Case C-204/23

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:

28 March 2023

Referring court:

Consiglio di Stato (Italy)

Date of the decision to refer:

24 March 2023

Appellant:

Autorità di regolazione dei trasporti

Respondents:

Lufthansa Linee Aeree Germaniche

Austrian Airlines AG

Brussels Airlines SA/NV

Swiss International Air Lines Ltd

Lufthansa Cargo AG

Subject matter of the main proceedings

Appeal brought before the Consiglio di Stato (Council of State, Italy) against the judgment in which the Tribunale amministrativo regionale per il Piemonte (Regional Administrative Court, Piedmont, Italy) upheld the appeal brought by Lufthansa Linee Aeree Germaniche, Austrian Airlines AG, Brussels Airlines SA/NV, Swiss International Air Lines Ltd and Lufthansa Cargo AG, respondents, against the decision of the Autorità di Regolazione dei Trasporti (Italian Transport Regulatory Authority; ‘the ART’ or ‘the Authority’), appellant, in the part in which it provides for levying a financial contribution on entities operating ‘air passenger and/or air cargo transport services’.

Subject matter and legal basis of the request for a preliminary ruling

The subject matter of the present request for a preliminary ruling relates to the regulation of the manner in which the ART is funded and the identification of the objective prerequisites for such funding over a period of time that has witnessed a succession of several legislative, case-law and regulatory interventions. The request for a preliminary ruling under Article 267 TFEU seeks an interpretation of Article 11(5) of Directive 2009/12/EC of the European Parliament and of the Council of 11 March 2009 on airport charges.

Questions referred for a preliminary ruling

Must Article 11(5) of Directive 2009/12/EC – a legislative act relating to the airport sector – be interpreted as meaning that the funding of the Authority must be carried out only by means of levying airport charges, or may it not also be carried out by means of other forms of funding such as levying a financial contribution (the present Chamber finds that collecting the sums intended to fund the Authority by means of levying airport charges is merely an option for Member States)?

Must the charges or the financial contribution which may be levied for the funding of the supervisory authority pursuant to Article 11(5) of Directive 2009/12/EC relate only to specific services and costs – which, in any event, are not referred to in the Directive – or is their correlation to the Authority's operating costs as resulting from the financial statements submitted to and audited by the public authorities not sufficient?

Must Article 11(5) of Directive 2009/12/EC be interpreted as meaning that charges may be levied only on persons resident or incorporated under the law of the State which established the Authority, and can this also apply in the case of financial contributions levied for the operation of the Authority?

Provisions of EU law cited

Directive 2009/12/EC of the European Parliament and of the Council of 11 March 2009 on airport charges; Articles 2([3]), 11(3) and 11(5)

Article 267, first paragraph, TFEU

Provisions of national law cited

Decreto-legge 6 dicembre 2011, n. 201 – Disposizioni urgenti per la crescita, l'equità e il consolidamento dei conti pubblici, convertito, con modificazioni, dalla legge 22 dicembre 2011, n. 214 [Decree-Law No 201 of 6 December 2011 – Urgent provisions for growth, fairness and the consolidation of public accounts, converted, with amendments, by Law No 214 of 22 December 2011];

Article 37(2) and (6)(a) and (b), as amended by *decreto-legge 28 settembre 2018, n. 109 – Disposizioni urgenti per la città di Genova, la sicurezza della rete nazionale delle infrastrutture e dei trasporti, gli eventi sismici del 2016 e 2017, il lavoro e le altre emergenze, convertito con modificazioni dalla legge 16 novembre 2018, n. 130* [Decree-Law No 109 of 28 September 2018 – Urgent provisions for the city of Genoa, the security of the national infrastructures and transport network, the seismic events of 2016 and 2017, employment and other emergencies, converted, with amendments, by Law No 130 of 16 November 2018];

Article 16 of Decree-Law No 109 of 28 September 2018, entitled '*Competenze dell'Autorità di regolazione dei trasporti e disposizioni in materia di tariffe e di sicurezza autostradale* [Powers of the Transport Regulatory Authority and provisions on charges and motorway safety]', amended Article 37(6)(b), first sentence, of Decree-Law No 201 of 6 December 2011 – an article that constitutes the key provision on the subject of funding for the ART – as follows:

