

Case C-662/22**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:**

19 October 2022

Referring court:

Tribunale Amministrativo Regionale per il Lazio (Italy)

Date of the decision to refer:

10 October 2022

Applicant:

Airbnb Ireland UC

Defendant:

Autorità per le Garanzie nelle Comunicazioni

Subject matter of the main proceedings

Action brought by Airbnb Ireland Unlimited Company for the annulment of (i) Decision No 200/21/CONS of the Autorità per le Garanzie nelle Comunicazioni (Communications Regulatory Authority, Italy) ('AGCOM') of 17 June 2021 requiring providers of online intermediation services and providers of online search engines to be entered in the register of communications operators and (ii) related acts, including AGCOM Decision No 666/08/CONS.

Subject matter and legal basis of the request

Interpretation of the principle of freedom to provide services laid down in Article 56 TFEU and Article 16 of Directive 2006/123/EC, of Article 3 of Directive 2000/31/EC and of Regulation (EU) 2019/1150 for the purpose of ascertaining whether they preclude national provisions that require providers of online intermediation services and providers of online search engines to be entered in a register, which in turn gives rise to other financial and administrative obligations for those service providers, failure to comply with which results in the

imposition of penalties; interpretation of Article 3(4)(b) of Directive 2000/31 and Directive (EU) 2015/1535 for the purpose of ascertaining whether Member States are obliged to notify the Commission of the measures requiring those service providers to be registered and whether private individuals may object to measures not notified to the Commission being applied to them.

Questions referred for a preliminary ruling

- Does Regulation (EU) 2019/1150 preclude a national provision that, in order to promote fairness and transparency for business users of online intermediation services, including by adopting guidelines, encouraging codes of conduct to be drawn up and gathering relevant information, requires providers of online intermediation services and providers of online search engines to be entered in a register, which involves the communication of relevant information about their organisation and payment of a financial contribution, a failure to comply with which results in the imposition of penalties?

- Does Directive (EU) 2015/1535 oblige Member States to notify the Commission of measures that require providers of online intermediation services and providers of online search engines to be entered in a register, which involves the communication of relevant information about their organisation and payment of a financial contribution, a failure to comply with which results in the imposition of penalties? If so, does the directive allow a private individual to object to measures not notified to the Commission being applied to him or her?

- Does Article 3 of Directive 2000/31/EC preclude the adoption by national authorities of provisions that, in order to promote fairness and transparency for business users of online intermediation services, including by adopting guidelines, encouraging codes of conduct to be drawn up and gathering relevant information, impose additional administrative and financial obligations on operators established in another European country, such as entry in a register, which involves the communication of relevant information about their organisation and payment of a financial contribution, a failure to comply with which results in the imposition of penalties?

- Does the principle of freedom to provide services laid down in Article 56 TFEU and Article 16 of Directive 2006/123/EC preclude the adoption by national authorities of provisions that, in order to promote fairness and transparency for business users of online intermediation services, including by adopting guidelines, encouraging codes of conduct to be drawn up and gathering relevant information, impose additional administrative and financial obligations on operators established in another European country, such as entry in a register, which involves the communication of relevant information about their organisation and payment of a financial contribution, a failure to comply with which results in the imposition of penalties?

- Does Article 3(4)(b) of Directive 2000/31/EC require Member States to notify the Commission of measures requiring providers of online intermediation services and providers of online search engines to be entered in a register, which involves the communication of relevant information about their organisation and payment of a financial contribution, a failure to comply with which results in the imposition of penalties? If so, does the directive allow a private individual to object to measures not notified to the Commission being applied to him or her?

Provisions of European Union law relied on

Article 56 TFEU;

Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), in particular recital 22 and Articles 2 and 3;

Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, in particular Articles 16 and 19;

Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services, in particular Articles 1 and 5;

Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services, in particular recitals 46 and 47 and Articles 15 and 16.

Case-law of the Court of Justice relied on

Judgments in Cases C-194/94, C-215/01 and C-390/18.

Provisions of national law relied on

Legge 31 luglio 1997, n. 249, 'Istituzione dell'Autorità per le garanzie nelle comunicazioni e norme sui sistemi delle telecomunicazioni e radiotelevisivo' (Law No 249 of 31 July 1997 establishing the Communications Regulatory Authority and telecommunications and broadcasting standards), as amended (following the entry into force of Regulation 2019/1150) by legge 30 dicembre 2020, n. 178, 'Bilancio di previsione dello Stato per l'anno finanziario 2021 e bilancio pluriennale per il triennio 2021-2023' (Law No 178 of 30 December 2020 on the State budget for the 2021 financial year and the multiannual budget for the three-year period 2021-2023).

For the purposes of this reference for a preliminary ruling, the resulting rules are as follows:

- according to the legislation, the adequate and effective enforcement of Regulation 2019/1150, which promotes fairness and transparency for business users of online intermediation services, including by adopting guidelines, encouraging codes of conduct to be drawn up and gathering relevant information, must be guaranteed;
- it is an obligation for providers of online intermediation services and providers of online search engines offering services in Italy, even if they are not established there, to be entered in the Register of Communications Operators ('the RCO');
- in the event of non-compliance with the measures adopted by the authority pursuant to Regulation 2019/1150, each entity concerned will incur a fine of not less than 2% and not more than 5% of its turnover for the previous financial year;
- the entry in the RCO gives rise to an obligation to pay an annual contribution intended to cover the operating costs of AGCOM as the regulatory and supervisory authority.

Legge 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, 'Provisions for the preparation of the annual and multiannual State budget') (2006 Finance Law), in particular Article 1(66-bis), which concerns the financial contribution to AGCOM's operations which those service providers are obliged to pay.

