

JUDGMENT NO 210 YEAR 2024

[omitted]

THE CONSTITUTIONAL COURT

[omitted]

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Articles 3(2) (more correctly: (1)) (v)(no 2) and 65 of Autonomous Province of Bolzano Law No 12 of 2 December 2019 (Commercial Code), initiated by the Sixth Division of the Council of State (*Consiglio di Stato, sesta sezione*) in the proceedings pending between the Municipality of Bolzano and Lintner Bau srl and others, with referral order of 8 February 2024, registered as No 64 in the 2024 Register of Referral Orders and published in *Official Journal of the Italian Republic* No 18, first special series 2024.

Having regard to the statement in intervention filed by the Autonomous Province of Bolzano;

after hearing Judge Rapporteur Giovanni Pitruzzella in chambers on 15 October 2024.

after deliberation in chambers on 15 October 2024.

The facts of the case

1.– By referral order of 8 February 2024, registered as No 64 in the 2024 Register of Referral Orders, the Sixth Division of the Council of State raised questions concerning the constitutionality of Article 3(2) (more correctly: (1)) (v)(no 2) and Article 65 of Autonomous Province of Bolzano Law No 12 of 2 December 2019 (Commercial Code). The first contested provision stipulates that the term “counter service” (*somministrazione*) shall be taken to mean, “within the ambit of street trading, the immediate consumption of the products concerned, excluding any table service and subject to compliance with applicable health and hygiene regulations”. The second contested provision (as replaced by Article 12(7) of Autonomous Province of Bolzano Law No 12 of 13 October 2020 laying down “Budgetary amendments for the Autonomous Province of Bolzano for the financial years 2020, 2021 and 2022 and other provisions”) provides that, “[t]aking account of the provisions of Article 181(4-*bis*) of Decree-Law No 34 of 19 May 2020, [...] street trading pitch concessions [*concessioni di posteggio per l’esercizio del commercio su aree pubbliche*] expiring on 31 December 2020 as provided for under Article 22(1)(a) shall be renewed for a period of twelve years [...]”.

With regard to the first contested provision, the referring court argues that Articles 4, 5 and 9 of Decree of the President of the Republic No 670 of 31 August 1972 (Approval of the consolidated text of constitutional laws concerning the Special Statute for Trentino-Alto Adige) have been violated. With regard to the second provision, the referring court argues that Articles 3, 41, 97 and 117(2)(a), (e) and (q) of the Constitution have been violated.

2.– The proceedings arose out of an application filed by various persons with the Regional Court for Administrative Justice of Trentino-Alto Adige, Autonomous Division for the Province of Bolzano (*Tribunale regionale di giustizia amministrativa del*

Trentino-Alto Adige, sezione autonoma per la Provincia di Bolzano), seeking the annulment of certain extensions of public pitch permits for street trading, which had been issued to them by the Municipality of Bolzano in respect of the operation of kiosks providing food and drink situated on public land in various parts of the municipal territory, insofar as the duration of the permits in question had been set at three rather than twelve years.

The referring court states that the Bolzano Regional Court for Administrative Justice accepted the application, concluding on the one hand that the applicants were not providing table service in addition to counter service for the sale of food, and on the other that – even had such service been provided – the Municipality should in any case have ordered renewal for a period of twelve years of the licences to occupy public land that had been issued for the applicants’ kiosks.

The referring court states that this decision was challenged by way of a primary appeal by the Municipality of Bolzano and by way of a cross-appeal by the applicants at first instance. By non-definitive Judgment No 11121 of 22 December 2023, the referring court allowed the first head of the primary appeal and reserved decision on the second head of the primary appeal and on the cross-appeal, holding that it was not necessary for the Municipality to verify in advance whether or not the food counter service actually included table service. According to the court, once it had been established that the original applicants fell in theoretical terms within the category of holders of a public pitch permit authorised to provide food counter service in conjunction with table service, the Municipality of Bolzano could not do anything other than extend the permits for three years only, in accordance with the applicable provincial legislation.

