Corte costituzionale

JUDGMENT NO. 215 OF 2010

Francesco AMIRANTE, President

Luigi MAZZELLA, Author of the Judgment

JUDGMENT NO. 215 YEAR 2010

In this case the Court considered a direct application by several regions and the Autonomous Province of Trento challenging State legislation which purported to regulate centrally certain matters relating to the production, distribution and transportation of energy which fell under regional jurisdiction. The Court struck down the contested legislation, holding that it was not sufficient to state in generic terms that centralisation was necessary, but that such requirements had to be substantiated on a case by case basis. Moreover, the fact that the legislation purported to reserve the initiatives concerned to the private sector meant that it was disproportionate.

THE CONSTITUTIONAL COURT

composed of: President: Francesco AMIRANTE; Judges: Ugo DE SIERVO, Paolo MADDALENA, Alfio FINOCCHIARO, Alfonso QUARANTA, Franco GALLO, Luigi MAZZELLA, Gaetano SILVESTRI, Sabino CASSESE, Maria Rita SAULLE, Giuseppe TESAURO, Paolo Maria NAPOLITANO, Giuseppe FRIGO, Alessandro CRISCUOLO, Paolo GROSSI,

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Article 4(1), (2), (3) and (4) of Decree-Law no. 78 of 1 July 2009 (Measures to counter the economic crisis, and extension of time limits), converted, with amendments, into Law no. 102 of 3 August 2009, as amended by Article 1(1)(a) of Decree-Law no. 103 of 3 August 2009 (Provisions correcting Decree-Law no. 78 of 2009 to counter the economic crisis), converted, with amendments, into Law no. 141 of 3 October 2009, initiated by Umbria Region, the Autonomous Province of Trento and Tuscany and Emilia-Romagna Regions by applications served on 3 and 2 October 2009, filed in the Court Registry on 7, 8 and

13 October 2009, and respectively registered as nos. 79, 80, 84 and 88 in the Register of Applications 2009.

Considering the entries of an appearance by the President of the Council of Ministers, as well as the interventions by TERNA, Rete elettrica nazionale S.p.A.;

having heard the Judge Rapporteur Luigi Mazzella in the public hearing of 11 May 2010;

having heard Counsel Rosaria Russo Valentini and Giandomenico Falcon for Emilia Romagna Region, Giandomenico Falcon for Umbria Region, for the Autonomous Province of Trento and for Tuscany Region and the *Avvocato dello Stato* Giuseppe Fiengo for the President of the Council of Ministers.

The facts of the case

1. – With reference to Articles 117(3) and 118(2) and (3) of the Constitution, Umbria Region raised several questions concerning the constitutionality of Article 4 of Decree-Law no. 78 of 1 July 2009 (Measures to counter the economic crisis, and extension of time limits), converted, with amendments, into Law no. 102 of 3 August 2009, as amended by Article 1 of Decree-Law no. 103 of 3 August 2009 (Provisions correcting Decree-Law no. 78 of 2009 to counter the economic crisis), converted, with amendments, into Law no. 141 of 3 October 2009 (R.R. no. 79 of 2009).

1.1. – The applicant states that Article 4 concerns urgent initiatives relating to energy networks. Paragraph 1 provides that the Council of Minsters shall, acting on a proposal by the competent ministers, "identify the initiatives relating to the transmission and distribution of energy and also, acting in concert with the regions and the autonomous provinces concerned, the initiatives relating to the production of electricity that are to be carried out with entirely or predominantly private capital which are particularly urgent for socio-economic development and which must be implemented using extraordinary means and powers".

In order to carry out the aforementioned initiatives, paragraph 2 provides for the appointment by resolution of the Council of Ministers, according to the same

procedures, of one or more extraordinary government administrators pursuant to Article 11 of Law no. 400 of 23 August 1988 (Provisions governing the activity of the Government and the organisation of the Office of the President of the Council of Ministers).