'*6. The exercise of the powers referred to in paragraph 2 and the activities referred to in paragraph 3, as well as the exercise of the other powers and activities assigned by law, shall be provided for as follows: (…)*

[b)] by means of a financial contribution paid by the economic operators operating in the transport sector and for whom the Authority has specifically initiated, in the market in which they operate, the exercise of the powers or the performance of the activities provided for by the law, to an extent not exceeding 1 per mille of the turnover received in the previous financial year deriving from the exercise of the activities carried out, with exemption thresholds taking into account the size of the turnover. Turnover is calculated in such a way as to avoid duplication of contributions'.

Succinct presentation of the facts and the proceedings

1 The air carriers Lufthansa Linee Aeree Germaniche, Austrian Airlines, Brussels Airlines, Swiss International Air Lines Ltd and Lufthansa Cargo ('the respondents') brought proceedings before the Regional Administrative Court of Piedmont challenging ART Resolution No 141 of 19 December 2018 on the 'Extent and methods of payment of the financial contribution due to the Transport Regulatory Authority for the year 2019', which provided for the levying of a financial contribution on entities operating 'air passenger and/or air cargo transport services' [Article 1(1)(g)].

2 In its judgment No 381 of 15 June 2020, the Regional Administrative Court of Piedmont upheld the action and, consequently, annulled that resolution in so far as it provided for the levying of the aforementioned financial contribution. The ART accordingly appealed to the Council of State, the referring court.

3 The respondent parties have challenged the merits of the arguments put forward by the ART, concluding that the appeal should be dismissed.

4 They also raised the issue of the disapplication of the measure introducing the levy and, if appropriate, the submission of a request for a preliminary ruling to the Court of Justice of the European Union concerning the infringement and misapplication of Directive 2009/12. The respondents also raised a question concerning the constitutionality of Article 37(6)(b) of Decree-Law No 201 of 2011 in relation to Articles 3, 23, 53 and 77 of the Italian Constitution.

Principal arguments of the parties to the main proceedings

5 The ART, which operates in full autonomy and with independence of decision-making and assessment, has among its tasks the promotion of competition, the removal of barriers to accessing the relevant market, and the protection of consumers 'in the transport sector and in their access to infrastructures and ancillary services, in accordance with European legislation and in compliance with the principle of subsidiarity and the powers of the regions and local authorities under Title V of Part Two of the Italian Constitution'. It has cross-sectoral competence over the entire transport sector and over access to its infrastructure.

6 As appellant, the ART takes the view that the assumption of the court of first instance – to the effect that the only activity specifically regulated by the ART concerning the determination of airport charges, is that of the airport infrastructure managing body and not that of the air carriers – is incorrect.

7 The issue of whether air carriers belong to the category of 'operators of infrastructure and regulated services' has, according to the ART, been clarified by Article 37(6) of Decree-Law No 201 of 2011, as amended by Article 16(1)(a-bis) and (a-ter) of Decree-Law No 109 of 2018. The new wording of Article 37(6) leaves no doubt as to the fact that air carriers are certainly 'economic operators', even significant ones, active in the 'transport sector', with the result that they come fully within the scope of the subjects required to pay the financial contribution for the performance of the activities and powers assigned to the Authority by law.

8 The ART takes the view that the Regional Administrative Court's argument is the result of an erroneous rigid distinction between the market in which airport infrastructure managing bodies operate (which the Authority regulates) and the market in which air carriers operate (which the Authority does not regulate).

9 The distinction made by the court of first instance between a regulated entity and a mere user or beneficiary has, in the view of the ART, been superseded by the 2018 legislative amendment, since what matters is whether or not an economic operator operates in a market where the Authority has been exercising its action.

10 The aviation and infrastructure markets are, it submits, interrelated, as more or less advantageous economic conditions for carriers for the use of airport infrastructure would lead to an increase, or reduction, in passenger traffic at the airport concerned, which, in turn, would generate more, or less, revenue for the managing body from the commercial activities used by the increased flow of passengers.

11 In the appellant's view, the respondent parties come within the scope of regulated entities, both in terms of their own status and in terms of the subject matter.