3.– As regards the first contested provision (Article 3(1)(v)(no 2) of Province of Bolzano Law No 12/2019), the referring court asserts that it violates Article 27(1)(a) of Legislative Decree No 114 of 31 March 1998 (Reform of the law applicable to the trade sector, adopted pursuant to Article 4(4) of Law No 59 of 15 March 1997), which defines “street trading” as “the activity involving the retail sale and counter service of food and drink on a street, including areas falling within coastal public property, as well as in private areas that the Municipality is able to use, whether serviced or not, and whether covered or uncovered”. Since the definition under state law of “street trading” constitutes a principle that must be taken into account within provincial legislation, “as it is an aspect that defines the very scope of the exercise of legislative power”, it is asserted that the contested provision violates Article 9 of the Special Statute, which vests the autonomous provinces with concurrent legislative competence over trade.

As regards the second contested provision (Article 65 of Province of Bolzano Law No 12/2019), the referring court states that it purports to apply the rule on twelve-year renewal provided for under Article 181(4-*bis*) of Decree-Law No 34 of 19 May 2020 (Urgent measures on health, support for employment and the economy, as well as social policies related to the COVID-19 emergency), converted with amendments into Law No 77 of 17 July 2020 only to public pitch permits involving street trading as defined under Province of Bolzano Law No 12/2019, i.e. “excluding table service”. It is asserted that this violates Article 117(2)(q) of the Constitution, which vests the State with exclusive legislative competence over international preventive measures. Indeed, Article 181 expressly refers to the COVID-19 epidemiological emergency, “thereby making it clear that the national legislature intended to exercise its legislative power also in relation to international preventive measures”.

It is also claimed that the contested Article 65 violates Article 117(2)(e) of the Constitution. The exclusion of table service from the definition of street trading, with the result that the rule on twelve-year renewal does not apply to the permits in question, entails an “encroachment by the provincial legislature on protection of competition”, an area of law over which the State has exclusive legislative competence. As this area of the law is cross-cutting in terms of its effect, the Autonomous Province could not, so it is argued, exercise its legislative competence over trade in a manner at odds with the State provisions applicable to the renewal of permits, which have been enacted in relation to the protection of competition.

It is also asserted that the provincial legislation violates the principle of equal treatment laid down by Article 3 of the Constitution, “as it could give rise to a clear difference in treatment between operators in the Autonomous Province of Bolzano and those elsewhere in the country, thereby violating not only Article 41 of the Constitution, by imposing an unjustified limit on private economic initiative, but also Article 97 of the Constitution, which provides that the public administration must be impartial”.

Finally, it is also argued that the contested provisions violate freedom of establishment and freedom to provide services pursuant to Articles 49 and 56 of the Treaty on the Functioning of the European Union (TFEU), “with all of the resulting effects in terms of the violation of Article 117(2)(a) of the Constitution, as they could be deemed to impose restrictions not justified by overriding requirements of public interest such as public order, public security and public health”.

4.– The President of the Autonomous Province of Bolzano intervened in the proceedings on 13 May 2024, asserting that the questions were inadmissible on various grounds.

First of all, the referring court had purportedly not explained why “the provincial provisions [...] should have complied with the national provisions setting aside principles of both constitutional law and EU law” and also why that court “did not disapply the above-mentioned national provisions that set aside principles of EU law”. The Autonomous Province mentions report AS 1721 by the Italian Competition and Markets Authority (*Autorità garante della concorrenza e del mercato* – AGCM) dated 15 February 2021, which states that the rules on public pitch permits for street trading fall within the scope of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (known as the “Services Directive” or the “Bolkestein Directive”). As such, according to the AGCM, Article 1(686) of Law No 145 of 30 December 2018 (State budget for financial year 2019 and multi-year budget for the 2019-2021 period) and Article 181(4-*bis*) of Decree-Law No 34/2020, as converted into law, which departed from the provisions of the Service Directive, thereby violate the “provisions of constitutional law and EU law enacted in order to safeguard freedom of economic initiative and protection of competition [...], insofar as liable to unduly restrict access to and the conduct of an economic activity”. They should therefore be disapplied by national authorities. The AGCM also recalls that this Court’s Judgment No 291/2012 declared unconstitutional a regional provision that exempted street trading from the scope of Article 16 of Legislative Decree No 59 of 26 March 2010 (Implementation of Directive 2006/123/EC on services in the internal market). Thus, according to the Autonomous Province, the referring court should have explained why the issue of public pitch permits used for retail trade could lawfully be removed from the scope of EU law, and in particular from the principles of freedom of

competition, competitive public bidding procedures and the prohibition on the renewal of permits without competitive public bidding procedures.

