Corte costituzionale

JUDGMENT NO. 350 OF 2008

Giovanni Maria FLICK, President

Ugo DE SIERVO, Author of the Judgment

JUDGMENT NO. 350 YEAR 2008

In this case the Court considered an appeal from the Regional Administrative Tribunal for Lombardy concerning legislation enacted in order to regulate premises providing telephone and internet services to the general public. The legislation stipulated various sanitation requirements which such premises were obliged to comply with, and that any business activity for which a permit had not been issued was to be closed. The Court stuck down the legislation in toto because it provided for regime of authorisations parallel to that stipulated in the Communications Code, implementing various Community directives, which had the status of a general principle of state legislation that was accordingly binding on regional legislatures.

THE CONSTITUTIONAL COURT

Composed of: President: Giovanni Maria FLICK; Judges: Francesco AMIRANTE, Ugo DE SIERVO, Paolo MADDALENA, Alfio FINOCCHIARO, Alfonso QUARANTA, Luigi MAZZELLA, Gaetano SILVESTRI, Sabino CASSESE, Maria Rita SAULLE, Giuseppe TESAURO, Paolo Maria NAPOLITANO,
gives the following

JUDGMENT

in proceedings concerning the constitutionality of Articles 1, 3, 4, 8(1)(e), (f), (h) and (i) and (2), 9(1)(c) and (2) and 12 of Lombardy Region law No. 6 of 3 March 2006 (Provisions governing the establishment and management of telephone centres with fixed location), commenced pursuant to the referral orders of 20 September 2007 (2 orders), 29 October 2007, 26 November 2007 (3 orders), 10 December 2007 (2 orders), 27 December 2007 and 22 January 2008 by the Regional Administrative Tribunal for Lombardy, Section IV Milan, registered as numbers 2, 15, 65, 66, 67, 100, 101, 102, 103 and 127 in the Register of

Orders 2008 and published in the *Official Journal of the Republic* Nos. 7, 8, 13, 16 and 19, first special series 2008.

Considering the intervention by Lombardy Region;

having heard the Judge Rapporteur Ugo De Siervo in chambers on 24 September 2008.

The facts of the case

1. – By ten separate referral orders (Nos. 2, 15, 65, 66, 67, 100, 101, 102, 103 and 127 of 2008) adopted during the course of ten proceedings, the Regional Administrative Tribunal for Lombardy, Section IV Milan, raised the question of the constitutionality of Articles 1, 4, 8(1)(e), (f), (h) and (i) and (2), 9(1)(c) and (2) and 12 of Lombardy Region law No. 6 of 3 March 2006 (Provisions governing the establishment and management of telephone centres with fixed location), with reference to Articles 3, 15, 41 and 117 of the Constitution.

2. – The referring court states that the appellants are the owners of phone centres already operating at the time when regional law No. 6 of 2006 entered into force who were the addressees, pursuant to measures adopted by the respective municipal administrations, of orders to terminate their activities of cessation of business activities "due to failure to comply with the new requirements (predominantly concerning the sanitation and safety of premises) laid down under the above regional law". These orders were issued pursuant to the following contested provisions of regional law No. 6 of 2006: Article 1, "insofar as it classifies the matter in question under the residual regional competence over trade and commerce"; Article 4, "which introduces a general system of municipal permits for the pursuit of this business activity"; Article 8, "insofar (sub-section 1(e), (f), (h) and (i) and sub-section 2) as it introduces – amending with immediate effect the municipal regulations in force – numerous new requirements regarding the sanitation and safety of premises; Articles 9(i)(c) and (2) and 12, which provide that phone centres already operational must comply with the new requirements within one year, failing which the permit shall be withdrawn.

3. – As regards the question of relevance, the referring court states that the contested measures notified the appellants of "the immediate cessation of the business activity due to the failure to comply on time with the new requirements mentioned above" and that the regional law did not leave or allow "any discretion to the enforcing administrative authority which … was required to adopt the measure (with no discretion over its content) ordering the immediate cessation of business activities on expiry of the mandatory one year time limit provided for". The referring court states in addition that it has adopted an interim injunction suspending the measure which ordered the cessation of the business activities of the phone centres with effect limited to the period of time necessary for the Constitutional Court to pass judgment.

