Corte costituzionale

JUDGMENT NO. 401 OF 2007

FRANCO BILE, PRESIDENT
ALFONSO QUARANTA, AUTHOR OF THE JUDGMENT

JUDGMENT No. 401 YEAR 2007

This Case concerned various direct references by regions regarding various provisions of "legislative decree No. 163 of 12 April 2006 (Code of public works contracts, public supply contracts and public service contracts implementing directives 2004/17/EC and 2004/18/EC)". The Court held that "Once in fact it has been found that the legislative action by the state falls under competition law, it also has the power to enact the relevant provisions governing that sector including through detailed provisions contained in regulations; this is of course subject to the requirement that the provisions as a whole pass constitutional muster regarding the respect for the criteria of adequacy and proportionality, in relation to any specific provisions which may from time to time be subject to scrutiny". The Court also found that "there is no duty to consult the regions where the state exercises its power to issue regulations in matters reserved to its exclusive legislative competence". The Court ruled groundless, on the grounds of their generic or indeterminate nature, the various questions concerning aspects of competition law, competence over which was vested in the state, but rather struck down the detailed state provisions which related more specifically to the administrative organisation of the tendering organs (which fell under regional competence).

THE CONSTITUTIONAL COURT

Composed of: President: Franco BILE; Judges: Giovanni Maria FLICK, Francesco AMIRANTE, 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,

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Articles 4(2), (3), (5), (6) and (9)*(a)*; 7(8); 10(1); 11(4); 48; 53(1); 54(4); 55(6); 56; 57; 62(1), (2), (4) and (7); 70; 71; 72; 75; 81; 82; 83; 84; 85; 86; 87; 88; 91(1) and (2) (and the provisions contained in Part II, Title I and Title II referred to therein); 93; 98(2); 112(5)(b); 113; 118(2); 120(2);

121(1);122(1)-(7); 123; 124(2), (5) and (6); 125(5), (6), (7), (8) and (14); 130(2)(c); 131; 132; 141; 153; 197; 204; 205; 240(9) and (10); 252(3) and (6); 253(3), (10), (11) and (22)(a) and 257(3) of legislative decree No. 163 of 12 April 2006 (Code of public works contracts, public supply contracts and public service contracts implementing directives 2004/17/EC and 2004/18/EC), commenced pursuant to applications for review by Tuscany and Veneto Regions, the Autonomous Province of Trento, and Piedmont, Lazio and Abruzzo Regions served on 4 July and 30 June 2006, filed in the Court Registry on 5, 6, 7 and 10 July 2006 and registered as Nos. 84, 85, 86, 88, 89 and 90 in the Register of Appeals 2006.

Considering the entries of appearance by the President of the Council of Ministers;

having heard the Judge Rapporteur Alfonso Quaranta in the public hearing of 23 October 2007 ;

having heard Lucia Bora, barrister, for Tuscany Region, Luigi Manzi Vittorio Domenichelli, barristers, Veneto Region, Giandomenico Falcon and Luigi Manzi, barristers, for the Autonomous Province of Trento, Emiliano Amato and Anita Ciavarra, barristers, for Piedmont Region, Vincenzo Cerulli Irelli, barrister, for Lazio Region, Sandro Pasquali and Vincenzo Cerulli Irelli, barristers, for Abruzzo Region and the *Avvocato dello Stato* Danilo Del Gaizo for the President of the Council of Ministers.

The facts of the case

1.— By application for review served on 30 June 2006 and filed on 6 July (appeal No. 85 of 2006), Veneto Region challenged Articles 4(2) and (3); 5(1), (2), (4), (7) and (9); 6(9)(a); 7(8); 10(1); 11(4); 53(1); 54(4); 55(6); 56; 57; 62(1), (2), (4) and (7); 70; 71; 72; 75; 81; 82; 83; 84; 85; 86; 87; 88; 91(1) and (2) (and the provisions contained in Part II, Title I and Title II referred to therein); 93; 98(2); 112(5)(b); 113; 118(2); 120(2); 122(1)-(7); 123; 125(5), (6), (7), (8) and (14); 130(2)(*c*); 131; 132; 141; 153; 197; 204; 205; 240(9) and (10); 252(3) and (6); 253(3), (10), (11) and (22)(a); and 257(3) of legislative decree No. 163 of 12 April 2006 (Code of public works contracts, public supply contracts and public service contracts implementing directives 2004/17/EC and 2004/18/EC), due to violation of Articles 76, 117(2), (3), (4), (5) and (6) and 118 of the Constitution, as well as the principle of loyal cooperation.

1.1.— The applicant argues that the aforementioned legislative decree No. 163 of 2006 was issued in accordance with the authorisation conferred on the government by Article 25 of law No. 62 of 18 April 2005 (Provisions governing the implementation of obligations resulting from Italy's membership of the European Communities. Community law of 2004) with a view to implementing directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, and directive 2004/18/EC of the European Parliament and the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts.

The aforementioned law No. 62 of 2005 also conferred on the government an additional and distinct authorisation to adopt "consolidated legislation containing provisions enacted pursuant to authorisations conferred with a view to transposing community directives, with a view to coordinating the same with the law in force in the same areas, making only such amendments are may be necessary to guarantee simplification and the logical, systematic and semantic coherence of the legislation" (Article 5(1)).

1.2.— Again as a preliminary matter, the applicant emphasises that the sector of public works contracts, public supply contracts and public service contracts falls under the competence of the regions pursuant to Articles 117(3) and (4), 118(1) and (2) of the Constitution.

The applicant asserts, recalling the contents of judgment No. 303 of 2003 of the Constitutional Court, that there is no specific area of law governing public works, "which are classified according to the object to which they relate"; accordingly, such works may from time to time fall under the exclusive competence of the state, or concurrent competence, or the residual competence of the regions, "as in the case of works involving infrastructure of exclusively regional or local interest".

A result of the division of competence described above "is the inescapable and fundamental distinction between 'public works of national interest' and 'public works of regional interest'".

This distinction is argued to apply, again according to the region, also to contracts relating to services or supplies, since the contracts in question are vital for the execution and management of public works and projects or are indispensable for the operation of bodies and institutions. In particular, it is noted that contracts for services and supplies entered into by the Region "due to its own internal requirements" fall under the residual legislative competence pertaining to administrative organisation.

Contracts concluded by other territorial bodies are also claimed to fall under regional competence "insofar as the Region may determine their functions in accordance with the principles contained in Article 118(1) and (2) of the Constitution".

1.3.— Having set out the above premises, the applicant in the first place avers that Article 4(2)(2) is unconstitutional insofar as it refers to "public works programming", "administrative organisation", and "tasks and requirements of the person responsible for the procedure", due to violation of Article 117 of the Constitution.

As far as "public works programming" is concerned, the applicant argues that this is not an area of law *stricto sensu* but a "manner of exercising competences", which must be regulated "from time to time by state or regional legislation depending on the relevance of the programming activity for matters falling under state or regional competence". The region therefore claims that the programming of public works of regional interest falls under the residual competence of the regions.

As far as the substantive matter of "administrative organisation" is concerned, the applicant points out that, as recognised under constitutional case law (citing judgment No. 17 2004), this area of law falls under the residual legislative competence of the regions and not concurrent competence, as far as non-state bodies are concerned (emphasising how the government has on this point also disregarded the issues raised by the Council of State, Consultative Section for Legislation, hearing No. 355 of 28 September 2006).

Finally, as far as the "tasks and requirements of the person responsible for the procedure" are concerned, it is argued that also in this case these are not a matter that is subject to concurrent legislative competence, since they concern organisational aspects "which may be freely regulated by the regional legislatures".

1.4.— The applicant goes on to argue that Article 4(3) is unconstitutional, due to violation of Article 76 of the Constitution – with reference to Article 1(6) and Article 5(5) of law No. 62 of 2005 – and of Article 117(5) of the Constitution.

The regional authorities emphasise that, with reference to contracts "relevant under EC law", the government had been authorised to enact only "rules necessary to implement the directives contained in the lists set out in Annexes A e B", which included the aforementioned directives 2004/17/EC and 2004/18/EC (Article 1(1) of law No. 62 of 2005).

As far as the relationship with the Community legal order is concerned, the region points out that Article 117(5) of the Constitution confers upon the regions in matters falling within their competence the power to transpose and implement EC law, subject to the procedural rules laid down by the state governing the exercise of the reserve power to enact legislation in cases involving a failure to act on the part of the region. These procedures are set out in law No. 11 of 4 February 2005 (General rules governing the participation of Italy in the European Union legislative process and on the procedures for implementing Community law obligations), which provides that the regions have the power to implement Community directives immediately in all matters falling under their competence, and that where a region fails to act, the state may only implement alternative measures of a preventive, supplementary and reserve nature.

The parent law No. 62 of 2005 (in particular Article 1(6)) allowed for the implementation of Community directives subject to the limits provided for under law No. 11 of 2005 due to the existence of substantive matters falling under the competence of the regions.

In fact, Article 4(4) of legislative decree No. 163 of 2006 contains a provision in line with that permitted under law No. 11 of 2005; however, this "is irredeemably contradicted by Article 4(3) which obliges the regions to respect unconditionally a series of rules brought under matters falling under exclusive state competence". It follows from this that Article 4(3) is unconstitutional as the government did not limit itself to laying down state legislation of an exclusively supplementary and reserve nature in relation to contracts "relevant under EC law".

As far on the other hand as “'below threshold' contracts of regional interest” are concerned, the region claims that Article 76 of the Constitution has been breached, since even though the requirement to enact only supplementary and reserve legislation did not flow from Article 117(5) of the Constitution, it was imposed by Article 5(5) of the parent law No. 62 of 2005. Through the reference to Article 1(6), this rule in fact provided that the government should have enacted exclusively supplementary and reserve rules when adopting consolidated laws bringing together the legislation implementing EC law and national legislation governing the same matters.

1.5.— The applicant goes on to formulate a series of challenges to Article 4(3) due to violation of Article 117(2), (3) and (4) insofar as it provides that the regions may not amend legislation in a range of sectors set out below.

A) In the first place, the applicant challenges the applicability of the contested provision to “sub-contracts”, since the relationship with competition law is so tenuous that if it were sufficient to provide a basis for the state's legislative competence “it would result in an anomalous manifestation of that 'protection'”. This is because “in economic and contractual relations there is no element which cannot be considered in isolation from a competition law point of view”. In the view of the region, sub-contracting rather falls under “the means by which the 'economic' result which the contract intends to achieve is reached”.

B) As far on the other hand as the “activity of designing” works and plant is concerned, “as understood in the Code” and in the light of the opinion of the Council of State mentioned above, it is emphasised that this pertains to the area of law of “territorial government”, including town planning and building control.

C) In relation to the reference contained in the contested provision to “safety plans”, it is noted that, as also recognised by the Council of State in the opinion cited above, such plans are related to the issue of “safety in the workplace” falling under concurrent competence (which is besides specified in Article 4(2) to be a concurrent matter) in relation to the reduction to a minimum of the risks of accidents for workers employed on the contract, “territorial government” for the part relating to executive design, as well finally as “professional training”.

D) As regards the "stipulation and implementation of contracts, including the management of the implementation, works direction, accounting and testing, with the exception of organisation aspects and administrative accounting", it is emphasised that these sectors concern organisational and procedural aspects of administrative action and should therefore be included, depending upon the object, within the matters falling under concurrent or residual competence; in the case before the court, it is noted, contract stipulation and implementation as governed by the Civil Code, which form part of the general area of private law, are not an issue.

E) Regarding the inclusion of the institution of testing within the ambit of the contested provision, it is argued that there are no grounds which justify "state interference with a regional matter which, by regulating this matter, provide for the adoption of measures aiming at ensuring uniform behaviour by tendering authorities in the execution of public works projects of regional interest".

F) As regards finally "contracts relating to the protection of cultural heritage", it is argued that, whilst the protection of cultural heritage is distinct from its "exploitation", there are also aspects of the legislation which do not have a "safeguarding function, such as for example the setting of the deposit, the administrative organisation of the projects, and the person responsible for the procedure or the approval of projects". Nor it is added can it be concluded that such matters fall prevalently under the competence of the state insofar as prohibited by Article 118(3) of the Constitution, which precisely with reference to the protection of cultural heritage, requires state law to regulate "forms of agreement and coordination".

1.6.—Veneto Region also argues that Article 4(3) is unconstitutional insofar as it provides, using a "self-classifying" provision, that the regions "may not enact legislation which departs from the present Code", rather than "may not make provisions in contrast with the principles which may be inferred from the present Code in relation to the competition law", due to alleged violation of Articles 76, 117(2), (3), (4) and (5) of the Constitution and of the principle of reasonableness.

In particular, it is argued that even in the context of competition law, the state may not "impose obligations on the regions through a body of detailed and heterogeneous provisions, all brought together indiscriminately by virtue of their mandatory status".

On this point, having argued that constitutional case law has found that projects in the above matters must be characterised by the respect for the requirements of proportionality and adequacy, the region claims that for contracts above the threshold the goals of protecting competition are already guaranteed under EC law; for this reason "for contracts of regional interest (...) national legislation which stands between EC law and regional legislation appears as a rule to be disproportionate compared to the goal, other than in exceptional cases, the burden of identifying and demonstrating which should be incumbent upon the state legislature".

As far on the other hand as contracts below threshold are concerned, the region stresses that "the requirement to protect competition appears to be less stringent in that, in special circumstances such as for example the granting of a concession involving a very limited economic value", it must at most satisfy requirements of transparency without it being necessary to follow tender procedures.

In conclusion, the applicant submits that in order for Article 4(3) to pass constitutional muster, it would be necessary to reduce the scope of the restriction imposed on the regions, obliging them to respect only the fundamental principles laid down in the provisions referred to.

1.7.— The application for review before the court also claims that Article 4(2) and (3) breach Article 76 of the Constitution, with reference to Article 25(2) of law No. 62 of 2005.

This latter provision in fact stipulated that legislative decrees had to be issued after consultation with the Joint Assembly mentioned in Article 8 of legislative decree No. 281 of 28 August 1997 (Specification and extension of the competences of the permanent Assembly for the relations between the state, the regions and the autonomous provinces of Trento and Bolzano and unification, for matters and tasks of common interest to the regions, provinces and municipalities, with the State, Cities and Local Autonomous Bodies Assembly).

Indeed, the Joint Assembly was effectively consulted on the draft of the legislative decree, which however passed judgment on a text which for the purposes of the provisions contested before this court was "completely different" from the text which was then definitively published.

In fact, the original version of Article 4 limited itself to recalling generically the constitutional limits of regional legislative powers and identified only two specific substantive matters (classification and selection of tenderers; conduct of the tender procedures) falling under exclusive state competence in competition law matters.

Subsequently, even though "the opinion given by the Assembly was (…) already strongly negative", the government then "completely rewrote" the provision before the court "in a manner which significantly limited the regions' legislative competence", identifying "five aspects of the legislation which allegedly fell under concurrent competence (whilst the original draft of the provision was silent on this point), and even listing in sub-section 3 seventeen 'objects' (as against only two contained in the original text)" reserved to the exclusive competence of the state.

On the basis of the arguments set out above, the applicant claims that the limit provided for under Article 25 of law No. 62 of 2005 has been "substantively violated".

1.8.— The applicant goes on to argue moreover that Article 5(1) of legislative decree No. 163 of 2006 violates Articles 117(6) and 118 of the Constitution and the principle of loyal cooperation.

The contested provision stipulates that the government shall enact regulations to give effect to and implement the Code, following a procedure in which the Superior Council for Public Works and the Council of State participate, but not the regions.

The provision before the court is claimed to be unconstitutional not only due to the fact that Article 4(3) classifies as exclusive state matters certain sectors and objects which however fall under the competence of the regions, but also the fact that for the cross-cutting matters falling under the legislative competence of the state, the state may intervene only only through primary legislation and not also by statutory instrument, as there are no grounds for differentiating between the limitations articulated in fundamental principles and those contained in legislation governing cross-cutting matters. Nor can any other conclusion be reached by recalling constitutional case law (judgment No. 88 of 2003) which has accepted, in relation to a cross-cutting matter (essential service levels), that administrative decisions may, subject to the necessary involvement of the regions, develop and more closely regulate specific goals and objectives formerly elaborated in detail by the law. This is because the relationship

between the law and regulations may not be assumed to be equivalent to that between law and administrative acts.

It is argued in addition that “the political autonomy” enjoyed by the regions may be “limited only by acts directly or indirectly attributable to Parliament, the forum for national representation”, and not also by the government acting alone and the “majority which supports it”.

In conclusion therefore, the provision before the court is unconstitutional insofar as it provides for the application to the regions and to contracts of regional interest of the regulations referring to the sectors which Article 4(3) classifies as competition law matters.

1.9.— In the alternative, the applicant argues that the principle of loyal cooperation has been breached. In fact, it is noted that competition law impinges upon regional competence over public works, administrative organisation (both of the region and of bodies dependent on it) and the regulation of administrative functions.

It follows from this that it is necessary that the aforementioned state matters be coordinated with regional competences through an instrument of cooperation such as an agreement (recalling *inter alia* Constitutional Court judgment No. 303 of 2003). It is on this point significant, it is added, that in relation to certain aspects the very same legislative decree provides for the adoption of regulations following “agreement with the Joint Assembly” (Articles 201(3), 204(3), 252(3)) or “having consulted the Joint Assembly” (Article 204(4)) or “having consulted the State-Regions Assembly” (Article 253(10)).

1.10.— Again in the alternative, the region argues that law No. 11 of 2005 provides for certain interferences by the state in the regions' task of implementing [EC law] and “none of these allows for the adoption of binding regulations”.

The first type of state intervention entails the adoption of rules as “pre-emptive substitution” for regions which have failed to act: “and even accepting that “pre-emptive substitution” may occur by regulation, the regulations in question must also have the same supplementary and reserve character”, in contrast to the rule contained in the contested provision.

A second type of state intervention occurs in cases in which the Community legislation affects both regional matters and state matters listed in Article 117(2) of the Constitution.

When the exclusive legislative competence of the state pursuant to Article 117(2) of the Constitution is at issue, "the government shall indicate the criteria and formulate the directives with which the regions and autonomous provinces must comply in order to ensure respect for requirements pertaining to the unitary nature of the state, the pursuit of economic programming objectives and respect for international law obligations" (Article 16(4) of law No. 11 of 2005). Accordingly, the law implementing Article 117(5) of the Constitution does not amount to a "usurpation of regional competences, but only the prior establishment of objectives falling within the ambit of specific goals". The aforementioned Article 16(4) goes on to provide that the criteria and the directives shall be imposed: "a) by law or other instrument with the force of law"; b) or "on the basis of Community law, by regulation provided for under Article 11"; c) or again "by resolution of the Council of Ministers, acting on a proposal by the President of the Council of Ministers or the Minister for European Community Affairs in consultation with the competent ministers according to the procedures contained in Article 8 of law No. 59 of 15 March 1997".

Ultimately, in relation to matters falling under Article 117(2) of the Constitution which impinge upon regional matters (such as those before the court), the adoption of regulations is not permitted.

In fact, the regulations provided for under Article 11 of law No. 11 of 2005 are those which Community law specifically authorises to implement directives, and may contain detailed principles and directional criteria "where the directives leave room for choice regarding the manner of their implementation". However, the region argues, no such authorisation was contained in the parent law No. 62 of 2005 which, on the contrary, always refers to implementation by legislative decree where it does not directly implement the directives.

Furthermore, the resolution of the Council of Ministers mentioned above, which was intended to establish criteria and directions in order to guarantee state interests in cross-

cutting matters, would only be valid where adopted following an agreement with the Joint Assembly.

The region accordingly concludes on this point by arguing that the provision before the court is unconstitutional insofar as it provides that the power to make regulations applies also to contracts of regional interest to which Community law applies; in the alternative, the provision is argued to be unconstitutional insofar as it does not provide that the regulation be adopted following agreement between the state [and the Joint Assembly] pursuant to Article 8 of law No. 59 of 1997.

The applicant reaches these conclusions on the basis of the argument that law No. 11 of 2005 cannot be set aside through primary legislation, since it is a law which "directly implements Article 117 of the Constitution" (citing Constitutional court judgment No. 12 of 2006).

Secondly, a derogation as significant as that contained in law No. 11 of 2005 would have required a specific principle or directional criterion which is absent in this case. It follows from this that the provision before the court also breaches Article 76 of the Constitution in that the government has overstepped the authorisation conferred upon it "and the region has standing to challenge such a violation as it concerns a failure to respect the provisions enacted in order to establish its own autonomy in the implementation of Community directives".

1.11.— Veneto Region challenges Article 5(2) of legislative decree No. 163 of 2006 due to violation of Articles 117(3) and (4), and 76 of the Constitution insofar as it provides that the provisions contained therein which also apply to the regions in that they implement or transpose provisions falling under the exclusive competence of the state pursuant to Article 4(3) may be determined by regulation.

The applicant emphasises that, "even though the rationale can be appreciated", a unilateral classification by the state of the provisions applicable to the regions "cannot be made by government regulation especially where, as in the present case, a very broad margin of discretion is left to the regulation". It goes on to argue that "the contested provision ends up leaving to the regulation both the horizontal limits to the region's competence (through the "negative" definition of its spheres of competence) as well as the vertical limits (through the imposition of more or less stringent limits intended to

regulate internally those regional matters which apply in the same areas as state matters)". From the region's point of view however, such a task must be carried out by primary legislation or an equivalent instrument, as required under Article 117(3) and (4) of the Constitution and the principle of legality which governs relations between the state and the regions.

1.12.— Veneto Region also challenged Article 5(7) and (9) insofar as they allow all tendering authorities to adopt their own terms of reference, or to adopt as their own the general terms of reference issued by the Minister for Infrastructure, due to violation of Article 117(3) and (4) of the Constitution. This is because – by preventing regional law from approving specific general terms of reference, or from permitting tendering authorities to adopt uniform frameworks of special terms of reference – the above provisions violate the legislative competence vested in the region over public works "of regional interest" as well as competence over internal organisation and that of regionally dependent bodies.

1.13.— Veneto Region also contests Article 10(1) insofar as it provides that there must be a "single person responsible for procedures throughout the project, award and implementation stages" because the object of this provision falls under the residual competence of the regions over administrative organisation, as argued by the applicant with reference to Article 4(2).