Each administrator shall "following consultation with the local authorities concerned, issue the decisions and measures and attend to all activities under the competence of the public administrations which have not respected the time limits provided for by law or any other shorter time limit by up to one half that may have been set by the Administrator that may be necessary in order for the initiatives to be implemented, whilst respecting Community law and relying where necessary on powers replacing or departing from those provided for under Article 20(4) of Decree-Law no. 185 of 29 November 2008" (paragraph 3, as amended by Decree Law no. 103 of 2009, converted into Law no. 141 of 2009).

The measures referred to under paragraph 1 shall also determine "the facilities which the extraordinary administrator will use, notwithstanding that this shall not entail any new or additional charges on the State exchequer, as well as the control and oversight powers of the Minister for Legislative Simplification and the other competent ministries" (paragraph 4).

1.2. – Although the applicant does not dispute the fact that, in the circumstances indicated in the legislation, the identification of the urgent initiatives relating to the transmission, distribution and production of energy be carried out centrally, it recalls that this Court has stressed that the centralisation* with the State of powers over matters under regional competence can only be justified where the State legislation "enacts provisions that are logically pertinent, and therefore capable of regulating the aforementioned functions, and [...] is limited to that which is strictly indispensable to this end"; moreover, "it must have been adopted following the conclusion of procedures that assure the participation of the various levels of Government involved through loyal cooperation procedures, or must otherwise make provision for adequate cooperation

* Translator's note: in Italian, "*chiamata in sussidiarietà*", whereby local powers are delegated upwards according to a kind of reverse subsidiarity in order to ensure that they are exercised in a uniform fashion.

mechanisms for the specific exercise of the administrative functions allocated to the central authorities" (judgment no. 6 of 2004).

In the opinion of Umbria Region, the legislation contained in Article 4 of Decree Law no. 78 of 2009 is not pertinent (because the unspecified initiatives in respect of which there are stated to be "particularly urgent" must be carried out "with entirely or predominantly private capital", and therefore the Law is not capable of regulating genuinely urgent initiatives, since the availability of private capital is by definition not guaranteed), and not proportionate, since there is no reason why the implementation of the initiatives, in addition to their identification, should be concentrated with the State.

The State legislature could have achieved the objective of accelerating initiatives under regional competence by reducing the time limits or simplifying procedures in some other way through the exercise of its primary legislative powers. Moreover, no provision is made for administrators to be used as an instrument to carry out urgent acts under the competence of other administrations.

The Region's representative adds that the principle of subsidiarity has already applied in reverse to matters relating to energy, given that Article 29 of Legislative Decree no. 112 of 31 March 1998 (Conferral of the administrative functions and tasks of the State on the Regions and local authorities, implementing Head I of Law no. 59 of 15 March 1997) and Law no. 239 of 23 August 2004 (Reorganisation of the energy industry, and authorisation for the Government to restructure the provisions applicable to energy) attribute administrative functions to State authorities on the basis of the requirement that they be exercised in a unitary fashion.

According to Umbria Region therefore, in providing for State administrative powers over matters falling under the regions' jurisdiction (energy and territorial government), Article 4(2), (3) and (4) of Decree Law no. 78 of 2009 violate Articles 117(3) and 118(1) and (2) of the Constitution.

1.3. – In the alternative, the applicant avers that, in granting the extraordinary government administrator the powers to replace or depart from the provisions of Article 20(4) of Decree-Law no. 185 of 29 November 2008 (Urgent measures to provide support for families, work, employment, and business and to restructure the strategic national framework to counter the economic crisis), converted, with amendments, into

Law no. 2 of 28 January 2009, and to specify shorter limits for the completion of the activities falling under the competence of the public administrations compared to those provided for by law, Article 4(3) of Decree Law no. 78 of 2009 in any case violates the aforementioned constitutional principles.

