

**Case C-399/19**

**Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice**

**Date lodged:**

22 May 2019

**Referring court:**

Consiglio di Stato (Italy)

**Date of the decision to refer:**

11 April 2019

**Appellant:**

Autorità per le Garanzie nelle Comunicazioni

**Respondents:**

BT Italia SpA  
Basictel SpA  
BT Enia Telecomunicazioni SpA  
Telecom Italia SpA  
PosteMobile SpA  
Vodafone Italia SpA

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**Subject matter of the main proceedings**

Appeals brought before the Consiglio di Stato (Council of State, Italy) against the judgments of the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio, Italy) upholding the actions brought by the present respondents and annulling various decisions adopted by the Autorità per le Garanzie nelle Comunicazioni (Communications Regulatory Authority, Italy) ('AGCOM'), the present appellant, concerning the amount and method of payment of the contributions due to AGCOM for 2014, 2015 and 2016 from companies operating in the electronic communications sector and media services

companies, and specifying the online form and instructions for payment of the contributions due from those companies to AGCOM for 2015 and 2016.

### **Subject matter of the reference**

The compatibility of the national legislation concerning the funding of AGCOM by electronic communications operators with Article 12 of Directive 2002/20/EC and with the case-law of the Court of Justice, in particular the judgment of 18 July 2013 (Joined Cases C-228/12 to C-232/12 and C-254/12 to C-258/12)

### **Questions referred**

1. Does Article 12(1)(a) of Directive 2002/20/EC preclude national legislation which imposes on undertakings authorised under that directive the total administrative costs incurred by the national regulatory authority in organising and carrying out all the tasks, including regulatory, supervisory, dispute-resolution and sanctioning tasks, assigned to it under the European framework for electronic communications (laid down in Directives 2002/19/EC, 2002/20/EC, 2002/21/EC and 2002/22/EC), or are the activities mentioned in Article 12(1)(a) of Directive 2002/20/EC co-extensive with the ‘*ex ante* regulatory activities’ performed by the national regulatory authority?
2. Is Article 12(2) of Directive 2002/20/EC to be interpreted as meaning that the yearly overview of the administrative costs of the national regulatory authority and of the charges levied (a) may be published after the end of the financial year, in accordance with national laws on public accounting, in which the administrative charges have been levied and (b) permits the national regulatory authority to make the ‘appropriate adjustments’ even with reference to financial years that are not immediately consecutive?

### **Provisions of EU law relied on**

Article 12 of Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive) (‘the Authorisation Directive’) and recital 30 thereof.

### **Provisions of national law relied on**

Legge del 23 dicembre 2005, n. 266, – Disposizioni per la formazione del bilancio annuale e pluriennale dello Stato (legge finanziaria 2006) (Law No 266 of 23 December 2005 laying down provisions for drawing up the annual and multiannual budget of the State (Finance Law 2006)) (‘Law No 266/2005’). In particular, Article 1(65) and (66) provides that, from 2007 onwards, the operating

costs of AGCOM, in so far as they are not covered by funding from the State budget, are to be financed by the relevant market, and that the amount of the contribution to be paid by companies operating in the communications sector is to be determined by AGCOM and paid directly to AGCOM, and is to be capped at 0.2% of the income recorded in the last set of company accounts approved before the adoption of the decision.

Decreto legislativo del 1° agosto 2003, n. 259, – Codice delle comunicazioni elettroniche (Legislative Decree No 259 of 1 August 2003 establishing the Electronic Communications Code) ('the Electronic Communications Code'). In particular, Article 34(1) provides that '... undertakings providing networks or services in accordance with the general authorisation or which have been granted rights of use may be required to pay administrative charges to cover, in total, only the administrative costs incurred in the management, control and enforcement of the general authorisation scheme, rights of use, and specific obligations as referred to in Article 28(2) .... The administrative charges shall be imposed on individual undertakings in an objective, transparent and proportionate manner ...'. In addition, Article 34(2a), inserted by Article 5 of the legge del 29 luglio 2015, n. 115 (Law No 115 of 29 July 2015) (also known as the 2014 European Law) ('Law No 115/2015'), provides that 'in order to cover the total administrative costs incurred in carrying out the regulatory, supervisory, dispute-resolution and sanctioning tasks assigned by law to [AGCOM] in the fields referred to in paragraph 1, the amount of the administrative charges referred to in paragraph 1 shall be determined in accordance with Article 1(65) and (66) of [Law No 266/2005] and shall be in proportion to the income earned by undertakings from the activities which are subject to the general authorisation or in respect of which rights of use have been granted'. Lastly, Article 34(2b) provides that 'the Ministry, together with the Ministry of the Economy and Finances, and [AGCOM] shall publish annually the administrative costs incurred in the performance of the activities referred to in paragraph 1 and the total amount of the charges levied in accordance with paragraphs 2 and 2a. Where there is a difference between the total amount of charges and the administrative costs, appropriate adjustments shall be made'.

