JUDGMENT NO. 24 YEAR 2019

In this case, the Court heard referral orders from various courts concerning the application of certain personal preventive measures and the *in rem* preventive measures of seizure and confiscation to (a) "any person who may be presumed, on the basis of factual findings, to be habitually involved in unlawful dealings" and (b) "any person who, owing to his or her conduct and lifestyle, may be presumed, on the basis of factual findings, to earn a living, either in full or in part, from the proceeds of unlawful activities". The Court noted as a preliminary matter that "the fact that the imposition of a personal preventive measure is in any case conditional upon indications that suggest prior involvement in criminal activity by the individual does not mean that the measures concerned have the status of sanctions or punitive measures". Referring also to the case law of the ECtHR (in particular the *de Tommaso* case), the Court declared unconstitutional the provision allowing for the first type of personal and *in rem* preventive measures (letter (a) above). However, it declined to make a similar ruling to measures issued on the basis of letter (b) above. Whilst the legislation was sufficiently precise in relation to letter (b), the wording of letter (a) was inherently imprecise (in particular as regards the terms "unlawful dealings" and "habitually") in a manner that could not be rectified through judicial interpretation.

[omitted]

THE CONSTITUTIONAL COURT

[omitted]

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Articles 1, 3 and 5 of Law no. 1423 of 27 December 1956 (Preventive measures against persons representing a danger to security and public morality), Article 19 of Law no. 152 of 22 May 1975 (Provisions on the protection of public order) and Articles 1, 4(1)(c), 6, 8, 16, 20 and 24 of Legislative Decree no. 159 of 6 September 2011 (Code of anti-mafia laws and preventive measures, and new measures on anti-mafia documentation, issued pursuant to Articles 1 and 2 of Law no. 136 of 13 August 2010), initiated by the *Tribunale di Udine*, the *Tribunale di Padova* and the Naples Court of Appeal by the referral orders of 10 April, 30 May and 15 March 2017, registered respectively as nos. 115, 146 and 154 in the Register of Referral Orders 2017 and published in the *Official Journal* of the Republic nos. 37, 43 and 45, first special series 2017.

Considering the entry of appearance by F.S. and the intervention by the President of the Council of Ministers, and by M.S., the latter after expiry of the applicable time limit;

having heard Judge Rapporteur Francesco Viganò at the public hearing of 20 November and in chambers on 21 November 2018;

having heard Counsel Massimo Malipiero and Counsel Giuseppe Pavan for F. S. and State Counsel [*Avvocato dello Stato*] Gabriella Palmieri for the President of the Council of Ministers.

[omitted]

Conclusions on points of law

1.– By the referral order registered as no. 154 in the Register of Referral Orders 2017, the Naples Court of Appeal raised:

a) questions concerning the constitutionality of Articles 1, 3 and 5 of Law no. 1423 of 27 December 1956 (Preventive measures against persons representing a danger to

security and public morality), Article 19 of Law no. 152 of 22 May 1975 (Provisions on the protection of public order) and Articles 1, 4(1)(c), 6 and 8 of Legislative Decree no. 159 of 6 September 2011 (Code of anti-mafia laws and preventive measures, and new measures on anti-mafia documentation, issued pursuant to Articles 1 and 2 of Law no. 136 of 13 August 2010), all with reference to Article 117(1) of the Constitution, in relation to Article 2 of Protocol no. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), signed in Strasbourg on 16 September 1963 and implemented in Italy by Decree of the President of the Republic no. 217 of 14 April 1982.

b) questions concerning the constitutionality of Article 19 only of Law no. 152 of 1975 with reference to Article 117(1) of the Constitution, in relation to Article 1 of the Additional Protocol to the ECHR, signed in Paris on 20 March 1952, ratified and implemented by Law no. 848 of 4 August 1955, and Article 42 of the Constitution.

2.– By the referral order registered as no. 115 in the Register of Referral Orders 2017, the *Tribunale di Udine* raised questions concerning the constitutionality of Articles 1, 3 and 5 of Law no. 1423 of 1956 and of Articles 1, 4(1)(c), 6 and 8 of Legislative Decree no. 159 of 2011, all with reference to Article 117(1) of the Constitution, in relation to Article 2 of Protocol no. 4 to the ECHR.

3.– Finally, by the referral order registered as no. 146 in the Register of Referral Orders 2017, the *Tribunale di Padova* raised:

a) questions concerning the constitutionality of Articles 1, 4(1)(c), 6, 8, 16, 20 and 24 of Legislative Decree no. 159 of 2011, due to the violation of both Article 117(1) of the Constitution in relation to Article 2 of Protocol no. 4 to the ECHR and Article 25(3) of the Constitution and also – as is apparent from the reasons stated in the referral order – Article 13 of the Constitution;

b) questions concerning the constitutionality of Articles 16, 20 and 24 of Legislative Decree no. 159 of 2011, due to the violation of Article 117(1) of the Constitution in relation to Article 1 of the Additional Protocol to the ECHR.

4.– As a preliminary matter, the three referral orders must be joined as the questions raised – which, whilst not being identical in terms of the remedy sought and the parameters invoked, all concern the prerequisites for the lawful application of personal preventive measures and, in two cases, *in rem* preventive measures – are based on largely overlapping arguments.

5.– In addition, it is necessary to declare, pursuant to Article 4(4) of the Supplementary Rules on Proceedings before the Constitutional Court, that the intervention by M. S. is inadmissible as it was filed, within the two proceedings concerned, after expiry of the time limit of twenty days following the publication in the Official Journal of the application or referral order that resulted in the commencement of proceedings.

6.– Due to the considerable number of contested provisions, which are closely related to one another, it is necessary – again as a preliminary matter – to clarify the object of these proceedings, which may be identified on the basis of the remedies sought in the referral orders, thereby immediately excising the (numerous) inadmissible questions.

6.1. – At the core of all of the questions raised lies the alleged failure to clarify the two hypothetical scenarios provided for under numbers 1) and 2) of Article 1 of Law no. 1423 of 1956, as amended by Law no. 327 of 3 August 1988 (Provisions on personal preventive measures), which were subsequently restated in almost identical terms within letters *a*) and *b*) of Article 1 of Legislative Decree no. 159 of 2011, which applies to

proposed preventive measures filed after the date of entry into force of Legislative Decree no. 159 (13 October 2011).
These provisions allow for the application – firstly – of the personal preventive measure of special supervision, with or without an obligation to reside or a prohibition on residing in a particular location, and – secondly – the *in rem* preventive measures of seizure and confiscation, which are applicable to two classes of person: "any person who may be presumed, on the basis of factual findings, to be habitually involved in unlawful dealings" (Article 1, no. 1 of Law no. 1423 of 1956, restated in almost identical terms by Article 1(a) of Legislative Decree no. 159 of 2011), and "any person who, owing to his or her conduct and lifestyle, may be presumed, on the basis of factual findings, to earn a living, either in full or in part, from the proceeds of unlawful activities" (Article 1, no. 2 of Law no. 1423 of 1956; Article 1(b) of Legislative Decree no. 159 of 2011).
Moreover, as is apparent from the overall wording of the referral orders, the questions raised concern the constitutionality of the provisions referred to only insofar as they constitute the prerequisite for the application of the personal and *in rem* preventive measures mentioned.
Accordingly, these proceedings do not consider the question as to whether the provisions concerned may legitimately also operate as a basis for the application of other measures still falling under the competence of the police (in particular, mandatory relocation order and police cautions). In fact, no such question has been raised by the referring courts; moreover, no such question could have been raised, as the ordinary courts do not have competence over the application of such measures.
6.2.– It follows from the above, first and foremost, that the questions raised by the Naples Court of Appeal and the *Tribunale di Udine* concerning Article 1 of Law no. 1423 of 1956, which is applicable *ratione temporis* within the respective proceedings before the referring courts, are admissible on the grounds that they concern the constitutionality of that provision only insofar as it allows for the application to the persons mentioned in Article 1, no. 1 and 2, of the personal preventive measure of special supervision on public security grounds, with or without an obligation to reside or a prohibition on residing in a particular location.
Moreover, Article 19 of Law no. 152 of 1975, which is applicable *ratione temporis* within the relevant proceedings, has been correctly challenged by the Naples Court of Appeal with reference to Article 117(1) of the Constitution in relation to Article 1 of the Additional Protocol to the ECHR. That provision stipulates that the preventive measures provided for under Law no. 575 of 31 May 1965 (Provisions to combat mafia-style criminal organisations, including foreign organisations), thus including the *in rem* preventive measures governed by Article 2-*ter* of Law no. 575, apply – specifically – to the persons referred to in Article 1, no. 1 and 2 of Law no. 1423 of 1956.
6.3.– As regards the provisions of Legislative Decree no. 159 of 2011, which applies *ratione temporis* only to the proceedings pending before the *Tribunale di Padova*, the challenge relating to Article 1 of the Legislative Decree must be ruled inadmissible on the grounds that it is irrelevant, as that Article is limited to regulating the prerequisites for the application of measures relating to mandatory relocation orders and police cautions, which fall under the competence of the provincial chief of police.
On the other hand, the challenge brought by the *Tribunale di Padova* against Article 4(1)(c) of Legislative Decree no. 159 of 2011, which must be construed as seeking a declaration that the provision is unconstitutional insofar as it provides that the measures