Indeed, as far as the powers to replace the legislation are concerned, according to the Region's representative it is not permissible under constitutional law for alleged requirements of urgency to legitimise the granting to an administrator of the power to "expropriate" the administrative powers vested in the regions and the local authorities over matters relating to energy, territorial government and the protection of health, nor the ability of the administrator to depart from any provision, including the regional legislation regulating the environmental impact assessment and that enacted in order to protect the health of its inhabitants; moreover, the provision for these powers of replacement does not satisfy the prerequisites required under the case law of the Constitutional Court (specifically, no competence is vested in any political body, the acts concerned are not mandatory and no procedural guarantees have been put in place for the regions).

On the other hand, the power to reduce the time limits potentially impinges upon regional legislation and is detrimental to the ability of the regions and local authorities to exercise their administrative functions, thereby jeopardising the interests in the orderly development of the territory, the environment and health protected under regional legislation over energy and town planning.

1.4. – Umbria Region then asserts that, insofar as it does not provide for agreement with the region concerned over the decisions identifying the initiatives relating to the transmission and distribution of energy (paragraph 1), the decision to appoint the administrators (paragraph 2) and the decisions adopted by the administrators (paragraph 3), Article 4(1), (2) and (3) of Decree Law no. 78 of 2009 violates Articles 117(3) and 118(1) and (2) of the Constitution and the principle of loyal cooperation, which require the close involvement of the Region when, as in this case, the State appropriates administrative functions pertaining to matters falling under regional jurisdiction.

In fact, Article 4(1) requires that agreement be reached only in respect of the identification of energy production initiatives, but not also of those relating to

transmission and distribution. According to the Region, this difference in treatment is not justified, and the gap cannot be filled through interpretation, given the clarity of the text of the provision.

Paragraph 2 provides for the appointment by resolution of the Council of Ministers, according to the same procedures, of one or more extraordinary government administrators in order to implement the aforementioned procedures. According to the Region's representative, the principle that agreement is required should also apply in this case, whereas by contrast, due to the reference to paragraph 1, it is only required for the production of energy; for this reason, paragraph 2 is claimed to be unconstitutional on the grounds that it does not make provision for agreement also on the appointment of state administrators in relation to works concerning the transmission and distribution of energy.

In the opinion of the applicant, Article 4(3) of Decree Law no. 78 of 2009 is also unconstitutional because it does not provide that the measures relating to the authorisation and implementation of initiatives be adopted in agreement with the region concerned.

Umbria Region then refers to the case law of this Court establishing the requirement that agreement must be reached with the region concerned regarding the localisation and implementation of works administered by State authorities in accordance with the principle of subsidiarity (judgments no. 303 of 2003, no. 6 of 2004 and no. 62 and no. 383 of 2005).

Finally, the applicant points out that, in its report of 29 July 2009, the Parliamentary Committee on Regional Affairs also requested the restoration of the original test of Decree Law no. 78 of 2009 providing that agreement be reached with the regions and autonomous provinces concerned regarding the identification not only of initiatives relating to the production of energy but also those relating to the transmission and distribution of energy.

2. – The President of the Council of Ministers, represented by the *Avvocatura Generale dello Stato*, entered an appearance in the proceedings, requesting that the application be ruled inadmissible, and in any case groundless on the merits.

The respondent asserts that Article 4 of Decree Law no. 78 of 2009 aims to resolve situations of deadlock that may occur with reference to private energy producing installations (already completed or under construction) over which the powers of the region and the local authorities have already been exercised and for which there are difficulties in fully using the product in the national grid, or with reference to the identification of new plants necessary in order to resolve structural energy deficits that can be identified in important areas of the country.

Therefore, it only applies to particularly urgent situations that require extraordinary means and powers to be used in order to protect the interests of the entire national collectivity in a unitary fashion.

The region's representative adds that the centralisation of powers provided for under the contested legislation is reasonable and proportionate.

In fact, having established (as acknowledged by the applicant himself) that the urgent situation justifying the identification by the State of the initiatives to be implemented, it would now be unreasonable if the executive stage, as that resulting in the actual satisfaction of the unitary requirements justifying the State's intervention, were not also to be allocated to the State.