4. – The referring regional administrative tribunal [TAR] identifies the constitutional provisions which it suspects have been violated as Article 117, "with regard to Community law obligations and the arrangements governing the division of legislative competences between the state and the regions"; Articles 3 and 41 "with regard, in particular, to the significant obstacles which the restrictive sanitation requirements introduced by the regional law concerned, applicable also retroactively to pre-existing phone centre operations, place on the freedom of economic initiative of the latter"; and Article 15 on freedom of communication.

4.1. – The alleged violation of Article 117 of the Constitution is above all confirmed by the mistaken substantive classification of the contested provisions. In fact, Article 1 states that the legislation concerned relates to trade and commerce. By contrast however, the lower court finds that the provision of telephone services with fixed location, in premises open to the public, is not covered by the legislative provisions relating to commercial activities. This is confirmed by the prohibition, contained in the contested law, on the parallel operation – as in the past – of "support" business activities, with the sole exception of the sale of telephone cards and the installation of vending machines for food and drink.

For the referring court on the other hand, the business activity contemplated by the regional law falls under the area of the regulation of communications, over which competence is shared, and more specifically amounts to an "electronic communications

service" within the meaning of Article 2(1)(c) of directive No. 2002/21/EC of 7 March 2002, implemented by legislative decree No. 259 of 1 August 2003 (Electronic Communications Code).

4.2. – By virtue of the different substantive classification, the regional legislature is subject to a range of limits and obligations.

In the first place, on account of the the recognised European origin of this legislation, pursuant to Article 117(1) of the Constitution, the principle of proportionality applies. Secondly, since competence over the matter is shared, the regional legislature cannot disregard the limits contained in the principles underlying state legislation. Finally, it is also necessary to consider certain "cross-cutting issues under exclusive state legislative competence" pursuant to Article 117(2) of the Constitution, with specific reference to competition law (letter (e)) as well as the safeguarding of essential levels of protection for civil and social rights which must be guaranteed throughout the country (letter (m)).

The referring court recalls that Article 3(1) of the aforementioned Communications Code guarantees the "mandatory rights of persons to use forms of electronic communication freely", with express reference to arrangements ensuring free competition. Moreover, the principles contained in Community and constitutional law are expressly restated by Article 4 of the Communications Code, sub-section 1 of which provides that the legislation governing networks and services shall aim to safeguard the constitutional rights of "freedom of communication" as well as "freedom of economic initiative and its pursuit in a competitive market, guaranteeing access to the market in electronic communication networks and services in accordance with the requirements of objectivity, transparency, non discrimination and proportionality".

At the same time, Article 4(3) provides that the Code shall also aim to "promote the simplification of administrative procedures and the participation therein of the subjects concerned by adopting procedures in a timely, non-discriminatory and transparent fashion with regard to the companies which provide electronic communication networks and services".

4.3. – According to the referring court – by regulating the entire sector of phone centres with fixed location – the Lombard legislature introduced "an additional regime of permits which duplicated the system set out in the Community directive and implemented by legislative decree No. 259/2003".

By contrast, Article 2(3) of the Code stipulates that the provision of electronic communication networks and services is an activity of paramount general interest and shall be free from restrictions, except only "restrictions resulting from requirements pertaining to defence and national security, civil protection, public health and environmental protection as well as the confidentiality and protection of personal data imposed by specific statutory provisions or implementing regulations". The Code also stipulates that the provision of these services shall be subject to one single "general permit", in accordance with European law. In particular, permits are issued after a statement has been made by the interested party (following which the business activity may be commenced) setting out his intention to provide the service (Article 25(3)), whilst the power of the competent minister to prohibit the continuation of the business activity may be exercised "within and not beyond" sixty days according to the procedural rules governing the statement on the commencement of operations pursuant to Article 19 of law No. 241 of 7 August 1990 (Article 25(4)).

The referring court argues that the provision for an additional permit in any case modified "the regime of substantial freedom to provide the services concerned, as set out primarily under Community law, and as transposed by the implementing state legislation, with the resulting procedural burdens prohibited under Articles 3 and 4 of decree No. 259/2003".

