JUDGMENT NO. 259 YEAR 2019

The Constitutional Court examined a direct application filed by the Region of Emilia Romagna alleging a violation of the principle of the separation of powers on the part of the Bologna Provincial Association of Physicians and Dentists.

The Region challenged the punishment imposed by the Disciplinary Committee of the Provincial Medical Association on a medical doctor who also held a position as Regional Executive Councillor for Health Policy. The Disciplinary Committee of the Provincial Association had struck the doctor off the medical register because for having proposed and contributed to the approval of a Regional Executive deliberation on the possibility of using nurses onboard ambulances even in the absence of a medical doctor – a deliberation with which the Provincial Association did not agree.

The Court decided that the Bologna Provincial Association of Physicians could not take disciplinary action against a physician also working as a Regional Executive Councillor simply because he had proposed, and contributed to the approval of, regional policy-administrative provisions with which it did not agree. In so doing, the Provincial Association encroached upon the powers allocated to the Region in the field of healthcare by Articles 117(3) and 118 of the Constitution.

The Court determined that, in fact, the Professional Association's actions against the doctor in carrying out the functions of his office as Regional Executive Councillor, amounted to a review of Regional Executive policy and administrative decisions regarding the organisation of health services, over which it has no power. Consequently, the Court ruled that the doctor in question should be reinstated to the register of practicing physicians.

[omitted]

THE CONSTITUTIONAL COURT

[omitted]

gives the following

JUDGMENT

in proceedings concerning the jurisdictional dispute between State powers arising from the act of the Medical Disciplinary Committee of the Provincial Association of Physicians and Dentists of Bologna of 30 November 2018 and the inaction of the President of the Council of Ministers and the Minister of Health in relation to the certificate of official notification of the Emilia-Romagna Regional Executive, issued on 27 December 2018, initiated by the Emilia-Romagna Region with an application notified on 29 January-4 February 2019, lodged with the registry on 15 February 2019, registered as No. 4 of the 2019 Register of Jurisdictional Disputes between State Powers and published in the *Official Journal* of the Republic No. 16, first special series, 2019.

Having regard to the intervention *ad opponendum* of the Provincial Association of Physicians and Dentists of Bologna and the intervention *ad adiuvandum* of Sergio Venturi, as *pro tempore* member of the Regional Executive for Health Policy of the Emilia-Romagna Region;

after hearing Judge Rapporteur Silvana Sciarra at the public hearing of 22 October 2019;

after hearing Counsel Vittorio Manes and Giuseppe Caia for the Emilia-Romagna Region, Giuseppe Caia for Sergio Venturi, as Councillor with *pro tempore* responsibility for Emilia-Romagna Region health policy, and Alberto Santoli for the Provincial Association of Physicians and Dentists of Bologna.

[omitted]

Conclusions on points of law

1.– The Emilia-Romagna Region filed a jurisdictional dispute against the President of the Council of Ministers in relation to the decision of the disciplinary hearing of 30 November 2018, consisting in the disciplinary measure adopted by the Medical Disciplinary Committee of the Provincial Association of Physicians and Dentists of Bologna, erasing from the medical register Dr Sergio Venturi, at the time of the events – and currently – Regional Executive Councillor for Health Policy of said Region, and the failure to act of the Prime Minister and the Minister of Health, to whom the Region addressed a certificate of official notification and solicitation on 27 December 2018.

The applicant claims that, in adopting the above-mentioned disciplinary measure against the Regional Executive Councillor for Health Policy for having proposed and contributed to the approval of Regional Executive Resolution No. 508 of 11 April 2016 (Principles and criteria for the preparation of regional guidelines for the harmonisation of advanced protocols for the employment of nursing staff adopted pursuant to Article 10 of the Decree of the President of the Republic of 27 March 1992 for the execution of the territorial health emergency service, 118), which authorised the employment of nursing personnel specialised in emergency health care, led to an encroachment on regional powers in the field of "healthcare protection", provided for under Articles 117(3) and 118 of the Constitution, and, in particular, on the organisation of emergency health services.