Moreover, the public or private status of the initiative to be implemented is claimed to be irrelevant, whilst on the other hand it is only the public sector goal that it is intended to pursue rapidly that is decisive.

As far as the alleged violation of the principle of loyal cooperation is concerned, the State representative asserts that in this case it was implemented subject to the limits of that which was reasonably essential, namely in respect of initiatives for new production, to be implemented in concert with the region concerned, and in all cases with the participation of the local authorities.

The provision for different arrangements governing urgent initiatives relating to transmission and distribution on the one hand, and those relating to energy production on the other, is the result of a conscious choice by Parliament based on the conclusion that critical situations relating to transportation and distribution necessarily presuppose a prior positive assessment of the production activity by the region and aim to overcome

local difficulties and jealousies regarding the use of an already existing resource that a non-rational distribution could dissipate.

Moreover, the *Avvocatura Generale dello Stato* emphasises that the initiatives in matters relating to the transportation and distribution of energy are characterised by a strategic interest of the State that is more marked compared to those relating to production. In fact, the electricity transportation and transformation service over the national grid has the function of connecting national and trans-national production centres for the purpose of optimising production.

3. – With reference to Articles 117(3) and 118(2) and (3) of the Constitution, Articles 8(5), (6), (17), (19) and (22) and 16 of Presidential Decree no. 670 of 31 August 1972 (Approval of the consolidated text of constitutional laws concerning the Special Statute for Trentino-Alto Adige) and Article 4(1) of Legislative Decree no. 266 of 16 March 1992 (Provisions implementing the Special Statute for Trentino-Alto Adige concerning the relationship between national legislation and regional and provincial laws, as well as the state power of direction and coordination), the Autonomous Province of Trento raised certain questions concerning the constitutionality – *inter alia* – of Article (1), (2), (3) and (4) of Decree Law no. 78 of 2009 as per the previous application (Register of Applications, no. 80 of 2009).

3.1. – The applicant states that the contested provisions relate to the question of "energy" over which it has legislative and administrative powers pursuant to Legislative Decree no. 463 of 11 November 1999 (Provisions implementing the Special Statute of Trentino-Alto Adige Region in the areas of public water resources, hydraulic works and concessions for large-scale diversions for hydro-electricity, the production and distribution of electricity) which, implementing the provisions of the Statute conferring primary jurisdiction on the Province of Trento over matters relating to "town planning", "landscape protection", "public works of provincial interest", the "direct provision of public services" and "expropriations in the public interest" (Article 8(5), (6), (17), (19) and (22) of the Local Government Statute), introduced Article 01 into Presidential Decree no. 235 of 26 March 1977 (Provisions implementing the Special Statute of Trentino-Alto Adige Region in matters relating to energy).

Moreover, Article 14(1) of the Local Government Statute provides that it is mandatory for the opinion of the Province to be obtained for concessions relating to communications and transportation concerning lines that cross the province, and Article 9 of Presidential Decree no. 235 of 1977 specifies that the provisions of Article 14 apply "insofar as the territory of the autonomous provinces is affected" to all matters relating to "the development of the national transmission network".

In particular, Article 01 of Presidential Decree no. 235 of 1977 transfers to the autonomous provinces "the functions relating to energy exercised either by central or local State bodies themselves, or through national or inter-provincial bodies or public institutions, unless specified otherwise under paragraph 3" (paragraph 1), whilst paragraph 2 specifies that the functions relating to "energy" falling under paragraph 1 "relate to the research into and the production, storage, conservation, transportation and distribution of any form of energy".

Article 01(3)(c) reserves to the State solely "the construction and operation of installations which produce electricity from conventional sources with thermal power output exceeding 300 MW and electricity transportation networks comprising the national grid with voltage exceeding 150 KV, the issue of the relative technical rules and national gas pipelines with operating pressure exceeding 40 bar and oil pipelines". In any case, also as far as such tasks are concerned, Article 01(4) provides that it is mandatory for the opinion of the Province to be obtained, pursuant to Article 14(1) of the Local Government Statute.

