

Case C-511/23**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:**

8 August 2023

Referring court:

Tribunale Amministrativo Regionale per il Lazio (Italy)

Date of the decision to refer:

1 August 2023

Applicant:

Caronte & Tourist SpA

Defendant:

Autorità Garante della Concorrenza e del Mercato

Subject matter of the main proceedings

Action brought before the Tribunale amministrativo per il Lazio (Regional Administrative Court, Lazio) ('the TAR Lazio') by the company Caronte & Tourist ('the applicant'), seeking the annulment of the decision adopted by the Autorità Garante della Concorrenza e del Mercato (National Competition Authority, Italy) ('the AGCM') by which the latter established the existence of an abuse of a dominant position, prohibited under Article 3(1)(a) of legge 10 ottobre 1990, n. 287 (Law No 287 of 10 October 1990), an order that the applicant bring the infringement to an end, and the imposition of a fine on the applicant.

Subject matter and legal basis of the request

The reference for a preliminary ruling, made by the TAR Lazio, pursuant to Article 267 TFEU, concerns the interpretation of EU law, and in particular Article 102 TFEU, in the context of the application of Article 14 of legge 24 novembre 1981, n. 689 (Law No 689 of 24 November 1981) to antitrust procedures conducted by the AGCM.

Question referred for a preliminary ruling

‘Must Article 102 TFEU, read in the light of the principles of protection of competition and effectiveness of administrative action, be interpreted as meaning that it precludes national legislation, such as that arising from the application of Article 14 of legge 24 novembre 1981, n. 689 (Law No 689 of 24 November 1981) – as interpreted in the most recent case-law – which requires the Autorità Garante della Concorrenza e del Mercato (National Competition Authority, Italy) to initiate the investigation procedure with a view to establishing an abuse of a dominant position within a time limit of 90 days, starting from the moment the Authority has knowledge of the essential elements of the infringement, the latter of which may be met by the first report of the infringement?’

Provisions of European Union law relied on

Article 102 TFEU.

Provisions of national law relied on

Legge 10 ottobre 1990, n. 287 (Law No 287 of 10 October 1990), ‘Provisions for the protection of competition and the market’

Article 1

‘1. The provisions of this Law, which is enacted under Article 41 of the Constitution for the purposes of protecting and guaranteeing the right to economic initiative, shall apply to cartels, abuses of a dominant position and concentrations of undertakings.

2. The Autorità garante della concorrenza e del mercato (National Competition Authority, Italy) referred to in Article 10, hereinafter referred to as “the Authority”, shall also apply in parallel in relation to the same case Articles 101 and 102 of the Treaty on the Functioning of the European Union and Articles 2 and 3 of this Law on agreements restricting freedom of competition and abuse of a dominant position.

4. The provisions in this Title shall be interpreted in accordance with the principles laid down in the competition law of the European Communities.’

Article 3

‘1. Abuse by one or more undertakings of a dominant position within the national market or a substantial part of it shall be prohibited, and, moreover, the following shall be prohibited: (a) directly or indirectly imposing purchase or selling prices or other unjustifiably onerous contractual conditions [...].’

Article 12 ‘Powers of investigation’ (version in force at the time the investigation was opened):

‘1. The Authority shall, after having assessed the evidence in its possession and that brought to its attention by public administrations or by any other interested person, including associations representing consumers, carry out an investigation to verify the existence of infringements of the prohibitions laid down in Articles 2 and 3 [...]’

Article 12 (version resulting from the 2021 amendment):

‘... 1-ter The Authority shall have the power to set priorities for intervention in the application of this Law and Articles 101 and 102 TFEU. The Authority may refrain from following-up on reports that do not fall within its own priorities for intervention.

1-quater Proceedings relating to infringements of Articles 101 or 102 TFEU or Articles 2 or 3 of this Law, including the exercise of the powers referred to in this Chapter II by the Authority, shall comply with the general principles of EU law and the Charter of Fundamental Rights of the European Union [...]’.

Article 14 Investigation (version in force at the time the investigation was opened):

‘1. The Authority shall, in cases of alleged infringement of Articles 2 or 3, notify the undertakings and operations concerned of the opening of the investigation [...]’.

Article 14 (version resulting from the 2021 amendment):

‘1. The Authority shall, in cases of alleged infringement of Articles 101 or 102 TFEU or Articles 2 or 3 of this Law, carry out the investigation within a reasonable time and shall notify the undertakings and operations concerned of its opening [...]’.