Moreover – the referring court continues – many of the restrictions provided for under the contested law appear to relate to matters that in any event do not fall under the residual legislative powers which Lombardy Region by contrast purported to be exercising in the case before the court, including in particular defence and national security and environmental protection requirements, which fall under the exclusive competence of the state legislature, as well as civil protection and public health requirements, over which competence is shared.

4.4. – As regards the sanitation and safety requirements for the premises, for the lower court the contested law enacts "detailed provisions which automatically and simultaneously supplement all sanitation regulations of the health authorities and municipalities in Lombardy […], in spite of the fact that, within the ambit of this local regulation, the reference state legislation does not permit the enactment of regulatory and detailed provisions directly under regional laws". Nor does the law in force contain such restrictive requirements even for premises where there is a greater concentration of persons for a greater period of time, such as theatres, cinemas or premises where food and drinks are provided.

It follows from the above that the concurrent legislative powers of the region must be exercised in accordance with the fundamental principles mentioned in Articles 3 and 41 of the Constitution, as well as the principle of proportionality.

4.5. – The referring court considers that the question is not manifestly groundless also insofar as provision is made for the retroactive application of the new legislation, without even providing for the possibility of extensions in order to enable pre-existing activities to continue their operations.

According to the settled case law of the Constitutional Court, Parliament may enact retroactive legislation which has effects on substantive rights already established under previous laws, subject to a rigorous scrutiny of the rationality of the new regulation of interests.

For the lower court, in this case it is not certain that the *ius superveniens* complies with the criterion of reasonableness, with regard to the procedures by which the new legislation affects the legitimate expectations of the owners of pre-existing phone centres and their financial resources. This is claimed to result in a violation of the freedom of private economic initiative enshrined in Article 41 of the Constitution, also in view of the competition law protection guaranteed under European law.

5. – By writ filed on 26 February 2008, Lombardy Region intervened in these proceedings (in relation to the questions raised in referral order No. 2 of 2008) and, reserving the right to make subsequent submissions and arguments, averred as a

preliminary matter that the questions of constitutionality raised were inadmissible, and argued that they were in any case groundless on the merits.

6. – By written statement filed on 24 July 2008, Lombardy Region submitted a broad statement supplementing its previous entry of appearance.

6.1. – The regional representative considers the questions concerned to be inadmissible due to the clear lack of reasons given for their relevance, since the referring court failed to describe any decisive elements of the facts which gave rise to the principal proceedings (these observations also refer to the other referral orders "which challenged the provisions in a substantially identical manner"). In particular, the referral order does not contain information providing details of permits, if any, obtained, nor of the reasons underpinning the contested measure ordering the cessation of the business activities of the phone centres. Moreover, a further ground for inadmissibility is the failure to refer to a permit which has been denied, whilst the referral order refers only to an order to close the phone centre.

Similarly, the challenges raised with reference to Article 15 of the Constitution are also inadmissible due to the lack of reasons given.

Furthermore, the challenges made with reference to Article 8 of the regional law are claimed to be generic, since there is no clarification in detail of the alleged grounds for unconstitutionality of the four distinct legislative provisions.

7. – On the merits, the Region argues that the legislation governing phone centres clearly falls under the area of trade and commerce, hence precluding any state competence over the matter, since "the concept of 'electronic communication services' would not appear to apply to the operations of phone centres". In any case, "the permit provided for under the Lombardy Region law does not in any way interfere with the goals" of Community and state legislation, and is indeed by contrast "based precisely on the provisions contained in Articles 3 and 25 of the Communications Code which allow for the possibility of limiting the supply of networks or services on public health grounds".

The contested regional law therefore "renders the commencement (or continuation) of this business activity subject to the granting of a permit by the municipality for the purposes of protecting public health and the sanitary conditions in which the work is carried

out". Therefore, no legislative principles were violated by the regional legislature, nor can it be argued that regional legislation cannot modify local sanitation regulations.