### **Succinct presentation of the facts and the main proceedings**

- 1 The appellant AGCOM has brought five separate appeals against five judgments of the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio) ('the TAR') in which that court upheld the actions brought by the present respondents.
- 2 In those five judgments, the TAR had annulled various decisions adopted by AGCOM concerning the amount and method of payment of the contributions due to AGCOM for 2014, 2015 and 2016 from companies operating in the electronic communications sector and media services companies, and specifying the online

form and instructions for payment of the contributions due from those companies to AGCOM for 2015 and 2016.

- 3 In the TAR's view, AGCOM had used an incorrect method for determining the basis of assessment for calculating the contributions due from the operators, in that it had included therein costs that should not have been included.
- 4 In reaching its conclusion that the actions were well founded, the TAR referred in particular to the judgment of the Court of Justice in Case C-228/12.
- 5 In the TAR's view, Article 5 of Law No 115/2015, in so far as it introduced the new paragraph 2a into Article 34 of the Electronic Communications Code, was not applicable in the case at hand, in that it was a new, non-retroactive provision and therefore did not constitute a provision of authentic legislative interpretation of Law No 266/2005, in so far as it introduces rules governing the funding of AGCOM.
- 6 The TAR also held that, in accordance with the case-law of the Court of Justice, the charges imposed on telephone operators could only cover the total costs incurred by AGCOM in performing its regulatory activities, which it identified exhaustively as comprising the costs relating to the issue, management, control and enforcement of the general authorisation scheme. Lastly, the TAR held that, in accordance with Article 12(2) of the Authorisation Directive, read in conjunction with recitals 30 and 31 thereof, AGCOM must adopt its yearly overview of administrative costs and charges before demanding the contributions, otherwise that provision would be rendered nugatory.
- 7 AGCOM therefore appealed the judgments of the TAR before the referring court.
- 8 The present respondents contend that the appeal should be dismissed and that the judgments at first instance should be upheld.

#### **Main arguments of the parties in the main proceedings**

- 9 In the proceedings at first instance, the present respondents argued, in the first place, that the AGCOM decisions mentioned above were unlawful in that AGCOM included in its calculation of the contributions due to it all income earned by operators in the electronic communications sector and quantified the contributions so as to cover all of the costs incurred in the electronic communications sector, rather than restricting its calculation to the costs incurred in performing *ex ante* market regulation activities, as it should have done when selecting the elements of the basis for calculation.
- 10 In the AGCOM decisions at issue, for the purposes of calculating the contributions due, account was taken of income from, inter alia, the following activities: the installation of electronic and electrical plant and equipment, wholesale and retail trade in telecommunications equipment, programming and

broadcasting, and the activities of news agencies, dealers and other advertising services intermediaries. However, according to the present respondents, given their nature, those activities should not have been included in the basis for calculation at issue.