provided for under Chapter II of Title I of Book I of the Decree (and thus the measure of special supervision, with or without an obligation to reside or a prohibition on residing in a particular location, provided for under Article 6) apply also to the persons referred to in Article 1(a) and (b), is admissible.
Similarly, the challenge brought by the *Tribunale di Padova* against Article 16 of Legislative Decree no. 159 of 2011 is admissible and must be construed as seeking a declaration that the provision is unconstitutional insofar as it provides that the preventive measures of seizure and confiscation, which are governed by Articles 20 and 24, also apply to the persons referred to in Article 1(a) and (b) of Legislative Decree no. 159 of 2011.
6.4.– On the other hand, the objections raised by the Naples Court of Appeal and the *Tribunale di Udine* concerning Article 3 of Law no. 1423 of 1956, along with the objection formulated by the *Tribunale di Padova* concerning the corresponding Article 6 of Legislative Decree no. 159 of 2011, are inadmissible on the grounds that they are misconstrued. In fact, these provisions are limited to regulating the type of personal preventive measures along with the objective prerequisites for their application: the constitutionality of the provisions concerning type and prerequisites is not at issue within these proceedings, as the various remedies sought by the referring courts concern exclusively the establishment of persons to whom the measures may potentially apply.
For the same reason, the objections raised by the *Tribunale di Padova* against Articles 20 and 24 of Legislative Decree no. 159 of 2011, which govern the objective prerequisites and procedure for applying seizure and confiscation orders, are inadmissible as these aspects also fall outside the various remedies sought.
6.5.– The questions raised by the referral orders from the Naples Court of Appeal and the *Tribunale di Udine* concerning Article 5 of Law no. 1423 of 1956 and the corresponding Article 8 of Legislative Decree no. 159 of 2011 (the latter also contested by the *Tribunale di Padova*), which govern the substantive content of personal preventive measures, are also inadmissible due to the almost complete failure to provide reasons establishing that they are not manifestly unfounded.
In fact, the referring courts focus their arguments on the lack of clarity within the provisions that lay down the prerequisites for the application of the (personal and/or *in rem*) measures considered from time to time, and not on the lack of clarity of the actual substantive content of those measures: this aspect is not even mentioned in the order from the *Tribunale di Udine*, and is the object of nothing more than cursory observations in the two other referral orders from the Naples Court of Appeal and the *Tribunale di Padova*.
6.6.– As regards specifically the order from the Naples Court of Appeal, it is also necessary to rule inadmissible: a) the question concerning the constitutionality of Article 19 of Law no. 152 of 1975 formulated with reference to Article 117(1) of the Constitution in relation to Article 2 of Protocol no. 4 to the ECHR on the grounds that the interposed parameter invoked (on the right of free movement) is irrelevant for the contested provision (which is only relevant here insofar as it allows for the application of the *in rem* measures provided for under Article 2-*ter* of Law no. 575 of 1965 to the persons referred to in Article 1, no. 1 and 2 of Law no. 1423 of 1956); and b) all questions concerning the constitutionality of Legislative Decree no. 159 of 2011 insofar as not relevant within the proceedings before the referring court, as the referral order itself acknowledges that only the provisions of Law no. 1423 of 1956 and (with

reference to *in rem* measures) Article 19 of Law no. 152 of 1975 should apply within those proceedings *ratione temporis*.

6.7.– Finally, as regards the order from the *Tribunale di Udine*, all of the questions referred concerning the constitutionality of Legislative Decree no. 159 of 2011, which is not applicable within the proceedings before that court *ratione temporis*, must be ruled inadmissible on the grounds of irrelevance, as the referral order itself acknowledges that the court has been called upon to decide whether to revoke a measure adopted before the Decree entered into force.

7.– To summarise, the following are thus admissible, and must be examined on the merits:

a) the questions concerning the constitutionality of Article 1, no. 1 and 2 of Law no. 1423 of 1956, insofar as they allow for the application to the persons mentioned therein of the personal preventive measures of special supervision on public security grounds, with or without an obligation to reside or a prohibition on residing in a particular location, raised by the Naples Court of Appeal and the *Tribunale di Udine* with reference to Article 117(1) of the Constitution, in relation to Article 2 of Protocol no. 4 to the ECHR;

b) the questions concerning the constitutionality of Article 19 of Law no. 152 of 1975, raised by the Naples Court of Appeal with reference to Article 117(1) of the Constitution, in relation to Article 1 of the Additional Protocol to the ECHR, and with reference to Article 42 of the Constitution;

c) the questions concerning the constitutionality of Article 4(1)(c) of Legislative Decree no. 159 of 2011 insofar as it provides that the measures falling under Chapter II of Title 1 of Book I of the Decree shall apply also to the persons referred to in Article 1(a) and (b), raised by the *Tribunale di Padova* with reference to Article 117(1) of the Constitution, in relation to Article 2 of Protocol no. 4 to the ECHR, and with reference to Article 25(3) of the Constitution and Article 13 of the Constitution;

d) the question concerning the constitutionality of Article 16 of Legislative Decree no. 159 of 2011, insofar as it provides that the preventive measures of seizure and confiscation governed respectively by Articles 20 and 24 also apply to the persons referred to in Article 1(a) and (b), raised by the *Tribunale di Padova* with reference to Article 117(1) of the Constitution, in relation to Article 1 of the Additional Protocol to the ECHR.

8.– Having thereby clarified the *thema decidendum* within these proceedings, before examining the merits of the challenges, it is necessary to make some general introductory remarks concerning the guarantees (under the Constitution and the ECHR) associated with personal (section 9 below) and *in rem* (section 10 below) preventive measures, along with some more specific remarks concerning the two legislative scenarios to which these questions of constitutionality relate (section 11 below).

9.– Personal preventive measures have been available under Italian law since the unification of the country. Nevertheless, their precise constitutional status has not ceased to be controversial, having remained uncertain during the initial years following the entry into force of the republican Constitution.

9.1.– The personal preventive measures now regulated cohesively by Legislative Decree no. 159 of 2011 in actual fact represent the provisional point of arrival of a long historical evolution, the origins of which date back at least to nineteenth-century police law, which was crystallised shortly after Italian unification within Law no. 2248 of 20 March 1865 (For the administrative unification of the Kingdom of Italy), Annex B,

which granted the law enforcement authorities the power to issue police warnings, impose a mandatory residence order (known as police *confino* [confinement to residence within a designated area]) or issue mandatory relocation orders to persons deemed to represent a danger to society without – however – any requirement for their criminal conviction.
Having been widely used during the Fascist era as a means of controlling and repressing political opponents, these measures – the provisions governing which had in the meantime been incorporated into Royal Decree no. 773 of 18 June 1931 (Consolidated text on public security) – remained in force also following the adoption of the republican Constitution, although their compatibility with the Constitution was raised immediately within the literature and the case law.
Already during its first year of activity, this Court was thus requested to review the constitutionality of the legislation by numerous referral orders from *pretori* [county courts] that had been requested to rule on the criminal responsibility of persons charged with having violated the requirements associated with preventive measures imposed by the police. Judgment no. 2 of 1956 declared unconstitutional the legislation in force at that time on the compulsory enforcement of relocation orders issued by the provincial chief of police, whilst Judgment no. 11 of 1956 declared unconstitutional the legislation governing police warnings. In both cases, the decision was based on the incompatibility of the legislation in question with the reservation of such matters to the competence of the courts under Article 13 of the Constitution. Judgment no. 11 of 1956 stressed in particular "that the police warning has as its consequences the subjection of the individual to special police supervision" and "that as a result of such an order the recipient of the warning is subjected to a series of obligations, comprising both mandatory acts and omissions, amongst which the requirement to refrain from leaving the home after and to ensure return to the home before a certain time is only one of the numerous requirements that the special commission may impose": all of these effects entailed a significant "restriction" of the right of personal freedom protected under Article 13 of the Constitution, a provision which – at the wish of the Constituent Assembly – placed them beyond the scope of the executive powers of the police.
9.2.– The legislator promptly complied (in December of that year) with the Court's rulings by enacting new comprehensive legislation on preventive measures within Law no. 1423 of 1956. The original version of the Law indicated five different categories of person who could be subject to the measures: idlers and vagrants; persons "known to be habitually involved in illicit dealings"; "those prone to commit crime and those who, as a result of their conduct or lifestyle, must be presumed to earn a living, either in full or in part, from the proceeds of crime or aiding and abetting crime"; persons deemed to be involved in the exploitation of prostitution, the trafficking of women, the corruption of the youth, and smuggling or trafficking drugs; and "those who habitually carry out other activities contrary to public morals and common decency". The Law provided that the provincial chief of police could issue any such persons directly with a warning, supported by reasons, to change their behaviour, and order their mandatory relocation; on the other hand – in accordance with the principle laid down by Judgment no. 11 of 1956 – it vested the courts with the power to impose the more serious measure of special supervision, to which the courts could add the prohibition on residence in any municipality or municipalities, or province or provinces, and in cases involving particularly dangerous individuals, a requirement to reside in a particular municipality.