In the event, it is added, that the Constitutional Court were not to accept such a solution, the region argues that the provision in question is unconstitutional due to its detailed character which does not leave any scope for adaptation: in fact, it is not clear why the above stages, which are structurally, functionally and economically distinct, must necessarily have a single person responsible for procedures.

1.14.— Article 98(2) is on the other hand contested insofar as it provides that "the approval of definitive projects by the municipal council amounts to planning permissions for all purposes". Whilst recognising that the provision pertains to the substantive matter of territorial government, the applicant nonetheless complains that it "expresses a very broad-sweeping mandatory rule which removes the decision over whether to grant planning permission from the control of the competent region, with the

resulting violation of the competences vested in it by the Constitution" (citing Constitutional Court judgment No. 206 of 2001).

1.15.— The applicant also challenges Article 253(3) and (22)(a) insofar as they provide respectively that "up until the entry into force of the regulation mentioned under Article 5, presidential decree No. 554 of 21 December 1999, presidential decree No. 34 of 25 January 2000, and the other regulations in force which, under the terms of the present Code, must be contained in the regulation mentioned in Article 5 shall continue to apply to public works subject to compatibility with the Code. For public works, up until the adoption of the new general terms of reference, ministerial decree No. 145 of 19 April 2000 shall continue to apply if referred to in the contract notice" (sub-section 3); secondly, "in relation to Article 125 (public works, public services and public supplies paid from state funds) up until the entry into force of the regulation, publicly funded works shall be governed by presidential decree No. 554 of 21 December 1999 subject to compatibility with the provisions contained in the present Code" (sub-section 22(a)).

According to the region, these provisions breach Article 117(2), (3), (4) and (5) and Article 118 of the Constitution insofar as they leave the implementation of the primary provisions already contested for all public works of "regional interest" to a regulation to be issued on state level.

1.16.— In the alternative finally, Veneto Region challenges the following provisions contained in the Code: Articles 6(9)(a); 7(8); 11(4); 53(1); 54(4); 55(6); 56; 57; 62(1), (2), (4) and (7); 70; 71; 72; 75; 81; 82; 83; 84; 85; 86; 87; 88; 91(1) and (2) (and the provisions contained in Part II, Title I and Title II referred to therein); 93; 112(5)(b); 113; 118(2); 120(2); 122(1)-(7); 123; 125(5), (6), (7), (8) and (14); 130(2)(c); 131; 132; 141; 153; 197; 204; 205; 240(9) and (10); 252(3) and (6); 253(10) and (11); and 257(3).

In the event that the court does not accept the challenges to Article 4(3), the provisions mentioned above should be declared unconstitutional since, even though they refer to competition law matters, "they are extremely detailed and excessively thorough and therefore unlawfully restrict regional legislative autonomy, providing for measures which are disproportional and excessive compared to the goal pursued".

In particular, Article 91(1) and (2), as well as the provisions contained in Part II, Title I and Title II to which the above provision refers are argued to be unconstitutional. On this point, it is argued that regarding in general contracts for amounts below the Community threshold, the state legislature should limit itself to setting out fundamental principles which aim to ensure transparency, equal treatment and non-discrimination, or in other words to regulating the market and encouraging competition within the same, without going so far, as occurred in the case before the court, as enacting "broad-sweeping and detailed legislation" (citing Constitutional Court judgment. 345 of 2004).

For the same reasons, i.e. due to the existence of excessively thorough and detailed regulation, the following provisions are contested:

– Articles 6(9)(a) and 7(8) "insofar as, on account of their excessively detailed nature, they prevent the regions from enacting legislation to establish more streamlined procedures which are compatible with the internal organisation of the regional sections of the Public Contracts Watchdog";

– Article 11(4) and Articles 81-88 concerning the regulation of assessment criteria, "which due to their extreme thoroughness do not leave any effective space for any free-standing detailed legislation by the region";

– Article 53(1), insofar as, for amounts below the Community threshold, it identifies in an exclusive and mandatory manner the type of contracts which may be used to realise public works projects, and which is moreover more restrictive than the procedures allowed for under Community law;

– Articles 54(4), 56, 57, 62(1), (2), (4) and (7) and 122(7) "insofar as, on account of their excessively detailed nature, they prevent the regions from enacting legislation governing negotiations, above all with reference (also in this case) to the sector of contracts below threshold";

– Article 55(6) and 62(1), (2) and (4) insofar as "by providing for the possibility of limiting the number of candidates suitable for invitation to participate in restricted procedures only in relation to "public works for amounts equal to or greater than forty million Euros", they appear irrationally to prevent the regions from enacting their own legislation governing the "so-called '*forcella*' (suitability criterion) also in relation to contracts below threshold";

– Articles 75 and 113 “which which contain broad-sweeping and detailed provisions governing the forms of guarantee”, as well as the related Article 252(6)”;

– Article 93 “in that it makes detailed and rigid provision for design levels”;

– Article 112(5)(b), concerning project verification;

– Article 118(2) which governs “sub-contracting in an extremely detailed manner”;

– Articles 120(2) and 141, concerning testing, given the extremely detailed nature of the provisions contained therein, “with the law providing that yet further detailed provision may be made by regulation”;

– Article 122(1)-(6) and Articles 70, 71 and 72 insofar as they apply to contracts for amounts below the Community threshold through specific references or the general reference clause contained in Article 121(1); a similar challenge is also made for the same reasons to Article 252(3), as well as Article 253(10) and (11);

– Article 123 “due to the fact that the 'simplified restricted procedure' (governed therein) applies to public works contracts below threshold”;

– Article 125 (5)-(8) and (14) governing public sector acquisitions of goods, services and public works, on account of its excessively detailed nature;

– Article 130(2)(c), insofar as it provides for the award of works management activities to “individuals chosen according to the procedures provided for in the present Code for the appointment of designers”;

– Article 131, “which regulates safety plans in the most detailed terms”;

– Article 132, “insofar as the detailed regulation of project modifications whilst work is in progress contained therein does not leave any autonomous scope for regional legislative action”;

– Article 153, “which governs the stage involving the gathering and selection of proposals with reference to the institution of project financing”;

– Articles 197, 204 and 205, “which, even though they may be theoretically related to the 'protection of cultural heritage' (falling under the exclusive competence of the state), in any case are extremely detailed and excessively thorough, and therefore unlawfully restrict regional legislative autonomy, providing for (…) measures which are disproportional and excessive compared to the goal pursued”;

– Article 240(9) and (10) since, even though Articles 239 *et seq* "without doubt relate to a matter under the exclusive competence of the state which allows for the introduction of more stringent limits compared to those permitted respectively for the protection of competition and cultural heritage", sub-sections 9 and 10 nonetheless regulate "strictly organisational aspects of amicable settlements in an excessively detailed manner, depriving the regions of any possibility of passing their own autonomous legislation in such matters";

– Article 257(3), which for the year 2006 confirms the lists provided for in Article 23 of law No. 109 of 11 February 1994 (Framework law governing public works).

1.17.— In its application for review the region also applied for a suspension order pursuant to Articles 35 and 40 of law No. 87 of 14 March 1953.

2.— The President of the Council of Ministers entered an appearance, represented and advised by the *Avvocatura Generale dello Stato*, which, as a preliminary matter, argued that the question concerning the violation of the principles contained in the parent law was inadmissible in the light of the constitutional case law which holds that disputes lodged by the regions in which a direct violation of their competences is not averred are inadmissible (citing Constitutional Court judgments Nos. 287 of 2004 and 274 of 2003).

2.1.— In relation to the other questions, the state representative emphasises that the regulation of public works — which is not a real free-standing area of law — covers various substantive areas of law (citing Constitutional Court judgment No. 303 of 2003). In particular, it is argued that the aspects concerning the classification and selection of tenderers, tender procedures, award criteria, sub-contracting and market oversight entrusted to an independent authority are related to competition law as understood by the Constitutional Court in judgments Nos. 272 and 14 of 2004. The cross-cutting nature of the competence at issue is claimed to justify the intervention of the state legislature also within the ambit of matters falling under both concurrent and residual regional competence, "but not however throughout the whole area in question, with the result that as a rule certain spaces remain which are not sensitive to such problems and in relation to which the normal division of competences remains in place".

The *Avvocatura Generale dello Stato* considers moreover, recalling Opinion No. 355 of 2006 of the Council of State, that in addition to competition issues, "there are non marginal organisational, economic and other issues, such as design, works direction, testing, and the tasks and prerequisites of the person responsible for the procedure which, depending on the object of the contract, may fall under both concurrent competence as well as residual regional competence (as well as the exclusive competence of the state): in the latter case, regional legislative activity remains subject to the fundamental principles contained in the Code; in the former two cases, regional legislation may be enacted freely "without prejudice to the possible relevance of different restrictions" (imposed by the requirement to guarantee transparency or by general principles of law governing administrative procedures)".

Finally, it is noted that the law governing public works contracts also touches on other matters falling under the exclusive competence of the state: private law (concerning the performance of contracts), jurisdiction and procedural rules, as well as administrative justice, with reference to disputes.

2.2.— Having made this general premise, the state representative argues in relation to the challenges to Article 4(2) first that the legislation governing "public works programming" and "project approval for the purposes of town planning and expropriation" falls within the ambit of concurrent matters concerning territorial government (Article 117(3) of the Constitution).

As far as administrative organisation is concerned ("which, with the exception of state bodies and organs, falls under regional competence"), it is emphasised that in bringing it within the scope of Article 4(2), Parliament did not intend to deprive the regions of [competence over] the entire substantive matter in question, but to emphasise that "there may be particular issues concerning principles which must be respected by regional legislatures (such as the guarantee of transparency or the presence of the person responsible for the procedure)".

2.3.— Regarding the challenges specifically brought against Article 4(3), the following observations are submitted.

For contracts below threshold, in contrast to the assertions of the applicant, it is a matter for the state to "determine common principles which ensure transparency, equal treatment and non-discrimination".

Award procedures on the other hand fall under competition law, and do not pertain to organisational aspects, with the contested provision specifying that such aspects fall in any case under the exclusive competence of the state.

As far as the reference contained in the provision before the court to design is concerned, it is argued that – given its various manifestations including designer appointments, the levels and contents of design and the execution of projects – it falls "in many ways under exclusive state competence", in that it touches on the following areas of law: "competition law; private law; creative works (i.e. the projects); the determination of essential service levels concerning political and social rights which must be guaranteed throughout the country, since design levels aim to guarantee the implementation in accordance with the state of the art of public works intended to secure the political and social rights of the collectivity; protection of the environment, the ecosystem and cultural heritage achieved through a correct design". The state representative however points out that aspects relating to territorial government over which competence is shared must be excluded from the exclusive competence of the state and "that these have been correctly referred to in the contested Article 4(2) (public works programming, project approval for for the purposes of town planning and expropriation)".

The points raised above also apply, again in the opinion of the *Avvocatura Generale dello Stato*, to safety plans over which the state exercises exclusive legislative competence only in relation to their formation, whilst competence is concurrent for substantive aspects of health and safety rules.

As for the alleged breach of Article 117(5) of the Constitution, it is argued that the Code has maintained the competence of the regions to implement Community directives in matters falling under their competence: in such areas in fact, as expressly provided under Article 4(4), the provisions of the Code may be supplanted, hence applying unless and until the regions introduce their own legislation.

According to the state representative, the claim that the principle of loyal cooperation has been breached is also groundless since, in the case before the court, the text of the legislative decree was presented for examination to the State-Regions Assembly, and the fact that the regions' requests were not accepted is not of any relevance.

In any case, it is added, it is not possible to identify "a constitutional basis for the requirement that legislative procedures be informed by the principle of loyal cooperation between state and regions (nor is the summary reference to Article 11 of constitutional law n. 3 of 2001 sufficient)" (citing Constitutional Court judgment No. 196 of 2004).

2.4.— As regards the challenges to other provisions contained in legislative decree No. 163 of 2006, the *Avvocatura Generale dello Stato* argues that they are groundless, since in relation to the issues regulated therein the state acted in accordance with its own competence over competition law and private law.

2.5.— As far as the challenge to Article 5 is concerned, the state representative points out that the challenge is based on the assumption that Article 4 embraces substantive matters falling under regional competence, with the result that the provision of a state power to issue regulations in such areas is unconstitutional. In the light of the points set out above, once the aforementioned Article 4 has been found to comply with the constitutional division of competences, it follows that Article 5 is also constitutional, since it refers to Article 4 for the identification of the sectors in which the passing of state regulations is possible.

The additional complaints brought against Article 5, concerning the failure to provide for consultation with the regions, are also groundless since the constitutional case law referred to (judgment No. 196 of 2004) held that no "constitutional basis" could be found for such procedures.

2.6.— The state representative concludes arguing that there are no grounds to order the suspension of the effectiveness of the contested provisions in the light of the "case law applying Article 35 of law No. 87 of 1953".

3.— By application for review served on 30 June 2006 and filed on 7 July (appeal No. 88 of 2006), Piedmont Region challenged Article 4(2) and (3) and Article 5 of legislative decree No. 163 of 2006, due to violation of Articles 117 and 118 of the

Constitution, as well as “the principles of loyal cooperation, subsidiarity, adequacy and proportionality”.

After having outlined the principle stages which led to the issue of the legislative decree, the applicant pointed out that it had already enacted legislation governing contractual activity, contained in regional law No. 8 of 23 January 1984 (Provisions concerning the administration of property and the contractual activity of the Region), which applied in particular to contracts below the Community threshold. The applicant also argued that the region was about to pass a bill harmonising rules governing contracts for public services, public supplies and public works which was intended to establish a reference framework consistent with Community directives and its fundamental principles and which will be able to take into consideration particular regional requirements in relation to all aspects falling within the scope of the region's competence. However, the Code before the court had “exhausted” the regulation of such matters, legislating in areas specifically falling under concurrent or residual regional competence.

As a preliminary matter, the regional authorities refer to the contents of Constitutional Court judgments No. 303 of 2003 concerning competence in the area of public works, and No. 345 of 2004 concerning state competence over competition law and its limits.

It also points out that in the sector in question it is necessary to distinguish between contracts made by administrations or state bodies and contracts of regional interest and that the parallel presence of and interrelation between state and regional competence necessarily imposes a duty to respect the principle of loyal cooperation.

3.1.— In the light of the above, the applicant claims in the first place that Article 4(2) of legislative decree No. 163 of 2006 is unconstitutional, arguing that through this provision Parliament had defined, in an incorrect manner and unilaterally without consulting the regions, the matters over which competence is shared. In particular, it complains that the contested provision included matters relating to administrative organisation which falls under the residual competence of the regions, “except for the state and national public bodies”, despite the absence of requirements pertaining to the unitary nature of the state.

3.2.— The applicant also contested Article 4(3) insofar as it provides that the regions, may not enact legislation at odds with that contained in the Code in relation to a series of sectors, without indicating which matters are at issue, “out of respect for Article 117(2) of the Constitution”.

The region argued that, even assuming that competition law was relevant, the provision before the court did not comply with the requirements of reasonableness and proportionality (citing Constitutional Court judgments Nos. 272 and 14 of 2004) “because it indiscriminately subjects all matters specified in the provision to the Code, including its detailed provisions, for each of which however there is legitimate scope for the region to enact legislation”. In consequence, “even in relation to the classification and selection of tenderers, award procedures, assessment criteria and sub-contracting where the need to protect competition is most keenly felt, there are still aspects where the specific satisfaction of special needs of the regions or of the organisational autonomy requirements of the various public bodies may legitimately and rationally justify the enactment of regional legislation. This applies particularly in relation to public works contracts 'below threshold'”.

A similar conclusion is reached, from the region's point of view, also where the general area of private law is considered.

As regards in fact the stipulation and implementation of contracts, alongside works management, accounting and testing aspects related to the organisation of bodies, there are “significant spaces which must be ascribed to organisational issues and administrative organisation” and which fall within the remit of the region, with the exception of matters relating to state and national public bodies.

The region also disputes the inclusion of “safety plans” within the exclusive legislative competence of the state, as this sector, which must guarantee workers engaged the necessary safety measures, concerns the concurrent matter of safety in the workplace.

Similar critical arguments are brought against the inclusion in the provision in question of “design activity” which, as far as public works projects are concerned, falls within the ambit of territorial government and, as far as public service and supply contracts are concerned, “must be a matter for the body vested with substantive

competence" and therefore "for aspects which do not concern the state and national public bodies" must fall under "regional legislative competence over administrative structure and organisation".

3.3.— Finally, Article 5 is challenged insofar as it provides that "the state shall issue a regulation making provision for the implementation of the present Code in relation to contracts for public works, public services and public supplies entered into by administrations and state bodies and, regarding only those aspects contained in Article 4(3), in relation to the contracts of any other administration or equivalent subject".

The applicant argues that this provision is unconstitutional on two grounds.

In the first place, for the reasons set out above, Article 4(3), to which the provision before the court refers, contains a reference to matters falling under regional competence, which means that regulation by the state is not permitted.

Secondly, since cross-cutting matters under the exclusive legislative competence of the state also interfere with regional competences, it is necessary that the draft state regulation be subject to agreement procedures before the Joint Assembly in accordance with the principle of loyal cooperation.

4.— The President of the Council of Ministers also entered an appearance in this case represented by the *Avvocatura Generale dello Stato*.

In particular, in relation to the challenges to Article 4(2) based on the inclusion within the scope of its application of "administrative organisation" and "structure", the arguments already contained in the written statement submitted in the proceedings initiated by Veneto Region are reiterated.

Similarly, the arguments previously submitted as justification for the groundlessness of the complaints concerning Articles 4(3) and (5) are also repeated.

5.— By application for review served on 4 July 2006 and filed on 5 July (appeal No. 84 of 2006), Tuscany Region also contested a range of provisions contained in legislative decree No. 163 of 2006.

After having set out a detailed introduction the stages which resulted in the enactment of the Code, the applicant pointed out that it had made legislative provisions of its own governing the contracting-out of public services and public supplies in regional law No. 12 of 8 March 2001 (Provisions governing regional contractual activities) and the

related implementing regulation adopted by decree No. 45 of the president of the Regional Council on 5 September 2001 concerning contracts of the region and regional bodies, and that it was promptly acted to make provision for a consolidated law governing the contracting-out of public services, public supplies and public works applicable also to local autonomous bodies. The applicant argues that the Code "thereby destabilises the regional legislative framework already in place and leaves very little space for future regulation of the matter by the region".

5.1.— The applicant avers in the first place that Article 4(2) violates Articles 117 and 118 of the Constitution insofar as the latter include amongst concurrent matters public works programming, project approval, and the tasks and requirements of the person responsible for the procedure, which according to the region do not fall under shared legislative competence.

Similarly, it is also noted that for non-state bodies, administrative organisation falls under the residual legislative competence of the regions (citing Constitutional Court judgments Nos. 17 and 2 of 2004). Nor are there any centralisation requirements capable of justifying regulation as a subsidiary matter by the state.

5.2.— Article 4(3) was also contested insofar as it provides that the regions may not enact legislation which differs from that contained in the Code with reference to safety plans and design activity, on the grounds that it violates Articles 117 e 118 of the Constitution.

In particular, regarding the inclusion of safety plans in the list contained in the provision before the court, it is noted that, as recognised by the Council of State in opinion No. 355 of 2006 cited above, these concern the concurrent matter of safety in the workplace, since "the identification of the types of safety plan and of contracts in relation to which the drafting of such plans is considered to be necessary, the determination of the minimum contents of the plans and the procedures for the detachment of safety requirements, which are to be removed from the ambit of competitive tendering, can only be put in place in order to guarantee to workers engaged on the contract conditions which may reduce to a minimum the risk of accidents". In other words, the regulation of the plans is intended to relate only to the identification, analysis and evaluation of concrete risks with reference to the relevant industrial

processes, as well as the identification of preventive and protection measures designed to contain the risks flowing from the industrial processes in question.

Secondly, the applicant points out that safety plans constitute an integral part of the executive design of public works and are as such destined to have an impact also on the field of territorial government over which competence is shared.

Similar arguments are made in relation to design activities: again according to the region, such activities fall within the residual competence of the regions, since they are not indicated in any of the substantive matters mentioned in Article 117(2) and (3) of the Constitution.

In the alternative, the region argues that the design of public works falls under the concurrent matter of territorial government since it is "aimed to lead to the realisation of public works in the territory of the region". The planning of public supplies and public services must on the other hand in any case be attributed to the residual competence of the regions, as it cannot be inferred from any state competence provided for in the Constitution. It must be added that the design of public supplies and public services "in essence coincides with the legislation governing general and special terms of reference, i.e. instruments intended to specify the legal and technical aspects of contracts, which must as such necessarily fall within the sphere of autonomy of the individual tendering body". The applicant also claims that the regulation of the appointment of designers, which is included amongst the matters expressly listed by the contested provision under the heading "Classification and selection of tenderers" and "Award procedures", is separate from questions of design.

5.3.— Article 5(1), (2) and (4) is argued to be unconstitutional due to violation of Articles 117 and 118 of the Constitution since it encroaches upon the competence of the regions by authorising the issue of regulations for the sectors mentioned in Article 4(3). In fact, these sectors also include design activities and safety plans, which for the reasons set out are covered by matters falling under concurrent competence or the residual competence of the regions, which means that the state may not issue regulations, in the light of Article 117(6) of the Constitution.

In the alternative, should "Article 5(1) and (2) be upheld as constitutional, sub-section 4, which governs procedures for the adoption of regulations without providing

for any participation by the region, would in any case be unconstitutional": in fact, "the broad and detailed content of the regulation interferes with regional competences which means that, in accordance with the principle of loyal cooperation, it would be necessary for the amended regulation to be subject to concerted action with the regions".

5.4.— The region challenges Article 48 of the legislative decree before the court, which provides as follows: "1. Before opening the envelopes containing the offers presented, the tendering authorities shall request a number of tenderers representing not less than 10 percent of the offers presented, rounded up to the next unit and chosen by public drawing of lots, to prove within ten days of the request that they comply with any economic/financial and technical/organisational capacities required in the tender, submitting the documentation indicated in the said tender or in the letter of invitation. Where such evidence is not provided, or where it does not confirm the declarations contained in the application to participate or in the offer, the tendering authorities shall exclude the participant from the tender, retain the relevant provisional deposit and report the matter to the Authority so that it may take the measures contained in Article 11(6). The Authority shall also provide for a suspension of between one and twelve months from participation in award procedures.

