Corte costituzionale

JUDGMENT NO. 1 OF 2010

Francesco AMIRANTE, President

Paolo MADDALENA, Author of the Judgment

JUDGMENT NO. 1 YEAR 2010

In this case the Court considered a direct application by the Government challenging legislation enacted by Campania region relating to the usage of water resources, and in particular exempting certain concession renewals from the requirement for an environmental impact assessment or an assessment of implications, as well as legislation purporting to extend the duration of temporary concessions beyond the thirty year limit specified under State legislation, on the grounds that these purported to create exceptions to environmental protection standards that should, as a matter of constitutional law, be uniform throughout the country. The Court partially upheld the complaint, holding that the contested legislation still in force did not comply with the Constitutional reservation of environmental law to the State.

THE CONSTITUTIONAL COURT

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

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Articles 33(10), 44(8) and 45 of Campania Regional Law no. 8 of 29 July 2008 (Provisions governing the search for and use of mineral and thermal waters, geothermal resources and spring water), initiated by the President of the Council of Ministers by application served on 9-13 October 2008, filed in the Court Registry on 15 October 2008 and registered as no. 63 in the Register of Applications 2008.

Considering the entry of an appearance by Campania Region;

having heard the Judge Rapporteur Paolo Maddalena in the public hearing of 3 November 2009;

having heard the *Avvocato dello Stato* Giacomo Aiello for the President of the Council of Ministers and Counsel Vincenzo Cocozza for Campania Region.

The facts of the case

1. - By application served on 9-13 October 2008 and filed on 15 October, the President of the Council of Ministers, represented by the *Avvocatura Generale dello Stato*, seized the Court directly with a question concerning the constitutionality of Articles 33(10), 44(8) and 45 of Campania Regional Law no. 8 of 29 July 2008 (Provisions governing the search for and use of mineral and thermal waters, geothermal resources and spring water), published in the Official Bulletin of the Region no. 32 of 11 August 2008.

1.1. The Applicant – having recalled that the contested Article 33(10) provides that "Renewals of concessions operational for at least five years from the entry into force of this law shall not be subject to an environmental impact assessment or an assessment of implications" – avers that the provision violates Article 117(1) and (2)(s) of the Constitution on the grounds that it was "adopted in relation to a matter falling under the exclusive jurisdiction of the State and contrasts with the obligations resulting from Community law as implemented into Italian law" pursuant to Legislative Decree no. 152 of 3 April 2006 (Provisions governing environmental matters).

In particular, it is argued in the application that such concessions relate to the exploitation of reservoirs of natural mineral waters or thermal waters recognised as exploitable and that are appropriately abstracted (Article 4 of Regional Law no. 8 of 2008), the management of which Campania Region has undertaken pursuant to Article 1(3) of the Regional Law to ensure "continues to remain consistent with the general guidelines contained in national programming and the river basin planning implementing Legislative Decree no. 152 of 3 April 2006".

The State representative also observes that the issue of concessions for natural mineral waters and spring waters is conditional upon the requirement "of the supply and distribution of drinking water and the provisions set out in the water protection Plan which, upon conclusion of a complex inquiry procedure, is drawn up by the river basin

authorities and approved by the regions" and that the aforementioned Plan is reviewed and updated every six years.

It is therefore claimed to be clear that there is a need for "constant monitoring" of the overall system of water usage, due to the "renowned insufficiency of the raw material concerned" in order to "prevent uncontrolled usage from having negative implications on the broader river basin".

According to the Applicant it follows that, in permitting "an exception to the environmental impact assessment procedure for whole categories of plans for new works related to renewals for concessions that had been operating for at least five years when the above Law entered into force", the contested Article 33(10) of Regional Law no. 8 of 2008 "clearly circumvents the provisions originating from Community law set out in Legislative Decree no. l52/2006", also violating the interpretation provided by the Court of Justice of the European Communities in its judgment in Case C-201/02 *ex parte Delena Wells* [2004] ECR I-723.

