

Italian Constitutional Court

Legal summary

Judgment No 210/2024

ECLI:IT:COST:2024:210

**THE AUTONOMOUS PROVINCE OF BOLZANO HAS LEGISLATIVE POWER OVER TRADE MATTERS;  
EU LAW PROHIBITS THE AUTOMATIC RENEWAL OF STREET PITCH PERMITS**

In Judgment No 210/2024, the **Constitutional Court rejected the questions of constitutionality concerning the law of the Autonomous Province of Bolzano, which provided for the 12-year renewal of street pitch permits** for food and drink operators providing counter service.

On the one hand, the Court held that, **following the 2001 constitutional reform, the Autonomous Province enjoys legislative competence over trade matters**. Therefore, in the event of conflict, the law of the Autonomous Province prevails over prior State law (in this case, the Province adopts a narrower definition of “street trade,” which excludes activities involving table service).

On the other hand, the 12-year renewal provided by the Province law merely implemented a provision of State law that itself violated a directly effective prohibition on automatic renewals under an EU Directive. **Consequently, the referring court’s challenge of the Province’s provision was inadmissible**. Instead of challenging the Province law, the referring court should have either disapplied the relevant State measure that mandated the renewal (potentially after referring a preliminary question to the Court of Justice of the EU) or raised a constitutional question regarding the State measure for breach of EU law.

**Main proceedings**

Several providers operated kiosks in the Autonomous Province of Bolzano under a street pitch permit which authorises the sale of food and drink in public areas from vehicles, kiosks, or movable stalls. When these providers applied to renew their permits, the Municipality of Bolzano extended them for three years. The permit holders challenged this decision before the Regional Administrative Court of Trentino-Alto Adige, arguing that the permits should have been renewed for twelve rather than three years.

Article 3(1)(v)(no 2) of Province of Bolzano Law No 12/2019<sup>1</sup> (the “**first challenged provision**”) defines counter service (*somministrazione*) in the context of street trading as entailing “the immediate consumption of the products concerned, excluding any table service”. Article 65 of the same law (the “**second challenged provision**”), which implements an identical provision of Decree-Law No 34/2020,<sup>2</sup> stipulates that “street trading pitch concessions expiring on 31 December 2020

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<sup>1</sup> Autonomous Province of Bolzano Law No 12/2019 (Commercial Code).

<sup>2</sup> Decree-Law No 34/2020 (Urgent measures on health, support for employment and the economy, as well as social policies related to the COVID-19 emergency).

[...] shall be renewed for a period of twelve years”. The question of whether the applicants were entitled to this twelve-year extension for their street trading pitch concessions turned on whether their activity qualified as “street trading” or whether the inclusion of table service made them ineligible.

The Regional Administrative Court upheld the challenge, noting that the applicants provided only counter service (without table service) and that, in any case, they were entitled to a twelve-year extension. The Municipality appealed this decision to the Supreme Administrative Court (the “**referring court**”), arguing that since the applicants held a public pitch permit with an authorisation to provide table service, the twelve-year extension reserved for “street trading” did not apply, and only a three-year extension was permitted.

However, the referring court questioned the constitutionality of the challenged provisions. The first challenged provision appeared to contradict the concept of “street trading” as defined by State law, thereby exceeding the Autonomous Province’s legislative competence as defined in the Special Statute of Trentino-Alto Adige (the “**Special Statute**”).<sup>3</sup> The second challenged provision, in turn, seemed to interfere with the State’s exclusive competence in matters relating to international preventive measures and the protection of competition, resulting in unequal treatment of similar situations across Italy and potentially infringing on the freedom to provide services within the European Union (EU).

As a result, the referring court stayed the proceedings and referred the matter to the Constitutional Court (the “**Court**”), alleging that the challenged provisions violated the Italian Constitution (IC).

## Complaints

The referring court argued that the challenged provisions of the provincial law violated both the Special Statute and the Constitution.

In particular, it contended that the definition of “counter service” in the first challenged provision was inconsistent with Legislative Decree No 114/1998, which defines “street trading.” Under the Special Statute, trade is a concurrent legislative competence shared between the Autonomous Province and the State. Consequently, a conflict between provincial and State law would render the provincial provision unconstitutional.