2. The request mentioned in sub-section 1 shall also be forwarded, within ten days of the conclusion of tender procedures, to the successful tenderer and the tenderer immediately below it in the ranked list, unless the two were included amongst the tenderers chosen by lot, and where these do not submit evidence or do not confirm their declarations, the above sanctions shall apply, the new anomaly threshold of the offer shall be determined and any consequent new award shall be made".

In the view of the applicant, these provisions violate Articles 117 and 118 of the Constitution since, whilst the choice of the sanctions regime "logically falls under state competence which ensures uniformity in relation to an aspect of such great importance, the same cannot be said with reference to the other contents of the provision in question". In fact, it is emphasised that the percentage of subjects to be controlled, as well as the procedures according to which the individual tendering authority carries out the above control must be brought back "within the ambit of the organisational autonomy of the tendering authority".

Without prejudice to the principle laid down in Article 71 of presidential decree No. 445 of 28 December 2000 (Consolidated text of legislative provisions and regulations governing administrative documentation) according to which the administrations are required to carry out suitable checks, including sample checks, of the declarations made by the tenderers, the procedures by which this principle is implemented are, according to the applicant, an "expression of autonomous and organisational choices by the administrations in question".

The contested provisions were amended by Article 10(1)-*quater* of law No. 109 of 11 February 1994 (Framework law governing public works), which also extended them to the sectors of public supplies and public services, without however "giving reasonable consideration to the differences and specific characteristics which these sectors have compared to the public works sector". The applicant notes in fact that, whilst checks on compliance with the technical/organisational and economic/financial requirements of the public contractors may be assumed to be concluded within a short period of time through the acquisition of SOA certification,* the same cannot be said for the sectors of public services and public supplies in relation to which, given the absence of appropriate mechanisms, checks are made by the tendering authority "separately and on a detailed level with the resulting lengthening of the time-scale necessary to conclude the relevant checks". For these reasons, the individual tendering authorities may decide to adopt different control procedures, with a view to limiting the negative effects of the suspension of the contract "where the failure by a tenderer to confirm that it satisfies the prerequisites, which therefore means that its participation is unlawful, does not invalidate the tender procedures as a whole". It is noted in fact that in cases involving award according to the criterion of the lowest price, the evaluation of individual offers does not depend on a comparison between the offers which makes it reasonable, as in the case of award according to the criterion of the most economically favourable offer, to bring forward the point at which the checks are made. "None of this – the applicant goes on to specify – gives consideration to the fact that, in addition to the

* Translator's note: SOA certification is necessary for participation in public tenders, and confirms for instance compliance with such ISO standards as may from time to time be required by law. SOA [*Società Organismi di Attestazione*] is the generic name for the certification agencies which issue such documentation.

technical/organisational and economic/financial prerequisites, in order to participate in the tender the applicants must declare that they also comply with the general requirements provided for under Article 38 of the Code (…). The tendering authorities are therefore faced with the choice over whether to carry out a double control procedure (during the tender for the technical and economic requirements, and after the provisional award for the legal requirements), or to unify the two procedures, with the resulting excessive lengthening of the time-scale for the tender, which is also to the detriment of the general principle of simplification".

Similar arguments are submitted in relation to the contested Article 48(2) insofar as it requires the tendering authorities to carry out checks not only on the successful tenderer but also on the tenderer immediately below it in the ranked list. The complaint is based on the fact that, without prejudice to the general requirement to carry out detailed sample checks, the determination of the procedures for selecting the tenderers to be controlled must fall within the ambit of the organisational autonomy of the individual tendering authority.

Finally, given the absence of requirements pertaining to the unitary nature of the state, the contested provision is claimed to be unconstitutional in that it makes "detailed and self-applying provision" concerning the checks over self-certified declarations made by tenderers in the area of administrative organisation, a matter falling under the residual competence of the regions which are entitled to alter the substantive content of such provisions in a nuanced manner in order better to moderate between the various interests in play.

5.5.— The applicant also contests Article 75(1) insofar as it provides that "offers shall be accompanied by a guarantee equal to two percent of the base price specified in the tender or invitation to tender in the form of a deposit or surety at the discretion of the party making the offer", due to violation of Article 117 of the Constitution.

In particular – having argued that the above provision also applies to contracts below the Community threshold, and having recognised that the procedures for the payment of the deposit and the specific contents of the same may be considered to involve questions of private law – the region goes on to note that the substantive content of the provision specifically contested relates to organisational aspects falling under the residual

competence of the region. Indeed, it may appear "excessive" in relation to certain tender procedures involving limited amounts on the one hand to oblige all tenderers to pay a provisional deposit, whilst on the other hand "burdening the administrative activity of the offices with procedural requirements both during and after the conclusion of tender procedures". It should be added that there may also be other ways of ensuring the seriousness of the offers presented, as provided for example by Tuscany Region law No. 12 of 2001 which requires, amongst other things, the payment of the provisional deposit only by the successful tenderer.

It follows from the above that the contested provision violates Article 117 of the Constitution since, by not permitting the regions to frame the request for a deposit differently depending on the type of procedure and on the amount, it infringes the residual competence of the regions in organisational matters.

5.6.— Article 84(2), (3), (8) and (9) are contested insofar as they regulate the composition and functioning of the awarding board in cases in which the award is made according to the criterion of the most economically favourable offer, both for procedures involving amounts above the Community threshold, as well as, pursuant to the reference contained in Article 121 of the Code, for procedures involving lower amounts. These sub-sections are argued to violate Articles 117 and 118 of the Constitution insofar as, in the absence of centralisation requirements, the setting of the number of members (sub-section 2), the qualifications of the chairman (sub-section 3) and commissioners (sub-section 8), as well as the procedures for their selection (sub-sections 8 and 9) should fall within the organisational ambit of the individual tendering authority, which may alter them giving consideration to the complexity of the object of the contract, as well as the amount of the contract.

In the "unlikely event" that the court were to find that the legislation governing the functioning of the awarding board should fall within the ambit of award procedures and hence competition law, [the applicant argues that] the features which characterise such matters are absent in this case. In particular, the action is not macroeconomic in nature, nor would the principle of reasonableness and adequacy be respected, which requires a limitation of state intervention to "provisions of a general nature" and not to detailed provisions such as those before the court.

Article 76 of the Constitution is also argued to have been breached in that the directional criteria laid down under Article 25 of law No. 62 of 2005 did not allow for "the enactment of new provisions other than on the grounds of simplification", which are certainly not present in the case before the court. According to the region, this *ultra vires* delegation translates into an infringement of regional competence.

5.7.— Article 88 is contested insofar as, by regulating in detail the procedure for checking and excluding offers considered "abnormally low", it breaches Articles 117 and 118 of the Constitution. This is because the procedure through which it provides for the checking of anomalous offers and the right of the company to make representations impinges upon organisational aspects falling within under the residual competence of the regions over contracts entered into by the regions and regional and local authorities.

Finally, it is argued that it is not possible for the state to claim competence on a competition law basis, since the regulation of the procedure for checking anomalous offers not only does not have any overall impact on the economy, but is also detailed and meticulous, which means that it fails to comply with the principles of suitability and proportionality.

5.8.— Tuscany Region contests Articles 121(1), 122(2), (3), (5) and (6) and 124(2), (5) and (6), claiming that they breach Articles 76, 117 and 118 of the Constitution.

Article 121(1) provides that the provisions of Part I, Part IV and Part V, as well as of Part II insofar as not amended by the provisions contained in Title II, in which contested provision is contained, shall apply to public contracts concerning public works, public services and public supplies for amounts lower than the Community relevance threshold. Ultimately, the provisions governing all public contracts below threshold are thus claimed to be treated in the same way as contracts above threshold, with the exception of the possibility to make provision for reduced time limits and more limited publication, although a general requirement of publication of all tenders in the *Official Journal* has been introduced.

Article 122(2), (3), (5) and (6) contain detailed provisions governing the procedures and deadlines for the publication and communication of public works contracts below threshold. Article 124 regulates the same aspects with reference to contracts for public services and public supplies below threshold.

According to the applicant, these provisions breach Articles 117 and 118 of the Constitution since, in the absence of centralisation requirements, they regulate aspects which could not, in the light of constitutional case law (citing Constitutional Court judgments Nos. 272 and 14 of 2004), legislate for competition law matters on account of their detailed content and the very modest economic impact of the contracts.

In particular, as far as Article 121 is concerned, the state legislature is claimed to have passed legislation affecting a whole range of issues pertaining to contracts below threshold which had previously fallen under regional competence, without any complaint by the state. On this point, the applicant recalls the requirement to receive a deposit in all tender procedures (Article 75), as well as the procedure for identifying anomalously low offers (Article 86(1) and (2)). The level of detail becomes even more evident "where one considers the procedure for the receipt of justifications for anomalous offers pursuant to Article 86(5) where Parliament goes so far as to impose a mandatory obligation on tenderers to provide along with the offer, at the same time as it is submitted, justifications for the individual prices which go together to make up the offer". It is argued that for contracts of modest importance and involving low amounts it is neither reasonable nor proportional to impose upon tenderers the burden of "detailing in the offer the individual constituent elements". In such cases it might be possible to delay the request for elements justifying the offer to a time after the conclusion of the tender procedures, "applying it only to the winner", with a significant simplification of the procedure to the advantage of the tenderers and the tendering authority.

As far as Articles 122 and 124 are concerned, the region disputes the detailed and exhaustive way in which these provisions regulate the procedures for publicity and communication of below threshold public contracts in relation to contracts falling under the competence of the regions, dependent bodies and local authorities. It is noted first that below threshold contracts have no macroeconomic value and hence do not have any significant impact on the market; secondly, competition law permits the state legislature to "bind regional legislatures only with provisions of a general nature". Finally, the contested provisions do not comply with the requirements of proportionality and adequacy: "once in fact the state legislature has imposed the rule that all tender procedures must be publicised adequately and in due time, the modification of the

details of the procedure may indeed be left to the regions, which may give consideration where appropriate to the greater or lesser economic significance of the contract". This applies above all to publication requirements, since publication in the *Official Journal* entails a significant economic exposure for the tendering authority, which appears to be reasonable only where justified by the amount and complexity of the contract. It is also added that regional law has for some time governed procedures for below threshold contracts, including publication and notification requirements, regarding which no complaint has been made by the state.

The applicant refers, in support of the conclusions submitted, to the findings of the Council of State in Opinion No. 355 of 2006, cited at various points above.

There are moreover no centralisation requirements under the terms of Article 118 of the Constitution that are capable of justifying the contested provisions, and in any case no provision was made for the involvement of the region, in contrast with the principles laid down by the Constitutional Court in judgment No. 303 of 2003.

Finally, the region argues that Article 76 of the Constitution has been violated insofar as the directional criteria contained in Article 25 of law No. 62 of 2005 did not allow for the enactment of complete and detailed legislation also for below threshold contracts. This *ultra vires* delegation translates into a violation of regional competence.

5.9.— The applicant finally contests Article 131(1) insofar as it provides that "the government, acting on a proposal by the ministers of Social Policies, Health, Infrastructure and Transport, and European Community Policy, and having consulted the most representative trade unions and business organisations, may approve such amendments as may be necessary to the regulation contained in presidential decree No. 222 of 3 July 2003 concerning safety plans in temporary or mobile building sites in accordance with Community directives and the relevant national implementing legislation". This provision is argued to violate Articles 117 and 118 of the Constitution, in that, since matters concerning safety plans fall under concurrent legislative competence (safety in the workplace), the issue of a regulation is not legitimate.

In the alternative, should the Court find the state to have exclusive competence, the region argues that the compulsory consultation of regional governmental bodies was in any case not guaranteed.

6.— The President of the Council of Ministers entered an appearance, represented and advised by the *Avvocatura Generale dello Stato,* submitting, in relation to the challenges specifically presented by Tuscany Region, arguments similar to those contained in the written statement submitted in appeals Nos. 86 and 88 of 2006.

7.— By application for review served on 30 June 2006 and 10 July (appeal No. 89 of 2006), Lazio Region contested Article 4(2) and (3) and Article 5 of legislative decree No. 163 of 2006, due to an alleged violation of Articles 76, 97, 117 and 118 of the Constitution.

The applicant first of all sets out the events which led to the enactment of the Code, going on to detail its individual complaints against the contested provisions.

7.1.— As far as the contested Article 4(2) is concerned, the applicant region argues in the first place that matters relating to the administrative organisation of non-state contracts fall under the residual competence of the region, with the result that Articles 97 and 117 of the Constitution have been violated. It goes on to assert, in relation to Article 97 of the Constitution, that it is not clear "which principles of administrative organisation, in addition to those of impartiality and proper functioning laid down by the Constitution, may be contained in the Code, such as to declassify regional competence from residual to concurrent in this sector".

As regards the reference contained in the provision before the court to "tasks and requirements of the procedure", the region emphasises that the Constitution does not contemplate amongst the matters falling under the exclusive competence of the state that over the general principles of administrative action or procedures. In consequence, "the question as to whether the general rules governing administrative action or procedure may be regulated under regional legislation changes at most into a problem of relations between regional legislation and principles established (not by the Code but) by law No. 241 of 7 August 1990 (New provisions governing administrative procedures and the right of access to administrative documents), as amended in 2005, insofar as these principles are expressly recognised as directly implementing principles of constitutional law".

The above is also claimed to apply to public works programming and project approval for the purposes of town planning and expropriation, which "are typical

manifestations of the exercise of active administration for which, in cases involving contracts of regional interest, it is not clear how they may attract state competence to enact (through the Code) principles for regional legislators".

The region also argues that the provision before the court was "absolutely *ultra vires* in view of the delegation conferred on the government by law No. 62 of 2005, which does not contain any indication of the possibility that the Code may have any impact on the division of competences between the state and the regions (not to speak in the terms enacted by the Code and described in the above)".

Finally, it is claimed that the legislation violates the principle of loyal cooperation between the different levels of territorial government, which must be respected each time there are interrelations and overlaps between state and regional competences.

7.2.— Lazio Region also argues that Article 4(3) violates Articles 76, 97, 117 and 118 of the Constitution, as well as the principles of reasonableness, proportionality and loyal cooperation.

Having first set out the contents of the contested provision, stressing that according to constitutional case law public contracts do not constitute a homogeneous area of law (citing Constitutional Court judgment No. 303 of 2003), the applicant sketches out the characteristic features of competition law as defined by the Constitutional Court (citing judgments Nos. 345 and 14 of 2004).

The region also argues that "the regulation of public contracts is not entirely covered by competition law requirements" nor is it entirely a private law or litigation-related matter. Indeed, "it can be classified differently, including principally as the exercise of active administrative activities carried out specifically in the pursuit of public interests, from award procedures to design activities, works direction etc.; within this context, the region must be recognised as having (…) a non-negotiable legislative competence".

The region concludes arguing that, in the light of its detailed content, Article 4(3) does not comply with the requirements of proportionality and adequacy.

The provision before the court is also claimed to be unconstitutional insofar as it places safety plans under the exclusive legislative competence of the state, without giving consideration to the fact that Article 117(3) of the Constitution provides that

matters concerning health and safety in the workplace fall under concurrent competence.

As regards the reference to the award procedures contained in the provision before the court, the region points out that the award procedures are full administrative procedures, and in fact "historically constitute the paradigm for administrative action in proceduralised forms". Whilst it is beyond doubt that there are competition law requirements within these procedures, it is noted that the regulation of these procedures should occur according to the divisional criterion contained in Article 29(2) of law No. 241 of 1990 "which on this point faithfully applies the new constitutional settlement, denying the exclusive competence of the state". This provision stipulates in fact that "the regions and local authorities may, within the ambit of their respective competences, regulate the matters governed by the present law provided that they respect the constitutional system and the guarantees of citizens in relation to administrative action, as defined by the principles contained in the present law".

Article 4(3) is also claimed to breach Article 117(5) of the Constitution, which provides that in matters falling under their competence the regions make provision for the transposition and implementation of EC law, provided that they respect for the procedural rules contained in state laws.

Article 16 of law No. 11 of 2005 provides that the regions may immediately implement Community directives, provided that they respect: a) mandatory fundamental principles, provided for by national law (Community law) in matters falling under concurrent competence; b) the criteria and directions contained in state laws or in regulations implementing Community legislation in matters falling under the exclusive competence of the state. This is without prejudice to the state's power, the applicant specifies, to implement Community directives in matters falling under the residual competence of the regions in the event of regional inaction notwithstanding a requirement to transpose; in such cases however, national legislation is set aside in the face of supervening regional legislation (Article 11(8) of law No. 11 of 2005).

The Code is argued to have violated these general arrangements: the state law did not in fact leave the regions any margin of legislative autonomy, "covering through its own

binding and detailed legislation (also for below threshold contracts) matters clearly attributed by the Constitution to concurrent or residual regional legislative competence".

It is also clear from the above that the government overstepped the authorisation conferred.

The parent law laid down the following principles: a) the need to draft a single consolidated text implementing the two directives regulating public contracts, also harmonising the other provisions in force with the principles of Community law; b) the need to simplify award procedures which do not involve the direct application of Community legislation, with a view to reducing time-scales and ensuring the maximum flexibility of legal instruments.

As regards the first principle, it is noted that Parliament intended in the parent law that the implementation of directives should follow the transposition procedures provided for under national law, without impinging upon the system for the division of legislative competence between the state and the regions.

As regards the second principle, "the goals of simplification, legal flexibility and the acceleration of procedures appear to be contradicted by the centralising tendency of the Code, which had transformed its own detailed provisions from reserve status to mandatory also in matters clearly attributed by the Constitution to the legislative competence of the regions".

Finally, the principle of loyal cooperation is argued to have been breached since, despite their applicability in sectors characterised by interrelations and overlaps between areas of law and despite the negative opinion of the Joint Assembly, Parliament "unilaterally proceeded" with the enactment of the contested provisions.

7.3.— Finally, Article 5 is argued to be unconstitutional due to violation of Articles 76, 97, 117 and 118 of the Constitution, as well as "due to violation of the constitutional principles concerning the exercise of the power to pass regulations and the rule of law".

In particular, the region notes that "by virtue of the congruence between legislative competence and the power to pass regulations provided for under Article 117(6) of the Constitution (…), since Article 4(3) assigned to the exclusive legislative power of the state matters which on the other hand cannot be regarded as falling under Article 117(2) of the Constitution (…), the Code ended up conferring on the state, in those matters, an

undue power to pass regulations to implement the provisions of the Code which was broad and all-embracing, and binding (rather than reserve) also for public contracts of regional interest (according to the principle that government regulations, including authorising regulations, may not legislate in areas falling under regional competence" (citing, *inter alia*, Constitutional Court judgments Nos. 302 of 2003, 408 of 1998 and 482 of 1995).

8.— The President of the Council of Ministers entered an appearance, represented by the *Avvocatura Generale dello Stato*, submitting a written statement in relation to the challenges brought by Lazio Region, the contents of which were similar to the written statements submitted in the other cases mentioned above.

9.— By application for review served on 30 June 2006 and filed on 10 July (appeal No. 90 of 2006), Abruzzo Region raised the same questions of constitutionality contained in the application for review by Lazio Region.

10.— The President of the Council of Ministers also entered an appearance in these proceedings, represented by the *Avvocatura Generale dello Stato*, repeating the same arguments contained in the other written statements concerning the cases mentioned above.

11.— By application for review served on 30 June 2006 and filed on 6 July, the Autonomous Province of Trento (appeal No. 86 of 2006) contested Article 4(3) and Article 5(1), (2) and (4) of legislative decree No. 163 of 2006 on the grounds that it violated Article 8 (*sic*: Article 11) (1), (17) and (19) and Article 16 of constitutional law No. 5 of 26 February 1948 (Special Statute for Trentino-Alto Adige), presidential decree No. 381 of 22 March 1974 (Provisions implementing the Special Statute for the Trentino-Alto Adige region in matters relating to town planning and public works), Articles 2 and 4 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), as well as the combined provisions of Article 117(3), (4) and (6) of the Constitution and Article 10 of constitutional law No. 3 of 18 October 2001 (Amendments to Title V of the Second Part of the Constitution).

11.1.— The applicant province claims that pursuant to Article 11(17) of the Statute it enjoys primary legislative competence in matters concerning public works of provincial interest, as well as the organisation of provincial offices (sub-section 1) and the direct provision of public services (sub-section 19). Administrative competence over the same matters is also vested in the province.

Article 1 of presidential decree No. 381 of transferred to the autonomous provinces "competences vested in the state administration in matters relating to town planning, housing otherwise subsidised, the use of public waters, water infrastructure works, prevention against and primary assistance in natural disasters, expropriation in the public interest, the road network, water supplies and public works of provincial interest exercised both directly by central and local state bodies as well as through national or regional (or otherwise 'supra-provincial') public bodies and institutes".

Article 19 reserves state competence over certain categories of public works; however, Article 2(2) provides that "In the event of a delegation to the provinces of functions relating to the realisation of public works falling under state competence, the provinces shall carry out the necessary expropriations and occupations in the name of and on behalf of the state on the basis of the legislation in force for public works falling under their competence". Moreover, Article 19-*bis* provides that for the "purposes of the exercise of the functions delegated under the present decree, the provinces of Trento and Bolzano shall apply, in relation to their respective territories, provincial legislation governing the organisation of offices, accounting, contractual activity, public works and the evaluation of environmental impact".

The applicant moreover emphasises that it has on various occasions passed legislation concerning public works. It recalls on this point: provincial law No. 26 of 10 September 1993 (Provisions governing public works of provincial interest and transparency in public contracts); provincial law No. 23 of 19 July 1990 (Provisions governing the contractual activity and the administration of the assets of the Autonomous Province of Trento); and provincial law No. 7 of 14 September 1979 (Provisions governing the budget and general accounting of the Autonomous Province of Trento).

The province goes on to point out that it also exercised its own power to pass regulations with the issue of decree of the President of the Provincial Council No. 12-

10/Leg of 30 September 1994 (Regulation implementing provincial law No. 26 of 10 September 1993 containing “Provisions governing public works of provincial interest and transparency in public contracts”, as amended by provincial law No. 6 of 12 September 1994, containing “Provisions amending the legislation in force governing public works of provincial interest and housing”); as well as decree No. 10-40/Leg. of the President of the Provincial Council of 22 May 1991 (Regulation implementing provincial law No. 23 of 19 July 1990 containing: “Provisions governing the contractual activity and the administration of the assets of the Autonomous Province of Trento”).

