Corte costituzionale

JUDGMENT NO. 325 OF 2011

Francesco AMIRANTE, President
Franco GALLO, Author of the Judgment

JUDGMENT NO. 325 YEAR 2010

In this case the Court considered various applications from numerous regions and the President of the Council of Ministers concerning national and regional legislation applicable to awards of local government services. The disputed points concerned, *inter alia,* whether: (a) the national legislation on local public services constituted the mandatory application of Community law, or alternatively a breach of it; (b) the law on the contracting out of local public services was a sub-branch of competition law, as argued by the State, or a sub-branch of the law on local public services, as argued by the regions; (c) the State or the region has jurisdiction over the classification of services as "economically relevant"; and a further four core questions concerning other matters. The Court made a partial declaration of unconstitutionality in respect of the State legislation requiring compliance with the stability pact on the grounds that such matters related to the coordination of public finances, over which jurisdiction was shared. With respect to other matters, the Court ruled against the regions on the grounds *inter alia* that the matters concerned related to competition law, which falls under the exclusive jurisdiction of the State.

(omitted)

JUDGMENT

in proceedings concerning the constitutionality of Article 23a of Decree-Law no. 112 of 25 June 2008 (Urgent measures to provide for economic development, simplification, and competitiveness, the stabilisation of public finance and tax equalization), converted, with amendments, into Law no. 133 of 6 August 2008, as originally enacted and as amended by Article 15(1) of Decree-Law no. 135 of 25 September 2009 (Urgent provisions to implement Community law obligations and to enforce the judgments of the Court of Justice of the European Communities), converted, with amendments, into Law no. 166 of 20 November 2009; Article 15(1b) also of Decree-Law no. 135 of 2009, converted, with amendments, into Law no. 166 of 2009; Article 4(1), (4), (5), (6) and (14) of Liguria Regional Law no. 39 of 28 October 2008 (Establishment of the Service Boards [*Autorità d'Ambito*] to perform the functions of local authorities in matters relating to water resources and waste management pursuant to Legislative Decree no. 152 of 3 April 2006. Provisions on the environment); Article 1(1) of Campania Regional Law no. 2 of 21 January 2010 (Provisions governing the formation of the annual and long-term budget of Campania Region – Finance Law

2010); initiated by Emilia-Romagna (two applications), Liguria (two applications), Piedmont (two applications), Puglia, Tuscany, Umbria and Marche Regions and the President of the Council of Ministers (two applications), served on 20 October 2008, 21 January 2010, 20 October 2008, 22 January 2010, 20 October 2008, 29 January, 9 January, 22 January, 21 January and 22 January 2010, 30 December 2008 and 20 March 2010, filed in the Court Registry on 22 October 2008, 28 January 2010, 22 October 2008, 27 January, 27 October, 29 January, 18 January, 27 January, 28 January and 29 January 2010, 2 January 2009 and 30 March 2010, and registered as nos. 69 in the Register of Applications 2008, 13 in the Register of Applications 2010, 72 in the Register of Applications 2008, 12 in the Register of Applications 2010, 77 in the Register of Applications 2008, 16, 6, 10, 14 and 15 in the Register of Applications 2010, 2 in the Register of Applications 2009 and 51 in the Register of Applications 2010.

Considering the entries of appearance by the President of the Council of Ministers and by Liguria and Campania Regions;

having heard the Judge Rapporteur Franco Gallo in the public hearing of 5 October 2010;

having heard Counsels Giandomenico Falcon, Franco Mastragostino and Luigi Manzi for Emilia-Romagna Region, Giandomenico Falcon, Luigi Manzi and Luigi Piscitelli for Liguria Region, Alberto Romano and Roberto Cavallo Perin for Piedmont Region, Nicola Colaianni and Adriana Shiroka for Puglia Region, Lucia Bora for Tuscany Region, Giandomenico Falcon and Luigi Manzi for Umbria Region, Stefano Grassi for Marche Region, Vincenzo Cocozza for Campania Region and the State Counsels [*Avvocati dello Stato*] Chiarina Aiello, Giuseppe Albenzio and Paolo Gentili for the President of the Council of Ministers.

(omitted)

Conclusions on points of law

1. – The questions brought before this Court for examination by the applications referred to in the headnote were initiated by the regions Emilia-Romagna (Register of Applications no. 69 of 2008 and no. 13 of 2010), Liguria (Register of Applications no. 72 of 2008 and no. 12 of 2010), Piedmont (Register of Applications no. 77 of 2008 and 16 of 2010), Puglia (Register of Applications no. 6 of 2010), Tuscany (Register of Applications no. 10 of 2010), Umbria (Register of Applications no. 14 of 2010) and Marche (Register of Applications no. 15 of 2010), as well as by the President of the Council of Ministers (Register of Applications no. 2 of 2009 and no. 51 of 2010).

1.1. – The provisions contested by the regions may be sub-divided into three groups: a) a first group relating to the original text (no longer in force) of Article 23a of Decree-Law no. 112 of 25 June 2008 (Urgent measures to provide for economic development, simplification, and competitiveness, the stabilisation of public finance and tax equalization) – Article added upon conversion into Law no. 133 of 6 August 2008, which entered into force pursuant to Article 1(4) of that Law on 22 August 2008 – concerns paragraphs 1, 2, 3, 4, 7, 8 and 10 of that Article (Application no. 69 of 2008, Emilia-Romagna; Application no. 72 of 2008, Liguria; and Application no. 77 of 2008, Piedmont); b) a second group, relating to the text in force of Article 23a of Decree-Law no. 112 of 2008 – Article added upon conversion into Law no. 133 of 2008, and amended by Decree-Law no. 135 of 25 September 2009 (Urgent provisions to implement Community law obligations and to enforce the judgments of the Court of Justice of the European Communities), converted, with amendments, into Law no. 166 of 20 November 2009, which entered into force on 26 September 2009 and, with respect to the amended parts, on 25 November 2009 – concerns paragraphs 2, 3, 4, 4a, 8, 9 and 10 of that Article (Application no. 6 of 2010, Puglia; Application no. 10 of 2010, Tuscany; Application no. 12 of 2010, Liguria; Application no. 13 of 2010, Emilia-Romagna; Application no. 14 of 2010, Umbria; Application no. 15 of 2010, Marche; and Application no. 16 of 2010, Piedmont); and c) a third group relating to paragraph 1b only of Article 15 also of Decree-Law no. 135 of 2009, a paragraph which entered into force on 26 September 2009, pursuant to Article 21 of that Decree-Law (Application no. 15 of 2010, Marche).

These groups of provisions introduce legislative changes relating to the regulations governing the award of local public services (LPS) along with transitory arrangements applicable to services currently under award.

Provision is made in particular for: a) the award of LPS on an ordinary basis by public tender procedures not only to capital companies – as was the case under previous legislation – but more generally to "entrepreneurs or […] companies incorporated in any form" (paragraph 2 of the original text and the text currently in force of Article 23a of Decree-Law no. 112 of 2008); b) the direct award – that is without a public tender procedure – of the management of the LPS to companies under mixed public and private ownership, the private shareholder of which is chosen by public tender procedures, amounts to a situation in which the management services are contracted out "on an ordinary basis", subject to the twofold condition that the tender procedure be held in order to determine not only capacity as a shareholder but also the contracting out of "specific operational tasks associated with the management of the service" and that the private shareholder is granted an equity interest not lower than 40% (paragraph 2 of Article 23a of Decree-Law no. 112 of 2008 as currently in force); c) a direct award, "as an exception" to those made on an ordinary basis, requires "adequate publicity" in advance and that reasons be given by the body for such a choice on the basis of a "market analysis", and also that a "report" be transmitted by the tendering authority to the sectoral authorities, if established (original text of Article 23a of Decree-Law no. 112 of 2008), or to the Competition Authority (*Autorità garante della concorrenza e del mercato*, AGCM) (text in force of Article 23a of Decree-Law no. 112 of 2008), in order to receive a mandatory but non-binding opinion which shall be issued within 60 days of receipt; d) pursuant to paragraphs 3 and 4 of the original text of Article 23a of Decree-Law no. 112 of 2008, the direct award must "be made in accordance with the principles set forth under Community legislation", and is subject to the further requirement that "due to the particular economic, social, environmental and geomorphologic characteristics of the reference territorial framework, … [exceptional circumstances] ... do not enable the market to be used in an effective and beneficial manner"; e) however, pursuant to paragraphs 3 and 4 of Article 23a as currently in force, such an award must be made according to in-house management procedures, and shall comply with the conditions required under Community law, subject to the requirement that an opinion be

obtained from the AGCM only, along with the further prerequisite that "due to the particular economic, social, environmental and geomorphologic characteristics of the reference territorial framework, … [exceptional circumstances] ... do not enable the market to be used in an effective and beneficial manner"; f) the tender districts for the different services shall be defined, in accordance with sectoral legislation, by the regions and the local authorities acting in concert with the Joint Assembly pursuant to Article 8 of Legislative Decree no. 281 of 28 August 1997 (Article 23a(7), both as originally enacted and also as currently in force); g) Article 113 of Legislative Decree no. 267 of 18 August 2000 (Consolidated law on local authorities), hereafter the CLLA, concerning the award and management of economically relevant local public services (Article 23a(11) of Decree-Law no. 112 of 2008, both as originally enacted and as currently in force) is hereby repealed insofar as incompatible with the new legislation; h) the government shall have the power to adopt regulations setting out secondary legislation both in relation to the matters falling under Article 23a(10) (as provided for under the original version of Article 23a as well as that currently in force) and also in order to determine the minimum thresholds above which awards "become relevant and require that an opinion be obtained" from AGCM (as provided for under paragraph 4a of Article 23a as currently in force); i) direct awards made prior to entry into force of the new legislation shall terminate on 31 December 2010 (according to the original version of Article 23a(8)) or at later dates, starting from 31 December 2011, depending upon the types of award concerned (Article 23a(8) as currently in force); l) "All forms of award of the management of the integrated urban water management service falling under Article 23a of Decree-Law no. 112 of 2008 […] shall occur in accordance with the principles of the management autonomy of the operator and that water resources remain under full and exclusive public ownership and their administration remain entirely a matter for public institutions, with particular regard to the quality and price of the service, in accordance with the provisions of Legislative Decree no. 152 of 3 April 2006, guaranteeing the right to the universal provision and availability of the service" (Article 15(1b) of Decree-Law no. 135 of 2009 converted, with amendments, into Law no. 166 of 2009).

1.2. – The President of the Council of Ministers challenged in turn two groups of provisions from regional legislation.

1.2.1. – The first group of contested provisions (Application no. 2 of 2009) is comprised of Article 4(1), (4), (5), (6) and (14) of Liguria Regional Law no. 39 of 28 October 2008 (Establishment of the Service Boards to perform the functions of local authorities in matters relating to water resources and waste management pursuant to Legislative Decree no. 152 of 3 April 2006 – Provisions on the environment). These paragraphs provide that: a) the Regional Council shall have jurisdiction to approve the framework service contract and convention for the integrated urban water management service (paragraph 1); b) the Service Board shall have jurisdiction to award the integrated urban water management service "in accordance with the criteria laid down in Article 113(7) of Legislative Decree no. 267 of 2000 and the procedures laid down under Articles 150 and 172 of Legislative Decree no. 152 of 2006" (paragraph 4); c) existing licences shall be terminated, and the relative transitory arrangements shall apply to awards of the integrated urban water management service without any public competition, by reference to the provisions of Article 113(15a) CLLA (paragraphs 5 and 6); and d) that the Local Service Board shall have jurisdiction to conclude service agreements specifying qualitative targets with regard to the services provided, the monitoring of services, pricing issues and the participation of residents and consumer associations (paragraph 14).

1.2.2. – The second group of provisions contested by the State (Application no. 51 of 2010) is contained in Article 1(1) of Campania Regional Law no. 2 of 21 January 2010 (Provisions governing the formation of the annual and long-term budget of Campania Region – Finance Law 2010), which provides that the Region shall have jurisdiction to regulate the regional integrated urban water management service as a service that is not economically relevant and to determine in its own right both the legal forms of the parties to which the service may be contracted out as well as the time limit for the expiry of existing awards.

2. – The regions raised questions with reference to Articles 3, 5, 41, 97, 114, 117(1), (2), (3), (4) and (6), 118, 119(6) and 120 of the Constitution. Supplementing the principle laid down in Article 117(1) of the Constitution, some regions invoked as interposed provisions: a) the European Charter of Local Self-Government (specifically Articles 3(1) and 4(2) and (4)), signed under the aegis of the Council of Europe in Strasbourg on 15 October 1985, and ratified by Law no. 439 of 30 December 1989

(Ratification and implementation of the European Charter of Local Self-Government, signed in Strasbourg on 15 October 1985); b) "Community law"; c) the "principles of Community law on the free movement of persons and the autonomy of local government institutions"; and d) Articles 14 and 106 of the Treaty on the Functioning of the European Union (TFEU).

According to the applicants' arguments, these questions may be sub-divided into the following seven core issues, the first four of which it is appropriate to treat on a general preliminary basis in consideration of their impact on the overall legislative framework challenged. The conclusions which will be arrived at on conclusion of this examination will provide the basis for the decisions on the individual questions which will then be considered in detail.

The first core question concerns the nature of the relationship between the legislation governing LPS contained in European Union law and the European Charter of Local Self-Government and that laid down by the contested provisions. This account is necessary in order to assess the opposing arguments of the parties, according to which the special conditions – which are more limited compared to earlier Italian legislation – laid down by the contested Article 23a(3) of Decree-Law no. 112 of 2008 (both as originally enacted and as currently in force) governing in-house awards of local public services constitute either the mandatory application (according to the State representative) or a breach (according to the applicants) of Union law.

The second core issue concerns the identification of the sphere of competence within which, according to the Constitution, the contested legislation is located: whether – as the State asserts – it falls under constitutional law on the protection of competition, or other exclusive State jurisdiction, or – as the majority of the applicants asserts – under the law on local public services, over which the regions have residual jurisdiction; or further, as is asserted by Marche Region, under the regulatory power of local authorities pursuant to Article 117(6) of the Constitution; or finally, as Puglia Region asserts, under shared regional jurisdiction on the protection of health and food products.

The third core issue – should the State be found to have exclusive jurisdiction under competition law – relates to the assessment as to whether the contested legislation violates the principle of reasonableness, having regard to its proportionality and

adequacy, and accordingly whether it infringes upon the legislative or regulatory jurisdiction of the regions governed by ordinary statute.

The fourth core issue relates to the issue as to whether it the State or the regions have jurisdiction to decide whether LPS are economically relevant, namely the very prerequisite for the application of the legislation to those services. According to the applicant Marche Region, this problem will also arise if it is considered that the aforementioned legislation falls under competition law and is proportionate and adequate.

The fifth core issue concerns the violation of Articles 3 and 97 of the Constitution in terms of the obligation to give reasons for administrative acts with regard to the provisions of the contested Article 23a of Decree-Law no. 112 of 2008, interpreted as providing that the choice of the local authority to award the LPS "on an ordinary basis" is not subject to any requirement to give reasons analogous to those in place for awards made "as an exception" (that is, in-house awards).

The sixth core issue relates to the alleged unreasonable difference between the legislation applicable to the integrated urban water management service and that applicable to other local public services.

The seventh core issue relates to the alleged violation of the financial autonomy of the regions and the local authorities.

3. – The President of the Council of Ministers raised questions with reference to Articles 117(1) and (2)(e) and (s) of the Constitution and the following interposed legislation: a) for the questions relating to Liguria Regional Law no. 39 of 2008, Article 161(4)(c) of Legislative Decree no. 152 of 3 April 2006 (Provisions on the environment), as well as Article 23a(2), (3), (8), (9) and (11) of Decree-Law no. 112 of 2008; and b) for the questions relating to Campania Regional Law no. 2 of 2010, Articles 141 and 154 of Legislative Decree no. 152 of 2006, Article 23a(2), (3), (8), (9) and (11) of Decree-Law no. 112 of 2008, Decree-Law no. 135 of 2009, and Article 113 CLLA.

These questions concern: a) the identification of the area of jurisdiction within which, according to the Constitution, the contested regional legislation is located: whether – as asserted by the State – it falls under the constitutional law on the protection of competition or the environment or – as asserted by the respondent regions – under

that on local public services (under the residual jurisdiction of the regions); and b) the assessment as to whether the regional legislation contrasts with the interposed State legislation invoked, as alleged.

4. – Where the above questions of constitutionality have been raised within the same application along with others, they must be treated separately from the latter and it is appropriate to examine them separately. The proceedings thus separated, which have been delineated according to their subject matter, must therefore be discussed and decided upon together, in consideration of the fact that the provisions contested and the questions raised are in part identical.

