Corte costituzionale

# JUDGMENT NO. 378 OF 2007

*Franco BILE, President*
*Paolo MADDALENA, Author of the Judgment*

# JUDGMENT No. 378 YEAR 2007

**In this case the Court considered various direct applications by the office of the Prime Minister against a law enacted by the autonomous province of Trento regulating environmental law matters (diversions of public waters for hydro-electricity, waste management and habitats protection). The Court struck down the legislation, insofar as not amended whilst the dispute was pending, on the grounds that: (a) it undermined the state's ability to enact uniform protection standards throughout the country, pursuant to its primary legislative competence over environmental law; (b) the provincial legislation purported to amend state legislation implementing Community directives; and c) relations with the EC are to be managed on a unitary level by the state and not by local self-governing bodies.**

THE CONSTITUTIONAL COURT

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

JUDGMENT

in proceedings concerning the constitutionality of Articles 8(14) and (15), 9(2)(3) and (11), 10 and 15(2) of Autonomous Province of Trento law No. 10 of 15 December 2004 (Provisions governing town planning, environmental protection, public waters, transport, fire services, public works and hunting) of Autonomous Province of Trento law No. 17 of 6 December 2005 (Urgent provisions governing concessions of large-scale diversions of public waters for hydro-electricity, amending Article 1-*bis*-I of provincial law No. 4 of 6 March 1998), and of Article 1(483-492) of law No. 266 of 23 December 2005 (Provisions governing the formulation of the annual and long-term

budget of the state – Finance law 2006), commenced pursuant to two appeals by the President of the Council of Ministers and one appeal by the Autonomous Province of Trento, served on 15 February 2005, 12 January and 27 February 2006, filed in the Court Registry on 22 February 2005, 18 January and 3 March 2006 and registered as No. 26 in the Register of Appeals 2005 and Nos. 1 and 40 in the Register of Appeals 2006.

*Considering* the entries of appearance by the Autonomous Province of Trento and the President of the Council of Ministers;

*having heard* the Judge Rapporteur Paolo Maddalena in the public hearing of 25 September 2007;

*having heard* the *Avvocato dello Stato* Giorgio D'Amato for the President of the Council of Ministers and Franco Mastragostino and Giandomenico Falcon, barristers, for the Autonomous Province of Trento.

*The facts of the case*

1. By the appeal served on 15 February 2005, filed on 22 February and registered as number 26 in the Register of Appeals 2005, the President of the Council of Ministers, represented and advised by the *Avvocatura Generale dello Stato*, raised the question of the constitutionality of Articles 8(14) and (15), 9(2), (3) and (11), 10 and 15(2) of Autonomous Province of Trento law No. 10 of 15 December 2004 (Provisions governing town planning, environmental protection, public waters, transport, fire services, public works and hunting).

More specifically, the President of the Council of Ministers challenged:

- Article 8(14) and (15) of provincial law No. 10 of 2004, with reference to Articles 8(5) and 9(10) of presidential decree No. 670 of 31 August 1972 (Approval of the consolidated text of constitutional laws concerning the special statute of Trentino-Alto Adige); and, should Article 10 of constitutional law No. 3 of 18 October 2001 (Reform of Title V of Part II of the Constitution) apply, with reference to Article 117(1) and (2)(s) of the Constitution; in both cases, with reference to Article 17 of legislative decree No. 36 of 13 January 2003 (Implementation of directive 1999/31/EC on the landfill of waste), and Articles 11, 12 and 15 of legislative decree No. 22 of 5 February

1997 (Implementation of directive 91/156/EEC on waste, directive 91/689/EEC on hazardous waste and directive 94/62/EC on packaging and packaging waste);

- Article 9(2), (3) and (11) and Article 10 of provincial law No. 10 of 2004 with reference to Article 117(1) of the Constitution; Article 8(15) and (16) of the Special Statute of Trentino-Alto Adige; and, should Article 10 of constitutional law No. 3 of 2001 apply, with reference to Article 117(2)(a) and (s) of the Constitution; in both of these last cases, with reference to Article 1(5) of law No. 349 of 8 July 1986 (Establishment of the Ministry for the Environment and provisions governing environmental damage), and Articles 3 *et seq* of presidential decree No. 357 of 8 September 1997 (Regulation implementing directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora), as subsequently amended;

- Article 15(2) of provincial law No. 10 of 2004, with reference to the principle of loyal cooperation, Article 107 of the Special Statute of Trentino-Alto Adige and 16 of legislative decree No. 79 of 16 March 1999 (Implementation of directive 96/92/EC concerning common rules for the internal market in electricity); with reference to Articles 9(9) of the Special Statute of Trentino-Alto Adige and, should Article 10 of constitutional law No. 3 of 2001 apply, with reference to Article 117(1), (2)(a) and (e) (taking into account also the judgment of the Court of Justice of the European Communities of 11 January 2005 in Case C-26/03) and (3) of the Constitution; in both of these last cases, with reference to Article 1-*bis* of presidential decree No. 235 of 26 March 1977 (Provisions implementing the Special Statute of Trentino-Alto Adige Region in energy matters), introduced by Article 11 of legislative decree No. 463 of 11 November 1999 (Provisions implementing the Special Statute of Trentino-Alto Adige Region in the areas of public water resources, hydraulic works and concessions for large-scale diversions for hydro-electricity, the production and distribution of electricity), as subsequently amended, and Article 12 of legislative decree No. 79 of 1999.

2. The contested Article 8(14) of Autonomous Province of Trento law No. 10 of 2004 replaced Article 75 of President of the Regional Council decree No. 1-41/Legisl of 26 January 1987 (Approval of the consolidated text of provincial laws governing the protection of the environment from pollution), which provides (in Article 75(1)) that “in

particularly urgent cases where it is necessary to protect environmental resources and public health, the Regional Council may order or authorise, also derogating from the plans provided for under Article 65, the upgrading or expansion of existing landfills for urban waste or the construction of new plant and landfills in the absence of other alternatives, or the recourse to other forms of disposal and recovery of urban waste. The Provincial Council may order or authorise on the same grounds the collection and transport of urban and equivalent waste to plant located outwith the Province, subject to agreement, if necessary, with the Region, the Autonomous Province and the interested public administrations".

2.1. Article 8(15) of Autonomous Province of Trento law No. 10 of 2004 inserts into Article 77 of the consolidated text of provincial laws governing the protection of the environment from pollution sub-sections 1-*bis*, 1-*ter* and 1-*quater*, providing for the measures to be adopted (and the related procedures) where, during the planning or implementation of public or private works, non-controlled landfills and waste stores are discovered in the works area, irrespective of whether the site is contaminated or not.

In particular, the new sub-section 1-*ter* of the amended Article 77 provides that operations for the safeguarding of the sites in question shall be exempt from the obligations contained in Articles 11, 12 and 15 of legislative decree No. 22 of 1997 concerning the waste register, the recording of incoming and outgoing waste and the transport of waste.

2.2. The applicant argues that the contested Article 8(14) introduces exceptions from mandatory obligations provided for in relation to landfills of waste by Article 17 of legislative decree No. 36 of 2003 (implementing directive 99/31/EC); that Article 8(15) introduces exceptions from mandatory obligations contained in Articles 11, 12 and 15 of legislative decree No. 22 of 1997 (implementing directives 91/156/EEC on waste, 91/689/EEC on hazardous waste and 94/62/EC on packaging and waste packaging); and that both of the provisions are *ultra vires* in view of the Province's legislative competence conferred pursuant to Articles 8(5) and 9(10) of the Special Statute (which confer on the Autonomous Province, respectively, primary legislative competence over town planning and shared competence over health and hygiene).

Taking into account Article 10 of constitutional law No. 3 of 2001, the applicant continues, the provisions in question are nevertheless unconstitutional, since they infringe the exclusive competence of the state over environmental protection (Article 117(2)(s) of the Constitution), whilst at the same time also violate the restrictions imposed by Community law, which were implemented by the provisions of legislative decrees Nos. 22 of 1997 and 36 of 2003 mentioned above.

3. The contested Article 9 of Autonomous Province of Trento law No. 10 of 2004 contains the provincial legislation for the "Implementation of Council directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora".

3.1. The President of the Council of Ministers also challenges Article 9(2) and (3) also of provincial law No. 10 of 2004, which lay down provisions that diverge from those enacted by the state legislature when implementing Community directive 92/43/EEC through presidential decree No. 357 of 1997, as amended by presidential decree No. 120 of 12 March 2003, containing "Regulations modifying and supplementing presidential decree No. 357 of 8 September 1997 concerning the implementation of directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora", and, in particular, grant the Regional Council the power to pass resolutions designating, independently, the sites of Community importance forming part of the European ecological network "natura 2000" as Special Conservation Areas (SCA), as well as Article 9(11), which provides that the relations with the European Commission regarding the assessment of the impact of plans or projects not directly related to or necessary for the management of an SCA site shall be managed directly by the President of the Province.

The applicant argues that these provisions breach Article 117(1) of the Constitution due to violation of Article 4 of directive 92/43/EC which "appears to presume the creation of a unitary draft list of the sites of Community importance of each Member State and of a unitary management thereof".

The state representative goes on to argue that Article 9(2), (3) and (11) of the contested provincial law in any case go beyond the limits of provincial competence laid down in Article 8(15) and (16) of the Special Statute (which grants the Autonomous

Province primary legislative competence, respectively, over hunting and fishing and Alpine agriculture and parks for the protection of fauna and flora).

Even taking into account Article 10 of constitutional law No. 3 of 2001, the *Avvocatura Generale* continues, the provisions in question are nonetheless unconstitutional insofar as they infringe the exclusive competence of the state over environmental protection (Article 117 (2)(s) of the Constitution) and responsibility for relations with the European Union (Article 117(2)(a) of the Constitution).

The conferral on the regional bodies of the powers of designation and notification described above are, according to the state representative's arguments, claimed to violate, in particular: Article 1(5) of law No. 349 of 1986, since they infringe the powers conferred upon the Minister for the Environment including responsibility for coordination with the Community institutions; and "Article 3 *et seq*" of presidential decree No. 357 of 1997, mentioned above, since they infringe the prerogative of the Minister for the Environment to designate sites considered as SCAs by decree adopted in consultation with the relevant region or province and to coordinate the activities of the regions and autonomous provinces in order to ensure their necessarily unitary representation with the European Union, in view of notification requirements which "apply to the national government authorities on a uniform basis under the terms of the directive, for the implementation of which the state alone is responsible".

3.2. The applicant also challenges Article 10 of provincial law No. 10 of 2004, which makes provision for the initial application of the rules laid down in Article 9, contesting it "*mutatis mutandis*" and arguing that it is unconstitutional as a "consequence" of the unconstitutionality of Article 9.

4. The contested Article 15(2) of Autonomous Province of Trento law No. 10 of 2004 introduces Article 1-*bis*-I (entitled "Provisions governing large-scale diversions of water for hydro-electricity") into provincial law No. 4 of 6 March 1988 (*sic*: 1998) (Provisions implementing presidential decree No. 235 of 26 March 1977. Establishment of a special provincial energy company, regulation of the use of electricity controlled by the Province pursuant to Article 13 of the Special Statute of Trentino-Alto Adige, criteria for the drafting of the distribution plan and amendments to provincial law No. 38 of 15 December 1980 and provincial law No. 7 of 13 July 1995), laying down

detailed provisions governing the award and renewal of concessions for the large-scale diversions in question.

4.1. The applicant first describes the complex legislative passage of the provisions in question, recalling:

- that, by conferring shared legislative competence on the Autonomous Province over the use of public waters, Article 9(9) of the Special Statute of Trentino-Alto Adige expressly precluded large-scale diversions for hydro-electricity;

- that Article 11 of legislative decree No. 463 of 1999 containing, pursuant to Article 107 of the Special Statute, provisions to implement the Statute in the area of public water resources and hydro-electric energy, however introduced Article 1-*bis* into presidential decree No. 235 of 1977, containing provisions implementing the Statute in matters relating to energy, which delegates (sub-section 1) to the two autonomous provinces, as of 1 January 2000, the exercise of the state's functions in the area of large-scale hydro-electric diversions and provides (sub-section 16) that the relevant legislation be enacted by the provinces in accordance with the principles underlying state legislation and with Community obligations;

- that the state legislation in this area is principally contained in legislative decree No. 79 of 1999 (implementing directive 96/92/EC concerning common rules for the internal market in electricity), as subsequently amended).

4.2. The state representative goes on to note:

- that the European Commission has instigated, pursuant to Article 226 of the Treaty, two infringement proceedings (No. 1999/4902 and No. 2002/2282) relating to Italian legislation governing the award of hydro-electricity concessions;

- that, in particular, these proceedings related to Article 12 of presidential decree (*sic:* legislative decree) No. 79 of 1999 which, all things being equal between applicants, provides that preference be given to the outgoing concession-holder, and Article 1-*bis* of presidential decree No. 235 of 1977, which provides that preference be given not only to the outgoing concession-holder, but also to bodies controlled by the Province or by local authority companies – provisions considered to have restrictive effects on competition and on the market;

- that, against this background, the joint Commission for the enactment of legislation implementing the Special Statute is examining, pursuant to Article 107 of the Statute, draft legislation which would reform the legislative powers of the Province over the award of hydro-electric concessions, also in view of Article 10 of constitutional law No. 3 of 2001.