- 11 In the second place, the present respondents complained that AGCOM had failed to adopt the yearly overview for 2014, setting out the total amount of charges levied and the total amount of administrative costs actually incurred during the year, before determining the contribution obligations for 2015. It was required to do so by Article 12 of the Authorisation Directive and the principle contained in that provision, which is that any charges must be imposed in an objective, transparent and proportionate manner.
- 12 AGCOM submits that the national legislation is perfectly compatible with the provisions of Article 12 of Directive 2002/20/EC, in that the range of costs that are to be financed corresponds to that defined in the relevant EU legislation. Indeed, the costs that are to be borne by the electronic communications market are confined to those which correspond to the activities referred to in Article 12 of that directive (namely those which relate to the management, control and enforcement of the general authorisation scheme, rights of use, and specific obligations). In addition, the contribution scheme provided for in the national legislation is proportionate, inasmuch as it ensures a fair distribution of the burden on the market.
- 13 AGCOM also adds that, in Case C-228/12, the Court of Justice had held that ‘Article 12 of Directive 2002/20/EC ... must be interpreted as meaning that it does not preclude legislation of a Member State ... pursuant to which undertakings providing electronic communications services or networks are liable to pay a charge intended to cover all the costs incurred by the [national regulatory authority] which are not financed by the State, the amount of which being determined according to the income received by those undertakings, provided that that charge is exclusively intended to cover the costs relating to the activities mentioned in Article 12(1)(a), that the totality of the income obtained in respect of that charge does not exceed the total costs relating to those activities and that that charge is imposed upon individual undertakings in an objective, transparent and proportionate manner, which is for the national court to ascertain’.
- 14 AGCOM also remarks that the European Commission launched the investigative procedure EU Pilot 7563/15/CNCT to gather information on Italy’s implementation of Article 12 of the Authorisation Directive and Article 3 of Directive 2002/21/EC (the Framework Directive). The Commission had requested clarification from the Italian Government regarding (i) the range of the administrative costs of the national regulatory authority (‘the NRA’) that could be financed by operator contributions, in light of the judgments of the Consiglio di Stato (Council of State), (ii) the effect of those judgments, in quantitative terms, on the NRA contribution and (iii) the ways in which it was ensured that the NRA had sufficient human resources and financial resources, in accordance with

Article 3 of Directive 2002/21/EC. Therefore, precisely in order to avert the commencement of infringement proceedings, and to dispel any doubts about the compatibility of the funding scheme established by Law No 266/2005 with Article 12 of the Authorisation Directive, Law No 115/2015 inserted paragraph 2a into Article 34 of the Electronic Communications Code. This clarified that the contribution scheme to which Article 12 of the Authorisation Directive referred has been implemented via the scheme provided for in Law No 266/2005 and covers all the activities within the NRA's remit. After the enactment of Law No 115/2015, the European Commission asked 'what degree of certainty is there that the new rule in paragraph 2a applies retroactively' and also asked for copies of any judgments delivered in disputes concerning the funding of the Italian NRA.

- 15 In one of its grounds of appeal, AGCOM submits that the TAR erred in concluding that it followed from the judgment of the Court of Justice in Case C-228/12 that the national legislation relating to the funding scheme for AGCOM was incompatible with EU law because it permitted the financing of a greater range of costs than that provided for in Article 12 of the Authorisation Directive. The Court of Justice did not, in AGCOM's submission, state that Article 12 of the Authorisation Directive restricts the costs which may be financed from operator contributions to those which relate to the *ex ante* regulatory activities performed by AGCOM.
- 16 The court of first instance was mistaken to restrict the range of costs to be taken into account in calculating the contributions due from operators to those which related only to *ex ante* regulation. It also erred in failing to find that the 'administrative costs that would be incurred in the management, control and enforcement of the general authorisation scheme, rights of use, and specific obligations' were in reality the costs incurred by the NRA through operating within the electronic communications sector governed by the EU legislative framework. Such costs in fact go beyond the costs incurred merely through the regulatory activities performed by the NRA and are not co-extensive with such activities.
- 17 AGCOM goes on to explain that the *ex ante* regulatory activities performed by a national regulatory authority consist in the adoption of standard measures of a restrictive and temporary nature addressed to particular parties and aimed at regulating, by means of special provisions, competition in a given market on which the presence of an operator in a dominant position — one that is potentially detrimental to competition — has been detected. Those activities are therefore only some of the many activities referred to in Article 12 of the Authorisation Directive. The general authorisation scheme for whose 'management, control and enforcement' the NRA is responsible is thus a complex scheme and one which includes all the regulatory, supervisory, sanctioning and dispute-resolution activities which are indispensable to the overall functioning of that scheme.
- 18 In another of its grounds of appeal, AGCOM submits that the court of first instance erred in not finding that Article 5 of Law No 115/2015, which inserted

paragraph 2a into Article 34 of the Electronic Communications Code, was an interpretative provision (and that it therefore had retroactive effect, such that it was applicable to the case at hand, notwithstanding the fact that the actions were brought prior to the entry into force of Law No 115/2015). The TAR thus failed to have regard to the content of the explanatory memorandum to Law No 115/2015, in which the Italian Government explained that it was taking the opportunity to ‘provide definitive clarification, by means of a provision of authentic legislative interpretation, of the findings reached by the Court of Justice of the European Union in its judgment of 18 July 2013 (Joined Cases C-228/12 to C-232/12 and C-254/12 to C-258/12) concerning the compatibility, in observance of the principles enshrined in EU law, of the self-funding scheme ... with the scheme of administrative charges payable by operators authorised to provide electronic communications networks and services, referred to in Article 12 of the [Authorisation] Directive, to cover the administrative costs incurred by [AGCOM]’.