Secondly, the referring court did not explain why it did not disapply the subsequently enacted State legislation, “insofar as it provides for subjection to the principles and provisions of EU law, when allocating public pitch permits, only from 1 January 2024 rather than retroactively”. The Autonomous Province states that Article 11 of Law No 214 of 30 December 2023 (Annual law on markets and competition 2022), which removed the bar on the application of the Services Directive to street trading, although only with future effect, was enacted before the referral order was made. Indeed, Article 11(5) provides that “[t]he procedure for the renewal of permits referred to under Article 181(4-*bis*) of Decree-Law No 34 of 19 May 2020, converted with amendments into Law No 77 of 17 July 2020, that, upon the entry into force of Law No 77/2020, were due to expire on 31 December 2020 and that, upon the entry into force of this Law, have not yet been concluded for any reason, including any failure to take action by municipalities, shall be concluded in accordance with the provisions of Article 181 applying the renewal period provided for thereunder [...]”. It is asserted that the referring court has not taken into account this subsequently enacted legislation, which purportedly demonstrates the unlawful nature of the State provisions setting aside the Services Directive, and does not justify the failure to disapply the provision precluding retroactivity contained within the subsequently enacted legislation.

Thirdly, the questions raised are claimed to be inadmissible on the grounds that they lack relevance and contradict the non-definitive Judgment No 11121/2023, cited above. The referring court does not explain how this partial decision (on the first head of the Municipality’s appeal) “can be reconciled with the future decision on the second head of the primary appeal and on the cross-appeal”, given that the first decision would already have applied those provisions that, were the questions raised to be accepted, the referring court would be unable to apply when deciding on the remainder of the case.

Fourthly, the President of the Autonomous Province of Bolzano claims that the questions raised are inadmissible due to a lack of relevance or, in the alternative, the provision of insufficient reasons as to their relevance. It is asserted that, when addressing the issue of relevance, the referring court simply restates the contested provisions without offering any interpretation of them “in coordination with one another”. In particular, it does not explain why the provincial legislation cannot avoid falling prey to doubts as to its constitutionality “insofar as applied both by the Municipality of Bolzano when deciding on applications for renewal as well as by the administrative court ruling at first instance, which held that the provincial legislation concerned was manifestly not unconstitutional [...]”.

Fifthly, it is claimed that the questions raised are inadmissible due to the failure to fulfil the prerequisite of establishing that the questions are not manifestly unfounded or, in the alternative, the provision of insufficient reasons as to why that prerequisite is met. With regard to the first contested provision, the Council of State is asserted not to have clarified in which respect the provincial legislation is inconsistent with Article 27(1)(a) of Legislative Decree No 114/1998, “nor what relevance any such inconsistency should have for the purposes of deciding on the second head of the primary appeal of the Municipality of Bolzano and/or on the cross-appeal”. In addition, the referring court mentions Article 28 of Legislative Decree No 114/1998, despite purportedly not specifying the “salient part”.

As regards the second contested provision, it is asserted that the referring court does not explain why Article 65 of Province of Bolzano Law No 12/2019 should apply the rule on the twelve-year renewal of public pitch permits only to businesses that do not provide table service, “in spite of the fact that neither Article 65 nor Article 22(1)(a) of Provincial Law No 12/2019 [...] makes any provision concerning this matter”. Once again, it is asserted that the referring court does not clarify why Article 181(4-*bis*) of Decree-Law No 34/2020, as converted into law, refers to the COVID-19 emergency and also what the relationship is between that emergency and a twelve-year renewal, “far beyond any epidemiological emergency”, which in any case would not justify the failure to comply with EU competition law.