4.3. The President of the Council of Ministers considers that since the contested Article 15(2) of provincial law No. 10 of 2004 – which lays down unilateral and systematic legislation in the area and provides that Article 1-*bis*(6)-(12) of presidential decree No. 235 of 1977 no longer apply to the award of hydro-electricity concessions – was adopted before the Joint Commission provided for under the Special Statute of Trentino-Alto Adige had made provision for the adoption of new legislation implementing the Statute and reforming provincial competences in this area, it violates the principle of loyal cooperation, Article 107 of the Statute and Article 16 of legislative decree No. 79 of 1999, which delegates the coordination between its general principles and the legal systems of the autonomous provinces to appropriate legislation implementing the Statute.

4.4. The applicant also argues that insofar as the contested provision covers the rules for selecting concession-holders for large-scale hydro-electricity diversions, it falls outwith the Province's competence under the Statute, as defined by Article 9(9) of the Statute, mentioned above.

Moreover, the provision cannot be justified by Article 10 of constitutional law No. 3 of 2001 due to the limit imposed by the exclusive competence of the state over competition law matters (Article 117(2)(e) of the Constitution).

4.5. With regard to the specific contents of the contested provision, the *Avvocatura Generale* argues that Article 1-*bis*-I(7)(8) and (9) of provincial law No. 4 of 1998, introduced by the contested Article 15(2) of provincial law No. 10 of 2004, infringe the exclusive competence of the state over competition law matters, since they provide for the possibility of the direct award of the management of large-scale diversions of water for hydro-electricity to public limited companies established by the Province and with a shareholding of at least 49% held by a private shareholder chosen according to tender, thereby brining about a situation of a less open sectoral market compared that envisaged

under state legislation (under which Article 12 of legislative decree No. 79 of 1999 lays down the fundamental principle), which requires that awards be made pursuant to tender procedures.

In relation to this point and taking into account the principles laid down in the ECJ judgment of 11 January 2005 in Case C-26/03 concerning direct awards, Article 1-*bis*-I(7), (8) and (9) also violate Article 117(1) of the Constitution, which requires the legislative authorities to respect Community law.

4.6. The state representative goes on to argue that the other sub-sections of Article 1-*bis*-I of provincial law No. 4 of 1998, introduced by the contested Article 15(2) of provincial law No. 10 of 2004, do not take into account the mandatory requirement to implement rules for the transfer of functions and, notwithstanding the points made above in relation to those sub-sections, also in cases involving shared competence over the "production, transport and distribution of energy", the provisions do not in any case respect the fundamental principles contained in state legislation, thereby violating Article 117(3) of the Constitution, as well as Article 1-*bis*(16) of presidential decree No. 235 of 1977.

In particular:

- Article 1-*bis*-I(2)(a) provides that the award of concessions for large-scale diversions for hydro-electricity may even have a duration shorter than the maximum length of thirty years, thereby breaching the fundamental principle of national legislation liberalising the sector contained in Article 12(3) of legislative decree No. 79 of 1999, implementing directive 96/92/EC, which sets the duration of such concessions at thirty years throughout the country;

- sub-sections 12, 13 and 14 of the same Article provide for and regulate the possibility for the Regional Council to grant renewals at its discretion (even without any requirement for tender), thereby precluding the application of the fundamental principle contained in Article 12(7) of legislative decree No. 79 of 1999 concerning extensions (at the simple request of the concession-holder) of expired concessions or those which will expire before 31 December 2010, in the absence of provisions to the contrary in the implementing legislation.

The Regional Council's discretion to award concession renewals for large-scale diversions of water for hydro-electricity pursuant to Article 1-*bis*-I(12)(13) and (14) of provincial law No. 4 of 1998, introduced by the contested Article 15(2) of provincial law No. 10 of 2004, is also claimed to infringe the exclusive state competence over relations with the European Union (Article 117(2)(a) of the Constitution), since it is a matter for the state, which holds sole responsibility with the European Union, to regulate in general terms the possibility of extending the concessions in question under the terms of agreements pending agreement with the European Commission in order to resolve the infringement proceedings commenced by the latter.

4.7. Following the filing of the appeal, provincial law No. 17 of 6 December 2005 (Urgent provisions governing concessions of large-scale diversions of public waters for hydro-electricity, amending Article 1-*bis*-I of provincial law No. 4 of 6 March 1998) was enacted, which amended the legislation introduced by the contested Article 15(2) of provincial law No. 10 of 2004: replacing sub-sections 1, 6 and 12, introducing sub-sections 1-*bis* to 1-*septies*, amending sub-sections 2(a),(l) and (m), 3, 4, 5, 13(d) and 15; and by repealing sub-sections 14 and 16.

As far as the present appeal is concerned, the following points are of significance:

- the replacement of Article 1-*bis*-I(1) of provincial law No. 4 of 1998 insofar as, amongst other things, the Autonomous Province asserts in the preamble to the above legislation that it is exercising the legislative competence provided for under Article 1-*bis* (16) of presidential decree No. 235 of 1977 (introduced by Article 11 of legislative decree No. 463 of 1999) and provides that sub-sections 7-11 and 12(iv) and (v) (and hence no longer sub-sections 6-12) of Article 1-*bis* of presidential decree No. 235 of 1977 shall no longer apply to the concessions in question;

- the amendments of the contested sub-sections 2(a) and 13(d);

- the replacement of the contested sub-section 12, which provides that the Provincial Council may order the renewal of concessions on the basis of the applications filed by the interested parties and in accordance with the requirements of sub-sections 1-*ter* to 1-*septies* and (13);

- the repeal of sub-section 14.

4.8. Again after the appeal was filed, Article 1(483) of law No. 266 of 23 December 2005 (Provisions governing the formulation of the annual and long-term budget of the state – Finance law 2006) was enacted, which entirely replaced Article 12(1) and (2) of legislative decree No. 79 of 1999 and repealed Article 12(3) and (5).

5. The Autonomous Province of Trento entered an appearance, submitting a written statement in which it argues that the appeal is inadmissible and groundless, "for the reasons which will be set out in a separate written statement during the course of proceedings".

6. On 20 January 2006 a joint request was filed by the parties to adjourn discussion of the appeal due to the enactment of Autonomous Province of Trento law No. 17 of 2005, containing new provisions governing the matters in question, and the challenge thereto (appeal No. 1 of 2006) by the President of the Council of Ministers.

Given the objective and subjective relations between the appeals, this Court therefore ordered the adjournment of the hearing to 2 May 2006 in order to enable the joint treatment of the questions.

7 Shortly before the public hearing of 2 May 2006 the parties filed written statements.

8. The President of the Council of Ministers filed a written statement in which it in essence restates the grounds of appeal regarding the contested Articles 8(14) and (15), 9(2), (3) and (11) and 10 of provincial law No. 10 of 2004.

With regard to the question of the legislation governing large-scale hydro-electricity concessions, covered by the contested Article 15(2) of provincial law No. 10 of 2004, the state representative also refers to the written statement filed during the related proceedings against provincial law No. 17 of 2005 (appeal No. 1 of 2006).

9. The Autonomous Province of Trento in turn filed a written statement, in which it submits its own arguments relating to the challenges raised against Articles 8(14) and (15), 9(2), (3) and (11) and 10 of provincial law No. 10 of 2004.

As regards the challenges raised against Article 15(2) of provincial law No. 10 of 2004, the Province argues that, since the provision was never applied (according to a declaration by the director of the Public Water Usage Service submitted together with the written statement) prior to its replacement by provincial law No. 17 of 2005, the

matter in dispute no longer subsists. As far as the merits of the question are concerned however, the respondent Autonomous Province also refers to the written statement filed during the related proceedings concerning appeal No. 1 of 2006.

9.1. Following a description of the legislative framework, the Autonomous Province of Trento presents its arguments separately with regard to the two groups of challenge, concerning respectively waste (Articles 8(14) and (15) of provincial law No. 10 of 2004) and the Special Conservation Areas (Article 9(2), (3) and (1) [*sic*: (11)] and Article 10 of the same law).

9.2. On the question of waste, the Province claims that the appeal is inadmissible, due to its generic formulation, and on the merits groundless.

As regards the challenges raised by the state with reference to Article 117 of the Constitution, the Province avers that they are inadmissible in general terms due to the state's failure to give reasons why this constitutional provision should apply to the Autonomous Provinces.

9.2.1. According to the respondent, the contested Article 8(14) – which provides that "in particularly urgent cases where it is necessary to protect environmental resources and public health, the Regional Council may order or authorise, also derogating from the plans provided for under Article 65, the upgrading or expansion of existing landfills for urban waste or the construction of new plant and landfills in the absence of other alternatives, or the recourse to other forms of disposal and recovery of urban waste" and "for the same reasons the Regional Council may order or authorise the collection and transport of urban and equivalent waste to plant located outwith the Province, subject to agreement, if necessary, with the Region, the Autonomous Province and the interested public administrations" – contemplates the possibility for derogations from the programmatic provisions governing the disposal of urban waste that are absolutely limited to exceptional cases of extreme urgency and which may therefore be classified as strategic choices.

This provision does not breach state legislation, but offers a safety valve within the system, a closure norm for the system of waste containment in order to confront individual and unpredictable cases with emergency instruments, yet always respecting the practice, which has been elevated to the status of principle in this area, of prior

agreement with the interested local government body in cases involving the disposal of waste outwith the Province.

9.2.2. The provisions contained in Article 8(15) of the contested provincial law No. 10 of 2004 are therefore, according to the Province, aimed at resolving a practical problem – namely the problem of the discovery, during excavations carried out during works construction, of residual materials.

The provincial law pursues the goal of enabling the disposal *in loco* of non-hazardous waste, without setting in motion complicated procedures during work in progress; essentially, it sets out the generic powers already granted to mayors in this area.

This provision does not violate Article 17 of legislative decree No. 36 of 2003, since it does not relate to a new form of disposal alternative to those governed by previous state and provincial legislation, nor to a new type of landfill, but only to an initiative to rehabilitate a polluted site, which is moreover subject to stringent conditions and accompanied by appropriate guarantees.

Neither moreover does it violate the principles set out in Articles 11, 12 and 15 of legislative decree No. 22 of 1997, from which the contested provincial legislation expressly exempts the rehabilitation procedures concerned, since the provisions of national legislation referred to concerning the recording and transport of waste in any case do not apply to the case before the court.

Essentially the provincial legislation does not have a substantive content, such as the exemption from an obligation contained in national legislation, but rather limits itself to confirming and taking note that this obligation does not subsist.

The Autonomous Province argues on this point that the legislation governing the recording of waste does not in fact apply, since waste is not produced, but simply discovered in excavation sites and, where it is not hazardous, it is securely stored *in loco*, and is not disposed of, removed or relocated. For the same reasons, national legislation governing the transport of waste does not apply, since in this specific case the waste is not in any way transported. Were this however to occur, the respondent Province argues, the transport activity would fall under national legislation, and the contested provincial provision would not interfere in any way with the former.

9.3. As far as the issue of Special Conservation Areas is concerned, the Autonomous Province of Trento claims, following a description of the legislative framework and the grounds of appeal, in the first place, that all challenges based on presidential decree No. 357 of 1997 are inadmissible.

9.3.1. The Province recalls on this point Constitutional Court judgment No. 425 of 1999, which rejected the appeal lodged against the above government regulation on the grounds that its enactment by the state, on a substitutive and pre-emptive basis due to the Province's inaction, did not infringe the Province's sphere of constitutional competence insofar as the power of the Autonomous Province directly to implement the Community directive in any case remained unchanged and that, in this case, this power was subject only to the limits imposed by national legislation since, beyond the confines of these limits, national legislation could not impose any limits on the Province's legislative powers.

The Province also recalls the provisions contained in Article 11(8) of law No. 11 of 4 February 2005 (General provisions governing the participation of Italy in the legislative process of the European Union and procedures for implementing Community obligations), which were inspired by the same principle of the reserve status of state regulations implementing Community directives in matters falling under the legislative competence of the regions and provinces.

According to the Province, the the state's challenges founded on presidential decree No. 357 of 1997 are not only inadmissible but also groundless, since these regulatory provisions are not binding on the provincial legislature on a constitutional level.

9.3.2. More specifically, the state's challenge relating – according to the Province – to the violation of the state's exclusive competence over the environment and the ecosystem, pursuant to Articles 3 *et seq* of presidential decree No. 357 of 1997, is argued to be inadmissible due to the generic nature of the grounds of appeal and the failure to illustrate the reasons for the alleged contrast between the state legislation and the contested provincial legislation.

9.3.3. With regard to the state's complaints averring the violation of directive 92/43/EC (Article 4) and law No. 349 of 1986 (Article 1(5)), the Autonomous Province of Trento argues in the first place that it is inadmissible, insofar as it was raised with

reference to Article 117(2)(a) and (s) of the Constitution. According to the Province, the invocation of these provisions is incorrect, since they do not refer to the Autonomous Province of Trento, and the appeal by the President of the Council of Ministers did not contain any reasons why these provisions should apply, with the result that it is inadmissible.