Finally, the applicant recalls that pursuant to Articles 117(3) and 118 of the Constitution, the ordinary regions have shared legislative powers and the power to allocate administrative functions relating to the "production, transportation and national distribution of energy".

3.2. – The Autonomous Province of Trento argues that, if Article 4 of Decree Law no. 78 of 2009 is to be understood as referring to all installations and all networks (that is, also to those which Article 01 of Presidential Decree no. 235 of 1977 allocates under provincial jurisdiction), it would violate both 8(5), (6), (17), (19) and (22) and 16 of Presidential Decree no. 670 of 1972, as well as Article 4(1) of Legislative Decree no. 266 of 1992, which provides that – in respect of matters falling under the sole

jurisdiction of the autonomous provinces – the law may not allocate administrative functions to State bodies, including oversight and administrative policing functions and those relating to the determination of administrative irregularities other than the functions vested in the State under the terms of the Special Statute and the relative implementing legislation.

3.3. – In the opinion of the applicant, Article 4 of Decree Law no. 78 of 2009 would also be unconstitutional if understood as referring exclusively to works other than those transferred under the jurisdiction of the Province of Trento.

In fact, whilst it remains necessary to obtain the Province's opinion for concessions relating to communications and transportation concerning lines that cross the province as provided for under Article 14 of Presidential Decree no. 670 of 1972 (a provision which – pursuant to Article 9 of Presidential Decree no. 235 of 1977 – also applies to the development of the national energy transmission network), the contested provision is claimed to unlawfully allocate administrative tasks to State bodies in matters over which jurisdiction is shared, without providing for a close involvement of the Province.

The applicant submits considerations on this matter that are analogous to those contained in the application filed by Umbria Region (see above, paragraph 1.4).

4. – The President of the Council of Ministers, represented by the *Avvocatura Generale dello Stato*, entered an appearance and requested that the application be rejected.

The Government representative asserts that, in matters relating to the production of energy, the contested legislation provides for the involvement of the regions and autonomous provinces concerned by stipulating that their agreement be obtained. On the other hand, the transportation and distribution of energy occur within a reference framework which, it is argued, necessarily requires a global valuation that only the unitary perspective of the State is in a condition to guarantee.

The appointment of administrators pursuant to Article 4(2) of Decree Law no. 78 of 2009 is claimed to be consistent with that competence, whilst respect for the principles of loyal cooperation is guaranteed by the requirement (provided for under paragraph 3) that the local authorities concerned be consulted. Finally, Article 4(4) regulates, in an entirely legitimate manner, the office of the administrator, which is a State body.

5. –Tuscany Region also raised a question concerning – *inter alia* – the constitutionality of Article 4(1) of Decree Law no. 78 of 2009 as per the previous applications (Register of Applications, no. 84 of 2009), with reference to Articles 117 and 118 of the Constitution and the principle of loyal cooperation.

The applicant argues that Article 4(1) of Decree Law no. 78 of 2009 as originally enacted was constitutional, because it provided for the requirement that agreement be reached with the region concerned regarding the identification not only of initiatives relating to energy production, but also those relating to the transportation and distribution of energy.

By contrast, the requirement for agreement was removed for the latter category of initiatives upon conversion into law, and the previous text of the provision was not carried over into Article 1(1)(a) of Decree Law no. 103 of 2009.

This is claimed to result in the infringement of the region's powers over the transportation and distribution of energy, since the State took on responsibility for administrative functions that were vested in the regions in relation to such matters, without providing for the requirement of close agreement, as required under the case law of this Court (on this point, the applicant cites judgments no. 303 of 2003, no. 6 of 2004 and no. 383 of 2005).