As regards the challenge based on Article 117(2)(e) of the Constitution, the Autonomous Province observes that the referring court does not explain why it considers that the provincial law provided for the exclusion of activities involving table service from the definition of street trading, whereas Article 3 of Autonomous Province of Bolzano Law No 12/2019 “excluded table service from the definition of counter service contained in that Law, but not from the definition of street trading”. In addition, it is claimed not to be clear why the referring court takes the view that the failure to apply the rule on twelve-year renewal of permits should result in an encroachment on the State’s legislative competence over the protection of competition, without considering in greater detail whether such renewal is compatible with EU competition law.

Furthermore, it is asserted that incomplete reasons are given also in relation to the questions based on Articles 3, 41 and 97 of the Constitution and on Articles 49 and 56 TFEU. First of all, the referring court apparently does not state which provision specifically violates Article 3 of the Constitution (and indeed the contested aspect). Moreover, Articles 49 and 56 TFEU “could never support automatic renewals for outgoing permit holders for an extended period of time, without any public bidding procedures, as is by contrast provided for under the State legislation that the Council of State is seeking to apply within the province”.

Sixthly, it is claimed that the questions raised are inadmissible (once again) due to the failure to fulfil the prerequisite of establishing that the questions are not manifestly unfounded or, in the alternative, the provision of insufficient reasons as to why that prerequisite is met. The Autonomous Province states that, according to Article 28(7) of Legislative Decree No 114/1998, a “concession for the street sale of food products also constitutes authorisation for counter service for the same products if the holder fulfils the prerequisites laid down for both activities. Authorisation for counter service must be indicated by a specific note on the permit”. It is asserted that the referring court does not clarify whether such authorisation was noted on the applicants’ permits. If this were not the case, the question would be manifestly unfounded as it has “specific and exclusive relevance in situations involving a concession for the on-street sale of food with counter service”. As well as arguing that the questions are inadmissible, the Autonomous Province objects to an “inadequate investigation” and suggests that the case file should be remitted to the referring court.

5.— On the merits, the Autonomous Province asserts that the questions raised are unfounded.

The State legislation that the referring court would like to apply in the Province of Bolzano is claimed to violate EU law, as clarified by the AGCM report of 15 February 2021. Thus, before addressing the questions concerning the constitutionality of the

contested provincial legislation, it states that it is first necessary to establish whether the State legislation is compatible with EU law and, if appropriate, to make a reference for a preliminary ruling to the Court of Justice of the European Union. The Autonomous Province refers to Judgment No 9104 of 19 October 2023 of the Seventh Division of the Council of State, which upheld a decision made by a local authority to disapply the State legislation on the extension of the permits in question on the grounds that businesses operating in public areas fall within the scope of the Services Directive.

In addition, it is contended that the first contested provision (Article 3(1)(v)(no 2) of Bolzano Provincial Law No 12/2019) does not violate Article 27(1)(a) of Legislative Decree No 114/1998 (which does not exclude table service from the scope of street trading). The Autonomous Province argues that it restates Article 3 of Decree-Law No 223 of 4 July 2006 (Urgent provisions on economic and social recovery, the containment and rationalisation of public spending and initiatives to boost tax revenues and combat tax evasion), converted with amendments into Law No 248 of 4 August 2006, which provides that “business operations as identified by Legislative Decree No 114 of 31 March 1998, and those involving the provision of food and drink with counter service shall not be subject to the following limits and restrictions: [...] *f-bis*) a prohibition on, or the requirement of prior authorisation for, the immediate consumption of food products inside the neighbourhood shop, using the premises and furniture of the business, excluding any table service and subject to compliance with health and hygiene regulations”. With regard to the interpretation of that provision, the Autonomous Province refers to some rulings of the administrative courts (Judgment No 9847 of 28 September 2020 of Division 2-*ter* of the Regional Administrative Court for Lazio; Judgments No 8923 of 31 December 2019 and No 2280 of 8 April 2019 of the Fifth Division of the Council of State), arguing that the referring court failed to consider both Article 3 of Decree-Law No 223/2006, as converted into law, and the judgments cited.