Besides, the contested provision is claimed to prevent a review of the "continuing compatibility […] with any changes to territorial and environmental conditions that may have subsequently occurred" including in the event that the concession renewal is "associated with works already subject to the environmental impact assessment procedure at the relevant time".

Moreover, the contested provision is also claimed to contrast with the principles set out under Article 95 of Legislative Decree no. 152 of 2006, "which subjects all concessions involving the diversion of public waters to regulation by the concession-granting authority aimed at guaranteeing as low a vital outflow as possible from water bodies".

Ultimately, in the opinion of the *Avvocatura Generale dello Stato*, the contested Article 33(10) "makes provision in an area of law, namely that governing the environment and the ecosystem, reserved to the exclusive jurisdiction of the State […] with the effect of rendering meaningless the control by the public authorities over the exploitation of a limited resource such as water, thereby exposing environmental compartments to the risk of harm".

1.2. The Applicant also challenges Article 44(8) of Regional Law no. 8 of 2008, which provides that the "perpetual concessions issued without time-limits" shall be

extended by fifty years at the time it enters into force. In doing so the provision violates the principle established by Article 96(8) of Legislative Decree no. 152 of 2006 which, replacing Article 21(1) of Royal Decree no. 1775 of 11 December 1933 (Consolidated text of statutory provisions on waters and electrical installations), provides that: "All concessions for diversions shall be temporary. Without prejudice to the provisions of paragraph two, the duration of concessions may not exceed thirty years, or forty years for concessions for irrigation or fish-breeding, except for large hydroelectric diversions for which the provisions contained in Article 12(6), (7) and (8) of Legislative Decree no. 79 of 16 March 1999 shall continue to apply".

In the opinion of the State representative, the principle of the temporary nature of the diversions takes on "crucial importance in permitting the reassertion of the general interest in the use of water resources according to principles of solidarity, setting aside the rights obtained by individuals at a time when water supply problems had not taken on the proportions of the modern age". This means that the State statutory provision referred to above constitutes "the expression of a standard of environmental protection which must be applied in a uniform manner throughout the country", with the result that the contested regional provision is contrary to Article 117(2)(s) of the Constitution, "which confers exclusive jurisdiction over legislation aimed at protecting the environment on the State".

1.3. Article 45 of the Regional Law is also challenged. This Article is claimed to establish, with regard to unauthorised drilling, eligibility for "regularisation for those that have, without prior authorisation, carried out a new abstraction of waters already covered by a concession issued before 31 December 2005 by submitting an appropriate application and paying an administrative fine".

This legislation – according to the Applicant – is entirely incompatible with that contained in Article 96(6) of Legislative Decree no. 152 of 2006, which limited eligibility for a regularisation "to diversions or uses of public water being carried out either entirely or partly in an unlawful manner provided that the relevant application was submitted before 30 June 2006". For its part on the other hand, the contested provision is claimed to permit "a general reopening of the time-limits until 11 August 2009 in order to permit the regularisation of abuses committed until that date, subject to

the only limit that the conduct in breach of water protection laws be associated with the award of a concession issued prior to 31 December 2005".

According to the State representative, the contested provision lends itself, in an entirely unreasonable manner, to causing effects that are highly detrimental for environmental standards, encouraging "abuses during a time-frame that even extends beyond the time of publication of the Regional Law".

Moreover, the provision under the contested Article 45 for a "flat rate" administrative fine, the payment of which is a prerequisite for the issue of the regularised concession (which was set in breach of the parameters set out under Royal decree no. 1775 of 1933, as referred to by Article 96, which provides for different penalties depending on the seriousness of the unlawful conduct) results in an unjustified difference in treatment "between individuals responsible for the same conduct, depending on the part of the country in which it was carried out".