5. – By written statement filed shortly before the hearing, the State representative claimed that the entry of appearance by Campania Region in the proceedings relating to Application no. 51 of 2010 was inadmissible. The applicant argues that this entry was resolved upon by a body which lacked jurisdiction, due to the fact that it had been adopted by director's decree of the Coordinator Counsel, acting on a proposal by the Director of the Administrative and Tax Law Litigation Department and not of the Regional Council.

The objection was accepted by this Court by the order read out at the public hearing of 5 October 2010 on the grounds that, pursuant to Article 32(2) of Law no. 87 of 11 March 1953 "Questions of constitutionality may be referred to the Constitutional Court […] by the President of the Regional Council […] pursuant to a resolution by the Regional Council", and that power to authorise the initiation of proceedings before the Constitutional Court must be deemed also include the power to enter appearances in such proceedings, given the political nature of the assessment which both actions require (see to the same effect, the order read out in the public hearing of 25 May 2010 and the relative proceedings concluded by judgment no. 225 of 2010).

6. – The first of the core issues referred to above relates – as has been noted – to the relationship between the contested provisions and the legislation on LPS contained in European Union law and the European Charter of Local Self-Government. According to some of the applicants, since these provisions contrast with Community and international law, they violate Article 117(1) of the Constitution, insofar as this Article subjects the exercise of legislative powers by the State and the regions to the requirement of respect for Community law and obligations under international law.

According to the State representative on the other hand, the very wording of Article 23a(1) of Decree-Law no. 112 of 2008 ("the provisions of this Article shall govern the award and management of economically relevant local public services in accordance with Community law […]") highlights that the contested provisions, including in particular those relating to the in-house award of local public services, amount to a mandatory application of Union law and do not contrast with the European Charter of Local Self-Government.

Neither of these two accounts can be endorsed because the provisions contested by the applicants do not amount either to a violation or a mandatory application of the Community and international law referred to, but are simply compatible with such legislation, and constitute one of the different possible legislative frameworks in this area which Parliament was at liberty to adopt without violating Article 117(1) of the Constitution. This conclusion may be reached by comparing the contested provisions both with the Community legislation as well as the international law relied on as interposed provisions.

6.1. – Under Community law the expression "economically relevant local public service" is never used, but rather only "service of general economic interest" (SGEI), which is referred to in particular in Articles 14 and 106 of the Treaty on the Functioning of the European Union (TFEU). These articles do not specify the conditions under which this expression may be used; however, according to the interpretations adopted within Community case law (see *inter alia*, ECJ judgment of 18 June 1998 in Case C-35/96 *Commission v. Italy* [1998] ECR I-3851) and by the European Commission (specifically in the Communications on services of general interest in Europe of 26 September 1996 and 19 January 2001, as well as in the Green Paper on such services of 21 May 2003), it is clear that the Community law concept of SGEI, where limited to a local scale, and the national law concept of economically relevant LPS have "analogous content", as was acknowledged by this Court in judgment no. 272 of 2004. Through its stated intention to regulate "economically relevant local public services" in order to favour the broader dissemination of the principles of competition, freedom of establishment and the freedom to provide services for all "economic operators interested in managing public services of general interest on local level", the contested Article 23a(1) of Decree-Law no. 112 of 2008 itself confirms this interpretation and expressly

defines economically relevant LPS as economically relevant "services of general interest on local level", which is evidently derived from Community law.

Both of the concepts under national and Community law mentioned above refer to a service which: a) is provided through economic activity (in the form of a public or private undertaking) understood in a broad sense as "any activity consisting in offering goods and services on a given market" (as stated in the ECJ judgment of 18 June 1998 in Case C-35/96, *Commission v. Italy*, cited above, as well as that court's judgments of 10 January 2006 in Case C-222/04, *Ministero dell'economia e delle finanze* [2006] ECR I-289 and of 16 March 2004 in Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01 *AOK Bundesverband* [2004] ECR I-2493 as well as section 2.3, paragraph 44 of the Green Paper on services of general interest of 21 May 2003); and b) provides services which are considered necessary (i.e. intended to achieve also "social goals") for a general class of residents, irrespective of their individual circumstances (ECJ judgment of 21 September 1999, Case C-67/96 *Albany International BV* [1999] ECR I-5751). Moreover, the two concepts have the identical function of identifying the services which are as a rule, for the purposes of competition law, to be administered through contracting out to third parties according to public tender procedures.

Insofar as is of interest here, the Community legislation on SGEI and the contested legislation on LPS differ in specifying the exceptions to the above rule. It is therefore necessary to determine whether the differences between the two sets of legislation are such as to render them incompatible, as argued by the applicant regions. As will be seen below, they are not incompatible.

A first difference consists in the fact that the LPS are managed directly by the public authority. Community law permits such arrangements in cases in which the Member State considers that the application of competition law rules (and therefore also of the rule that such operations must be contracted out to third parties according to public tender procedures) would *de facto* or *de iure* obstruct the "particular tasks" assigned to the public body (Article 106 TFEU; see inter alia the judgments of the ECJ of 11 January 2005 in Case C-26/03 *Stadt Halle* [2005] ECR I-1, paragraphs 48 and 49, and of 10 September 2009 in Case C-573/07 *Sea s.r.l.* [2009] ECR I-8127). In such cases Community law, which respects the broad discretion over such matters reserved to the Member States, only reserves the right to review whether the Member State's decision is

the result of a "manifest error". On the other hand, the contested national legislation results from a different development of the general principle of the prohibition on the direct administration of LPS by local authorities. This prohibition was introduced by Article 35 of Law no. 448 of 28 December 2001 (Provisions on the formation of the annual and long-term budget of the State – Finance Law 2002) and Article 14 of Decree-Law no. 269 of 30 September 2003 (Urgent provisions to promote development and correct trends in the public accounts) converted, with amendments, into Law no. 326 of 24 November 2003, neither of which was contested. It is therefore clear from the above that: a) Community law permits, but does not require, the Member States to make provision on an exceptional basis in certain specific cases for the direct management of public services by a local authority; and b) exercising its discretionary rights granted under Community law in this area, the Italian State has made a choice to prohibit as a general rule the direct management of LPS, and therefore issued legislation imposing that prohibition.

A second difference relates to the contracting out of the service to companies under mixed public and private ownership, that is with capital which is in part publicly owned and in part privately owned (PPP, or public-private partnership). Community legislation allows for the direct award of the service (i.e. without any public tender procedure in order to choose the operator) to companies under mixed public and private ownership in which a public tender procedure has been followed in order to choose the private shareholder, and essentially requires that such a shareholder must be "industrial" and not merely "financial (see in particular on this point the Commission's Green Paper of 30 April 2004), without expressly stipulating any maximum or minimum limit to the private shareholder's equity interest. The original text of Article 23a of Decree-Law no. 112 of 2008 does not contain any specific legislation regulating this type of award, and takes for granted that the procedure specified above for choosing the shareholder falls under the Community rule applicable to awards according to public tender procedures, whereas it is immaterial whether that tender procedure concerned the choice of the private shareholder instead of the operator. National and Community law are therefore identical on this point. The version of Article 23a currently in force also complies with Community law insofar as it permits the management of the service to be contracted out by direct award "on an ordinary basis" to a company under mixed public and private

ownership, subject to the twofold condition that the private shareholder be chosen according to "public tender procedures" and that the shareholder be allocated "specific operational tasks associated with the management of the service" (the "dual object" public tender procedure: choice of the shareholder and allocation of specific operational tasks). However, the new wording of Article 23a departs from Community law insofar as it imposes the further condition for the purpose of such a direct award that the private shareholder be granted "an equity interest no lower than 40 percent". This minimum level of the equity interest (which, as mentioned above, is neither required nor prohibited under Community law) amounts to a restriction on the exceptional cases involving the direct award of services, and accordingly its enactment has the effect of expanding the cases in which the general Community rule must be applied whereby services are to be awarded to third parties according to public tender procedures. It follows that national law is fully compatible with Community law also in this case.

A third difference relates to cases in which services are awarded directly "as an exception" to the arrangements applicable to awards on an ordinary basis (original version of Article 23a), namely according to in-house management (as is clarified by the version of Article 23a currently in force). According to Community legislation, the prerequisites applicable to this type of management and to which its direct award is subject (full public ownership; control exercised by the tendering authority over the operator chosen of "analogous content" to that exercised by the tendering authority over its own offices; and the conduct of the predominant portion of the operator's activity for the tendering authority) must be interpreted narrowly, since in-house provision amounts to an exception from the general rule of awards to third parties by public tender procedure. This exception is justified under Community law on the grounds that the applicability of the aforementioned conditions means that an in-house contract will not in essence constitute an ordinary contractual relationship between the tendering authority and the operator chosen, because the latter is in reality merely the *longa manus* of the former. Nevertheless, Community case law does not impose any further requirements as preconditions for making this type of direct award, but is limited to clarifying the specific scope of the above three conditions. By contrast, under Article 23a of Decree-Law no. 112 of 2008 as currently in force, with respect to in-house awards, national legislation not only expressly requires that the three prerequisites laid

down under Community law be met, but also imposes three further conditions: a) advance "adequate publicity" of and reasons for the choice of that type of award by the authority on the basis of a "market analysis", with the subsequent transmission of a "report" form the tendering authority to the sectoral authorities, if established (original text of Article 23a), or to the AGCM (Article 23a as currently in force) in order to receive a mandatory but non-binding advance opinion which shall be issued within 60 days of receipt; b) the existence of "circumstances which, due to the particular economic, social, environmental and geomorphologic characteristics of the reference territorial framework" (paragraphs 3 and 4 del original text of Article 23a), or of "exceptional circumstances which, due to the particular economic, social, environmental and geomorphologic characteristics of the reference territorial framework" (paragraphs 3 and 4 of Article 23a as currently in force), "do not enable the market to be used in an effective and beneficial manner". These further prerequisites, to which the applicants particularly object, effectively limit the cases in which the service may be managed on an in-house basis, and therefore the ability to make exceptions to the rule of Community competition law whereby services are to be awarded according to public tender procedures. This evidently entails a broader application of that Community rule, as a consequence of a precise choice by the Italian Parliament. Precisely because this choice entails pro-competition legislation which is more stringent than that required under Community law, it is not necessary according to the latter – and hence not mandatory as a matter of constitutional law pursuant to Article 117(1) of the Constitution, as argued by the State. However at the same time it does not breach the Community legislation cited above – as is by contrast argued by the applicants – since this is intended to favour the competitive structure of the market, and as such constitutes merely a minimum inderogable standard for the Member States. Indeed, it cannot be denied that national legislatures enjoy a "margin of appreciation" as regards the minimum inderogable standards of protection set forth under Community law in relation to a value which is deemed to deserve specific protection, such as the protection of competition "within" the market and "for" the market. It follows in particular that the Italian Parliament is not precluded from enacting legislation providing for rules on competition – such as those on public tender procedures for the award of public services – which are broader in scope compared to those required under Community law. The fact that the object of the

national and the Community legislation is identical therefore means that there cannot be any contrast or incompatibility also as regards the third difference referred to.

6.2. – As regards the alleged violation of the European Charter of Local Self-Government ratified by Law no. 439 of 1989, some of the applicants aver that the contested provisions violate the following provisions of the Charter: a) Article 3(1) which provides that, "[l]ocal self-government denotes the right and the ability of local authorities, within the limits of the law, to regulate and manage a substantial share of public affairs under their own responsibility and in the interests of the local population"; b) Article 4(2) which provides that "[l]ocal authorities shall, within the limits of the law, have full discretion to exercise their initiative with regard to any matter which is not excluded from their competence nor assigned to any other authority"; and c) Article 4(4) which provides that "[p]owers given to local authorities shall normally be full and exclusive" and "may not be undermined or limited by another, central or regional, authority except as provided for by the law".* According to the applicants, this international convention has been breached due to the infringement of the autonomy of the public authority guaranteed by the provision referred to. This infringement is claimed to have been caused by the introduction of restrictions and specific procedural formalities relating to the choice by the public authorities to assume themselves the direct management of integrated urban water management services, namely one of the fundamental functions of the municipalities.

The Charter has not been violated as alleged for the following reasons.

It should be pointed out first and foremost that – as set out above in paragraph 6.1. – in replacing Article 113 CLLA, Article 35 of Law no. 448 of 2001 had excluded "industrially relevant" local public services (according to the definition adopted at the time, which were then re-defined as "economically relevant" under Article 14 of Decree-Law no. 269 of 2003, which amended Article 113 CLLA) from any direct management by the public authority, either in-house or through specialist companies. Article 35(8) also required existing special companies to transform themselves into capital companies before 31 December 2002. The ban on direct management was therefore not an innovation, but merely maintained the existing rule contained in Article 23a of Decree-Law no. 112 of 2008, with the result that the contested provisions do not

* Translator's note: the term "not" from the Charter is omitted from the judgment.

breach the Charter as alleged, and any breach is caused at most by Articles 35 of Law no. 448 of 2001 and 14 of Decree-Law no. 269 of 2003, which were not challenged.

Secondly, it should be pointed out that the applicants have brought their challenges on the stated assumption that the provision of water is one of the fundamental functions of the public authority, and assume that these functions are specifically protected under the Charter. However, precisely this assumption is without foundation because, as this Court has asserted on various occasions, that service does not constitute one of the fundamental functions of a local authority (judgments no. 307 of 2009 and no. 272 of 2004).

Thirdly, it should be pointed out that the Articles of the European Charter of Local Self-Government referred to do not have specific normative content, but set out predominantly definitions (Article 3(1)), policy statements (Article 4(2)) and other generic provisions (Article 4(4)). Moreover, the Charter asserts in Article 4(1), with a provision that is generic in scope, that "[t]he basic powers and responsibilities of local authorities shall be prescribed by the constitution or by statute", thereby reserving the task of defining the general framework of powers to national legislation.

7. – The core issue within the questions raised relates to the determination of the sphere of jurisdiction under which, according to the Constitution, the contested legislation is to be classified. In particular, this Court has been called upon to verify whether such legislation falls under exclusive State jurisdiction according to constitutional law, including specifically that over competition law, or under the regions' residual jurisdiction, including specifically the area of local public services, which is included within the regulatory jurisdiction of the local authorities pursuant to Article 117(6) of the Constitution, or finally whether jurisdiction is shared.

It should be reiterated in this regard – as this Court has asserted on various occasions – that the legislation governing the procedures for contracting out the management of economically relevant local public services: a) does not fall under the exclusive jurisdiction of the State on the "determination of essential service levels in relation to civil and social rights" (Article 117(2)(m) of the Constitution), because it relates to economically relevant services, and not to the determination of essential levels (judgment no. 272 of 2004); b) it cannot be classified as one of the "fundamental functions of the municipalities, the provinces or the metropolitan cities" (Article

117(2)(p) of the Constitution) because "the management of the aforementioned services can certainly not be deemed to be an expression of one of the local authority's own and unquestioned functions" (judgment no. 272 of 2004) and therefore "does not relate to […] functional aspects of the local authorities" (section 6.1 of judgment no. 307 of 2009); and c) is by contrast to be classified under the area of "competition law", within the exclusive jurisdiction of the State pursuant to Article 117(2)(e) of the Constitution, taking account of its own structural and functional aspects and its direct impact on the market (see *inter alia*, judgments no. 314, no. 307, no. 304 and no. 160 of 2009; no. 326 of 2008; no. 401 of 2007; no. 80 and no. 29 of 2006; and no. 272 of 2004). Consequently, as regards the specific legislation contested, State jurisdiction prevails over the regional and regulatory powers of the local authorities invoked, and in particular over the powers over local public services, precisely because the subject matter and purposes which characterise such legislation primary concern the protection and promotion of competition (judgments no. 142 of 2010, no. 246 and no. 148 of 2009, no. 411 and no. 322 of 2008).

These conclusions are supported by the "Community concept of competition", which reflects that specified under Article 117(2)(e) of the Constitution, including through Article 117(1) and Article 11 of the Constitution. The concept is also referred to in Article 1(4) of Law no. 287 of 10 October 1990 (Provisions to protect competition and the market). According to that concept, competition presupposes "the broadest liberalisation of the market for all economic operators from the sector in accordance with competition law requirements and the Community law principles of the free movement of goods, the freedom to provide services and the freedom of establishment" (judgment no. 401 of 2007). Therefore – as has been asserted in numerous judgments of this Court (judgments no. 270, no. 232 and no. 45 of 2010; no. 314 of 2009 and no. 148 of 2009; no. 63 of 2008; no. 430 and no. 401 of 2007; and no. 272 of 2004) – it may be protected through different types of regulatory intervention, such as: 1) "legislative measures *stricto sensu* concerning the actions and conduct of undertakings which have a negative impact on the competitive structure of the markets" (antitrust measures); 2) legislative supporting measures, "intended to liberalise the market or consolidate its liberalisation, removing entry barriers, reducing or removing restrictions on the free expression of entrepreneurial capacities or competition between undertakings" (directed

at competition "within" the market); and 3) legislative measures which pursue the goal of ensuring competitive procedures which provide guarantees by structuring those procedures in such a manner as to achieve "the broadest liberalisation of the market for all economic operators" (directed at competition "for" the market).