12 The Authority claims to have exercised in practice, in various circumstances, regulatory sectoral powers pursuant to Article 37(6), as amended by Decree-Law No 109 of 2018.

13 In the aviation sector, which is governed by Directive 2009/12 and by the national transposition measures, the Authority submits that its activity is ultimately to be directly addressed to both groups, namely managing bodies and users, so as to ensure that the process of setting airport charges is carried out in accordance with European requirements.

14 The respondents, for their part, state that Article 11(5) of Directive 2009/12 provides that '*Member States may establish a funding mechanism for the independent supervisory authority, which may include levying a charge on airport users and airport managing bodies*'. The Italian legislation concerning the financing of the ART provides for the payment of a financial contribution (based on turnover), with economic operators subject to direct regulation being required to pay such a contribution.

15 The respondents emphasise that the financial contribution is something entirely different from the charge, the reason being that the charge is the consideration for a service, or a set of services, and the obligation to pay it is found in the use of that specific service, and such are the airport charges, whereas the financial contribution for the ART, as provided for by law, is a tax (for a specific purpose) which, in so far as it is general (for the transport sector), is not connected to the performance of a specific service, is based on turnover and not on the services received, with the result that it could be defined as an imposed pecuniary obligation which is yet again not connected to a service, but to the operation of an entity.

16 They therefore consider this financial contribution to be foreign to and outside the scope of Directive 2009/12.

17 In addition, still according to the respondents, there is a conflict between the national rules and the European Union rules as regards the costs incurred by the Authority which may be covered by the compulsory financial contribution to be borne by the undertakings, since the national rules, by providing for a contribution to cover all of the Authority's costs, go beyond what is permitted by Directive 2009/12, as the financial contribution is not expressly correlated to the actual

operating costs. In particular, whereas national legislation is said to be oriented towards covering, through the use of financial contributions, all the costs of the Authority not covered by State funding, in the perspective of the EU legislature the imposition of administrative charges on operators appears to be justified exclusively on the basis of the proven costs actually borne by the national Authority.

Succinct presentation of the grounds for the request

18 The referring court takes the view that, in order to rule on the issues in the request for a preliminary ruling, it is necessary to analyse the relevance of the question[s] referred for a preliminary ruling, since the questions put forward do not appear to have already been the subject of interpretation by the Court of Justice and the conditions outlined by the Court of Justice itself for finding that there are no reasonable doubts as to the interpretation of Article 11(5) of Directive 2009/12 are not satisfied.

19 Indeed, if the appeal brought by the ART were to be dismissed, no relevance would be attached to the proposed question[s], in view of the fact that the respondents would have no interest in that regard.

20 On the other hand, if the Authority's grounds of appeal were to prove to be well founded, the preliminary question on EU law would be decisive for the resolution of the case and it would be necessary to stay the proceedings and refer that question to the Court of Justice.

21 The objections raised by the ART against the grounds of the judgment upholding the action at first instance are well founded in light of the most recent case-law of the present Council of State (see, inter alia, Council of State, VI, 4 January 2021, No 9).

22 The referring court observes that Resolution No 141 of 19 December 2018 was adopted following the legislative amendment introduced by Decree-Law No 109 of 28 September 2018, which resulted in an objective broadening of the range of undertakings required to pay the financial contribution; whereas, until Decree-Law No 109 of 28 September 2018, the financial contribution was borne solely by managing entities, while now the burden also falls on mere economic operators.

23 In its opinion, while the first-instance court's interpretative direction can be confirmed for the sake of legal certainty until 2018, it cannot be endorsed as from 2019, since the legislative amendment introduced a unitary concept, comprising '*economic operators operating in the transport sector*', thus emphasising the central rationale of the regulation, which is based on the benefit that the entrepreneurial categories receive from the regulation, where therefore the pre-eminence of the utility factor makes the fragmentation into the two categories superfluous.

24 Therefore, after the 2018 reform, it appears necessary to establish, given the comprehensive nature of the parties involved, only the circumstance of the actual commencement in the relevant market of '*the exercise of the powers or the performance of the activities provided for by the law*', with the position of regulated or beneficiary subjects having no longer any relevance. The transport activity performed by air carriers is therefore to be understood as coming within the regulatory scope assigned to the ART.