The measures provided for under Law no. 1423 of 1956 were then extended by Law no. 575 of 1965, as amended, to "persons suspected of belonging to mafia-type associations"; thereafter, Law no. 152 of 1975 (known as the Reale Law) further extended their scope to a vast category of persons suspected of involvement in terrorist or subversive activity, of membership of outlawed political associations or the reconstituted Fascist Party, as well as persons previously convicted of breaches of the law on firearms who, on account of their subsequent conduct, were considered to be "prone" to committing further offences of the same type.

9.3.– In 1980, however, at the height of the terrorist emergency that had in the meantime swept through the country, two important judgments – one of the ECtHR and the other of this Court – once again drew attention to the requirements of protecting the fundamental rights of the persons subject to the measures under examination.

The ECtHR judgment of 6 November 1980 in *Guzzardi v. Italy* held (in paragraph 102) that the application of the measure of special supervision associated with an order to reside on the island of Asinara imposed on the applicant, who was suspected of being a member of a mafia association pursuant to Law no. 575 of 1965, had not only limited his freedom of movement protected under Article 2 of Protocol no. 4 to the ECHR (which at the time had not yet been ratified by Italy) but also – due to the particularly restricted space to which the applicant was confined, as well as the substantial personal isolation in which he was forced to live – amounted to a genuine deprivation of liberty pursuant to Article 5 ECHR. Moreover, that deprivation of liberty could not be considered to be lawful, as none of the exceptions laid down by Article 5(1) ECHR applied: according to the Court, the confinement of the applicant could not – in particular – be legitimated as a measure necessary "to prevent him from committing an offence" pursuant to Article 5(1)(c), as any deprivation of liberty imposed for that purpose should have necessarily been ordered with reference to subsequent criminal proceedings before a court of law for a specific offence with which the individual had been charged. There is evidently no functional connection of this type in cases involving preventive measures, the application of which is detached from any requirement that criminal charges be brought.

Within internal law, Judgment no. 177 of 1980 of this Court held that the provision allowing for them to be applied to persons who "due to the conduct previously displayed by them, have given justified grounds to conclude that they are prone to commit crime" was incompatible with the principle of no punishment without law – which was considered on that occasion to be applicable also to personal preventive measures pursuant both to Article 13 of the Constitution and to Article 25(3) of the Constitution – due to the intolerably vague nature of that legislative formula, which was considered to "provide officials with discretionary powers not subject to judicial review".

The legislative response came several years later with Law no. 327 of 3 August 1988 (Provisions on personal preventive measures), which in the first place removed the power of the courts to order a person to live in a municipality other than the municipality of residence, and secondly reformulated the classifications laid down by Article 1 of Law no. 1423 of 1956, eliminating "vagrants" and "idlers" from the classes of person to whom the measures in question could be applied, and stipulating for each of them the requirement that the court should allocate the individual to one of the categories described by the Law on the basis of "factual circumstances" (and thus not on the basis of simple rumours or suspicions).

9.4.– Moreover, the legislation continued to develop over the following years along a trajectory that resulted in the progressive expansion of the categories of individual on whom the measures in question could potentially be imposed.
Those categories are now comprehensively listed in Article 4 of Legislative Decree no. 159 of 2011, as amended, which incorporated all of the scenarios previously spread over various legislative texts, which were not always easy to coordinate with one another. Letter (c) of that list contains in particular a reference to the three residual situations originally provided for under Law no. 1423 of 1956, as amended by Law no. 327 of 1988, which is now reproduced by Article 1 of Legislative Decree no. 159 of 2011: these situations continue to apply as prerequisites for the preventive measures still remaining under the competence of the provincial chief of police (mandatory relocation order and police cautions), which are now governed by Articles 2 and 3 of the Decree, and which at the same time constitute potential prerequisites for the application of the preventive measures falling under the competence of the courts, in the same manner as all other situations listed within Article 4.
9.5.– Alongside a verification as to whether an individual falls under any of the categories now listed in Article 4 of Legislative Decree no. 159 of 2011, a common prerequisite for the application of special supervision, with or without an obligation to reside or a prohibition on residing in a particular location, is that the individual must represent a danger to public security (Article 6(1) of Legislative Decree no. 159 of 2011).
It is thus necessary not only to obtain evidence of his/her past criminal activity, but also to carry out a further examination in court as to his/her dangerousness, that is as to whether there is a significant likelihood of the commission of further criminal acts in future.
9.6.– The prerequisite that the individual upon whom personal preventive measures are imposed must represent a danger to public security is shared with the security measures provided for under the Criminal Code, although the former differ from the latter in that they are not conditional upon the prior celebration of a criminal trial against the individual. In fact, a sufficient and necessary condition in order to legitimise the imposition of a personal preventive measure is that the criminal activity – falling under the various descriptions listed in Article 4 of Legislative Decree no. 159 of 2011, proof regarding which acts as a basis upon which to reach an assessment as to the dangerousness of the individual for public security – is substantiated by what the Law refers to in some places as "factual circumstances", although more often as "indications"; this evidence must be assessed by the courts within procedures governed by rules of evidence and according to procedural rules different from those applicable to criminal proceedings.
9.7.– The historical account set out above provides the essential framework for clarifying the guarantees to which personal preventive measures are subject under both the Constitution and the ECHR.
9.7.1.– First and foremost, the fact that the imposition of a personal preventive measure is in any case conditional upon indications that suggest prior involvement in criminal activity by the individual does not mean that the measures concerned have the status of sanctions or punitive measures, thereby necessarily engaging the guarantees in the area of criminal law enshrined by the ECHR and the Constitution itself.
As the personal preventive measures are premised on an assessment of the persisting dangerousness of the individual, they have a clear preventive rather than punitive goal

in seeking to limit the freedom of movement of the individual who is subject to them in order to prevent him/her from committing further offences, or at least in order to make it more difficult to commit offences, whilst at the same time enabling the law enforcement authorities to monitor more effectively the possible criminal initiatives of the individual. Within this perspective, the undoubted punitive dimension is simply a collateral consequence of measures the essential purpose of which is to monitor in future the dangerousness to society of the individual concerned, and not to impose punishment for any acts committed by him/her in the past.

In the recent judgment which – as will be discussed below – gave rise to the questions of constitutionality at issue within these proceedings, the ECtHR itself expressly held that the personal preventive measures brought before it for examination did not constitute sanctions that were substantially punitive in nature, and as such subject to the constraints imposed by the Convention in the area of criminal law (ECtHR, judgment of 23 February 2017, *de Tommaso v. Italy*, paragraph 143). Moreover, on the various occasions on which it has had the opportunity to rule on personal preventive measures, the Constitutional Court has also never held them to be subject to the principles laid down in the area of criminal law and the law of criminal procedure by Articles 25(2), 27, 111(3), (4) and (5) and 112, of the Constitution.

9.7.2.– In the *de Tommaso* judgment, on the other hand, the ECtHR asserted that the preventive measures provided for under Italian law – following the abolition in 1988 of the obligation to live in a municipality other than the municipality of residence, which had resulted in a finding against Italy in the *Guzzardi* judgment – constitute restrictions on the freedom of movement enshrined in Article 2 of Protocol no. 4 to the ECHR; accordingly, such measures are legitimate where the conditions laid down by paragraph 3 of that Convention provision are met (specifically: an appropriate basis in law, the legitimate aim and the necessity, "in a democratic society", of the limitation having regard to the objectives pursued).

9.7.3.– Moreover, long before the judgments of the ECtHR, a similar position was stated also by this Court, which – alongside its albeit not consistent references to Article 25(3) of the Constitution – has consistently asserted, since its initial 1956 judgments in this area, that the implementation of the preventive measures submitted to it for examination from time to time entailed a restriction on personal freedom enshrined within Article 13 of the Constitution. This restriction certainly results from the requirements attendant to supervision on public security grounds pursuant to Article 8(2) of Legislative Decree no. 159 of 2011 which – even where no obligation to reside or prohibition on residence is imposed – for example entail the fixing of an individual's place of abode and the requirement that he/she may not leave it without having previously informed the authorities, along with the prohibition on leaving the home or failing to return home outside certain hours.