These measures, including in particular those falling under point 3) expressly include the provision for competitive public tender procedures which – such as those in this case – are intended to guarantee respect on the one hand for the principles of equal treatment, non-discrimination, proportionality and transparency, and on the other hand for the requirement that action taken by public authorities be effective and efficient in order to ensure that the public interests in the goods or services awarded is fully achieved.

Therefore, these findings, which are based on Community law, also confirm that the legislation governing the procedures for contracting out local public services fall under "competition law" and that the specific legislation under examination prevails over other powers (judgments no. 270 of 2010; no. 307 and no. 283 of 2009; no. 320 and no. 51 of 2008; n.430 and no. 401 of 2007; and no. 272 of 2004).

With reference to the specific sector of integrated urban water management, this Court has held – applying the principles referred to above and examining the legislation applicable to the determination of the tariff within the Local Service Board – that the legislation governing the identification of a single Service Board and the setting of the tariff for the service according to a price cap mechanism (Article 148 of Legislative Decree no. 152 of 2006) involves the exercise of exclusive State powers in matters relating to competition law (Article 117(2)(e) of the Constitution) and environmental law (Article 117(2)(s) of the Constitution), which will predominate over any regional powers, the latter being limited accordingly. This is because this legislation, which is intended to overcome the fragmentation within the management of water resources, makes it possible to rationalise the market, and is therefore intended to guarantee the competitive nature and efficiency of the market itself (judgments no. 142 and no. 29 of 2010; and no. 246 of 2009). Judgment no. 246 of 2009 also specified that the form of integrated urban water management and the procedures according to which it is awarded, which are governed by Article 150 of Legislative Decree no. 152 of 2006, are to be classified under competition law – within exclusive State jurisdiction – since it

concerns rules "intended to assure competition over integrated urban water management, and regulates the procedures according to which such services are contracted out and the individual prerequisites which operators must meet, with the precise goal of guaranteeing transparency, efficiency, efficacy and value for money in the management".

In conclusion, according to the case law of this Court, the rules applicable to the award and management of economically relevant local public services – including water services – essentially fall under "competition law", over which the State has exclusive jurisdiction pursuant to Article 117(2)(e) of the Constitution.

8. – The third core issue arising out of the questions put by the regions in relation to the contested legislation both under standard conditions and on a transitory basis, relates to the principle of reasonableness. The applicants refer in this regard to the case law of this Court, according to which the exercise of the State's exclusive legislative powers over competition law is legitimate – especially in cases in which powers are shared with the regions – subject to the requirement that the State legislature comply with the principle of reasonableness with regard to the proportionality and adequacy of the measures adopted (judgment no. 272 of 2004, to which judgments no. 148 of 2009; no. 326 of 2008; no. 452 and no. 401 of 2007; and no. 345 and no. 272 of 2004 may be added).

8.1. – As far as the arrangements applicable under standard conditions are concerned, some of the applicants argue that, notwithstanding that they may be classified under "competition law" they nonetheless infringe the regions' unspecified residual powers over local public services. In particular, the applicants argue that, since it limits cases in which direct awards may be made in-house, the contested legislation is unreasonable and not proportionate or adequate because: a) it is legislation which is self-applying and detailed; and b) it places additional – and hence unjustified – restrictions to those provided for under Community law for in-house awards.

None of these arguments can be endorsed.

8.1.1. – As far as the first argument is concerned, it should be reiterated here that according to the case law of the Constitutional Court, the issue of self-applying and detailed legislation in relation to the exercise of the exclusive powers of the State does not violate any of the criteria applicable to the division of legislative powers under

constitutional law. This Court has repeatedly held on this matter (judgments no. 232 of 2010 and no. 430 of 2007 on competition law; and analogously judgment no. 255 of 2010 on the system of State taxation) that: a) "the allocation of the [competition law] measures under the exclusive jurisdiction of the State means both that the provisions set forth cannot be subject to exceptions and also that, within their specific limits and subject to the legislative provisions contained in them, they impinge upon all areas of law within which they apply"; and b) once a provision has been classified as falling under "competition law", "it is not necessary […] to assess whether or not it is highly detailed, according to principles and rules relating to the regulation of legislative jurisdiction that is shared with the regions, but on the other hand to ascertain whether, in the light of the scrutiny referred to above, the provision is conducive to the removal of limits on and barriers to entry into the market and the free expression of entrepreneurial capacity".

Moreover, it cannot be asserted – as is argued by some of the applicants – that the provisions governing the award of local public services and the procedures applicable to their management are in themselves unreasonable on the grounds that they make provision in relation to competition law through legislation which is detailed and self-applying. Indeed, this Court has held on various occasions that it is reasonable for competition law provisions to be detailed and self-applying, in order to ensure better protection for the pro-competition goals underlying them (judgments no. 148 of 2009; no. 320 of 2008; and no. 431 of 2007).

8.1.2. – As regards the second argument, the applicants' argument that the only legislation on competition which may be deemed to be proportional is that which does not place limits (other than those set forth under Community case law) on the in-house award of economically relevant local public services cannot be accepted.

It should be observed first and foremost that legislation, such as that at issue in this case, which is aimed at further limiting – beyond the Community law limits – situations in which awards may be made in-house (that is, cases in which the operator chosen is the *longa manus* of a public authority exercising full and complete control over it) does not appear to be unreasonable, even though it is not required under constitutional law. As was observed above in section 6.1, this legislation has been incorporated consistently into a national legislative framework containing a prohibition on direct

awards through a special company or on an in-house basis (introduced by Articles 35 of Law no. 448 of 2001 and 14 of Decree-Law no. 269 of 2003, which have not been challenged) and within which therefore any cases involving in-house awards – as an organisational model substituting the (prohibited) direct administration by the public authority – must be exceptional and expressly permitted.

Secondly, it should be pointed out that the provisions contested by the applicants cannot be deemed to be disproportionate or inadequate solely because, by reducing situations in which local public services may be awarded directly on an exceptional basis, they reinforce the general pro-competition rule preferred by the legislature which imposes the obligation to award services only according to public tender procedures. The possibility to make in-house awards under Community law also in cases in which such awards are prohibited under the contested national provisions does not render the latter unreasonable on the grounds mentioned because – as was highlighted again in paragraph 6.1. – the Community law on the protection of competition and in particular the contracting out of public services constitutes only a minimum mandatory standard for Member State legislatures, and therefore does not prevent national law from regulating the procedures governing such awards on a more rigorous basis, by favouring the competitive structure of a market. Therefore, the national legislature is entirely at liberty to choose between a range of equally legitimate legislative arrangements.

Thirdly, it must be stressed that the contested legislation does not fully prevent public authorities from managing economically relevant local authorities, refusing them any possibility to carry out a "special [public] mission" (as provided for under Community law), but is able to strike one of the many possible balances between the various interests operating in the area under examination. It should be recalled in this regard that, according to the case law of this Court, the area of private autonomy and competition do not receive "absolute protection" under the legal order, and may therefore be restricted and subject to coordination necessary "in order to permit a range of constitutionally relevant interests to be satisfied in parallel with one another" (judgment no. 279 of 2006; see by analogy order no. 162 of 2009). However, the case law has also highlighted that "a regulation that is conducive to guaranteeing the protection also of interests different from those related to the competitive structure of the guaranteed market" must have the status as an "exemption" and hence be

exceptional in nature, as well as being "the only measure capable of providing a fair guarantee that those interests would be protected" (judgment no. 270 of 2010). In this case, given the intention to mitigate the rule that competition should be protected to the full against the exceptions resulting from the pursuit of the special public mission by the local authority, Parliament in effect weighed up two different interests: on the one hand the general interest in the protection of competition, and on the other hand the specific interest of local authorities in administering LPS (through in-house awards) in cases in which recourse to the market is "effective and useful" and not solely when it is possible. Considering the facts of the case, the balance has been struck between these interests in a manner which is not unreasonable since, on the one hand, it permits capital companies which are (wholly or partly) under public ownership to participate in public tender procedures for the award of services on an equal footing with any other entrepreneur or company where the conditions for direct awards have not been met (Article 23a(1)); on the other hand, it limits in-house awards to cases in which, notwithstanding fact that the LPS is economically relevant, the recourse to the market in order to administer the service is not "effective and useful" (Article 23a(2)). This is confirmed by Article 3(2) of Presidential Decree no. 168 of 7 September 2010 (Regulation on economically relevant local public services, pursuant to Article 23a(10) of Decree-Law no. 112 of 25 June 2008, converted, with amendments, into Law no. 133 of 6 August 2008), which expressly provides that "capital companies under full public ownership may participate in public tender procedures pursuant to Article 23a(2), unless prevented from doing so by specific statutory prohibitions".

8.2. – These conclusions governing arrangements under standard conditions impinge upon the solution to the question put by the applicants regarding the adequacy and proportionality – and hence the reasonableness – of the transitory arrangements laid down by the contested legislation.

The challenge cannot be accepted for the following additional arguments relating specifically to the transitory regulations, in addition to the general considerations made in the previous section.

On this matter, even leaving aside the fact that, in the event that new legislative provisions are enacted, the legislature has full discretion to stagger the introduction of the legislation over time, subject to the sole limit of reasonableness (see *inter alia*,

judgment no. 376 of 2008; orders no. 40 of 2009 and no. 9 of 2006), it should nonetheless be pointed out that in this case the period of time granted under the contested legislation in order to terminate existing direct awards is compatible and proportionate with the scale and effects of the legislative amendments introduced, and is accordingly reasonable. This conclusion may be reached reasoning by analogy if we consider the following chronological succession of the statutory provisions now subject to challenge. With reference to integrated urban water management, paragraph 8 of the original text of Article 23a (which entered into force on 22 August 2008) provided that concessions which did not meet the specific characteristics required under paragraph 3 were to terminate on 31 December 2010. With reference to sectors other than integrated urban water management, that paragraph delegated the specification of transitory arrangements to secondary legislation to be adopted pursuant to paragraph 10(e), although such legislation was never issued. The current version of Article 23a(8) (which entered into force on 26 September 2009) now regulates the transitory arrangements governing awards which do not comply with the provisions of paragraphs 2 and 3 of that Article, subject to different time-scales for the various cases, falling between 31 December 2010 and 31 December 2012. As of 25 November 2009, the latter time limit was subsequently amended to 31 December 2015. These broad time-scales will ensure that it is tangibly possible to mitigate the negative financial implications of the early termination of management, and accordingly mean that it will not be possible to rely on the fact of the legitimate expectations of the operator for the natural term of the service agreement, the only grounds on which the provision could be ruled unreasonable.

9. – The fourth general issue raised by the questions referred, which must be considered on a preliminary basis, relates to the identification of the legislative jurisdiction of the region or the State in determining the economic relevance of the LPS. Indeed, once it has been ascertained that the legislation applicable to the award of contracts for economically relevant local public services falls under the exclusive legislative jurisdiction of the State, it is still necessary to verify whether the State is also vested with exclusive powers to specify the circumstances in which services must be deemed to be "economically relevant" or whether the decision to classify a local service in this matter is reserved under Community law or constitutional law to the region or to the local authority.

To this effect, it is necessary first and foremost to verify the extent of the concept of "economic relevance" under State legislation applicable to LPS. Thereafter, it will be necessary to identify the constitutional foundation for that concept, and finally draw conclusions as to which party has jurisdiction to determine whether a service is "relevant".

9.1. – With regard to the first issue, it must be pointed out that, in regulating the award and management of "economically relevant" local public services, neither the contested Article 23a of Decree-Law no. 112 of 2008 – in both of its versions – nor Article 113 CLLA provides a clear definition of the concept of "significance". However, Article 23a provides interpreting bodies with certain elements which are useful in order to arrive at such a definition, specifying that: a) the purpose of the Article is (*inter alia*) to favour the broadest dissemination of the principles of competition, freedom of establishment and the freedom to provide services for all "economic operators interested in managing public services of general interest on local level" (paragraph 1); b) the fact that – due to the particular economic, social, environmental and geomorphologic characteristics of the reference territorial framework – circumstances do not permit "an effective and useful resource to the market for the service" does not in itself mean that the service lacks economic relevance, but simply permits its management to be contracted out according to exceptional arrangements differing from ordinary procedures (paragraph 3); and c) the "economic relevance" of the services has nothing to do with the thresholds above which the award of services "becomes relevant" and requires an prior opinion to be obtained from the AGCM regarding the choice of the local authority to contract out a "economically relevant" public service, according to exceptional arrangements differing from ordinary procedures (paragraphs 4 and 4a in the version currently in force).

It may be inferred first and foremost from the evident structural similarity provided for under that Article between "economically relevant local public services" and "public services of general interest on local level" that the concept of "economically relevant local public service" refers to the broader concept of "service of general economic interest" (SGEI) used under Community law and which has already been examined in section 6. Moreover, in judgment no. 272 of 2004, this Court already pointed out that there is also a structural similarity between the concept of "economic relevance" used in

Article 113a CLLA (relating to local public services "which lack economic relevance" and which was declared unconstitutional in that judgment) and the Community law concept of "general economic interest", as interpreted also by the European Commission in its Green Paper on services of general interest of 21 May 2003. In particular, according to the indications provided under Community case law and by the European Commission, "general economic interest" is to be deemed to refer to an interest in services aimed at satisfying the needs of an indiscriminate general class of users, and at the same time refers to services to be provided in the course of an economic activity, that is "any activity consisting in offering goods and services on a given market", including a potential market (judgment of the ECJ of 18 June 1998 in Case C-35/96 *Commission v. Italy* [1998] ECR I-3851 and the Green Paper on services of general interest of 21 May 2003, section 2.3, paragraph 44) and which hence, according to an economic methodology, are intended at the very least to cover their costs within a given period of time. It therefore concerns an objective concept of economic interest, relating to the possibility of introducing a specific activity into the corresponding real or potential market.

If we are to reason on the basis of such a broad Community law concept of economic interest, it is easy to conclude that the empirical indicators of this economic interest – such as the profit motive, the acceptance of the risks of the activity and the impact of public funding – at times applied by the ECJ (judgment of 22 May 2003 in Case C-18/01 *Korhonen* et al. [2003] ECR I-5321), and which have also been referred to by this Court (judgment no. 272 of 2004), may only be useful in relation to a service that is already available on the market in order to ascertain whether the activity carried on is to be deemed economic. However, this does not mean that the economic nature of the interest is to be determined *ex post* exclusively on the basis of these indicators, that is following a discretionary choice by the competent local authority as to the procedures for administering the service. On the contrary, under the different scenario in which a public service must be contracted out to the market – and therefore it is necessary to ascertain whether and how to apply the Community rules on competition law and public tenders when awarding its management – it is necessary to take account of the possibility for a market to be liberalised (according to an objective assessment of its actual feasibility), irrespective of any subjective determination by the authority in that

regard. It may be the case that Community law leaves some space in this area to the discretion of the Member States, granting them the power, albeit on an exceptional basis, to create exceptions to the Treaty rules on competition and State aids where – unless they result from manifest errors by the States – such rules are deemed to preclude the pursuit of the special mission and social goals of the service. However, the power to grant exemptions presupposes that there is an economic interest in the service, and that power is to be exercised precisely in relation to the SGEI, namely those services which are objectively and by definition of "economic interest" because they are liable to influence a competitive structure which either already exists or is developing.

In a similar manner to the situation observed for Community law, the contested provisions do not refer exclusively to local services operating in a market which already exists, but relate to services with mere financial "significance", and therefore also include services which still have to be organised and placed on the market. In fact, in accordance with the Community concept of economic interest referred to above, they highlight the following two fundamental characteristics of the concept of financial "significance": a) that the service may be placed on a market which is merely potential in the sense that, pursuant to Article 23a, it is sufficient that the operator is able to enter into a market which does not yet exist, but for which there is a concrete possibility that it will be able to open itself up and accordingly accept operators acting in an economically rational manner; and b) that the activity be operated according to the economic method in the sense that, considered overall, it must be carried out with the intention at the very least of covering its costs within a certain period of time through earnings (of any nature, including any public funding).

This arrangement – which is a result of the legislative choice to promote competition "for" the service management market – is distinctly clear in particular from Article 23a(3), (4) and (4a), which may only be interpreted to the effect that local public services do not cease to be "economically relevant" solely on the grounds that it may be concluded that a simple recourse to the market is expected to be ineffective or useless, with reference to the public goals pursued by the local authority. Evidently, according to national legislation – and also under Community law – an activity is also economically relevant when the automatic operation of the market is not sufficient in order to overcome particular difficulties associated with the reference territorial framework and

to guarantee quality services also for a class of users who are in a certain sense disadvantaged, and public action or funding is necessary in order to offset the public service obligations imposed on the operator, provided that it is actually possible to create an "upstream market", that is a market "where undertakings contract with the public authorities to provide these services" to users (see paragraph 44 of the European Commission's Green Paper, referred to above in section 6.1.).

