JUDGMENT NO. 195 YEAR 2019

In this case, the Court heard a series of applications from some Regions questioning the constitutionality of a number of provisions of Decree-Law no. 113 of 4 October 2018 (Urgent provisions on international protection and immigration, public security, as well as measures for the functioning of the Ministry of the Interior and the organisation and functioning of the National Agency for the Administration and Allocation of Assets Seized and Confiscated from Organised Crime), specifically: Article 21(1)(a) allowing for the extension of banning orders to health facilities, challenged as infringing the right to health, encroaching upon regional competences and breaching the principle of loyal cooperation between the State and the Regions; Articles 21-*bis*(1) and 21-*bis*(2) allowing agreements to be entered into between a prefect and trade associations with a view to improving urban security based on guidelines to be drawn up after consultation with the State - Cities and Local Authorities Conference, challenged on the basis that consultation with the Unified State - Regions, Cities and Local Authorities Conference was not envisaged despite the fact that the challenged provisions impacted on residual regional competence in matters of trade; Article 28(1) allowing a prefect in certain circumstances to act for a local authority, challenged as infringing the constitutionally guaranteed autonomy of local authorities.

The Court ruled that: Article 21(1)(a) was not unconstitutional in that it could be interpreted in a manner consistent with the Constitution thereby *inter alia* not infringing the right to health of banned persons; Article 21-*bis*(2) was unconstitutional as regards the part thereof that envisaged consultation with the State - Cities and Local Authorities Conference instead of the Unified State - Regions and Local Authorities Conference; and Article 28(1) was unconstitutional in that the prerequisites for exercise of the prefect's substitutive power were not sufficiently clear in law and hence incompatible with *inter alia* the constitutionally guaranteed autonomy of local authorities.

[omitted]

THE CONSTITUTIONAL COURT

issues the following

JUDGMENT

in proceedings concerning the constitutionality of Articles 21(1)(a), 21-*bis*(1), 21-*bis*(2) and 28(1) of Decree-Law no. 113 of 4 October 2018 (Urgent provisions on international protection and immigration, public security, as well as measures for the functioning of the Ministry of the Interior and the organisation and functioning of the National Agency for the Administration and Allocation of Assets Seized and Confiscated from Organised Crime), converted with amendments into Law no. 132 of 1 December 2018, initiated by the applications filed by the Umbria, Emilia-Romagna, Tuscany and Calabria Regions, served on 31 January - 4 February, 1 - 6 February, 31 January - 4 February and 1 February 2019, filed with the Court Registry on 1, 4, 6 and 8 February 2019, registered respectively as nos. 10, 11, 17 and 18 in the Register of Applications 2019 and published in the Official Journal of the Republic, nos. 11 and 13, first special series, 2019.

Considering the entries of appearance filed by the President of the Council of Ministers.

Having heard Judge Rapporteur Giovanni Amoroso at the public hearing of 19 June 2019.

Having heard Counsel Massimo Luciani for the Umbria Region, Giandomenico Falcon and Andrea Manzi for the Emilia-Romagna Region, Marcello Cecchetti for the Tuscany Region, Giuseppe Naimo and Vincenzo Cannizzaro for the Calabria Region and State Counsel [*Avvocatura dello Stato*] Giuseppe Albenzio and Ilia Massarelli for the President of the Council of Ministers.

[omitted]

Conclusions on points of law

1. – The Regions of Emilia-Romagna (Application no. 11 of 2019), Tuscany (Application no. 17 of 2019) and Calabria (Application no. 18 of 2019) have *inter alia* raised, with reference to Articles 3, 32 and 117(3) of the Constitution and the principle of loyal cooperation, questions concerning the constitutionality of Article 21(1)(a) of Decree-Law no. 113 of 4 October 2018 (Urgent provisions on international protection and immigration, public security, as well as measures for the functioning of the Ministry of the Interior and the organisation and functioning of the National Agency for the Administration and Allocation of Assets Seized and Confiscated from Organised Crime), converted with amendments into Law no. 132 of 1 December 2018; a provision that – amending Article 9(3) of Decree-Law no. 14 of 20 February 2017 (Urgent provisions on security in cities), converted with amendments into Law no. 48 of 18 April 2017 – has inserted the words "health facilities," after the words "home to".

The applicants claim that the extension of the list of places in relation to which, in order to protect their decorum and public safety, a ban on access to specific urban areas (so-called 'urban DASPO') may apply means that, in the case of behaviour envisaged as a ground for imposing the ban (drunkenness, indecent acts, unauthorised trading and acting as an unauthorised parking attendant), persons in need of medical treatment may be banned from precisely those urban areas that are home to "health facilities", with an ensuing violation of his or her right to health.