Conclusions on points of law

1. – The Regional Administrative Tribunal for Lombardy, Section IV Milan, raised, by referral orders Nos. 2, 15, 65, 66, 67, 100, 101, 102, 103 and 127 of 2008, adopted during the course of ten proceedings, the question of the constitutionality of Articles 1, 4, 8(1)(e), (f), (h) and (i) and (2), 9(i)(c) and 12 of Lombardy Region law No. 6 of 3 March 2006 (Provisions governing the establishment and management of telephone centres with fixed location), with reference to Articles 3, 15, 41 and 117 of the Constitution.

2. – In all proceedings before the lower court, the appellants, owners of phone centres already operating at the time when regional law No. 6 of 2006 entered into force, contested the measures adopted by the respective municipal administrations ordering the cessation of business activities pursued by them "due to failure to comply with the new requirements (predominantly concerning the sanitation and safety of premises) laid down under the above regional law".

Within the ambit of these proceedings, the referring court questioned the constitutionality of the regional provisions implemented by the contested measures adopted.

In particular, the regional administrative tribunal challenges Article 1, "insofar as it brings the matter concerned under the region's residual legislative competence over trade and commerce"; Article 4, "which introduces a general system of municipal permits for the pursuit of this business activity"; Article 8, insofar as it introduces – amending with immediate effect the municipal regulations in force (sub-section 2) – new requirements regarding the sanitation and safety of premises, including in particular the provision of: a toilet for the exclusive use of employees (letter (e)); a toilet reserved for the public, which may also be in the proximity of the premises for businesses already operating when this law enters into force, but for the exclusive use of the same for premises smaller than 60 square

metres; an additional toilet for premises larger than 60 square metres (letter (f); "a waiting area within the premises of at least 9 square metres, for up to 4 telephones, furnished with appropriate seating positioned in such a way as not to obstruct the exit routes" (letter (h)); a minimum surface area (equal to 1 square metre) for every telephone and its positioning in such a way as to guarantee an exit route free from any obstacles, as well as a minimum width of 1.20 metres (letter (i)).

The Tribunal also challenges Articles 9(1)(c) and (2) and 12, which impose transitional arrangements for old businesses, providing that prior permits shall be withdrawn, without any possibility of extensions, "if the owner has not complied with the obligation to bring the activity into line with existing legislation, prohibitions and permits in the area of building, town planning and sanitation, as well as the provisions regulating the intended use of premises and buildings, fire prevention and safety prior to the commencement of the business activity pursuant to Article 4, or within one year of the entry into force of this law pursuant to Article 12".

In the opinion of the referring court, these provisions violate Article 117 of the Constitution in that, by impinging upon the regulation of communications (over which competence is shared), they are incompatible with the proportionality principle, of Community law origin (Article 117(1)). Moreover, they are claimed to infringe the exclusive competence of the state legislature over "competition law" laid down in Article 117(2)(e) of the Constitution, and the "determination of essential service levels for the civil and social rights which must be guaranteed throughout the country" (Article 117(2)(m) of the Constitution).

The regional provisions are also claimed to violate Article 117(3) of the Constitution insofar as they breach the fundamental principles enacted by the state legislature regarding its arrangements for permits – principles which may be inferred from Articles 2, 3, 4 and 25 of legislative decree No. 259 of 1 August 2003 (Electronic Communications Code).

It is also claimed to violate Articles 3 and 41 of the Constitution insofar as the introduction, with retroactive effect, of new and more stringent structural and sanitation requirements amounts to an unlawful difference in treatment between phone centres already

operational (required, within a short space of time and at high cost, to carry out the necessary refit work) and those opened after the entry into force of the contested provisions, with negative repercussions on the freedom of economic initiative and the competitive structure of the market.

Finally, in the opinion of the regional administrative tribunal, the provisions concerned are incompatible with Article 15 of the Constitution, since they introduce measures liable to infringe the freedom of communication.

3. – The referral orders raise identical questions, and therefore the related proceedings shall be joined for ruling with a single decision.

4. – The questions raised in eight of the above referral orders (Nos 2, 15, 65, 66, 101, 102, 103 and 127 of 2008) are manifestly inadmissible due to the failure to describe the specific facts of the case.