Due to the objective scope of the concepts under examination highlighted above, and the fact that even a potential market is sufficient, any interpretations seeking to establish that these concepts are merely subjective in nature are mistaken, including in particular the interpretation – adopted by some of the applicants – according to which a service will only be economically relevant subject to the twofold condition that the market for the service actually exists and that the local authority decides, at its discretion, to finance the service out of the profits earned from business activities in that market.

9.2. – As regards the second issue to be examined, concerning the constitutional foundation of the State Law determining the content of the objective concept of "economic relevance", it must be remembered that this concept – as is the case for the similar concept of "economic interest" adopted under Community law – is to be used in relation to legislation governing the market in public services as a discretionary criterion relating to the application of competition law and the Community rules on public tenders for the contracting out of such services (as is moreover expressly asserted by Article 23a(1)). It follows that, precisely due to this extent of its use, the determination of the conditions of economic relevance is reserved to the exclusive legislative jurisdiction of the State over "competition law" pursuant to Article 117(2)(e) of the Constitution. Since the Community order prevents the Member States, including infrastructure authorities, from deciding on a subjective basis and at their discretion whether or not a service is of economic interest, consequently the State legislature fell into line with this principle of Community law in promoting the application of rules of competition law and provided that infrastructure authorities could not decide on a subjective basis and at their discretion whether or not a service is of economic relevance (which, as pointed out on several occasions, corresponds as a matter of national law with the economic interest considered under Community law).

10. – In the light of the core issues highlighted in section 2, is it now necessary to examine the individual questions proposed by the applicant regions.

It should be pointed out as a preliminary matter in this regard that, with regard to the applications by the regions concerning Article 23a as currently in force, the State Counsel has raised two objections of inadmissibility.

10.1. – It is claimed in the first placed, in general terms, that "a region cannot generically object that State laws are unconstitutional, or that they breach Community law, without specifically indicating the breach of a power vested in it".

This objection must be objected due to its generic nature, since the State has not specified to which of the questions raised by the regions this refers.

10.2. – The State representative asserts secondly that, "with reference to the questions raised by the regions regarding the failure to apply and/or incorrect application of Community principles applicable to local public services, it is considered that the complaint has been incorrectly framed under constitutional law" since "should this Court consider it necessary to ensure the uniform interpretation of Community law, the question should be referred to the Court of Justice of the EU for a preliminary ruling pursuant to Article 234 of the EC Treaty".

The objection must be rejected because, in proceedings in which the Constitutional Court is seized directly, the regions may always submit questions of constitutionality to the Court in which Community law provisions are invoked as interposed provisions. At most – as specified in judgment no. 102 of 2008 and order no. 103 of 2008 – it will be for the Constitutional Court to refer the case to the Court of Justice should it consider that the interpretation of Community law is unclear. Moreover, as noted in section 6, in this case the interpretation of the Community law provisions invoked by the applicants as interposed provisions of constitutional law has been sufficiently clarified under the settled case law of the Court of Justice of the European Union, which has held that they do not preclude the contested legislation.

11. – The questions falling under the first of the core issues referred to above (considered in section 6) – concerning the relationship between the contested provisions and the rules applicable to LPS which may be inferred from the system of European Union law and the European Charter of Local Self-Government – were raised by Liguria, Emilia-Romagna, Umbria, Piedmont and Tuscany regions. Marche Region

raises questions which concern both that core issue as well as the fourth core issue (analysed in section 9) on the determination of the economic relevance of LPS.

11.1. – Piedmont Region challenges Article 23a(1), (2) and (3) of Decree-Law no. 112 of 2008, as originally enacted (Application no. 77 of 2008), and also Article 23a(2), (3) and (4) as amended by Article 15(1) of Decree-Law no. 135 of 2009 (Application no. 16 of 2010), as well as Article 15(1b) of Decree-Law no. 135 of 2009 with reference to Article 117(1) of the Constitution, arguing that Community law does not permit the Member States to push competition so far as the infringe the "principle of the freedom of individuals or the autonomy – also of constitutional standing – of the local authorities (Articles 5, 117 and 118 of the Constitution) to maintain the capacity to operate whenever they consider it most appropriate: that is, whether to benefit from the economic advantages offered by the market of producers or to create their own structure capable of structuring the public service in a different manner".

The question is inadmissible on the grounds that it is generic.

In fact, the applicant limited itself to referring to Community law as a whole and did not specify which provisions of Community law were to be used as interposed rules. And this is notwithstanding the fact that Community law in any case permits the national legislator to impose restrictions on direct awards which are more far-reaching than those under Community law (which amount solely to full public ownership, "analogous control", and the requirement that activities be carried out predominantly for the controlling authority). As noted above in section 6.1, in providing solely for "minimum" pro-competition rules, it leaves the Member States a broad margin of appreciation, with the result that in cases – such as that before the Court – in which the Member State wishes to lay down further conditions operating in the same "direction" as Community law, there will be no conflict with the latter.

11.2. – Tuscany and Emilia-Romagna regions contest various paragraphs from Article 23a of Decree-Law no. 112 of 2008 on the grounds that they violate Community law.

11.2.1. – In particular, Tuscany Region challenges Article 23a(2), (3) and (4), as amended by Article 15(1) of Decree-Law no. 135 of 2009, with reference to Article 117(1), (2) and (4) of the Constitution, asserting that Community law expressly allows for the provision of public services through an internally controlled body as an

alternative to externalisation, which means that the contested provisions have no foundation either in the constitutional reservation of exclusive jurisdiction over "competition law" to the State (Article 117(2)(e) of the Constitution) or under Community law.

The region also challenges Article 23a(8), as amended by Article 15(1) of Decree-Law no. 135 of 2009, which provides that direct awards already in operation upon entry into force of the legislation shall cease at a later date, starting from 31 December 2011, depending upon the types of award concerned. According to the applicant, this paragraph violates Article 117(1) of the Constitution because, insofar as it requires that all in-house management cease on 31 December 2011, it contrasts with Community law, which by contrast permits such management to be continued.

Emilia- Romagna region challenges paragraph 8 (Application no. 13 of 2010) with reference to Article 117(1) of the Constitution, complaining that "under Community law the organisational model for the internal provision of services through in-house awards has been found to comply with the principles contained in the Treaty, including as is known the principle of the promotion of competition".

The questions are inadmissible due to their generic nature since the applicants do not specify the provisions of Community law alleged to have been violated, as well as on the grounds of inconsistency since the applicants themselves assert that Community law permits and does not require local authorities to continue to provide public services through according in-house arrangements. And this is irrespective of the fact that, for the reasons set out in sections 6.1 and 11.1, Community law in any case permits the Member States to impose restrictions on direct awards which are more far-reaching than those under Community law.

11.2.2. – Emilia-Romagna Region (Application no. 13 of 2010) challenges Article 23a(8) of Decree-Law no. 112 of 2008, as amended by Article 15(1) of Decree-Law no. 135 of 2009, with reference to Article 117(1) of the Constitution also on different grounds.

The applicant asserts that Community law provides that in-house companies must be required to provide services in favour of their reference authorities only on a predominant basis, although residual activities may be destined for the market, whilst "the provision in question transfers the concept of 'predominance' into 'exclusivity',

requiring operators under direct awards (and not only in-house providers) to carry out their activities exclusively in favour of the awarding authorities".

The question is inadmissible due to its generic nature, since the applicant does not specify the provisions of Community law alleged to have been violated. And this is notwithstanding the fact that, for the reasons set out in sections 6.1 and 11.1, Community law in any case permits the national legislator to impose restrictions on direct awards which are more far-reaching than those under Community law.

11.3. – Article 23a(8), as amended by Article 15(1) of Decree-Law no. 135 of 2009, is also challenged by the regions Liguria (Application no. 12 of 2010) and Umbria, with reference to Article 117(1) of the Constitution, "on the grounds that it contrasts with the European Charter of Local Self-Government".

The question is inadmissible due to its generic nature, since the applicants do not specify which provisions of the European Charter of Local Self-Government are claimed to have been.

11.4. – As mentioned above, Marche Region raises a question which may be classified at the same time under two core issues: the fourth because it argues that it falls to itself and the local authorities to decide whether or not the integrated urban water management services is of economic relevance; and to the first because it asserts that this reservation of powers is guaranteed under Community law, and that accordingly, in imposing limits on the award of the service which are not provided for under Community law, the contested legislation breaches the latter.

In particular – in the event that Article 15(1b) of Decree-Law no. 135 of 2009 cannot be interpreted to the effect that an integrated urban water management service is only subject to the provisions of Article 23a in cases in which "the competent authorities have chosen to organise it in such a manner as to grant it economic relevance" – the region challenges Article 23a(2), (3) and (4) of Decree-Law no. 112 of 2008, as amended by Article 15(1) of Decree-Law no. 135 of 2009, and Article 15(1b) also of Decree-Law no. 135 of 2009 insofar as they apply to integrated urban water management services.

The contested legislation – which is already set out in summary form in section 1.1 – provides that: 1) "The contracting out of local public services shall occur, on an ordinary basis: a) to entrepreneurs or companies incorporated in any form identified

according to public tender procedures, in accordance with the principles set forth in the Treaty establishing the European Community and the general principles relating to public sector contracts, including in particular the principles of value for money, efficacy, impartiality, transparency, adequate publicity, non-discrimination, equal treatment, mutual recognition and proportionality; b) to companies under mixed public and private ownership, provided that the shareholder is selected according to public tender procedures in accordance with the principles specified under letter a) in respect both of status as a shareholder and the allocation of specific operational tasks associated with the management of the service, and provided that the shareholder be granted an equity interest no lower than 40 percent" (paragraph 2 of Article 23a); 2) "As an exception from the ordinary award procedures provided for under paragraph 2, due to the particular economic, social, environmental and geomorphologic characteristics of the reference territorial framework, in exceptional circumstances which do not enable the market to be used in an effective and beneficial manner, awards may be made to capital companies under full public ownership in which the local authority holds an equity interest, provided that they meet the prerequisites required under Community law for 'in-house' management, and subject in any case to compliance with Community rules on analogous control and the requirement that its activities be carried out predominantly for the public authority or authorities which control it" (Article 23a(3)); 3) "In cases falling under paragraph 3, the tendering authority must give adequate publicity to the choice, which shall be justified on the basis of a market analysis and transmitted to the Italian Competition Authority (*Autorità garante della concorrenza e del mercato*, *AGCM*) along with a report setting out the results of that verification for the purpose of obtaining an advance opinion, which shall be issued within 60 days of receipt of the aforementioned report. Upon expiry of that time limit, if the opinion has not been issued the report shall be deemed to have been approved" (paragraph 4 of Article 23a); 4) "All forms of award of the management of the integrated urban water management service falling under Article 23a of Decree-Law no. 112 of 2008, converted, with amendments, into Law no. 133 of 2008, shall occur in accordance with the principles of the management autonomy of the operator and that water resources remain under full and exclusive public ownership, their administrating being entirely a matter for public institutions, with particular regard to the quality and price of the

service, in accordance with the provisions of Legislative Decree no. 152 of 3 April 2006, guaranteeing the right to the universal provision and availability of the service" (Article 15(1b) of Decree-Law no. 135 of 2009).

The applicant complains of the violation of Article 117(1) of the Constitution, through Articles 14 and 106 TFEU, which provide that: "Without prejudice to Article 4 of the Treaty on European Union or to Articles 93, 106 and 107 of this Treaty, and given the place occupied by services of general economic interest in the shared values of the Union as well as their role in promoting social and territorial cohesion, the Union and the Member States, each within their respective powers and within the scope of application of the Treaties, shall take care that such services operate on the basis of principles and conditions, particularly economic and financial conditions, which enable them to fulfil their missions." (Article 14); "Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union." (Article 106).

According to the Region, the contested provisions violate the reference provisions invoked because, since water services are necessarily services of economic relevance and since they place restrictions on the conditions governing the contracting out of that service which are not completed under Community law, they require that internal market rules be applied on a general basis throughout the county, thereby depriving the regions and the local authorities of the power to carry out a specific case-by-case assessment of the economic relevance of the service provided, whereas such a power is reserved to them under Community law.

The question is groundless.

The principles invoked do not specify the circumstances in which the expression "general economic interest" used in it – which the applicant itself admits is a synonym for "economic relevance" – is to be applied, and do not specify whether the existence of such an interest may be established at the discretion of the Member States or infrastructure authorities. However, as is specified in greater detail in sections 6.1 and 9,

the interpretative space left open by these Articles from the Treaty has been filled by Community case law and the European Commission, according to which, where it is conducive to Community legislation aimed at favouring the competitive structure of the markets, "the general economic interest" relates to the possibility of introducing a specific activity onto the relevant (real or potential) market, and accordingly has an essentially objective nature. It follows that (as well be observed in greater detail in section 9.2), in consideration of the objective scope of the concept of "economic interest", Community law prohibits the Member States and infrastructure authorities from deciding whether there is such an interest on a subjective basis and at their own discretion. In particular, the specification by the contested provisions of the conditions applicable to direct awards of local public services which are more restrictive than those provided for under Community law does not violate any Community law principles of competition law, since these principles constitute merely a minimum inderogable requirement for the Member States, which are entitled to enact more legislation which promotes more rigorous competition, such as that at issue in this case which, by restricting the exceptions to the application of the rule that public tender procedures must be followed – imposed in order to protect competition – expands the scope of that rule.

With reference to the facts of this case, in accordance with the Community legislation referred to above and the indisputable requirement that the integrated urban water management service relate to a specific individual market (as was acknowledged by this Court in judgment no. 246 of 2009), the State legislation has correctly classified that service as one of economic relevance, thereby excluding any power of the infrastructure authorities to classify in any other manner.

11.5. – Article 23a(2), (3) and (4) of Decree-Law no. 112 of 2008, as amended by Article 15(1) of Decree-Law no. 135 of 2009, have been challenged with reference to Article 117(1) of the Constitution by the regions Liguria (Application no. 12 of 2010) and Umbria and also, with respect to paragraph 3 only, by Emilia-Romagna Region (Application no. 13 of 2010).

The applicants complain of the violation of the principle referred to through the European Charter of Local Self-Government, including in particular the following provisions: a) Article 3(1) which provides that, "[l]ocal self-government denotes the

right and the ability of local authorities, within the limits of the law, to regulate and manage a substantial share of public affairs under their own responsibility and in the interests of the local population"; b) Article 4(2) which provides that "[l]ocal authorities shall, within the limits of the law, have full discretion to exercise their initiative with regard to any matter which is not excluded from their competence nor assigned to any other authority"; and c) Article 4(4) which provides that "[p]owers given to local authorities shall normally be full and exclusive".

The applicants argue that, once it has been acknowledged that water services form part of the fundamental functions of the municipalities, "it appears evident that they alone will be entitled to decide on the best way of organising it" and Parliament may not "specify that the choice over whether to take on responsibility for the direct management of the service themselves is only possible as an exception and subject to specific procedural requirements".

The questions are groundless.

Indeed, as was observed in greater detail in section 6.2: a) with reference to direct management, there cannot be any breach of the Charter by the contested provisions, but only at most by Articles 35 of Law no. 448 of 2001 and 14 of Decree-Law no. 269 of 2003, which were not challenged; b) the applicants' underlying assumption that the water service constitutes one of the fundamental functions of the public authority is groundless (judgments no. 307 of 2009 and no. 272 of 2004); and c) the Articles of the European Charter of Local Self-Government referred to do not have specific normative content, but predominantly set out definitions (Article 3(1)), policy statements (Article 4(2)) and other generic provisions (Article 4(4). Moreover, the Charter asserts in Article 4(1), with a provision that is generic in scope, that "[t]he basic powers and responsibilities of local authorities shall be prescribed by the constitution or by statute", thereby reserving the task of defining the general framework of powers to national legislation.

12. – The questions relating to the second of the core issues referred to above, concerning the determination of the sphere of jurisdiction under which the contested legislation, examined above in section 7, falls have been raised by Piedmont, Liguria, Tuscany, Umbria, Marche, Emilia-Romagna and Puglia regions. The applicants challenge the classification of the various provisions of Article 23a of Decree-Law no.

112 of 2008 – both as originally enacted and also as currently in force – as well as Decree-Law no. 135 of 2009 under the State's exclusive jurisdiction over "competition law". For Marche Region, the contested legislation falls under the regulatory powers of the local authorities pursuant to Article 117(6) of the Constitution, for Puglia Region, it falls under shared regional jurisdiction over the protection of health and foodstuffs, whilst for the other applicants, it falls under the region's residual jurisdiction over local public services.