Consequently, the measures in question may be considered to be lawful as they comply with the prerequisites which Article 13 of the Constitution stipulates for establishing the legality of any restriction on personal freedom, which include in particular the absolute reservation of such matters to primary legislation (which is enhanced, given the requirement that the law must specify in advance the "circumstances and manner" of the restriction) along with the reservation of competence to the courts.

The results arrived at within the case law of the Italian Constitutional Court, which must be reasserted within these proceedings, thus end up vesting persons who are subject to measures of special supervision, with or without an obligation to reside or a prohibition

on residing in a particular location, with a level of fundamental rights protection that is greater even than that assured under European law. Specifically, the fact that the measures in question are classified within the scope of Article 13 of the Constitution means that the guarantees (which are also required under the ECHR framework) a) of a suitable basis in law for the measures in question and b) that the measure must be proportionate with legitimate crime prevention aims (a requirement of proportionality applies systematically within Italian constitutional law in relation to any act by the authorities that is liable to impinge upon the fundamental rights of the individual) must be supplemented by the further guarantee c) of the reservation of jurisdiction to the courts, which is not required at European level for restrictive measures that are considered by the ECtHR to merely restrict freedom of movement, which as such fall within the scope of the guarantees under Article 2 of Protocol no. 4 to the ECHR.

10.– The *in rem* preventive measures of confiscation and the related seizure were incorporated much more recently into Italian law.

10.1.– Leaving aside some albeit significant legislative precedents within legislation enacted in part by the Fascist regime and in part immediately after its downfall (on which latter precedents this Court ruled in Judgments no. 46 of 1964 and no. 29 of 1961), it was only Law no. 646 of 13 September 1982, laying down "Provisions on *in rem* preventive measures and to supplement Laws no. 1423 of 27 December 1956, no. 57 of 10 February 1962 and no. 575 of 31 May 1965. Establishment of a parliamentary committee on the issue of the mafia" (known as the Rognoni-La Torre Law) that introduced into Law no. 575 of 1965 provision concerning a new type of confiscation (Article 2-*ter*(3)), which was not dependent upon a criminal conviction, and the effects of which could be pre-empted by a special seizure (Article 2-*ter*(2)) in order to ensure the more effective combatting of mafia crime.

The 1982 legislation thus chose to model these new regimes on the framework of the 1965 Law, extending the applicability of the personal preventive measures provided for under Law no. 1423 of 1956 to those suspected of membership of a mafia association. That systematic classification also shaped the overall structure of the legislation providing for the new measures, power to issue which was vested in the same court that was authorised to order personal preventive measures; moreover, the prerequisites for and procedure governing the application of the new form of confiscation (and the related seizure) were initially derived from those applicable to personal preventive measures, without prejudice naturally to the special circumstances attendant to the need to investigate ownership in order to identify the assets that could potentially be confiscated.

Consequently, the law provided that also these measures were to be entirely independent of any criminal proceedings launched against the individual subject to the proposed *in rem* preventive measure, as they could by contrast be based on the same "indications" that legitimated the application against them of personal preventive measures. The original legislation from 1982 applied the following further requirements to those indications: for the purposes of the seizure of the assets of the suspected person, the existence of "sufficient indications, such as a considerable imbalance between his/her lifestyle and the level of apparent or declared income", from which it could be concluded that the assets which the individual apparently controls, whether directly or indirectly, "constituted the proceeds of illicit activity or the reinvestment of such proceeds"; and for the purposes of their definitive confiscation, the failure to demonstrate the lawful origin of the assets previously seized.

As is apparent from the clear wording of Article 2-*ter*(3) of Law no. 575 of 1965, according to the original version introduced by the Rognoni-La Torre Law, the purpose of these measures from the outset was to deprive organised crime of assets and money of illegal origin (demonstrated according to a classical set of presumptions), whilst at the same time avoiding the need to subject deprivation of ownership to any requirement to demonstrate the precise origin of each individual asset or amount of money from a particular offence within a criminal trial.

Moreover, since the outset, the application of the new regimes was not limited to mafia-style organised crime but – as a result of the reference (which, according to the prevailing view within the case law, was "dynamic") made by Article 19 of Law no. 152 of 1975, which provided for the applicability of all of the provisions of Law no. 575 of 1965 to some of the circumstances provided for under Article 1 of Law no. 1423 of 1956 – it was immediately held to be applicable also to individuals who had been subject to personal preventive measures on the grounds of "generic dangerousness" pursuant to Law no. 1423 of 1956, and in particular to the two situations which – with very slight modifications – are covered by the present questions of constitutionality.

The specific adoption of the new *in rem* measures remained for a long time dependent upon the parallel adoption of a personal preventive measure against the individual concerned, which – in turn – was premised on an assessment as to his/her current social dangerousness. This led this Court to assert in 1996 that "[i]t is therefore apparent from the prevailing legislation in force that, as a matter of principle, the rationale for *in rem* measures does not pertain exclusively to the nature of the assets affected. They are directed not at assets as such, as a consequence of their suspected unlawful origin, but at assets that, in addition to this, are controlled by individuals who are socially dangerous insofar as suspected of membership of a mafia-style association or of any other equivalent association […]. The dangerousness of the assets is considered by the law to result, so to speak, from the dangerousness of the person who is able to control them" (Judgment no. 335 of 1996).

10.2.– The subsequent developments within the legislation governing these new *in rem* preventive measures was characterised in particular by the aspects of significance in this case: a) a progressive expansion of their scope, in an analogous manner to what had previously occurred for personal preventive measures (see below, 10.2.1); b) a change in the way in which the presumption of unlawful origin was established, a presumption which gave self-standing significance to the lack of proportion between the assets and declared income (see below, 10.2.2); and, above all, c) the provision for separate procedures to apply such measures from procedures on the application of personal preventive measures (see below, 10.2.3).

10.2.1.– As early as Law no. 55 of 19 March 1990 (New provisions on the prevention of mafia-style crime and other serious forms of socially dangerous activity), provision was made to extend the measures in question to individuals suspected of criminal association for the purpose of committing narcotics offences and to individuals suspected of habitually living, either in full or in part, from the proceeds of extortion offences, kidnapping for the purposes of extortion, money laundering, handling money, assets or benefits of unlawful origin or smuggling.

However, it was above all Decree-Law no. 92 of 23 May 2008 (Urgent measures on public security), converted with amendments into Law no. 125 of 24 July 2008 and the subsequently enacted Law no. 94 of 15 July 2009 (Provisions on public security) that gradually brought about a full overlap between the subjective scope of *in rem*

preventive measures and personal preventive measures; this overlap was subsequently confirmed in full within Article 16 of Legislative Decree no. 159 of 2011, which refers to all of the scenarios provided for under Article 4.

10.2.2.– In the meantime, Law no. 256 of 24 July 1993 (Amendments to the regime of compulsory residence and Article 2-*ter* of Law no. 575 of 31 May 1965) had partially altered the prerequisites for preventive seizure, providing that the prerequisite of a lack of proportion between the assets to be confiscated and the declared income or economic activity carried out should have self-standing significance: such a lack of proportion thus became an alternative basis to that originally envisaged, whereby seizure was permitted where there were grounds to conclude that the assets constituted the proceeds of illicit activity or the reinvestment of such proceeds.

10.2.3.– However, the innovation which is certainly most significant for the purposes of defining the nature of the preventive measures in question along with the guarantees associated with them is the recent provision for an application procedure that is separate from the procedure concerning the application of personal preventive measures.

This development was initially implemented in substantive terms by Decree-Law no. 92 of 2008, which expressly provided that the two types of measure could be sought and applied separately, also providing for their application in the event of the death of the individual and for the continuation of the proceedings against his/her heirs or successors in the event of the individual's death during the course of the proceedings. The subsequently enacted Law no. 94 of 2009, Article 2(22) of which amended Article 10(1)(c), no. 2) of Decree-Law no. 92 of 2008, completed that process, clarifying that the measures in question could be applied "irrespective of the social dangerousness of the individual against whom their application was proposed at the time the preventive measure was sought". All of these principles were incorporated without any significant changes into Legislative Decree no. 159 of 2011.

10.3.– Even though the complex legislative framework set out above results from a stratification of occasional legislative changes implemented without a precise systematic plan, it is nonetheless possible to infer – on the basis of the recent case law of this Court and of the Court of Cassation – some conclusions concerning the rationale of preventive seizure and confiscation: these conclusions are in turn essential in order to identify the constitutional and Convention principles engaged by those measures.