In the light of the arguments set out above, the Applicant therefore avers that the contested Article 45 of Campania Regional Law no. 8 of 2008 violates Articles 3 and 117(2)(s) of the Constitution, since Article 96 of Legislative Decree no. 152 of 2006 "amounts to an environmental protection standard resulting from the exercise of the exclusive legislative competence of the State".

2. Campania Region entered an appearance in the proceedings, requesting that the application be ruled "procedurally and substantively inadmissible, and in any case groundless".

As a preliminary matter, the regional representative recalls that the case law of the Constitutional Court has often reiterated that the State's exclusive jurisdiction over matters relating to environmental protection is "inextricably linked to and interrelated with other concurrent regional interests and powers". This means that, due to this "cross-cutting" aspect, "specific initiatives by the regional legislature relating to its own powers" are possible (judgments no. 214 of 2005, no. 259 of 2004 and no. 407 of 2002).

Campania Region then adds that since mineral and thermal waters are not included in the lists set out in Article 117(2) and (3) of the Constitution, such matters should be deemed to fall under the residual jurisdiction of the regions. Consequently, the contested legislative initiative by the Region should be deemed to comply with the division of powers between the State and the Region over such matters; if moreover it were to be

attributed to the area of law of "territorial government", there would be no grounds for challenge by the Applicant.

2.1. With reference to the specific challenge to Article 33(10) of Regional Law no. 8 of 2008, the Respondent Region argues that the contested provision should be considered to relate to the area of "territorial government", and as such should only comply with "any minimum safeguard standards that the State has decided to implement through the procedural arrangements relating to the environmental impact assessment and an assessment of implications". Nevertheless – the regional representative continues – there is no State statutory provision which "requires such assessments for every renewal of a concession", as they are made prior to the implementation of a project but are not repeated unless there is a substantial change "to the exploitation of the environmental resource".

Moreover, the Community case law referred to by the Applicant concerning "a 'reactivation' of a prior authorisation, albeit on the basis of new conditions", is claimed to be irrelevant; in this sense, it would support an even narrower reading of the regional legislation, which would permit the environmental impact assessment procedure and the assessment of implications to be avoided "only in the situations specifically indicated".

Besides, the Region adds, the "requirement of an ongoing verification of the compatibility of the work with changes in territorial conditions" is in any case guaranteed by Article 28 of Legislative Decree no. 152 of 2006, which permits "an ongoing monitoring of the concessions, even prior to their renewal".

2.2. As regards the challenge to Article 44(8) of the above Campania Regional Law, the contested provision concerning the "time-limit on concessions issued without any expiry" is claimed to comply with the value-based principle of the temporary nature of concessions laid down by Article 96(8) of Legislative Decree no. 152 of 2006. According to the Respondent, it follows that the different time-limit specified in the contested provision expresses "a discretionary choice which is not amenable to constitutional review once the interest in environmental protection has been satisfied".

2.3. Finally, with reference to the challenge to Article 45 of Regional Law no. 8 of 2008, the regional representative avers that, since it amounts to a remission "relating to territorial government", the Region operated lawfully within the ambit of its own

concurrent jurisdiction, in accordance with the principles specified under state legislation.

Campania Region also contests the Applicant's reading of the provision, since it does not concern "the regularisation of future abuses, including those that may be committed until 11.8.2009", since that time-limit concerns "exclusively the time-scale within which the application for remission is to be submitted", whilst the "cut-off date for abuses eligible for remission" is 31 December 2005.

Accordingly, the contested provision is claimed to be a legitimate expression of the regional power "to decide on the possibility of and the conditions and procedures governing eligibility for the regularisation of unlawful activities carried out inside the region"; moreover, the determination of the level of the administrative fine associated with the regularisation also falls under the Region's powers.

3. By subsequent written statement, the President of the Council of Ministers reasserted his request for a declaration that the contested Articles 33(10), 44(8) and 45 of Campania Regional Law no. 8 of 2008 are unconstitutional.