The Association allegedly exercised its disciplinary power in the absence of the necessary prerequisites, censuring not the conduct of the physician, that could have been of disciplinary significance, but the political and administrative conduct of the Regional Executive Councillor. In doing so, it allegedly infringed the prerogatives of the Councillor, in particular his power to propose and contribute to the drafting and deliberation of the acts of the collegiate body to which he belongs. It also allegedly encroached upon the powers of the Regional Executive itself, due to the total identification and overlapping of the councillor with the Regional Executive, in the field of "healthcare protection" and, specifically, the organisation of emergency health services.

2.– As a preliminary matter, both the conflict in relation to the State and the intervention explained during the proceedings by the Regional Councillor for Healthcare Policy of the Emilia-Romagna Region, Dr Sergio Venturi, must be declared admissible.

As a rule, in proceedings regarding jurisdictional disputes between State bodies, the intervention of parties other than those entitled to file or respond to a claim is not permitted, "such rule being subject to the exception relating to cases where the intervention is part of a proceeding before an ordinary court, the outcome of which may be affected by the Court's judgment" (Judgment No. 107 of 2015).

In this case, the premises for such an exception exist. In fact, Dr Sergio Venturi is a party to the proceedings pending before the Central Disciplinary Committee for Health Professions (*Commissione centrale di disciplina per gli esercenti le professioni sanitarie* – CCEPS), challenging the same disciplinary measure adopted by the Provincial Association of Physicians and Dentists of Bologna, which is also challenged here. Therefore, this constitutional proceeding, seeking to ascertain whether it was a matter for the State – and, on its behalf, the Association of Physicians and Dentists of Bologna – to adopt the aforementioned disciplinary measure, is likely to affect the proceeding pending before the CCEPS.

3.– Again as a preliminary matter, there is no obstacle to the intervention of the Medical Association, despite the failure of the President of the Council of Ministers to enter an appearance as respondent.

This Court has recently emphasised that, in cases of jurisdictional dispute between State powers initiated filed by the Region against the State, Article 25(2) of the Supplementary rules for proceedings before the Constitutional Court "expressly provides that the application [...] must also be notified 'to the body which issued the act, when it concerns authorities other than those of the Government and those dependent on the Executive". (Judgment No. 43 of 2019) and autonomous bodies of the State with legal personality, 'so they are able to appear in court (Judgment No. 252 of 2013)'. (Judgment No. 43 of 2019). This is "in order for the claims regarding the constitutionality of the disputed act, which they have adopted, to be asserted independently by the respondent, the President of the Council of Ministers" (Judgment No. 252 of 2013).

3.1. - In the case under discussion, the requirements mentioned above must be deemed to exist, given that the Association, which adopted the disputed act, is expressly qualified in Article 1(3) of Legislative Decree of the Provisional Head of State No. 233 of 13 September 1946 (Reconstitution of the associations of health professions and for the regulation of the exercise of the professions themselves), as replaced by Article 4(1) of Law No. 3 of 11 January 2018 (Delegation to the Executive on the matter of clinical trials of medicinal products, as well as provisions for the reorganisation of the health professions and for the management of the Ministry of Health), as a non-profit public body, endowed with broad "financial, economic, regulatory, and disciplinary autonomy" (letter *b*), which acts as a subsidiary body of the State "in order to safeguard the legally protected public interest connected with professional practice" (letter *a*), and for this very reason it is subject to supervision by the Ministry of Health (letter *b*).

4.– In this regard, it should be specified, again as a preliminary matter, that the act put in place by the aforementioned Provincial Association of Physicians and Dentists of Bologna – disputed here – refers to the State "understood, according to the case law of this Court, not as a legal person, but as a complex and comprehensive legal system (Judgment No. 72 of 2005) made up of bodies, with or without legal personality, and entities distinct from the State in the strict sense, but placed in an instrumental relationship with the State in view of the different forms of exercise of typical State functions" (Judgment No. 31 of 2006). This Court has long emphasised that, from the perspective of relations with the regional system, the term 'State' is used in Article 134 of the Constitution in a broader sense, as "a conglomerate of bodies, linked by precise functional and policy constraints, intended to express, in a dialectical interaction with the regional system, the requirements pertaining to the unitary nature of the State imposed by the overriding values protected by Article 5 of the Constitution". (Judgment No. 31 of 2006).