Regarding the second challenged provision – which grants a twelve-year extension only to “street trading pitch concessions” and excludes operators offering table service – the referring court identified issues of compatibility with four constitutional standards:

- **Article 117(2)(q) IC (State’s exclusive legislative competence in matters of international prevention).** The 12-year renewal stipulated by Decree-Law No 34/2020 was a measure

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<sup>3</sup> The Special Statute for Trentino-Alto Adige was adopted with Constitutional Law No 5/1948. The powers of the Autonomous Province of Bolzano were expanded in 1972, with Decree of the President of the Republic No 670/1972 (Approval of the consolidated text of constitutional laws concerning the Special Statute for Trentino-Alto Adige). Since 1972, the Autonomous Province of Bolzano has enjoyed more autonomy and wider legislative powers than ordinary Regions.

adopted to address the COVID-19 pandemic, a matter outside the competence of the Autonomous Province. Therefore, the carve-out of table service providers in the Province law was unlawful.

- **Article 117(2)(e) IC (State's exclusive legislative competence in matters of competition).** The Province measure contradicted State rules on the renewal of licenses.
- **Articles 3 (Principles of equality and non-discrimination), 41 (Freedom of private economic enterprise) and 97 (Impartiality of the public administration) IC.** The second challenged provision discriminated between operators in Bolzano and those in the rest of Italy, imposing an unjustifiable restriction on the economic freedom of the former.
- **Article 117(2)(a) IC (State's exclusive legislative competence in relations with the European Union).** The second challenged provision violated Articles 49 and 56 of the Treaty on the Functioning of the European Union (TFEU), concerning the freedom of establishment and the freedom to provide services in the EU.

### Decision of the Court

The Court held that the **first challenged provision does not violate the Special Statute**. It also ruled that **the referral concerning the second challenged provision was inadmissible**, as it failed to provide a comprehensive overview of the applicable law.

The Court first addressed the referring court's argument that the first provision violated the Special Statute. Legislative Decree No 114/1998, which defines street trading, does not exclude table service from its scope. The referring court had contended that the first challenged provision – which, by contrast, excludes table service from street trading – violated a fundamental principle of State law governing the matter. In this view, the Autonomous Province's adoption of the first challenged measure infringed the constraints set out in the Special Statute. Specifically, Article 9(3) of the Special Statute establishes that trade is an area of concurrent legislative competence shared between the Autonomous Province and the State, which the Autonomous Province can regulate "within the principles imposed by State law" (Article 5).

However, following a constitutional reform in 2001, all Regions acquired legislative powers over all subject matters that the Constitution does not expressly reserve to the State (as provided in Article 117(4) of the Italian Constitution). These residual powers – including in the area of trade – apply, a fortiori, to all Regions and Provinces governed by a Special Statute (such as the Autonomous Province of Bolzano), which generally enjoy enhanced autonomy.<sup>4</sup>

As a consequence of this reform, Legislative Decree No 114/1998 must give way to the legislation of Regions and Provinces governed by Special Statutes, and applies only to those which have not regulated trade with local laws. **The referral relating to the first challenged provision, therefore,**

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<sup>4</sup> Article 10 of Constitutional Law No 3/2001 (Amendments to Title V of Part II of the Constitution) provides that the new provisions of the Constitution that expand the legislative powers of the Regions – including the introduction of residual legislative powers under Article 117(4) IC – also apply to the five Special Statute Regions and the Autonomous Provinces of Trento and Bolzano, insofar as they extend their legislative powers. See also Constitutional Court, Judgments Nos 18/2012, 150/2011, 247/2010.

**was rejected because it was based on the erroneous notion that State law prevailed over the law of the Autonomous Province in matters of trade.**

As regards the second challenged provision, the referral was based on the argument that twelve-year renewals were granted to one category of service providers only, namely street traders not providing table service, thus excluding other providers. This provision of Province law expressly implements the rule on twelve-year renewals set out in State law, namely Article 181(4-*bis*) of Decree Law No 34/2020.

**The Court found that, with respect to this provision, the referring court failed to consider all applicable laws.** Specifically, EU Directive 2006/123<sup>5</sup> (the “**Services Directive**”) regulates the provision of services within the EU internal market and was transposed into Italian law by Legislative Decree No 59/2010,<sup>6</sup> which originally included street trading. However, a 2018 legislative change subsequently excluded street trading from the scope of Legislative Decree No 59/2010, and therefore from the application of the Services Directive.