The Emilia-Romagna Region alone, in its application, has also raised questions concerning the constitutionality of Articles 21-*bis*(1) and 21-*bis*(2) of Decree-Law no. 113 of 2018, with reference to Article 117(4) of the Constitution on residual legislative power, as regards trade matters "clearly involved since the trade associations for the owners and operators of business establishments are affected", and with reference to Article 118(3) of the Constitution, as regards the part of the challenged provision that – in order to strengthen the protection of public security in the vicinity of public establishments, in the context of collaboration and coordination between the public security authorities and trade associations within the framework of ministerial guidelines – provides solely for the involvement of the State - Cities and Local Authorities Conference rather than the Unified State - Regions and Local Authorities Conference.

By application filed on 1 February 2019 (Application no. 10 of 2019), the Umbria Region has *inter alia* raised questions concerning the constitutionality of Article 28(1) of Decree-Law no. 113 of 2018, a provision that has inserted paragraph 7-*bis* into Article 143 of Legislative Decree no. 267 of 18 August 2000 (Consolidated Law on the organisation of local government), which provides for the dissolution of municipal and provincial councils in the event of mafia-type or similar infiltration and influence. Such with reference to Articles 3, 5, 23, 25, 27, 77, 97, 114, 117(2), 117(3), 118(2), 118(3), 119 and 120(2) of the Constitution as well as to Article 117(1) of the Constitution, in relation to Articles 6 and 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), signed in Rome on 4 November 1950, ratified and executed with Law no. 848 of 4 August 1955.

In particular, the Region complains that the wide scope of the substitutive prefectural power provided for in the challenged provision, in the event of the occurrence of "situations symptomatic of serious and repeated unlawful conduct that is such as to lead to an alteration of procedures and to compromise the efficiency and impartiality of municipal and provincial authorities and the proper functioning of the services entrusted

to them", in many respects infringes the constitutionally guaranteed autonomy of local authorities.

2. – The proceedings concerning the above-mentioned provisions – pertaining to one and the same context since they are all contained in Title II of Decree-Law no. 113 of 2018 concerning matters of public security, the prevention and fight against terrorism and mafia crime – can be joined and heard together. Separate judgments will decide the questions relating to the other provisions challenged in the same applications.

3. – The question of the constitutionality of Article 21(1)(*a*) of the aforementioned Decree-Law must be examined first of all.

The provision has inserted a reference to "health facilities" into paragraph 3 of Article 9 of the said Decree-Law no. 14 of 2017 on security in cities.

In the context of a detailed initiative aimed at improving safety in cities, in 2017 the legislator introduced a special measure, also aimed at safeguarding decorum in particular places (so-called 'urban DASPO'), based on the model of the ban on access to places where sports events are held (DASPO), regulated by Article 6 of Law no. 401 of 13 December 1989 (Measures in the field of illegal gambling and betting and protection of fairness in the conduct of sporting events); a provision cited, in particular, as regards the system for judicial confirmation of banning orders and the possibility to appeal to the Supreme Court.

Article 9 of Decree-Law no. 14 of 2017 takes into consideration and punishes the conduct of those who – violating any one of Articles 688 of the Criminal Code (drunkenness), Article 726 of the Criminal Code (indecent acts and use of foul language), Article 29 of Legislative Decree no. 114 of 31 March 1998 (Reform of the rules governing the commercial sector) through unauthorised trading in public areas or Article 7(15-*bis*) of Legislative Decree no. 285 of 30 April 1992 (New Road Traffic Code) through acting as unauthorised car parking attendants – block access to and the use of railway, airport, maritime and local public transport infrastructure. In addition to an administrative fine, the authorities responsible for establishing the commission of the offence may order that the offender be removed from inside the infrastructure in question (Article 9(1) of Decree-Law no. 14 of 2017, in the forms provided for in the successive Article 10(1)). In the event of repetition of the conduct so punished, the Chief of Police may adopt the more incisive measure of banning access to one or more of the above areas (Article 10(2) of Decree-Law no. 14 of 2017).

Article 9(3) allows municipal police regulations to identify further areas, the accessibility and use of which may also be governed by the above measure, in the form of an administrative fine, a removal order or in more serious cases a ban on access. The provision specifies the types of areas that the measure may be extended to cover: schools, school complexes and university sites, museums, archaeological areas and parks, monument complexes or other institutions and places of culture or in any case areas that attract significant tourist flows or that are used as public green areas.

Article 21(1)(*a*) of Decree-Law no. 113 of 2018 extended this list by adding "health facilities" and "areas designated for the holding of fairs, markets and public performances".

The applicant Regions challenge that provision solely to the extent that health facilities have been added to the above list, which municipal police regulations may now include among the areas protected by the measure in question (so-called 'urban DASPO').

The constitutional provisions that the applicant Regions claim have been violated are: firstly, Article 32 of the Constitution in conjunction with Article 3 of the Constitution because the extension of the measure infringes the right to health of persons in need of

medical treatment, precluding or otherwise hindering the necessary health care, thereby subjecting him or her to a disproportionate and unreasonable measure; and, secondly, Article 117(3) of the Constitution and the principle of loyal cooperation, because the shared competence of regional legislators in matters of healthcare are infringed, without moreover making provision for any form of loyal cooperation by the State with the Region.