- 19 As regards the adoption of the yearly overview, AGCOM maintains that it is not possible for a national regulatory authority to provide a yearly overview before the end of the financial year in question, that is to say, the year during which the charges must be levied. Thus, the yearly overview necessarily comes after the demand for contributions from operators for the year in question, inasmuch as it physically follows the end of the financial year and the approval of the authority’s final balance sheet. Moreover, the subsequent publication of the yearly overview does not mean that appropriate adjustments, which may also be carried out in a subsequent financial year, cannot be made to the contributions paid.
- 20 Lastly, AGCOM submits that, in so far as concerns the provisions of Article 5 of Law No 115/2015, the court of first instance failed to conduct the necessary examination of the requirements usually identified by the Italian Corte costituzionale (Constitutional Court) in order for a legislative provision to be treated as a provision of authentic legislative interpretation.
- 21 The present respondents contest the arguments put forward by AGCOM and also refer to the judgment of the Court of Justice in Case C-228/12, in which the Court held that ‘the charges imposed pursuant to Article 12 of the Authorisation Directive are not intended to cover all the administrative costs incurred by the NRA’. They also refer to the judgment in Case C-284/10, *Telefónica de España*, in which the Court of Justice emphasised that, although administrative charges ‘may cover so-called “general” administrative costs, those must, however, relate only to the four activities referred to [namely the issue, management, control and enforcement of the applicable general authorisation scheme] and the fees may not thus include expenditure relating to other tasks such as the general supervisory activities of the national regulatory authority and, in particular, monitoring possible abuses of a dominant position. Indeed, that form of monitoring goes beyond the work strictly generated by the implementation of general authorisations’. The case-law of the Court of Justice therefore rebuts AGCOM’s

argument that the supervision and monitoring of the market and sanctioning activities should also be financed by contributions.

- 22 The present respondents also emphasise that there must be a relationship of relevance between the contributions paid and the activities financed (in the sense that the contributions, and therefore the income to be taken into account in calculating them, must correlate with the costs for which funding is requested). There must also be proportionality (in the sense that the total paid in contributions must not exceed the total costs of the activities which they are to finance). AGCOM failed to observe those principles in drawing up the decisions at issue. It is precisely in order to verify the relevance and proportionality of the contributions that the [Authorisation Directive] imposes the obligation to adopt a yearly overview of the costs incurred and the charges levied.
- 23 Since the new paragraph 2a of Article 34 does not expressly state that the new method for determining the basis of assessment for calculating the contributions, which is the income earned by the undertakings from activities to which the general authorisation or the grant of rights of use relates, is to apply retroactively, that provision cannot serve the function of providing authentic legislative interpretation of Law No 266/2005 on the funding scheme for AGCOM.
- 24 Lastly, the present respondents emphasise the obligation to publish the yearly overview prior to calculation of the contributions. They also criticise AGCOM for the fact that the yearly overview published, albeit belatedly, fails clearly to set out individual cost and revenue items and merely separates them into ‘costs directly attributable to the communications sector’ and ‘costs indirectly attributable to the communications sector’, which does not enable the operators to verify that their contributions have been properly used to finance the costs referred to in Article 12 of the Authorisation Directive.

#### **Succinct presentation of the reasons for the reference**

- 25 In the appeal proceedings, AGCOM requested the referring court, in the event of doubt as to the correct interpretation of the rules of EU law, to refer a question regarding that interpretation to the Court of Justice.
- 26 By contrast, the respondents, taking the view that the judgments at first instance are correct, asserted that there was no need to request a preliminary ruling of the Court of Justice. They also add that the fact that, from May 2015 to date, the Commission has not commenced infringement proceedings against Italy with regard to the case-law on annual contributions means that that institution has not noted anything that infringes EU law in the judgments of the TAR and the Consiglio di Stato (Council of State). The national sectoral legislation is therefore compatible with the corresponding provisions of EU law.
- 27 The referring court observes that it was precisely in response to the commencement of Infringement Procedure No 2013/4020, in which the



Commission asserted that Articles 6 and 12 of the Authorisation Directive had not been transposed into national law, that the Italian legislature inserted Article 34(2a) into the Electronic Communications Code, by means of Law No 115/2015.