4. Shortly before the public hearing, Campania Region filed a written statement requesting a ruling that there was no longer any matter in dispute with reference to the challenge to Articles 33(10) and (45) of Regional Law no. 8 of 2008, and a ruling that "the application was procedurally and substantively inadmissible and in any case groundless […] with reference to Article 44(8) of the same Law".

With regard to the issue that there is no longer any matter in dispute, the Region points out that the provisions contained in the aforementioned Articles 33(10) and (45) were repealed by Article 1(1) [respectively, letters (e) and (n)] of Campania Regional Law no. 8 of 22 July 2009 (Amendments to Regional Law no. 8 of 29 July 2008 – Provisions governing the search for and use of mineral and thermal waters, geothermal resources and spring water). Moreover, the Respondent argues that, with regard to the challenge to Article 44(8), since that provision was replaced by Article 1(1)(l) of Regional Law no. 8 of 2009 – a provision not challenged by the Government – the application should be ruled procedurally inadmissible in this regard.

In any case, in the opinion of the Region, the question was groundless on the basis of the arguments previously submitted.

5. During the course of the discussion in the public hearing, the representative of Campania Region filed a Regional Note (prot. 2009/0889092 of 16 October 2009) attesting that the legislation contained in Articles 33(10) and (45) of Regional Law no. 8 of 2008 had not been applied; on this point, the *Avvocato Generale dello Stato* agreed with the regional representative that there was no longer any matter in dispute with regard to the questions concerning the above provisions.

Conclusions on points of law

1. The President of the Council of Ministers seized the Court directly with a question concerning the constitutionality of Articles 33(10), 44(8) and 45 of Campania Regional Law no. 8 of 29 July 2008 (Provisions governing the search for and use of mineral and thermal waters, geothermal resources and spring water), published in the Official Bulletin of the Region no. 32 of 11 August 2008.

The contested Article 33(10) provides that: "Renewals of concessions operational for at least five years from the entry into force of this law shall not be subject to an environmental impact assessment or an assessment of implications".

This provision is claimed to violate Article 117(1) and (2)(s) of the Constitution since:

a) "the exception to the environmental impact assessment procedure for whole categories of plans for new works related to renewals for concessions that had been operating for at least five years when the above Law entered into force … clearly circumvents the provisions originating from Community law set out in Legislative Decree no. l52/2006", also violating the interpretation provided by the Court of Justice of the European Communities in its judgment in Case C-201/02 *ex parte Delena Wells* [2004] ECR I-723;

b) it prevents the verification of the "ongoing compatibility […] with any changes in territorial and environmental conditions", including in the event that the concession renewal is "associated with works already subject to the environmental impact assessment procedure at the relevant time";

c) it contrasts with the principles set out under Article 95 of Legislative Decree no. 152 of 2006, "which subjects all concessions involving the diversion of public waters to

regulation by the concession-granting authority aimed at guaranteeing as low a vital outflow as possible from water bodies".

The contested Article 44(8) provides that: "Perpetual concessions issued without time-limits pursuant to the laws in force prior to the entry into force of Royal Decree no. 1443/1927 shall be extended by fifty years from the time this Law enters into force, and the relative sub-concessions shall be extended by twenty years, unless the grounds for ineligibility apply to the concessionary or the sub-concessionary respectively. Upon expiry of the aforementioned term this Law shall apply".

The provision is claimed to breach Article 117(2)(s) of the Constitution due to the violation of the principle laid down by Article 96(8) of Legislative Decree no. 152 of 2006 which, in replacing Article 21(1) of Royal Decree no. 1775 of 11 December 1933 (Consolidated text of statutory provisions on waters and electrical installations), provides that: "All concessions for diversions shall be temporary. Without prejudice to the provisions of paragraph two, the duration of concessions may not exceed thirty years, or forty years for concessions for irrigation or fish-breeding, except for large hydroelectric diversions for which the provisions contained in Article 12(6), (7) and (8) of Legislative Decree no. 79 of 16 March 1999 shall continue to apply".