The albeit broad arguments on the question of relevance set out in identical terms in the various referral orders are not in fact sufficient. The various lower court has provided only generic indications regarding the effects of the contested provisions on the legal rights claimed by the appellants, and failed to provide the required description of the specific violations allegedly documented by the municipal administrations.

According to the settled case law of this Court, since the insufficient description of the facts of a case makes it impossible to ascertain that the contested provisions are in actual fact applicable in the cases concerned, the result is that the reasons given for the relevance of the question are insufficient. This therefore means that the question is manifestly inadmissible, and the direct cognisance of the case file is accordingly precluded in accordance with the principle of the self-sufficiency of referral orders (amongst the most recent decisions, see referral orders No. 224, No. 223, No. 217, No. 210 and No. 174 of 2008; No. 251 of 2007 and No. 303 and No. 164 of 2006).

5. – By contrast, in orders Nos. 67 and 100 of 2008, the regional administrative tribunal expressly states that the municipal measures ordering the termination of the business activities of the phone centres were adopted in view of the failure to obtain the permit provided for and regulated under regional law No. 6 of 2006.

In particular, in referral order No. 67, the referring court not only expressly cites the municipal ordinance decreeing the termination of business activities "issued under the terms of and pursuant to regional law No. 6/2006", but adds that the measure specifies "that any business activity may, where appropriate, be recommenced only after having rectified the violations discovered during the inspection cited in the preamble and having obtained a regular permit pursuant to Article 4 of regional law No. 6/2006".

As regards referral order No. 100 of 2008, the referring court states that the closure of the phone centre operated by the appellant was ordered on the grounds that it was being "operated without the required permit issued pursuant to regional law No. 6 of 3 March 1996 (*sic*: 2006)".

Since all of the provisions contained in regional law No. 6 of 2006 (and all the more so the fundamental Articles 4 and 9, both challenged) are characterised by this special and new municipal permit "for the establishment and management of phone centres with fixed location", the specific reference made in these two referral orders to the new permit is sufficient to justify the relevance of the challenges made against Article 4, as well as Articles 9 and 12, which extend the new legislation to phone centres which already existed when the regional law entered into force. On the other hand, the questions of constitutionality raised in relation to Article 8 are inadmissible, since the referring court did not specify whether, and if so which, sanitation requirements were certified in actual fact as inadequate, i.e. whether they were in fact those challenged. This failure to provide greater detail means, once again, that insufficient grounds were given regarding the relevance of the questions.

6. – Turning now to the merits of the questions of constitutionality raised, the referring court complains of the establishment, by the Lombard legislature, of "an additional regime of permits which duplicated" the system set out in the Community directive and implemented by legislative decree No. 259 of 1 August 2003 (Electronic Communications Code).

In order to ascertain whether the challenges raised are well founded, it is necessary to direct our attention to the classification of the regional legislation concerned under the matters listed in Article 117 of the Constitution.

Article 1 of regional law No. 6 of 2006 classifies the regulations applying to the centres concerned as relating to trade and commerce, as restated in Article 2(2)(a), according to which "phone centre with fixed location" means "any facility where business activity is carried out involving exclusively the provision to the public of telephone services". Moreover, Article 2(2)(b) provides that the "provision to the public of telephone services" includes "any business activity involving a telephone or telematic connection in order to provide vocal telephone services, irrespective of the communications technologies used, in premises or areas open to the public and equipped for such purposes, as well as the activity of selling telephone cards". The regional representative, for its part, restates that "the essential core of the region's legislative initiative may be identified in the procedures for the pursuit of the business activity".

This classification of the matters covered by the law is disputed by the referring court which, by contrast, classified phone centres as an "electronic communication service" within the meaning of Article 2(1)(c) of directive No. 2002/21/EC (Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services), which provides that this is "a service normally provided for remuneration which consists wholly or mainly in the conveyance of signals on electronic communications networks, including telecommunications services and transmission services in networks used for broadcasting, but exclude services providing, or exercising editorial control over, content transmitted using electronic communications networks and services".