4. – First of all, the challenges must be held to be admissible also with reference to provisions that are not related to the allocation of legislative competences.

The applicant Regions also cite provisions not included in Title V of Part Two of the Constitution – Article 32 of the Constitution (all Regions) and, in conjunction with the latter, Article 3 of the Constitution (the Emilia-Romagna Region alone) – and argue that the alleged violations encroach upon regional powers, complaining of the unreasonable impediment to accessing health facilities for people – such as those covered by the challenged provision – who are in need of care, with consequent infringement of their right to health.

As this Court has recently confirmed in its judgment no. 194 of 2019 issued on this same date, "the Regions can only invoke constitutional provisions other that those that regulate the allocation of competences between the State and the Regions under two conditions: when the alleged violation is potentially likely to affect the regional powers guaranteed by the Constitution [...] and when the applicant Regions have suitably explained how the alleged unconstitutionality has encroached upon the allocation of competences, stating the specific competences that are supposedly infringed and adequately arguing in this regard". In particular, with reference to Decree-Law no. 113 of 2018 itself, this Court specified that "the way the infringement has encroached upon regional and local competences must be argued in relation to the specific regulatory content of the decree and its susceptibility to oblige the Region to exercise its powers in accordance with national rules contrary to constitutional provisions".

In the present case, the challenged provision concerns access to and presence within health facilities on the part of certain categories of people, the organisation of which facilities falls within the regional legislator's shared competence in the matter of "health protection" (Article 117(3) of the Constitution). Legislating for the possibility to order the removal of persons identified by reason of certain behaviour on their part and to deny access to them impinges on the said competence insofar as it allegedly mandates the exclusion of those persons from the health care services provided in those facilities.

The applicant Regions have also given adequate reasons regarding how their constitutionally guaranteed autonomy would be impaired, insofar as they would be obliged, as a result of the challenged provision, to follow a selective criterion for access to health services, the regulation of which services falls within their shared legislative competence.

This leads to encroachment having regard to the violations of the parameters relied on (Articles 3 and 32 of the Constitution) which, although not directly linked to regional legislative competence, concern the protection of health and therefore the relevant complaints are admissible.

5. – On the merits, the questions are unfounded with reference to the parameters relied on, since an interpretation of the challenged provision consistent with the Constitution is possible. As that provision pursues the objective of avoiding disturbances of public order in areas to which the municipal police regulations can extend the applicability of an urban DASPO, it thus concerns matters of "public order and security" and hence falls within the exclusive legislative competence of the State (Article 117(1)(h) of the Constitution).

The pursuit of the constitutional interests of security, public order and peaceful coexistence, in fact, is entrusted by the Constitution exclusively to the State. The Regions can cooperate for this purpose, but only through measures falling within their own powers (amongst many, Judgments no. 63 of 2016 and no. 35 of 2012).
In the present case, Article 10(2) of Decree-Law no. 14 of 2017 expressly provides that the method of application of the ban on access to protected areas must be compatible with the health needs of the addressee of the measure. An interpretation of this provision in a manner consistent with the parameters cited (Articles 3 and 32 of the Constitution) means that the addressee could still use health services for medical reasons without being precluded from gaining access to them even though banned by the Chief of Police, in as much as that ban prevents him or her from accessing that area for other reasons.
The same interpretation can be adopted, even in the absence of express wording, in light of the same rationale that underlies both measures, to also delimit the scope of application of the removal order from the health facility in the same terms envisaged for a ban on access.
In any case, therefore, a person who resorts to the health facility for medical treatment (or therapeutic services or analysis and diagnostics) can neither be removed nor precluded from gaining access to the facility because the right to health prevails over the need for decorum in the area and the need to combat, for reasons of public security, the types of conduct – all punished only administratively – listed in Article 9(2) of Decree-Law no. 14 of 2017.
The need to gain access to health services, verified by the staff at the facility, does not however rule out the administrative punishment of any behaviour that the person, although in need of medical care, is guilty of in violation of Article 9(2).
Interpreting the challenged provision in that way means that there is no obstacle to the use of health services by those in need, whose right to health remains fully protected. It also means in practice that there is no impact on the organisation of health care, such that there is no breach of either shared regional competence in the field of health protection or the principle of loyal cooperation.
6. – The question of the constitutionality of Articles 21-*bis*(1) and 21-*bis*(2) of the aforementioned Decree-Law no. 113 of 2018 must now be examined, an aspect raised by the Emilia-Romagna Region alone, which though not disputing that the challenged provisions pertain to the exclusive competence of the State in matters of public order and security (Article 117(2)(h) of the Constitution), alleges that it has an impact on the residual regional competence in matters of trade, which would require the involvement of the Regions in the drafting of guidelines for the application of the rule in accordance with the principle of loyal cooperation.
In reality, the complaint is directed against paragraph 2 of Article 21-*bis* of the said Decree-Law no. 113 of 2018, which provides for consultation with the State - Cities and Local Authorities Conference rather than with the Unified Conference, as should be the case according to the applicant Region.
7. – The question is well-founded.
Article 21-*bis*(1) of the Decree-Law in question provides that "[f]or the purposes of a more effective prevention of illegal acts or situations of danger to public order and security inside and in the immediate vicinity of public establishments, identified in accordance with Article 86 of the Consolidated Law on public security enacted through Royal Decree no. 773 of 18 June 1931, with appropriate agreements signed between the prefect and the most representative trade associations, specific measures of prevention can be identified based on the cooperation between the operators of the establishments

and the police forces, which the operators concerned will abide by in the manner provided for by the agreements in question".