6. – The President of the Council of Ministers, represented by the *Avvocatura Generale dello Stato*, entered an appearance and requested that the application be rejected.

The respondent asserts that Parliament did not stipulate the requirement of agreement for initiatives relating to the transportation and distribution of energy because these are characterised by a predominant strategic interest in economic development, industrial production and the provision of essential public services throughout the country, and therefore legitimately considered that, within a situation of particular urgency, the individual regions should be involved exclusively in matters relating to energy production.

7. –Emilia-Romagna Region also raised questions concerning the constitutionality of Article 4(1), (2), (3) and (4) of Decree Law no. 78 of 2009 (Register of Applications no. 88 of 2009) with reference to Articles 117(3) and 118(1) and (2) of the Constitution,

as well as due to violation of the principle of loyal cooperation, submitting arguments analogous to those contained in the application by Umbria Region set out above in paragraphs 1.1 to 1.4).

8. – The President of the Council of Ministers, represented by the *Avvocatura Generale dello Stato*, entered an appearance and requested that the application be ruled inadmissible and in any case groundless on the merits on the basis of the same arguments contained in the entry of appearance in the proceedings initiated by Umbria Region (see above, paragraph no. 2).

9. –TERNA – Rete Elettrica Nazionale S.p.A. intervened in all of the proceedings, requesting that the applications be rejected.

10. –Umbria and Emilia-Romagna Regions and the Autonomous Province of Trento filed written statements.

10.1. – Umbria Region states that Article 2-quinquies of Decree-Law no. 3 of 25 January 2010 (Urgent measures to guarantee the security of the electricity supply to the larger islands), included into the conversion Law no. 41 of 22 March 2010, according to which the provisions of Article 11 of Law no. 400 of 1988 do not apply to the extraordinary administrators referred to under Article 4 of Decree Law no. 78 of 2009, has no impact on the matter in dispute in these proceedings.

It further avers that the intervention by TERNA S.p.A. is inadmissible.

On the merits, Umbria Region challenges the arguments submitted by the President of the Council of Ministers, asserting that the situations indicated by the *Avvocatura Generale dello Stato* as a basis for the contested legislation do not justify the centralisation of powers concerning the implementation of the initiatives contemplated under the provision; it adds that the contested provisions are not even suitable to guarantee initiatives that are effectively urgent, since they must be carried out with predominantly private capital.

The Region therefore reiterates that Article 4 of Decree Law no. 78 of 2009 violates the principle of loyal cooperation and that is it also unlawful because it grants the administrators powers that are too broad.

Finally, it argues that the initiatives provided for under the contested provision do not refer to facilities, the implementation of which had already been agreed to with the

Regions, and that the urgent situations justifying them depended on international obligations taken on by Italy.

10.2. – In its own written statement, the Autonomous Province of Trento submits arguments analogous to those contained in the written statement of Umbria Region.

10.3. –Emilia-Romagna Region in turn challenges the arguments submitted by the President of the Council of Ministers and by TERNA S.p.A. and asserts that the contested legislation is also unconstitutional because the powers granted to the administrators are excessively broad, and are not limited to installations in respect of which authorisation proceedings are pending that need to be expedited or to those, the implementation of which has already been agreed with the regions.

In the opinion of the Region's representative, the principle of loyal cooperation has been violated on the grounds that no forms of cooperation between the State and the regions have been provided for with regard to the interventions concerning the transmission and distribution of energy. Moreover, the alleged heightened strategic interest of the State in these initiatives compared to those relating to the production of energy is claimed not to justify the appropriation of the matter concerned within the ambit of the State's legislative jurisdiction.

Finally, the Region claims that the State had no basis upon which to enact the contested legislation under the terms of its own legislative jurisdiction over relations with the European Union, the environment and the determination of essential levels of services pertaining to civil and social rights that must be guaranteed throughout the country. In fact, the provisions concerned fall under matters relating to the "production, transportation and national distribution of energy", over which legislative jurisdiction is shared. Consequently, the need to adapt the law in line with European legislation in order to deal with the delays accumulated by our country is immaterial, and is not sufficient in order to legitimate the contents actually adopted by the State legislature, due both to the violation of the principle of loyal cooperation as well as the lack of a positive answer to the alleged requirements of urgency (given also the failure to provide for secured public funding in order to implement the initiatives deemed necessary).