Finally, it is argued that the second contested provision (Article 65 of Autonomous Province of Bolzano Law No 12/2019) does not violate Article 181(4-*bis*) of Decree-Law No 34/2020, as converted into law, since, having regard to Article 3 of Decree-Law No 223/2006, as converted into law, the operation of street trading does not include table service. It is therefore asserted that Article 65 legitimately provides for the twelve-year renewal only of pitch permits not involving table service.

Conclusions on points of law

1.– The Sixth Division of the Council of State questions the constitutionality of Article 3(1)(v)(no 2) and Article 65 of Autonomous Province of Bolzano Law No 12/2019. The first contested provision stipulates that the term “counter service” shall be taken to mean, “within the ambit of street trading, the immediate consumption of the products concerned, excluding any table service and subject to compliance with applicable health and hygiene regulations”. The second contested provision (as replaced by Article 12(7) of Autonomous Province of Bolzano Law No 12 of 13 October 2020) provides that, “[t]aking account of the provisions of Article 181(4-*bis*) of Decree-Law No 34 of 19 May 2020, [...] street trading pitch concessions expiring on 31 December 2020 as provided for under Article 22(1)(a) shall be renewed for a period of twelve years [...]”.

According to the referring court, the first provision violates Article 9 of the Special Statute, which vests the autonomous provinces with concurrent legislative competence over trade, in that it is incompatible with Article 27(1)(a) of Legislative Decree No 114/1998, which defines “street trading”.

The second contested provision is claimed to violate: a) Article 117(2)(q) of the Constitution, which vests the State with exclusive legislative competence over international preventive measures, in that it purports to apply the rule on twelve-year renewal provided for under Article 181(4-*bis*) or Decree-Law No 34/2020, as converted into law, only to pitch permits for public areas not involving table service; b) Article 117(2)(e) of the Constitution as the Autonomous Province could not exercise its legislative competence over trade in a manner at odds with the State provisions applicable to the renewal of permits, which have been enacted in relation to the protection of competition; c) Articles 3, 41 and 97 of the Constitution, “as it could give rise to a clear difference in treatment between operators in the Autonomous Province of Bolzano and those elsewhere in the country, thereby violating not only Article 41 of the Constitution, by imposing an unjustified limit on private economic initiative, but also Article 97 of the Constitution, which provides that the public administration must be impartial”; d) Article 117(2)(a) of the Constitution on the grounds that it violates freedom of establishment and freedom to provide services pursuant to Articles 49 and 56 TFEU by imposing “restrictions not justified by overriding requirements of public interest such as public order, public security and public health”.

2.– The first question concerning Article 3(1)(v)(no 2) of Autonomous Province of Bolzano Law No 12/2019 is unfounded.

The referring court objects to the violation of Article 27(1)(a) of Legislative Decree No 114/1998, which defines street trading (“For the purposes of this title: *a*) ‘street trading’ means the activity involving the retail sale and counter service of food and drink on a street, including areas falling within coastal public property, as well as in private areas that the Municipality is able to use, whether serviced or not, and whether covered or uncovered”) but does not exclude the table service of food and drink from its scope. It is argued that the State provision lays down a fundamental principle in this area, which is binding for the purposes of the concurrent legislative competence over trade vested in the autonomous provinces (Article 9, No 3 of the Special Statute).