This is a rule ascribable to matters of public order and security, which falls within the exclusive competence of the State (Article 117(1)(h) of the Constitution), a fact that the applicant Region does not doubt. It does not envisage a power for the prefect to impose measures but rather a pact-based mechanism for agreeing specific preventative measures, an arrangement not unknown to the legal system which already makes provision for "pacts for the implementation of urban security" pursuant to Article 5 of Decree-Law no. 14 of 2017.

Whereas for the pacts, entered into between the prefect and the mayor, the comparatively most representative trade associations affected by the measure can only submit indications or observations, the agreements envisioned by the challenged provision are entered into directly between the most representative trade associations and the prefect.

T he operators of public establishments authorised under a licence granted in accordance with Article 86 of Royal Decree no. 773 of 18 June 1931 (Consolidated Law on public security) may individually sign up to those agreements, thus voluntarily agreeing to "precisely and completely respect them" and hence adopting the specific preventive measures agreed therein. This collaborative behaviour is taken into account – essentially in terms of exempting or mitigating circumstance – when it comes to making decisions to suspend or revoke licences in the event of the occurrence of significant events within the meaning of Article 100 of the Consolidated Law on public security, such as riots or serious disturbances.

The above agreements – according to paragraph 2 of the said Article 21-*bis* – are adopted locally in compliance with the approved national guidelines, acting on a proposal from the Minister of the Interior, in agreement with the most representative trade associations after consultation with the State - Cities and Local Authorities Conference.

Although the subject of these guidelines can be ascribed to matters of public order and security, which fall within the exclusive competence of the State, there is still a possible impact on rules governing trade, which is a matter within the residual legislative competence of the Region (Article 117(4) of the Constitution), as already recognised by this Court (amongst many, Judgment no. 98 of 2017); rules to which the regulation of the business conducted in the above-mentioned public establishments is also connected. This requires the involvement of the Regions, all the more necessary if one considers that Article 118(3) of the Constitution prescribes that national law shall regulate forms of coordination between the State and Regions precisely in the matter of the "public order and security" referred to in Article 117(4)(h) of the Constitution.

The lack of any involvement on the part of the Region in the drawing up of those guidelines therefore constitutes – as the applicant claims – a breach of the constitutional provisions referred to and thereby means in this part that Article 21-*bis*(2) of Decree-Law no. 113 of 2018 is unconstitutional.

The *reductio ad legitimitatem* of the challenged provision can be achieved – as requested by the applicant Region – by replacing, in paragraph 2 of the cited Article 21-*bis*, the reference to the State - Cities and Local Authorities Conference with that of the Unified State - Regions, Cities and Local Authorities Conference (Article 8 of Legislative Decree no. 281 of 28 August 1997 on "Definition and extension of the powers of the Permanent Conferences for relations between the State, the Regions and the Autonomous Provinces of Trento and Bolzano and unification, for matters and tasks of common interest to the regions, provinces and municipalities, with the State - Cities and Local Authorities