12.1. – It is necessary first and foremost to examine the questions which, due to the manner in which they are formulated, do not allow an examination on the merits.

12.1.1. – The regions Liguria (Application no. 12 of 2010) and Umbria contest Article 23a(8), as amended by Article 15(1) of Decree-Law no. 135 of 2009, with reference to Article 117(2) of the Constitution, "due to the incorrect interpretation of the confines of the State powers provided for thereunder".

The question is inadmissible due to its generic nature because the applicants do not specify which of the various fields of jurisdiction of the State governed by Article 117(2) of the Constitution it is necessary to refer to for the purposes of constitutional review.

12.1.2. – Liguria and Umbria regions also contest Article 23a(8), as amended by Article 15(1) of Decree-Law no. 135 of 2009, with reference to Article 118(1) and (2) of the Constitution, "due to the violation of the principle of subsidiarity and the principle that the municipalities retain powers over their own functions".

This question is also inadmissible on the grounds that it is generic because the applicants do not specify how the principle of subsidiarity has been violated, nor the functions of the municipalities to which they refer.

12.1.3. – Article 23a(8), as amended by Article 15(1) of Decree-Law no. 135 of 2009, is also challenged by Emilia-Romagna Region on the grounds that it breaches the "principle of institutional pluralism on an equal footing, thereby violating Articles 114 and 118 of the Constitution" and Article 117(4) of the Constitution because it contains legislation that is so rigid as to annul any autonomy which could be exercised in that area, thereby violating the principle of subsidiarity.

The question is inadmissible due to its generic nature because the applicant limits itself to asserting that the contested provision annuls "any autonomy which could be

exercised in that area", without specifying which constitutional powers it considers have been violated and without explaining the grounds for the alleged violation.

12.2. – The questions relating to this core issue which must by contrast be reviewed on the merits should be distinguished between those concerning: a) the general regulations governing LPS under standard conditions and on a transitory basis (Article 23a(1), (2), (3) and (4) as originally enacted and as currently in force, as well as Article 23a(8) as currently in force); b) the determination of the minimum thresholds above which an opinion from the AGCM is necessary (Article 23a(4a), as currently in force); c) the determination of tender districts (Article 23a(7) as originally enacted); and d) subjection to the stability pact and the associated management of services (Article 23a(10)(a) and (b) both as originally enacted and as currently in force). These groups of questions should be examined separately.

12.3. – The first group of questions – which as noted above relate to the power to regulate local public services in general, and concern Article 23a(1), (2), (3) and (4) as originally enacted, as well as paragraph 8 as currently in force – has been raised by Piedmont, Liguria, Tuscany, Umbria, Marche and Emilia-Romagna regions.

12.3.1. – Piedmont Region (Application no. 77 of 2008) challenges Article 23a(1), (2) and (3), as originally enacted.

The contested provisions, which have already been referred to in summary form in section 1.1 above, stipulate that: a) "The provisions of this Article shall govern the award and management of economically relevant local public services in accordance with Community law and in order to favour the broader dissemination of the principles of competition, freedom of establishment and the freedom to provide services for all economic operators interested in managing public services of general interest on local level, and to guarantee the right of all users to the universal provision and availability of local public services and essential service levels pursuant to Article 117(2)(e) and (m) of the Constitution, ensuring an adequate level of protection for users, according to the principles of subsidiarity, proportionality and loyal cooperation. The provisions contained in this Article shall apply to all local public services and shall take precedence over the relative sectoral legislation where incompatible" (paragraph 1); b) "The contracting out of local public services shall occur, on an ordinary basis, to entrepreneurs or companies incorporated in any form identified according to public

tender procedures, in accordance with the principles set forth in the Treaty establishing the European Community and the general principles relating to public sector contracts, including in particular the principles of value for money, efficacy, impartiality, transparency, adequate publicity, non-discrimination, equal treatment, mutual recognition and proportionality" (paragraph 2); c) "As an exception ordinary award procedure provided for under paragraph 2, due to the particular economic, social, environmental and geomorphologic characteristics of the reference territorial framework, in exceptional circumstances which do not enable the market to be used in an effective and beneficial manner, awards may be made in accordance with the principles laid down under Community law (paragraph 3).

The applicant argues that these provisions violate Article 117(4) of the Constitution, which grants the regions residual legislative powers over public services because, in not permitting the regions to choose to provide services in-house also in cases other than those provided for under paragraph 3, they *de facto* encroach upon their constitutional powers in this area. Moreover, such encroachment is claimed not to be justifiable on the grounds that it involves the exercise of exclusive legislative powers by the State, including in particular those over competition law.

12.3.2. – In addition to paragraphs 2 and 3 referred to in the previous section, Liguria Region (Application no. 72 of 2008) also challenges Article 23a(4) as originally enacted, which provides that: "In cases falling under paragraph 3, the tendering authority must give adequate publicity to the choice, which shall be justified on the basis of a market analysis and transmitted to the Italian Competition Authority (*Autorità garante della concorrenza e del mercato*, *AGCM*), and the sectoral regulatory authorities, if established, along with a report setting out the results of that verification for the purpose of obtaining an advance opinion, which shall be issued within sixty days of receipt of the aforementioned report".

In the opinion of the applicant, the contested provisions violate Article 117(4) of the Constitution which grants the regions residual legislative powers over public services on grounds analogous to those relied on by Piedmont Region in the previous section.

12.3.3. – Piedmont Region (Application no. 77 of 2008) challenges Article 23a(3) and (4) as originally enacted, arguing that they violate Article 117(4) and (6) "on the grounds that the State legislature encroached upon the legislative jurisdiction of

Piedmont Region and of local authorities in Piedmont in defining the performance of the functions allocated to them […] since part of the provision sets forth special provisions governing the contracting out of services to parties other than market operators, including through in-house provision", whereas such provisions fell under the Region's legislative jurisdiction.

12.3.4. – Tuscany Region challenges Article 23a(2), (3) and (4), as amended by Article 15(1) of Decree-Law no. 135 of 25 September 2009, converted, with amendments, into Law no. 166 of 20 November 2009, with reference to Article 117(2) and (4) of the Constitution on the grounds that they express a preference for the externalisation of local public services since they make apply to the organisation of the management of such services, enacting detailed provisions, which do not leave any margin of autonomy to the regional legislature, and also on the grounds that they pursue goals in excess of those strictly related to competition law.

12.3.5. – The regions Liguria (Application no. 12 of 2010) and Umbria challenge Article 23a(2), (3) and (4) of Decree-Law no. 112 of 25 June 2008, as currently in force – with reference to Article 117(4) of the Constitution – on the grounds that they limit the regions' legislative power to enact legislation to regulate the ordinary provision of public services by the authority, subjecting the choice to provide services in-house to restrictions that are both substantive (the "particular economic, social, environmental and geomorphologic characteristics of the reference territorial framework") and procedural (the requirement to submit a report setting out the results of that verification to the Italian Competition Authority and the sectoral regulatory authority).

The applicants challenge the same paragraphs with reference to Article 118(1) and (2) of the Constitution, arguing that, in prohibiting the direct management of the water service, they thwart "the provision stipulating the preference in favour of the allocation of administrative functions to the municipalities (the water service technically remains under municipal control, but is in actual fact allocated to other parties; moreover, the contested provision deprives the municipalities of an essential part of their functions, namely the ability to choose the most adequate form of management)" and disregard the principle of subsidiarity because they contrast with the principle that "the municipalities 'are vested with their own administrative powers'".

12.3.6. – Should the Constitutional Court decide not to accept that the integrated urban water management service falls under the regulatory power of the local authorities pursuant to Article 117(6) of the Constitution – Marche Region challenges Article 23a(2), (3) and (4) of Decree-Law no. 112 of 2008, as amended by Article 15(1) of Decree-Law no. 135 of 2009, and Article 15(1b) also of Decree-Law no. 135 of 2009 insofar as they apply to the integrated urban water management, asserting that they violate Article 117(2)(e) and (4) of the Constitution by enacting *ultra vires* legislation governing local public services, over which the regions have residual legislative jurisdiction.

12.3.7. – Piedmont Region (Application no. 16 of 2010) challenges Article 23a(2), (3) and (4) of Decree-Law no. 112 of 2008, as amended by Article 15(1) of Decree-Law no. 135 of 2009, with reference to Article 117(4) of the Constitution, arguing that they enact legislation which does not fall under competition law or any other matter under State jurisdiction, but rather encroach upon the residual legislative powers of the regions.

12.3.8. – Emilia-Romagna Region (Application no. 13 of 2010) challenges Article 23a(3), as amended by Article 15(1) of Decree-Law no. 135 of 2009, on the grounds that, in providing that services may be awarded directly to in-house companies only on an exceptional basis, it limits the legislative power of the regions to regulate the ordinary conduct of public services by the authority by subjecting that choice to substantive and procedural restrictions, and consequently violates Article 117(4) of the Constitution.

The region challenges the same paragraph with reference to Article 118(1) and (2) of the Constitution because, in prohibiting the direct provision of the water service, it thwarts the provision stipulating the preference in favour of the allocation of administrative functions to the municipalities and disregards the principle of subsidiarity, thereby violating the principle that "the municipalities 'are vested with their own administrative powers'".

12.3.9. – Piedmont Region (Application no. 16 of 2010) challenges Article 23a(3) and (4), as amended by Article 15(1) of Decree-Law no. 135 of 2009, arguing that they violate Article 117(4) and (6) of the Constitution on grounds analogous to those set out in section 12.3.3.

12.3.10. – Tuscany Region challenges Article 23a(8), as amended by Article 15(1) of Decree-Law no. 135 of 2009, with reference to Article 117(1), (2)(e) and (4) of the Constitution, complaining that, in enacting the legislation under examination, the State legislature did not limit its action to the aspects which were most closely connected with competition law and market regulation, but enacted detailed legislation depriving the regions of the ability to decide whether or not to use the market in order to operate public services. Such a decision is claimed to fall under the proper organisation of public services, which is a matter for the regions pursuant to Article 117(4) of the Constitution.

12.3.11. – The regions Liguria (Application no. 12 of 2010) and Umbria challenge Article 23a(8), as amended by Article 15(1) of Decree-Law no. 135 of 2009, with reference to Article 117(4) of the Constitution, asserting that it limits the regions' legislative powers to regulate the normal provision of public services by the authority, including with respect to applicable time limits, and subjects that choice to substantive and procedural requirements, thereby infringing the legislative jurisdiction of the regions over local services and the organisation of the local authorities".

In the alternative, the regions also challenge the same paragraph in the event that "it may be deemed legitimate to impose an 'ordinary' regime applicable to the externalisation of the service and limiting non-competitive forms of management to exceptional cases", with reference to Article 117(2)(e) and (4) of the Constitution, complaining that it enacts detailed legislation concerning quantities, procedures and the time-scales for terminating the management of such services.

12.3.12. – Emilia-Romagna Region (Application no. 13 of 2010) challenges Article 23a(8), as amended by Article 15(1) of Decree-Law no. 135 of 2009, with reference to Article 117(4) of the Constitution, arguing that it impinges upon the structure of the regional system governing awards, thereby infringing the region's role, which is also legislative in nature, by specifying the duration of such awards.

12.3.13. – Piedmont Region (Application no. 16 of 2010) challenges Article 23a(8), as amended by Article 15(1) of Decree-Law no. 135 of 2009, with reference to Articles 5, 114, 117(2) and (6) 118 of the Constitution, "also also with reference to Article 3, of the Constitution" because "it cancels at a single stroke the legitimacy […] of all arrangements under which public services are managed by companies under mixed

public and private ownership where the tender to select the private shareholder – notwithstanding that it has been held according to European and Italian procedures – concerned exclusively the financial stake", thereby encroaching on the jurisdiction of the local authorities "over their internal organisation, including with reference to bodies under local authority control or in which the local authorities hold a minority stake".

12.3.14. – The questions referred to under sections 12.3.1 to 12.3.13 are groundless for the reasons set out in detail in section 7.

In fact, it has been seen that the arrangements setting out the procedures applicable to the award of local public services provided for under the contested legislation fall under "competition law", within the exclusive legislative jurisdiction of the State.

12.3.15. – Puglia Region challenges Article 23a(2), (3) and (4) of Decree-Law no. 112 of 2008, as amended by Article 15(1) of Decree-Law no. 135 of 2009, with reference to Article 117(3) of the Constitution because: a) "they limit the regions' legislative power to regulate the normal operation of public services by the local authority, and the latter's power to manage the public services in its own right" by imposing substantive and procedural restrictions, preventing a prior comparative assessment by the administration of all possible options regarding the form of management, "that is, whether to benefit from the economic advantages offered by the market of producers or to create their own structure capable of regulating the provision of the public service in a different manner"; and b) they do not limit themselves to setting out fundamental principles in that area, but enact "detailed and specific legislation which infringes the regions' powers also over the regulation of integrated urban water management services", which may be allocated under the category referred to "insofar as that service is conducive to and used for the purpose of foodstuffs and the protection of health".

The applicant also challenges Article 23a(8), as amended by Article 15(1) of Decree-Law no. 135 of 2009 with reference to the same principle because, in providing that awards made according to procedures other than public tenders, except those which comply with the further requirements of an assessment and the provision of reasons under the new legislation, are to terminate on 31 December 2010, "it would appear to have the effect of terminating all awards made under previous legislation (Article 113(5)(c) of Legislative Decree no. 267 of 2000), creating uncertainty for the

implementation of management and investment plans, as well as the relative tariff plans, and causing upheavals to established legal relations which are being acted upon, and which the parties wish to pursue until their natural expiry".

The questions are groundless since they interpret the principle of constitutional law incorrectly.

In fact, the region starts from the assumption that local public services fall under shared legislative jurisdiction pursuant to Article 117(3) of the Constitution. This principle is entirely immaterial for the case under examination since it does not constitute the basis for the regions' legislative jurisdiction invoked over public services.

12.3.16. – Piedmont Region challenges Article 23a(2), (3) and (4), both as originally enacted (Application no. 77 of 2008) and as currently in force (Application no. 16 of 2010), in relation to the principles set forth under "Article 117(1), (2) and (4) of the Constitution, with reference to Articles 114, 117(6) and 118(1) and (2) of the Constitution" on the grounds that they infringe "the constitutional autonomy of the entire system of local authorities", thereby limiting the "ability to organise and enact legislation on an autonomous basis governing the award of local public services", since State legislation may only lawfully impose a given form of management for a public service if powers to organise the management of services "hitherto considered local (e.g. integrated water services and the collection of municipal solid waste) [have been transferred to the State] on the grounds that the universal exercise of these services has become optimal only on State level (Article 118(1) of the Constitution)".

The question is groundless.

It is based on the applicant's assumption that the State legislature may only lawfully regulate the forms of management for local public services if administrative powers over the organisation of service management have previously been transferred to the State. This assumption cannot be shared because the State's exclusive legislative jurisdiction over "competition law" also includes administrative powers over the organisation of procedures for managing local public services, irrespective of whether the administrative powers of other levels of local government have been transferred to the State.

12.4. – The second group of questions to be examined on the merits – which again relate to the core issue concerning the identification of legislative jurisdiction to regulate

local public services – concerns the determination of the minimum thresholds above which an opinion from the AGCM is necessary (Article 23a(4a), as currently in force). This group corresponds to the question raised by Emilia Romagna Region in Application no. 13 of 2010.

The applicant challenges Article 23a(4a) of Decree-Law no. 112 of 2008, as amended by Article 15(1) of Decree-Law no. 135 of 2009, which provides that "The regulations referred to under paragraph 10 shall specify the thresholds above which awards of local public services become relevant and require that an opinion be obtained pursuant to paragraph 4".

The Region claims that – by deferring to a governmental regulation the task of specifying the thresholds above which an opinion must be obtained from the AGCM for in-house management – this provision violates Article 117(6) of the Constitution because decisions relating to these thresholds can only be adopted on regional level, within the limits specified under State legislation. According to the applicant, in setting the thresholds referred to above, a level of efficiency for the service is stipulated which can only be specifically and correctly assessed on regional level. Moreover, given the lack of exclusive State jurisdiction, it is claimed to be *ultra vires* to delegate regulations to secondary legislation.

The question is groundless because the thresholds to which the contested provision relates concern the procedures applicable to the award of local public services, which – as was noted in section 7 – pertain to "competition law", which falls under the exclusive legislative jurisdiction of the State, and not to public services. This means that the State is also vested with regulatory powers, according to the provisions of Article 117(6) of the Constitution.

12.5. – The third group of questions to be examined on the merits concerning the core issue of legislative jurisdiction to regulate local public services relates to the determination of tender districts (Article 23a(7) as originally enacted).