25 The Council of State takes the view that the respondents' arguments do not allow national law to be disapplied, since the reasons for a potential conflict with EU law are not immediate and are not sufficiently clear, precise and unconditional. On the other hand, it finds that, since the dispute concerns the financial contribution for the year 2019, the ART's arguments are well founded and the preliminary question raised by the respondents is therefore relevant.

26 The referring court observes that Directive 2009/12 has the objective of ensuring uniform treatment among European Union airport managing bodies and infrastructure users, in order not only to foster competition among airports but also to protect airlines against potential abusive conduct by airports in a particularly strong position.

27 Article 2[(3)] of Directive 2009/12 includes within the category of airport users '*any natural or legal person responsible for the carriage of passengers, mail and/or freight by air to or from the airport concerned*', thus excluding passengers using airport facilities and services – on to whom, rather, air carriers subsequently pass on the charges.

28 Article 3 of Directive 2009/12 enshrines the principle of non-discrimination, by prohibiting airport charges that may discriminate among airport users, so that the rule is aimed at ensuring a level playing field among the air carriers operating therein, in order to exclude the determination of favourable conditions that allow one or more users to overcome the competition by offering more attractive services on the market.

29 In summary, the crucial role conferred by the Directive on national supervisory authorities is aimed at achieving a 'common framework' for airport charges.

30 Article 11 of Directive 2009/12, the provision of EU law which the [respondents] claim is being infringed, provides, in its paragraph 3, that '*Member States shall guarantee the independence of the independent supervisory authority by ensuring that it is legally distinct from and functionally independent of any airport managing body and air carrier […]*' and, above all, Article 11(5) provides that '*Member States may establish a funding mechanism for the independent supervisory authority, which may include levying a charge on airport users and airport managing bodies*'.

31 It is therefore indisputable that a Member State is entitled to provide for the financing of the supervisory authority also by charging system operating costs to air carriers.

32 Moreover, also according to the referring court, while it is true, as the respondent airlines point out, that the concept of an airport charge, as consideration for a service (in particular, a charge for the landing and departure of aircraft, a charge for the parking or uncovered parking of aircraft and a charge for the embarkation of passengers, that is to say, charges linked to the use of the infrastructure) is ontologically different from that of a financial contribution not related to a specific service, which is payable in order to finance the Authority that oversees the transparency and accessibility of the infrastructure collecting the charges, it is equally true that, though the European measure provides for the establishment of a financing mechanism '*which may include levying a charge*' (that is to say, which may treat the charges as the instrument of financing), this does not *sic et simpliciter* mean that the financing mechanism cannot provide for a form of financial contribution that is independent of a specific service.

33 Likewise, in line with Judgment No 69 of the Corte costituzionale (Constitutional Court, Italy) of 2017, the Council of State takes the view that there is no conflict with the European rule with regard to the quantification criteria because, even if the national provision does not expressly provide that the financial contribution must be correlated to proven costs of the Authority's operating expenses to be identified analytically for establishing the amount of the financial contribution, the national practice is not detached from the correlation to such costs, given that national law also provides, in the same Article 37(6)(b) of Decree-Law No 201 of 6 December 2011, converted by Law No 214 of 2011, for a procedure in several stages to establish the amount of the financial contribution, namely that the Authority's decision must be approved by the Italian Prime Minister in agreement with the Minister for Economy and Finance, with the possibility of formulating remarks on the matter undoubtedly correlated to the Authority's costs as per its financial statements, costs which are then distributed in accordance with the turnover achieved by the companies.

34 Lastly, according to the referring court, it must be pointed out that, while the introduction of a common framework for airport charges is intended to ensure uniform treatment not only among EU airport managing bodies but also among airport users such as air carriers, it is clear that restricting the levy to air carriers established in a national territory could create a mechanism distorting competition, so that it does not appear possible to agree with the [respondents'] assumption that carriers established in other Member States should be exempt from the financial contribution (since it cannot be denied that the regulation of airport infrastructures by the individual national authorities benefits all European Union undertakings within each national territory).