11.2.— In the light of the above arguments, the applicant notes that the challenges presented apply both to matters concerning public works, as well as to public services and public supplies, the regulation of which falls within the ambit of the province's primary legislative powers in that it relates – with the exception of the private law aspects – to the organisation of its offices.

The representative of the province emphasises that Article 4(5) contains a safeguard clause (the “regions governed by special statute and the autonomous provinces of Trento and Bolzano shall amend their legislation in line with the provisions contained in the statutes and in the relevant implementing provisions”), “which is well suited to the position of the province of Trento”, since Article 2 of legislative decree No. 266 of 1992 provides for a separation between state and provincial legislation in matters falling under provincial competence (such as public works of regional interest), requiring the autonomous provinces to bring their own legislation into line with state legislation which impose limits for the purposes of the special statute, and providing that in the meantime the pre-existing provincial laws shall continue to apply.

There are however, according to the applicant, other provisions which breach the above safeguard clause. On this point, the contents of Article 4(1) already raise doubts in that they oblige the autonomous provinces to respect also those provisions concerning matters over which the state has exclusive competence, which “probably” are those contained in Article 117(2) of the Constitution and not those falling under the competence of the state on the basis of the provisions of the Statute. In any case, this sub-section can be interpreted in a manner which complies with the Constitution and the Statute. Furthermore, the province argues, the implementation of the provision in

question is a matter for the province, which does so having regard for the actual contents of the Statute and not the abstract formulation of Article 4(1). For these reasons the provision in question is not challenged before the court.

11.3.— As regards the contents of Article 4(3), it is argued that the exclusive legislative competence of the state is founded on competition law, although the sectors under examination go beyond this material limit.

In addition, the province argues that this provision, considered in itself, could not infringe provincial competences since, in the first place, it mentions only the regions, whilst secondly the question as to its actual binding effect could arise only in future proceedings concerning specific provincial legislative provisions.

However, the above violation is claimed to flow from the provisions of Article 5. This article in fact also applies to the Province of Trento providing in the first place, in sub-section 1, that the state regulation shall apply "only to aspects covered by Article 4(3) in relation to the contracts of every other administration", and secondly, in sub-section 2, that the "regulation shall indicate which provisions applying or implementing legislation falling under the exclusive competence of the state pursuant to Article 4(3) shall also apply to the regions and the autonomous provinces".

In consequence, also Article 4(3), which is referred to by Article 5, applies to the applicant.

In conclusion therefore, these provisions, which provide for the application of Article 117(2) of the Constitution to the autonomous provinces, impinge upon the substantive matters reserved to the provinces pursuant to the Statute and the relevant implementing provisions.

This is argued to be in breach of the Constitution, since Article 10 of constitutional law No. 3 of 2001 allows for the application to the regions governed by special statute and the autonomous provinces of the provisions contained in the new Title V only where they are more favourable and not, as in the case before the court, in order to restrict the legislative autonomy of the applicant (citing Constitutional Court judgments Nos. 134 of 2006, 103 of 2003 and 536 of 2002).

It goes on to argue that "the province cannot thereby claim to exclude the state *in toto* from the areas of law mentioned in Article 4(3), but that this may occur in accordance

with the division of competences under the statute, and not on the basis of Title V. The state may interfere with provincial competences only in accordance with the limits set out in the Statute and according to the procedures contained in legislative decree No. 266 of 1992, but may not however use criteria relating to the ordinary regions".

11.4.— The applicant also argues that Article 5(1) and 2) are unconstitutional insofar as the provisions grant power to the state to issue regulations in the matters listed in Article 4(3). However, the said article concerns public works of provincial interest in relation to which the Statute confers primary competence on the autonomous province. This does not mean, the province goes on to argue, that the applicant is not required to comply with the limits in the sectors mentioned in Article 4(3), but that only those pertaining to primary legislative competence are of relevance, i.e. limits flowing from reforms and international law obligations, which must be adhered to by provincial legislation, with amendments being required in order to comply with state legislation within six months according to the procedures set out in legislative decree No. 266 of 2002.

It follows from the above that Article 5(2) is unconstitutional insofar as it provides that the regulation may indicate "which provisions applying or implementing legislation falling pursuant to Article 4(3) under the exclusive competence of the state shall also apply to the regions and the autonomous provinces". Moreover, the arguments contained in Constitutional Court judgment No. 482 of 1995 also apply in this respect; in this case the court held, albeit dismissing the appeal according to its interpretation based on the special nature of the provisions contested at the time, that the regulation concerning public works provided for under law No. 109 of 1994 could not apply to the applicant region.

11.5.— In the alternative, the province argues that, should the court find that the sectors mentioned in Article 4(3) fall not under the statutory [i.e. provincial] matter of public works of provincial interest, but rather the state matter of competition law, it would nonetheless be necessary to challenge "the abnormal extension" which this provision attributes to such matters, bearing in mind the fact that the mere unilateral classification by the state legislature in any case cannot be binding (citing again judgment No. 482 of 1995; as a demonstration of the unconstitutionality of the

provision before the court the province also refers to opinion No. 355 of the Council of State).

The applicant stresses the cross-cutting nature of competition law in order to demonstrate the unconstitutionality of the contested provision, which entirely occupies certain specific substantive areas of law (citing, *inter alia*, Constitutional Court judgment No. 272 of 2004).

Finally, the province contests the provision contained in Article 4(3) which prevents the regions from enacting provisions "different" from those contained in the Code.

In fact, if "different" is taken to mean "contrasting", the provision would be unconstitutional for the reasons set out above, that is because it classified as "binding all the provisions of the Code concerning the areas of law indicated on the basis of an absolute and incontrovertible state 'claim' to competence".

However, the province adds, the expression used seems to be intended to prevent the enactment of "any other provision" in these sectors and, therefore, even provisions which supplement and develop those enacted by the state.

11.6.— It follows from the above that also Article 5(1) and (2) is unconstitutional: "once not all the matters mentioned in Article 4(3) fall under the exclusive competence of the state, the provision of a state power to pass regulations is unlawful due to violation of Article 117(6) [of the Constitution] and of Article 2 of legislative decree No. 266 of 1992 (which provides for the intervention in provincial matters of state laws alone) and the principles which have for some time been consolidated within constitutional case law".

11.7.— Again in the alternative, the province argues that Article 4(3) and Articles 5(1) and (2) are unconstitutional "insofar as they provide for the mandatory nature of the state legislation in the areas mentioned also in relation to contracts below the Community threshold".

As far as these contracts are concerned in fact, as emphasised by the Council of State in the opinion cited, only the "establishment of common principles which ensure transparency, equal treatment and non-discrimination" is lawful, "there being however no requirement (derived from Community law) to extend harmonisation to specific individual rules". On this point, the applicant also refers to Constitutional Court

judgment No. 345 of 2004, which recognised “the legitimacy of the applicability to the regions only of the principles contained in national legislation transposing Community law where it requires a tender, determines the subjective and objective scope of that obligation, limits the possibility for private negotiations or associates the violation of the obligation with civil law sanctions and forms of liability”.

11.8.— Finally, the province argues that Article 5(4) is unconstitutional due to violation of the principle of loyal cooperation.

Indeed, even assuming that the state has exclusive legislative competence in the sectors mentioned in Article 4(3), the regulation would in any case have to be adopted subject to agreement with the State-Regions Assembly.

This is because, given the cross-cutting nature of competition law, “the secondary legislation enacted in accordance with these competences is interrelated with regional matters, thereby conditioning the exercise of the relative legislative power”. This results in a situation which characterised the state's directional and coordination role prior to the reform of Title V in the sense that it created a kind of exception “to the normal hierarchy of sources”, with the resulting possibility of regional law “remaining bound by provisions which did not have the status of primary legislation”.

The principle of loyal cooperation must therefore be observed when secondary legislation is enacted.

12.— The President of the Council of Ministers entered an appearance, represented by the *Avvocatura Generale dello Stato*, requesting that the challenges raised be declared inadmissible.

The state representative emphasises that Article 4(5) contains a safeguard clause which provides that the “regions governed by special statute and the autonomous provinces of Trento and Bolzano shall amend their legislation in line with the provisions contained in their statutes and in the relevant implementing provisions”.

The *Avvocatura Generale* also points out that “the applicant itself takes note of this provision, and therefore the challenge appears directed exclusively towards obtaining an “opinion” from the Court on the fact that provisions of the Code cannot be applied to the applicant province directly, a fact however clearly confirmed by the contested provision”.

It should also be added that, unlike the regions which contested legislative decree No. 163 of 2006, the autonomous province limited itself to challenging only 4(3) which, in contrast to sub-section 2, "does not even refer to the autonomous provinces, a further confirmation of the specification contained in sub-section 5".

Adopting a parallel argument, it is pointed out that the applicant itself accepts that it is subject to limits, specifying however that these may only be limits contained in the Statute. On this point, the *Avvocatura Generale* argues that Article 4 of the Special Statute for the Trentino-Alto Adige Region requires compliance, even in matters of primary legislative competence, with the "principles of the legal order of the Republic and respect for international law obligations and the national interest (…) as well as the fundamental rules of socio-economic reforms implemented by the Republic".

It follows from the above that the provisions falling under the exclusive legislative competence of the state in competition law matters pursuant to Article 117(2)(e) of the Constitution are not applicable to the applicant, as they cannot be regarded "as an imposition of a new limit on the regions and autonomous provinces (as such being inapplicable pursuant to Article 10 of constitutional law No. 3 of 2001)".

13.— Shortly before the public hearing, all the regions, with the exception of Piedmont Region and the Autonomous Province of Trento, submitted written statements in which they reiterated and substantiated the arguments contained in their applications.

Conclusions on points of law

1.— Veneto, Piedmont, Tuscany, Lazio and Abruzzo Regions, as well as the Autonomous Province of Trento have contested Articles 4(2) and (3); 5(1), (2), (4) (7) and (9); 6(9)(a); 7(8); 10(1); 11(4); 48; 53(1); 54(4); 55(6); 56; 57; 62(1), (2), (4) and (7); 70; 71; 72; 75; 81; 82; 83; 84; 85; 86; 87; 88; 91(1) and (2) (and the provisions contained in Part II, Title I and Title II referred to therein); 93; 98; 112(5)(b); 113; 118(2); 120(2); 121(1); 122(1)-(7); 123; 124(2), (5) and (6); 125(5), (6), (7), (8) and (14); 130(2)(c); 131; 132; 141; 153; 197; 204; 205; 240(9) and (10); 252(3) and (6); 253(3), (10), (11) and (22)(a); and 257(3) of legislative decree No. 163 of 12 April 2006 (Code of public works contracts, public supply contracts and public service contracts implementing directives 2004/17/EC and 2004/18/EC), due to alleged violation of

Articles 76, 97, 117 e 118 of the Constitution and the principle of loyal cooperation; Article 8 (*sic*: Article 11) (1), (17) and (19) and Article 16 of constitutional law No. 5 of 26 February 1948 (Special Statute for Trentino-Alto Adige), presidential decree No. 381 of 22 March 1974 (Provisions implementing the special statute for the Trentino-Alto Adige Region in the area of town planning and public works), Articles 2 and 4 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), as well as the combined provisions of Article 117(3), (4) and (6) of the Constitution and Article 10 of constitutional law No. 3 of 18 October 2001 (Amendments to Title V of the Second Part of the Constitution).

Since the above applications for review raise similar questions, the cases concerned must be joined for treatment together in a single decision.

2.— Before proceeding to an examination of the questions of the constitutionality raised, it is important as a preliminary matter to discuss the legislative progress through Parliament of the aforementioned legislative decree No. 163 of 2006 and the subsequent decrees containing amendments.

2.1.— Article 25 of law No. 62 of 18 April 2005 (Provisions governing the implementation of obligations resulting from Italy's membership of the European Communities. Community law of 2004) authorised the government to adopt "one or more legislative decrees laying down a legislative framework for the transposition of directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, and of directive 2004/18/EC of the European Parliament and the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts". The law provided that such decrees must comply with, amongst other things, the following principles and directional criteria: "*a*) draft a consolidated text containing the legislative provisions regulating the procedures for contracts governed by the two directives, also harmonising the other provisions in force with the principles contained in the Treaty Establishing the European Union; *b*) simplify award procedures which do

not involve the direct application of Community legislation, with a view to reducing time-scales and ensuring the maximum flexibility of legal instruments" (Article 25(1), cited above).

The enactment of the parent law and the subsequent legislative decree was accordingly imposed above all by the need to implement in Italian law the requirements imposed at Community level in the pursuit of precise goals.

In particular, the adoption of 2004/18/EC was informed by the need to consolidate within a single text – in order to meet requests for simplification and modernisation made by contracting authorities and economic operators alike in their responses to the Green Paper adopted by the Commission on 27 November 1996 – of the Council Directives 92/50/EEC of 18 June 1992, relating to the coordination of procedures for the award of public service contracts, 93/36/EEC of 14 June 1993, coordinating procedures for the award of public supply contracts, and 93/37/EEC of 14 June 1993, concerning the coordination of procedures for the award of public works contracts.

The goal pursued by directive No. 2004/18/EC was in the first place that of guaranteeing that the award of contracts by the state, or by regional or local authorities and other bodies governed by public law entities occurred under the individual national legal systems subject to the respect of the principles contained in the Treaty and, in particular, to the principles of the freedom of movement of goods, the freedom of establishment and the freedom to provide services, as well as to the "principles deriving therefrom, such as the principle of equal treatment, the principle of non-discrimination, the principle of mutual recognition, the principle of proportionality and the principle of transparency" (Recital No. 2 of directive 18 of 2004). The intention was in fact to guarantee the opening up of public contracts to competition also through "detailed rules" aimed at ensuring "competitive tendering procedures at European Union level" (Commission interpretative communication on the Community law applicable to contract awards not or only partially subject to the provisions of the Public Procurement Directives of 1 August 2006).

Moreover, the Court of Justice of the European Communities has on various occasions stressed – albeit with reference to particular sectors, but making assertions of more general nature – that the coordination on Community level of the procedures for

the award of public contracts has the essential goal of "protecting the interests of traders established in a Member State who wish to offer goods or services to contracting authorities established in another Member State and, to that end, to avoid both the risk of preference being given to national tenderers or applicants whenever a contract is awarded and the possibility that a body governed by public law may choose to be guided by considerations other than economic ones" (see, *inter alia*, ECJ judgment of 27 November 2001 in joined cases C-285/99 and C-286/99, *Lombardini and Mantovani v ANAS [2001] ECR I-9233*). It follows that these public bodies are bound to observe "the principle of equal treatment of tenderers", as well as "the requirement of transparency" in order to guarantee respect for the "prohibition on discrimination on the grounds of nationality" (judgment of 27 November 2001, cited above).

In directive 2004/17/EC of 31 March 2004 – "on the occasion of new amendments being made to Council directive 93/38/EEC of 14 June 1993" – EC lawmakers considered it appropriate to consolidate the provisions contained in the above directive within a single text in order to guarantee clarity.

Community lawmakers also asserted that one of the principal reasons why it was necessary to coordinate the award procedures of the contracts of bodies supplying water and energy, as well as of bodies providing transport and postal services, was "the closed nature of the markets in which they operate, due to the granting by the Member States of special or exclusive rights over supplies or the making available or management of the networks which provide the service in question". Within this context therefore, a different but related aspect of competition law also comes to the fore: the need to legislate for the liberalisation of the sectors mentioned above with a view to guaranteeing the gradual and complete opening up of markets to free competition (see, albeit with reference to a sector different from that before the court, judgment No. 336 of 2005).

2.2.— In order to implement the aforementioned Community legislation and parent law No. 62 of 2005, the Council of Ministers approved a draft legislative decree containing the "Code of public works contracts, public supply contracts and public service contracts".

In its hearing of 6 February 2006 the Council of State, Consultative Section for Legislation, gave the opinion requested on this draft, proposing certain amendments and additions.

In relation to the same draft, the Joint State-Regions Assembly duly expressed its opinion, complaining of the infringement of specific regional competences and to this end also made critical observations in relation to a series of provisions contemplated therein.

Having received the above opinions, together with those of the competent parliamentary committees, the government issued the decree contested today before this court.

2.3.— Subsequently – implementing the requirements contained in Article 25(3) of law No. 62 of 2005 which allowed for the adoption of provisions to correct or supplement the Code within two years of its entry into force – the government drafted a decree containing amendments which was communicated to the Joint Assembly. The Assembly then requested the inclusion in the text of the Code of a provision that, up until the date of entry into force of the corrective and supplementary decree, "the legislative provisions of the regions and the autonomous provinces governing contracts for public works, public services and public supplies and concerning the conclusion and approval of contracts, the single person responsible for the procedure, the publication of the contract notices and the procedures for the award of contracts for amounts below the Community threshold [should apply, even in derogation from Article 4 of the Code] insofar as they do not contrast with Community law".

The Council of State also expressed its opinion on this draft decree (Consultative Section for Legislation, hearing of 28 September 2006), suggesting amongst other things that the provision requested by the Assembly not be included, as it did not consider it appropriate to make amendments to Articles 4 and 5 of legislative decree No. 163 of 2006 before the decision of this court.

Following receipt, amongst other things, of the above opinions, legislative decree No. 6 of 26 January 2007 was issued (Provisions amending and supplementing legislative decree No. 163 of 12 April 2006 containing the Code of public works contracts, public supply contracts and public service contracts implementing directives 2004/17/EC and

2004/18/EC, pursuant to Article 25(3) of law No. 62 of 18 April 2005 concerning Community law of 2004); in accordance with the opinion of the Council of State cited above, this decree did not make amendments to Articles 4 and 5, nor did it have any significant impact on the contents of the other contested provisions.

2.4.— Finally, the government drafted a second draft decree containing amendments on which the Joint Assembly and the Council of State have expressed opinions (Consultative Section for Legislation, hearing of 6 June 2007). Following the outcome of these procedures, legislative decree No. 113 of 31 July 2007 was issued (Additional provisions amending and supplementing legislative decree No. 163 of 12 April 2006 containing the Code of public works contracts, public supply contracts and public service contracts, pursuant to Article 25(3) of law No. 62 of 18 April 2005). This second decree also did not have any significant impact on the contents of the contested provisions, other than as specified below in relation to the challenge to Article 84.

3.— Having clarified this, it must be pointed out as a preliminary matter that, due to the variety of the interests pursued and the objects involved, the provisions contained in legislative decree No. 163 of 2006 do not fall under one single area of law.

This court has previously found that public works "do not constitute a real area of law, but are classified depending upon the nature of the relevant project" and therefore may from time to time be classified as matters of either state or regional legislative competence (judgment No. 303 of 2003). There is therefore no area of law covering national public works, nor one relating to the sector of public works of regional interest.

These assertions not only apply to procurement contracts for public works, but also extend to the entire contractual activity of the public administration which cannot be classified as an area of law in itself, but rather represents an activity related to the individual areas of law over which it produces its effects.

It follows that the problems of constitutionality raised by the applicants must be examined in the light of the legislative content of the individual contested provisions with a view to establishing under which substantive matter they may be classified.

Again as a preliminary point, it appears to be necessary to specify – in the light of the observations set out above – that it is not possible to draw a clear dividing line traced exclusively on subjective grounds, distinguishing the procedures for invitations to

tender issued by state administrations from those of regional or sub-regional administrations, thereby concluding that only the former fall under the competence of the state and that the latter are subject to regional legislative competence. The delineation of the substantive spheres of competence cannot in fact be determined exclusively with reference to the nature of the entity which issues the invitation to tender or to which particular goods or services refer since, as already mentioned above, it is by contrast necessary to refer to the substantive content of the contested provisions in order to bring them under the substantive matters mentioned in Article 117 of the Constitution.

4.— Having made this premise, it is now possible to move on to an examination of the questions of constitutionality formulated with reference to each of the provisions of the Code contested before the court.

5.— As regards the challenge to Article 4(2), it must be noted as a preliminary matter that this provision in fact contains two rules: the first makes a generic reference to the legislative power of the state to lay down fundamental principles in the matters governed by the Code; the second refers "in particular" to a range of specific sectors identified with reference to relevant aspects of the activity carried out in order to complete the public works.

Accordingly, as far as the first part of the contested sub-section is concerned, it should be pointed out that it is limited to the assertion that, without prejudice to other provisions to be made thereafter in relation to the autonomous provinces concerning "matters falling under concurrent competence, the regions and the autonomous provinces of Trento and Bolzano shall exercise their legislative powers out of respect for the fundamental principles contained" in the Code.

By virtue of its general content, this provision withstands the challenges made since it is beyond doubt that the establishment of fundamental principles in competition law is a matter for state law. It is therefore only with specific reference to these matters, and therefore to the individual provisions contained in the Code, that the problem of the state overstepping its competence in the determination of the fundamental principles intended to regulate each of the above matters may from time to time arise.

From this standpoint by contrast it is important to note the challenge made by the applicants to the second part of the sub-section before the court, in which the state legislature provided "in particular" that the fundamental principles which must be observed by the regions and the autonomous provinces concern "public works programming, project approval for the purposes of town planning and expropriation, administrative organisation, the tasks and requirements of the person responsible for the procedure and safety in the workplace". According to the applicants in fact, these sectors fall within the ambit of the matters covered by the residual competence of the regions.

5.1.— In the light of the above, before assessing whether the specific legislation referred to "in particular" by the sub-section in question concerns matters over which competence is shared, it is necessary to examine the challenges raised with reference to principles other than those contained in Articles 117 and 118 of the Constitution, as well as the principle of loyal cooperation.

5.2.— In the first place, the question concerning the violation of Article 97 of the Constitution, raised by Lazio and Abruzzo Regions, must be ruled inadmissible.

Secondly, according to the settled case law of the Constitutional Court (see, *inter alia*, judgments Nos. 116 of 2006; 383 of 2005; 287, 196, and 4 of 2004; 274 of 2003), the regions have the right to challenge state laws by directly seizing the Constitutional Court exclusively in questions relating to the division of their respective competences. Other questions of constitutional law are however admissible only where their violation infringes constitutionally guaranteed regional competences. In the case before the court, the alleged violation is not only generic but also does not amount to an infringement of the competences of the regions. The question is therefore inadmissible.

5.3.— As far as the questions addressing the violation of Article 76 of the Constitution are concerned, proposed on the basis of different arguments by Lazio and Abruzzo regions on the one hand, and Veneto Region on the other, it must be pointed out that, even assuming that they are admissible insofar as they attempt indirectly to aver an infringement of the competences of the region (in the light of the constitutional case law mentioned above), they are in any case groundless.