It is important to point out that the range of interests affected by the law may entail, as regards the division of legislative competence between the state and the regions, a convergence of grounds for competence over specific areas of law or individual issues. In situations of this type, this Court has on several occasions clarified that "it is necessary to refer to the object of and to the rules laid down by the provisions under review, on the basis

of the legislation they introduce (judgments No. 450 and No. 411 of 2006), in the light of the rationale of the legislative initiative considered overall and with regard to its fundamental points, disregarding the marginal aspects and knock-on effects of the same provisions (judgments No. 319 and No. 30 of 2005), in order thereby also to identify correctly and comprehensively the protected interest (judgments No. 449 of 2006 and No. 285 of 2005)" (judgment No. 165 of 2007; by analogy judgment No. 430 of 2007).

In these proceedings, this Court notes that the regional law under scrutiny has as its absolutely characteristic object the imposition, for a specific class of business activities classified as "commercial", of special prerequisites necessary in order for the municipalities to be able to issue a specific permit to new as well as pre-existing phone centres. In the absence of such a permit, or in the event of its withdrawal, "the pursuit of operations involving the provision to the public of telephone services with fixed location" is forbidden. A clear confirmation of this reading of the law can be found in administrative practice, starting from the explanatory circulars concerning the contested law sent by the region to the mayors of the municipalities throughout Lombardy.

Furthermore, even disregarding the complete overlap of the detailed legislative provisions with the regulatory and administrative powers vested in the municipalities (an issue which, despite the problematic aspects it throws up, cannot be examined in these proceedings, since it is not subject to any specific complaint supported by reasons), it appears to be evident that the regional law refers to a particular activity provided for and regulated by the aforementioned Electronic Communications Code as an "electronic communications service", Article 1(1)(gg) of which reproduces *verbatim* Article 2(1)(c) of Community directive 2002/21, cited above.

In this regard, the region's argument in its defence that the concept of "electronic communication services" does not apply since the phone centres "limit themselves, acting as 'intermediaries', to making personal computers or telephones available to the public, and in turn themselves use network supply services provided by various companies" is groundless.

In actual fact, this activity specifically falls under the concept of electronic communications service as defined by the Code, since it consists precisely in the provision of the service of transmitting signals over electronic communications networks, namely telecommunications services.

Moreover, both a teleological and a literal interpretation of the entire Code support the view that it governs the entire spectrum of electronic communications, up to user's rights to access the means of communication. Article 25 of the Code, which contemplates – as will be seen in greater detail below – a general permit and the related Schedule No. 9 expressly refer also to providers to the public of "electronic communications services".

Furthermore, this view in in addition reflects the settled administrative practice in place also in Lombardy Region: in fact, the operators of phone centres declare the commencement of the business activity to the local inspectors office [*ispettorato territoriale*] of the Ministry for Communications, pursuant to and according to the procedures set out in Article 25(2) of the Code, using the form specified in Schedule No. 9.

There is no doubt that the activity carried on by phone centres embraces some of the elements typical of business operations, so much so that, for example, Article 6 of the regional law in question deals specifically with the business hours and procedures for the pursuit of this activity (aspects falling under the area of "trade and commerce": see judgments No. 243 of 2005 and No. 76 of 1972). However, these are ancillary and subordinate elements compared to the characteristic aspect of the activity carried on by the phone centres with fixed location, consisting in the provision of an electronic communications service.

In fact, in the phone centres, the exchange of a service for the payment of a price regards resources and needs that are fundamental to the individual and, at the same time, the community since it touches on both individual interests (relating to communication with other persons) as well as general interests (defence and national security; civil protection; public health; environmental protection; confidentiality and protection of personal data), in contrast to the situation for ordinary business activities governed by Article 4 of legislative

decree No. 114 of 31 March 1998 (Reform of the legislation relating to the trade and commerce sector, pursuant to Article 4(4) of law No. 59 of 15 March 1997).

7. – In judgment No. 336 of 2005, this Court has already recognised how, in order to bring itself into line with Community law, the Electronic Communications Code on a general level is intended to pursue "the objective of the liberalisation and simplification of procedures also in order to guarantee the implementation of competition law rules".