Article 15 Warnings and penalties (version in force at the time the investigation was opened):

‘1. If, following the investigation referred to in Article 14, the Authority establishes the existence of infringements of Article 2 or 3, it shall lay down a time limit for the undertakings and operations concerned to cease the infringements. In cases of serious breaches, it may also impose, having regard to their gravity and duration, an administrative fine of up to 10% of the turnover [...]’.

Article 15 (version resulting from the 2021 amendment):

‘1. If, following the investigation referred to in Article 14 of this Law, the Authority finds the existence of an infringement of Articles 101 or 102 TFEU or of Articles 2 or 3 of this Law, it shall lay down a time limit for the undertakings and associations of undertakings concerned to cease the infringements or, if the infringement has already ceased, it shall prohibit its repetition. For that purpose, the Authority may impose any behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end. When choosing between two equally effective remedies, the Authority shall choose the remedy that is least burdensome for the undertaking, in line with the principle of proportionality.

1-bis It may also impose, having regard to the gravity and duration of the infringement, an administrative fine of up to 10% of the turnover realised [...].

1-quater If, on the basis of the information in its possession, the Authority considers that the conditions for establishing an infringement are not met, the Authority may take a decision to that effect. Where, after having informed the European Commission in accordance with Article 11(3) of Regulation (EC) No 1/2003, the Authority considers that the grounds for intervention have ceased to exist and therefore terminates the investigation procedure, it shall inform the European Commission accordingly [...].

Article 31

‘1. In relation to administrative fines for breaches of this Law, in so far as applicable, the provisions of Chapter I, Sections I and II, of Law No 689 of 24 November 1981 shall apply’.

Law No 689 of 24 November 1981, ‘Amendments to the Criminal System’

Article 12

‘The provisions of this Chapter shall be complied with, in so far as they are applicable and unless otherwise specified, for all infringements for which the administrative penalty of payment of a sum of money is provided, even where that penalty is not provided for in place of a criminal penalty. [...].’

Article 14

‘The infringement, where possible, shall be immediately challenged before both the infringer and the person which is jointly and severally liable for payment of the sum due in respect of that infringement.

If the immediate challenge has not taken place before all or some of the persons referred to in the preceding paragraph, the details of the infringement must be notified to the persons concerned residing in the territory of the Italian Republic within 90 days and to those residing abroad within 360 days of the assessment.

[...]

The obligation to pay the sum due for the infringement shall be extinguished with regard to the person against whom notification was omitted within the specified period.’

Article 28

‘The right to recover the sums due for the infringements set out in this Law shall be time-barred within five years from the day on which the infringement was committed.

Interruption of the limitation period shall be governed by the rules of the Civil Code’.

Law No 287 of 10 October 1990

Article 10(5)

‘... by decreto del Presidente della Repubblica (Presidential Decree) [...] investigation procedures shall ensure that interested parties have full knowledge of investigative acts, the adversarial nature of the proceedings and the minutes.

Decreto del Presidente della Repubblica 30 aprile 1998, n. 217 (Presidential Decree No 217 of 30 April 1998), “Rules on investigation procedures falling within the competence of the National Competition Authority, Italy”.

Succinct presentation of the facts and procedure in the main proceedings

- 1 In 2022, the AGCM found that the applicant had abused its dominant position by imposing excessive prices for the transport service, by ferry, of vehicles in the Strait of Messina.
- 2 In particular, the AGCM, following the so-called *United brands* doctrine, noted the complete lack of correlation between costs and revenues, including through the use of several economic tests which confirmed the existence of a significant lack of proportionality. Furthermore, even comparing the applicant’s charges with those of other foreign companies, the prices imposed were found to be excessive. In addition, the AGCM noted the particular importance of the unfair competition – which directly affects the consideration paid by the user – having regard also to the geographical area concerned, the Strait of Messina, in which the applicant holds a near monopoly position, transporting approximately ten million passengers and two million motor vehicles each year (data from 2019).
- 3 In the present case, on 24 March 2018, the AGCM received a report from a consumer complaining about the excessively high prices of the transport service. After obtaining that report, on 23 April 2019, that is, 394 days after receiving the report, the AGCM sent a request for information to the Autorità portuale di

Messina (Port Authority of Messina), which, on 22 May 2019, replied, but only in part. The AGCM therefore sent a reminder to that port authority, on 19 November 2019, to which it replied on 26 November 2019.