With specific regard to the qualification of professional associations, it should be recalled that this Court has previously, and in harmony with the case law of the Court of Cassation (among others, Civil Court of Cassation, First Division, Judgment No. 21226 of 14 October 2011), and through administrative case law (among many, Council of State, Fourth Division, Decision No. 1344 of 16 March 2004), defined them as "public bodies with compulsory membership" (Judgment No. 405 of 2005) and recognised that their establishment and regulation "meets the need to protect an important public interest, the uniform protection of which requires the State to provide for specific access requirements", entrusting them "with the task of maintaining the registers and controlling the possession and permanence of the requirements, with regard to those who are already

enrolled or who aspire to enrol", in view of the objective of "guaranteeing the proper exercise of the profession in order to safeguard the confidence of the community" (Judgment No. 405 of 2005).
In other words, these are associations with compulsory membership, to which the State legislator has entrusted powers, functions and prerogatives, subject to supervision by the organs of the State apparatus, all of which have been envisaged "to protect weighty interests of constitutional import" (Judgment No. 173 of 2019, concerning the Bar Association), in connection with the exercise of professional activities, necessarily characterised by their "national dimension" and therefore their "indivisibility" (Judgment No. 405 of 2005). Such are the interests inherent in the protection of health.
This Court has brought the regulation of bodies that are "auxiliaries of the Public Administration" (Council of State, No. 1344 of 2004) under the "administrative order and organisation of the State and national public bodies" (Judgment No. 405 of 2005), because these bodies are called upon to perform public functions to safeguard standard public interests. This serves to unequivocally confirm that these bodies belong to the State legal order.
The already mentioned Article 4 of Law No. 3 of 2018 confirms what has been stated above with specific regard to the associations of the health professions. Associations are classified, as already seen, as "non-profit public bodies" acting "as subsidiary bodies of the State in order to protect legally protected public interests connected with the practice of a profession" (Article 1(3), letter *a*, of the Legislative Decree of the Provisional Head of State No. 233 of 1946, as replaced by the aforementioned Article 4). To this purpose, these bodies are entrusted with multiple tasks and functions, which may usefully be listed by way of illustration: the verification of the possession of the qualifications required to practice a profession; keeping, also in digital form, and making public, also in electronic format, the professional registers; a compulsory opinion on the regulations governing the qualifying examination leading to the practice of the profession; cooperation with local and central authorities to study and implement measures that may be of interest to the association, and collaboration with public and private health and training institutions for the promotion, organisation and assessment of educational activities and updating procedures for the continuous professional development of all those enrolled on the registers. The close connection between those tasks and the protection of a standard public interest clearly qualifies them as bodies performing public functions attributable to the State apparatus.
With sole regard to the constitutional conflict of jurisdiction between the Regions and the State, the attribution of such functions to the area of State power – "entrusted" to the Association of Healthcare Practitioners, in the context of the particular organisational model designed by the State legislator, in particular by Legislative Decree of the Provisional Head of State No. 233 of 1946, as amended by Law No. 3 of 2018 – requires acts issued in the exercise of the same to be attributed to the system of the State order (Judgment No. 72 of 2005).
5.- Given these necessary premises, it is appropriate to examine the objections arguing the inadmissibility of the application raised by the defence of the Provincial Medical Association of Bologna.
The latter, first of all, objects that the application regarding conflicts between State powers is inadmissible. The applicant Region has allegedly seized the Court not to establish whether the Constitution entrusts it with a power pursuant to Article 38 [referred to in Article 41] of Law No. 87 of 11 March 1953 (Rules on the constitution and

functioning of the Constitutional Court), but that the Association has no power to adopt the disputed disciplinary measure and to annul it, incorrectly identifying, moreover, the conduct of the regional executive councillor and not that of the registered physician as the subject-matter of the disputed decision. In other words, it claims that the proceeding at hand does not seek to define the respective areas of power of the State and the Region but rather the review and the delimitation of the disciplinary power of the Association, which is exercised with regard to the conduct of registered physicians. There would not appear therefore to be any action detrimental to regional powers, nor would the Region have any concrete and present interest in taking legal action. On the one hand, the Region's resolution, proposed and voted for by Sergio Venturi, as Regional Executive Councillor for Health, which gave rise to the disciplinary measure, is in force and enforceable; on the other hand, Venturi, as regional executive councillor, does not enjoy the prerogative referred to in Article 122(4) of the Constitution.