In particular, the applicant Lazio and Abruzzo regions argue that the above constitutional provision has been violated due to the averred breach of the provisions of the legislative decree and the authorisation contained in law No. 62 of 2005, which is claimed not to contain any provision allowing the Code to have an impact on the division of concurrent legislative competences.

This argument cannot be accepted since, as far as the aspect mentioned above is concerned, the Code directly applied the principles and provisions of the Constitution and, in this respect, no legislative authorisation was necessary. It is indeed beyond doubt that, even where the parent law is silent on the matter, the body authorised to enact secondary legislation is in any case required to comply with constitutional principles, irrespective therefore of any reference made to them in the parent law.

The violation averred by Veneto Region of Article 76 of the Constitution due to the alleged failure to observe the so-called additional limits of the authorisation insofar as the procedural requirements contained in Article 25(2) of law No. 62 of 2005, which imposed the duty to consult the Joint Assembly, had not been respected is equally groundless. In particular, the applicant complains that this opinion was requested and obtained in relation to a draft legislative decree different from that subsequently adopted by the Council of Ministers in its meeting of 23 March 2006.

It is important to point out in relation to this point, as a general question, that – given the enduring absence of a transformation of the parliamentary institutions and more generally of legislative procedures, even in accordance only with the limits imposed by Article 11 of constitutional law n. 3 of 2001 (see judgments Nos. 423 and 6 of 2004) – the principal instrument which enables the regions to play a role in the determination of the contents of certain legislative acts of the state which have an impact on matters falling under the competence of the regions is offered by the Assembly system. This system – governed by legislative decree No. 281 of 28 August 1997 (Specification and extension of the competences of the permanent Assembly for the relations between the state, the regions and the autonomous provinces of Trento and Bolzano and unification, for matters and tasks of common interest to the regions, provinces and municipalities, with the State, Cities and Local Autonomous Bodies Assembly) – sets in place an organisational form of cooperation and constitutes “one of the most appropriate *fora* for

the development of rules intended to supplement the principle of loyal cooperation" (judgment No. 31 of 2006).

Having clarified the above, the court however finds that for our present purposes, there is as a rule no violation of the principle of loyal cooperation in cases in which the amendments made to the draft legislative decree after its presentation to the Joint Assembly were imposed by the need to adapt the text to the amendments suggested by the Assembly (see judgment No. 179 of 2001). In this case, it is not necessary for the amended text to return again to the Assembly for an additional opinion, also because otherwise a complex and arcane mechanism of continuous passages between the subjects involved would be set in motion.

In any case, even where the government introduces rules into the draft decree which do not strictly follow from the comments made by the Assembly, the court finds that this does not constitute an automatic violation of the principle of loyal cooperation.

This court has in fact already held that "the procedures for cooperation and concerted action" before the Joint Assembly may "be taken into consideration for the purposes of examining the constitutionality of legislative acts only insofar as the compliance with the same is required either directly or indirectly under the Constitution" (judgment No. 437 of 2001). Therefore, in order for the failure to consult the Assembly, which is albeit a requirement contained in primary legislation, to amount to a breach of the constitutional principle of loyal cooperation, it is necessary that the requirements for the operation of the principle be satisfied, and that is, as far as the issues of relevance before this court are concerned, the impact on substantive matters falling under regional competence. In the case before the court, the applicant has not even indicated which specific provisions introduced by the government *ex novo* in the sub-section in question are capable of having an impact on regional competences.

In conclusion therefore, even disregarding its generic formulation, the complaint must be rejected.

5.4.— The complaint made by Lazio and Abruzzo Regions that the principle of loyal cooperation has been violated due to the failure to provide for adequate forms of coordination between the different territorial levels involved, even through the contested

provision affects sectors characterised by the interrelation and overlap of substantive areas of law, must also be rejected.

Even disregarding its generic formulation, this complaint is therefore in any case not relevant with reference to the Article 4(2), since an eventual reference to the problem of coordination during the implementation stage between the governmental bodies involved could, in theory, emerge exclusively in relation to the individual provisions contained in the Code and not in relation to a provision laying down a general principle governing the division of competences between the state and the regions.

5.5.— It is now possible to move on to an examination of questions raised in relation to the particular sectors mentioned in the contested provision due to violation of Articles 117 and 118 of the Constitution.

In particular, "public works programming" arises as an issue, the inclusion of which within the scope of the provision in question was specifically contested by Veneto, Tuscany, Lazio and Abruzzo Regions.

As a preliminary matter, it is important to emphasise that the requirement underlying public works programming "is that of determining which public works may be effectively and completely completed on the basis of financial resources and according to an order of priority based on an evaluation of the costs and benefits" (judgment No. 482 of 1995).

Having clarified the above, the court finds – disregarding the enabling content of the legislation which specifically governs the sector in question (Article 128) and which has not been challenged – that the activity of the programming of such works, which is not a self-standing area of law and cannot be brought under a specific substantive matter, follows the legal regime applicable to the completion of the relevant public works which may, depending on the circumstances, fall under sectors within the exclusive competence of the state, the residual competence of the regions, or shared competence between state and regions.

In the light of the legislative content of the contested provision, it appears clear that the reference to programming activity concerns only procedures which are necessary for the completion of public works that come neither under the exclusive competence of the

state nor the residual competence of the regions, falling rather under one of the matters over which competence is shared pursuant to Article 117(3) of the Constitution.

Interpreted in this way, the rule contained in the contested provision cannot violate Articles 117 and 118 of the Constitution, since there was no violation of regional competences as averred.

5.6.— The applications for review lodged by Tuscany, Lazio and Abruzzo Regions, relating to the "project approval for the purposes of town planning and expropriation", must similarly be dismissed.

The court indeed finds that, as is clear from the literal wording of the provision, "project approval" is strictly related to town planning goals and therefore territorial planning. In the case before the court moreover, expropriation is also of significance due to its essential role in the acquisition of land necessary for the completion of public works considered within an overall planning context. Ultimately, the extent of the application of the provision in question coincides with town planning law, which means that it is included within the sphere of legislative powers pertaining to the concurrent area of territorial government law. This court has held on various occasions that, whilst it may be true that "the word 'town planning' does not appear in the amended version of Article 117", this nonetheless "does not permit the court to find that the relative matter is no longer included in the list contained in sub-section three" since it is a subcategory of territorial government (judgment No. 303 of 2003; see, *inter alia*, also judgments Nos. 383 and 336 of 2005).

It therefore follows that the provision in question cannot be unconstitutional in that it requires respect for the fundamental principles imposed by the state during the stage of "project approval for the purposes of town planning and expropriation".

5.7.— It is now necessary to examine the question arising out of the reference contained in the sub-section before the court to "administrative organisation" and to the "tasks and requirements of the person responsible for the procedure".

The complaint, which was lodged in substantially similar terms by all the applicant regions, challenges this part of the provision on the grounds that both administrative organisation and the rules applicable to the person responsible for the procedure fall under the residual competence of the regions in that they concern intrinsic aspects of

regional organisation, with the result that the provision in question constitutes a violation of the latter's legislative prerogatives.

The question is groundless.

It must first of all be pointed out that the reference to administrative organisation must concern the sector of the completion of public works, as well as that of public supplies and services, and certainly not the other more general sector pertaining to the structure and functioning of the region as a body. This is clear from the very wording of the contested provision which – by indicating the individual sectors in respect of which the competence to determine fundamental principles is conferred on the state – concerns the programming and execution of the public works necessary for their completion. The organisation to which the provision refers is therefore that of the institution or institutions charged with operating in the relevant sector and, in particular, of the person responsible for the procedure, providing simply for the creation of the latter and not its organisational procedures. This connection between the organisation and the tasks and requirements of the person responsible for the procedure makes it possible, with reference to the sector in question, to interpret the provision in a manner compatible with the Constitution and hence to find that it does not infringe the residual legislative competence of the regions; the provision can by contrast be viewed as forming part of the procedures falling under the competence shared between the state and the regions, and as a result is treated in the same manner.

5.8.— Since the question is related, it is now necessary to consider the question raised by Veneto Region with reference to Article 10(1) insofar as it provides that “For each individual project which is to be carried out through a public contract, the awarding administrations shall appoint, pursuant to law No. 241 of 7 August 1990, a person single responsible for the procedure during the project, award and implementation phases”. The subsequent subsections (2-9) govern in particular the appointment and functions of this individual.

The question is inadmissible.

In the first place, it lacks valid arguments in support. The applicant framed its complaint only against sub-section 1, whilst it should have also referred to all the other provisions concerning the appointment and remit of the single person responsible for

the procedure. Nor finally is it clear whether the complaint concerns the figure of the person responsible for the procedure in general, or his special role in the procedure.

However, even disregarding the above considerations, the court finds that on the basis of the comments made above in relation to the organisation of the offices charged with the realisation of public works, it would in any case be groundless since the provision for a single person responsible for the procedures concerned does not result in any infringement of regional competences.

6.— The applicant regions and the Autonomous Province of Trento have also contested Article 4(3) of the Code, which provides as follows: "In accordance with Article 117(2) of the Constitution, the regions may not make provisions which depart from those contained in the present Code in relation to: the classification and selection of tenderers, award procedures, except issue concerning administrative organisation; award criteria; sub-contracting; powers of oversight over the market for public contracts entrusted to the Oversight Authority for Contracts for Public Works, Public Services and Public Supplies; design activities and safety plans; the stipulation and implementation of contracts, including executive direction, works management, accounting and testing, with the exception of organisational issues and administrative accounting; disputes. This is without prejudice to the exclusive competence of the state to regulate contracts relating to the protection of cultural heritage, contracts in the defence sector or those which are classified or which require particular safety measures relating to public works, services or supplies".

6.1.— As a preliminary matter, it is necessary to examine the question proposed by the Autonomous Province of Trento, which asserts that the contested provision violates in particular provisions contained in the special statute which confer primary legislative competence on provincial law in the sector in question.

The question is inadmissible due to a lack of interest to sue.

Article 4(5) of legislative decree No. 163 of 2006 contains in fact a safeguard clause which provides that "regions governed by special statute and the autonomous provinces of Trento and Bolzano shall amend their legislation in line with the provisions contained in the statutes and in the relevant implementing provisions".

This is accordingly why the mechanism provided for under Article 2 of legislative decree No. 266 of 1992 provides that the enactment of new provisions of state law shall not entail the direct repeal of pre-existing provincial laws, but only a duty to make amendments within six months of the publication of the state legislative act in the *Official Journal* or before expiry of such longer deadline as may be specified therein.

The failure to comply with this duty may be invoked by the government in an application for review against provincial laws which have not been amended (see, *inter alia*, judgment No. 302 of 2003).

Parliament therefore expressly enacted a clause which, according to the state representative, means that the provision as a whole cannot be unconstitutional due to the detail of its content concerning the extent of its application (see judgments Nos. 384, 287 and 263 of 2005). Moreover, Article 4(3) itself expressly refers to "regions" alone and not also to the autonomous provinces.

6.2.— As far as the regions' applications for review are concerned, it is necessary in the first place to examine the question raised by Veneto Region, which argues that the contested provision is unconstitutional due to violation of Article 76 of the Constitution – in relation to Articles 1(6) and 5(5) of law No. 62 of 2005 – and Article 117(5). A similar complaint is made by Lazio and Abruzzo Regions, which argue in particular that Article 117(5) of the Constitution has been violated on the grounds that, even though it applies to areas of law "clearly attributed under the Constitution to concurrent or residual regional legislative competence", the contested provision does not leave any space to the regions in the implementation of EC law.

In particular, it is argued that the parent law (Article 1(6)) conferred upon the region the power to implement Community directives subject to the limits provided for under law no. 11 of 4 February 2005 (General rules governing the participation of Italy in the European Union legislative process and on the procedures for implementing Community law obligations). This law, which implemented the principle contained in Article 117(5) of the Constitution, granted this power for all matters falling under the competence of the regions, allowing the state, where a region fails to act, to implement exclusively substitutive measures of a preventive, supplementary and reserve nature.

Veneto Region also argues that the contested provision violates Article 76 of the Constitution “also in relation to the regulation of contracts of regional interest that are 'below threshold '”, as the government was under a duty to impose only supplementary and reserve provisions pursuant to Article 5(5) of law No. 62 of 2005, though not admittedly under the terms of Article 117(5) of the Constitution.

The questions are groundless.

Article 1(6) of parent law No. 62 of 2005, to which Article 5(5) refers, provides in relation to the provisions of the aforementioned constitutional rule that any legislative decrees adopted in matters within the legislative competence of the regions and the autonomous provinces shall, where relevant implementing legislation has not been enacted locally, enter into force on the date on which the deadline provided for the transposition of the Community legislation expires, and that such provisions shall in any case become ineffective following the entry into force of the implementing legislation adopted by each region and autonomous province, which must respect the duties imposed by Community law and, in matters falling under concurrent competence, the fundamental principles contained in state legislation. Sub-section 6 goes on to provide that: “To this end the legislative decrees shall contain an explicit indication of the substitutive and reserve nature of the provisions contained therein”.

Having thus identified the contents of the provisions to which the applicants refer, the court finds that they may not be invoked as a basis for the complaints which seek to obtain recognition of the existence of a duty incumbent upon secondary legislators to include in statutory instruments a reserve status clause for provisions which, for the reasons set out above, govern sectors falling under the exclusive legislative competence of the state, subject to the limits specified below.

It follows that the existence of a right on the part of the state to make exclusive provision governing the activities mentioned in the contested provision allows the state, in contrast to the arguments submitted by Lazio and Abruzzo Regions in particular, to adopt legislation which contains not only general principles, but also detailed rules which are exhaustive in nature.

For the same regions, as will be clarified below at the appropriate juncture, the question concerning contracts below the Community threshold cannot be well-founded

since, also in this case, the existence of a basis for the state's legislative competence precludes any need to provide for a reserve status clause.

6.3.— Veneto Region also claims that Article 76 of the Constitution had been violated, with reference to Article 25(2) of law No. 62 of 2005, due to the alleged failure to comply with the so-called outer limits of the authorisation, insofar as the procedural requirements set out in the above provision, which imposed a duty to consult the Joint Assembly, were not respected.

The question is groundless. The court refers to its comments made above in their entirety concerning the similar question raised with reference to Article 4(2) of the Code (see paragraph 5.3).

6.4.— Veneto Region also claims that the Article 4(3) as a whole is unconstitutional insofar in that it provides that the regions "may not enact legislation which departs from the present Code", and indeed "may not make provisions in contrast with the principles which may be inferred from the present Code in relation to the competition law".

The question is inadmissible due to its generic nature, since the complaint submitted does not set out specific grounds for unconstitutionality, but argues for the introduction into the text of the contested provision of a new and different rule. It should be added that the complaint also contains contradictions in that it expressly refers on the one hand to competition law, as contemplated under Article 117(2) of the Constitution, whilst on the other hand to "the principles" contained in the Code, and hence implicitly to Article 117(3).

6.5.— In the same way, the court also finds inadmissible the question raised by Veneto Region, which complains that for "contracts relating to the protection of cultural heritage" it is possible to identify "aspects of the legislation which do not have a safeguarding function, such as for example the setting of the deposit, the administrative organisation of projects, the person responsible for procedures or the approval of projects".

On this point it is important to note that this court has already held that the protection of cultural heritage is an area of law within the competence of the state, whilst the regions may supplement the relevant legislation with measures which depart from or supplement those provided for at state level (see, *inter alia*, judgment No. 232 of 2005).

In the case before the court, the contested provision is limited to providing that "without prejudice to the exclusive competence of the state to regulate contracts relating to the protection of cultural heritage" – governed by Articles 197-205 of the Code – whereas the complaint raised by the applicant region concerns only specific aspects of this legislation, in relation to which there is no indication of the legislative source which governs them and which an eventual judgment of this court would ultimately affect.

It follows from the above that the question raised is inadmissible due to its generic nature.

6.6.— The court must also declare inadmissible the questions — which are examined in this forum on the grounds that they are related to other issues before the court — raised by Veneto Region concerning specifically Articles 197, 204 and 205, contained in the part of the Code relating to "contracts relating to cultural heritage".

In particular, the applicant argues that "even though they may be theoretically related to the 'protection of cultural heritage' (under the exclusive competence of the state), the said provisions in any case are extremely detailed and excessively thorough, and therefore unlawfully restrict regional legislative autonomy, providing (...) for measures which are disproportional and excessive compared to the goal pursued".

The complaint thus formulated is completely generic.

The contested provisions do not in fact have a homogeneous content in that they lay down: "Common provisions applicable to public contracts relating to cultural heritage" (Article 197), "Systems for selecting tenderers" and "award criteria" (Article 204), as well as the limits to the admissibility of "Variations" (Article 205). Faced with this complex legislation, the region limited itself to indicating the contested provisions, without even specifying their content and above all without even illustrating — bearing in mind the nature of state competence in the sector in question and of the resulting scope for action granted to the regions — the eventual grounds for a breach of Article 117 of the Constitution.

6.7.— As regards the application for review lodged by Piedmont Region, the applicant complains that, even though "as regards the classification and selection of tenderers, award procedures, award criteria and sub-contracting" there is effectively a claim to competence rooted in competition law, Parliament nevertheless violated the

principles of adequacy and reasonableness by “indiscriminately imposing on the regions even the detailed contents of the Code”, in spite of the fact that there was by contrast legitimate scope for regional legislative action. Veneto Region in turn challenges, specifically, the inclusion of sub-contracts within the extent of the contested provision's application, since the relationship with competition law would be so tenuous that, if it were found to be sufficient to act as a basis for the legislative power of the state, “it would result in an abnormal expansion of the very same 'protection' [of competition]”.

Secondly, all the applicant regions complain, for various reasons, that each of the specific activities indicated in the contested provision is identified as falling within the exclusive competence of the state, but point out that some of those referred to fall by contrast under concurrent or residual regional competence. They therefore argue that Articles 76, 97, 117 and 118 of the Constitution have been breached.

The questions as formulated are groundless.

In the first place, it must be pointed out that a significant part of the provisions contained in the relevant sub-section is certainly justified on competition law grounds, which Article 117(2) of the Constitution assigns to the exclusive legislative competence of the state.

On this point – also in order to clear the field of a misunderstanding of some of the applicants – it is instructive to pause to consider the notion of competition law with a view to clarifying, as far as is relevant for these proceedings, its relevance, nature and the limits of its application.

In relation to the first point, it is important to remember that this court has already held that the concept of competition, reflecting that applicable under Community law, embraces both action undertaken “to regulate and restore a lost equilibrium”, as well as action targeted at reducing imbalances through the creation of the conditions for the establishment of competition structures (judgment No. 14 of 2004; see also, *inter alia*, judgments Nos. 29 of 2006 and 272 of 2004). Measures to guarantee the maintenance of markets which were previously competitive and instruments for market liberalisation therefore fall within the material ambit of this area of law.

However, it is the aspect of competition law which manifests itself in the first place through the requirement to ensure the broadest opening up of the market to all economic

operators in the sector, subject to the respect of the Community law principles of the free movement of goods, the freedom of establishment and the freedom to provide services (Articles 3(1)(c) and (g), 4(1), 23-31 and 39-60 of the Treaty Establishing the European Communities of 25 March 1957), which is above all of significance before this court.

This means ensuring the adoption of uniform public and open procedures for the choice of the contractor, which are capable of guaranteeing in particular respect for the principles of equal treatment, non-discrimination, proportionality and transparency.

As far as Italian law is concerned, compliance with these principles involves, amongst other things, the implementation of the parallel constitutional rules of impartiality and proper conduct, which must guide the actions of the public administration pursuant to Article 97 of the Constitution. Indeed, it is important to note that it was precisely the requirement to bring national legislation regulating procedures for selection of the contractor into line with Community law which resulted in the definitive side-lining of the so-called accounting model which considered this national legislation as having been enacted exclusively in the interests of the administration, also for the purposes of the correct formulation of its contractual intention.

It must also be pointed out that compliance with Community and national law obligations for public and open procedures guarantees respect for the requirements incumbent upon public authorities to act effectively and efficiently: the selection of the best offer in fact ensures the full realisation of the public interest in the receipt of the goods or service under award.

To summarise, the Community concept of competition, which is at issue before this court and which is reflected in that mentioned in Article 117(2)(e) of the Constitution, is defined as competition “for” the market, which requires that the contractor be chosen by way of guarantee procedures which ensure respect for the Community and constitutional values mentioned above. This clearly does not mean that there are not also concurrent requirements to ensure so-called competition “in” the market in the same sector of public sector contracts, above all in relation to network services, through the liberalisation of the markets, which is achieved, amongst other things, through the

elimination of special or exclusive rights granted to undertakings (see recital No. 3 of directive No. 2004/17/EC of 31 March 2004).

As regards the second point, concerning the nature of the area of law at issue here, the court finds that competition law – with the exception in particular of aspects of specific antitrust legislation intended to combat anti-competition conduct by undertakings – is of a cross-cutting nature in that it does not have the characteristics of an area of law with a definite extent, but rather of "a function which may be exercised with reference to various different objects" (judgment No. 14 of 2004; see also judgments Nos. 29 of 2006; 336 of 2005 and 272 of 2004). In the specific sector of public contracts, the court however finds that the interference with regional competences occurs in a special way, as it does not normally result in an interaction *stricto sensu* with substantive matters under regional competence, but rather the priority of state legislation over any other source of law. It follows that the stage of public and open procedures, which is a competition law matter, may be entirely regulated by state legislation, subject to the limits and according to the procedures specified below.

Finally, as far as the internal limits are concerned, it should be pointed out that, whilst it is not the role of this court to establish in individual cases the economic value of state initiatives (judgments Nos. 14 and 272 of 2004), it is nevertheless a matter for the court to carry out a review of the constitutionality of individual legislative acts of the state in order to establish whether the specific choice adopted is reasonable and proportionate compared to the predetermined objective which consists, in the case before the court, of the broadest possible opening up of the market for public contracts to competition.

The rationale of this control lies precisely in the nature of the matter before the court: it does not in fact have a defined scope, but is characterised by the specific goals pursued. From this perspective, a constitutional review – informed by the criteria of proportionality and adequacy – which aims to test "the suitability of the instrument used compared to the goal of stimulating the core elements in the general economic equilibrium" is justified (judgment No. 14 of 2004, cited above).