Conference"), which, witnessing the participation of the Regions, fulfils the need to involve them, in compliance with the principle of loyal cooperation.
7.1. – Therefore, Article 21-*bis*(2) of Decree-Law no. 113 of 2018, converted with amendments into Law no. 132 of 2018, should be declared unconstitutional insofar as it provides for "having heard the State - Cities and Local Authorities Conference" rather than "having heard the Unified State - Regions, Cities and Local Authorities Conference".
8. – Finally, the questions of the constitutionality of Article 28(1) of Decree-Law no. 113 of 2018, raised by the Umbria Region alone, must be examined.
This provision has inserted – in Article 143 of the Consolidated Law on the organisation of local government regulating the dissolution of municipal and provincial councils in the wake of instances of mafia-type infiltration and influence – a new paragraph (7-*bis*), which is the subject of multiple complaints by the applicant. That paragraph is worded as follows: "In the case referred to in paragraph 7, if the prefect's report reveals, with regard to one or more administrative sectors, situations symptomatic of serious and repeated unlawful conduct that is such as to lead to an alteration of procedures and to compromise the efficiency and impartiality of municipal and provincial authorities and the proper functioning of the services entrusted to them, the prefect – on the basis of the findings of its inspection and in order to put an end to the situations uncovered and to bring the authority's administrative activity back to normality – shall identify, without prejudice to the aspects of criminal relevance, priority restoration measures, indicating the steps to be taken and setting a deadline for their adoption, and shall provide all useful technical-administrative support through its offices. If the deadline is not met, the prefect shall grant the authority a further period of time not exceeding 20 days for their adoption, upon the expiry of which the prefect shall, through an *ad acta* commissioner, take the place of the administration in breach. Local authorities shall cover the costs using the resources available in their budget under the law in force".
9. – It is necessary to first review the relevant legislative framework.
In the context of the scrutiny of bodies governed by Chapter II of Title VI of the aforementioned Legislative Decree, which regulates the dissolution and suspension of municipal and provincial councils in general (Article 141), in addition to the removal or suspension of their elected officials under Article 142, the subsequent Article 143 – which includes the challenged provision – addresses the more specific case of mafia-type infiltration and influence in the life and administrative action of municipalities and provinces, and regulates the relevant procedures. This is an "extraordinary government measure of a sanctioning nature" that is "functional to the need to combat mafia-type or similar organised crime" (Judgment no. 182 of 2014).
The process is started by the territorially competent prefect, who inspects the authority concerned and at the same time appoints a commission of inquiry, arranging in any case for an appropriate investigation and also obtaining information from the relevant State public prosecutor, who communicates it as an exception to the obligation of secrecy under Article 329 of the Criminal Procedure Code provided that such is not impeded by particular requirements of secrecy of the criminal proceedings.
Having gathered and evaluated all the useful information, commencing from the conclusions of the commission of inquiry, and having consulted the provincial committee for public order and security, the prefect draws up a final report and sends it to the Minister of the Interior. On the basis of that report, the latter may conclude that "concrete, unambiguous and significant" elements are disclosed, indicative of a direct or indirect link to mafia-type organised crime. In that case, the Minister may propose the dissolution of the investigated municipal or provincial council if it emerges that a local elected

representative has links to crime (Article 77 of the Consolidated Law on the organisation of local government), dissolution which is decided by the Council of Ministers and ordered by Decree of the President of the Republic (Article 143(4)).
If, on the other hand, the involvement concerns not local elected officials but the secretary (municipal or provincial), the director general, the management or employees in any capacity of the local authority, the Minister of the Interior, acting on the proposal of the prefect, adopts all useful measures to put an end to the ongoing harm and return the administrative life of the local authority to normality, including measures, in a broad sense precautionary, concerning the aforementioned employees (such as suspension from employment or assignment to another office or other task) with the obligation for the authority to initiate disciplinary proceedings (Article 143(5)).
Where, on the contrary, "concrete, unambiguous and significant" elements do not emerge indicative of a link to mafia-type organised crime, the Minister of the Interior issues a decree concluding the procedure and giving an account of the results of the investigation (Article 143(7)).
In that case – i.e. when the prefect's report does not disclose grounds for exercise of the governmental power of dissolution of municipal and provincial councils, either because it transpires that in reality there is no surmised link to organised crime or because, even though there may be indicators of such a connection, they do not reach the threshold of probative reliability, in terms of being "concrete, unambiguous and significant" – the procedure ends with a sort of order to drop the case, without therefore arriving at the final deliberative phase aimed at dissolving the municipal or provincial council that the prefect's report concerns: a reasoned decree is adopted by the Minister of the Interior concluding (and thus terminating) the proceedings.
10. – This is where the challenged provision comes in.
At the end of the procedure provided for in the first seven paragraphs of Article 143 mentioned above, the newly introduced measure (paragraph 7-*bis*) seamlessly comes into play. A negative outcome to that procedure constitutes the first precondition for a separate but related sub-procedure aimed at triggering the prefect's taking over of the powers of the local authority. The beginning of paragraph 7-*bis* makes this sequential link manifest by providing that this sub-procedure can be commenced "[i]n the case referred to in paragraph 7", i.e. in the event of non-fulfilment of the prerequisite for the dissolution of the municipal or provincial council (paragraph 1) or for the adoption of measures to correct the actions of the authority and to punish, in a broad sense, the employees involved in the mafia-type infiltration (paragraph 5).
The purpose of the legislator is reflected in the specific way that the challenged provision has been conceived, as an appendix to the procedure governed by the first seven paragraphs of Article 143 of the Consolidated Law on the organisation of local government.
In fact, it may happen that the link between local elected officials (or employees) and mafia-type criminality, which alters and harms the activity and management of the local authority, occurs without meeting the standard of evidence of "concrete, unambiguous and significant elements" but nonetheless has led to proven mismanagement of the authority.
It may be recalled that the original wording of the rule which preceded Article 143 – i.e. Article 15-*bis* of Law no. 55 of 19 March 1990 (New provisions for the prevention of mafia-type delinquency and other serious forms of manifestation of social danger) – provided for the possibility to dissolve municipal and provincial councils, as always because of direct or indirect links between elected officials and organised crime, but only

on the basis of the existence of unspecified "elements". This Court (Judgment no. 103 of 1993) held that the questions of constitutionality raised with reference to multiple parameters were unfounded, indicating in substance that the challenges could be overcome through an interpretation conforming the rule to the Constitution, in the sense that "it permits the extraordinary power of dissolution only where evident factual situations exist and therefore necessarily supported by objective findings that lend credence to the hypothesis of collusion, including indirect, between the elected bodies and organised crime".