In the same judgment the Court also held that the provisions of the above Code have effects in various areas of law with differing status as regards the division of legislative competence between the state and the regions: in fact, this sector includes areas under exclusive state competence ("private law", "coordination of the informative, statistical and information-technology aspects of the data of the state, regional and local administrations", "competition law"), as well as areas over which competence is shared ("protection of health", "regulation of communication", "town and country planning"). Finally, also matters falling under the residual legislative competence of the regions are of significance including, in particular, "industry" and "trade and commerce" (to which the 2005 judgment did not give particular importance, since they fell outwith the matters taken into consideration by the Court).

On the other hand, the reference to Article 117(2)(m) of the Constitution is not relevant in this case because the regional legislation governing phone centres has no impact on the "determination of structural and qualitative standards of service provision which, insofar as it concerns the fulfilment of social and political rights, must be guaranteed in general terms to all persons with rights thereto" (judgment No. 168 of 2008; see also judgments No. 50 of 2008; No. 387 of 2007 and No. 248 of 2006).

For the reasons set out above, the present case concerns the provisions enacted by the Electronic Communications Code, and in particular Article 3, which expressly lays down the general principles governing the electronic communications sector.

The court finds that the following provisions are of particular importance in this case: sub-section 1, which guarantees "mandatory rights of persons to use forms of electronic communication freely, as well as the right of economic initiative and its pursuit in a

competitive market within the electronic communications sector", as well as sub-section 2, according to which "the supply of electronic communications networks and services, which is of paramount general interest, shall be free from restrictions". It is clear that provisions of this nature are an expression of the exclusive competence of the state over "competition law" and "private law", even prior to their status as fundamental principles in the area of the "regulation of communication".

This does not prevent Article 3(3) of the Code from also providing for the possibility of imposing "limits resulting from defence and national security requirements, civil protection, public health and environmental protection as well as the confidentiality and protection of personal data". Such limitations must however be "contained in specific legislative provisions or implementing regulations". For its part, Article 4 list amongst the "general objectives of the provisions regulating electronic communications networks and services" the guarantee of "access to the market in electronic communications networks and services in accordance with the criteria of objectivity, transparency, non discrimination and proportionality", as well as the promotion of the "simplification of administrative procedures and the participation therein of the subjects concerned by adopting procedures in a timely, non-discriminatory and transparent fashion with regard to the companies which provide electronic communication networks and services".

8. – The general principles laid down in the Code are given specific form through the provision for a "general permit" which Article 25 of the Code requires for the activities involving the provision of electronic communications services. This authorisation "is issued following the presentation" by the interested parties to the Ministry for Communications of a specific declaration "stating their intention to commence the supply of electronic communications networks or services, together with the information strictly necessary to allow the Ministry to maintain an up to date list of suppliers of electronic communications networks and services", supplemented insofar as specifically required under Schedule No. 9 of the Code.

The fact that the declaration amounts to a statement of the commencement of operations, such that "the undertaking is entitled to start its own operations after the declaration has

been made" is consistent with the principle of the freedom to provide services and the goal of the greatest possible simplification of procedures; the Ministry may only order, within a time-limit of sixty days, "if necessary, by a measure accompanied by reasons, to be notified to the interested parties within the same time-limit, the prohibition on the continuation of operations" where it ascertains *ex officio* that the necessary requirements have not been complied with (Article 25(4)).

The contested regional law clearly breaches this "legal framework established by the Member State" (the definition of "general authorisation" pursuant to Article 2(2)(a) of directive No. 2002/20/EC of 7 March 2002). In fact, in the name of its own legislative competence over trade and commerce, it purports to regulate on a general level "the establishment and management of phone centres with fixed location", providing under Article 4 for the requirement for a special permit, different from and additional to that provided for under Article 25 of the Code which the municipality is called upon to issue or refuse within ninety days of the presentation of the application, and the issue of which is a prerequisite for the pursuit of the business activity.