In order to identify the precise limits of the substantive matter before the court, it is therefore necessary to undertake a two stage control: first of all to establish whether the state action is theoretically related, in the ways mentioned above, to principles

concerning competition in the market or competition for the market, or both; secondly, to ascertain whether the instrument used is appropriate for the goal pursued in the light of the criteria of proportionality and adequacy. This means that, in contrast to the arguments presented by some of the applicants, once the state legislation has been recognised as falling under the area of law in question, it make even detailed provisions. Proportionality and adequacy are not in fact measured having regard exclusively to the level of detail which characterises that specific legislation. If this were the case, an illegitimate parallel would be drawn between concurrent matters and cross-cutting matters falling under exclusive state competence, which are however regulated differently under the Constitution.

In the light of the above considerations, the court finds that the complaints presented by Piedmont Region are without foundation.

In relation to the first stage of the control mentioned above, the court finds that – having regard to the goal pursued by the state legislature of ensuring that the tender procedures respect competition law rules enacted in order to uphold the principles of the free movement of goods, the freedom to provide services and the freedom of establishment, as well as the principles of transparency and equal treatment – the procedures for the classification and selection of tenderers, award procedures (except aspects pertaining to administrative organisation), award criteria, including those which must apply to design activities and the formulation of safety plans, as well as oversight powers over the market for public contracts, fall within the ambit of competition law pursuant to Article 117(2)(e) of the Constitution. With particular reference to sub-contracting, which is also covered by the provision before the court, the court finds that it is an institution typical of public contracts, as governed by the Civil Code (Article 1656), and that such contracts may be classified as derived contracts. Although it is characterised by elements which without doubt pertain to public law, this institution maintains its private law nature and falls under the general area of private law. Nevertheless, in relation to certain not unimportant aspects, it also fulfils a guarantor role of competition in the market and therefore, also for this reason, falls under the exclusive legislative competence of the state.

Having clarified the above, the court rejects the arguments of Lazio and Abruzzo Regions that, since award procedures are "proper administrative procedures", they must be governed in line with the division of competences provided for under Article 29(2) of law No. 241 of 7 August 1990 (New provisions governing administrative procedures and the right of access to administrative documents), according to which the "the regions and local authorities may, within the ambit of their respective competences, regulate the matters governed by the present law provided that they respect the constitutional order and the guarantees of citizens in relation to administrative action, as defined by the principles contained in the present law". Administrative procedures do not constitute a proper area of law as they may, depending on the issues which are from time to time regulated, apply to various substantive matters falling under state or regional competence (judgment No. 465 of 1991), and the state legislation in question governs in a uniform manner the rights of citizens in their dealings with the public administrations. In the case before the court, having regard to the specific complaint presented, it must be reiterated that award procedures – which are intended to guarantee the above principles in an attempt to permit the full opening of the market in the sector of public contracts – are at root a matter for competition law.

Having established, according to the points made above, that the sectors mentioned above are competition law matters by virtue of the objectives which characterise such legislation, it is not however possible, on the basis of the legislative content of the contested provision, to carry out the second stage of the control which attempts to establish whether the internal limits of the area of law have been respected, and therefore whether the state action was effectively proportionate and adequate compared to the objective pursued. Due to their specific nature, these judgments of proportionality and adequacy cannot but refer to the specific provisions which govern the sector. The validity of the provision before the court is on the other hand only general in nature, being limited to the assertion that the individual areas of law mentioned therein fall under the exclusive legislative competence of the state, with an implicit reference to the specific rules contained in the provisions which concern those sectors which were only indicated in the contested provision. It is the regulation of these sectors which may be duly subject to constitutional review by this court.

6.8.— Veneto and Piedmont Regions also contest the inclusion in the provision before the court of the reference to the stages of stipulation and implementation of contracts, including the stages of executive direction and works management, accounting and testing, with the exception of organisational issues and administrative accounting. In particular, the provision before the court governs sectors relating to the organisational and procedural aspects of administrative action, which should be included, "depending on their object, amongst the matters of concurrent or residual competence" (Veneto Region appeal No. 85 of 2006), or concerns substantive matters in which there are "significant spaces classifiable under administrative structure and organisation" over which the regions have competence with the exception of the matters reserved to the state and national public bodies (Piedmont Region appeal No. 88 of 2006).

The question is groundless.

It is well known that the contractual activity of the public administration, which is carried out in pursuit of the public interest, consists of two-stages: first, the typically procedural stage of public and open procedures, followed by the second negotiation stage.

During the first stage during which the contractor is chosen, the administration acts, as has already been pointed out, in accordance with predefined procedural guarantee forms for the protection of the public interest, even though this may be accompanied by some negotiations, which means that the behaviour of the public administration must in any case be characterised by the respect, amongst other things, for the principles of good faith.

During the second stage – which starts with the stipulation of the contract (see Article 11(7) of the Code) – the administration is placed in a position of apparent equality with the other party and acts not by exercising its administrative powers, but rather its own contractual autonomy.

This stage, which covers the entire regulation of performance pursuant to the contractual relationship, including the institution of testing – which is, amongst other things, also specifically regulated under the Civil Code (Article 1665 et seq), also is also subject to the arguments already brought in relation to sub-contracting – is therefore

characterised by the normal absence any power of the authority for the public subject, such powers having been replaced by the exercise of contractual autonomy.

It follows that the contested provision – which governs aspects concerning relations which are predominantly private law in nature, even though one of the parties is a public administration – must be classified as forming part of private law. There is in fact a requirement, derived from the constitutional principle of equality, to guarantee throughout the whole country uniform treatment of the regulation of the phases of conclusion and implementation of public contracts which amongst other things – on account of the efforts at unification and legislative simplification carried on by Parliament – has systematic validity. It cannot be objected, as Veneto Region attempts, that the system of private law provides no grounds for competence on the grounds that "the stipulation and implementation [of contracts] governed by the Civil Code" are not issues which arise. On this point, it is important to note that the substantive area of law in question embraces all aspects pertaining to private law relations in respect of which the requirements mentioned above are satisfied, and it is not necessary that the said relations be governed strictly in accordance with the Code. In other words, the presence of special aspects compared to the provisions of the Civil Code in the rules governing the stipulation and implementation of public contracts is not an obstacle to the recognition of the state's right to act pursuant to Article 117(2)(l) of the Constitution.

None of the above however suggests that the public administration may not retain public powers relating, amongst other things, to specific organisational aspects pertaining to the executive stage where justified by particular requirements in the public interest. On the other hand, the contested provision expressly excludes from the legislative competence of the state "organisational issues and administrative accounting", with the result that where one of the contracting parties is not a state administration in these areas, there would be grounds for regional competence.

Accordingly, whether an issue is a private law matter or falls under the competence of the regions may be established only in relation to individual and specific provisions governing the conclusion and implementation of the contractual relationship.

6.9.— In the same way, for the sake of completeness, it should be added that, in relation to ordinary and administrative justice, the disputes mentioned in sub-section 3,

to which the applicants refer albeit in general terms, fall under the exclusive competence of the state.

In conclusion therefore, according to the arguments examined above, the court finds that the questions of the constitutionality raised in relation to the constitutional principles contained in Articles 117 and 118 of the Constitution are groundless.

6.10.— It is now necessary to examine the question of constitutionality raised by Veneto, Piedmont and Tuscany Regions concerning the rule, contained in the sub-section before the court, that the requirement incumbent upon the regions to comply with the provisions of the Code (that is, the prohibition on enacting contrasting legislation) also concerns design activities and safety plans.

The regions argue in particular that design activity falls under the residual competence of the regions (as it is not mentioned in any of the substantive matters set out in Article 117(2) and (3) of the Constitution), which – it is argued – means that only works design (which is "intended to lead to the realisation of public works within a given territory") falls under the substantive matter of territorial government (Tuscany Region appeal No. 84 of 2006); safety plans on the other hand are related to the concurrent matter of safety in the workplace or (due to their connection with the executive design phase of the public works) territorial government. Similar complaints were made with reference to safety plans by Lazio and Abruzzo Regions.

The complaints raised only by Veneto Region concerning Articles 93 and 112(5)(b) may also be considered by this court on the grounds that they are related. In particular, the applicant complains that the above provisions violate Article 117(2)(e) of the Constitution in that they regulate in an excessively analytical manner "design levels" and the "checking of projects" respectively.

The questions are groundless.

It is important as a preliminary matter to point out that:

Article 4(3) provides that the regions may not enact legislation which departs from the present Code in matters relating to design;

Article 93 makes detailed provisions regulating the design levels for public contracts and works concessions providing, amongst other things, that the design be divided – in

three levels of increasingly technical specialisation – into preliminary, definitive and executive stages;

Article 112(5)(b) – which is also contested by Veneto Region – authorises the issue of regulations governing the procedures for checking projects, provided that these respect, amongst other things, the principle that the checks may be carried out by the technical offices of the tendering authorities where the project has been drafted by external designers or where the tendering authorities have an internal quality control system, or finally by other subjects authorised in accordance with the criteria contained in the regulation.

For the purposes of the specification of the *thema decidendum*, it must be emphasised that only those criteria which apply to conduct of design activity are relevant before this court. In particular, the defining feature of such activities, according to the contested Article 93, consists in the drafting of designs, which this court has found to be essential "in order to ensure the viability of the public works project according to the executive design" and "indispensable in order to guarantee certainty in time-scales and completion costs" (judgment No. 482 of 1995).

It is important to points out that the provision of uniform design criteria in relation not only to public works, but also to public services and public supplies – which is essentially in order to ensure, amongst other things, the principles of equal treatment and non-discrimination throughout the country of participants in tender procedures – must predominantly fall within the substantive reach of competition law.

The above requirement of uniform legislation also applies to the procedures for checking projects provided for in the contested Article 112(5)(b).

Having said this, it is important to clarify that during the implementation stage of design activities (which – as also for public works programming – does not constitute a free-standing area of law, but represents one element within a complex procedure governing the completion of public works) the administration or subject responsible for overseeing the completion of the public works through the appropriate tender procedures is vested with specific competence. In other words, the bringing of design activity within the exclusive competence of the state applies exclusively to the setting of criteria on the basis of which this activity must be carried out such as to ensure in all

cases the broadest level of competition and the free movement of economic operators in the market segment in question, but does not extend to impinging on the individual awarding administrations' competence over the specific conduct of design activity, since competence over this is not affected by the legislation in question.

The court therefore finds that the questions concerning both this aspect of Article 4(3) as well as the provisions contained in Articles 93 and 112(5)(b) of the Code are groundless.

Turning now to the reference contained in the provision before the court to safety plans, the court finds, again with a view to specifying the *thema decidendum*, that a uniform regulation of the criteria for the formulation of safety plans is also intended to guarantee, amongst other things, the principles of equal treatment and non-discrimination between participants in the tender. Subject to the above limits therefore, the provision before the court falls within the ambit of competition law, with the result that the complaint is groundless.

In the light of the arguments set out above, the questions concerning Article 131, which makes specific provision for safety plans, can also not be allowed.

In particular, Veneto Region claims that the above Article breaches Article 117(2)(e) of the Constitution on the grounds that the provision in question is excessively detailed.

Tuscany Region on the other hand contests only Article 131(1), which provides that "The government, acting on a proposal by the ministers of Social Policies, Health, Infrastructure and Transport, and European Community Policy, and having consulted the most representative trade unions and business organisations, may approve such amendments as may be necessary to the regulation contained in presidential decree No. 222 of 3 July 2003 concerning safety plans in temporary or mobile building sites in accordance with Community directives and the relevant national implementing legislation". According to the applicant, this provision violates Articles 117 and 118 of the Constitution on the grounds that it is not lawful for the government to issue a regulation concerning matters relating to safety plans, which fall under concurrent legislative competence (safety in the workplace). In the alternative, the applicant argues that even were the court to find that the state has exclusive competence, the necessary involvement of regional governmental bodies was not guaranteed.

The question raised by Veneto Region is inadmissible due to its generic nature.

Indeed, even though the provision makes detailed provisions touching on a variety of areas of law, over which the state may without doubt exercise its legislative competence over the determination of criteria for the drawing up of safety plans, the applicant limited itself to contesting the provision generically in its entirety.

As regards the question raised by Tuscany Region concerning Article 131(1), the court finds that this is groundless.

This sub-section must be interpreted as conferring on the government only the power to issue regulations concerning the criteria for the drafting of safety plans which, as already pointed out, are essential in order to ensure the uniformity of treatment of the participants in tenders and therefore the principles of competition law. Since therefore it is a matter of exclusive state legislative competence which comes into question, the court finds that the provision of a corresponding power to issue regulations is lawful.

The observation that during the implementation stage their drafting is governed by the legal regime applicable to the public project to be completed applies also to safety plans, since the state has exclusive competence to fix the general criteria for the formulation of the said instruments.

6.11.— Finally, Lazio and Abruzzo Regions claim that the provision in question violates the principle of loyal cooperation in that, even though it regulates sectors characterised by substantive interrelations and overlaps and despite the negative opinion of the Joint Assembly, it “unilaterally” drafted the contested provisions.

The complaint is groundless for the same reasons discussed in relation to Article 4(2) (see paragraph 5.4).

7.— The applicant regions have contested, in the terms set out below, Article 5(1), (2) and (4), whilst the Autonomous Province of Trento has contested sub-sections 1 and 2 insofar as they allow the state to issue regulations in the matters specified in Article 4(3) that are binding also on the autonomous provinces, due to violation in particular of: Article 11(17) of constitutional law No. 5 of 1948, which confers primary legislative competence on the province over public works of provincial interest; and Article 117(6) of the Constitution, as well as Article 2 of legislative decree No. 266 of 1992 (which provides for the applicability to provincial matters of state laws alone), since “given that

some of the objects mentioned in Article 4(3) do not fall under the exclusive competence of the state, the provision of a state power to make regulations is unlawful". The applicant province also claims that Article 5(4) is unconstitutional due to the violation of the principle of loyal cooperation.

On this point, the court finds that the question concerning sub-section 1 is groundless. The contested provision in fact provides that provision may be made in state regulations for the implementation of the Code in relation to contracts for public works, public services and public supplies of the administrations and state bodies and, "only to aspects covered by Article 4(3), in relation to the contracts of every other administration". Under a constitutionally informed interpretation, this latter reference must be understood as meaning that the Article applies to the state and the regions and not also the autonomous provinces of Trento and Bolzano. It follows from the above that the complaint is groundless also as regards Article 5(4).

On the other hand, Article 5(2) must be declared unconstitutional insofar as it refers, in a manner that contradicts the safeguard clause contained in Article 4(3), also to the autonomous provinces, applying the regulations to them in the sectors mentioned in sub-section 3.

7.1.— Turning now to the complaints raised by the applicant regions, they concern the problem of the limits to the state's power to make regulations in the matters falling under Article 4(3) of the Code, that is in those matters which this provision attributes to the exclusive legislative competence of the state pursuant to Article 117(2) of the Constitution, which is expressly referred to in sub-section 3. Article 5(1) in fact delineates the ambit of the state's power to make regulations with reference "to contracts for public works, public services and public supplies of administrations and state bodies and, regarding only those aspects contained in Article 4(3), in relation to the contracts of any other administration or equivalent subject", including the regions.

The applicants argue in the first place that the provision before the court is unconstitutional in that Article 4(3) includes amongst the matters under exclusive state competence sectors and objects over which by contrast the regions have competence.

Secondly, Veneto Region alone argues that for cross-cutting matters over which the state has legislative competence, the latter may enact only primary legislation and not

also regulations, as there are no grounds to distinguish between obligations expressed through fundamental principles and those resulting from the legislation applying to cross-cutting matters.

Finally, Veneto Region also argues that "the political autonomy" enjoyed by the regions may be "limited only by acts directly or indirectly attributable to Parliament, the forum for national representation" and not also by the government alone and the "majority which supports it".

7.2.— The questions thus formulated are groundless.

Article 117(6) of the Constitution provides that the state may exercise the power to make regulations only in the matters under its exclusive legislative competence; "in all other matters" the power to make regulations is vested in the regions.

The contested provisions apply the above constitutional principle, providing that the regulation implementing and applying the Code may bind the regions only in areas of law falling within the sphere of the exclusive legislative competence of the state pursuant to Article 4(3) of the Code.

It is clear that the reference in the contested provision to Article 4(3) for the purposes of the delineation of the state's power to make regulations is lawful. In other words, this power may be exercised only in substantive matters over which the state has exclusive competence, in accordance with the provisions of Article 117(6) of the Constitution.

7.3.— The points made above also apply when the cross-cutting matter of competition law is at issue. Once in fact it has been found that the legislative action by the state falls under competition law, it also has the power to enact the relevant provisions governing that sector including through detailed provisions contained in regulations; this is of course subject to the requirement that the provisions as a whole pass constitutional muster regarding the respect for the criteria of adequacy and proportionality, in relation to any specific provisions which may from time to time be subject to scrutiny.

7.4.— Finally, it is necessary to examine the further complaint, raised more specifically by Veneto Region, that the passing of regulations which end up limiting the autonomy recognised to the regions is not lawful in the context of legislative competence which is cross-cutting in nature.

This question embraces broader issues touching on the relationship between state-level regulations and regional primary legislation.

On this point, it is important to remember that prior to the reform of Title V of Part II of the Constitution, the fundamental principles governing matters falling under regional competence, which were binding on the regions, could be imposed exclusively by laws or by acts having the force of a state law, which meant that regulations were not permitted (see, *inter alia*, judgments Nos. 376 of 2002; 408 of 1998 and 482 of 1995). The justification for this assertion lay in the principle of the division of competences, which prevented the imposition of any form of conditioning of regional primary legislation by state regulations, including those adopted pursuant to a decision to legislate through secondary legislation [in Italian: *delegificazione*].

This argument was further reinforced with the reform of Title V (a point already addressed in judgment No. 303 of 2003) which, as the court has already found, provided that the state may not pass regulations in matters over which competence is shared, whilst it may on the other hand only adopt regulations in matters over which it has exclusive legislative competence. Where areas of law which are cross-cutting in nature are at issue, the only problem which could arise is that concerning the relationship between sources of law belonging to different spheres of competence, since cross-cutting matters are characterised by the fact that they may touch upon other regional competences because such legislation does not normally cover one single specific object.

In the case before the court, disregarding all points relating to the actual infringement of regional legislative autonomy, it must be emphasised that a regional law is not conditioned by a piece of secondary legislation where the state is entitled to act on competition law grounds, precisely by virtue of its particular characteristics described above and its operating procedures in the sector of public contracts.

In the light of the specific questions of constitutionality raised and the type of regulations provided for, the court does not therefore see how there can be any conditioning of regional primary legislation by state secondary legislation. The latter, which implements and applies primary legislative provisions, enacts all the provisions necessary in order to pursue the objective of realising competition law goals; the former

on the other hand govern those aspects which, albeit ancillary, do not directly touch on competition law. The operating procedures of the matters before the court therefore guarantee a separation between state and regional legislation with different hierarchical status, even where the case involves the use of the power to issue regulations, thereby preventing acts of delegated legislation from interfering with regional laws.

7.5.— Having clarified this, it is necessary to examine the question raised in the alternative by Tuscany Region which argues that, should the court find Article 5(1) and (2) to be lawful, sub-section 4, which governs the procedures for the adoption of regulations without providing for any consultation of the regions, would in any case be unconstitutional. Veneto Region raised a similar question with reference to Article 5(1). Piedmont Region by contrast claims that in matters falling under exclusive state competence which are cross-cutting in nature, due to the interference with regional competences, it is necessary that the state regulation be drafted in agreement with the Joint Assembly.

In the light of the above considerations, the court finds that the questions cannot be well founded.

In fact, there is no duty to consult the regions where the state exercises its power to issue regulations in matters reserved to its exclusive legislative competence. This also applies for competition law matters, due precisely to the particular effects of its cross-cutting nature. The duty to comply with the requirements for cooperation may be imposed on a constitutional level only in cases in which there is a significant overlap with regional competences which calls for the adoption of jointly agreed procedures or in any case of mechanisms which guarantee consultation with the relevant governmental bodies. In the case before the court, the other regional competences are touched upon by the state through the exercise of its legislative powers in competition law matters. There is therefore a separation between state competence and regional competence which does not require, other than in special circumstances, particular forms of loyal cooperation when the power to issue regulations is exercised. This is obviously without prejudice to Parliament's discretionary ability to provide, as occurred in relation to specific provisions contained in the Code, for forms of cooperation with regional governmental bodies during the adoption stage of individual regulations.

7.6.— Veneto Region in addition claims that Article 5(2) violates Articles 117(3) and (4) and 76 of the Constitution, insofar as "a unilateral classification by the state of the provisions applicable to the regions cannot be carried out by government regulation especially where, such as in the present case, a very broad margin of discretion is left to the regulation, even though the rationale can be appreciated".

The question is inadmissible.

The provision in question limits itself to providing, in the sectors falling under state legislative competence, that the regulation shall indicate which provisions contained in it are also directed to the region. It is therefore clear that, by virtue of its specific content, this provision has an exclusively information-related goal, which means that, given the absence of an effective legislative scope of the contested provision, the court finds that there has been no breach of regional competences.

The argument contained in the written statement submitted by Veneto Region that the draft regulation applying and implementing the Code, approved by the Council of Ministers on 13 July 2007, provides for the applicability of the entire regulation to every awarding administration (Article 1(3)) is also not persuasive. Irrespective of whether it was still a draft, as such open to amendments or adjustments, the court finds that had the state, when exercising its power to issue regulations, gone beyond the substantive matters within its own competence, the regions would be entitled to invoke the remedies laid down in order to safeguard any of their competences which had been infringed.

7.7.— Veneto Region argues, again in the alternative, that Article 5(1) violates Articles 76 and 117(5) of the Constitution on the grounds that:

a) the pre-emptive substitution provided for, in accordance with Article 117(5) of the Constitution, by law No. 11 of 2005 could not occur by regulation and, even assuming this to be possible, the regulations should be of a supplementary and reserve nature;

b) in the matters falling under Article 117(2) of the Constitution which impinge upon regional matters (such as those at issue here), the adoption of regulations governing contracts of regional interest which are also relevant under EC law is not permitted, since Article 11 of law No. 11 of 2005 allows for the implementation of Community directives by regulation only where permitted under Community law, whilst the parent law No. 62 of 2005 does not contain any such authorisation. The applicant argues that,

for the reasons set out, the unconstitutionality stems from the fact that law No. 11 of 2005 was not open to amendment by ordinary legislation in that it was a law "directly implementing Article 117 of the Constitution. In any case, a derogation of this significance from the provisions of the above law would have required a specific principle or directional criterion which was lacking in this case. This means that the provision before the court breaches Article 76 of the Constitution on further grounds, since the government overstepped the authorisation conferred upon it "and the region has standing to challenge such a violation as it concerns a failure to respect the provisions enacted in order to confirm its own autonomy in the implementation of Community directives".