These are, in essence, objections that can be summarised in the alleged lack of prerequisites to initiate a jurisdictional dispute between State powers. In particular, it is claimed that the Region has no interest in appealing against an act – the disciplinary sanction of the erasure of Dr Venturi from the medical register – intended to affect the private sphere of the latter and therefore devoid of any capacity to be of detriment to the regional sphere of power. The dispute would therefore lack any constitutional relevance.

5.1.– These objections are unfounded.

This Court has long affirmed and constantly reiterated that "conflicts of jurisdiction are not limited to the sole circumstance of dispute with regard to holding the same power, which each of the contending parties claims for itself, but extends to include any circumstance in which the unlawful exercise of the power of another results in the limitation of an area of power constitutionally assigned to the other party" (Judgment No. 110 of 1970; more recently, Judgment No. 130 of 2014).

The Region considers unlawful the measure taken by the Medical Association at the conclusion of the disciplinary proceedings brought against the Regional Executive Councillor for Health Policy, who is also a physician, for having proposed and voted for a Regional Executive resolution containing a regulation for the organisation of emergency health services not approved by the Association, because the State (and, on its behalf, the Association) allegedly does not have the authority to submit to disciplinary proceedings and censure an act of political and administrative policy regarding healthcare organisation by the Regional Executive Councillor, a member of the Regional Executive. Indeed, the exercise of this authority would stand in contrast to the constitutionally guaranteed Regional administrative autonomy, which would therefore be diminished.

This Court considered that in order to deem a dispute constitutionally relevant, it is essentially necessary to envisage the effective exercise of a power, without legal basis, "concretely impinging on the constitutional prerogatives of the applicant" (among others, see Judgments No. 260 and No. 104 of 2016). The objections of inadmissibility of the application are, therefore, groundless, as the dispute lacks constitutional relevance.

In fact, the Region does not dispute the way in which the disciplinary power of the Association is exercised, but the very existence of such a power with regard to the political and administrative conduct of the regional medical councillor, stating that the infringement of the prerogatives of the latter (the power to propose and vote) arising from the "improper" exercise of disciplinary power leads to an encroachment on the powers of the Regional Executive itself, due to the total identification and overlapping between the Regional Executive Councillors and the Regional Executive, and therefore of the Region.

Thus, not only is the Region's interest in presenting an appeal clear, "qualified by the aim of restoring the integrity of the sphere of constitutional powers" (Judgment No. 265 of 2003) which are assumed to be impaired, but also the effective damage resulting from the disputed act. The adoption of the measure, in fact, in constituting an unlawful exercise of the power to review and punish the political-administrative choices of the Regional Executive on the disciplinary level, through the Regional Executive Councillor being subjected to the most rigorous disciplinary sanction possible, would in itself determine an infringement of regional administrative autonomy.

For the purposes of the admissibility of the appeal, the fact that the same measure, disputed here was also challenged before the CCEPS – the court with jurisdiction to rule on appeals brought against disciplinary measures adopted by the committees of professional associations, pursuant to Article 3(4) of Legislative Decree of the Provisional Head of State No. 233 of 1946, as subsequently amended – is not relevant. The fact that a case against the same disputed measure concerning a conflict of powers between authorities is pending before a court does not imply – as this Court has specified – the inadmissibility of the dispute in the event of a matter of constitutional relevance (recently, Judgment No. 57 of 2019).

6.– On the merits, the application is well founded.

The associations of healthcare professionals, including the Medical Association, are endowed – as mentioned above – with public interest functions under Legislative Decree of the Provisional Head of State No. 233 of 1946, as amended by Article 4 of Law No. 3 of 2018. Among these functions, in order to protect the general interests of the community, enshrined in law and bound to professional practice, is the supervision of "those enrolled in the registers, in whatever legal form they exercise their profession, including corporate activity, by imposing disciplinary sanctions" (Article 1(3), letter *l*, of Legislative Decree of the Provisional Head of State No. 233 of 1946, as subsequently amended). The Association is called upon, from this perspective, to promote and ensure "the independence, autonomy and responsibility of the professions and professional practice, technical and professional quality, the enhancement of the social function, the protection of human rights and the ethical principles of professional practice set out in the respective codes of ethics, in order to ensure the protection of individual and collective health" (Article 1(3), letter *c*, of Legislative Decree of the Provisional Head of State of No. 233 of 1946, as subsequently amended). The Association is endowed with disciplinary power, exercised, in particular, by the Association Committee (Article 3(2), letter *c*, of Legislative Decree of the Provisional Head of State No. 233 of 1946, as subsequently amended).