The contested Article 45 provides: "Within one year of the entry into force of this law, the concession holders that have, without prior authorisation, carried out a new abstraction of waters already covered by a concession issued before 31 December 2005 by submitting an appropriate application for a regularisation according to the procedures specified in the implementing regulation. They shall also be required to pay a fine of Euro 15,000.00 after having obtained the opinions of the administrations concerned".

The violation of Articles 3 and 117(2)(s) of the Constitution is averred on the grounds that the provision:

a) enacts legislation that does not comply with that contained in Article 96(6) of Legislative Decree no. 152 of 2006 which limited the eligibility for regularisation "for diversions or uses of public water being carried out either entirely or partly in an unlawful manner provided that the relevant application was submitted before 30 June 2006";

b) resulted in an unjustified difference in treatment "between individuals responsible for the same conduct, depending on the part of the country in which it was

carried out", providing for a "flat rate" administrative fine, payment of which is a prerequisite for the issue of the regularised concession, but which is not determined in accordance with the principles laid down by Royal Decree no. 1775 of 1933, as referred to by the aforementioned Article 96, which "amounts to an environmental protection standard resulting from the exercise of the exclusive legislative competence of the State".

2. As a preliminary matter, the Court finds that, after the application was filed by the State, the regional legislature enacted Campania Regional Law no. 8 of 22 July 2009 (Amendment to Regional Law no. 8 of 29 July 2008 – Provisions governing the search for and use of mineral and thermal waters, geothermal resources and spring water) to amend the contested provisions.

In particular, Article 1(1)(e) of Regional Law no. 8 of 2009 repealed Article 33(10) of Regional Law no. 8 of 2008. Moreover, Article 1(1)(l) of Regional Law no. 8 of 2009 replaced Article 44(8) and the new text of the provision is as follows: "Perpetual concessions issued without time-limits valid at the time this Law enters into force shall have a term of fifty years from the time this Law enters into force and the relative sub-concessions shall have a term of twenty years, unless the grounds for ineligibility apply to the concessionary or the sub-concessionary respectively". Finally, Article 1(1)(n) of Regional Law no. 8 of 2009 repealed Article 45 of Regional Law no. 8 of 2008.

During the course of the discussion in the public hearing, the representative of Campania Region submitted a note originating from the Region attesting that the legislation contained in Articles 33(10) and (45) of Regional Law no. 8 of 2008 had not been applied; this claim was not objected to by the *Avvocatura Generale dello Stato*, and the parties in fact agreed that there was no longer any matter in dispute as regards the questions relating to the above provisions.

It follows that in the light of the repeal of the above provisions, which occurred after the application was filed by the State, and the fact that the legislation already challenged had not in the meantime actually been implemented (see *inter alia* judgments no. 234 of 2009, no. 164 of 2009 and no. 438 of 2008), the Court finds that there is no longer any matter in dispute as regards the questions relating to Articles 33(10) and (45) of Regional Law no. 8 of 2008.

A similar ruling that there is no longer any matter in dispute cannot be made in relation to the challenge to Article 44(8), a provision which has not only been applied (as is clear from the regional note referred to above) and not repealed, but even replaced by a new provision; this does not satisfy the arguments raised in the application, since it sets the duration of the concessions that were "perpetual" at the time of entry into force of Regional Law no. 8 of 2008 at fifty years (namely specifying the same term for the extension provided for under the provision that was replaced) and not at thirty years, according to the provisions of the State legislation invoked by the Government (Article 96(8) of Legislative Decree no. 152 of 2006).

3. The question concerning the constitutionality of Article 44(8) of Campania Regional Law no. 8 of 2008 is well-founded on the merits.

3.1. It must first and foremost be pointed out that "mineral and thermal waters" must be considered from two distinct points of view as a life resource: with regard to their use or enjoyment and with regard to their protection (for the distinction between use and enjoyment, see *inter alia* judgment no. 105 of 2008).