Subsequently, in reformulating the provision – currently incorporated into Article 143 of the Consolidated Law on the organisation of local government – so as to take account of the ruling of this Court, the legislator prescribed that the elements indicative of links to mafia-type organised crime should be "concrete, unambiguous and significant".

This rigorous prerequisite is required precisely because the exercise of the governmental power to dissolve a municipal or provincial council – an expression of the will of the people, safeguarded by a constitutional guarantee – is particularly incisive and drastic.

However, between the extreme measure of the dissolution of a municipal or provincial council (under paragraph 1 of Article 143) and the dropping of the investigation through the decree concluding the procedure (under the subsequent paragraph 7), there was no less invasive half-way provision envisaging a measure not affecting the bodies of the local authority but concerning merely steps to be taken by the authority aimed at remedying the latter's mismanagement suspected of being caused by possible infiltration by organised crime.

In fact, there was – and there is – in general Article 135 of the Consolidated Law on the organisation of local government, which, in the case of attempts at mafia-type infiltration into the activities of a local authority, already grants the prefect power, although merely to initiate action, in that the prefect may request the competent state and regional entities to take the investigative and substitutive action provided for by law. Action in theory already taken through the procedure referred to in the aforementioned Article 143 but resulting in the issuance of a decree concluding the procedure referred to in paragraph 7 of the same provision.

Therefore, the legislator decided to address the fact that the measures to combat mafia-type organised crime had been held to be inadequate and proceeded to introduce the challenged provision in an attempt to construct a corrective instrument which was less invasive than the dissolution of a municipal and provincial council and more flexible than ordinary substitutive measures.

But it did so by designing an *extra ordinem* prefectural substitutive power, entailing wide discretion, on the basis of general and ill-defined prerequisites and moreover not specifically aimed at the fight against organised crime. In other words, as a whole in terms that are incompatible with the constitutionally guaranteed autonomy of local authorities.

11. – In the light of above, at the outset it must be held that the complaints concerning the alleged infringement of the constitutionally guaranteed autonomy of local authorities are admissible.

In general, the Regions have standing to challenge national law also on grounds of infringement of the powers of local authorities regardless of any arguments alleging infringement of the regional legislative competence (Judgments no. 220 of 2013, no. 311 of 2012 and no. 298 of 2009). This Court, in fact, has repeatedly stated that the Regions enjoy such standing since "the close connection [...] between regional powers and those of local authorities enables one to hold that an infringement of local competences is

potentially likely to lead an infringement of regional competences" (Judgments no. 169 and no. 95 of 2007, no. 417 of 2005 and no. 196 of 2004).
Therefore, the possibility for the Region to challenge national law for alleged infringement of the constitutionally guaranteed powers of local authorities (Judgments no. 261 of 2017 and no. 29 of 2016) is further reiterated.
Equally admissible – leaving aside the other provisions not falling within Title V of Part II of the Constitution which, as explained shortly, will be absorbed – is the complaint of violation of Article 97(2) of the Constitution from the point of view of the efficiency of the public administration, which also includes the principle of legality of administrative action (Judgment no. 115 of 2011), given the obvious impact on the constitutionally guaranteed autonomy of local authorities. In fact, by stating that the prefect indicates the "steps to be taken" by way of "priority restoration measures", the challenged provision relates precisely to the regulation of the administrative action of the local authority.
12. – The questions are well-founded on the merits.
13. – First of all, it should be considered that the challenged provision combines the negative prerequisite of the lack of "concrete, unambiguous and significant" elements regarding direct or indirect links to mafia-type organised crime with a positive prerequisite: a finding of "situations symptomatic of serious and repeated unlawful conduct that is such as to lead to an alteration of procedures and to compromise the efficiency and impartiality of municipal and provincial authorities and the proper functioning of the services entrusted to them".
Both these prerequisites must be fulfilled but the wording of the provision does not in reality show any logical or causal connection between them other the fact that one must follow the other temporally.
Analogous situations arising in a different context (such as that of scrutiny of the acts of local authorities pursuant to the provisions of Chapter I of Title VI of the Consolidated Law on the organisation of local government) would be outside the scope of the challenged provision and would not allow the prefectural substitutive power in question to be exercised. This seems inexplicable, all the more so because in general terms the case of "serious and persistent violations of law" is provided for, including outside instances of links to mafia-type organised crime, which already makes it possible to take remedial action such as the ordinary procedure for dissolution and suspension of municipal and provincial councils under Article 141 of the Consolidated Law on the organisation of local government, with specific guarantees.
In addition, there is the fact that the definition of the positive prerequisite for exercise of the substitutive power introduced by the challenged provision is phrased in totally general terms.
Since the Consolidated Law on the organisation of local government already also provides for – in addition to the government's substitutive power in certain circumstances (Article 137) – a general power of extraordinary annulment whereby the government takes the place of the bodies of local authorities in the event of "unlawful acts" (Article 138), the "serious and repeated unlawful conduct" referred to in the challenged paragraph 7-*bis* of Article 143 cannot consist only of mere unlawful acts, for which a remedy is already provided in terms of a substitutive power. Something more is needed, which however the challenged provision not only fails to specify but also does not explicitly require.
The reference to "serious and repeated unlawful conduct", if understood as regarding criminal acts by the elected officials of the local authority or its employees, would in any case be very general, if compared to that of the first paragraph of Article 143, which