9.3.4. Moreover, these complaints are groundless on the merits.

9.3.5. As far as the violation of Article 4 of directive 92/43/EC is concerned, the question is irrelevant, since the reference contained therein to the Member State is neutral and cannot modify the constitutional or regional statute arrangements concerning competences, since for the purposes of Community law the internal criteria for the division of competences are not relevant.

9.3.6. The Autonomous Province of Trento goes on to recall Constitutional Court judgment No. 265 of 2003, which ruled inadmissible a challenge to a ministerial decree ordering the publication of Sites of Community Interest (SCI) due to the lack of interest to sue of the Province, "insofar as the decree did not preclude the additional exercise by the Provincial Council of the power to designate relevant sites […] pending the completion of Community procedures".

The Province asserts that "if when designating SCIs the state limits itself to adopting the regions' choices and notifying them to the Commission, it is not clear why the regions should not also be endowed with the power to designate sites as Special Conservation Areas, pursuant to Article 4(4) of the directive, which is a power essentially consisting in the exercise of a mandatory duty".

9.3.7. As far as the alleged violation of Article 117(2)(a) of the Constitution is concerned, the state's challenge is groundless for various reasons.

In the first place, it is groundless because the contested provisions do not in any sense regulate the state's relations with the European Union.

Moreover, again according to the Province, given the object of the contested provisions, there are by no means any requirements for unitary representation of the regions' choices with the Union.

The respondent observes in effect that a local government body's decision to disregard the negative conclusion of the impact study and to create a plan regardless,

adopting the appropriate compensatory measures, represents a special case which could affect a particular region at any given moment in time. For this reason, it is fully appropriate that the relations with the Commission be managed directly by the interested body, whilst "it would on the other hand be incongruous and cumbersome if the bodies with competence to take the decision had to communicate […] through an intermediary".

The Autonomous Province also notes that not even presidential decree No. 357 of 1997, which is inapplicable and non-binding, contains provisions which contrast with Article 9(11) of provincial law No. 10 of 2004, nor does it confer on the Minister any duty of communication with regard to cases falling under Article 6(4) of Community directive 92/43/EC.

9.3.8. The question is equally groundless if considered in the light of Article 1(5) or Article 5 of law No. 349 of 1986.

According to the Autonomous Province of Trento, Article 1(5) does not purport to confer on the Minister for the Environment the task of mediating between the European Union and the regions, but simply specifies the state authorities with competence where the state is responsible for implementing Community or international law obligations in environmental matters.

Article 5, concerning parks, does not have anything to do with the contested provisions.

9.3.9. The Province of Trento also argues that the challenges averring the violation of the provisions of the Statute (Article 8(15) and (16) of the Special Statute of Trentino-Alto Adige) are inadmissible on the grounds that the appeal is formulated too generically.

9.3.10. Finally, it also argues that the challenge to Article 10 of provincial law No. 10 of 2004 is inadmissible.

This provision, which the applicant challenges as a consequence of its challenge to Article 9 does not in fact have any relevance for the contested Article 9 (2), (3) and (11). On the contrary it sets out rules implementing the principles laid down in other sub-sections of Article 9, which are not challenged. There is therefore no consequential

relationship between the complaints and it is therefore impossible to make sense of the generic claims made in the appeal.

10. By appeal served on 12 January 2006, filed on 18 January and registered as No. 1 in the Register of Appeals 2006, the President of the Council of Ministers, represented and advised by the *Avvocatura Generale dello Stato*, also challenged Autonomous Province of Trento law No. 17 of 6 December 2005 (Urgent provisions governing concessions of large-scale diversions of public waters for hydro-electricity, amending Article 1-*bis*-I of provincial law No. 4 of 6 March 1998).

11. The President of the Council of Ministers argues, first, that the competence over large-scale diversions of water for hydro-electricity, initially precluded pursuant to Article 9(9) of the Special Statute, was subsequently delegated to the Autonomous Province of Trento pursuant to Article 1-*bis*(16)(ii) of presidential decree No. 235 of 1977 (implementing the Statute), subject to the limits imposed by the principles underlying state legislation and Community law obligations.

The applicant argues that this delegated competence was "in practice" subject to the same limits as that granted to the ordinary regions in this area under Article 117 of the Constitution, as amended by constitutional law No. 3 of 2001; therefore, since the ordinary regional authorities do not enjoy greater autonomy, and therefore since Article 10 of constitutional law No. 3 does not apply, provincial competence over hydro-electric diversions should be assessed in accordance with the Statute.

11.1. The state representative identifies the fundamental principles underlying state legislation in the area of hydro-electric concessions as those contained in Article 12 of legislative decree No. 79 of 1999 (implementing directive 96/92/EC concerning common rules for the internal market in electricity).

These provisions are claimed to be mandatory for local bodies both because they are an integral part of the liberalisation of the internal market in electricity (and therefore fall under competition law) and also because hydro-electricity concessions must be regulated uniformly because they concern rivers which cross several regions.

The *Avvocatura Generale* argues that these provisions essentially correspond to those laid down by Article 1-*bis* of presidential decree No. 235 of 1977. In particular, Article

1-*bis*(7) and (8) reflect the provisions contained in Article 12(2) of legislative decree No. 79 of 1999, whilst Article 1-*bis*(9), (10) and (11) correspond to sub-section 12(3).

The contested provincial law No. 17 of 2005 is therefore unconstitutional – insofar as Article 1(1) precludes the application of sub-sections 7-11 and Article 1-*bis*(12)(iii), (iv) and (v) of presidential decree No. 235 of 1977 and lays down different provisions in the area – on two grounds: first, because the Province thereby purports to amend unilaterally legislation which was adopted bilaterally, under the terms of the special procedure provided for under Article 107 of the Special Statute of Trentino-Alto Adige; secondly, because it violates the provisions of the Statute which are fundamental principles. And this is the case irrespective of whether competence has been delegated to the Statute or whether it lies with the Province pursuant to Article 10 of constitutional law No. 3 of 2001.

11.2. The President of the Council of Ministers then points out that also sub-sections 5 and 6 of legislative decree No. 79 of 1999 – which extend until 31 December 2010 the concessions which expire beforehand and provide that the public tender for the award of concessions shall be called no later than five years before the expiry – lay down fundamental principles in this area, since the use of a concession for a large-scale diversion entails significant business commitments and it is necessary to guarantee the same amount of time to parties interested in new concessions.

11.3. The applicant recalls the two infringement proceedings (No. 1999/4902 and No. 2002/2282, also referred to in the contested provincial law), commenced by the European Commission pursuant to Article 226 of the Treaty, concerning the rules for the award of hydro-electricity concessions in Italy, on account of the preference given to the outgoing concession-holder and, in Trentino-Alto Adige Region, to the electricity companies controlled by the Provinces or the local authorities. Moreover, "in order to respond to the objections" new provisions governing the matter were introduced into Article 1(483) *et seq* of law No. 266 of 2005.

This last legislation undoubtedly has the status of fundamental principle, since it is aimed at introducing generally applicable legislation which guarantees respect for the Community law limits throughout the country.

Provincial law No. 17 of 2005 is also claimed to violate this new state legislation.

11.4. With regard to the specific contents of the contested provincial law, the *Avvocatura Generale dello Stato* argues, in the first place, that the Province reserved to itself the right to verify whether there is an overriding public interest in a different use for the waters, which is either entirely or partially incompatible with their use for hydro-electricity.

This provision is claimed to be unconstitutional since "if the competence to make the evaluation is attributed to the Province, the relevant public interest is that of the Province, which does not take into account the fact that the use for hydro-electricity affects interests on a national level, as expressly stated in Article 117(3) of the Constitution".

Moreover, the *Avvocatura Generale* continues, "there is a public interest *also* in cases involving the direct use of public waters, *including* for hydroelectricity, by the owner authority through facilities directly controlled by it. Therefore, an interest of these *facilities* in the direct use of water also for purposes other than hydro-electricity would *ipso facto* render that interest prevalent".

"Such use would be permitted provided that the safety of the population and land downstream from the collection point, i.e. from the works which cause the flooding – a population which can only be that of the Province since it cannot confer upon itself powers which affect other areas – is guaranteed priority status".

According to the applicant, "the reservations under these conditions" would end up "amounting to a new violation of Community law similar to that already raised", which it would exacerbate, "rather than providing a remedy".

11.5. The *Avvocatura Generale* goes on to challenge Article 1(2) of the contested Province of Trento law No. 17 of 2005 on two grounds.

First, on the grounds that it is contradictory, since the provision refers to applications regulated under Article 1-*bis*(6) of presidential decree No. 235 of 1977, which is declared to be no longer applicable in Article 1(1) of the contested provincial law.

Second, on the grounds that it violates Article 12(6) of legislative decree No. 79 of 1999, as well as Articles 43 and 49 of the EC Treaty, since by setting the date for the submission of applications at 31 December 2005 it violates the rule, which is a fundamental principle in this area, that concessions be extended until 31 December

2010 in order to allow all interested companies the same amount of time in order to prepare their applications.

11.6. The state representative finally challenges the new Article 1-*bis*(12) of provincial law No. 4 of 1998 (introduced by Article 1(8) of the contested provincial law No. 17 of 2005) which provides, under its initial application and subject to certain conditions, for the renewal of concessions for large-scale diversions in existence at the time when the law entered into force.

The *Avvocatura Generale* argues that these provisions violate the fundamental principles laid down in Article 12 of legislative decree No. 79 of 1999 and in sub-sections 483 *et seq* of law No. 277 of 2005, as well as, first and foremost, Articles 43 and 49 of the EC Treaty.

The unconstitutionality of the provision is not precluded by the rule, contained in the last part of Article 1-*ter* and Article 1-*bis* of provincial law No. 4 of 1998 (introduced by Article 1(2) of the contested provincial law No. 17 of 2005), according to which "notwithstanding the provisions of the last sentence of sub-section 1 and subsection 13... applications" for renewal, "may be accepted only after the entry into force of the legislative decree mentioned in Article 15 of law No. 62 of 18 April 2005 (Provisions governing the implementation of obligations resulting from Italy's membership of the European Communities – Community law 2004), provided that this decree enact transitional provisions governing the extension or renewal without tender procedures of existing concessions", since "any transitional provisions concerning the extension or renewal of existing concessions enacted by the legislative decree issued pursuant to Article 15 of law 62/2006" (*sic*: 2005) "would have been replaced by the provincial legislation".

According to the state representative, the fact that the provisions of Article 4(1-*quinquies*)(*a*) of the 1998 provincial law (introduced by Article 1(2) of the contested provincial law No. 17 of 2005) stipulate that the Autonomous Province shall indicate, in the invitation for tender containing the list of concessions due to expire during the five year period, the applications submitted pursuant to Article 4(1-*ter*) (also introduced by Article 1(2) of the contested provincial law), which refers to applications for the

renewal of concessions, establishes above all that the legislation governing renewals is not transitional in nature, but is of general application.

12. The Autonomous Province of Trento entered an appearance with a written statement in which it claims that the appeal is inadmissible and groundless, "for the reasons which will be set out in separate written statement during the course of proceedings".

13. Shortly before the public hearing of 2 May 2006, the parties filed written statements containing arguments both with regard to provincial law No. 10 of 2004 (the object of appeal No. 26 of 2005) as well as provincial law No. 17 of 2005 (the object of appeal No. 1 of 2006).

14. In its written statement, the President of the Council of Ministers essentially restates and develops the arguments underlying its appeal.

In addition to these arguments, the *Avvocatura Generale* expresses a doubt over the constitutionality of the provision implementing the Statute (Article 1-*bis*(16) of presidential decree No. 235 of 1977) which delegates legislative functions in the area of large-scale hydro-electricity diversions to the Autonomous Province. This is because the Special Statute of Trentino-Alto Adige expressly (Article 9(9)) states that this area does not fall under provincial competence, and the implementing legislation cannot have the effect of amending the Statute.

15. In its written statement, the Autonomous Province of Trento argues first that the approval of provincial law No. 17 of 2005, amending Article 15(2) of provincial law No. 10 of 2004, had the effect of resolving the matter in dispute in the appeal (No. 26 of 2005) raised by the state against this previous provision.

"In any case", the Province argues, "the arguments made here are correspondingly valid also in relation to the first appeal".

15.1. Following a description of the evolution of the Statute's legislative framework in the area of large-scale diversions for hydro-electricity and the matters relating to the reasoned opinion of the European Commission that the preference given to outgoing concession-holders under Article 12 of legislative decree No. 79 of 1999 and to local authority companies controlled by the Province under Article 1-*bis* of presidential decree No. 235 of 1977 (introduced by legislative decree No. 463 of 1999,

implementing the Statute) is incompatible with Community law, the resistant Province claims that the state's challenges averring the violation by provincial law No. 17 of 2005 of law No. 266 of 2005 (Article 1(483-492)) are inadmissible.