However, the referring court has not considered the reform of Title V of the Constitution, following which the ordinary regions acquired residual powers over trade, under the terms of Article 117(4) of the Constitution (see also Judgments Nos 187/2022, [195/2019](#) and 164/2019). Applying the “more favourable interpretation” rule laid down by Article 10 of Constitutional Law No 3 of 18 October 2001 (Amendments to Title V of Part II of the Constitution), this Court has extended the ordinary regions’ residual legislative competence over trade to autonomous bodies governed by special statute. That extension applied both to regions governed by special statute vested with primary legislative competence over trade (such as the Friuli-Venezia Giulia Autonomous Region: Judgments No 98/2017, point 6.4. of the *Conclusions on points of law*, and No 165/2007) and also, a fortiori, to those vested with concurrent legislative competence in that area, such as the autonomous provinces. Judgment No 183/2012 is explicit on this issue: “As this constitutional provision [Article 117(4) of the Constitution] provides that trade falls under residual legislative competence, there is no doubt that it must apply to the benefit of the Autonomous Province, to the exclusion of the less favourable provision contained in the special statute (amongst many, Judgments Nos 18/2012, 150/2011 and 247/2010; Order No 199/2006)”. It may also be recalled that, in relation to the Sardinia Autonomous Region, Judgment No 18/2012 referred to the “area of trade, which falls under the residual legislative competence of the regions”.

The question objecting to the violation of a fundamental principle of State law, which operates as a limit on the (supposedly) concurrent legislative competence of the province, does not take account of the fact that the competence of the autonomous provinces is broad under the terms of Article 117(4) of the Constitution as well as the “more favourable interpretation” rule.

As regards specifically the area of trade, it is clear from the case law of this Court that Legislative Decree No 114/1998 has had fall-back status since 2001, and as such only applies to those regions that have not enacted their own legislation to regulate trade (Judgments Nos 187/2022, 164/2019 and 98/2017). When ruling on a question similar to that now under examination (in proceedings concerning a challenge brought against a law of the Friuli-Venezia Giulia Autonomous Region due to the violation of Legislative Decree No 114/1998), this Court held the question unfounded on the grounds that Legislative Decree No 114/1998 had not been binding since 2001 (Judgment No 98/2017).

On account of these considerations, there is no need to establish whether the contested provincial legislation (which excludes table service from the notion of counter service within the context of street trading) is actually at odds with the State legislative framework, in which Article 3(1)(f-*bis*) of Decree-Law No 223/2006, as converted into law, contains a similar exclusion, albeit not specifically in relation to street trading.

3.– The questions concerning Article 65 of Autonomous Province of Bolzano Law No 12/2019 are inadmissible as they do not provide a complete account of the legislative framework.

3.1.– Article 65 of Autonomous Province of Bolzano Law No 12/2019 is challenged insofar as it limits the scope of the rule on the twelve-year renewal of public pitch permits (laid down by Article 181(4-*bis*) of Decree-Law No 34/2020, as converted into law) by applying it only to concessions not involving table service. The referring court objects that various constitutional parameters have been violated, although all challenges are rooted in the violation of Article 181(4-*bis*) as an interposed provision. Accordingly, the provision of provincial law is contested in that it implicitly prevents renewal under certain circumstances.

The referring court does not take account of Directive 2006/123/EC within its argumentation.

That Directive establishes general provisions facilitating the exercise of the freedom of establishment for service providers and the free movement of services (Article 1), where “‘service’ means any self-employed economic activity, normally provided for remuneration, as referred to in Article 50 of the Treaty” (Article 4).

The Directive was transposed in Italy by Legislative Decree No 59/2010, which initially included street trading within its scope (being specifically addressed by Article 70).

Shortly afterwards, this Court ruled concerning a provision of law from the Tuscany Region that prevented Article 16 of Legislative Decree No 59/2010 from applying to street trading. Article 16 provides that, “[i]n the event that the number of permits available for a particular service business is limited on grounds related to scarcity of natural resources or of available technical capacity, the competent authorities shall operate a selection procedure among potential candidates and shall ensure that criteria and

arrangements capable of ensuring the impartiality of those procedures, which must be complied with, are specified in advance and published in the manner provided for under the respective authorities' regulations" (paragraph 1). In situations falling under paragraph 1, "the permit shall be issued for a limited period and may not be renewed automatically, and no benefits may be granted to the previous service provider or to any other persons, even where these might be justified by specific links with the former" (paragraph 4). Judgment No 291/2012 of this Court declared that the provision of the Tuscan law was unconstitutional due to the violation of the Services Directive and the State's legislative competence over competition. The applicability of the Services Directive to street trading has subsequently been confirmed (Judgments Nos 239/2016, 39/2016, 165/2014, 49/2014 and 98/2013).