The disciplinary power, thus envisaged in its aims, serves to ensure compliance with the ethical rules governing the proper exercise of the profession. The legislator sought, in this way, to demarcate a sanctioning power which, if not restricted within precise boundaries, might unreasonably invade the sphere of the rights of the individual recipients of sanctions. It may therefore only be legitimately exercised "taking into account the obligations of the enrolled members that derive from the national and regional regulations in force and from the provisions contained in the national employment contracts and conventions", as well as "according to a sliding scale correlated to the intentional nature of the conduct, the gravity and the repeated nature of the offence" (again Article 1(3), letter *l*, mentioned above). Their disciplinary power is thus limited by mandatory respect for the protection afforded to the members, but also by the nature of codes of conduct,

which are, as defined by the CCEPS itself (Decision No. 80 of 7 July 2017), "*soft law"* acts binding within the terms and limits laid down by law.
From this perspective, Article 38 of Presidential Decree No. 221 of 5 April 1950 (Approval of the regulations for the execution of Legislative Decree No. 233 of 13 September 1946 on the reconstitution of the associations of the health professions and for the regulation of the exercise of the professions themselves) establishes the limits to the scope of disciplinary power and ordains that it may be exercised only with regard to "health care professionals who are guilty of abuse or failure in the exercise of their profession or, in any case, of acts contrary to professional decorum".
For the precise identification of any such possible liability, the code of medical ethics clarifies in Article 1 of the text approved in 2014, that the rules set out therein oblige "the doctor to safeguard individual and collective health by overseeing the dignity, decorum, independence and quality of the profession". Thus circumscribed, the purpose of the power is to target conduct dissonant with the proper performance of the professional activity, as well as "conduct adopted outside the exercise of the profession when considered relevant and impinging on the decorum of the profession". The generic nature of the latter provision – which is, moreover, contained in a formula common to all disciplinary systems – is very clear. This does not, however, preclude the identification of conduct, in a physician's private life, which is detrimental to his reputation and likely to compromise the image (the "decorum") of the profession, or is in any case such as to justify, in general, "a reprimand, since it does not respect the duties of loyalty to other members" (Civil Court of Cassation, Third Division, Judgment No. 8915 of 19 June 2002).
In the light of these indications, the CCEPS itself, a special tribunal called upon to rule on appeals brought against the disciplinary measures adopted by the Association Committee (Article 3(4) of Legislative Decree of the Provisional Head of State No. 233 of 1946), states: "the conduct of a doctor falling within the exercise of public duties or functions and unrelated to activities carried out in the professional's personal interest" (Decision No. 16 of 8 June 1991) or to professional activity in general (Decision No. 41 of 21 February 2000) is outside the disciplinary power of the Association.
The scope of the disciplinary power of the Medical Association being thus circumscribed, it is therefore evident that, in the case in point, the Association acted outside its remit, as it subjected to disciplinary proceedings, and punished, one of its members for acts that he carried out not in the exercise of the profession of physician but in the exercise of a public function, as Regional Executive Councillor. Such acts, ascribable to a public *munus* [office], are not among those subject to the Association's authority to impose penalties.
The Association in fact disciplined the Regional Executive Councillor for Health Policy without having the authority to do so, for having proposed and voted for, and therefore contributed to the approval of, Regional Executive Resolution No. 508 of 2016, which was not approved of by the Association itself. In this way, it unlawfully interfered with the exercise of the prerogatives of the Regional Executive Councillor, including his authority to propose and contribute to the drafting and deliberation of the acts of the collegiate body to which he belongs. Through the disciplined Councillor, it interfered with the constitutional powers of the Region in matters of healthcare organisation, to the consequent detriment of the same. The Councillor, a member of the Regional Executive, a collegial body with administrative responsibilities for the Region, contributes to defining the political and administrative direction of the Regional Executive within the area assigned to it – namely, healthcare policy. These functions are assigned to the

Regional Executive Councillor at the request of the President, by a directly elected body (pursuant to Article 122, last paragraph, of the Constitution). This appointment produces a total identification and overlapping with the Executive, so that encroachment on the powers of the Regional Executive Councillor is translated into encroachment on the powers, on the same matter, of the Regional Executive of which he is part and, consequently, of the Region itself.