The state legislation invoked as an interposed principle for constitutionality proceedings in which the Court has been seized directly was in fact enacted after the contested provincial legislation, which precludes at root the possibility of any irregularity in the latter. It could at most be argued that it is necessary to bring the provincial legislation into line with the new state legislation, before the time limit of six months provided for under legislative decree No. 266 of 1992 implementing the Statute.

15.2. The challenges are however groundless for various reasons.

The Province claims on this matter that the legislative competence exercised by itself subsists both under the terms of the competences attributed under the Statute as well as pursuant to the extension ordered by Article 10 of constitutional law No. 3 of 2001 of the ordinary arrangements provided for under Article 117(3) of the Constitution to energy matters.

The Province indeed claims that there is a logical defect in the appeal of the President of the Council of Ministers which, according to the Province, on the one hand argues that Article 10 of constitutional law No. 3 of 2001 (and the resulting growth in the Province's legislative competences) does not apply on the grounds that it has already been attributed shared legislative competence over energy, whilst on the other claims that the Province does not enjoy any legislative authority in the area of large-scale diversions for hydro-electricity.

For the Autonomous Province – which refers on this point judgments No. 383 of 2005 and No. 8 of 2004 of the Constitutional Court – there is by contrast no doubt that Article 10 does apply and it is not therefore possible for the state to rely on the provisions of the Statute where these are more restrictive for the local government body than those which apply to the ordinary regions.

Therefore, the challenges made by the state claiming a failure to comply with national legislation which does not have the status of fundamental principle are therefore inadmissible and groundless.

15.3. However, according to the Autonomous Province of Trento, only those principles of state law which are not incompatible with Community law are binding, and in other cases it is a matter for the local government body to implement Community law even where this departs from the provisions contained in state legislation.

15.3.1. In the case before the court, the non-compatibility "of the provisions contained in legislative decree No. 235 of 1977" with Community law is admitted by the applicant itself, which specifies in the appeal that "sub-sections 483 *et seq* of law No. 266 of 2006 […] were introduced in order to respond to the objections of the Commission".

It is hence not possible for the state to invoke this principle in these proceedings.

15.3.2. The same supervening law (No. 266 of 2005) is also claimed to conflict with Community law in this regard, and therefore cannot be averred as a principle in the proceedings in question.

Alongside its reference to its appeal (No. 40 of 2006) against law No. 266 of 2005, the Province also in fact argues that the provision for an extension of existing concessions (Article 1(485) of law No. 266 of 2005), is not only (unlawfully) excessively detailed, but also by no means attains the declared goal of protecting competition (pursuant to Article Article 117(2)(e) of the Constitution, invoked by the applicant), and indeed is in fact at odds with the principles of a free market guaranteeing competition.

15.4. On the other hand, for the Autonomous Province, Article 1-*bis*-I of provincial law, as amended by the contested provincial law No. 17 of 2005 is not unconstitutional, because it does not depart from from state legislation "except that part in which, when regulating the tender procedures between the outgoing concession-holder and all those who have submitted an application for the award, on expiry of the concession, it provides that on conclusion of the tender procedures the outgoing concession-holders or the bodies controlled by the province and local authority companies shall be given preference".

Essentially, by enacting the contested provision the Autonomous Province did not do anything other than expressly set aside the provisions of the legislation implementing the Statute with regard to the preferences incompatible with Community law. It is

moreover a merely declaratory provision, since the inapplicability of the above implementation of the Statute may be directly inferred from Community law.

15.5. According to the respondent Autonomous Province of Trento, the contested provincial law No. 17 of 2005 does not even contrast with the fundamental principles underlying state legislation in energy matters.

15.5.1. As far as the contested possibility of ten year extensions of existing concessions where accompanied by adequate modernisation programmes is concerned, the provincial legislation is no different from the possibility to grant extensions, again for ten years, provided for under Article 1(485) of law No. 266 of 2005. The only difference is that, under the state legislation, extensions are granted automatically in the presence of investments of an explicitly specified financial level, whilst the provincial law stipulates that the right to renewal is dependent on a prior re-examination and a new discretionary assessment of other public interests competing with that of the mere economic exploitation of water resources.

15.5.2. As regards the assertion (Article 1-*bis*-I(1) of provincial law No. 4 of 1998, as amended by provincial law No. 17 of 2005) that there is a overriding public interest in the reassignment or renewal of a concession for the use of public waters by the owner authority "through facilities directly controlled by it, provided that the safety of the population and land downstream from the collection point – i.e. from the works which cause the flooding – is guaranteed priority status", the Province claims that the said facilities are not those to which the preferences in breach of EC law refer and that these facilities do not have any interest that can be detached from the public interest as evaluated by the Province.

15.5.3. The Autonomous Province of Trento goes on to point out the obscure nature of the challenge made by the state that provincial law No. 17 of 2005 on the one hand stipulates that Article 1-*bis*(6) of presidential decree No. 235 of 1977 does not apply, whilst on the other hand making a reference to this very same provision.

The Province states that only Article 1-*bis*(7)-(11) of the decree were declared inapplicable, and therefore the meaning of the challenge is not clear.

15.5.4. Finally, as regards the complaint concerning the renewal of concessions to outgoing concession-holders, the Province submits that the challenges raised with

reference to provisions of state law which still have to be enacted (such as the legislative decree provided for under law No. 62 of 2006) are irrelevant and inadmissible and that the transitional nature of a provision clearly and expressly intended to apply only during the initial application of the law cannot be contested.

16. On 19 April 2006 a joint request was filed by the parties to adjourn the discussion of the application in view of the enactment of law No. 266 of 2005, containing (in Article 1(483-492)) new provisions governing the matters in question, and of the appeal against this legislation (appeal No. 40 of 2006) by the Autonomous Province of Trento.

Given the objective and subjective relations between the appeals, this Court therefore ordered the adjournment of the hearing of 10 October 2006 in order to enable the joint treatment of the questions concerned.

17. By appeal served on 27 February 2005, filed on 3 March and registered as number 40 in the Register of Appeals 2006, the Autonomous Province of Trento raised the question of the constitutionality of various provisions of law No. 266 of 23 December 2005 (Provisions governing the formulation of the annual and long-term budget of the state – Finance law 2006), including those contained in Article 1(483-492) concerning large-scale diversions of water for hydro-electricity.

17.1. Article 1(483-492) of law No. 266 of 2005 introduce detailed provisions governing concessions of large-scale diversions of water for hydro-electricity, laying down both immediately applicable transitional provisions as well as ruled intended to apply to “normal operations”.

17.2 The rules applying to normal operations include those governing public tenders (sub-section 483) as a general principle for the granting of concessions, as well as those concerning the transferability (along with the related assessment criteria, including only) of company subsidiaries with regard to the exercise of concessions (sub-sections 489 and 490).

17.3. On the other hand the rules enacted concerning the ten year extensions of existing concessions (sub-section 485) are intended to apply immediately.

This extension is enacted (under sub-section 485) in view of the “time-scale for the completion of the process of the liberalisation and European integration of the internal

market in electricity, and also in order to define common principles in competition matters and equal treatment in hydro-electricity production".

The extension is subject to the payment for four years, starting from 2006, of an additional uniform tariff calculated on the basis of the nominal installed electrical energy capacity, five sixths of which is allocated to the state and the remainder to the interested municipalities (sub-section 486).

In order to qualify for an extension, investments to modernise plant are also necessary (sub-section 485), provided that they satisfy the conditions (quantitative, qualitative and temporal) provided for under sub-section 487.

Sub-section 488 governs the procedures for submitting applications for extensions, and checks by the competent administrations as well as the effects (termination of the concession) of the failure to complete investments in modernisation.

17.4. Sub-sections 491 and 492 classify the preceding provisions as competition law rules implementing the Community law obligations of the state, and set the time limit (ninety days) before which the regions and autonomous provinces must bring their legislation into line with the new arrangements.

Against this background, sub-section 484 repeals Article 16 of legislative decree No. 79 of 1999 which, making provision in the area of large-scale hydro-electricity concessions, did not infringe the prerogatives contained in the statutes of the Autonomous Region of Valle d'Aosta and the Autonomous Provinces of Trento and Bolzano, delegating the necessary coordination to special legislative decrees implementing the Statutes.

18. The Autonomous Province of Trento – following a detailed presentation of the development of its own competences over water and having criticised the legislative technique used by the national Parliament in approving, in one single article sub-divided into hundreds of sub-sections, the entire budgetary law and incorporating systemic reforms into it, such as that before the court, which had moreover already been the object of significant disputes during the technical examination stage of the State-Regions Assembly – claims in the first place that, considered as a whole, the provisions in question are unconstitutional, arguing that they restrict its autonomy guaranteed under the Statute by infringing the Province's competences as set out in the presidential

decrees implementing the Statute Nos. 115 of 1973, 381 of 1974 and 235 of 1977 (as amended by legislative decree No. 463 of 1999, implementing the Statute), and also that they also violate, on different grounds, Articles 117(2)(e) and (3), and 118 of the Constitution.

18.1. The applicant also notes, as a preliminary matter, that the various challenges have been raised in view of a potential direct impact by Article 1(483-492) of law No. 266 of 2005 on the Province's autonomy.

The Autonomous Province of Trento points out that, notwithstanding the safeguard clause contained in Article 1(610) of law No. 266 of 2005 (which appears to guarantee the special arrangements for the autonomous regions and provinces), sub-section 484 expressly repeals Article 16 of legislative decree No. 79 of 1999, sub-section 491 unilaterally classifies the provisions contained in the Article as falling under the exclusive legislative competence of the state pursuant to Article 117(2)(e) of the Constitution and as the implementation of the Community law principles set out in the reasoned opinion of the European Commission given on 4 January 2004, and finally, that sub-section 492 sets a time limit of ninety days both for the regions as well as the autonomous provinces to bring their legislation into line with the provisions contained in sub-sections 483-491.

The appellant infers from the combined provisions of these sub-sections that the state legislation is intended to have binding effect and to apply also to the special autonomous regions and provinces.

The challenge is therefore made on this basis, with the rider that it “would lose its rationale should it be found that the state provisions, and in particular the extension of the concessions provided for therein, are not intended to apply within the territory of the Province”.

18.2. The Autonomous Province of Trento challenges the state legislation on a general basis, arguing that the state law purports to regulate a matter already governed by provisions implementing the Statute, which have priority status and over which competence is reserved, but does not comply with these.

Moreover, according to the applicant, it is also unconstitutional for the state to repeal by ordinary legislation a legal provision (such as that repealed by Article 16 of legislative decree No. 79 of 1999) which expressly refers to implementation legislation.

It is finally argued to be unconstitutional to impose (as is done expressly by Article 1(484) and (492) of law No. 266 of 2005) on the Autonomous Province obligations to bring its legislation into line before a time limit (ninety days) shorter than that (six months) provided for under legislative decree No. 266 of 1992 (legislation implementing the Statute, concerning the relationship between state laws, regional laws and provincial laws).

18.3. The applicant then raises specific challenges against the extension of existing concessions provided for under sub-section 485.

18.3.1. First, the extension is claimed to violate Article 1-*bis* of presidential decree No. 235 of 1977, introduced by legislative decree No. 463 of 1999, which states the principle that on expiry of the concession a new concession shall be awarded under tender procedures, whilst also recognising that the local government body has the right to consider the existence of an overriding public interest in a different use of the waters.

18.3.2. Secondly, since in the absence of an overriding interest in a different use, the extension would prevent the granting of a new concession on financially more advantageous conditions compared to the previous conditions, it would infringe the financial autonomy of the Autonomous Province.

18.3.3 Thirdly, the applicant Province of Trento challenges the consistency of the extension introduced with the constitutional requirement to uphold competition, which the national Parliament invokes as a basis for the contested provisions.

According to the applicant, it is even "provocative" for the state to invoke Article 117(2)(e) of the Constitution in order to introduce legislation, such as that providing for extensions, which runs entirely contrary to the creation of competition markets and Community liberalisation policies.

The introduction of extensions to relations with current concession-holders occurred, according to the applicant, not in order to protect competition in the economic sector concerned, but rather as compensation to the outgoing concession-holders for the cancellation of the preference given to them under Article 12 of legislative decree No.

79 of 1999, a provision repealed by the state legislature following the reasoned opinion that it did not comply with Community law given by the European Commission on 4 January 2004.

In the case of Trentino-Alto Adige – within which Article 1-*bis* of presidential decree No. 235 of 1977 (introduced by legislative decree No. 463 of 1999 implementing the provisions of Article 16 of legislative decree No. 79 of 1999) provided not only that preference be given to outgoing concession-holders but also to local authority companies – this extension, again according to the applicant, operates only in favour of outgoing concession-holders, and would prejudice the "legitimate expectations of the local authorities to be able to take over the management, if not under a preference regime – a possibility which has also been granted to them – then at the very least under competitive tender procedures duly commenced".

The Autonomous Province of Trento then recalls that the extension provided for under Article 1(485) of law No. 266 of 2005 interferes with the tender procedures already initiated by the applicant on 31 December 2005 pursuant to provincial law No. 17 of 2005 (in turn challenged by the state in appeal No. 1 of 2006), with reference to existing concessions in Trentino-Alto Adige (all expiring on 31 December 2010).