Conclusions on points of law

1. – Umbria, Tuscany and Emilia-Romagna Regions and the Autonomous Province of Trento have raised questions concerning the constitutionality of Article 4(1), (2), (3) and (4) of Decree-Law no. 78 of 1 July 2009 (Measures to counter the economic crisis, and extension of time limits), converted, with amendments, into Law no. 102 of 3 August 2009, as amended by Article 1(1)(a) of Decree-Law no. 103 of 3 August 2009 (Provisions correcting Decree Law no. 78 of 2009 to counter the economic crisis), converted, with amendments, into Law no. 141 of 3 October 2009, with reference to Articles 117 and 118 of the Constitution, Articles 8(5), (6), (17), (19) and (22) and 16 of Presidential Decree no. 670 of 31 August 1972 (Approval of the consolidated text of constitutional laws concerning the Special Statute for Trentino-Alto Adige), Article 4(1) of Legislative Decree no. 266 of 16 March 1992 (Provisions implementing the Special Statute for Trentino-Alto Adige concerning the relationship between national legislation and regional and provincial laws, as well as the state power of direction and coordination) and the principle of loyal cooperation.

By the same applications, the Autonomous Province of Trento and Tuscany Region have also raised questions concerning the constitutionality of other provisions of Decree Law no. 78 of 2009, which will be dealt with in separate proceedings.

1.1. – Article 4 of Decree Law no. 78 of 2009, as in force pursuant to the amendments introduced by Decree Law no. 103 of 2009, provides that the Council of Ministers may identify the initiatives relating to the production, transportation and distribution of energy to be carried out with entirely or predominantly private capital which are particularly urgent for socio-economic development and which must be implemented using extraordinary means and powers (paragraph 1); the provision stipulates that it is necessary to reach agreement with the Region only in relation to the identification of the initiatives relating to production, and not also for those concerning transportation and distribution.

According to the same procedures as those specified under paragraph 1, the Council of Ministers may appoint one or more extraordinary administrators to carry out these initiatives (paragraph 2).

In respect of the activities necessary to obtain the authorisation and implementation of the initiatives concerned, the extraordinary administrator may determine shorter time limits compared to those ordinarily provided for; moreover, in the event that the administrations do not respect these time limits (either the ordinary time limits or those as shortened by his decision), he may act in place of the administrations themselves in order to carry out any activity that may fall under their competence (paragraph 3).

The measures referred to under paragraph 1 may also specify the facilities which the extraordinary administrator will use, notwithstanding that this shall not entail any new or additional charges on the State exchequer, as well as the control and oversight powers of the Minister for Legislative Simplification and the other competent ministers (paragraph 4).

1.2. – In the opinion of Umbria and Emilia-Romagna Regions and the Autonomous Province of Trento, given that the contested provision must fall under matters concerning the "production, transportation and distribution of energy", there are no justifications for the centralisation of powers with State bodies as ordered under the contested provision.

Umbria and Emilia-Romagna Regions and the Autonomous Province of Trento argue first and foremost that the centralisation of the power to identify and implement initiatives relating to the production, transmission and distribution of energy was implemented by Article 4(1), (2), (3) and (4) of Decree Law no. 78 of 2009 by legislation that was not pertinent (because the unspecified initiatives in respect of which there are stated to be "particularly urgent" must be carried out "with entirely or predominantly private capital", and therefore the Law is claimed not to be capable of regulating genuinely urgent initiatives, since the availability of private capital is by definition not guaranteed), and not proportionate, since there is no reason why the implementation of the initiatives, in addition to their identification, should be concentrated centrally.