The regions Emilia-Romagna (Application no. 69 of 2008) and Liguria (Application no. 72 of 2008) challenge Article 23a(7) of Decree-Law no. 112 of 2008, as originally enacted, due to violation of Articles 117(4) and 118(1) and (2) of the Constitution.

The contested legislation provides that "The regions and the local authorities, each acting in accordance with its respective powers and in concert with the Joint Assembly

pursuant to Article 8 of Legislative Decree no. 281 of 28 August 1997, as amended, may define the tender districts for the different services in accordance with sectoral legislation in such a manner as to permit the exploitation of economies of scale and purpose and to favour greater efficiency and efficacy in the provision of services, as well as the incorporation of services for which demand is low into the framework of more profitable services, guaranteeing that the minimum efficient scale for installations involving more than one operator will be achieved and that the obligations to provide universal service will be covered".

The applicants argue that the provisions governing the scale on which public services are operated fall under legislative jurisdiction "of the region, and the conditioning by the State of the exercise of that power and of the administrative choices in furtherance of it violates both the legislative jurisdiction considered in itself […] as well as the principle of subsidiarity, since there does not appear to be any reason why such choices should be centralised".

The questions are groundless.

The contested provision regulates the scale on which public services are to be operated, and grants the regions and the local authorities powers to identify tender districts for the various services in accordance with State legislation. As this Court held in judgment no. 246 of 2009 with specific reference to integrated urban water management, the power to regulate service management districts (and therefore also tender districts) falls under the State's legislative jurisdiction because it is intended to protect competition by remedying the fragmentary structure of service management. Accordingly, neither Article 117(4) of the Constitution nor Article 118 of the Constitution applies in this case.

12.6. – The fourth group of questions to be examined on the merits – again concerning legislative jurisdiction over local public services – relates to the subjection of services to the stability pact and the associated management of services (Article 23a(10)(a) and (b) as originally enacted and as currently in force).

The regions Emilia-Romagna (Applications no. 69 of 2008 and no. 13 of 2010), Liguria (Application no. 72 of 2008) and Piedmont (Application no. 77 of 2008) challenge Article 23a(10) of Decree-Law no. 112 of 2008 – the first sentence of which provides that "within one hundred and eighty days of the date of entry into force of the

Law converting this Decree, the government, acting on a proposal by the Minister responsible for Relations with the Regions and after consultation with the Joint Assembly pursuant to Article 8 of Legislative Decree no. 281 of 28 August 1997, as amended, as well as the competent parliamentary committees, shall adopt one or more regulations setting out secondary legislation, pursuant to Article 17(2) of Law no. 400 of 23 August 1988" – and raise specific objections against letters a) and b) of that paragraph. Insofar as is of relevance here, these letters provide – both as originally enacted and in the substantively identical form as amended by Article 15(1) of Decree-Law no. 135 of 2009 – that the State regulations referred to above shall provide for: the subjection of the parties to which local public services have been contracted out directly to the internal stability pact and the requirement for in-house companies and companies under mixed public and private ownership to adhere to "public tender procedures when purchasing goods and services and when hiring staff" (letter a); and the possibility for municipalities with a limited number of residents to "perform functions relating to the management of local public services in associate form" (letter b).

As far as the original version of the provision is concerned, the applicants refer to the principle of constitutional law contained in Article 117(6) of the Constitution, according to which regulatory powers are only vested in the State in relation to matters falling under the State's exclusive legislative jurisdiction, unless these have been delegated to the regions. Piedmont Region alone also invokes Article 117(2) and (4) of the Constitution as well as "the principle of reasonableness and loyal cooperation" (Articles 3 and 120 of the Constitution).

As regards the current version of the provision, Emilia-Romagna Region (Application no. 13 of 2010) invokes Article 117(2) and (4) of the Constitution as a principle of constitutional law.

All of the contested provisions are claimed to violate the principles invoked: in the first instance because, given the lack of legislative jurisdiction for the State in this area, it does not have regulatory jurisdiction either in relation to letter a) or to letter b) of Article 10; in the alternative, because the only way of reconciling the respective powers of the State and the regions is claimed to involve the submission of the regulation to the State-Regions Assembly or the Joint Assembly in order to reach agreement, rather than the simple opinion required under the contested provisions, taking account of the

inextricable link in this regard between the matters over which jurisdiction is shared (such as the coordination of public finances, underlying letter a) or vested exclusively in the regions (as in cases involving the associated management of local services, falling under letter b) and the jurisdiction of the State.

The question is well founded with regard to the first part of letter a), which provides that the regulatory powers of the State require the subjection of the parties to which local public services have been contracted out directly to the internal stability pact.

Indeed, the scope of the internal stability pact relates to the coordination of public finances (judgments no. 284 and no. 237 of 2009; and no. 267 of 2006), over which jurisdiction is shared, and not to matters under the exclusive jurisdiction of the State, for which only Article 117(6) of the Constitution grants the State regulatory powers.

With reference to the second part of letter a) – which provides that the regulatory power of the State shall require in-house companies and companies under mixed public and private ownership to adhere to "public tender procedures when purchasing goods and services and when hiring staff" – the question is groundless.

Finally, this provision relates in the first place to competition law, because it is intended to avoid situations which, in cases involving direct awards, may cause distortions to the competitive structure of the market during the stage after the service has been awarded in which the instruments necessary in order actually to provide the service are acquired. Secondly, it also relates to the area of private law, also under the exclusive jurisdiction of the State, since this requires the particular class of company awarded the direct management of local public services to adhere to specific procedures governing the conclusion of contracts for purchasing goods and services and hiring staff (on the classification of the procedures governing the conclusion of contracts under the private law, see *inter alia* judgment no. 295 of 2009). It follows that the requirement for a simple opinion from the "Joint Assembly pursuant to Article 8 of Legislative Decree no. 281 of 28 August 1997, as amended", rather than agreement, does not infringe on any regional powers.

With reference to letter b) – which grants the State the power to issue regulations stipulating that "municipalities with limited number of residents may perform functions relating to the management of local public services in associate form" – the question is also groundless.

In fact, the area within which the State regulation applies relates to "competition law" since its aim is to determine the optimum scale of service management (judgment no. 246 of 2009, sections 12.2 and 12.5 of the "Conclusions on points of law"). It follows also in this case that the requirement that a simple opinion be obtained from the "Joint Assembly pursuant to Article 8 of Legislative Decree no. 281 of 28 August 1997, as amended", rather than that agreement be reached, does not infringe any regional competence.

13. – The third of the core issues mentioned above (analysed in section 8), relating to the principle of reasonableness, having regard to its proportionality and adequacy, is raised by some of the questions filed by Piedmont, Liguria, Umbria, Tuscany and Emilia-Romagna regions.

13.1. – It is necessary first and foremost to examine some of the questions raised by Piedmont and Emilia-Romagna regions which, due to the manner in which they are framed, need not be examined on the merits.

13.1.1. – Piedmont Region (Application no. 77 of 2008) challenges the original text of Article 23a(8) with reference to Articles 5, 114, 117(6) and 118 of the Constitution on the grounds that this paragraph provides for the termination "of all awards made under previous legislation (Article 113(5)(c) of Legislative Decree no. 267 of 2000), creating uncertainty for the implementation of management and investment plans, as well as the relative tariff plans, and causing upheavals to established legal relations which are being acted upon, and which the parties wish to pursue until their natural expiry on the same basis as concessions granted to third party undertakings according to public tender procedures".

The question is inadmissible due to a lack of motivation since the applicant does not explain why the principles invoked have been violated. Moreover, as noted in section 8.2, the State legislature may lawfully enact transitory provisions, as in the case under examination, with the purpose of regulating the effects over time of the prohibition on the recourse to in-house management on an ordinary basis.

13.1.2. – Piedmont Region (Application no. 16 of 2010) challenges Article 23a(8), as amended by Article 15(1) of Decree-Law no. 135 of 2009, with reference to Articles 3, 5, 42, 114, 117(6) and 118 of the Constitution because it provides for "a general advance termination *ex lege* on 31 December 2011 of all in-house provision

arrangements, including those made by local government bodies in accordance with Community and Italian law, and a considerable depreciation of the market values to be paid for the sale of the equity interests due to the parallel implementation throughout the country of the sale of 40% of a significant number of companies held by the local authorities".

The question is inadmissible because it concerns a critical assessment of the economic convenience as to when to implement the reform of service awards, which is reserved to the discretion of Parliament.

13.1.3. – Emilia-Romagna Region (Application no. 13 of 2010) challenges Article 23a(9), as amended by Article 15(1) of Decree-Law no. 135 of 2009 – which contains detailed provisions imposing limits on the possibility for the operators of LPS to manage additional services, operate in different districts, or provide services or carry out activities for other public or private bodies – with reference to Article 117(4) of the Constitution on the grounds that such provisions are unreasonable and not proportional with the predetermined competition law goals.

The question is inadmissible due to its generic nature because the applicant does not clarify the reasons why the legislation contained in the contested provision should be unreasonable and not proportional with competition law goals.

13.2. – The questions relating to the third core issue (concerning the reasonableness of the contested legislation) which must be reviewed on the merits have been raised by Piedmont, Liguria, Umbria and Tuscany regions.

13.2.1. – Piedmont Region challenges Article 23a(2), (3) and (4) both as originally enacted (Application no. 77 of 2008) and amended by Article 15(1) of Decree-Law no. 135 of 2009 (Application no. 10 of 2010), as well as Article 15(1b) of Decree-Law no. 135 of 2009, with reference to Article 117(2) "in the light of Article 3 of the Constitution" because, even if the legislation enacted by the contested provisions were held to fall under competition law, it would not be proportionate and adequate.

Liguria and Umbria regions challenge Article 23a(2)(b) and (3), as amended by Article 15(1) of Decree-Law no. 135 of 2009 – in the event that the Court "were to find that the imposition of an 'ordinary' regime under which services are to be contracted out and that the restriction of non-competitive forms of management to exceptional cases was lawful" – on the grounds that they enact detailed regulations governing the award

of services to companies under mixed public and private ownership and non-competitive forms of award, due to violation of Article 117(2)(e) and (4) of the Constitution, complaining that these provisions contrast with the principle that competition law measures must accord with the proportionality principle, thereby encroaching on the area reserved to the legislative jurisdiction of the regions over public services by imposing further limits on the regions' legislative powers even though they are not conducive to the further promotion of competition, which they could even have the effect of limiting.

The applicants complain that the contested provisions violate the principle that competition law measures must be reasonable, having regard to the requirements of proportionality and adequacy, by imposing limits on the ability to operate in-house management, namely the special circumstances required under paragraph 3 in order for in-house provision to be permitted. In doing so they seek to request that the local authorities be guaranteed the possibility to choose at their discretion whether to operate according to this form of management, irrespective of the existence of exceptional circumstances which do not enable the market to be used in an effective and beneficial manner.

The questions are groundless.

As highlighted in detail in section 8, the contested provisions must by contrast be deemed to be proportional and adequate because: a) they have been incorporated in a consistent manner into an internal legislative system which is already subject to the prohibition on direct management through special undertakings or in-house provision, in which therefore instances of in-house awards must be regarded as exceptional and expressly provided for; b) the Community law on the award of the management of public services constitutes merely a minimum inderogable standard for the Member States and therefore does not preclude more stringent regulation of award procedures under national law which favours the competitive structure of a market; and c) when the conditions for direct awards are not met, the public authority is in any case entitled to participate in the public tender procedures for the award of the service.

13.2.2. – Piedmont Region challenges Article 23a(3) and (4), both as originally enacted (Application no. 77 of 2008) and as currently in force (Application no. 16 of 2010), with reference to Article 3 of the Constitution, in the light of the principle of

reasonableness because they contain "detailed provisions which are so specific that they are not even compatible with exclusive State jurisdiction […] and which violate the principle of reasonableness (pursuant to Article 3(2) of the Constitution) since it is not clear from the contested law why the arrangements applicable to local public services should differ from those generally provided for by the Italian Competition Authority, and generally by other regulatory authorities".

The question is groundless.

Contrary to the assertions of the applicant – as noted in section 8.1.1 – the enactment of detailed provisions does not in itself violate the principle of reasonableness, irrespective of the fact that, with regard to matters such as competition law which fall under exclusive State jurisdiction, the distinction between detailed legislation and the assertion of principles is irrelevant. It must also be added that the *tertium comparationis* specified under the legislation, "generally stated to be the Italian Competition Authority or other regulatory authorities", is of no consequence for the case under examination because it does not apply in respect of the scope of the legislation governing public services, but in the entirely different area concerning the functioning of the AGCM and the regulatory authorities. Moreover, the above applies regardless of the solution to the problem as to whether or not the AGCM has the status of a regulatory authority.

13.2.3. – Tuscany Region challenges Article 23a(8), as amended by Article 15(1) of Decree-Law no. 135 of 2009, with reference to Article 117(1), (2)(e) and (4) of the Constitution because, in enacting transitory legislation and in particular by specifying the time limits within which existing awards must be terminated, it does not respect the principles of adequacy and proportionality which State legislation with pro-competition goals must adhere to.

The applicant essentially complains that the contested provisions violate the principle of reasonableness having regard to the requirements of proportionality and adequacy within competition law by imposing time limits on existing direct awards.

The question is groundless.

As was highlighted in greater detail in section 8.2, these time limits on the termination of existing direct awards must be deemed to be appropriate and reasonable because they are sufficiently flexible as to make it possible to mitigate the negative

economic consequences of the advance termination of service management, and therefore preclude the operator from relying on its legitimate expectation in the natural term of the service agreement, the only grounds on which the provision could be ruled unreasonable, leaving aside moreover the broad discretion which Parliament enjoys over transitory provisions.

13.2.4. – Piedmont Region (Application no. 77 of 2008) challenges Article 23a(8) as originally enacted – which contains the general provision that "concessions relating to integrated urban water management issued according to procedures other than public tenders shall under all circumstances terminate before and no later than 31 December 2010" – with reference to Articles 41, 114 and 117(2) of the Constitution and "in the light of Article 3, of the Constitution" on the grounds that it violates "the principle of reasonableness and Community competition" which that provision states that it wishes to assert and even surpass on the grounds that it "it is merely the latest […] provision to regularise awards to the market of producers, in spite of the fact that they were made once again without following public tender procedures, with an extension which third party undertakings may rely on *ex lege* until the specified date of 31 December 2010". The applicant also challenges the same paragraph as amended by Article 15(1) of Decree-Law no. 135 of 2009, which provides that existing direct awards shall terminate at later dates, starting from 31 December 2011, depending on the types of award concerned, due to violation of Articles 3, 5, 42, 114, 117(6) and 118 of the Constitution, arguing that they unreasonably establish a statutory regularisation of "illegitimate" expectations "which harm the very competition which the contested law states its intention to reassert".

The applicant essentially complains that the contested provision – in both versions – applies a "regularisation" as an exception to the system created under legislation which prohibits the use of in-house provision on an ordinary basis, permitting it only in special cases.

The questions are groundless.

It must be stated that the extension of the term of "concessions relating to integrated urban water management services issued according to procedures other than public tender procedures" falling under the contested paragraph 8 must be deemed to refer not to in-house provisions in breach of Community rules – as the applicant mistakenly

considers – but only to those which, notwithstanding the fact that they originally complied with Community and national legislation, currently fail to meet the statutory prerequisites under the contested Article 23a. It follows that this provision is reasonable – and hence legitimate – because it does not provide for any regularisation, but is limited to enacting transitory arrangements to regulate the effects over time of the prohibition on recourse to in-house provision on an ordinary basis.

13.2.5. – Piedmont Region (Application no. 16 of 2010) challenges Article 23a(8), as amended by Article 15(1) of Decree-Law no. 135 of 2009, with reference to Articles 3, 5, 42, 114, 117(6) and 118 of the Constitution because it treats significantly different situations in an identical manner and does not stagger the introduction of the requirement to rely on the market.

The question is groundless because – contrary to the assertions of the applicant – as specified in section 8.2, the contested provision stipulates sufficiently different provisions to govern the termination of direct awards, both in relation to the different categories of operator as well as with respect to time-scales.

14. – The fourth of the core issues highlighted above (analysed in section 9) relating to the question as to whether the regions or the State have legislative jurisdiction to specify the economic relevance of LPS is raised not only by the question submitted by Marche Region (considered above in paragraph 11.4 and which has been ruled groundless) but also by a different question also filed by Marche Region – in the event that Article 15(1b) of Decree-Law no. 135 of 2009 cannot be interpreted to the effect that integrated urban water management services are only subject to the provisions of Article 23a in cases in which "the competent authorities have chosen to organise it in such a manner as to grant it economic relevance" – concerning Article 23a(2), (3) and (4) of Decree-Law no. 112 of 2008 and Article 15(1b) also of Decree-Law no. 135 of 2009 insofar as they apply to the integrated urban water management.