Nonetheless, Article 1(686) of Law No 145/2018 later amended Legislative Decree No 59/2010 in various respects to exclude street trading from the scope of the Decree (and thus of the Services Directive). In particular, a reference to "retail street trading" (letter *f-bis*) was added to Article 7 of Legislative Decree No 59/2010 on excluded services. Moreover, a paragraph 4-*bis* ("The provisions of this Article shall not apply to street trading falling under Article 27 of Legislative Decree No 114 of 31 March 1998") was introduced into Article 16, and finally Article 70 of Legislative Decree No 59/2010 was repealed. Subsequently, Article 181(4-*bis*) of Decree-Law No 34/2020, as converted into law, renewed street trading pitch concessions "expiring on or before 31 December 2020 [...] for a period of twelve years", as one of the various measures adopted to support economic activity during the pandemic. Article 181(4-*bis*) was implemented by the Decree of the Minister of Economic Development of 25 November 2020 (Guidelines on the renewal of public pitch permits).

In report AS 1721 of 15 February 2021, the AGCM objected to the above-mentioned provisions of Law No 145/2018 and of Decree-Law No 34/2020, as converted into law, stating its hope that they would be amended and adding that, were they not to be amended, operators would have to disapply them. The need for competitive procedures within the street trading sector, as provided for in the Services Directive, had already been asserted on various occasions by the AGCM (for example, report AS 1335 of 15 December 2016) and was subsequently reiterated (report AS 1785 of 6 August 2021).

The case law of the administrative courts has also confirmed that street trading is subject to the Services Directive and that the State provisions objected to by the AGCM may be disapplied (see Seventh Division of the Council of State, Judgments Nos 4163 of 9 May 2024 and 9104 of 19 October 2023; Division 2-*ter* of the Regional Administrative Court of Lazio, Judgment No 8136 of 17 June 2022).

That position is consistent with Article 4 of the Services Directive in addition to Article 2, which lists excluded services but does not mention trade. In addition, the CJEU has held that "Article 4(1) of Directive 2006/123 must be interpreted as meaning that the activity of retail trade in goods constitutes a 'service' for the purposes of that directive" (CJEU, Grand Chamber, judgment of 30 January 2018, Joined Cases C-360/15 and C-31/16, paragraph 97), and that "Article 12(1) and (2) of Directive 2006/123 must be interpreted as meaning that the obligation for Member States to apply an impartial and transparent selection procedure to potential candidates and the prohibition on automatic renewal of an authorisation granted for a given activity are laid down unconditionally and sufficiently precisely to be regarded as having direct effect" (CJEU, Third Chamber, judgment of 20 April 2023, Case C-348/22, *AGCM*).

More recently, Article 11 of Law No 214/2023 has regulated the “Arrangements applicable to the allocation of permits for street trading”, repealing the provisions (introduced into Legislative Decree No 59/2010 by Law No 145/2018) that excluded street trading from the scope of Legislative Decree No 59/2010 and providing that, “with effect from the entry into force of this Law, street trading pitch concessions shall be issued for a period of ten years on the basis of competitive procedures [...]”. However, Article 11 was without prejudice – according to paragraphs 4 and 5 – to the extension previously granted until 2032 by Article 181(4-*bis*) of Decree-Law No 34/2020, as converted into law.

3.2.– The referring court has not addressed the legislative framework set out above, which would have identified the potential solutions. Since Article 181(4-*bis*) of Decree-Law No 34/2020, as converted into law (in addition to Article 11 of Law No 214/2023, which did not affect the extension previously provided for until 2032), appears to violate Article 12 of the Services Directive (on which, see the recent Order No 161/2024 and Judgment No 109/2024 of this Court), a provision which is considered to be self-executing by the CJEU, the referring court should have disapplied those provisions within the case before it. However, as an alternative to disapplication, it could also have referred to this Court a question concerning the constitutionality of the provisions on the twelve-year renewal of concessions (Article 181(4-*bis*) of Decree-Law No 34/2020, as converted into law, and Article 11 of Law No 214/2023), given that these provisions established the legal framework relevant for its own assessment, in constituting the basis for the concession holders’ claims.