In the alternative, Umbria and Emilia-Romagna Regions aver that, in any case, the powers granted to the administrators were too broad.

Finally, all of the applicants assert that, even assuming that there is a requirement for matters to be centralised, the provision is unconstitutional insofar as it provides that

agreement is to be reached with the Regions only in respect of initiatives relating to production, and not also for those relating to the transportation and distribution of energy.

Therefore, according to the applicant regions, Articles 117 and 118 of the Constitution have been violated and, for the Province of Trento, also the provisions of the Statute relating to "energy" (Articles 8(5), (6), (17), (19) and (22) and 16 of Presidential Decree no. 670 of 1972 and Article 4(1) of Legislative Decree no. 266 of 1992).

2. – Given the fact that they are objectively related, the four applications must be joined for the purposes of a single judgment.

3. – TERNA S.p.A., the operator of the national energy network, intervened in the proceedings before this Court.

This intervention is inadmissible because, as has been consistently asserted by this Court, constitutionality proceedings in which the Court is seised directly are only conducted between the parties vested with legislative powers, to the exclusion of any other party.

4. – The question is well founded.

In consideration of the fact that this case concerns the production, transmission and distribution of energy, it cannot be asserted in merely theoretical terms that the identification and implementation of the relative initiatives may be carried out centrally, pursuant to Article 118 of the Constitution. Indeed, on the facts, when such a transfer of powers is justified by the fact that it is deemed necessary to implement the works urgently, this must be backed up by valid and convincing arguments.

It can easily be observed that, since it involves initiatives of strategic significance, any requirement for urgent action should entail the direct assumption by the State of responsibility for implementing the works.

By contrast however, the contested provision specifies that the initiatives provided for thereunder must be implemented with entirely or predominantly private capital which is by its very nature uncertain, both as regards its availability as well as its amount.

It should be added that the provision that the implementation of the initiatives is reserved to the private sector means that the intervention by the State is disproportionate. If in fact the presumed grounds of urgency are not such as to render it certain that it will be the State itself to attend to the immediate implementation of the works due to requirements that the relevant powers be exercised centrally, there is no reason to deprive the regions of competence over the implementation of the initiatives.

Therefore, the principles of relevance and proportionality required under constitutional case law for the purposes of determining the legitimacy of legislative provisions that appropriate functions under regional competence to the State have not been respected. Accordingly, Article 4(1)-(4) of Decree Law no. 78 of 2009, as in force pursuant to the amendments introduced by Decree Law no. 103 of 2009 should be ruled unconstitutional due to violation of Articles 117(3) and 118(1) and (2) of the Constitution.

4. – The further questions raised by the applicants (on the breadth of the extraordinary administrators' powers and the failure to make provision for agreement with the regions when determining the initiatives relating to the transmission and distribution of energy) are moot, since the contested provisions have been struck down in their entirety.

ON THOSE GROUNDS

THE CONSTITUTIONAL

having reserved its decision on the other questions of constitutionality raised by the Autonomous Province of Trento and Tuscany Region for separate judgments,

declares that Article 4(1), (2), (3) and (4) of Decree-Law no. 78 of 1 July 2009 (Measures to counter the economic crisis, and extension of time limits), converted, with amendments, into Law no. 102 of 3 August 2009, as in force pursuant to the amendments introduced by Article 1(1)(a) of Decree-Law no. 103 of 3 August 2009

(Provisions correcting Decree-Law no. 78 of 2009 to counter the economic crisis), converted, with amendments, into Law no. 141 of 3 October 2009, is unconstitutional.

Decided in Rome, at the seat of the Constitutional Court, *Palazzo della Consulta*, on 9 June 2010.

Signed:

Francesco AMIRANTE, President

Luigi MAZZELLA, Author of the Judgment

Giuseppe DI PAOLA, Registrar

Filed in the Court Registry on 17 June 2010.

The Director of the Registry

Signed: DI PAOLA