In the opinion of the applicant, these provisions violate Article 117(6) of the Constitution, which grants the local authorities regulatory powers "to govern the organisation and performance of the functions allocated to them" because State legislation cannot impose on a general and theoretical level, and in a manner which does not allow exceptions, a rule classifying the integrated urban water management service

as a “local public service of economic relevance”, since that classification is a matter for the regulatory powers of the local authorities.

The question is groundless.

In fact, Article 117(6) of the Constitution does not reserve the decision as to whether to classify public service activities as economically significant to local authority regulations because – as was noted in section 9 – that classification is a matter for “competition law”, which falls under the exclusive legislative jurisdiction of the State, which is therefore vested with regulatory powers over such matters pursuant to the first sentence of Article 117(6) of the Constitution.

15. – The fifth of the core issues raised concerns – as noted in section 2 – the alleged violation of Articles 3 and 97 of the Constitution, in the light of the obligation to give reasons for administrative decisions.

In particular, Piedmont Region challenges Article 23a(2), (3) and (4), both as originally enacted (Application no. 77 of 2008) and as currently in force (Application no. 16 of 2010) on the grounds that they violate the principles invoked because: a) the legislation governing the award of local public services according to in-house management arrangements contained in the contested provisions encroaches upon the “competence of the regions and the local authorities if it is considered as supplementary legislation in addition to the general rules applicable to administrative procedures, which have for some time specified the obligation to give reasons for administrative decisions (Article 3 of Law no. 241 of 7 August 1990), which according to many was established in order to implement the constitutional principle that reasons should be provided for the choices of the public administrations at the very least in relation to the furtherance of the public interest”; and b) “no predominant public interest can be discerned in the case under examination which is capable of establishing either the exception from the general duty to give reasons for awards to third party undertakings (Article 23a(2)), or vice versa for the restriction of the cases to which the reasons underlying other organisational solutions may be applied”.

The applicant essentially complains that the contested provisions impose an obligation on the tendering authority to give reasons, on the basis of a market analysis, only for the choice to award the public service in-house (Article 23a(3)) and not the choice to make the award according to public tender procedures (Article 23a(2)). This

obligation is claimed to contrast with the principles invoked because it applies in addition to the general obligation to give reasons for administrative decisions.

The question is inadmissible.

According to the case law of this Court, the regions are only entitled to challenge State legislation by a direct application to the Constitutional Court in relation to questions concerning the infringement of the system regulating the division of legislative powers, and other principles of constitutional law may only be averred where their violation entails an infringement of regional powers guaranteed under the Constitution (see *inter alia* judgments no. 156 and no. 52 of 2010; and no. 289 and no. 216 of 2008). This means – in the context of this case – that the question raised is inadmissible because the alleged violation of the duty to give reasons under Articles 3 and 97 of the Constitution does not entail any infringement of regional powers guaranteed under the Constitution, nor does it have any implications on the division of legislative powers between the State and the regions. Moreover, the above does not take account of the consideration that the principles invoked do not prevent Parliament from providing for specific obligations to give reasons solely in relation to exceptions grounded on the special factual circumstances referred to in paragraph 3 and not in relation to the ordinary circumstances referred to in paragraph 2.

16. – The sixth of the core issues highlighted in section 2 relates to the alleged unreasonable difference between the provisions applicable to integrated urban water management and those applicable to other local public services.

Piedmont Region (Application no. 77 of 2008) challenges Article 23a(10) as originally enacted – again with reference to Articles 3 and 97 of the Constitution – on the grounds that it delegates the enactment of transitory legislation governing local public services other than the water service to government regulations, "thereby bringing about an unreasonable difference in treatment, which does not appear to be justified, […] for integrated urban water management in relation to which the State law specifies – undoubtedly on a general and theoretical basis – the deadline of 31 December 2010, whilst for other public services it specifies that the regulation may provide for adequate 'different time-scales' taking account of the heterogeneous nature of the services taken into account".

This question is also inadmissible for the reasons already set out in section 15 because the applicant has not averred any violation of its jurisdiction, but has limited itself to complaining that the contested provision is unreasonable.

17. – The seventh of the core issues listed in section 2, relating to the alleged violation of the financial autonomy of the regions and the local authorities, is raised by some of the questions submitted by Marche, Liguria, Umbria and Emilia-Romagna regions.

17.1. – As a preliminary matter it is necessary to examine the questions raised by Marche, Liguria and Umbria regions, which do not require an examination on the merits.

17.1.1. – Marche Region challenges Article 15(1b) of Decree-Law no. 135 of 2009, insofar as it applies to the integrated urban water management, due to violation of Article 119(6) of the Constitution.

The applicant complains that the contested provision is limited to requiring "respect" for the "principle … of full and exclusive public ownership of water resources", without in any way ensuring that public ownership of "water infrastructure" will be safeguarded either in formal or substantive terms, thereby in particular: a) bringing about "the substantial 'negation' of public ownership of assets belonging to regional and local water authorities which are, according to the express provisions of Article 153(1) of Legislative Decree no. 152 of 2006 necessarily and *ex lege* 'allocated under concession for no consideration' to the private operator of the integrated urban water management"; and b) by failing to provide for a specific safeguard clause in favour of public ownership of the water infrastructure actually owned by the regions and the local authorities.

The question is inadmissible.

In fact, the question does not relate to the legislation enacted by the contested provisions, but rather Article 153(1) of Legislative Decree no. 152 of 2006, which effectively provides for the allocation under concession for no consideration of water infrastructure owned by the local authorities, which has not however been challenged. The applicant therefore committed an evident *aberratio ictus* (i.e. the challenge was brought against the wrong provisions). Moreover, as regards the contested Article 15(1b), the applicant limits itself to objecting that Parliament failed to include a

safeguard clause in order to secure public ownership of water infrastructure. Marche Region, which made a generic challenge objecting to a mere omission by Parliament, unduly requested this Court to introduce legislation not specified by the applicant, and which would in any case not be required under constitutional law.

17.1.2. – The regions Liguria (Application no. 12 of 2010) and Umbria challenge Article 23a(8), as amended by Article 15(1) of Decree-Law no. 135 of 2009 with reference to Article 119 of the Constitution, with respect to the violation of the financial autonomy of the local authorities because "it requires them to sell significant shares of the companies controlled by them".

The question is inadmissible due to its generic nature, because the applicants do not specify the reasons why the sale of the shares of the shares in companies controlled by the local authorities would result in the violation of their financial autonomy as objected.

17.2. – The only question relating to the seventh core issue which may be examined on the merits is that raised by Emilia-Romagna Region in Application no. 13 of 2010.

The applicant challenges Article 23a(8), as amended by Article 15(1) of Decree-Law no. 135 of 2009, arguing that it violates Article 119(6) of the Constitution in requiring "the public administrations to divest a share of their own corporate assets, irrespective of whether the transaction offers value for money, and therefore of any specific considerations relating to time-scales, procedures or quantities – assessments which are indispensable in order to prevent a fire sale of public assets".

The question is groundless.

Indeed, the principle of constitutional law invoked guarantees that the regions and local authorities shall hold assets, although specifies that these shall be "allocated according to the general principles set forth under State legislation". The autonomy of the regions and local authorities in relation to their assets is not therefore unconditional, but must comply with the principles laid down under State legislation in the areas under its legislative jurisdiction – which certainly include competition law – regulated in the case under examination precisely by the contested provisions.

18. – It is now necessary to consider the questions raised by the President of the Council of Ministers concerning Article 4(1), (4), (5), (6) and (14) of Liguria Regional Law no. 39 of 2008.

18.1. – The applicant challenges in the first place paragraphs 1 and 14 of that Article with reference to Article 117(2)(s) of the Constitution, including in the light of Article 161(4)(c) of Legislative Decree no. 152 of 2006. The latter provision stipulates, *inter alia*, that the Supervisory Committee on the Use of Water Resources, and the Regional Council, shall draft one or more framework conventions, to be adopted by decree of the Minister for the Environment and Protection of the Territory and the Sea.

18.1.1. – In the opinion of the State representative, the contested paragraph 1 – which grants the Regional Council powers to approve the framework services agreement and the convention falling under Article 151 of Legislative Decree no. 152 of 2006 – violates paragraph 4(c) of the new version of Article 161 also of Legislative Decree no. 152, which "tacitly repealed" Article 151 and granted the "Supervisory Committee on the Use of Water Resources" – and not the Regional Council – powers to draft one or more of the aforementioned framework conventions, to be adopted by decree of the Minister for the Environment and Protection of the Territory and the Sea, following consultation with the Permanent Assembly for Relations between the State, the Regions and the Autonomous Provinces of Trento and Bolzano.

The respondent Liguria Region argues that the question is procedurally inadmissible on the grounds that Article 9a(6) of Decree-Law no. 39 of 28 April 2009 (Urgent measures in support of the populations affected by the seismic events in Abruzzo Region in April 2009 and further urgent civil protection measures) converted, with amendments, into Law no. 77 of 24 June 2009, abolished the Supervisory Committee on the Use of Water Resources (*Comitato per la vigilanza sull'uso delle risorse idriche*, *COVIRI*) and replaced it with the National Supervisory Commission on the Use of Water Resources (*Commissione nazionale per la vigilanza sull'uso delle risorse idriche*, *CONVIRI*), which does not have the same powers as the Committee abolished.

The objection must be rejected.

The question is not procedurally inadmissible because Article 9a(6) itself of Decree-Law no. 39 of 2009, which is cited by the respondent, provides that the *CONVIRI* shall take on the powers formerly allocated to the *COVIRI*. Indeed, it provides that "starting from the date of entry into force of the Law converting this Decree, the National Supervisory Commission on the Use of Water Resources shall be established with the Ministry for the Environment and Protection of the Territory and the Sea, and shall take

on the powers formerly allocated to the Supervisory Authority on Water Resources and Waste […] subsequently allocated to the Supervisory Committee on the Use of Water Resources, which shall be abolished as of that date". It follows that, given that the powers of the *COVIRI* and the *CONVIRI* are identical, the prerequisite for the objection alleged does not obtain, and therefore there is no procedural inadmissibility, such that the question is to be transferred to the contested provision, as in force following the legislative amendments referred to above.

The question is well-founded on the merits.

As was stated in detail in section 7, the legislation governing integrated urban water management services is to be allocated under the exclusive jurisdiction of the State over "competition law" and the "protection of the environment" (judgment no. 246 of 2009), and the regions are therefore prevented from departing from such provisions. In this case the Region took action in these areas, enacting legislation which contrasted with the State provisions by allocating a series of administrative powers to the Regional Council which are – as provided for by contrast under the interposed provisions invoked by the applicant – vested in the *COVIRI* (now the *CONVIRI*). Accordingly, the principle of constitutional law which reserves to the State legislative jurisdiction over the "protection of the environment" (Article 117(2)(s) of the Constitution) has been violated.

18.1.2. – The State representative complains that the contested Article 4(14) of Liguria Regional Law no. 39 of 2008 – which grants the Local Service Board (*AATO*) powers to conclude "service agreements specifying qualitative targets with regard to the services provided, the monitoring of services, pricing issues and the participation of residents and consumer associations pursuant to Regional Law no. 26 of 2 July 2002" – "contrasts with State legislation", namely with paragraph 4(c) referred to above of the new text of Article 161 of Legislative Decree no. 152 of 2006, which granted the relative powers to the *COVIRI*.

The respondent Liguria Region claims that the question is inadmissible on the grounds that it is generic because it does not specify the reasons for the contrast with the State legislation.

The objection must be rejected.

The question is not generic because the grounds for contrast have been specified with sufficient clarity. Indeed, according to an overall reading of the challenge, it is easy to conclude that the provision of State law invoked as an interposed rule is paragraph 4(c) of the new text of Article 161 of Legislative Decree no. 152 of 2006, which was also invoked by the previous question mentioned in section 18.1.1 and which objects to the allocation to the Service Board of a range of administrative powers which should by contrast have been vested in the *COVIRI*.

On the merits, the question is well founded for the same reasons as specified in the previous section. In fact, the Region also took action in this case in relation to the "protection of the environment" by allocating to the Service Board a series of administrative powers which should by contrast have been vested in the *COVIRI* (now the *CONVIRI*) pursuant to Article 161(4)(c) of Legislative Decree no. 152 of 2006, thereby violating Article 117(2)(s) of the Constitution.

18.2. – The applicant also challenges Article 4(4) of Liguria Regional Law no. 39 of 2008, which provides that the Service Board is to have powers to award the integrated urban water management service, "in accordance with the criteria laid down in Article 113(7) of Legislative Decree 267 of 2000 and the procedures specified under Articles 150 and 172 of Legislative Decree 152 of 2006". The challenge alleges the violation of Article 117(2)(e) of the Constitution, in the light of Article 23a(2), (3) and (11) of Decree-Law no. 112 of 2008, as originally enacted.

The State representative points out that, in providing that the Local Service Board (AATO) shall award integrated urban water management service, "in accordance with the criteria laid down in Article 113(7) of Legislative Decree 267 of 2000 and in stipulating the procedures set out under Articles 150 and 172 del Legislative Decree 152 of 2006", the contested paragraph refers to Article 150 of Legislative Decree no. 152 of 2006, which permits the Service Board to chose one of the forms of management for the service listed in Article 113(5) CLLA. This Article provides in turn that "The service shall be provided according to sectoral legislation and in accordance with European Union legislation, and the services shall be awarded: a) to capital companies identified according to public tender procedures; b) to capital companies under mixed public and private ownership in which the private shareholder is chosen according to public tender procedures which guaranteed compliance with national and Community legislation on

competition according to the guidelines issued by the competent authorities through specific measures or circulars; and c) to capital companies under full public ownership provided that the public authority or authorities which hold the share capital exercise control over the company which is analogous to that exercised over its or their own services and that the company carries on the most significant part of its business with the public authority or authorities controlling it".

In the opinion of the State representative, recalling the forms of management for LPS provided for under Article 113(5) CLLA, the contested provision contrasts with Article 23a, of Decree-Law no. 112 of 2008, which provides on the other hand that any parts of Article 113 which are incompatible with the requirements of Article 23a shall be repealed (paragraph 11), and specifies as a rule governing the award of local public services no longer that laid down by Articles 150 of Legislative Decree no. 152 of 2006 and 113 CLLA, but rather the requirement of public tender procedures (paragraph 2), without prejudice to the possibility to make direct awards where the prerequisites specified under paragraph 3 of that Article are met.

Liguria Region avers that there is no longer any matter in dispute, claiming that the contested Article 4(4) of Liguria Regional Law no. 39 of 2008, which regulates the powers of the Service Boards, has not actually been applied and may not be so applied since these authorities were abolished by Decree-Law no. 135 of 2009 before they were established in the region.

The objection must be rejected.

It is not the case that there is no longer any matter in dispute since Decree-Law no. 135 of 2009 did not abolish the Service Boards with immediate effect. It is therefore possible that those authorities may still be established and operate until the time limit specified by the Law for their abolition, namely within the limit of one year specified under Article 2(186a) of Law no. 191 of 23 December 2009 (Provisions on the formation of the annual and long-term budget of the State – Finance Law 2010). This provision stipulates that "The Local Service Boards referred to under Articles 148 and 201 of Legislative Decree no. 152 of 3 April 2006, as amended, shall be abolished one year after entry into force of this Law. Upon expiry of that term, any act carried out by the Local Service Boards shall be deemed to be void. Within one year of the entry into force of this Law, the regions shall enact legislation to allocate the functions formerly

exercised by the Authority, in accordance with the principles of subsidiarity, differentiation and adequacy. The provisions contained in Articles 148 and 201 of Legislative Decree no. 152 of 2006 shall have effect in each region until entry into force of the regional legislation referred to in the previous sentence. These Articles shall nonetheless cease to apply one year after entry into force of this Law".

The question is well-founded on the merits.

The contested provision requires in fact that Article 113(5) CLLA be applied, that is a paragraph repealed on the grounds of incompatibility by Article 23a, with which it accordingly contrasts. In fact, as pointed out above, Article 23a provides that "Article 113 of the consolidated text of the laws regulating the local authorities contained in Legislative Decree no. 267 of 18 August 2000 as amended is repealed insofar as incompatible with the provisions of this Article" (paragraph 11). In particular, Article 113(5) is clearly incompatible with Article 23a(2), (3) and (4) since it regulates the procedures governing the award of LPS in a manner which does not comply with the provisions of those paragraphs, which were invoked as interposed rules.