The questions are groundless.

In the first place, as far as the first complaint is concerned, the court finds that the provision in question – which allowed for the issue of regulations in matters falling under the exclusive legislative competence of the state – need not give an express indication of the reserve nature of the rules contained in it. This characteristic need in fact only be present in cases in which the power to issue regulations is exercised in matters under the competence of the regions.

As regards the second complaint, it is first important to point out that it is framed in generic, and even obscure, terms since it would appear that the region has amongst other things directed its complaints not against the provisions of the Code, but rather against parent law No. 62 of 2005, which is not subject to review, insofar as it is claimed to have departed from the requirements of law No. 11 of 2005 which is, according to the region, a law "directly implementing Article 117 of the Constitution" and therefore not subject to amendment by ordinary legislation.

In any case, the court finds that, since it is more recent and more specific, law No. 62 of 2005 in any case prevails over the provisions contemplated in law No. 11 of 2005.

Turning now to the applicant's argument that such a derogation would in any case have required a specific "principle or directional criterion", it must be pointed out that, whilst it may be true that Article 11(1) of law No. 11 of 2005 provides that in the matters falling under Article 117(2) of the Constitution which are not precluded from regulation by secondary legislation, directives may be implemented by regulation only

“if the Community legislation so provides” and in the case before the court Community law [sic.] No. 62 of 2005 makes no such provision, this does not however render the provision unconstitutional due to violation of Article 76 of the Constitution. In fact, the power to issue regulations in the matters falling under Article 117(6) of the Constitution is derived directly from the Constitution, which means that the absence in a parent law of specific directional criteria on this point is not relevant.

8.— Article 5(7) allows tendering authorities to adopt terms of reference containing detailed and technical regulations applying to its own contracts in general or to specific contracts (special terms of reference), subject to compliance with the provisions contained in the Code “and the regulation mentioned in sub-section 1”, i.e. the government regulation to be issued pursuant to the provisions of Article 4(3) for the matters reserved to the exclusive competence of the state. Article 4(3) goes on to provide that “The terms of reference mentioned in the contract notice or in the invitation shall constitute an integral part of the contract”.

Article 4(8) in turn provides that general terms of reference shall be adopted for contracts awarded by state administrations, subject to the respect of the provisions of the Code “and the regulation mentioned in sub-section 1”.

Finally, Article 4(9) provides that the general terms of reference for public works “may be referred to in the contract notices and in the invitations where the administration making the award is not a state administration”.

Veneto Region has contested only sub-sections 7 and 9 insofar as they allow tendering authorities to adopt their own terms of reference or to transpose the general terms of reference of the state. It claims that Article 117(3) and (4) of the Constitution have been violated insofar as – unless a regional law is enacted providing for the approval of specific general terms of reference or the introduction for all tendering authorities of uniform frameworks of special terms of reference – the contested provisions infringe the legislative competence of the regions over public works of regional interest, in addition to the region's competence over its internal organisation and that of bodies dependent on it.

The question is groundless.

Irrespective of the area of law under which they fall, the contested provisions do not impose any obligation on tendering authorities to adopt special terms of reference, but rather simply the ability to do so ("may adopt"). And it is logical that if the tendering authorities avail themselves of this right, the content of the special terms of reference will have to comply with the provisions of the Code and the government regulation mentioned in Article 5(1).

In the same way, Article 4(9), which is contested, provides for the right of and not the duty on tendering authorities, where the administration making the award is not a state administration, to refer ("may be referred to") in the contract notices or in the invitations to participate in tenders to the general terms of reference for public works.

On the basis therefore of the substantive content of the contested provisions raised, the court finds that there has been no infringement of the legislative competences of the region as far as the completion of regional public works is concerned.

9.— Veneto Region has contested Article 6(9)(a) and Article 7(8) due to violation of Article 117(2)(e) of the Constitution on the grounds that "on account of their excessively detailed nature, they prevent the regions from enacting legislation to establish more streamlined procedures which are compatible with the internal organisation of the regional sections of the Public Contracts Watchdog".

In particular, Article 6(9)(a) provides that the Oversight Authority for Contracts for Public Works, Public Services and Public Supplies may "request from tendering authorities, economic operators which carry out the contracts, as well as any other public administration and any body, including regional bodies, economic operator or natural person in possession of documents, information and clarifications concerning public works, public services and public supplies in progress or which have not yet been commenced, the making of design appointments and awards".

Article 7(8) provides in turn which information the tendering authorities and awarding bodies are required to provide, within a predetermined deadline, to the Public Contracts Watchdog for Public Works, Services and Supplies, which operates within the ambit of the aforementioned Oversight Authority.

The questions are inadmissible due to their generic nature.

The applicant does not in fact analyse the heterogeneous content of the provisions, which are contested as a whole in the light of the constitutional principle invoked. In addition, no arguments are submitted – beyond the insufficient reference to the excessive detail of the contested provisions and an obscure reference to organisational aspects – which attempt to demonstrate the violation of the principles of adequacy and proportionality.

10.— The contested Article 48 regulates the stage of the administrative procedure in which the contractor is chosen, characterised by a series of checks of the tenderer's compliance with the prerequisites for participation in the tender. It provides in particular that before opening the envelopes containing the offers submitted, the tendering authorities shall request a number of tenderers representing no less than 10 percent of the offers submitted, rounded up to the nearest number, chosen by public drawing of lots, to provide evidence within 10 days of the date of the request that they satisfy any economic/financial and technical/organisational requirements requested in the contract notice or in the letter of invitation.

The sub-section goes on to make provision for cases in which such evidence is not provided and the consequences as regards the further continuation of the tender procedures.

Article 48(2) provides moreover that the requests mentioned in sub-section 1 must also be forwarded, within ten days of the conclusion of tender procedures, to the successful tenderer and the tenderer immediately below it in the ranked list, unless the two were included amongst the tenderers chosen by lot, and also makes provision for the consequences of the failure to comply with these requirements.

The article in question is contested by Tuscany Region, which claims that it is unconstitutional due to violation of Articles 117 and 118 of the Constitution on the grounds that, despite the absence of centralisation requirements, it introduced detailed and self-applying provisions relating to controls over self-certified declarations given by participants in the tender. This is claimed to amount to an undue interference in the matter of administration organisation, which falls under the residual competence of the regions, which are entitled to alter the contents of such legislation in a differentiated manner in order better to moderate between the various interests in play.

The question is groundless.

The court has pointed out above, with reference to the provisions contained in Article 4(3) of the Code which has already been subject to examination, that the regulation of the procedures for the choice of the contractor, undertaken with a view to concluding contracts with the public administration, relates principally to competition law which falls under the exclusive competence of the state. This competence means that the legislation governing those aspects of the administrative procedure – set out by the Code on the basis moreover of previous legislation which was simply reiterated – which concerns directly the procedures for the choice of the contractor, and therefore the effectiveness of competition between the participants in the tender, is not unconstitutional. These aspects without doubt include the instruments which control tenderers' compliance with the economic/financial and technical/organisational requirements capable of providing valid guarantees of the seriousness which must characterise participation in the tender. The enactment of harmonised legislation in relation to this aspect is essential in order to satisfy the requirement, referred to on various occasions at Community level, of equal treatment and non-discrimination between the tenderers with a view to ensuring, amongst other things, freedom of movement of goods, freedom of establishment and the freedom to provide services.

Finally, it is incorrect to assert, as the applicants do, that since the legislation enacted in the Code is technical in nature or excessively detailed and self-applying, it is automatically unconstitutional. This is because, as has been pointed out on various occasions, even legislation of this nature does not breach the constitutional principles mentioned in that it derives its legitimacy from the constitutional provision conferring exclusive competence on the state in such matters.

11.— Veneto Region has also contested Articles 70, 71 and 72 arguing that, in relation to so-called below threshold contracts, they violate Article 117(2)(e) of the Constitution on the grounds that they are excessively detailed and thorough; a similar complaint is made against Article 252(3), as well as against Article 253(10) and (11).

The contested provisions govern respectively: the time limits for receipt of applications to participate and of offers (Article 70); the deadlines for transmission to the tenderers of the terms of reference, documents and supplementary information in

open procedures (Article 71), as well as in restricted procedures, negotiations and competitive dialogue (Article 72); publication requirements for below threshold contracts (Article 252(3)); the procedures for amending contract notices relating to public services and public supplies, as well as contract notices by non-state tendering authorities (Article 253(10)); the creation of the special series concerning public contracts in the *Official Journal* of the Italian Republic (Article 253(11)).

The questions must be declared inadmissible.

Due to the broad and in many senses heterogeneous content of the contested provisions the applicant should have specifically indicated the provisions which do not comply with the limits of proportionality and adequacy which underpin competition law. In any case, the court finds that since the contested provisions concern the procedure for the choice of the contractor, they fall under competition law for the reasons set out above.

12.— The questions concerning the constitutionality of Articles 75, 113 and 252(6) must be examined together on the grounds that they are related.

In particular, Tuscany Region contests Article 75(1) which provides that "offers shall be accompanied by a guarantee equal to two percent of the base price specified in the contract notice or invitation to tender in the form of a deposit or surety at the discretion of the party making the offer". The applicant argues that the above provision is unconstitutional due to violation of Article 117 of the Constitution, since by not permitting the regions to frame the request for a deposit differently depending on the type of procedure and on the amount, it infringes the residual competence of the regions in organisational matters.

Veneto Region on the other hand contests Article 75 as a whole, asserting that, by enacting a "broad-sweeping and detailed" regulation of the forms of guarantee, it breaches the limits to which the legislative competence of the state is subject in competition law matters.

The questions are in part groundless and in part inadmissible.

12.1.— As a preliminary matter, the court finds that the question concerning Article 75 as a whole, submitted by Veneto Region, is inadmissible due to its generic nature.

Whilst recognising that the contested provision governs a sector falling within the ambit of competition law, the applicant complains of the excessively detailed nature of the provisions contained therein. As has already been pointed out on various occasions, it is not however sufficient to invoke simply the detailed character of the regulation in order that the court may automatically find there to have been a violation of the principles of proportionality and adequacy which must inform constitutional review.

It should be added that in the case before the court, even though the provision in question has a broad and complex content, the applicant has limited itself to challenging it generically as a whole, without providing any specific grounds capable of justifying this manner of framing the application for review.

12.2.— The court finds groundless the question concerning Article 75(1) which, in contrast to the arguments submitted by the applicant Tuscany Region, is an integral part of the framework of provisions governing the conduct of the tender, and as such the stage during which the contractor is chosen which, for reasons already discussed, is justified by the exclusive legislative competence of the state over competition law. In fact, the provisions concerning the provision of the guarantees accompanying the offer relate to the stage in which the contractor is chosen and aim, along with all those introduced in order to govern the system of offers, to ensure the competitiveness of the companies in the market segment which are interested in contracts for the completion of public works, public services and public supplies.

12.3.— Moreover, the claim submitted by Veneto Region that Article 113 is unconstitutional in that, despite its status as part of competition law, it was excessively broad-sweeping and detailed in nature, is groundless.

On this point, the court finds that the contested provision does not, as claimed by the applicant, concern competition law, but falls within the exclusive legislative competence of the state over private law matters (Article 117(2)(l) of the Constitution).

Article 113 opens Section V of Title I of Part II of the Code containing “Principles relating to the completion of contracts” and, against this background, regulates the surety guarantees for completion and insurance cover, stipulating the procedures for the constitution, retention and refund of such guarantees, as well as the consequences of the failure to comply with them. For the reasons set out in general regarding the

performance stage of the contractual relationship, these issues – which concern the private law regulation of aspects relating to bargaining limits – must necessarily receive uniform treatment throughout the whole country.

12.4.— Similarly, the challenge by Veneto Region to Article 252(6), which provides that the frameworks for model policies for insurance cover and surety guarantees must be approved by decree of the Minister for Productive Activities acting together with the Minister for Infrastructure and Transport, is groundless. These regulations relate to the implementation of the contract, a stage which for the reasons set out above as such falls under the exclusive legislative competence of the state over private law.

13.— Article 84(2), (3), (8) and (9) have been challenged, which stipulate provisions concerning the functions, composition and appointment procedures for members of the assessment board charged with expressing an opinion in the event of an award according to the criterion of the most economically favourable offer.

Tuscany Region challenges the above sub-sections, which do not concern the functions of the Board (governed by sub-section 1, not subject to review), but rather its composition and the procedures for the appointment of its members.

The applicant argues in support of its complaint first that Articles 117 and 118 of the Constitution have been violated in that, in the absence of centralisation requirements, the setting of the number of members (sub-section 2), the qualifications of the chairperson (sub-section 3) and commissioners (sub-section 8), as well as the procedures for their appointment (sub-sections 8 and 9) must be placed within the organisational remit of the individual tendering authorities, which may alter them giving consideration to the complexity of the object of the tender as well as the amount of the same. It is also stated in the application for review that in the "unlikely event" that the above arguments are not accepted and should the court find that the content of the provision can be classified as a competition law matter, the case before the court lacks the features characteristic of such matters, i.e. the macroeconomic nature of the action and compliance with the principles of proportionality and adequacy which require that the action be limited to the passing of legislation of a general and not detailed nature.

On other grounds, the applicant argues that Article 76 of the Constitution has been violated insofar as the directional criteria provided for under Article 25 of law No. 62 of

2005 do not permit "the enactment of new provisions other than on the grounds of [procedural] simplification" which in this case do not apply.

The question is well founded.

It should be pointed out that, leaving aside the formal amendment made to Article 84(3), legislative decree No. 113 of 2007 (the first decree which amended the Code) specified in sub-section 8(ii) that "functionaries from the awarding administrations mentioned in Article 3(2)5" may be appointed as commissioners. The amendment in question is therefore not relevant for the question of constitutionality raised in the application by Tuscany Region.

As far as the merits of the question are concerned, the court does not accept the argument that the delegated legislation – relating to the composition and procedures for appointing members of the assessment board – was enacted on the basis that the state has exclusive legislative competence in competition law matters. It claims that these provisions concerned specifically the criteria and procedures for choosing the contractor, which were capable of having an effect on the participation of operators in the tender and, by extension, on competition in the market in the sense that any differences in procedures used could have consequences in terms of a greater or lesser possibility of access to the market by companies, as well as the equal treatment which they must be guaranteed.

On the other hand, even though the provision before the court governs aspects of the selection procedure, it is intended to fulfil other goals and must follow the general legal regime applicable to these goals, provided it does not impinge upon the requirement to safeguard competition in the market, which justify legislative action by the state pursuant to Article 117(2)(e) of the Constitution.

Accordingly, the issues related to the composition of the assessment board and the procedures for appointing its members relate more specifically to the administrative organisation of the organs charged with the task of verifying compliance by the tenderer companies with the necessary requirements for award of the tender. It follows from this that the legislative competence of the regions in the regulation of these aspects cannot be precluded.

The court therefore finds that the provisions contained in the sub-sections in question do not comply with the system of the division of competences between the state and the regions. These provisions apply certainly as a whole to contractual activity undertaken on state level, whilst it must necessarily be set aside as regards the regions if (and only if) there is any specific legislation to the contrary at regional level, in accordance with Article 117(5) of the Constitution and Article 1(6) of parent law No. 62 of 2005.

In the light of the above considerations, the court finds that the provisions contained in Article 84(2), (3), (8) and (9) are unconstitutional insofar as, with regard to contracts relating to sectors under regional competence, they do not provide that they be of a supplementary and reserve nature in relation to any contrasting regional legislation which has already been enacted or which may be enacted in future.

The above finding of unconstitutionality applies also to the amendments, mentioned above, to the provisions in question made by legislative decree No. 113 of 2007.

14.— Tuscany Region has contested Article 88, insofar as it makes detailed provisions concerning procedures for the checking and exclusion of offers considered to be "abnormally low". In particular, the applicant claims that Articles 117 and 118 of the Constitution have been violated insofar as, first, the procedure for checking anomalous offers in which the company may make representations concerns aspects of regional organisation over contracts of the region, of regional bodies and of local authorities; secondly, the region argues that it is not possible to claim competence on the basis of competition law, since the regulation of the procedure for verifying anomalous offers has no overall impact on the economy, and is also too detailed and thorough, which means that it fails to comply with the requirements of adequacy and proportionality.

The question is groundless.

By enacting the contested provision, the state legislature followed the Community rules (Article 55 of directive 2004/18/EC and Article 57 of directive 2004/17/EC) governing the institution in question, providing in particular that the exclusion of anomalous offers must not be automatic, but must occur following the outcome of a procedure in which the company has a right to make representations.

On this point, this court has already found – albeit with reference only to public works contracts, but using reasoning which may also be extended to the sectors of

public services and public supplies contracts – that the Community legislation governing the institution (at the time, Article 30 of Council directive 93/37/EEC of 14 June 1993) "entails the requirement to guarantee competition and to obtain the performance at the most favourable price for the administration, along with the requirement to ensure that the offers are serious, providing that, before rejecting those which have an abnormally low price compared to the performance, the administration must seek such clarifications as it considers useful concerning the composition of the offer and must carry out a check, giving consideration to the justifications provided" (judgment No. 40 of 1998; see also judgment No. 132 of 1996).

The respect for the company's right to make representations, imposed by Community law, has the goal in the first place of verifying whether, for instance, the company is not in a condition effectively to guarantee the result sought by the administration at a price lower than that which the other companies are able to offer; secondly, by not permitting measures which automatically exclude tenderers (see, *inter alia*, the ECJ judgment in the *Lombardini and Mantovani* case, cited above), it aims to pursue the objective of the broadest participation of economic operators in tender procedures.

It is therefore clear that that the procedure in question is complex and the goal of ensuring that the procedure complies with the rules of competition law when choosing the contractor is predominant, which means that the passing of legislation on a national level is justified pursuant to Article 117(2)(e) of the Constitution, also with reference to the criteria of adequacy and proportionality.

15.— Veneto Region has also challenged Article 91(1) and (2) (as well as the provisions contained in Part II, Title I and Title II referred to therein) concerning the appointment of designers for amounts below the Community threshold, insofar as the said provisions have "an excessively detailed nature", which contrasts with the requirement of reasonableness and proportionality.

The question is inadmissible due to its generic and indeterminate nature.

In fact, the applicant limits itself to asserting that the provision in question violates the above principles of reasonableness and proportionality, without even a complete reference to the contents of the contested provision, and generically challenging the reference contained in Article 91(1) to provisions contained in other parts of the Code.

Moreover, the region has not given any justification for overstepping the limits applicable to competition law, since, as has been pointed out on several occasions, it is not sufficient simply to refer to the "excessive detail" of the contested provisions.

16.— Article 98(1) provides that "The present law is without prejudice to the provisions in force governing the effects of the approval of projects for the purposes of town planning and expropriation".

Article 98(2), contested before this court, provides that "In order to bring forward the realisation of transport, road and parking infrastructure designed to improve the quality of the air and environment in the cities, the approval of definitive projects by the municipal council constitutes planning permission for all purposes".

Veneto Region challenges sub-section 2 alone insofar as it provides that "the approval of definitive projects by the municipal council constitutes planning permission for all purposes", averring a breach of Article 117(3) of the Constitution on the grounds that, even though the provision in question falls within the sector of town planning and thus impinges upon the concurrent matter of territorial government, it expresses a mandatory rule.

The question is well founded.

In providing that "the approval of definitive projects by the municipal council constitutes planning permission for all purposes", even though on account of the goals pursued, which are stated to be those of improvement of the "quality of the air and environment in the cities" and are related to environmental law matters, having regard to its particular object, the contested provision predominantly concerns the substantive matter of territorial government, over which competence is shared between the state and the regions. It follows from this classification that the state alone has the power to determine the fundamental principles in these matters, with the regions having power to issue detailed legislation in accordance with Article 117(3), last sentence, of the Constitution.

Applying the above rule to the case before the court, it follows that the provision in question is unconstitutional on the grounds that, due to its legislative content which is highly detailed, it does not leave any space for action by the regions. In fact, the assertion that "the approval of definitive projects constitutes planning permission for all

purposes" may not be subject to additional measures enacted by the regional legislature, with the resulting infringement of the competences vested in the regions in town planning matters and hence territorial planning policy (see judgment No. 206 of 2001).

17.— Tuscany Region has contested Articles 121(1), 122(2), (3), (5) and (6)(ii), (v) and (vi) due to violation of Articles 76, 117 and 118 of the Constitution.

In particular, Article 121(1) is contested insofar as it provides that the provisions contained in Part I, Part IV and Part V, as well as those contained in Part II of the Code, shall apply to public contracts relating to public works, public services and public supplies for amounts lower than the Community relevance thresholds, unless amended by the provisions contained in Title II into which the contested provision was introduced. The region complains that this rule eliminates any differences in treatment between public contracts below threshold and those above the threshold, with the exception of the possibility to make provision for reduced time limits and more limited publication, although a general requirement of publication of all tenders in the *Official Journal* has been introduced. Moreover, the aforementioned reference would in particular lead to a requirement to receive a deposit in all tender procedures (Article 75), as well as to follow the procedure for identifying abnormally low offers (Article 86(1) and (2)). This is argued to violate the constitutional principles mentioned above since, in the absence of centralisation requirements, the contested provisions govern aspects which, on account of their detailed content and due to the extremely low economic importance of the tenders, could not have any bearing on competition law matters. It is also claimed that Article 76 of the Constitution has been violated in that the directional criteria imposed by Article 25 of law No. 62 of 2005 do not allow for the adoption of complete and detailed legislation also for contracts below threshold.

The applicant also contests Articles 122(2), (3), (5) and (6) and 124(2), (5) and (6) insofar as they make detailed and exhaustive provision for the procedures for publication and communication of the above tenders, due to violation of Articles 117 and 118 of the Constitution since, in the absence of centralisation requirements, the articles govern aspects which, on account of their detailed content and due to the low economic importance of the tenders, could not have any bearing on competition law matters. In this way the provisions are argued to have overstepped the limit which

permits the enactment only of provisions of a general nature, as well as the principles of proportionality and adequacy, especially since publication in the *Official Journal* appears to be reasonable only where justified by the amount and complexity of the tender.