The extension of concessions until 31 December 2020 would essentially render the procedures initiated useless and would ultimately have the only goal of upholding the interests of outgoing concession-holders.

18.3.4. The extension is also challenged by the Autonomous Province of Trento on the grounds of the conditions associated with it.

The applicant argues that it is entirely arbitrary to associate the extension with initiatives to modernise the plant which had already been carried out ("clearly within the financial context of the previous concession") at the time when the law entered into force (and when the extension introduced became operational).

It is also claimed to be unconstitutional on the grounds that no role was attributed to the Autonomous Province in the assessment of the suitability of the initiatives still to be carried out in order to modernise and improve the energy yield and environmental performance of the plant, even though it is vested with significant competences in this area.

18.3.5. The Autonomous Province of Trento goes on to argue that sub-section 488, which governs the procedures for submitting applications for extensions and those for checks by the competent administrations, is unconstitutional.

In particular, the provision violates Article 1-*bis* of presidential decree No. 235 of 1977, which devolves to provincial law, in accordance with the principles underlying state legislation and with Community law obligations, matters concerning the concession of large-scale diversions for hydro-electricity, as well as Articles 2 e 4 of legislative decree No. 266 of 1992.

18.3.6. The applicant then makes specific submissions concerning the provision (in sub-section 486) for a supplementary four-year fee from concession-holders who benefit from the extension.

First, the Province of Trento specifies that, pursuant to presidential decree No. 115 of 1973 (as amended by legislative decree No. 463 of 1999), public water resources were entirely transferred under its own legislative and administrative authority and that, pursuant to Article 1-*bis* of presidential decree No. 235 of 1977 (as amended by legislative decree No. 463 of 1999), competence over fees for concessions for large-scale diversions for hydro-electricity was delegated to it.

Secondly, the applicant argues that this delegation was rendered moot by the provision for shared legislation power over energy matters, pursuant to Article 117(3) of the Constitution and Article 10 of constitutional law No. 3 of 2001, and that within this new legislative context there is no doubt that it is entitled to receive the entire proceeds from fees relating to the public water resources transferred.

Article 1(486) of law No. 266 of 2005 however provides, in return for the unlawful extension granted to outgoing concession-holders, for a single supplementary fee in favour of the state (five sixths) and the interested municipalities (the residual sixth).

This provision therefore violates the Province's financial autonomy and, in particular, Article 1-*bis*, last sub-section, of presidential decree No. 235 of 1977, according to which “the proceeds deriving from the use of public waters, including the state fees for concessions of large-scale diversions for hydro-electricity, shall be allocated to the province with territorial competence”.

18.4. Finally, the applicant challenges Article 1(491) of law No. 266 of 2005, insofar as it purports to classify the entire article in question (though in reality, it more correctly refers only to sub-sections 483-490) as provisions under the exclusive competence of the state pursuant to Article 117(2)(e) of the Constitution, and which implement the Community law principles set out in the reasoned opinion of the European Commission of 4 January 2004.

Irrespective of the points recalled above concerning the division of legislative competence in this area, the Autonomous Province of Trento challenges both the "clear" incompatibility of the provisions in question with the principles of Community law mentioned as well as the state's claim to be able to "classify unilaterally" the provisions, since their nature is an objective question of fact subject to review and verification by the Constitutional Court, and does not result from a unilateral choice by the state.

19. The President of the Council of Ministers, represented and advised by the *Avvocatura Generale dello Stato*, entered an appearance claiming that the appeal was inadmissible and groundless since the contested provisions did not apply to, or in any case did not infringe the competences of, the applicant autonomous province.

19.1. The state representative recalls in this regard Article 1(610) of law No. 266 of 2005, according to which "the provisions of the present law shall apply to the regions governed by special statute and the autonomous provinces of Trento and Bolzano insofar as compatible with their respective statutes". It argues that the combined effect of this provision and that laid down in sub-section 492, which sets the time limit for the autonomous provinces to bring their legislation into line with the new state legislation at ninety days, should be read as a rule that "in the event that any of the provisions set out in sub-sections 483-492 are applicable, including as fundamental principles, to the autonomous regions and provinces without any need for implementation norms insofar as already compatible with the statutes … a deadline is set for the autonomous regions and provinces" to ensure "the harmonisation of their own legal systems".

Essentially, sub-section 610, which refers to Article 1 as a whole, and therefore to provisions extremely different from one another, amounts to a general closure rule as against the specific rule contained in sub-section 492; this means that the former precludes the occurrence of any real inconsistency between the state legislation and the

regional/provincial statutes, whilst the latter refers to situations in which state legislation governing large-scale diversions for hydro-electricity is directly applicable within a province.

20. In a single written statement submitted shortly before the hearing 10 October 2006, the President of the Council of Ministers set out detailed arguments regarding appeals Nos. 1 and 40 of 2006, emphasising the close connection *ratione materiae* of some of the questions raised in them.

21. With reference to appeal No. 1 of 2006, the state representative emphasises that in its submissions the Autonomous Province of Trento has not clearly indicated on which source it grounds the power exercised and in dispute.

21.1. Since the dispute concerns the legitimacy of legislative powers, the *Avvocatura Generale* considers that is superfluous for the Autonomous Province to rely on provisions relating to administrative powers.

21.2. The state representative then goes on to dispute that the provision contained in Article 1-*bis* of presidential decree No. 235 of 1977 (as amended by legislative decree No. 463 of 1999) may be effectively invoked in order to resolve the dispute, which is however referred to by the Province of Trento.

Since the decree in question is presidential (and now legislative) implementing the Statute and issued pursuant to Article 107 of the Special Statute, it cannot make any amendments to the Statute itself, which expressly (Article 9(9)) precludes any legislative power of the autonomous provinces over large-scale diversions for hydro-electricity, since the amendments concerned must first necessarily be subject to the different procedure provided for under Article 103 of the Statute, or by enactment of a law amending the Constitution.

In order to avoid any doubts as to its constitutionality therefore, the provision contained in Article 1-*bis* must be interpreted as being merely a supplement, and not an amendment, to the Statute.

In this context, according to the President of the Council of Ministers, the principles underlying state legislation, which are binding on the delegated legislative powers of the province in the area of large-scale diversions for hydro-electricity, should be interpreted

broadly and, in any case, more broadly than the mere fundamental principles within that particular area of law.

Regardless of whether the above position is adopted or the different view which considers the principles contained in Article 1-*bis* of presidential decree No. 235 of 1977 (as amended by legislative decree No. 463 of 1999) to be fundamental principles for the purposes of Article 117(3) of the Constitution, according to the *Avvocatura Generale* the autonomous body's competence under the Statute would be no broader than that of the ordinary regions; this means that the provision implementing the Statute is irrelevant for the purposes of this dispute, which must by contrast be resolved in the light of the division of competences set out in Article 117 of the Constitution.

21.3. Having thus identified the legislative background against which the question is to be considered, the President of the Council of Ministers challenges the arguments of the Autonomous Province of Trento where it claims that it enacted provincial law No. 17 of 2005 in order to circumvent both the incompatibility with Community law (ascertained by the Commission of the European Communities) of the legislative principles governing state hydro-electricity concessions, as well as the inertia on the part of the organs of state on this issue.

The state representative argues that no provision or principle of Community law may have the effect of transferring competence away from national bodies, nor can any inertia on the part of the state legitimise a non-existent substitutive power for the local government body.

21.4. The *Avvocatura Generale* also challenges the view that any incompatibility between a principle of state law and Community law authorises a region or province to set aside the state law.

This view, which according to the state representative was essentially that adopted by the Province of Trento through its disputed legislative activity, is, again according to the *Avvocatura Generale*, mistaken. This is because even though the state legislation is inapplicable in legal relations concerning Community law, it nevertheless remains capable of producing effects under internal law.

Moreover, the *Avvocatura Generale* continues, even if it could be found that principles of state law incompatible with Community law become entirely ineffective,

this would not nevertheless enable the regions or provinces to pass legislation at odds with it. This is because the absence of principles would open up a legislative *lacuna*, giving rise to the suspension of the legislative powers of the local government body, which could not be exercised other than in accordance with the fundamental principles of state law.

According to the President of the Council of Ministers therefore, even "accepting the premise adopted by the Province, its law would be unconstitutional due to the absence of fundamental principles".

22. The same argument is made by the state representative with reference to appeal No. 40 of 2006, filed by the Autonomous Province of Trento against Article 1(483-492), of law No. 266 of 2005.

22.1. The *Avvocatura Generale* argues in fact that if these provisions – amending the previous fundamental principles in this area, contained in Article 12 of legislative decree No. 79 of 1999 – were to be declared unconstitutional, this would result in the unconstitutionality of provincial law No. 17 of 2005 due to the absence of fundamental principles both with reference to Article 1-*bis* of presidential decree No. 235 of 1977 as well as with reference to Article 117(3) of the Constitution.

22.2. The state representative then goes on to discuss the various grounds of appeal of the Autonomous Province of Trento, both restating its arguments in response already submitted in the entry of appearance and also raising specific and new exceptions to them.

22.2.1. In particular, the *Avvocatura Generale* argues that the contested "unilateral classification" of the provisions contested by the Autonomous Province as provisions within the exclusive legislative competence of the state, pursuant to Article 117(2)(e) of the Constitution, only expresses the state's conviction on this issue, and that it is therefore a classification devoid of binding or mandatory force.

22.2.2. The state representative argues however that the contested provisions governing tenders for the award of concessions do in fact fall under the area of competition law as indicated.

22.2.3. Moreover, the provision contained in the contested Article 1(492) of law No. 266 of 2005 does not infringe the Province's competences, since "the time limit of

ninety days" set in order to bring provincial legislation into line with the new principles of state law "has a merely expeditive nature. This is proven by the fact that, even though it was not complied with, nothing happened".

22.2.4. Neither, according to the *Avvocatura Generale*, does the repeal of Article 16 of legislative decree No. 79 of 1999, provided for under sub-section 484, infringe provincial competences since this repeal does not give rise to any infringement of the prerogatives guaranteed under the Statute to the Province, which are in fact reasserted in sub-section 492.

22.2.5. The President of the Council of Ministers also points out that the Autonomous Province cannot at the same time claim both scope for autonomy under the Statute and also the application of Article 10 of constitutional law No. 3 of 2001, nor may it infer legislative powers from the provisions which govern administrative functions. It also points out that the Province is required to comply with the fundamental principles laid down in state legislation both with reference to Article 1-*bis* of presidential decree No. 235 of 1977 as well as Article 117(3) of the Constitution.

22.2.5.1. Once it has been found, the state representative argues, that the contested provisions concerning tenders fall under the area of competition law, the Province's grounds of appeal would lose their force, since that matter falls under the exclusive legislative competence of the state and Article 9(9) of the Special Statute expressly precludes provincial competence over large-scale diversions for hydro-electricity.

22.2.5.2. The state competences provided for under Article 1(483)(a)(ii) of law No. 266 of 2005 may also be regarded as falling under competition law, as well as the principle of subsidiarity, since they concern activities which have an impact on the whole national internal market for energy.

22.2.6. The *Avvocatura Generale* also argues that the extension provided for under sub-section 485 is of a transitional nature and was introduced "in view of the time-scale for the completion of the process of liberalisation". Even if this provision "could not be regarded as being aimed at competition law, it would certainly constitute a fundamental principle since it is aimed at the protection of the market, which is by definition national".

For the same reasons sub-section 487, which is closely related to sub-section 485 and sub-section 488 (self-certification by the concession-holder of the level of investments made, in progress or authorised), are claimed to be unconstitutional. In particular, sub-section 488 falls entirely beyond the ambit of provincial competences.

22.2.7. Neither, according to the state representative, does the introduction of a supplementary fee provided for under sub-section 486 infringe the competence of the Autonomous Province of Trento. “By virtue of its supplementary status”, it does not in fact have any impact “on the fees which have been allocated to the Province”.

22.2.8. Finally, the provision (sub-section 489) regarding the transferability of company subsidiaries also falls under the area of competition law and constitutes a fundamental principle. Moreover, according to the *Avvocatura Generale*, it could also be brought under exclusive state competence over private law (Article 117(2)(l) of the Constitution).

22.3. The President of the Council of Ministers concludes, requesting the Court to accept appeal No. 1 of 2006, filed by it against Province of Trento law No. 17 of 2005, and to dismiss appeal No. 40 of 2006, filed by the Province of Trento against Article 1(483-492) of law No. 266 of 2005.

23. In two separate written statements filed shortly before the hearing of 10 October 2006 the Autonomous Province of Trento responded to the written statement of the President of the Council of Ministers filed for the hearing of 2 May 2006 in proceedings relating to appeal No. 1 of 2006 and the entry of appearance by the latter in proceedings concerning appeal No. 40 of 2006.

24. With regard to appeal No. 1 of 2006 (but elaborating arguments also relating to provincial law No. 10 of 2004, at issue in the separate appeal No. 26 of 2005) the Autonomous Province of Trento responds to the written statement of the *Avvocatura Generale*, rebutting the state's assertion that it has competence, including legislative competence, over large-scale diversions for hydro-electricity.