For a long time, Italian law has only dealt with the first aspect, as is shown moreover by the consolidated text of statutory provisions on waters and electrical installations, approved by Royal Decree no. 1775 of 1933 which deals with concessions for small and large diversions, but not water protection. And it was within this context that the provisions of Article 117 of the Constitution applied, as in force prior to the constitutional amendment to Title V of Part Two, where it stipulated that jurisdiction over "Mineral and thermal waters" was shared with the regions.

The emergence of the environmental problem then led Parliament to enact ordinary legislation also providing for water protection, and Article 144(1) of the currently applicable Legislative Decree no. 152 of 2006 provides that "All surface and underground waters are State property, even if they have not been extracted from the sub-soil", whilst the last paragraph of the same Article provides that "Thermal and mineral waters and waters used for geothermal energy shall be regulated by specific legislation, subject to compliance with the division of competences regulated under constitutional law".

It may easily be inferred that the division of competences depends precisely on the distinction mentioned above between the use of mineral and thermal waters, which falls

under the residual jurisdiction of the regions, and the environmental protection of those waters, which falls under the exclusive jurisdiction of the State pursuant to Article 117(2)(s) of the Constitution, as currently in force.

This environmental protection is irrefutably confirmed by Article 97 of Legislative Decree no. 152 of 2006, according to which: "Concessions for the use of natural mineral waters and spring waters shall be issued taking account of supply and distribution requirements for drinking water and the provisions of the protection Plan referred to under Article 121". In other words, concessions for mineral and thermal waters – and hence the administrative measures pertaining to their use – must comply with the environmental protection limits imposed by the water protection Plan in such a manner that no detriment is caused to water resources, in accordance with the provisions of Article 144(3) of Legislative Decree no. 152 of 2006 and that the water content balance is assured, as provided for under Article 145 and Article 96(6) of the same Legislative Decree.

Jurisdiction is evidently shared over the same resource (mineral and thermal waters), and this jurisdiction relates – as far as the regions are concerned – to the use of the resource and – as far as the State is concerned – to the resource's protection or conservation (see most recently judgment no. 225 of 2009 and judgment no. 105 of 2008, cited above).

Moreover, this should be the backdrop against which to view judgment no. 168 of 2008 of this Court which, whilst specifying "mineral and thermal waters" as matters falling under the residual jurisdiction of the regions, placed specific emphasis on the State legislation which was claimed to infringe regional powers [Article 1(1284) of Law no. 296 of 27 December 2006 (Provisions governing the formation of the annual and long-term budget of the State – Finance Law 2007) on the establishment of a solidarity fund with the Office of the President of the Council of Ministers "intended to promote the exclusive financing of projects and initiatives on national and international level suitable to guarantee the greatest possible access to water resources according to the principle of the universal guarantee of access to water"]. The Court accordingly held that the legislation related not to the aforementioned area of law, but rather "a complex body of other matters over which legislative jurisdiction is conferred by the Constitution on the State and the regions", including "that of 'environmental protection' under the

exclusive jurisdiction of the State (Article 117(2)(s) of the Constitution). This is because, since the legislation had the goal of financing projects aimed at promoting access to water resources, it impinged upon the interactions and equilibria between the various components of the 'biosphere', and therefore the environment understood as a 'system' [...] in its dynamic aspect" (judgment no. 378 of 2007; order no. 144 of 2007).

3.2. It is therefore necessary to scrutinise against this backdrop the challenge to Article 44(8) of Campania Regional Law no. 8 of 2008, which set the fifty year extension to perpetual concessions awarded under laws in force prior to the entry into force of Royal Decree no. 1443 of 29 July 1927 (Legislative provisions to regulate the search for and exploitation of mineral resources in the Kingdom).

The provision is marked as "transitional", in the sense that upon expiry of the fifty year term, Article 4(4) of Regional Law no. 8 of 2008 shall apply, namely the rule specifying a duration of concessions for a period falling between fifteen and thirty years.