The underlying justification for preventive confiscation – and thus for seizure itself, which imposes its effects on a provisional basis – is "the reasonable presumption that the asset was acquired from the proceeds of unlawful activity" (Court of Cassation, Joint Divisions, judgment no. 4880 of 26 June 2014-2 February 2015). As noted above, such a rationale was evident from the original wording of Article 3-*bis*(2) of Law no. 575 of 1965 introduced in 1982; however, the conclusion did not even change after the amendments made to the provision by Law no. 256 of 1993, which was incorporated substantially unchanged in this respect into Articles 20 and 24 of Legislative Decree no. 159 of 2011, which now govern preventive seizure and confiscation. The fact that the lack of proportion between the value of the asset and the income or economic activity has been elevated from a mere indication of the unlawful origin of assets (as originally provided in 1982) since 1993 into a self-standing prerequisite, as an alternative for demonstrating its unlawful origin, does not alter the rationale of the measures in question: in fact, the verification by the courts of the lack of proportion continues to make sense as it is capable of establishing a reasonable presumption as to the unlawful origin of the asset, where the prior involvement in criminal activity of the person with

control of the asset is established at the same time and that individual is not able to demonstrate its legitimate origin when the prerequisites for confiscation are being assessed.

Indeed, such seizure and confiscation share the same goal as that underlying the so-called "extended" confiscation originally provided for under Article 12-*sexies* of Decree-Law no. 306 of 8 June 1992 (Urgent amendments to the new Code of Criminal Procedure and measures to combat mafia-style crime), converted with amendments into Law no. 356 of 7 August 1992, and now restated in Article 240-*bis* of the Criminal Code; this Court has recently held such measures to be rooted "in the presumption that disproportionate and unjustified financial resources found under the control of the convicted individual result from the accumulation of unlawful wealth, which certain categories of offence are normally capable of generating" (Judgment no. 33 of 2018). This (relative) presumption is also rooted in the finding that there is a lack of proportion between the assets to be confiscated and the income or economic activity of the individual – having been convicted of one of the offences mentioned under Article 240-*bis* of the Criminal Code – who owns or on any basis controls such assets, in the event that he/she is unable to demonstrate their lawful origin.

"Preventive" confiscation and "extended" confiscation (along with the seizures provisionally implementing the effects of both) thus constitute two *species* of the same *genus*, which this Court identified – in Judgment no. 33 of 2018 – as being the "confiscation of assets suspected to be of unlawful origin" (now established according to a legal presumption), an instrument for combatting profit-making crime which is now widely used around the globe. This instrument is characterised "both by a loosening of the relationship between the asset to be confiscated and the individual offence, and also, above all, by a relaxing of the burden of proof incumbent upon the public authorities", having regard to the need to "move beyond the limits to the efficacy of 'classical' criminal confiscation associated with the need to demonstrate the existence of a nexus of relevance between the assets to be confiscated and the individual offence of which this individual was convicted, consisting in the fact that the assets were conducive to the commission of the offence or constitute the proceeds of the offence. Owing to the difficulty in furnishing such proof, "traditional" confiscation proved to be unsuitable for combatting effectively the accumulation of unlawful wealth by criminals, and specifically by organised criminals: this phenomenon is particularly alarming in view of the potential to reuse the resources in order to finance further illicit activities, as well as their investment within the legal economy, the effects of which result in a distortion of the market" (Judgment no. 33 of 2018).

In keeping with that rationale, the case law of the Court of Cassation has for some time followed an approach in relation both to preventive seizure and confiscation as well as "extended" confiscation – as recalled once again in Judgment no. 33 of 2018 – which seeks to circumscribe the class of assets eligible for confiscation, limiting it to those acquired over a period of time that reasonably coincides with the period over which the individual was involved in criminal activity. As regards in particular preventive seizure and confiscation, the Joint Divisions reached that conclusion having clarified the need to establish the involvement of the individual within criminal activity over the period of time during the past involving the increase in assets which confiscation seeks to neutralise (Court of Cassation, Joint Divisions, judgment no. 4880 of 2015): although this requirement is unwritten, it evidently results from the need to ensure that the (relative) presumption of the unlawful origin of the assets, on which the preventive

seizure and confiscation are based, remains reasonable. In fact, such a presumption makes sense where it may reasonably be surmised that the assets or cash confiscated constitute the proceeds of the criminal activity in which the individual was involved at the time they were acquired, even though it is not necessary to establish that they result specifically from any given offence.

10.4.– Having thereby clarified the rationale of the measures in question, it is necessary to establish which specific guarantees are applicable to them under the Constitution and the Convention.

10.4.1.– The presumption of the unlawful origin of assets which justifies their confiscation in favour of society at large is not necessarily tantamount – as is at times argued – to a recognition that the measures in question are substantially punitive in nature; this means therefore that the measures do not have the same status as sanctions, for the purposes of the Constitution and the ECHR.

In effect, considered from a systemic viewpoint, the confiscation of such assets does not amount to a sanction but rather results from their unlawful acquisition, which – as was highlighted in the recent judgment, mentioned above, of the Joint Divisions of the Court of Cassation – undermines the right of ownership since the outset, for the person who has acquired actual control over such assets, as it is "all too obvious that the social function of private property can only be fulfilled subject to the indispensable condition that ownership is acquired in accordance with the rules of the legal order. Therefore, the acquisition of assets *contra legem* cannot be deemed to be compatible with that function, with the result that any acquisition that occurred in an unlawful manner can never be relied on against the legal order" (Court of Cassation, Joint Divisions, judgment no. 4880 of 2015).

Thus, where there is a reasonable presumption that an asset that is owned by or actually controlled by the individual was acquired as a result of unlawful conduct – a presumption which is in turn based on a clear finding by the courts that the prerequisites laid down by the legislation under examination have been met – or *a fortiori* where there is direct evidence of that unlawful origin, the seizure and confiscation of the asset do not serve the purpose of punishing the individual for his/her own conduct but rather, more simply: of terminating the *de facto* relationship between the individual and the asset, as that relationship was established in a manner inconsistent with the legal order, or in any case of ensuring (as the case may be through confiscation of equivalent assets) the neutralisation of the individual's enrichment, which would have been impossible without the predicate criminal activity.

Absent any additional punitive characteristics, the purpose of the confiscation is, under these circumstances, merely to reinstate the situation that would have arisen had the asset not been unlawfully acquired. This enables the asset to be removed from the criminal sphere and by contrast to be dedicated – at least where it is not possible to return it to its previous owner, in the event that he/she was unlawfully deprived of it – to purposes in the public interest, such as those officially pursued by the National Agency for Confiscated Assets.

10.4.2.– On the other hand, on the numerous occasions on which it has previously examined complaints relating to the application of preventive confiscation, the ECtHR has never held it to be substantially punitive in nature. It has thus been held that neither Article 6, in terms of its "criminal limb", nor Article 7 ECHR can apply to it; and it has by contrast been held that the measure falls within the scope of Article 1 of the Additional Protocol to the ECHR in view of the fact that it impinges upon the right of

ownership (*ex multis*, ECtHR, Second Chamber, judgment of 5 January 2010, *Bongiorno and others v. Italy*; decision of 15 June 1999, *Prisco v. Italy*; judgment of 22 February 1994, *Raimondo v. Italy*).

On the other hand, within the case law of the ECtHR, the judgment in *Gogitidze and others v. Georgia* from 2015 appears to be particularly significant; this upheld as compatible with the Convention a confiscation order that was specifically intended to cover assets considered to be of unlawful origin and held by public officials accused of serious offences against the public administration as well as by close family members: more specifically, this confiscation was based on presumptions similar to those provided for under Italian law, and in any case did not require that the public official have been convicted. When reviewing in particular the compatibility of the provisions in question with the principles of a fair trial pursuant to Article 6 ECHR, the Court held that the measure did not constitute a sanction that was substantially punitive in nature, which would as such be subject to the Convention principles concerning fair trials. It rather classified the sanction as a "civil action *in rem* aimed at the recovery of assets wrongfully or inexplicably accumulated" by their holders (paragraph 91). It also went on to observe that the rationale for this type of confiscation without any conviction had "both a compensatory and a preventive aim" in seeking on the one hand to restore the status which had existed prior to the unjust enrichment of the public official, and on the other hand, to prevent illicit enrichment by sending the clear signal to public officials that their wrongful acts, even if they passed unscaled by the criminal justice system, would nevertheless not procure pecuniary advantage for them (paragraphs 101-102).

10.4.3.– Whilst not having the status of criminal measures, preventive seizure and confiscation nonetheless have far-reaching effects on the rights of ownership and economic initiative, which are protected under both constitutional law (Articles 41 and 42 of the Constitution) and the ECHR (Article 1 of the Additional Protocol to the ECHR).