24.1. The Province disputes, in the first place, that provincial laws Nos. 10 of 2004 and 17 of 2005 breach Community law, as averred by the President of the Council of Ministers.

The Autonomous Province by contrast claims that in its own provincial legislation it implemented precisely those principles of Community law which the state openly violated not only through the legislation assessed by the European Commission in its reasoned opinion, but also the provisions inserted into financial law No. 266 of 2005 (Article 1(483-492)).

24.2. According to the Province, the need to amend provincial legislation in line with Community law, the provisions implementing the Statute (the purpose of which is to provide an evolving interpretation of the Special Statute) and Article 117(3) of the Constitution, applicable pursuant to the provision laid down in Article 10 of constitutional law No. 3 of 2001 provide the legal basis for the competence of the provincial laws contested by the state.

24.3. The Province goes on to dispute the claim that the "new Article 1-*bis*(12) of the provincial law" (*sic*: Article 1(12) of Province of Trento law No. 17 of 2005, which replaces Article 1-*bis*-I(7) of provincial law No. 4 of 1998), which provides for the possibility of the renewal of concessions for large-scale diversions of public waters to outgoing concession-holders for a maximum period of ten years, where particular conditions are satisfied (to be assessed by the Provincial Council), breaches Community law.

There is no breach of Community law, according to the Province, because the provision is transitional and since sub-section 15 (again of Article 1-*bis*-I of provincial law No. 4 of 1998) associates the time limit for renewal with any shorter time limit for extensions or renewals of existing concessions provided for under state legislation, where the latter time limits have been altered after the entry into force of the provincial law.

The Province notes in this regard that, precisely in law No. 266 of 2005, the state provided for a ten year extension of existing concessions and asserts that "it would not appear that the Government may take court action, through the *Avvocatura Generale*, accusing the Province of legislative choices which became stuck in the rut of state legislation, but which were in fact made in an attempt to improve the latter".

The Province again points to the "schizophrenic" nature of a state which challenges "due to the alleged violation of Community legislation a provincial law which brings

provincial law into line with a state law contested by the Commission, when the Government itself" had "made further violations of Community objectives, enacting new legislation in breach thereof which it imposed through the finance law".

In its own words, the Autonomous Province of Trento had "intended to take urgent measures, expressly suspending provisions of the old transfer decree manifestly in breach of Community law (as is clear from the Commission's findings), and therefore already *per se* inapplicable, pending the approval of new implementing legislation, and therefore adopting a stance which was more than justified".

24.4. The Province finally disputes the obscure nature of the state's appeal insofar as it relates to Article 1-*bis*-I (*sic*: Article 1(1) of provincial law No. 17 of 2005, which replaces Article 1-*bis*-I(1) of provincial law No. 4 of 1998).

The provision in question is moreover entirely lawful, according to the Autonomous Province of Trento, because it limits itself "to protecting the interest in the safety of the population and the land located downstream against the priority of the exploitation rights of the owner, according to a hierarchy of values which nobody" may "dispute, at the summit of which ...stands the safety of the local community".

25. With regard to appeal No. 40 of 2006, the Autonomous Province of Trento responds to the entry of appearance by the President of the Council of Ministers, arguing in the first place that the claim advanced by the latter that the contested provisions do not refer to the Autonomous Province by virtue of the safeguard clause contained in Article 1(610) of law No. 266 of 2005 is tantamount to the acceptance that they are incompatible with the Province's rights under the Special Statute.

As regards the question as to whether or not the provisions contained in Article 1(483-492) of law No. 266 of 2005 apply to autonomous local government bodies, the Province of Trento essentially restates the arguments contained in the appeal, according to which the express repeal of Article 16 of legislative decree No. 79 of 1999 (provided for under sub-section 484) and the obligation to bring provincial legislation into line with state law (provided for under sub-section 492) preclude the "adaptive" interpretation, which responds to the Community's objections, proposed by the *Avvocatura Generale*.

Moreover, according to the Autonomous Province, even were this interpretative view accepted, the appeal would in any case have to be allowed with regard to sub-sections 484 and 492, mentioned above, at the very least in accordance with the principle of legal certainty.

26. Shortly before the hearing of 10 October 2006 the parties filed a joint request to to adjourn proceedings in question on the grounds that procedures for the adoption of new provisions implementing the Statute in the area of large-scale hydro-electricity diversions were in their final stages.

This Court therefore ordered the adjournment of proceedings to the hearing of 25 September 2007.

27. Shortly before the public hearing of 25 September 2007, the Autonomous Province of Trento filed three separate written statements.

27.1. The first written statement refers to appeal No. 26 of 2005, limited to the issues concerning Article 8(14) and (15), Article 9(2), (3) and (11), and Article 10 of provincial law No. 10 of 2004.

27.2. The second written statement refers to appeal No. 1 of 2006 and contains arguments relating to the overall question of concessions for large-scale diversions of water for hydro-electricity (and therefore also with reference to appeal No. 26 of 2005, insofar as it relates to Article 15(2) of provincial law No. 10 of 2004).

27.3. Finally, the third written statement concerns appeal No. 40 of 2006, again related, *ratione materiae*, to the question of large-scale diversions.

28. In the first written statement, the Province of Trento responds to the written statement of the *Avvocatura dello Stato* of 13 April 2006, essentially restating the arguments already developed in previous submissions.

28.1. As regards the question concerning Article 9(2), (3) and (11) and Article 10 of provincial law No. 10 of 2004, the Province first notes that the contested provisions were first amended (albeit on points immaterial for the challenge made by the President of the Council of Ministers) by Article 55(1) and (2) of provincial law No. 11 of 29 November 2006 (Provisions governing the formulation of the annual budget 2007 and long-term budget of the Autonomous Province of Trento – Finance Law 2007), and subsequently repealed by Article 115(1)(qq) of provincial law No. 11 of 23 May 2007

(Administration of woodland, mountains, watercourses and protected areas), starting from the dates mentioned in the regulations provided for under the above law.

The Province points out that the repeal has not yet taken effect, since the regulations in question have not yet been adopted, and that in any case Articles 37 and 39 of provincial law No. 11 of 2007 (not however contested by the President of the Council of Ministers) essentially mirror the contested provisions of provincial law No. 10 of 2004 in substantive terms.

28.2. On the merits, the Province of Trento claims that the arguments made by the *Avvocatura dello Stato* in its written statement regarding Special Protection Areas (SPA) are inadmissible.

The Province argues, more specifically, that the original appeal by the Government related exclusively to the provincial legislation regarding special conservation areas (SCA) contained in the contested Article 9(2) and (3) of provincial law No. 10 of 2004, and not the SPA, governed by Article 9(4).

The Province invokes on this point Constitutional Court judgments No. 98 of 2007, No. 246 of 2006 and No. 113 of 2003, which held that supplements or extensions to the grounds of appeal in written statements filed at later stages during proceedings are inadmissible.

It also disputes the claim that the provisions contained in Article 9(4) of provincial law No. 10 of 2004 in any way breach presidential decree No. 357 of 1997.

29. In its second written statement, the Autonomous Province of Trento reconstructs the complex legislative history, acknowledging the successive legislative amendments in this area.

29.1. The Province recalls in the first place legislative decree No. 289 of 7 November 2006 (Provisions to implement the Special Statute of the autonomous region of Trentino-Alto Adige/Südtirol, amending presidential decree No. 235 of 26 March 1977 concerning the concession of large-scale diversions), which replaced Article 1-*bis* of presidential decree No. 235 of 1977, providing that “it shall be a matter for the autonomous provinces of Trento and Bolzano, for their respective territories, according to the provisions of Article 01 and in accordance with Community law obligations, to exercise the functions formerly exercised by the state in the area of large-scale

diversions for hydro-electricity" (sub-section 1) and that "with regard to the provisions contained in sub-section 1, a provincial law shall, in accordance with international law obligations, with Article 117(2) of the Constitution, and with the fundamental principles underlying state legislation, make provision governing large-scale diversions of public waters for hydro-electricity" (sub-section 2).

The Province goes on to note that legislative decree No. 289 repealed Article 1-*bis*(6)-(12) of presidential decree No. 235 of 1977, as amended by legislative decree No. 463 of 1999, insofar as they provided that the preferential treatment of outgoing concession-holders, local authority firms or companies and companies owned or controlled by the Province, and that this should result in the closure of infringement proceedings in progress before the Community authorities.

29.2. The Province of Trento also refers to Article 6(7-*ter*) of decree-law 28 No. 300 of December 2006 (Extension of the time limits provided for under various legislative and financial provisions), introduced by conversion law No. 17 of 26 February 2007, which precluded the application of the extension to the concessions for large-scale diversions for hydro-electricity mentioned in Article 1(485) of law No. 266 of 2005 within the territories of the Autonomous Provinces of Trento and Bolzano, and provided that the concessions mentioned in Article 1-*bis*(15) of presidential decree No. 235 of 1977 shall expire on 31 December 2010, and that any concessions other than those mentioned under sub-section 15 shall expire on the dates specified in the relevant measures granting the concession.

29.3. The Province then refers to Article 25 of provincial law No. 11 of 2006, which amended Article 1-*bis*-I of provincial law No. 4 of 1998, reforming the procedures for the issue of concessions for large-scale diversions of water for hydro-electricity and, in particular, repealed the provisions contained in Article 1-*bis*-I (introduced by the contested provincial law No. 10 of 2004 and amended by provincial law No. 17 of 2005, also contested) which declared inapplicable the implementation rules laid down in Article 1-*bis* of presidential decree No. 235 of 1977, insofar as incompatible with Community law.

The Autonomous Province of Trento takes note of the fact that the said provision has not been challenged by the President of the Council of Ministers.

29.4. Finally, the Province refers to provincial law No. 14 of 27 July 2007 (Amendments to provincial law No. 4 of 6 March 1998 concerning the concession of large-scale diversions for hydro-electricity and amendments to provincial law No. 3 of 16 June 2006 concerning the Provincial Payments Agency. *ARPAG* [*Agenzia provinciale per i pagamenti*]) Article 1 of which introduced sub-section 15-*bis* into Article 1-*bis*-I of provincial law No. 4 of 1998, providing that "if on the date of expiry of a concession the procedure for identifying the new concession-holder has not yet been concluded, or in the event of withdrawal, expiry or revocation, the Province may directly manage the exercise of large-scale diversions for hydro-electricity for the time strictly necessary for the conclusion of award procedures".

29.5. On the basis of the above legislation, the Autonomous Province of Trento claims that: a) its legislative competence in the area is confirmed; b) the contrast between Community and national law has been remedied.

29.6. In the light of the developments mentioned above, the Province claims:

a) that the complaint of "*ultra vires*" (due to violation of Article 9(9) of the Statute or Article 117(2)(e) of the Constitution) has been further rebutted;

b) that, with regard to the state's challenge to 1-*bis*-I(1) of provincial law No. 4 of 1998, the matter in dispute no longer subsists, since the provisions (second and third sentence) were repealed by legislative decree No. 289 of 2006 and were never actually applied because they declared the provisions governing preferences to be inapplicable, that is the provisions which in any case could not have applied given the suspension of competition procedures ordered under sub-sections 1-*sexies* and 1-*septies*;

b1) that the same conclusion – that the matter in dispute no longer subsists – should in any case be reached regarding the question raised with reference to Article 1-*bis*-I(1) of provincial law No. 4 of 1998 due to violation of the fundamental principles laid down in legislative decree No. 79 of 1999, since Article 12 of decree No. 79 was amended by Article 1(483) of law No. 266 of 2005;

c) that the fundamental principle laid down in Article 12(7) of legislative decree No. 79 of 1999 concerning the extension until 31 December 2010 of existing concessions, which the state claims has been violated, does not apply to the Province of Trento in view of the different provisions contained in Article 1-*bis*(15) of presidential decree No.

235 of 1977, introduced under subsequent legislation (legislative decree No. 463 of 1999) with priority status (as legislation implementing the Statute). This was confirmed first by legislative decree No. 289 of 2006, which introduced into Article 1-*bis* sub-section 15-*bis* which provided that "concessions other than those mentioned under sub-sections 14 and 15 shall expire on the dates specified in the relevant measures granting the concession", and secondly by Article 6(7-*ter*) of decree-law No. 300 of 2006, according to which "the concessions mentioned in Article 1-*bis*(15) of presidential decree No. 235 of 1977 shall expire on 31 December 2010, and that any concessions other than those mentioned under sub-section 15 shall expire on the dates specified in the relevant measures granting the concession";

d) that the challenge averring the violation of Article 1 of law No. 266 of 2005 is not only generic but manifestly groundless, given that sub-sections 484, 491 and 492 of that Article are to be regarded as having been entirely superseded or in any case inapplicable in the light of the subsequent provision implementing the Statute contained in legislative decree No. 289 of 2006, and considering that sub-section 485 (referring to the extension of existing concessions) was ruled inapplicable to the Province of Trento by Article 6(7-*ter*) of decree-law No. 300 of 2006;

e) that, again with regard to the questions concerning the competition procedures provided for under Article 1-*bis*-I of provincial law No. 4 of 1998, the matter in dispute no longer subsists, since this provision was repealed by provincial law No. 11 of 2006 and that procedure was in any case suspended, except the preliminary stage involving the receipt of applications and publication of the notice mentioned in sub-section 1-*quinquies*, and these unsuspended preliminary stages cannot be regarded as being of any current legal significance since these procedures were repealed by Article 25 of provincial law No. 11 of 2006.