- 4 On 4 August 2020, the AGCM notified the applicant of the initiation of the procedure, decided at the meeting of 28 July 2020 (245 days after receipt of the port authority's reply). The procedure came to an end on 11 April 2022, with the adoption of a decision by which the AGCM ordered the applicant to refrain in future from imposing excessive prices and, in view of the seriousness of the infringement, also imposed a fine.
- 5 The applicant challenged that decision, seeking its annulment on the ground that the AGCM had allegedly initiated the procedure for establishing the infringement out of time, that is to say, after the period of 90 days laid down in Article 14 of Law No 689/1981.

The essential arguments of the parties in the main proceedings

- 6 According to the applicant, the preliminary investigation stage – in other words, the stage prior to notification of the initiation of the procedure, one during which, without an adversarial procedure, the AGCM collects the first evidence in order to verify the actual existence of the antitrust infringement – continued for a total of 855 days, thereby violating Article 14 of Law No 689/1981.
- 7 In the applicant's view, the AGCM's conduct is also in clear contrast with Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('the ECHR') and Article 41 of the Charter of Fundamental Rights of the European Union ('the Charter') in that the rights of defence and legitimate expectations of the accused party, which cannot be subject to a penalty procedure when the news of the infringement dates back more than 90 days, are breached.
- 8 However, the AGCM considers that the time limit of 90 days is not applicable to antitrust proceedings. The only obligation laid down is to open the investigation within a reasonable time. In the present case, that was complied with, taking into account the complexity of the facts under investigation, also in the light of the supervening entry onto the market of another operator, so that it became necessary to monitor, for a reasonable period of time, the development of the competitive dynamic.
- 9 In addition, the AGCM notes that there is no requirement in any other EU Member State for the national authorities responsible for the protection of competition to immediately initiate the investigation procedure, failing which it is time-barred. In this regard, the AGCM also highlights the concerns expressed by the European Commission about the effective application of EU law by the Italian Authority in the event of strict imposition of such a short period in which to act. In addition, the AGCM notes that that time limit is contrary to Articles 3

and 4(5) of Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018, which, read in the light of the principle of effectiveness, preclude national legislation which requires the AGCM to initiate the investigation in accordance with a strict time schedule (in the Italian case, of 90 days), without guaranteeing it the possibility of choosing independently its own priorities for action.

Succinct presentation of the reasoning in the request for a preliminary ruling

- 10 The referring court notes that, on the basis of a recent, now settled, line of case-law, the period of 90 days laid down in Article 14 of Law No 689/1981 is considered to be applicable to the initiation of the AGCM's investigation procedure.
- 11 It follows that, once the preliminary investigation stage has been completed, the AGCM is required to challenge the infringement within 90 days, by notifying the decision initiating the investigation. The 90 days do not necessarily start to run from the first report of the infringement, but rather at the conclusion of the assessment carried out in the preliminary investigation stage, that is to say, from the completion of the collection of the factual elements necessary to challenge the infringement. The conclusion of the assessment is subject to review by the administrative court (which evaluates the legality of the AGCM's acts, including penalties), which may verify whether, on a certain date, the challenge could reasonably be made.
- 12 The referring court notes, however, that, if Article 14 of Law No 689/1981 is applied mechanically, exceeding the time limit for bringing a challenge, even by only one day, results in the annulment of the AGCM's decision before the courts, essentially nullifying the latter's actions. Although Article 15 of Law No 287/1990 makes it clear that the main consequence of the finding of the infringement is an order to bring the infringement to an end (whereas the fine is imposed only for the most serious cases), the consequence of the single act and, above all, of the procedure is that the late initiation of the latter inevitably renders invalid the final decision adopted. Moreover, under the *ne bis in idem* principle, it is not possible to re-open at a later stage a new investigation for the same act, even in the event of a permanent infringement, in other words, in cases where the undertaking has never interrupted its unlawful conduct.
- 13 Next, the referring court notes that Article 3 of Law No 287/1990 transposes Article 102 TFEU into national law. Consequently, although an abuse of a dominant position limited to the national market is alleged, in the light of Article 1(4) of Law No 287/1990, there appears to be an interest on the part of the European Union in a correct application of the provisions of law for the prevention of anticompetitive actions, as the Court of Justice of the European Union has pointed out (Court of Justice of the European Union, judgment of

