the "bar" on the exercise of judicial powers resulting from the confirmation of the status of information as an official secret, taking note of the considerations which enable information classified as an official secret to be associated with the fundamental interests falling under the overarching principle of national security. Moreover, it is only when the reasons are incompatible with that purpose – thus revealing a potential "deviation" of the power of classification from its institutional purposes – that a flaw may be discerned within the decision, in respect of which an objection may be lodged with this Court by way of a jurisdictional dispute.

The scope of the obligation to give reasons to the judicial authority is naturally affected by the requirement that the measure to which it relates not be thwarted, which would occur if a detailed description were to betray information which should have remained secret. However, in spite of this, of more interest for our present purposes is

the fact that the adequacy of the reasons provided to the judicial authorities must be assessed having regard also to the characteristics of the information which is confirmed as secret, reflecting its level of specificity. Whilst it is one thing if the confirmation relates to matters which are described in detail, it is entirely another – depending upon the tone of the request – if it relates to more generic information, or even "category" information. In the preset case – limiting our scrutiny to the single issue which the applicant considers to be of genuine significance for the proceedings before it – the request seeking confirmation of the status of the information as an official secret regarded the fact that, over the course of a five-year period, the SISMI had issued orders or directions to Mr Pompa or to Ms Tontodimamma "to collect information regarding Italian or foreign judges" without specifying – as mentioned above – either names (or criteria for "selecting" the interested parties) or the purposes. When confronted with a request of this breadth, it may therefore be deemed sufficient in order to justify confirmation of the secret if an equally general reference is made by the President of the Council of Ministers to the requirement not to reveal indirectly, through the disclosure of the existence and contents of the said orders and instructions, the operational procedures and techniques of the services (including also their general objectives). In this regard it will be immediately apparent that there is an imbalance between the specific nature of the evidence in the proceedings from which the jurisdictional dispute originated and the breadth of the area which the jurisdictional dispute seeks to exempt from the protection provided to the instrument of classification.

15.– Furthermore, the additional request made by the applicant judge in the concluding part of his written statement in which he requests this Court to verify – through appropriate inquiries – whether the alleged proof of the innocence of the accused really exists within the material classified as an official secret and whether it "has been lawfully classified as an official secret" cannot be accepted. These inquiries are claimed to be fully practicable – since, according to the express provisions of Article 41(8) of Law no. 124 of 2007, "an official secret may not under any circumstances be invoked before the Constitutional Court" – and, according to the applicant, would not entail a review on the merits of the exercise of the discretionary power, but only a *de facto* control that "no evident abuse has been committed of the institution of official

secrets and that its invocation did not amount to a mere ploy by the suspects to avoid criminal prosecution".

The request in question is effectively based on an illegitimate conflation of the object of the criminal trial from which the jurisdictional dispute originated with the object of the dispute, and seeks once again to solicit assessments from this Court which – it is expected – are by contrast reserved to the judicial authorities.

As stressed above, once the President of the Council of Ministers has been requested to confirm the status of information as an official secret which has been alleged by other parties during criminal proceedings, he does not adopt any stance on the capacity of the information under discussion to effect the outcome of the proceedings in progress – an assessment which does not fall to him, as it is reserved as an institutional matter to the court seized of those proceedings – but only on its liability to compromise national security, if disclosed. Similarly, a decision to confirm the status of information as an official secret could not be ruled unlawful by this Court during a jurisdictional dispute on the basis of an "eccentric" consideration relating to its contents, i.e. following a hypothetical control that the material classified as an official secret does not in reality provide information useful for the purposes of the trial, whether in support of the prosecution or – as in the case under examination – in support of the defence.

ON THOSE GROUNDS

THE CONSTITUTIONAL COURT

rules that the President of the Council of Ministers was entitled to issue the notes of 3 December 2009 (no. 50067/181.6/2/07.IX.I) and of 22 December 2009 (no. 52285/181.6/2/07.IX.I) which confirmed, subject to the terms specified thereunder, the existence of the official secret invoked by Nicolò Pollari and Pio Pompa during the course of criminal proceedings against them.

Decided in Rome at the seat of the Constitutional Court, *Palazzo della Consulta*, on 21 November 2011.

(omitted)