30. In the third written statement, the Autonomous Province of Trento submits entirely similar arguments, claiming that the matter in dispute no longer subsists for the purposes of its own appeal filed against law No. 266 of 2005. Moreover, the Province insists on the merits of the challenges raised in its appeal.

31. Shortly before the public hearing of 25 September 2007, the President of the Council of Ministers also filed several written statements.

32. In the first written statement, which referred to appeal No. 1 of 2006 (but also contained references to the previous appeal No. 26 of 2005), the *Avvocatura dello Stato* submits arguments essentially similar to those set out in the previous written statement filed for the public hearing of 10 October 2006.

Moreover, the state representative adds arguments relating to the applicability to concessions for large-scale diversions of water for hydro-electricity of the legislation contained in legislative decree No. 387 of 29 December 2003 (Implementation of directive 2001/77/EC on the promotion of electrical energy produced from renewable energy in the internal electricity market), and requests the Court to allow the appeals.

33. In the second written statement, which referred to appeal No. 40 of 2006, the *Avvocatura dello Stato* takes note of the new legislation implementing the Statute contained in legislative decree No. 289 of 2006, and argues that in the light of this "at least as of November 2006, the relations between the autonomous provinces and the state in the area of large-scale concessions for large-scale diversions of water for hydro-electricity should be evaluated in accordance with the implementation legislation referred to and not the contested provisions which had not previously applied in the Provinces".

The state representative concluded, arguing that the Province's appeal against Article 1(483-492) of law No. 266 of 2005 is inadmissible, or at least that there is a bar to proceeding with it.

*Conclusions on points of law*

1. By the appeal served on 15 February 2005, filed on 22 February and registered as No. 26 in the Register of Appeals 2005, the President of the Council of Ministers, represented and advised by the *Avvocatura Generale dello Stato*, raised the question of the constitutionality of Articles 8(14) and (15), 9(2), (3) and (11), 10 and 15(2) of Autonomous Province of Trento law No. 10 of 15 December 2004 (Provisions governing town planning, environmental protection, public waters, transport, fire services, public works and hunting).

1.1. By appeal served on 12 January 2006, filed on 18 January and registered as No. 1 in the Register of Appeals 2006, the President of the Council of Ministers, represented

and advised by the *Avvocatura Generale dello Stato*, also contested Autonomous Province of Trento law No. 17 of 6 December 2005 (Urgent provisions governing concessions of large-scale diversions of public waters for hydro-electricity, amending Article 1-*bis*-I of provincial law No. 4 of 6 March 1998).

1.2. By appeal served on 27 February 2005, filed on 3 March and registered as No. 40 in the Register of Appeals 2006, the Autonomous Province of Trento finally raised the question of the constitutionality of various provisions of law No. 266 of 23 December 2005 (Provisions governing the formulation of the annual and long-term budget of the state – Finance law 2006), including those contained in Article 1(483-492) concerning large-scale diversions of water for hydro-electricity.

1.3. As far as appeal No. 40 of 2006 is concerned, these proceedings concern exclusively these last provisions, the object of which is similar to those challenged by the state in appeals No. 26 of 2005 and No. 1 of 2006, whilst the other questions have been treated separately.

1.4. The first of the appeals mentioned raises three questions concerning, respectively, waste, the conservation of natural habitats and the concession of large-scale diversions of public waters for hydro-electricity. The second and third appeals raise, albeit from a completely different perspective, substantially similar questions in the area of large-scale diversions for hydro-electricity.

2. Since the questions are in part identical, the three cases may be joined for decision in a single judgment.

2.1. As regards the issue of large-scale diversions for hydro-electricity, in the light of the provisions subsequently enacted implementing the Statute contained in legislative decree No. 289 of 7 November 2006 (Provisions to implement the Special Statute of the autonomous region of Trentino-Alto Adige/Südtirol, amending presidential decree No. 235 of 26 March 1977 concerning the concession of large-scale diversions), the President of the Council of Ministers withdrew appeals No. 26 of 2005 and No. 1 of 2006, and the Autonomous Province of Trento withdrew appeal No. 40 of 2006.

The withdrawals have been duly accepted.

Therefore, with regard to these questions, the court rules that the proceedings are moot.

3. It is therefore necessary to examine the grounds of appeal proposed by the state against provincial law No. 10 of 2004 (appeal No. 26 of 2005) concerning the regulation of waste and the conservation of natural habitats.

On this point, the Court moreover notes that the contested provisions concerning the conservation of natural habitats were restated in the subsequent provincial law No. 11 of 23 May 2007 – in Articles 37 and 39 – and hence the appeal by the President of the Council of Ministers must be regarded as referring also to these last provisions.

3.1. As regards both of the issues mentioned above, the representative of the Autonomous Province of Trento avers in the first place, as a preliminary point, that the appeal is inadmissible on the grounds that the applicant has not specified whether it intends to refer to the competences as set out in the Special Statute or those stipulated under the Constitution and, as far as waste landfills are concerned, on the grounds that it has not specified the relevant violations.

The challenge is groundless. In fact, as far as waste is concerned, it is clearly apparent which violations are averred and, with regard to natural habitats, it is clear that the applicant claims in the first place that the contested provisions are "*ultra vires*" *vis-à-vis* the matters contained in the Statute, and secondly refers to Article 117(2)(s) of the Constitution in the eventuality that the Court should find this constitutional provision to be applicable, in the light of Article 10 of constitutional law No. 3 of 2001.

4. It should also be mentioned, for the purposes of the resolution of the problem of the division of competences between the state, the regions and the autonomous provinces over environmental matters, that the environment is often regarded as an "intangible resource".

However, whereas the environment is considered as an "area of law", legislative competence over which is divided between the state and the regions, it must be remembered that it is a tangible and complex life resource, the regulation of which also covers the protection and safeguarding of the quality and equilibria of its individual components. The Court has moreover already made a ruling on this issue in order No. 144 of 2007, in order to distinguish between building and environmental offences.

The object of protection, as can also be inferred from the Stockholm Declaration of 1972, is the biosphere, which is taken into consideration not only as a function of its

various components, but also as including the interactions between them, their equilibria, their quality, the circulation of their elements, and so on. In other words, it is necessary to consider the environment as a "system", thus considered in dynamic terms as it really is, and not simply from a static and abstract point of view.

As far as the division of competences between the state and the regions is concerned, the power to enact legislation relating to the environment as a whole has been conferred exclusively on the state pursuant to Article 117(2)(s) of the Constitution which, as is known, speaks of "environment" in general and all-embracing terms. And it must not be forgotten that the constitutional provision places the word "ecosystem" alongside the word "environment".

It follows that it is a matter for the state to regulate the environment as a system-wide entity, that is to enact protection legislation which applies both to the whole as well as the individual components considered as parts of the whole.

It should be noted in this regard that the uniform and overall regulation of environmental resources pertains to a public interest of primary (judgment No. 151 of 1986) and absolute (judgment No. 210 of 1987) constitutional value, and must guarantee (as required under Community law) a heightened level of protection, which as such cannot be derogated from by other sectoral legislation.

It must however be emphasised that other legal resources may also coexist alongside the legal resource "environment" in a unitary sense, including those which relate to components or aspects of environmental resources, but which concern different legally protected interests.

The environment is referred to in this context as a "cross-cutting area of law", in the sense that different interests are focused on same object: interests in conserving the environment and those in its uses. In these cases, the uniform regulation of the overall resource "environment", which is reserved exclusively to the state, prevails over that enacted by the regions or autonomous provinces in areas falling under their own competence and with reference to other interests.

This means that, by virtue of its application to the environment as a whole, and therefore also to each of its parts, environmental legislation – which originates from the exercise of an exclusive competence by the state – operates as a limit on the legislation

which the regions and autonomous provinces may enact in other areas within their competence, and accordingly the latter may not in any way derogate from or lower the level of environmental protection provided for by the state.

The above principle was affirmed in judgment No. 246 of 2006, according to which "it is settled constitutional case law that, whilst the fact that particular legislation attributable to the area of 'environmental protection' falling under Article 117(2)(s) of the Constitution without doubt means that the state has the power to enact uniform protection standards valid throughout the country which may not be lowered by the regions, this by no means precludes the possibility that regional laws enacted pursuant to shared competence under the terms of Article 117(3) of the Constitution, or 'residual' competence pursuant to Article 117(4), may also adopt environmental protection amongst their goals (see, *inter alia*, judgments Nos. 183 of 2006; 336 e 232 of 2005; No. 259 of 2004 and No. 407 of 2002)".

The special nature described above of legislation governing the legal resource "environment" considered as a whole and in unitary terms also has implications for regions governed by special statute or autonomous provinces, subject however to the additional requirement that the relevant special statute providing for autonomy be taken into account.

And it must be remembered in this regard that for the regions governed by special statute and the autonomous provinces, when attributing legislative competence to the bodies in question, the statutes distinguish between matters subject to primary legislative competence and those subject to shared legislative competence.

The first problem which arises in these proceedings is therefore that of establishing whether the Autonomous Province has any competence in the area under discussion, since it is known that all matters which the Statutes do not confer upon the autonomous body remain under state competence, except insofar as provided under Article 10 of constitutional law No. 3 of 2001. Secondly, where such competence subsists, it is necessary to establish whether it is primary or shared, since in the former case the Autonomous Province is required to comply only with the general principles of the legal system and the fundamental rules of social and economic reform, whilst in the second

case it is also required to with the fundamental principles in the area laid down in state legislation.

5. As far as the sector of waste is concerned, the President of the Council of Ministers has challenged Article 8(14) and (15) of provincial law No. 10 of 2004, due respectively to violation of Article 17 of legislative decree No. 36 of 13 January 2003 (Implementation of directive 99/31/EC on the landfill of waste), and due to violation of Articles 11, 12 and 15 of legislative decree No. 22 of 5 February 1997 (Implementation of directive 91/156/EC on waste, directive 91/698/EC on hazardous waste and directive 94/62/EC on waste and waste packaging).

The contested Article 8(14), which replaces Article 75 of President of the Regional Council decree No. 1-41/Legisl. of 1987, provides, insofar as is of interest for the present appeal, that: "in particularly urgent cases where it is necessary to protect environmental resources and public health, the Regional Council may order or authorise, also derogating from the plans provided for under Article 65, the upgrading or expansion of existing landfills for urban waste or the construction of new plant and landfills in the absence of other alternatives, or the recourse to other forms of disposal and recovery of urban waste. For the same reasons the Regional Council may order or authorise the collection and transport of urban and equivalent waste to plant located outwith the Province, subject to agreement, if necessary, with the Region, the Autonomous Provinces and the interested public administrations; moreover the Council may re-qualify, also derogating from the plans provided for under Article 65, the waste collection area for the plant located in the Province, specifying the forms and procedures for coordination between the local authorities responsible for the management of urban waste".

Article 8(15), which replaced Article 77 of President of the Regional Council decree No. 1-41/Legisl., provides, insofar as is of interest for the present appeal, that: "where, during the planning or implementation of public or private works, non-controlled landfills and waste stores, except hazardous waste, created before 16 December 1999 are discovered in the works area, the administration or interested subject or contractor concerned shall take the necessary action, for the purposes of the rehabilitation mentioned in sub-section 1, according to the following procedures: […] c) the

safeguarding operations shall not be subject to the provision of financial guarantees, nor the requirements provided for under Articles 11, 12 and 15 of legislative decree No. 22 of 1997, except for waste removed from the site".

On this matter, and in relation to the points made above, it must first be pointed out that the Statute of the Autonomous Province of Trento does not provide for provincial competence over the waste sector, since the Court finds that waste does not fall under the concept of "town planning and regulatory plans", or of "health and hygiene" pursuant, respectively, to Article 8(5) and Article 9(10) of the Statute (in this latter case the principles laid down in state legislation would in any case apply; Article 5 of the Statute). It follows that they cannot but fall under the competence of the state, on the basis of the principles mentioned above which govern the relations between the state and autonomous bodies. It is also important not to lose sight of the fact that, as mentioned above, state competence is expressly provided for under Article 117(2)(s), which refers to exclusive competence over the "environment and ecosystem". Moreover, this exclusive competence does not preclude the state from also attributing functions on the Province in this area. And it must be remembered on this issue that Article 85 of legislative decree No. 112 of 31 March 1998 (Conferral of the administrative functions and tasks of the state on the regions and local authorities, implementing head I of law No. 59 of 15 March 1997), subsequently reiterated in legislative decree No. 152 of 3 April 2006 (Provisions concerning environmental matters), already share competence with the regions over waste management and that, as far as the Province of Trento is concerned, the state legislation implementing Community directives is no exception from this principle (for example, regarding plans for brining landfills up to standard).

It is also necessary to point out, in relation to this argument, that the state legislation under discussion is legislation implementing Community directives, which the Autonomous Province is required to respect.