11 December 2007, [*ETI and Others*] C-280/06, ECLI:EU:C:2007:775, paragraphs 21 and 26).

- 14 After reiterating that Article 14 of Law No 689/1981 requires the AGCM to initiate the investigation procedure within a time limit of 90 days, the referring court notes that the Court of Justice, with regard to the antitrust procedure carried out at European level, has ruled that the European Commission is required to conclude the procedure (understood as the preliminary investigation and the actual investigation stage) within a reasonable time (judgment of 15 October 2002, [*ICI v Commission*], C-254/99, ECLI:EU:C:2002:582).
- 15 It therefore considers it necessary to clarify whether or not that discrepancy in the initiation of antitrust investigations, depending on the (national or common) market in which the infringement takes place, is compatible with EU law.
- 16 In that regard, the referring court notes that the AGCM has pointed out that the application of Article 14 of Law No 689/1981 may adversely affect its functioning, impeding the correct application of national and European competition law. Indeed, the AGCM would be forced to pursue in parallel multiple procedures which, due to their number, could compromise the successful outcome of investigations, inevitably leaving some infringements unpunished.
- 17 It also stresses the complexity of the AGCM's activity, which must already carry out a considerable number of checks at the preliminary investigation stage in order to be able to formulate the challenge correctly.
- 18 Furthermore, the strict application of Article 14 of Law No 689/1981 could also affect the autonomy of the AGCM. The imposition of a time limit of 90 days translates, in practice, into the obligation to initiate investigations according to a purely chronological criterion, thus restricting the AGCM's discretion.
- 19 On the latter point, the referring court emphasises that the European legislation cited by the AGCM (namely, Articles 3 and 4(5) of Directive (EU) 2019/1) is not applicable in the present case – since it was not transposed into Italian law until 2021, thus after the initiation of the investigation. However, it notes at the same time that the Directive does not appear to have an innovative nature, merely codifying into substantive law a general principle which already existed in the legal system.
- 20 As regards the undertaking's right of defence, the referring court notes, first of all, that the imputability of the penalties imposed by the AGCM to the quasi-criminal field (on the basis of the principles established by the case-law of the European Court of Human Rights, known as the '*Engel criteria*') determines as a logical consequence compliance with the guarantees, including the procedural guarantees, referred to in Article 6 of the ECHR and Article 41 of the Charter. In particular, these include the obligation, on the public authority, to challenge the infringement immediately ('promptly', according to the language of the ECHR), in order to ensure equality of arms and to prevent that the time elapsed may be to the

detriment of the accused. However, the referring court notes that Article 14 of Law No 689/1981, as interpreted and applied, goes further, by establishing a genuine irrebuttable presumption of infringement of the undertaking's right of defence, linked to the expiry of the time limit, without it being necessary to prove the actual harm suffered as a result of the late initiation of the investigation procedure.

- 21 At the same time, the referring court notes that, in practice, a belated challenge against the infringement does not necessarily adversely affect the right of defence of undertakings: except in specific cases where the impossibility of submitting evidence to the AGCM is established, it should be noted that throughout the preliminary investigation stage, the undertakings might even derive a competitive advantage from the commission of the infringement.
- 22 The referring court then notes that it is precisely the criminal nature in the broad sense of the penalty which justifies the existence of a secret stage, in other words, without an adversarial process, during which the AGCM is required to gather all the elements necessary to bring the challenge: limiting the preliminary investigation stage to cursory checks leads to an unreasonable restriction of the AGCM's action, which might not be able to reconstruct the infringement correctly and completely. Moreover, excessively moving forward the opening of the procedure increases the risk that the AGCM will not acquire the relevant evidence.
- 23 As regards the protection of legitimate expectations, the referring court notes that, given that the moment from which the time limit must be calculated is not fixed, but depends on specific factors on a case-by-case basis, such as whether or not the report is complete, it does not, in any event, appear to adequately guarantee the legitimate expectations of the persons on whom penalties are imposed. In addition, it is often argued that inaction on the part of the AGCM harms public interests, so that the period is also set in order to seek prompt enforcement action, thus avoiding consolidation of reliance on the undertaking. However, the application of a time limit for the initiation of the investigation procedure, as regards unlawful conduct which is still ongoing, appears contradictory and illogical, in so far as it makes it substantially impossible for the AGCM to prevent unlawful acts which continue to harm the public interest.
- 24 Lastly, in relation to the requirement of legal certainty, the referring court notes that the Italian legal system already provides, precisely in order to avoid challenges arising after an excessively long period, for a different limitation period of five years from the cessation of the unlawful conduct (Article 28 of Law No 689/1981).