- 28 Nevertheless, the court of first instance took the view that that new legislation did not have retroactive effect and it therefore refrained from considering whether Article 34(2a) was compatible with Article 12 of the Authorisation Directive and remedied the failure to transpose criticised by the European Commission.
- 29 The most recent set of national proceedings concerns a 2016 decision adopted by AGCOM to which Article 34(2a) should in any event apply, *ratione temporis*.
- 30 The referring court also considers that the significance of the Commission's launching of the investigative procedure EU Pilot 7563/15/CNCT with regard to Italy following the delivery of the judgment in Case C-228/12 should not be underestimated.
- 31 In the observations which it submitted in Case C-228/12, and with particular reference to the meaning of 'ex ante regulatory activities', the Commission asserted that those activities are part of the tasks assigned to the national regulatory authorities under the Framework Directive and the Specific Directives and that the costs associated therewith may be financed using the administrative charges referred to in Article 12(1)(a) of the Authorisation Directive. However, Article 12(1)(a) allows costs incurred by national regulatory authorities other than those associated with their *ex ante* regulatory activities to be financed from those administrative charges.
- 32 In Case C-228/12, the Court of Justice held that 'Article 12 of Directive 2002/20/EC ... must be interpreted as meaning that it does not preclude legislation of a Member State ... pursuant to which undertakings providing electronic communications services or networks are liable to pay a charge intended to cover all the costs incurred by the [national regulatory authority] which are not financed by the State, the amount of which being determined according to the income received by those undertakings, provided that that charge is exclusively intended to cover the costs relating to the activities mentioned in Article 12(1)(a), that the totality of the income obtained in respect of that charge does not exceed the total costs relating to those activities and that that charge is imposed upon individual undertakings in an objective, transparent and proportionate manner, which is for the national court to ascertain'.
- 33 According to the referring court, however, in the judgment in Case C-228/12, the Court of Justice did not address the issue of the content and scope of *ex ante* regulatory activities, which is a question of central importance in the main proceedings. Indeed, the Court confined itself to stating that 'it follows from the wording of Article 12(1)(a) of the Authorisation Directive that Member States may impose on undertakings providing a service or a network under the general

authorisation or to whom a right to use radio frequencies or numbers has been granted only the total administrative costs covering the management, control and enforcement of the general authorisation scheme and of rights of use and of specific obligations as referred to in Article 6(2) thereof, which may include costs for international cooperation, harmonisation and standardisation, market analysis, monitoring compliance and other market control, as well as regulatory work involving preparation and enforcement of secondary legislation and administrative decisions, such as decisions on access and interconnection' and that 'such charges may cover only the costs relating to the activities set out in the preceding paragraph, which cannot include expenditure relating to other tasks'.

- 34 The referring court also cites the judgment of the Court of Justice of 28 July 2016 in Case C-240/15, in which the Court held that 'Article 3 of Directive 2002/21/EC ... and Article 12 of Directive 2002/20/EC ... must be interpreted as not precluding national legislation that subjects a national regulatory authority, within the meaning of Directive 2002/21, as amended by Directive 2009/140, to provisions of national law applicable to public finances and, in particular, to provisions for limiting and streamlining the spending of public administrative authorities ...'. In that case too, however, the Court of Justice gave no ruling on the content of *ex ante* regulatory activities.
- 35 The referring court also mentions that, in a judgment of the TAR to which reference has been made in the main proceedings, the TAR held that, in the judgment in Case C-228/12, the Court of Justice had found the legislative framework to be compatible [with EU law] and had found the activities listed in Article 12 of the Authorisation Directive to be fully the equivalent of the 'only' regulatory activities performed by AGCOM.
- 36 The referring court does not endorse that view and considers that it is necessary, for the purposes of the judgment in the main proceedings, to request a preliminary ruling of the Court of Justice on the compatibility of the abovementioned national legislation with Article 12 of the Authorisation Directive.