Turning to an examination of the question, it must be emphasised that, although it refers to situations of necessity and urgency, Article 8(14) does not in fact enact specific arrangements relating to this exceptional case, but set out alternative arrangements to those put in place by the state in order to implement Community directives relating to

the use of existing landfills, the construction of new plant, the transport of waste, the use of other forms of disposal and the modification of waste collection areas. However, in challenging only the violation of Article 17 of legislative decree No. 36 of 2003 which refers to existing landfills (implementing directive 99/31/EC), the *Avvocatura Generale dello Stato* contests only those provisions which relate to the Provincial Council's power to order or authorise the upgrading or expansion of existing landfills. It is on these last issues that the Court must pass judgment.

In this regard it is sufficient to remember that Article 17 of legislative decree No. 36 of 2003 lays down two fundamental rules: a) landfills already authorised may continue to receive the type of waste for which they were authorised until 31 December 2006; b) within six months of the entry into force of legislative decree No. 36, the holder of the authorisation or, where he has been delegated to do so, the operator of the landfill, must submit to the competent authority "a plan to bring the landfill up to standard with the provisions contained in the present decree, including financial guarantees". As is clear from a literal reading of the text, sub-section 14 on the other hand removes the requirement both of the expiry date for the use of landfills already authorised as well as the adaptation plan for the landfills. Insofar as these provisions are contested, the Court therefore finds that they are unconstitutional.

As far as sub-section 15 is concerned, it must be remembered that, in cases where a landfill or a store of illegal waste is discovered, it provides that the rehabilitation of the site may be commenced and that "operations for the safeguarding of the site shall be exempt from the requirement to provide financial guarantees as well as the obligations contained in Articles 11, 12 and 15 of legislative decree No. 22 of 1997 (implementing directive 91/156/EC on waste, directive 91/689/EC on hazardous waste and directive 94/62/EC on packaging and packaging waste), except for the waste removed from the site" (paragraph 1-*ter*(c)).

In its appeal, the *Avvocatura Generale dello Stato* does not complain of the exception from the obligation to provide financial guarantees, but only the violation of Articles 11 (waste register), 12 (recording of incoming and outgoing waste) and 15 (identification form for transported waste), and therefore it is only necessary to rule on these challenges.

If it is interpreted as providing that for operations to safeguard a site it is only necessary to "move" the waste *in situ*, and not to "collect and transport" it (as the phrase "except for the waste removed from the site" suggests), the contested provision is not unconstitutional. The state provisions contained in Articles 11, 12 and 15 of legislative decree No. 22 of 1997 in fact refer only to the "collection and transport" of waste and not their movement within a private area. This is moreover confirmed by Article 9(139) of legislative decree No. 152 of 2006, according to which "the movement of waste exclusively within private areas is not regarded as transport for the purposes of part four of the present decree".

The phrase used by the provincial legislature is in other words inappropriate, since this case does not involve the setting aside of state legislation, as suggested by the expression "shall be exempt", but simply that it is not relevant for this case.

In the light of the above interpretation, the appeal must therefore be dismissed on this point.

6. As far as the conservation of natural habitats is concerned, the question regards the "designation" of "special conservation areas" (SCA) and "relations" with the European Commission in cases involving the impact on these areas of plans and initiatives which may require restrictions on the environmental protection measures in place in these areas.

The provincial provisions contested by the President of the Council of Ministers are the following.

Article 9(2) and (3) of the provincial law, which provide as follows: "The legislation contained in the present article shall apply to sites and areas located within the Province […]. The Provincial Council shall designate by resolution the sites of Community importance mentioned in sub-section 2(a) as special conservation areas pursuant to Article 4(4) of directive 92/43/EC, also on the basis of the results of the monitoring activities mentioned in sub-section 7".

Article 9(11), which provides that: "Where the evaluation of the impact on projects […] gives rise to negative conclusions, these results may only be set aside exclusively by the Provincial Council, pursuant to a request by the interested individual, in accordance with the criteria and limits provided for under Article 6(4) of directive

92/43/EC. The relations with the European Commission pursuant to Article 6(4) of directive 92/43/EC shall be maintained personally by the President of the Province, who shall also ensure the notification of the Ministry for the environment and territorial protection".

Article 10 of the provincial law concerns safeguard measures to be adopted pending the elaboration of ordinary conservation measures in the special conservation areas. These rules are therefore ancillary to the provision contained in Article 9(5).

7. In order best to understand the question, it is important to remember that the procedure provides for: the "identification" by the regions and autonomous provinces of sites to be classed as "sites of Community importance" (SCI); the transmission of the said identification by the Member State to the European Commission; the approval by the latter of the list of sites; the choice, again by the Commission, of those which it considers to be of such ecological importance to be considered as "special conservation areas"; and finally the "designation" of the said sites as "special conservation areas" by the Member State which, in the meantime, has had to "classify" the SCA as a special type of "protected area".

As far as relations with the European Commission are concerned, it can be inferred from the directives themselves that these relations must be maintained by the Member State.

It must also be pointed out that the specific area of law in dispute falls under the primary legislative competence of the Autonomous Province, since Article 8(16) of the Statute confers on the Province competence over "parks and the protection of fauna and flora". It follows, as clarified above, that the legislative power of the Province in this specific area of law must be exercised in accordance with the Constitution and the principles underlying the legal order of the Republic, as well as with international law obligations, the national interest and the fundamental rules of social and economic reform of the Republic.

8. The President of the Council of Ministers challenges the provincial legislation contained in Article 9(2) and (3), concerning the power to "designate" sites as special conservation areas, due to violation of Article 5 of law No. 349 of 8 July 1986 (Establishment of the Ministry for the Environment and provisions governing

environmental damage), and Article 3 of presidential decree No. 357 of 8 September 1997 (Regulating implementing directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora). Article 3 provides that the regions and the Autonomous Provinces of Trento e Bolzano "shall identify" the sites of Community interest for the establishment of the European ecological network "Natura 2000" and notify the Ministry for the Environment, which shall gather these indications in a list to be sent to the European Commission, which in turn is required to choose special conservation areas amongst the sites. The Ministry for the Environment then "designates", in agreement with the regions, the sites concerned as special conservation areas.

The Province claims that, in accordance with Constitutional Court judgment No. 425 of 1999, this regulation is not binding on it, and that in any case it is a reserve regulation which lost efficacy following the entry into force of the contested legislation, which is to be regarded as legislation implementing the Community directive.

This objection, which is nonetheless accurate – since the state regulation implementing the Community directives in question has a reserve status compared to the subsequent implementing regional or provincial law – is not however relevant for the purposes of the decision, which by contrast concerns the violation of the general principles of Italian law (judgment No. 425 of 1999).

The appeal is well founded because the contested provisions breach these general principles of Italian law, as well as the fundamental rules of social and economic reform invoked by the state.

The principle in question is that laid down in Article 5(1) and (2) of law No. 349 of 1986, as supplemented by Article 8(3) of law No. 394 of 6 December 1991 (Framework law on protected areas), which provides that "where the park or reserve is located within the territory of a region governed by special statute or an autonomous province, the state shall proceed in agreement with the region or province".

If it is taken into account that parks and reserves, along with special conservation areas, are classified as "protected areas", is it all too clear that the reference to agreement over the designation and establishment of parks and reserves applies all the more so also to special conservation areas. This is especially the case because these

areas are of international interest and the designation of international protected areas is a matter for the state pursuant to Article 5(2) of law No. 349 of 1986.

This is moreover confirmed by Constitutional Court judgment No. 366 of 1992, in which the court held that "as this Court has asserted on several occasions, notwithstanding the absence of a framework law on protected areas […], the activities listed below (namely 'the competence to identify the protected areas of national or international significance, as well as over their classification and the establishment on them of national parks or state nature reserves') fall under the competence of the body which must assess the ecological interest which the establishment of the park or nature reserve is intended to further […]. This means that where the relevant interest is not unreasonably found to be of national or international importance, the relative competence to identify the areas, classify them and create national parks or state nature reserves on them (and hence to establish binding arrangements, consisting in the adoption of "conservation measures", covering other types of protected areas of international importance) is vested in the state, irrespective of the location of the area to be protected".

It must also be pointed out that, as is clear from Article 9(1) and (3) of the contested provincial law, as regards the matter under examination, it is necessary to distinguish between the "identification" of Sites of Community Importance, and the "designation" of special conservation areas, and that in the case before the Court "identification" and "designation" express two different concepts: identification consists in the mere indication of the site, whereas "designation" is the act which subjects the area chosen to special binding arrangements, consisting in the adoption of special "conservation measures". In other words, the word "designation" used in the Community directive has the same meaning which national law has traditionally conferred on the expression 'establishment of a protected area'.

Accordingly, the "designation" of a particular protected area which has been classified as a special conservation area cannot be made unilaterally by the Provincial Council, but must be made by the state in consultation with the Autonomous Province. It thus follows that Article 9(2) and (3) of provincial law No. 10 of 2004 are unconstitutional.

As far as the challenges against Article 9(11) are concerned, it must be pointed out that the applicant challenges not only the conferral on the Provincial Council of the power to "disregard" the negative outcome of procedures assessing the impact of projects on special conservation areas, but also the fact that it confers upon the President of the Council the power to maintain "relations" with the European Commission in this area. This concerns the power to conduct dialogue with the European Commission, which is vested in the state pursuant to Article 1(5) of law No. 349 of 1986 (which assigns the task of representing Italy with the institutions of the European Community in matters relating to the environment and cultural heritage to the Minister for the Environment), in accordance with the principle laid down in Article 117(3) and (5) of the Constitution, which confer upon the state competence to regulate the relations of the regions and autonomous provinces with the European Union and to delineate the procedures for the participation of the same, in matters falling under their competence, in the elaboration of Community legislation.

Article 1(5) of law No. 349 of 1986, invoked by the Province, is restated in full by Article 5 of law No. 131 of 5 June 2003 (Provisions to bring the legal system of the Republic into line with constitutional law No. 3 of 2001), which confirms the principle of the unitary representation of Italian interests with the European Union.

The Autonomous Province of Trento cannot therefore unilaterally confer upon itself the power to maintain "relations" with the European Union, regardless of the laws of the state.

The Court therefore finds that the contested provisions are unconstitutional.

9. As regards Article 10 of provincial law No. 10 of 2004, the complaints are inadmissible since the applicant considers the provisions contained in that Article to be ancillary to those laid down in Article 9(2) and (3), whilst they are ancillary to Article 10(5), a sub-section which was not challenged.

on those grounds

THE CONSTITUTIONAL COURT

hereby,

*declares* that Article 8(14) of Autonomous Province of Trento law No. 10 of 15 December 2004 (Provisions governing town planning, environmental protection, public waters, transport, fire services, public works and hunting) is unconstitutional;

*declares* that Article 9(2), (3) and (11) of Autonomous Province of Trento law No. 10 of 2004 are unconstitutional;

*rules* that the question of the constitutionality of Article 8(15) of Autonomous Province of Trento law No. 10 of 2004, commenced with reference to Articles 8(5) and 9(10) of presidential decree No. 670 of 31 August 1972 (Approval of the consolidated text of constitutional laws concerning the special statute of Trentino-Alto Adige), with reference to Articles 11, 12 and 15 of legislative decree No. 22 of 5 February 1997 (Implementation of directive 91/156/EEC on waste, directive 91/689/EEC on hazardous waste and directive 94/62/EC on packaging and packaging waste), as well as with reference to Article 117(2)(s) of the Constitution, by the President of the Council of Ministers in the appeal mentioned in the headnote, is groundless for the reasons given above;

*rules* that the question of the constitutionality of Article 10 of Autonomous Province of Trento law No. 10 of 2004, commenced with reference to Article 8(15) and (16) of presidential decree No. 670 of 31 August 1972 (Approval of the consolidated text of constitutional laws concerning the special statute of Trentino-Alto Adige), as well as with reference to Article 117(1) and (2)(a) and (s) of the Constitution, by the President of the Council of Ministers in the appeal mentioned in the headnote, is inadmissible;

*rules* that the proceedings concerning the constitutionality of Article 15(2) of Autonomous Province of Trento law No. 10 of 2004, commenced pursuant to appeal No. 26 of 2005, are moot;

*rules* that the proceedings concerning the constitutionality of Autonomous Province of Trento law No. 17 of 6 December 2005 (Urgent provisions governing concessions of large-scale diversions of public waters for hydro-electricity, amending Article 1-*bis* of provincial law No. 4 of 6 March 1998), commenced pursuant to appeal No. 1 of 2006, are moot;

*rules* that the proceedings concerning the constitutionality of Article 1(483–492) of law No. 266 of 23 December 2005 (Provisions governing the formulation of the annual

and long-term budget of the state – Finance law 2006), commenced pursuant to appeal No. 40 of 2006, are moot.

Decided in Rome, at the seat of the Constitutional Court, *Palazzo della Consulta*, on 5 November 2007.

Signed:

Franco BILE, President

Paolo MADDALENA, Author of the Judgment

Giuseppe DI PAOLA, Registrar

Filed in the Court Registry on 14 November 2007.

The Director of the Registry

Signed: DI PAOLA