With regard to the regional powers under discussion, it should be noted that Resolution No. 508 of 2016, proposed by Regional Executive Councillor Venturi and approved by the Regional Executive, authorised the use of nursing personnel specialised in emergency health care, following specific operating protocols drawn up by medical personnel. It constitutes the exercise of regional administrative powers in matters of healthcare organisation, "an integral part of the regional [...] powers in matters of health protection referred to in the third paragraph of the aforementioned Article 117 of the Constitution (among many, see Judgments No. 54 of 2015 and No. 371 of 2008)" (Judgment No. 137 of 2019) and "concerns [...] methods and practices for the rational and efficient use of human, financial and material resources intended to enable provision of the service" (Judgment No. 105 of 2007).

The resolution implemented the indications already formulated in the Decree of the President of the Republic of 27 March 1992 (Regional coordinating guidelines for the determination of emergency healthcare levels), in particular, Article 10 (which provides that "professional nurses may be authorised, in carrying out emergency services, to perform intravenous injections and phleboclyses, as well as other activities and procedures aiming to safeguard vital functions, envisaged by the clinical care protocols decided upon by the physician in charge of the service"), and in the subsequent agreement in the State-Regions Conference (Memorandum of understanding between the State and the Regions approving the guidelines on the emergency health system of 11 April 1996, pursuant to the Decree of the President of the Republic of 27 March 1992). This memorandum in fact defined the "organisational and functional requirements of the emergency network", identifying the operations centre as the centre for the confluence of all "urgent and emergency telephone requests channelled through the single number 118", and the centre for the identification of the most suitable actions to respond to the aforementioned requests, based on internal operating protocols, "to assess the criticality of the event" using "standard codifications and terminologies unlikely to give rise to ambiguities of interpretation" and "subject to periodic evaluation and review".

This detailed set of measures falls within the context of the conferral to the Regions of wider powers and responsibilities regarding the planning and organisation of healthcare services, in line with the provisions of Article 2 of Legislative Decree No. 502 of 1992 and in implementation of Article 117(3) and Article 118 of the Constitution.

7.- In conclusion, the application must be upheld.

The Court declares that it is not within the power of the State, or, on its behalf, the Committee of the Provincial Association of Physicians and Dentists of Bologna, to adopt, upon conclusion of the disciplinary procedure registered as No. 2501/gp/pm, the penalty of erasure from the medical register of Dr Sergio Venturi, the Regional Executive Councillor for Health Policy of the Emilia-Romagna Region for having proposed and contributed to drafting Regional Executive Resolution No. 508 of 2016.

Consequently, the penalty of erasure of the Regional Executive Councillor for Healthcare Policy of the Emilia-Romagna Region from the medical register, adopted at the conclusion of disciplinary proceeding No. 2501/gp/pm, must be annulled.

ON THESE GROUNDS
THE CONSTITUTIONAL COURT

1) *declares* that the intervention of Dr Sergio Venturi is admissible;

2) *declares* that the intervention of the Provincial Association of Physicians and Dentists of Bologna is admissible;

3) *declares that* it is not within the authority of the State, and on its behalf the Committee of the Provincial Association of Physicians and Dentists of Bologna to adopt, at the conclusion of the disciplinary proceeding No. 2501/gp/pm, the penalty of erasure from the medical register of Dr Sergio Venturi, the Regional Executive Councillor for Health Policy of the Emilia-Romagna Region, for having proposed and contributed to drafting Regional Executive Resolution No. 508 of 2016 (Principles and criteria for the preparation of regional guidelines for the harmonisation of advanced protocols for the employment of nursing staff adopted pursuant to Article 10 of the Decree of the President of the Republic of 27 March 1992 for the execution of the territorial health emergency service, 118) or of the President of the Council of Ministers and the Minister of Health not to take action following the certificate of official notification of the Emilia-Romagna Regional Executive, filed on 27 December 2018;

4) *annuls*, in consequence, the disciplinary measure imposed by the act mentioned in the headnote.

Decided in Rome, at the seat of the Constitutional Court, *Palazzo della Consulta*, 4 November 2019.

Signed by:

Giorgio LATTANZI, President

Silvana SCIARRA, Author of the Judgment