Moreover, under the terms of Article 4, the issue of the permit is subject to the fulfilment of rather disparate prerequisites ("requirements as to good character" for owners and managers – Article 3; the availability of premises – Article 4; sanitation characteristics, the presence of adequate workplace safety and fire prevention measures – Article 8; town planning – Article 7; etc.), which overlap, broadly and in various areas, with the requirements stipulated in the Code and in the laws to which it refers as well as, above all, clearly contradicting the principle that there be only one form of proceedings for the issue of permits and the related requirements of simplification and the timely conclusion of procedures.

There is no doubt that Article 25(1) of the Code (reiterating the requirement stated in general terms by Article 3(3) of the same text) provides that the freedom to provide electronic communications services may be limited also "by specific provisions" which are "justified by requirements pertaining to defence and national security and public health, insofar as compatible with the requirements of environmental protection and civil

protection". However, these provisions may only supplement the authorisation contemplated under Article 25 (although Schedule 9 to the Code provides that, at the time when the permit is applied for, the person making the declaration must also ensure respect "for any conditions which may be imposed on undertakings under the terms of other non-sectoral legislation") or temporarily supplement it in emergencies (see Article 7(1) of decree-law No. 144 of 27 July 2005, containing "Urgent measures to combat international terrorism", concerted into law, with amendments, by law No. 155 of 31 July 2005, which until 31 December 2008 also provided for the requirement of a permit from the Chief of Police [*Questore*]).

Therefore, the introduction by the regional legislature of a truly self-standing procedure for granting permits to carry on business activities relating to phone centres conflicts with the choices made by the state legislature regarding the liberalisation of electronic communications services and procedural simplification; this is without prejudice to the ability of the municipalities, exercising their power to issue regulations, and the regions, exercising their legislative powers, to regulate specific ancillary aspects also in this sector.

The Court therefore finds that Articles 1, 4, 9(1)(c) and (2) and 12 of regional law No. 6 of 2006 are unconstitutional, due to violation of the criteria governing the division of competences pursuant to Article 117 of the Constitution.

9. – Although the other provisions of the Lombardy Region law, which were not validly challenged, were excluded from the ambit of the proceedings, this Court finds that the ascertained unconstitutionality of Articles 1, 4, 9(1)(c) and (2) and 12 cannot fail to extend to the entire regional law No. 6 of 2006.

In fact, the legislative framework conceived by the Lombard legislature propagates out from the above provisions which regulate the permit provided for therein as the essential core of the administrative arrangements chosen. All of the other articles of the contested regional law are subsumed by an inseparable relationship of dependence on the provisions ruled unconstitutional. And therefore, the violation of the Constitution extends to the legislation governing phone centres as a whole, which the Court therefore strikes down *in toto* pursuant to Article 27 of law No. 87 of 11 March 1953.

10. – The remaining challenges, which refer to the other principles invoked, are moot.

ON THOSE GROUNDS

THE CONSTITUTIONAL COURT

hereby;

a) *declares* that Articles 1, 4, 9(1)(c) and (2) and 12 of Lombardy Region law No. 6 of 3 March 2006 (Provisions governing the establishment and management of telephone centres with fixed location) are unconstitutional;

b) *declares*, pursuant to Article 27 of law No. 87 of 11 March 1953, that the remaining provisions of Lombardy Region law No. 6 of 2006 are unconstitutional;

c) *rules* that the questions of constitutionality raised with reference to Articles 3, 15, 41 and 117 of the Constitution, in the referral orders Nos. 67 and 100 of 2008, by the Regional Administrative Tribunal for Lombardy regarding Article 8(1)(e), (f), (h), and (i) and (2) of Lombardy Region law No. 6 of 2006, are manifestly inadmissible;

d) *rules* that the questions of constitutionality raised by the Regional Administrative Tribunal for Lombardy, in referral orders Nos. 2, 15, 65, 66, 101, 102, 103 and 127 of 2008, are manifestly inadmissible.

Decided in Rome, at the seat of the Constitutional Court, *Palazzo della Consulta*, on 22 October 2008.

Signed:

Giovanni Maria FLICK, President

Ugo DE SIERVO, Author of the Judgment

Maria Rosaria FRUSCELLA, Registrar

Filed in the Court Registry on 24 October 2008.

The Director of the Registry

Signed: FRUSCELLA