They must therefore be subject to the combined guarantees laid down by both the Constitution and the ECHR as preconditions for the legality of any restriction of such rights, including – specifically: a) its establishment according to law (Articles 41 and 42 of the Constitution), thereby enabling those affected to foresee the potential future application of such measures (Article 1 of the Additional Protocol to the ECHR) in accordance with the settled case law of the ECtHR on the prerequisites for establishing the "basis in law" of the restriction; b) the restriction must be "necessary" having regard to the legitimate objectives pursued (Article 1 of the Additional Protocol to the ECHR), and therefore proportionate with those objectives, which amounts to a systematic prerequisite also within the Italian constitutional system for any act by a public authority that impinges upon the rights of the individual, in the light of Article 3 of the Constitution; and c) the requirement that its application must be ordered upon conclusion of proceedings which – whilst not necessarily being required to comply with the principles specifically laid down by the Constitution and the ECHR in relation to fair trials – must nonetheless comply with the general principles applicable to any "fair" trial guaranteed by law (Article 111(1), (2) and (6) of the Constitution, and Article 6 ECHR, in terms of its "civil limb"), ensuring in particular full protection for the right to a defence (Article 24 of the Constitution) of the person against whom the measure is sought.

11.– The specific questions under examination within these proceedings concern, as mentioned above, a guarantee that both special supervision, with or without an

obligation to reside or a prohibition on residing in a particular location, and also preventive seizure and confiscation must be provided for by law; moreover, this applies in relation to the two legislative scenarios involving so-called "generic dangerousness", which are rooted in Article 1, no. 1 and 2 of Law no. 1423 of 1956, subsequently restated in Article 1(a) and (b) of Legislative Decree no. 159 of 2011.

According to the referral orders, these legislative scenarios are not capable of establishing with sufficient precision the prerequisites for the measures in question, with the result that those affected are unable to reasonably foresee their application.

11.1.– As is apparent from the historical account provided above (in section 9), the formulation of the contested provisions is the legacy – which has remained substantially unchanged in more than a century – of nineteenth-century legislation on policing which was applicable to people on the margins of society – vagrants, the idle, persons suspected of agricultural theft – who were subjected to measures to restrict their personal freedom or their freedom of movement, which were applied directly by the law enforcement authorities.

The progressive judicialisation of these measures – which was furthered both by the rulings of this Court and by republican-era legislation – has been accompanied by a progressive typification of the conduct in relation to which preventive measures (both personal and, since 1982, also *in rem* may be ordered, the addressees of which gradually started to be identified by the legislator by reference to the numerous specific types of offence, including mafia association, which have now been brought together within the closed list contained in Article 4 of Legislative Decree no. 159 of 2011.

These now extremely numerous offences intended to combat particularly dangerous criminal activity – which are not an issue at all in these constitutionality proceedings – have however remained alongside the older category of "generic" dangerousness, which were only partially reconfigured following this Court's judgment from 1980 and the 1988 legislation.

In Judgment no. 177 of 1980 (mentioned above), this Court declared unconstitutional Article 1 of Law no. 1423 of 1956 insofar as it included amongst the persons who may be subject to a special supervision order "those who […] due to the conduct previously displayed by them, have given justified grounds to conclude that they are likely to commit crime". In that case, the Court held the "legislative description" of the "scenario provided for by law" to be inadequate, stressing that "the principle that preventive measures must be provided for by law […], whether rooted in Article 13 or in Article 25(3) of the Constitution, implies that the necessary prerequisite for the application of the measure consists in "scenarios characterised by dangerousness" provided for – i.e. described – within primary legislation; such scenarios constitute the point of reference for the ruling by the court, and at the same time the basis for an assessment as to dangerousness, which can only be deemed to be well-founded in law on this basis".

As noted above, following that ruling, the legislator took action – by adopting Law no. 327 of 1988 – to remove from the provision under examination also the reference to "vagrants" and "the idle", whilst also introducing the evidentiary prerequisite of a "factual basis".

However, the provisions – to which these constitutionality proceedings relate – concerning persons "habitually involved in unlawful dealings" and those who "earn a living, either in full or in part, from the proceeds of unlawful activities" remained within the text of the legislation, and were thus restated in the new Article 1 of Legislative Decree no. 159 of 2011.

11.2.– The constitutionality of these provisions was recently reviewed, in accordance with the yardstick of international human rights law, by the Grand Chamber of the European Court of Human Rights in the *de Tommaso* judgment of 23 February 2017.
The ECtHR held that the provisions in question did not comply with the qualitative standards – in terms of clarity, specificity and foreseeability – which any provision constituting the basis in law for an interference with the rights of the person recognised under the ECHR or its protocols must fulfil. In particular, the Court asserted that "neither the Act nor the Constitutional Court have clearly identified the 'factual evidence' or the specific types of behaviour which must be taken into consideration in order to assess the danger to society posed by the individual and which may give rise to preventive measures". The Court thus held that the law in question did not contain "sufficiently detailed provisions as to what types of behaviour were to be regarded as posing a danger to society" (paragraph 117); it thus reiterated that the provisions on the basis of which the preventive measure affecting the applicant had been adopted "did not indicate with sufficient clarity the scope or manner of exercise of the very wide discretion conferred on the domestic courts, and [were] … therefore not formulated with sufficient precision to provide protection against arbitrary interferences and to enable the applicant to regulate his conduct and foresee to a sufficiently certain degree the imposition of preventive measures" (paragraph 118).
According to the Court, precisely these legislative defects resulted in the violation of the applicant's right to freedom of movement, as recognised by Article 2 of Protocol no. 4 to the ECHR.
11.3.– The *de Tommaso* judgment is taken as a starting point for the challenges made within all of the referral orders, which object that the provisions on personal preventive measures brought before this Court for examination violate Article 117(1) of the Constitution with reference to Article 2 of Protocol no. 4 to the ECHR.
Starting from the argument that the basis in law must be characterised by clarity, specificity and foreseeability, which was asserted by the European Court in general terms also in relation to measures restricting the right of ownership, two of the referring courts in these proceedings take the view that, where they are invoked also as a basis for *in rem* preventive measures, the provisions in question also violate the further Convention guarantee laid down by Article 1 of the Additional Protocol to the ECHR, which protects private property, and thus violate Article 117(1) of the Constitution.
Other objections contained in the referral orders concern, as mentioned above, the internal law corresponding to the Convention guarantees mentioned above: Articles 13 and 25(3) of the Constitution as regards personal preventive measures, and Article 42 of the Constitution as regards *in rem* preventive measures.
11.4.– Before examining the merits of these challenges, it must be recalled that, immediately prior to the *de Tommaso* judgment, the case law of the Court of Cassation had already made a commendable effort to establish greater clarity through interpretation for the two instances of "generic dangerousness" under examination here. This interpretative effort was subsequently repeated and expanded following the ECtHR ruling for the stated purpose of remedying the lack of clarity ascertained within those proceedings.
This interpretation informed by the Convention, which has on occasion been referred to as "imposing a requirement for a closed list", is based on the methodological prerequisite that the forecast as to the likelihood that the individual may offend in future must be preceded by a diagnostic and fact-finding stage within which the constituent

elements of the so-called "instances of generic dangerousness" are ascertained (with reference to past conduct) by assessing "facts" which in turn constitute "indications" of the possibility that the individual concerned may be allocated to one of the criminal categories provided for by law (Court of Cassation, First Division, judgment no. 24707 of 1 February 2018-31 May 2018; Second Division, judgment no. 26235 of 4 June 2015-22 June 2015; First Division, judgment no. 31209 of 24 March 2015-17 July 2015; First Division, judgment no. 23641 of 11 February 2014-5 June 2014).

With reference in particular to the "instances of generic dangerousness" governed by Article 1, no. 1 and 2 of Law no. 1423 of 1956 and – now – by Article 1(a) and (b) of Legislative Decree no. 159 of 2011 (a provision which, for the sake of convenience, will be referred to predominantly below), the constituent elements for these scenarios have been clarified by the Court of Cassation as follows.

The adjective "unlawful", which appears both in letter *a*) and in letter *b*) of the provision, is construed as meaning that the acts of the individual concerned must be capable of being classified as "offences" and not simply as unlawful acts (Court of Cassation, First Division, judgment no. 43826 of 19 April 2018-3 October 2018; Second Division, judgment no. 16348 of 23 March 2012-3 May 2012), thus for example preventing "mere status as a tax evader" from being sufficient to establish such a measure, as tax evasion may amount to a mere administrative offence (Court of Cassation, Fifth Division, judgment no. 6067 of 6 December 2016-9 February 2017; Sixth Division, judgment no. 53003 of 21 September 2017-21 November 2017).