As this Court has recently clarified, the key issue in legitimising its intervention is an objection concerning a violation of a provision of EU law (contained in the Charter of Fundamental Rights of the European Union, in the Treaties or even in secondary law, as in the present case) that has some link with interests or principles of constitutional standing (Judgment No 181/2024; see also Judgments Nos [15/2024](#), [44/2020](#), [11/2020](#) and [20/2019](#)), thereby ensuring that the question has a “constitutional dimension”.

Where it finds that national law is incompatible with directly applicable EU law, the court must not apply the domestic provision, and where appropriate must either make a reference for a preliminary ruling to the Court of Justice (Article 267 TFEU) or raise a question of constitutionality concerning the violation of Article 117(1) of the Constitution.

The competence of this Court cannot in any way preclude or limit the power of the ordinary courts to make a reference for a preliminary ruling to the Court of Justice or to disapply any State legislation that is incompatible with EU law (CJEU, Grand Division, judgment of 22 June 2010, Joined Cases C-188/10 and C-189/10, *Melki and Abdeli*; CJEU, Grand Division, judgment of 22 February 2022, Case C-430/21, *RS*). Ultimately, it is the ordinary courts that must rule, having regard to the characteristics of the specific case, whether to disapply the law or to refer a question of constitutionality, without prejudice to the option of making a preliminary reference to the Court of Justice pursuant to Article 267 TFEU. A preliminary reference may also be made by this Court when apprised of a question of constitutionality, where there are doubts concerning the interpretation of EU law. Indeed, the Court of Justice has the task of ensuring, through its interpretation, the uniform application of EU law, thereby guaranteeing the equality of the Member States under EU law (Article 2 TEU). The “community of courts” and “dialogue” conducted among them, premised on the principle of sincere cooperation,

promote the full implementation of the principle of the primacy of EU law and ensure the proper functioning of the inter-dependencies among the various national and EU legal systems.

The system is characterised by a variety of remedies designed to ensure the full efficacy of EU law and, by definition, to prevent any preclusion. The system of centralised constitutional review is not at odds with a mechanism for the diffuse implementation of EU law, but rather cooperates with it in establishing increasingly more integrated protections. It falls to the individual court to choose the most appropriate remedy, weighing up the particular circumstances of the case before it. The engagement “with this Court, when called upon to issue a ruling with *erga omnes* effect, has proved to be particularly fruitful where the interpretation of the applicable law is not devoid of uncertainty, where the public administration continues to apply the contested provisions, where questions of interpretation may have a systemic impact with effects beyond the specific individual case, or where a balance needs to be struck between principles of constitutional standing” (Judgment No 181/2024).

4.– No examination of the objections of admissibility raised by the Autonomous Province of Bolzano is necessary.

ON THESE GROUNDS

THE CONSTITUTIONAL COURT

1) *declares* that the question as to the constitutionality of Article 3(1)(v)(no 2) of Autonomous Province of Bolzano Law No 12 of 2 December 2019 (Commercial Code), raised with reference to Articles 4, 5 and 9 of Decree of the President of the Republic No 670 of 31 August 1972 (Approval of the consolidated text of constitutional laws concerning the Special Statute for Trentino-Alto Adige) by the Sixth Division of the Council of State, with the relevant referral order, is unfounded;

2) *declares* that the questions concerning the constitutionality of Article 65 of Autonomous Province of Bolzano Law No 12/2019, raised with reference to Articles 3, 41, 97, 117(2)(a), (e) and (q) of the Constitution, by the Sixth Division of the Council of State, with the relevant referral order, are inadmissible.

Decided in Rome at the seat of the Constitutional Court, Palazzo della Consulta, on 15 October 2024.

Signed: Augusto Antonio BARBERA, President

Giovanni PITRUZZELLA, Judge Rapporteur