Again in relation to so-called below threshold tenders, Veneto Region argues that the following articles breach Article 117(2)(e) of the Constitution on the grounds that they are excessively detailed and thorough:

– Article 122(1)-(6);

– Article 123, "by virtue of the fact that the "restricted simplified procedure" (regulated therein) applies to below threshold public works contracts".

17.1.– The questions are in part inadmissible and in part groundless.

As a preliminary matter, it should be pointed out that this court has already found that "the notion of competition" to which Article 117(2)(e) of the Constitution refers "cannot but reflect that which applies within the Community context" (judgment No. 14 of 2004). The Court of Justice of the European Communities has held on various occasions that even where the relevant contract is below the threshold, the fundamental Treaty principles must in any case be respected in such a way as to allow for the exercise of powers in accordance, *inter alia*, with the requirements of equal treatment, transparency and publicity in order to guarantee a competitive market. The second recital of Community directive 2004/18 states, in general terms for all contracts, that the award "of contracts concluded in the Member States on behalf of the state, regional or local authorities and other bodies governed by public law entities is subject to the respect of the principles of the Treaty and in particular to the principle of freedom of movement of goods, the principle of freedom of establishment and the principle of freedom to provide services and to the principles deriving therefrom, such as the principle of equal treatment, the principle of non-discrimination, the principle of mutual recognition, the principle of proportionality and the principle of transparency" (see also the Commission interpretative communication of 1 August 2006 on the Community law applicable to contract awards not or not fully subject to the provisions of the "Public Procurement" Directives, cited above).

This implies that the distinction between contracts below threshold and above threshold cannot be relied upon *per se* as a useful criterion for the purposes of identifying the area of competition law. This extent of this substantive area in fact transcends any rigid and automatic application of rules determined by the mere reference, as in the case before the court, to the economic value of the contract. Even a contract which falls below the threshold for Community relevance may justify unitary legislation on a state level. And if on the facts this requirement is recognised to exist, in relation clearly to competition law goals, the state must in consequence be recognised as being legitimated to act according to the procedures and subject to the limits set out above. In other words, it cannot be concluded, as some of the applicants appear to be arguing, that state legislation should be of a more general nature for contracts below threshold.

Having specified this, the court finds in the first place, having regard to the legislative content of the contested provision, that the challenge to Article 121(1) is inadmissible on the grounds that the complaints submitted are too generic.

This provision states that, "in addition to the provisions contained in Part I, Part IV and Part V, also the provisions contained in Part II" shall apply to contracts for amounts lower than the Community relevance thresholds "insofar as the provisions contained in the present title to not stipulate otherwise". Tuscany Region first limits itself to reiterating the content of the contested provision without specifying which rules referred to therein fall outwith the state's legislative competence and cover matters falling under the legislative power of the regions; moreover, when referring to certain provisions (Article 75 and Article 86(1) and (2)), it limits itself to contesting their detailed character without any additional argument and, above all, without considering the complaint in the light of the principles of proportionality and adequacy.

The complaint submitted by Veneto Region concerning Article 123 is inadmissible in the same way and for the same reasons.

17.2.— The court finds that the challenges to Articles 122 and 124, with reference to the sub-sections mentioned above, are groundless since, leaving aside the purely enabling scope of some of the contested provisions (Article 124(2)), the norms in question are in any case intended to guarantee the principles of equal treatment and non-

discrimination for participants during the bidding stage in public tenders – which, as mentioned above, also apply to contracts below the Community threshold – with the goal of ensuring that the market on which the individual contracts operate is effectively competitive. The adoption of adequate publicity measures in fact is a indispensable way of guaranteeing the broadest awareness of and resulting participation in tender procedures.

Further more, it cannot be objected that these provisions are excessively thorough and detailed. As has been pointed out on various occasions, the existence only of provisions expressing principles is not an indispensable element in the identification of competition law matters. The assessment of the proportionality and adequacy of the state's legislative action is broader in scope and transcends the mere fact of the detailed nature of the contested provisions.

18.— Veneto Region has contested Article 125(5), (8) and (14) which govern the acquisition from public funds of goods, services and public works, arguing that they breach Article 117(2)(e) of the Constitution on the grounds that the contested provisions are excessively detailed.

The question is inadmissible.

By enacting the provisions in question, the secondary legislator intended to regulate in a comprehensive manner all stages of contracts funded from the public purse. The sub-sections specifically contested concern: the maximum amount above which such works projects are not permitted (sub-section 5); the procedures for identifying the works projects which may be implemented according to the procedures in question (sub-section 6); the funds necessary for their completion (sub-section 7); works projects for amounts greater than € 40,000 and up to € 200,000 (sub-section 8); the matters to be governed by regulation (sub-section 14).

In the light of the heterogeneous nature of the contested provisions and the range of substantive matters which could arise as issues, the applicant limits itself to objecting to the detailed nature of the provisions, without providing any arguments in favour of the complaints raised. It follows from this that the questions are inadmissible due to the generic nature of the complaints raised.

19.— Veneto Region has challenged Article 153 – "which governs the stage involving the gathering and selection of proposals with reference to the institution of project financing" – due to violation of Article 117(2)(e) of the Constitution.

In particular, the contested provision governs the figure of the promoter within the context of the institution of project financing. This provision also has a complex content, governing the stage involving the presentation of proposals for the realisation of public works to be included in triennial programmes (sub-section 1), the subjects entitled to present such proposals (sub-section 2), as well as programme approval and publication (sub-section 3).

The question is inadmissible due to the generic nature of the complaints raised, since – given amongst other things the complexity of the provision in question – the applicant has not submitted any arguments capable of justifying the challenge.

20.— It is now necessary to examine the challenge brought by Veneto Region against Article 240(9) and (10), which argues that the provisions contained therein infringe regional competences since, even though Articles 239 *et seq* are "without doubt related to an area of law under the exclusive competence of the state which allows for the introduction of more stringent limits compared to those allowed under competition law and the law regulating the protection of cultural heritage", nevertheless the contested provisions govern "in an excessively detailed manner strictly organisation aspects of the institution of the amicable settlement, depriving the regions of any possibility of enacting their own autonomous legislation on this point".

The question is inadmissible.

The provisions specifically contested set out the procedures for the appointment of the third member of the board charged with drafting a reasoned settlement proposal with reference to written reservations (sub-section 9), as well as regulations for the remuneration of commissioners. These provisions predominantly regulate aspects relating to the system of dispute resolution, and fall within the ambit of the exclusive legislative competence of the state.

On other grounds, the applicant claims – without, amongst other things, examining the specific legislative content of the contested provisions – that the requirements of proportionality and adequacy underpinning competition law were not complied with,

but does not provide any argument capable of demonstrating the infringement of regional competences, beyond an insufficient reference to the detailed nature of the contested provision. In addition, the reference to organisational aspects in relation to the constitutional principle invoked (117(2)(e) of the Constitution) remains unclear.

21.— Veneto Region contests Article 253(3) and (22)(a) insofar as they provide, respectively, that "For public works, up until the entry into force of the regulation mentioned under Article 5, presidential decree No. 554 of 21 December 1999, presidential decree No. 34 of 25 January 2000, and the other regulations in force which, under the terms of the present Code, must be contained in the regulation mentioned in Article 5, shall continue to apply to public works subject to compatibility with the Code. For public works, up until the adoption of the new general terms of reference, ministerial decree No. 145 of 19 April 2000 shall continue to apply if referred to in the contract notice" (sub-section 3); and that "in relation to Article 125 (public works, services and supplies paid from public funds) up until the entry into force of the regulation: *a*) public works paid from public funds shall be governed by presidential decree No. 554 of 21 December 1999 subject to compatibility with the provisions contained in the present Code" (sub-section 22(a)).

According to Veneto Region, these provisions breach Article 117(2), (3), (4) and (5) and Article 118 of the Constitution insofar as they allow for the issue of state regulations covering all public works of regional interest.

Even disregarding the generic nature of the complaint submitted, the question is groundless.

The provision in question limits itself to referring to the contents of the aforementioned regulations issued which were in force under previous constitutional arrangements.

On this point, it is important to point out that the amendment to Title V of Part Two of the Constitution non does not mean that legislation enacted under previous constitutional arrangements is automatically unconstitutional. In fact, in accordance with the principle of continuity, this legislation, which was adopted under the pre-existing constitutional framework, remains valid unless and until "it is replaced by new legislation enacted by the competent authority under the new system" (judgment No.

376 of 2002). In the event that state regulations subsequently adopted were found to breach the current division of competence to issue regulations, the regions would dispose of the procedural instruments to challenge such a use of the power to issue regulations (see judgment No. 376 of 2002).

The court therefore finds that the reference contained in the contested provisions, amongst other things, to ministerial decree No. 145 of 2000 and to presidential decree No. 554 of 1999 in order to ensure their continuing application up until the adoption of general terms of reference and of regulations – which, it is important to repeat, will have to be issued respecting the current division of the power to issue regulations enshrined in Article 117(6) of the Constitution – is lawful.

22.— The question raised by Veneto Region in relation to Article 257(3) with reference to Article 117(2)(e) of the Constitution is not supported by any argument and is therefore inadmissible, since the applicant limits itself to asserting that for the year 2006 this provision "confirms the lists provided for under Article 23 of law No. 109 of 1994 ".

23.— Finally, it is necessary to examine together the complaints against a range of provisions contained in the Code, challenged by Veneto Region.

In relation to this matter, this court shall analyse these complaints, ordering them into two groups in line with the contents of the contested provisions .

23.1.— In the first group of complaints, Veneto Region argues that the following provisions violate Article 117(2)(e) of the Constitution :

– Article 11(4) and Articles 81-88 concerning the regulation of award criteria, "which due to their extremely analytical nature do not leave any effective space for free-standing detailed provisions by the region";

– Articles 54(4), 56, 57, 62(1), (2), (4) and (7), and 122(7), "insofar as, on account of their excessively detailed nature, they prevent the regions from enacting legislation governing negotiations, above all with reference (also in this case) to the sector of contracts below threshold";

– Article 55(6), and 62(1), (2) and (4), insofar as, by providing for the possibility of limiting the number of candidates suitable for invitation to participate in restricted procedures only in relation to "public works for amounts equal to or greater than forty

million Euros", they appear irrationally to prevent the regions from making their own provisions governing the "so-called 'forcella' (suitability criterion) also with reference to contracts below threshold".

The questions are inadmissible.

First, it is important to point out that the regulation of the award criteria is, as is recognised also by the applicant, a competition law matter. In the same way, non-mechanical award methods, such as those concerning negotiated procedures (including those concerning the sector of below threshold contracts) also fall within this field of law.

As this court has previously found, the internal limits of the area of law at issue consist of the requirement to comply with principles of reasonableness and proportionality in the light of the predetermined objective. In any case, given the special nature of the cases covered by the legislation, even state legislation of a thorough and detailed nature could be found to comply with these principles.

In the case before the court, Veneto Region has in the first place failed to indicate which specific provisions have an excessively detailed content, as the contested provisions have a broad and, in many senses, heterogeneous content; moreover, it has not submitted any arguments capable of demonstrating that in this case such detail is not proportionate and adequate in the light of the goal of protecting the market's competition structure.

23.2.— A further group of complaints concerns the provisions governing the choice of type of contract, as well as the implementation stage of public contracts and sub-contracts.

In relation to the former, Article 53(1) is challenged insofar as it specifies a mandatory and exhaustive list of the types of contract which may be used for the realisation of public works, which is amongst other things more restrictive than those permitted under Community law. Veneto Region adds that, "with reference to this procedure, the breach of constitutional law averred appears to be particularly clear in relation to the category of public contracts for amounts below the Community threshold".

The question is groundless.

The area of law with which the provision at issue it most closely related is private law (Article 117(2)(l) of the Constitution): it is in fact a matter for the state legislature – without prejudice to the bargaining autonomy of the individual awarding administrations – to identify the type of contract to be used for the regulation of contracts for public works, public services and public supplies in order to guarantee uniform treatment throughout the country. Furthermore, in the case before the court, this uniformity in the type and object of contracts is necessary in order to ensure respect for the principles underpinning exclusive legislative competence over competition law matters.

This principle also extends to contracts below the Community relevance threshold in relation to which, as far as the issue before the court is concerned, there are no grounds which could justify any differences in regulation.

As far on the other hand as the implementation of contracts is concerned, Veneto Region, again on the grounds that it breaches Article 117(2)(e) of the Constitution, claims that Article 130(2)(c) is unconstitutional insofar as it provides for the award of works management activities to "subjects chosen according to the procedures provided for under this Code for the appointment of designers".

The question is groundless.

Works management concerns the implementation stage of the contract and is intended to ensure, amongst other things, the compliance of the works with the project and the contract. Within this context accordingly, for the reasons set out above, it is private law which is at issue, which means that the state may enact the relevant legislation even in detail.

The region also argues that the following articles are unconstitutional in that they violate Article 117(2)(e) of the Constitution:

– Articles 120(2) and 141 concerning testing, given the extremely detailed nature of the provisions contained therein, "in relation to which it is even provided that more detailed provision may be made by regulation";

– Article 132, "insofar as the detailed regulation contained therein of project modifications whilst work is in progress does not leave any effective space for free-standing detailed provisions by the region".

The questions are inadmissible.

The contested provisions relate to the implementation of contracts, and therefore predominantly involve private law matters, with the points made in the above applying in particular to testing.

In the case before the court, the applicant has limited itself to challenging the detailed nature of the contested provisions, claiming amongst other things that they overstep the limits of competition law. However, in order to ensure an examination by this court of the questions on the merits, given the breadth of the contested provisions, the region should have indicated which specific provisions overstep the boundaries of private law and competition law, and fall by contrast under the competence of the regions.

Finally, Veneto Region contests Article 118(2) insofar as it governs "sub-contracting in an extremely detailed manner".

The question is inadmissible due to its generic nature.

The contested provision is indeed detailed and, as noted above, falls under private law and, in relation to certain aspects, competition law. It is therefore not sufficient for the purposes of determining the admissibility of the question, even in the light of the above discussion of the limits of this latter area of law, to aver the excessively detailed nature of the provision.

on those grounds

THE CONSTITUTIONAL COURT

hereby,

1) declares that Article 5(2) of legislative decree No. 163 of 12 April 2006 (Code of public works contracts, public supply contracts and public service contracts implementing directives 2004/17/EC and 2004/18/EC) is unconstitutional insofar as it refers to the "autonomous provinces";

2) declares that Article 84(2), (3), (8) and (9) of legislative decree No. 163 of 2006, also as amended by legislative decree No. 113 of 31 July 2007 (Additional provisions amending and supplementing legislative decree No. 163 of 12 April 2006 containing the Code of public works contracts, public supply contracts and public service contracts, pursuant to Article 25(3) of law No. 62 of 18 April 2005) are unconstitutional insofar as

they do not provide that the provisions contained therein are supplementary and reserve for contracts pertaining to sectors which fall under regional competence;

3) *declares* that Article 98(2) of legislative decree No. 163 of 2006 is unconstitutional;

4) *rules* that the question of the constitutionality of Article 4(2) of legislative decree No. 163 of 2006, commenced with reference to Article 97 of the Constitution by the Lazio and Abruzzo Regions in the applications for review mentioned in the headnote is inadmissible;

5) *rules* that the question of the constitutionality of Article 4(3) of legislative decree No. 163 of 2006 commenced with reference to Article 8 (*sic*: 11) (1)(17) and (19) and Article 16 of constitutional law No. 5 of 26 February 1948 (Special Statute for Trentino-Alto Adige), presidential decree No. 381 of 22 March 1974 (Provisions implementing the special statute for the Trentino-Alto Adige Region in the area of town planning and public works), 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), as well as Article 117 of the Constitution and Article 10 of constitutional law No. 3 of 18 October 2001 (Amendments to Title V of Part Two of the Constitution) by the Autonomous Province of Trento in the application for review mentioned in the headnote, is inadmissible;

6) *rules* that the question of the constitutionality of Article 4(3) of legislative decree No. 163 of 2006 commenced with reference to Articles 76, 117(2), (3), (4) and (5) of the Constitution by Veneto Region in the application for review mentioned in the headnote is inadmissible;

7) *rules* that the question of the constitutionality of Article 4(3) of legislative decree No. 163 of 2006 commenced with reference to Articles 117(2), (3) and (4) of the Constitution by Veneto Region in the application for review mentioned in the headnote is inadmissible;

8) *rules* that the question of the constitutionality of Article 5(2) of legislative decree No. 163 of 2006 commenced with reference to Articles 117(3) and (4) and 76 of the

Constitution by Veneto Region in the application for review mentioned in the headnote is inadmissible;

9) *rules* that the question of the constitutionality of Article 10(1) of legislative decree No. 163 of 2006 commenced with reference to Article 117 of the Constitution by Veneto Region in the application for review mentioned in the headnote is inadmissible;

10) *rules* that the question of the constitutionality of Article 121(1) of legislative decree No. 163 of 2006 commenced with reference to Articles 76, 117 and 118 of the Constitution by Tuscany Region in the application for review mentioned in the headnote is inadmissible;

11) *rules* that the questions of the constitutionality of Articles 6(9)(a); 7(8); 11(4); 54(4); 55(6); 56; 57; 62(1), (2), (4) and (7); 70; 71; 72; 75; 81; 82; 83; 84; 85; 86; 87; 88; 91(1) and (2); 118(2); 120(2); 122(7); 123; 125(5), (6), (7), (8) and (14); 131; 132; 141; 153; 197; 204; 205; 240(9) and (10); 252(3); 253(10) and (11); and 257(3) of legislative decree No. 163 of 2006, commenced with reference to Article 117 of the Constitution by Veneto Region in the application for review mentioned in the headnote, are inadmissible;

12) *rules* that the questions of the constitutionality of Article 4(2) of legislative decree No. 163 of 2006 commenced with reference to Article 76 of the Constitution, as well as the principle of loyal cooperation, by Lazio, Abruzzo and Veneto Regions in the applications for review mentioned in the headnote are groundless;

13) *rules*, for the reasons set out in the above, that the questions of the constitutionality of Article 4(2) of legislative decree No. 163 of 2006 commenced with reference to Articles 117 and 118 of the Constitution by Tuscany, Veneto, Piedmont, Lazio and Abruzzo Regions in the applications for review mentioned in the headnote are groundless;

14) *rules* that the questions of the constitutionality of Article 4(3), of legislative decree No. 163 of 2006 commenced with reference to Articles 76, 97, 117 and 118 of the Constitution, as well as the principle of loyal cooperation, by Veneto, Tuscany, Piedmont, Lazio and Abruzzo Regions in the applications for review mentioned in the headnote are groundless;

15) *rules* that the question of the constitutionality of Article 5(1) and (4) of legislative decree No. 163 of 2006, commenced with reference to Article 11(1), (17) and (19) and Article 16 of constitutional law No. 5 of 1948, presidential decree No. 381 of 1974, legislative decree No. 266 of 1992, as well as Article 117 of the Constitution, constitutional law No. 3 of 2001 and the principle of loyal cooperation by the Autonomous Province of Trento in the application for review mentioned in the headnote, is groundless;

16) *rules* that the questions of the constitutionality of Article 5(1), (2) and (4) of legislative decree No. 163 of 2006 commenced with reference to Articles 76, 97, 117 and 118 of the Constitution by Tuscany, Lazio, Abruzzo, Piedmont and Veneto Regions in the applications for review mentioned in the headnote are groundless;

17) *rules* that the questions of the constitutionality of Article 5(1) and (4) of legislative decree No. 163 of 2006 commenced with reference to the principle of loyal cooperation by Tuscany, Veneto and Piedmont Regions in the application for review mentioned in the headnote are groundless;

18) *rules* that the question of the constitutionality of Article 5(1) of legislative decree No. 163 of 2006 commenced with reference to Articles 76 and 117(5) of the Constitution by Veneto Region in the application for review mentioned in the headnote is groundless;

19) *rules* that the question of the constitutionality of Article 5(7) and (9) of legislative decree No. 163 of 2006 commenced with reference to Article 117(3) and (4) of the Constitution by Veneto Region in the application for review mentioned in the headnote is groundless;

20) *rules* that the question of the constitutionality of Article 48 of legislative decree No. 163 of 2006 commenced with reference to Articles 117 and 118 of the Constitution by Tuscany Region in the application for review mentioned in the headnote is groundless;

21) *rules* that the questions of the constitutionality of Articles 53(1); 93; 112(5)(b); 113; 122(1)-(6); 130(2)(c); and 252(6) commenced with reference to Article 117 of the Constitution by Veneto Region in the application for review mentioned in the headnote are groundless;

22) *rules* that the question of the constitutionality of Article 75(1) of legislative decree No. 163 of 2006 commenced with reference to Article 117 of the Constitution by Tuscany Region in the application for review mentioned in the headnote is groundless;

23) *rules* that the question of the constitutionality of Article 88 of legislative decree No. 163 of 2006 commenced with reference to Articles 117 and 118 of the Constitution by Tuscany Region in the application for review mentioned in the headnote is groundless;

24) *rules* that the questions of the constitutionality of Articles 122(2), (3), (5) and (6) and 124(2), (5) and (6) of legislative decree No. 163 of 2006 commenced with reference to Articles 76, 117 and 118 of the Constitution, by Tuscany Region in the application for review mentioned in the headnote is groundless;

25) *rules* that the question of the constitutionality of Article 131(1), of legislative decree No. 163 of 2006 commenced with reference to Articles 117 and 118 of the Constitution by Tuscany Region in the application for review mentioned in the headnote is groundless;

26) *rules* that the question of the constitutionality of Article 253(3) and (22)(a) of legislative decree No. 163 of 2006 commenced with reference to Articles 117(2), (3), (4) and (5) and 118 of the Constitution by Veneto Region in the mentioned mentioned in the headnote is groundless.

Decided in Rome, at the seat of the Constitutional Court, *Palazzo della Consulta*, on 19 November 2007.

Signed:

Franco BILE, President

Alfonso QUARANTA, Author of the judgment

Giuseppe DI PAOLA, Registrar

Filed in the Court Registry on 23 November 2007.

The Director of the Registry

Signed: DI PAOLA