18.3. – Thirdly, the applicant challenges Article 4(5) and (6) of Liguria Regional Law no. 39 of 2008 – on the grounds that they contrast with Article 23a(8) and (9) of Decree-Law no. 112 of 2008, as originally enacted, and consequently with Article 117(2)(e) of the Constitution – which provide respectively that: a) "The foregoing shall be without prejudice to the provisions of Article 113(15a) of Legislative Decree 267 of 2000; to this effect, the Local Service Board shall determine the date on which existing concessions will terminate, taking account of the average duration of concessions awarded in the relevant sector following public tender procedures, and without prejudice to the possibility on a case by case basis to order termination at a later if this is in keeping with the time-scale necessary in order to recover the particular investments made by the operator, subject to the updating and renegotiation of existing agreements" (paragraph 5); and b) "The Local Service Board shall identify forms and procedures intended to supplement the waste management and water service, taking account of existing awards which have not been terminated pursuant to Article 113(15a) of Legislative Decree 267 of 2000, in order to resolve the fragmentation of the service within the territory of the service board" (paragraph 6).

Article 113(15a) CLLA – referred to by the contested provisions mentioned above – in turn provides with a detailed series of individual exceptions that "in the event that the provisions in place for individual sectors do not specify an appropriate transitory period […] any concessions issued according to procedures other than public tender procedures shall under all circumstances terminate before and no later than 31 December 2006, and in respect of integrated urban water management only 31 December 2007, without any requirement for a specific resolution by the tendering authority".

The State complains that, in regulating the termination of existing concessions and the relevant transitory arrangements for awards of integrated urban water management services made without a public competition by reference to the provisions of Article 113(15a) CLLA, the contested provisions contrast with Article 23a(8) and (9) of Decree-Law no. 112 of 2008 which – as noted above – repealed Article 113 insofar as incompatible with its provisions and specified that existing concessions issued according to procedures other than public tender were to be terminated before 31 December 2010.

Liguria Region avers also in relation to this question that there is no longer any matter in dispute for the reasons set out in section 18.2.

This objection must also be rejected for the same reasons provided in section 18.2.

The question is well-founded on the merits.

As observed above in section 18.2, the contested provision requires Article 113(15a) CLLA to be applied, even though the latter was repealed due to incompatibility with Article 23a, and hence contrasts with that Article. In fact, Article 113(15a) CLLA, is incompatible with Article 23a because it governs the transitory arrangements applicable to direct awards of local public services in a manner which differs from that contemplated under the interposed rule. It follows that Article 117(2)(e) of the Constitution has been violated.

19. – Finally, it is necessary to consider the questions raised by the President of the Council of Ministers in relation to Article 1(1) of Campania Regional Law no. 2 of 2010, which provides that the Region has competence to regulate the regional integrated urban water management service as a service without economic relevance and to determine independently both the legal forms of the parties to which the service may be awarded as well as the time limit for the expiry of existing awards.

The State representative complains that the provision violates Article 117(1) and (2)(e) of the Constitution, as well as the interposed rules contained in Articles 141 and 154 of Legislative Decree no. 152 of 2006, Article 23a of Decree-Law no. 112 of 2008, Decree-Law no. 135 of 2009 and Article 113 CLLA – which provide that the integrated urban water management service has economic relevance – because: a) it provides that the Region may regulate the aforementioned service "as a service without economic relevance"; and b) it regulates the legal forms of the parties to which the service may be awarded and the time limit for the expiry of existing awards in a manner which entirely disregards Article 23a of Decree-Law no. 112 of 2008, providing that "all forms of water service management currently in use with companies under mixed public and private ownership or under full private ownership shall cease to apply upon expiry of existing service agreements".

Both questions are well-founded because the contested provisions contrast with the Stage legislation invoked as an interposed rule, which was issued by the State in accordance with its exclusive jurisdiction over "competition law" (as argued in greater detail in section 7).

In particular, the question falling under point a) is well-founded because the contested provision evidently contrasts with the interposed State rules referred to above, which specify the integrated urban water management service as one of the services of economic relevance. As was noted in section 9 in fact, State legislation posits a general objective concept of economic relevance, which the regions may not replace with a merely subjective concept focused on a discretionary assessment by the individual territorial bodies.

The question falling under point b) is also well-founded because the contested provision, which identifies the individual bodies to which the water service may be awarded and specifies transitory arrangements to regulate the termination of existing direct awards, evidently contrasts with the transitory arrangements set out under Article 23a of Decree-Law no. 112 of 2008 which – as noted in section 7 – cannot be set aside by the regions.

ON THOSE GROUNDS

hereby;

reserves for separate judgments the decisions on the other questions of constitutionality raised by the regions Emilia-Romagna (Application no. 69 of 2008) and Liguria (Application no. 72 of 2008) and by the President of the Council of Ministers (Application no. 51 of 2010);

declares that the first part of Article 23a(10)(a) of Decree-Law no. 112 of 25 June 2008 (Urgent measures to provide for economic development, simplification, and competitiveness, the stabilisation of public finance and tax equalization) – Article added upon conversion into Law no. 133 of 6 August 2008 – both as originally enacted and as amended by Article 15(1) of Decree-Law no. 135 of 25 September 2009 (Urgent provisions to implement Community law obligations and to enforce the judgments of the Court of Justice of the European Communities), converted, with amendments, into Law no. 166 of 20 November 2009, is unconstitutional with respect to the words "the subjection of the parties to which local public services have been contracted out directly to the internal stability pact and" only;

declares that Article 4(1), (4), (5), (6) and (14) of Liguria Regional Law no. 39 of 28 October 2008 (Establishment of the Service Boards to perform the functions of local authorities in matters relating to water resources and waste management pursuant to Legislative Decree no. 152 of 3 April 2006 – Provisions on the environment) is unconstitutional;

declares that Article 1(1) of Campania Regional Law no. 2 of 21 January 2010 (Provisions governing the formation of the annual and long-term budget of Campania Region – Finance Law 2010) is unconstitutional;

rules that questions concerning the constitutionality of Article 23a(1), (2) and (3), as originally enacted, as well as paragraphs 2, 3 and 4 also of Article 23a, as amended by Article 15(1) of Decree-Law no. 135 of 2009, initiated with reference to Article 117(1) of the Constitution by Piedmont Region by the applications referred to in the headnote, are inadmissible;

rules that the questions concerning the constitutionality of Article 23a(2), (3) and (4), both as originally enacted (Application no. 77 of 2008) and also as amended by Article 15(1) of Decree-Law no. 135 of 2009, and paragraph 10 of the same Article, as originally enacted, initiated with reference to Articles 3 and 97 of the Constitution by Piedmont Region, by the applications referred to in the headnote, are inadmissible;

rules that the question concerning the constitutionality of Article 23a(2), (3) and (4), as amended by Article 15(1) of Decree-Law no. 135 of 2009, initiated with reference to Article 117(1), (2) and (4) of the Constitution by Tuscany Region by the application referred to in the headnote, is inadmissible;

rules that the question concerning the constitutionality of Article 23a(8), as originally enacted, initiated with reference to Articles 5, 114, 117(6) and 118 of the Constitution by Piedmont Region by Application no. 77 of 2008 referred to in the headnote, is inadmissible;

rules that the questions concerning the constitutionality of Article 23a(8), as amended by Article 15(1) of Decree-Law no. 135 of 2009, initiated by the applications referred to in the headnote: with reference to Article 117(1) of the Constitution by the regions Tuscany and Emilia-Romagna (Application no. 13 of 2010); with reference to Articles 117(1) and (2) 118(1) and (2) and 119 of the Constitution by the regions Liguria (Application no. 12 of 2010) and Umbria; with reference to Articles 114, 117(4) and 118 of the Constitution by Emilia-Romagna Region (Application no. 13 of 2010); and with reference to Articles 3, 5, 42, 114, 117(6) and 118 of the Constitution by Piedmont Region (Application no. 16 of 2010; as set out in paragraph 13.6. of the "Conclusions on points of law"), are inadmissible;

rules that the question concerning the constitutionality of Article 23a(9), as amended by Article 15(1) of Decree-Law no. 135 of 2009, initiated with reference to Article 117(1) and (4) by Emilia-Romagna Region by Application no. 13 of 2010 referred to in the headnote, is inadmissible;

rules that the question concerning the constitutionality of Article 15(1b) of Decree-Law no. 135 of 2009, insofar as it applies to the integrated urban water management, initiated with reference to Article 119(6) of the Constitution by Marche Region by the application referred to in the headnote, is inadmissible;

rules that the questions concerning the constitutionality of Article 23a(1), (2) and (3) of Decree-Law no. 112 of 2008, as originally enacted, initiated with reference to Article 117(4) of the Constitution by Piedmont Region by Application no. 77 of 2008 referred to in the headnote, are groundless;

rules that the questions concerning the constitutionality of Article 23a(2)(b) and (3) of Decree-Law no. 112 of 2008, as amended by Article 15(1) of Decree-Law no. 135 of 2009, initiated with reference to Article 117(2)(e) and (4), of the Constitution by the regions Liguria (Application no. 12 of 2010) and Umbria, by the applications referred to in the headnote, are groundless;

rules that the questions concerning the constitutionality of Article 23a(2), (3) and (4) of Decree-Law no. 112 of 2008, as originally enacted, initiated by the applications referred to in the headnote: with reference to Article 117(4) of the Constitution by Liguria Region (Application no. 72 of 2008); and with reference to Articles 3 and 117(2) of the Constitution by Piedmont Region (Application no. 77 of 2008), are groundless;

rules that the questions concerning the constitutionality of Article 23a(2), (3) and (4) of Decree-Law no. 112 of 2008, as originally enacted (Application no. 77 of 2008) and as amended by Article 15(1) of Decree-Law no. 135 of 2009 (Application no. 16 of 2010), initiated with reference to Articles 114, 117(1), (2), (3) and (4) and (6) and 118(1) and (2) of the Constitution by Piedmont Region by the applications referred to in the headnote, are groundless;

rules that the questions concerning the constitutionality of Article 23a(2), (3) and (4) of Decree-Law no. 112 of 2008, as amended by Article 15(1) of Decree-Law no. 135 of 2009, initiated by the applications referred to in the headnote: with reference to Article 117(1) of the Constitution and Articles 3(1), 4(2) and (4) of the European Charter of Local Self-Government pursuant to Law no. 439 of 30 December 1989 (Ratification and implementation of the European Charter of Local Self-Government, signed in Strasbourg on 15 October 1985) by the regions Liguria (Application no. 12 of 2010) and Umbria; with reference to Article 117(2) and (4) of the Constitution by Tuscany Region; with reference to Articles 117(4) and 118(1) and (2) of the Constitution by the regions Liguria (Application no. 12 of 2010) and Umbria; and with

reference to Article 117(4) of the Constitution by Piedmont Region, (Application no. 16 of 2010), are groundless;

rules that the question concerning the constitutionality of Article 23a(2), (3), (4) and (8) of Decree-Law no. 112 of 2008, as amended by Article 15(1) of Decree-Law no. 135 of 2009, initiated with reference to Article 117(3) of the Constitution by Puglia Region by the application referred to in the headnote, is groundless;

rules that the question concerning the constitutionality of Article 23a(2), (3) and (4) of Decree-Law no. 112 of 2008 – as amended by Article 15(1) of Decree-Law no. 135 of 2009 – and Article 15(1b) of Decree-Law no. 135 of 2009, initiated with reference to Articles 3 and 117(2) of the Constitution by Piedmont Region by Application no. 16 of 2010 referred to in the headnote, is groundless;

rules that the questions concerning the constitutionality of Article 23a(2), (3) and (4) of Decree-Law no. 112 of 2008 – as amended by Article 15(1) of Decree-Law no. 135 of 2009 – and Article 15(1b) also of Decree-Law no. 135 of 2009 insofar as they apply to integrated urban water management initiated with reference to Article 117(1) of the Constitution and Articles 14 and 106 of the Treaty on the Functioning of the European Union, as well as Article 117(2)(e), (4) and (6) of the Constitution by Marche Region, by the application referred to in the headnote, are groundless;

rules that the question concerning the constitutionality of Article 23a(3) of Decree-Law no. 112 of 2008, as amended by Article 15(1) of Decree-Law no. 135 of 2009, initiated with reference to Article 117(1) of the Constitution and Articles 3(1), 4(2) and (4) of the European Charter of Local Self-Government, as well as Articles 117(4) and 118(1) and (2) of the Constitution by Emilia-Romagna Region by Application no. 13 of 2010 referred to in the headnote, is groundless;

rules that the questions concerning the constitutionality of Article 23a(3) and (4) of Decree-Law no. 112 of 2008, both as originally enacted (Application no. 77 of 2008) and also as amended by Article 15(1) of Decree-Law no. 135 of 2009 (Application no. 16 of 2010), initiated with reference to Articles 3 and 117(4) and (6) of the Constitution by Piedmont Region by the applications referred to in the headnote, are groundless;

rules that the question concerning the constitutionality of Article 23a(4a) of Decree-Law no. 112 of 2008, as amended by Article 15(1) of Decree-Law no. 135 of 2009,

initiated with reference to Article 117(6) of the Constitution by Emilia-Romagna Region by Application no. 13 of 2010 referred to in the headnote, is groundless;

rules that the question concerning the constitutionality of Article 23a(7) of Decree-Law no. 112 of 2008, as originally enacted, initiated with reference to Articles 117(4) and 118(1) and (2) of the Constitution by the regions Emilia-Romagna (Application no. 69 of 2008) and Liguria (Application no. 72 of 2008), by the applications referred to in the headnote, is groundless;

rules that the question concerning the constitutionality of Article 23a(8) of Decree-Law no. 112 of 2008, as originally enacted, initiated with reference to Articles 3, 41, 114 and 117(2) of the Constitution by Piedmont Region by Application no. 77 of 2008 referred to in the headnote, is groundless;

rules that the questions concerning the constitutionality of Article 23a(8) of Decree-Law no. 112 of 2008, as amended by Article 15(1) of Decree-Law no. 135 of 2009, initiated by the applications referred to in the headnote: with reference to Article 117(1), (2)(e) and (4) of the Constitution by Tuscany Region; with reference to Article 117(2)(e) and (4) of the Constitution by the regions Liguria (Application no. 12 of 2010) and Umbria; with reference to Articles 117(4) and 119(6) of the Constitution by Emilia-Romagna Region, (Application no. 13 of 2010); and with reference to Articles 3, 5, 42, 114, 117(2) and (6) and 118 of the Constitution by Piedmont Region by Application no. 16 of 2010, are groundless;

rules that the question concerning the constitutionality of Article 23a(8) of Decree-Law no. 112 of 2008 – as amended by Article 15(1) of Decree-Law no. 135 of 2009 – as set out in paragraph 13.7 of the "Conclusions on points of law" initiated with reference to Articles 3, 5, 42, 114, 117(6) and 118 of the Constitution by Piedmont Region by Application no. 16 of 2010 referred to in the headnote, is groundless.

rules that the questions concerning the constitutionality of the second part of Article 23a(10)(a) and 23a(10)(b) of Decree-Law no. 112 of 2008, as originally enacted, initiated by the applications referred to in the headnote: with reference to Article 117(6) of the Constitution, by the regions Emilia-Romagna (Application no. 69 of 2008), Liguria (Application no. 72 of 2008) and Piedmont (Application no. 77 of 2008); and

with reference to Articles 3, 117(2) and (4) and 120 of the Constitution by Piedmont Region (Application no. 77 of 2008), are groundless;

rules that the question concerning the constitutionality of the second part of Article 23a(10)(a) and 23a(10)(b) of Decree-Law no. 112 of 2008, as amended by Article 15(1) of Decree-Law no. 135 of 2009, initiated with reference to Article 117(2) and (4) of the Constitution by Emilia-Romagna Region by Application no. 13 of 2010 referred to in the headnote, is groundless.

Decided in Rome, at the seat of the Constitutional Court, *Palazzo della Consulta*, on 3 November 2010.

(omitted)

ANNEX:

ORDER READ OUT AT THE PUBLIC HEARING OF 5 OCTOBER 2010

ORDER

Having found that Campania Region entered an appearance in the proceedings initiated by Application no. 51 of 2010 on the basis of instructions to resist contained in Director's Decree no. 231 of 26 March 2010 issued by the Coordinator of the General Coordination Area – Legal Counsel, on a proposal by the Director of the Administrative and Tax Law Litigation Department of the Region;

that pursuant to Article 32(2) of Law no. 87 of 1953 – with which Article 51(1)(f) of Regional Law no. 6 of 28 May 2009 (Statute of Campania Region) complies – "Questions of constitutionality may be referred to the Constitutional Court […] by the President of the Regional Council […] pursuant to a resolution by the Regional Council";

that the power to authorise the initiation of proceedings before the Constitutional Court must be deemed also include the power to enter appearances in such proceedings, given the political nature of the assessment which both actions require (see *inter alia*,

the order read out in the public hearing of 25 May 2010 and the relative proceedings concluded by judgment no. 225 of 2010);

that accordingly the entry of appearance by Campania Region is inadmissible.

ON THOSE GROUNDS

THE CONSTITUTIONAL COURT

rules that the entry of appearance by Campania Region is inadmissible.

(omitted)