clearly refers to a specific criminal offence: the crime of mafia-type criminal association referred to in Article 416-*bis* of the Criminal Code.
Nor is that prerequisite in fact better defined by the consequences that such "serious and repeated unlawful conduct" must have. Indeed, it is required that the conduct be such as to involve "an alteration of procedures and to compromise the efficiency and impartiality of municipal and provincial authorities and the proper functioning of the services". That wording is likewise general and does not add anything to the definition of the prerequisite if one considers that any serious and repeated unlawful conduct can only but have an adverse affect in and of itself on the efficiency of the local authority's activities.
In addition to the general nature of the prerequisite for exercise of the prefect's substitutive power, there is also the vagueness of the level of circumstantial elements that come to light during the investigation referred to in paragraph 3 of Article 143. Exercise of the power to dissolve a municipal or provincial council requires that such elements on direct or indirect links to mafia-type organised crime attain a level of consistency and significance such as to be able to classify them as "concrete, unambiguous and significant" (Article 143(1) of the Consolidated Law on the organisation of local government), whereas for the "serious and repeated unlawful conduct" referred to in the challenged paragraph 7-*bis*, it is sufficient that the elements be merely "symptomatic of situations".
Overall, therefore, the positive prerequisite for exercise of the prefectural substitutive power is stated by the challenged provision in vague terms, largely discretionary and certainly much less well defined than those of the governmental power to dissolve municipal and provincial councils, even though the former is tied to the latter as an occasional supplementary procedure.
14. – Furthermore, the challenged provision grants the prefect who believes that there is a situation of mismanagement at the local authority not a mere power of initiating action and soliciting fulfilment of legal obligations (such as, for example, in the procedure that may lead to the adoption of a resolution decreeing the state of insolvency of the authority: Article 243-*quarter*(7) of the Consolidated Law on the organisation of local government) but the far more incisive and largely discretionary one of direct identification of "priority restoration measures" entailing an obligation for the local authority to comply with them. It is this obligation – not pre-existing in the law but created *ad hoc* by decision of the prefect – which if not complied with by the local authority will enable exercise of the substitutive power through an *ad acta* commissioner.
The insufficient definition of the prerequisite for the substitutive power is thus aggravated by the breadth of its atypical and undifferentiated content, whereas – as this Court (Judgment no. 115 of 2011) has stated – all administrative powers must be "defined in content and manner, so as to maintain a constant, albeit flexible, legislative underpinning of the administrative action".
All this irremediably affects the compatibility of this *extra ordinem* substitutive power, first of all, with the principle of legality of administrative action (Article 97 of the Constitution), as well as with the constitutionally guaranteed autonomy that the Republic promotes and grants to local authorities (Article 5 of the Constitution); autonomy also recently mentioned by this Court (Judgments no. 33 and no. 29 of 2019).
The statement in Article 114(2) of the Constitution, further to which municipalities, provinces and metropolitan cities are autonomous entities having "their own statutes, powers and functions" is strengthened by the recognition that they carry out "administrative functions of their own" (Article 118(2) of the Constitution), that they wield regulatory power with regard to the organisation and implementation of the

functions attributed to them (Article 117(6) of the Constitution) and that they enjoy revenue and expenditure autonomy (Article 119(1) of the Constitution). This overall constitutional guarantee of autonomy has been accentuated after the constitutional reform of 2001 – inspired by a "wide decentralisation of functions" (Judgment no. 44 of 2014) – which, among other things, no longer provides for prior scrutiny as to the legality and sometimes the merits of the acts of local authorities, in that Article 130 of the Constitution was repealed by Article 9(2) of Constitutional Law no. 3 of 18 October 2001 (Amendments to Title V of Part II of the Constitution).

15. – Last but not least, one must consider that the substitutive power introduced by the challenged provision – conceived in a manner so as to generally have a wide effect on the local authority's activities, given that the prefect's identification of "priority restoration measures" is not limited to legally prescribed and non-discretionary matters – should have observed the canon of Article 120(2) of the Constitution, according to which the substitutive power must be exercised in accordance with the principle of subsidiarity and loyal cooperation.