This change was criticised in 2021 by the Italian Competition and Markets Authority, which called for reinstating the application of the competition principles enshrined in the Services Directive to street trading. The administrative courts shared this view, holding that the carve-out of street trading from the discipline of Legislative Decree No 59/2010 should be disapplied because it conflicts with the Services Directive.<sup>7</sup> This position also aligns with the case law of the Court of Justice of the EU, which has confirmed that retail trade in goods constitutes a service for the purposes of the Services Directive<sup>8</sup> and that the prohibition on the automatic renewal of authorisations under Article 12 of the Directive has direct effect.<sup>9</sup>

**In light of this regulatory framework, the referring court could have disapplied the State law providing for the twelve-year renewal of concessions** in the main proceedings, on the basis of the directly effective prohibition under Article 12 of the Services Directive.

**Alternatively, the referring court could have raised a constitutional question regarding the twelve-year renewal of concessions provided for in that provision of State law rather than in the provisions of Province law.** In this regard, the Court recalled the conditions that must be met to raise a constitutional question stemming from a conflict between Italian law and EU law: the domestic court must identify a breach of an EU law provision that has direct effect and a connection with interests or principles that have constitutional dimension (*tono costituzionale*).<sup>10</sup> In such a scenario, the domestic court may disapply the domestic norm (potentially after submitting a

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<sup>5</sup> Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market.

<sup>6</sup> Legislative Decree No 59/2010 on the implementation of directive 2006/123/CE on services in the internal market.

<sup>7</sup> For instance, Supreme Administrative Court, 7th division, Judgments Nos 4163/2024 and 9104/2023.

<sup>8</sup> CJEU, Grand Chamber, judgment of 30 January 2018 in Joined Cases C-360/15 and C-31/16, *Amersfoort and Appingedam*, paragraph 97.

<sup>9</sup> CJEU, Third Chamber, judgment of 20 April 2023 in Case C-348/22, *Autorità Garante della Concorrenza e del Mercato v Comune di Ginosa*.

<sup>10</sup> Constitutional Court, Judgment No 181/2024; see also Judgments Nos [15/2024](#), [44/2020](#), 11/2020 and [20/2019](#).

preliminary reference to the Court of Justice under Article 267 of the TFEU) or refer the matter to the Constitutional Court for a ruling on a violation of Article 117(1) IC.

The domestic court's power to raise a preliminary question to the Court of Justice or disapply domestic law is not constrained by the competence of the Constitutional Court.<sup>11</sup> Domestic courts are free to choose the appropriate course of action based on the specific features of the case. For its part, the Court can also refer a preliminary question to the Court of Justice when seised with a question of constitutionality if there are doubts about the interpretation of EU law that the Court of Justice can clarify. This ensures the uniform application of EU law, in line with Article 2 of the Treaty on European Union. The "community of courts" and their "dialogue" inspired by sincere cooperation promote the full implementation of the primacy of EU law and guarantee the proper interaction between the various national and EU legal systems.

Several remedies are available to ensure the full implementation of EU law, and these remedies are not mutually exclusive. Centralised constitutional review does not contradict the implementation of EU law by lower courts; rather, both mechanisms serve the same goal. The engagement of lower courts with the Constitutional Court, when the latter is called upon to issue a ruling with *erga omnes* effect, has proven particularly fruitful in the following situations: where the interpretation of the applicable law is uncertain; where the public administration continues to apply the contested provisions; where questions of interpretation may have systemic impacts extending beyond the specific individual case; or where a balance must be struck between constitutionally significant principles.<sup>12</sup>

For these reasons, **the referral relating to the second challenged provision was rejected as inadmissible, for failing to provide a complete account of the applicable law.**

Type of proceedings	Constitutional review by referral order
President of the Court	Augusto Antonio Barbera
Judge rapporteurs	Giovanni Pitruzzella
Composition of the Court	Augusto Antonio Barbera (President), Giulio Prosperetti, Giovanni Amoroso, Francesco Viganò, Luca Antonini, Stefano Petitti, Angelo Buscema, Emanuela Navarretta, Maria Rosaria San Giorgio, Filippo Patroni Griffi, Marco

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<sup>11</sup> CJEU, Grand Chamber, judgment of 22 June 2010 in Joined Cases C-188-10 e C-189/10, *Melki and Abdeli*; CJEU, Grand Chamber, judgment of 22 February 2022 in Case C-430/21, *RS*.

<sup>12</sup> Constitutional Court, Judgment No 181/2024.

	D'Alberti, Giovanni Pitruzzella, Antonella Sciarrone Alibrandi
Delivery of the judgment	19 December 2024
Challenged provisions	Articles 3(2) (more correctly: (1)) (v)(no 2) and 65 of Autonomous Province of Bolzano Law No 12 of 2 December 2019