The adverb "habitually", which appears both in letter *a*) and in letter *b*) of the provision, is interpreted as requiring the "commission of crime [...] not on an occasional basis, but at least over a significant period of time within the life of the individual concerned" (Court of Cassation, judgment no. 31209 of 2015), such as to enable "a variety of past conduct to be imputed to the individual" (Court of Cassation, First Division, judgment no. 349 of 15 June 2017-9 January 2018), subject in some cases to the requirement that it must characterise "significantly the lifestyle of the individual, who must therefore be classified as a person who has knowingly chosen crime as an everyday practice for sufficient or in any case significant periods" (Court of Cassation, Second Division, judgment no. 11846 of 19 January 2018-15 March 2018).

The term unlawful "dealings" contained in letter *a*) of the Article has been defined as "any unlawful activity that entails illicit enrichment, even without recourse to negotiations or fraud […]", and thus including also dealings "characterised by dispossession, exploitation or the alteration of a bargaining mechanism or of economic, social or civil relations" (Court of Cassation, judgment no. 11846 of 2018). In another ruling, by contrast, the term has been construed as "both the unlawful trade in tangible goods (including, merely by way of example, narcotics, arms, child pornography, counterfeit money, counterfeit branded goods, false documents capable of being used for tax purposes, and the proceeds of crime in all cases involving money laundering) as well as the peddling of intangible items (unlawful influence, confidential information, data protected under the law on privacy, etc.), or even in relation to living beings (human beings, with reference to the offences falling under Legislative Decree no. 286 of 25 July 1998 (Consolidated text of legislative provisions regulating immigration and rules governing the status of foreigners) or Article 600 of the Criminal Code, and animals with reference to the legislation on the protection of particular species), as well as conduct that is *lato sensu* commercial but inherently unlawful (usury, bribery), although in all instances avoiding any confusion with the mere concept of criminal

offence [...] giving rise to any form of benefit" (Court of Cassation, judgment no. 53003 of 2017).
The reference to the "proceeds" of unlawful activities contained in letter *b*) of the contested provision has in turn been interpreted as requiring the "commission of unlawful acts that [...] give rise to unlawful income", resulting in the effective derivation of unlawful profits (Court of Cassation, judgment no. 31209 of 2015).
Finally, the Court of Cassation – when interpreting the legislative prerequisite laid down both by letter *a*) and by letter *b*) of Article 1 of Legislative Decree no. 159 of 2011 of a "factual basis" for the application of the measure – has also taken this interpretation "imposing a requirement for a closed list" to incorporate also considerations pertaining to the manner in which such aspects of the case are established by a court of law. Whilst starting from the prerequisite that "the court ruling on the preventive measure may make factual findings concerning the historical episodes in question in full autonomy – even if there have not been any related criminal proceedings – owing to the lack of any requirement to refer to prior findings and the possibility for self-standing preventive action" (Court of Cassation, judgment no. 43826 of 2018), it clarified: that mere indications are not sufficient because the term used must be considered to be intentionally different and more rigorous than that used by Article 4 of Legislative Decree no. 159 of 2011 in order to identify the categories of so-called qualified dangerousness, which refers to "suspected" persons (Court of Cassation, judgments no. 43826 of 2018 and no. 53003 of 2017); that the fact that the individual has been acquitted of a particular offence prevents it from being used as a basis for measure, in the light also of Article 28(1)(b), other than in exceptional circumstances (Court of Cassation, judgment no. 43826 of 2018); that a prior finding by the criminal courts is required, which may result from a conviction or an acquittal as a result of time barring, an amnesty or the sentence reduction scheme, the reasons for which contain a finding in relation to the offence and its commission by that individual (Court of Cassation, judgments no. 11846 of 2018, no. 53003 of 2017 and no. 31209 of 2015).
12.– The questions of constitutionality currently before the Court must therefore concern the contested provisions as interpreted within the most recent case law of the Court of Cassation in order to verify whether that interpretation – which has been developed largely after the ECtHR *de Tommaso* judgment – ensures that it can be applied in a manner that is foreseeable by the public at large.
In the area of criminal responsibility, this Court has for some time stressed that "the existence of settled interpretations within the case law would not suffice to make up for a potential original lack of precision in the criminal precept" (Judgment no. 327 of 2008), and has recently reiterated in extremely clear terms that no interpretation can "fully replace the *praevia lex scripta*, which is intended to ensure that people have 'the legal certainty of free and consenting choices of action' (Judgment no. 364 of 1988)" (Judgment no. 115 of 2018); this is because "in countries with civil law traditions, and certainly in Italy" it is essential that the law be "written" and have "legislative origins" in relation to which "the interpretative assistance provided by criminal courts is nothing more than a *posterius*, designated to investigate potentially unclear areas, identifying the correct meaning of the provisions only from among the set of options that are authorized by the text, and which a person may envision by reading it" (Judgment no. 115 of 2018).
However, where – as in relation to the questions now before the Court for examination – the situation does not concern any matter of criminal relevance, it is not possible to

exclude entirely the possibility that the requirement to determine in advance the conditions under which a right protected under the Constitution and the Convention can legitimately be restricted may be satisfied also on the basis of the interpretation, provided within uniform and settled case law, of legislative provisions that also involve the use of general clauses, or otherwise wording originally characterised by a certain lack of precision.

In fact – with reference both to the Constitution and to the Convention (*ex multis*, ECtHR, Fifth Chamber, judgment of 26 November 2011 in *Gochev v. Bulgaria*; ECtHR, First Section, judgment of 4 June 2002 in *Olivieiria v. Netherlands*; ECtHR, First Chamber, judgment of 20 May 2010 in *Lelas v. Croatia*) – it is essential that any such interpretation within the case law is capable of placing the individual who may potentially be subjected to measures restricting the right in a position to be able to reasonably foresee whether the measure will be applied.

12.1.– Therefore, when examining whether the case law of the Court of Cassation discussed immediately above was successful in establishing a sufficient level of precision for the legislative scenarios in question, as required under all constitutional and Convention provisions invoked, it is necessary to eliminate from the outset any misleading overlap between the concept of substantive certainty as regards the *thema probandum* and so-called procedural certainty as regards the manner in which evidence is proffered. Whilst the former pertains to respect for the principle of no punishment without law, in line with the parameters referred to above, construed as a guarantee of the clarity, specificity and foreseeability of the constituent elements of the *actus reus* that is to be proven, the latter on the other hand relates to the manner in which evidence is taken within the proceedings, and thus pertains to various constitutional and Convention parameters – including in particular the right to a defence pursuant to Article 24 of the Constitution and the right to a "fair trial" under both Article 111 of the Constitution and Article 6 ECHR – which, whilst being of fundamental importance in ensuring the constitutionality of the system of preventive measures, are not relevant for the questions of constitutionality currently being examined.

Therefore – in view of the ongoing and complete absence from the law of any binding indications in this regard for the court hearing an application for preventive measures – the nonetheless significant efforts made within the case law to select the types of evidence (which are referred to generically within the provisions in question as the "factual basis") that are capable of being used in order to prove the substantive prerequisites for the "instances of generic dangerousness" described by the provisions contested within these proceedings are not relevant for the purposes of this case: these prerequisites consist – with reference to situations falling under letter *a*) of Article 1 of Legislative Decree no. 159 of 2011 – in the fact that the individuals concerned are "habitually involved in unlawful dealings" and – with reference to letter *b*) – in the fact that they earn a living "either in full or in part, from the proceeds of unlawful activities".

12.2.– This Court takes the view that, in the light of the development of the case law following the *de Tommaso* judgment, it is now possible to ensure sufficiently clear boundaries, through interpretation, to the situations described by Article 1, no. 2) of Law no. 1423 of 1956, which was subsequently restated in Article 1(b) of Legislative Decree no. 159 of 2011, thereby enabling the public at large to reasonably foresee in advance in which "cases" – and also in which "ways" – they may be subject to the preventive measure of special supervision, as well as to the *in rem* preventive measures of seizure and confiscation.