On this matter, it should be emphasised that the interposed rule laid down by Article 96(8) of Legislative Decree no. 152 of 2006, which replaced Article 21 of Royal Decree no. 1775 of 1933 provides that: "All concessions for diversions shall be temporary. Without prejudice to the provisions of paragraph two, the duration of concessions may not exceed thirty years, or forty years for concessions for irrigation or fish-breeding, except for large hydroelectric diversions for which the provisions contained in Article 12(6), (7) and (8) of Legislative Decree no. 79 of 16 March 1999 shall continue to apply".

In the light of the legislation referred to above and this Court's finding in relation to "environmental protection", it must also be considered that the principle of the temporary nature of the concession for diversions and the setting of a maximum ordinary limit for these of thirty years (unless specifically and expressly provided otherwise), with no extension for perpetual concessions in existence, constitute adequate and non-reducible levels of environmental protection specified under State legislation and that operate as a limit on regional legislation (judgments no. 61 of 2009 and no. 225 of 2009).

Moreover, lawmakers from Campania Region complied with that level of protection in providing for the duration of "ordinary operating" concessions up to the limit of thirty years, as provided for under Article 4(4) of Regional Law no. 8 of 2008.

3.3. The acknowledged environmental significance of the term of thirty years set for all concessions, including those relating to mineral and thermal waters, and therefore its subjection to the environmental protection limits imposed by Article 117(2)(s) of the Constitution, is supported by the further consideration that an excessive extension of the term from the existing thirty years – in this case, the Region provides for a fifty years term extending perpetual concessions – would violate the requirement to carry out an environmental impact assessment (EIA) as well as an assessment of implications [which applies to plans or projects that are not directly related to or necessary for the management of sites amounting to "special areas of conservation", but which may have significant impacts on those sites, as provided for under Article 6(3) of Directive 92/43/EEC and Article 5 of Presidential Decree no. 357 of 8 September 1997 (Regulation implementing Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora)] upon renewal of the concession. In fact, it was the contested Regional Law itself that provided – in accordance with requirements imposed under Community and State law – that both of these assessments should be carried out prior to the issue of permits authorising the search for and exploitation of natural mineral waters, thermal waters, spring waters and small local usages, where these relate to projects referred to under point 7(d) of Annex IV to Legislative Decree no. 152 of 2006 (Article 33(8) of Regional Law no. 8 of 2008), or that the assessments should be carried out for projects not already subject to the requirement for an EIA by virtue of the fact that they relate to sites of Community importance, areas of special protection as well as sites of regional interest (Article 33(9) of Regional Law no. 8 of 2008).

Ultimately, the provision contained in State legislation setting the time-limit for the duration of concessions for diversions of waters is also justified as an adequate and non-reducible level of environmental protection by reference to the impact that it may have for the purposes of the EIA, the allocation of which under the exclusive jurisdiction of the State pursuant to Article 117(2)(s) of the Constitution has again recently been reasserted by this Court (judgment no. 225 of 2009).

3.4. In the light of the above considerations, the Court therefore holds that Article 44(8) of Campania Regional Law no. 8 of 2008 is unconstitutional.

ON THOSE GROUNDS

THE CONSTITUTIONAL COURT

declares unconstitutional Article 44(8) of Campania Regional Law no. 8 of 29 July 2008 (Provisions governing the search for and use of mineral and thermal waters, geothermal resources and spring water);

rules that there is no longer any matter in dispute as regards the questions concerning the constitutionality of Articles 33(10) and (45) of the Campania Regional Law no. 8 of 2008.

Decided in Rome, at the seat of the Constitutional Court, *Palazzo della Consulta*, 11 January 2010.

Signed:

Francesco AMIRANTE, President

Paolo MADDALENA, Author of the Judgment

Giuseppe DI PAOLA, Registrar

Filed in the Court Registry on 14 January 2010.

The Director of the Registry

Signed: DI PAOLA