With reference to that provision, this Court has stated that "[t]he provision for a substitutive power is consistent with [...] the constitutional rules governing the allocation of powers" (Judgment no. 236 of 2004) and that power must therefore be respectful of local self-government. It is that same Article 120(2) of the Constitution which provides that the Government may decide to act as a substitute for bodies, implying the assumption of political responsibility by the Executive, when there is, in particular, a need "to preserve the legal or economic unity" of the legal system.

This Court has stated (Judgment no. 43 of 2004) that "[t]he Constitution wished [...] that, regardless of the distribution of administrative powers, as implemented by State and regional laws in the various matters, it would always be possible for the government to intervene to act for bodies in order to guarantee those essential interests". It was considered, for example, that protracted inertia on the part of local authorities "justifies provision being made for the substitutive power, which permits the central Government to safeguard general and unitary interests" (Judgment no. 44 of 2014) while it is the Prefect who notes the failure of the local authorities to implement what is prescribed by the law; power "attributed to the Prefect who exercises it without any margin of discretion" (again, Judgment no. 44 of 2014).

The Consolidated Law on the organisation of local government, on the other hand, grants the government a substitutive power in multiple cases of greater impact on the autonomy of local authorities, such as established inactivity (Article 138), unlawful acts (Article 139), malfunctioning of bodies and services or serious and persistent violations of law (Article 141), and even for serious reasons of public order (Article 142). While the prefect may act in the authority's stead in more limited and circumscribed circumstances, such as in the case of failure to comply with the obligations to convene a meeting of the council (Article 39) or in the case of inaction by the mayor in the exercise of state functions (Article 54) or, only provisionally, for reasons of serious and urgent necessity in the proceedings referred to in Articles 141, 142 and 143.

In short, the more the substitutive power – impacting on the autonomy of the local authority – exhibits discretion as regards prerequisites and content, the more the assumption of responsibility rises from the administrative level (order issued by prefect) to the political level (government decision).

The constitutional guarantee of autonomy for local authorities (municipalities, provinces and metropolitan cities) requires not only that the conditions for such substitutive powers affecting the activity of the authority be sufficiently defined by law but also that the

possible taking over of the powers of the bodies of the authority comply with the dictates of Article 120(2) of the Constitution, supplemented by the implementation provisions set out in Article 8 of Law no. 131 of 5 June 2003 (Provisions for the adaptation of the legal system of the Republic to Constitutional Law no. 3 of 18 October 2001), regarding the central government's assumption of responsibility for the exercise of such powers.

By contrast, the challenged provision leaves the exercise of a substitutive power, which it has been seen is largely discretionary, at the purely administrative level of the prefect without any involvement of the central Government (as in the case covered by paragraph 1 of Article 143) or even of the Minister of the Interior (as in the case covered by paragraph 5 of the same Article).

That provision, equally relied on by the applicant Region, is therefore also infringed.

16. – The considerations set out so far lead one to hold that the challenged provision is unconstitutional in that it violates Articles 5, 97(2), 114, 118(2) and 120(2) of the Constitution.

Obviously, it remains within the discretion of the legislator to reformulate the rule in terms that are compatible with the principle of legality of administrative action and with the guarantee of constitutionally guaranteed autonomy enjoyed by local authorities.

In conclusion, since the need to examine the other parameters indicated by the applicant Region has been absorbed, Article 28(1) of Decree-Law no. 113 of 2018, converted with amendments into Law no. 132 of 1 December 2018, must be declared unconstitutional.

ON THESE GROUNDS

THE CONSTITUTIONAL COURT

leaving to a separate judgment its decision on the other questions of unconstitutionality raised in the applications indicated in the headnote;

joining the proceedings,

1) *declares* that Article 21-*bis*(2) of Decree-Law no. 113 of 4 October 2018 (Urgent provisions on international protection and immigration, public security, as well as measures for the functioning of the Ministry of the Interior and the organisation and functioning of the National Agency for the Administration and Allocation of Assets Seized and Confiscated from Organised Crime), converted with amendments into Law no. 132 of 1 December 2018, is unconstitutional as regards the part thereof that provides "having heard the State - Cities and Local Authorities Conference" instead of "having heard the Unified State - Regions and Local Authorities Conference";

2) *declares* that Article 28(1) of Decree-Law no. 113 of 2018, converted with amendments into Law no. 132 of 2018, is unconstitutional;

3) *declares* that the questions of constitutionality of Article 21(1)(*a*) of Decree-Law no. 113 of 2018, converted with amendments into Law no. 132 of 2018, raised in the applications indicated in the headnote by the Emilia-Romagna Region with reference to Articles 3 and 32 of the Constitution, by the Tuscany Region with reference to Articles 32 and 117(3) of the Constitution and by the Calabria Region with reference to Articles 32 and 117(3) of the Constitution, and with reference to the principle of loyal cooperation, are unfounded on the grounds set out in the reasoning.

Decided in Rome, at the seat of the Constitutional Court, *Palazzo della Consulta*, on 20 June 2019.