The phrase "any person who, owing to his or her conduct and lifestyle, must be presumed, on the basis of factual findings, to earn a living, either in full or in part, from the proceeds of unlawful activities" is now in fact capable of being interpreted as an expression of the need to determine in advance not so much the individual "heads" of offence as rather the specific "categories" of offence.
Thanks to this interpretation of the case, it may be concluded that the requirement – which was most recently rightly insisted upon by the European Court, but to which Judgment no. 177 of 1980 of this Court had already drawn attention – to identify the "types of behaviour" on which the measure is based has been met.
The "categories of offence" that can operate as prerequisites for the measure are in effect likely to be established specifically within the present case examined by the courts in view of the triple prerequisite – which must be proven by precise "factual findings", which the court must substantiate specifically within the reasons (Article 13(2) of the Constitution) – that the case must involve: a) offences committed habitually (and thus over a significant period of time) by the individual, b) that effectively gave rise to a profit for himself/herself or another person, c) which in turn represent – or represented at a particular moment in time – the individual's only income, or at least a significant share of that income.
For the purposes of the application of the personal measure of special supervision, with or without an obligation to reside or a prohibition on residing in a particular location, it is necessary not only for the court to find that these prerequisites have been met but also to assess the actual dangerousness of the individual for public security pursuant to Article 6(1) of Legislative Decree no. 159 of 2011.
As regards on the other hand the *in rem* measures of seizure and confiscation, the prerequisites mentioned above must – in accordance with the now settled position within the case law discussed above (in section 10.3) – be ascertained with reference to the period of time in the past during which the unlawful increase in assets which confiscation intends to neutralise occurred. Since, according to the authoritative ruling by the Joint Divisions of the Court of Cassation, the requirement that the temporal overlap in question "result from an assessment of the grounds justifying preventive confiscation, namely the reasonable presumption that the asset was acquired from the proceeds of illicit activity" (Court of Cassation, Joint Divisions, judgment no. 4880 of 26 June 2014-2 February 2015), the deprivation of assets will be justified if, and only if, the past criminal conduct by the individual actually gave rise to unlawful gains in an amount that coincides reasonably with the value of the assets designated for confiscation, where he/she is unable to establish their lawful origin.
12.3.– The other scenario provided for under Article 1, no. 1 of Law no. 1423 of 1956, subsequently restated in Article 1(a) of Legislative Decree no. 159 of 2011, appears by contrast to be inherently imprecise, not having been affected by the case law following the *de Tommaso* judgment.
In fact, it has not been possible to discern within the case law a meaning for the legislative provision under examination that is certain and reasonably foreseeable *ex ante* for the interested party.
Indeed, as has been highlighted above, there are currently two opposing schools of thought regarding this issue, which define the concept of "unlawful dealings" differently. On the one hand for example, judgment no. 11846 of 2018 of the Court of Cassation refers to "any unlawful activity that entails illicit enrichment, even without recourse to negotiations or fraud […]", thus also including activities "characterised by

dispossession, exploitation or the alteration of a bargaining mechanism or of economic, social or civil relations". On the other hand, and again by way of example, Court of Cassation judgment no. 53003 of 2017 refers to the "unlawful trade in tangible goods […] as well as well as the peddling of intangible items […] or even in relation to living beings (humans […] and animals […]), as well as conduct that is *lato sensu* commercial but inherently unlawful […], although in all instances avoiding any confusion with the mere concept of criminal offence [...] giving rise to any form of benefit". The Court also went on to point out that, "according to its ordinary meaning in Italian […] *trafficare* [the verb associated with the noun in "*traffici delittuosi*", translated as "unlawful dealings"] means in the first place to engage in trade, but also to go about something, to get involved, to deal with a series of operations or work in a laboured, disorderly and at times pointless manner, and finally, within seafaring terminology, to handle; however, it cannot validly be extended to having the meaning of committing crime for the purpose of enrichment".

Similarly highly generic (and far from mutually compatible) definitions of an inherently vague term such as "unlawful dealings", which was not clarified further by the legislator, do not appear to be capable of selecting, even in relation to the specific case examined by the courts, the offences the commission of which could establish a reasonable basis for a finding that the person potentially subject to the measure is dangerous: the need to comply with this requirement was recalled not only by the ECtHR in the *de Tommaso* judgment but also – long before – by this Court in Judgment no. 177 of 1980.

Moreover, such notions of "unlawful dealings" (which have been declared not to be limited to offences that generate a profit) could never legitimise as a matter of constitutional law the dispossession of assets held by an individual who has committed those offences in the past, as in such an eventuality, the very basis for the reasonable presumption that the assets are of criminal origin (which as noted above constitutes the rationale for these measures) is lacking.

Therefore, even if considered in the light of the case law that has hitherto attempted to clarify its scope, the legislative description in question does not satisfy the requirements of precision laid down both by Article 13 of the Constitution and, with reference to Article 117(1) of the Constitution, by Article 2 of Protocol no. 4 to the ECHR as regards the personal preventive measures of special supervision, with or without an obligation to reside or a prohibition on residing in a particular location; it also fails to satisfy the requirements imposed by Article 42 of the Constitution and, with reference to Article 117(1) of the Constitution, by Article 1 of the Additional Protocol to the ECHR as regards the *in rem* measures of seizure and confiscation.

13.– It follows from the above that, due to their violation of the parameters mentioned above, all of the provisions to which the questions ruled admissible (as indicated in section 7 above) refer are unconstitutional insofar as they allow for the application of the preventive measures of special supervision, with or without an obligation to reside or a prohibition on residing in a particular location, seizure and confiscation to the persons referred to in Article 1, no. 1 of Law no. 1423 of 1956, subsequently restated in Article 1(a) of Legislative Decree no. 159 of 2011 ("any person who may be presumed, on the basis of factual findings, to be habitually involved in unlawful dealings"). The question concerning Article 25(3) of the Constitution is moot.

By contrast, these provisions pass constitutional muster with regard to the objections raised in these proceedings, as clarified above (section 12.2) insofar as they allow for

the application of the preventive measures of special supervision, with or without an obligation to reside or a prohibition on residing in a particular location, seizure and confiscation to the persons referred to in Article 1, no. 2 of Law no. 1423 of 1956, subsequently restated in Article 1(b) of Legislative Decree no. 159 of 2011 ("any person who, owing to his or her conduct and lifestyle, may be presumed, on the basis of factual findings, to earn a living, either in full or in part, from the proceeds of unlawful activities").

[omitted]

ON THESE GROUNDS

THE CONSTITUTIONAL COURT

having joined the proceedings, hereby,

1) *rules* inadmissible the interventions by M. S.;

2) *declares* unconstitutional Article 1 of Law no. 1423 of 27 December 1956 (Preventive measures against persons representing a danger to security and public morality), as in force until the entry into force of Legislative Decree no. 159 of 6 September 2011 (Code of anti-mafia laws and preventive measures, and new measures on anti-mafia documentation, issued pursuant to Articles 1 and 2 of Law no. 136 of 13 August 2010), insofar as it allows for the application of the personal preventive measure of special supervision on public security grounds, with or without an obligation to reside or a prohibition on residing in a particular location, also to the persons referred to in no. 1;

3) *declares* unconstitutional Article 19 of Law no. 152 of 22 May 1975 (Provisions on the protection of public order), as in force until the entry into force of Legislative Decree no. 159 of 6 September 2011, insofar as it provides that the seizure and confiscation provided for under Article 2-*ter* of Law no. 575 of 31 May 1965 (Provisions to combat mafia-style criminal organisations, including foreign organisations) also apply to the persons referred to in Article 1, no. 1 of Law no. 1423 of 1956;

4) *declares* unconstitutional Article 4(1)(c) of Legislative Decree no. 159 of 2011 insofar as it provides that the measures falling under Chapter II also apply to the persons referred to in Article 1(a);

5) *declares* unconstitutional Article 16 of Legislative Decree no. 159 of 2011 insofar as it provides that the preventive measures of seizure and confiscation governed by Articles 20 and 24 also apply to the persons referred to in Article 1(1)(a);

6) *declares* inadmissible the questions concerning the constitutionality of Articles 3 and 5 of Law no. 1423 of 1956, Article 19 of Law no. 152 of 1975, and Articles 1, 4(1)(c), 6 and 8 of Legislative Decree no. 159 of 2011, all raised by the Naples Court of Appeal by the referral order mentioned in the headnote (Register of Referral Orders no. 154 of 2017) with reference to Article 117(1) of the Constitution in relation to Article 2 of Protocol no. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), signed in Strasbourg on 16 September 1963 and implemented in Italy by Decree of the President of the Republic no. 217 of 14 April 1982;

7) *declares* inadmissible the questions concerning the constitutionality of Articles 3 and 5 of Law no. 1423 of 1956, and of Articles 1, 4(1)(c), 6 and 8 of Legislative Decree no. 159 of 2011, all raised with reference to Article 117(1) of the Constitution, in relation to Article 2 of Protocol no. 4 to the ECHR by the *Tribunale di Udine* by the referral order mentioned in the headnote (Register of Referral Orders no. 115 of 2017);

8) *declares* inadmissible the questions concerning the constitutionality of Articles 1, 6, 8, 16, 20 and 24 of Legislative Decree no. 159 of 2011, with reference to Article 117(1) of the Constitution, in relation to Article 2 of Protocol no. 4 to the ECHR, and to Article 25(3) of the Constitution, and of Articles 20 and 24 of Legislative Decree no. 159 of 2011, with reference to Article 117(1) of the Constitution, in relation to Article 1 of the Additional Protocol to the ECHR, signed in Paris on 20 March 1952, ratified and implemented by Law no. 848 of 4 August 1955, all raised by the *Tribunale di Padova* by the referral order mentioned in the headnote (Register of Referral Orders no. 146 of 2017).

Decided in Rome at the seat of the Constitutional Court, *Palazzo della Consulta*, on 24 January 2019.