AGCOM Decision No 161/21/CONS of 12 May 2021 amending Decision No 397/13/CONS of 25 June 2013 on 'Economic System Information'. Decision No 161/21/CONS amended the earlier Decision No 397/13/CONS by stipulating that providers of online intermediation services and providers of online search engines must also send Economic System Information (ESI).

AGCOM Decision No 200/21/CONS of 17 June 2021 amending Decision No 666/08/CONS on the rules for maintaining a register of communications operators following the entry into force of Law No 178 of 30 December 2020 on the State budget for the 2021 financial year and the multiannual budget for the three-year period 2021-2023. Decision No 200/21/CONS, in accordance with the provisions of Article 1(515) of Law No 178/2020, amended the earlier Decision No 666/08/CONS by requiring providers of online intermediation services and providers of online search engines to be entered in the RCO. Moreover, that obligation is accompanied by the following further obligations:

- the completion of various forms describing both the activity carried out by the obliged entity and how that entity is organised (information about the share capital, names of the shareholders, composition and term of the administrative

body). The information communicated must be updated annually and administrative penalties apply in the event of non-compliance.

Succinct presentation of the facts and procedure in the main proceedings

- 1 The applicant, Airbnb Ireland Unlimited Company, which is based in Ireland (‘the applicant’), offers online intermediation services in the short-term property rental sector.
- 2 By its action, the applicant seeks the annulment of Decision No 200/21/CONS of 17 June 2021, by which AGCOM, pursuant to Article 1(515) of Law No 178/2020, amended its earlier Decision No 666/08/CONS by requiring providers of online intermediation services and providers of online search engines to be entered in the RCO. Said registration in turn gives rise to obligations for those service providers to provide information and pay financial contributions. The service providers incur penalties in the event of non-compliance with those obligations. The obligations to provide information consist in completing various forms about the obliged entity’s business activities and organisation, while the payment obligations consist in paying an annual contribution intended to cover AGCOM’s operating costs.

The essential arguments of the parties in the main proceedings

- 3 The applicant submits that both the contested decision and the national legislation applicable in the present case infringe Regulation 2019/1150, Directive 2015/1535 and Directive 2000/31, as well as the principle of freedom to provide services.

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

- 4 The referring court has doubts as to whether the obligation to be entered in the RCO, which is imposed on providers of online intermediation services and search engines by Law No 249/1997 (as amended by Law No 178/2000) and by AGCOM Decision No 668/08/CONS (as amended by Decision No 200/21/CONS), complies with Articles 15 and 16 of **Regulation (EU) 2019/1150**. The obligation to be entered in the RCO amounts, in essence, to supervision of the service providers’ ownership and administrative structures. Such supervision, first, is not the same as the verification, required by Regulation (EU) 2019/1150, of compliance with the obligations laid down in the regulation and, second, is contrary to the objective pursued by that regulation – namely to ensure the transparency and fairness of contractual relations with business users.
- 5 The referring court also recalls that **Directive 2015/1535** lays down a procedure for the provision of information in the field of rules on information society services to ensure as much transparency as possible as regards national initiatives and to allow the Commission to supervise them, in order to safeguard the principle

of the free movement of goods and services. Since, first, the services provided by the abovementioned service providers come within the category of information society services and, second, the rules on the obligation to be entered in the RCO, applicable to those service providers, specifically introduce a general requirement for the operation of information society services, those rules should have been notified to the Commission. In the view of the referring court, in the event of non-compliance with the obligation to notify the Commission, the rules in question do not apply to private individuals.

- 6 The referring court also doubts whether the obligation to be entered in the RCO complies with Article 3 of **Directive 2000/31** ('Directive on electronic commerce'), given that such an obligation may constitute, in the light of that directive, an unlawful restriction on the free movement of information society services. The obligation pertains to the pursuit of the activity of information society services within the meaning of that directive; it also applies to service providers established in Member States other than Italy and creates an additional administrative burden and significant financial obligations for those service providers. In addition, the services in question do not come within the exempt categories provided for in Article 2 of Directive 2000/31, nor do they satisfy the conditions set out in Article 3 of that directive which allow the Member State to impose restrictions. Moreover, the obligations to provide information about the undertaking's subjective situation and to pay financial contributions seem disproportionate to the objective of promoting fairness and transparency for business users of online intermediation services.
- 7 The referring court also has doubts as to whether the obligation to be entered in the RCO complies with the principle of freedom to provide services enshrined in Article 16 of **Directive 2006/123** ('Services Directive'). That directive provides that Member States may not restrict the freedom to provide services in the case of a provider established in another Member State, in particular by imposing an obligation to obtain an authorisation from the competent authorities. In the present case, the obligation to be entered in the RCO imposed on undertakings established in another Member State is liable to affect the freedom to provide services, since it gives rise to financial and administrative costs which could distort the internal market and delay, complicate or make more onerous the provision of services in the host Member State.
- 8 Lastly, the referring court points out that the obligation to be entered in the RCO is liable to restrict the free movement of information society services provided by an entity established in another Member State. In that regard, the second indent of Article 3(4)(b) of Directive 2000/31 provides that the Commission and the Member State in which the undertaking is established must be notified of the intention to take such measures. According to the referring court, in the event of non-compliance with the obligation to notify the Commission, the measure at issue cannot be applied to private individuals.

- 9 The questions referred are relevant because if it were ascertained that a direct conflict existed between the obligation to be entered in the RCO and EU law, the national legislation at issue would have to be disapplied and the service providers would not be required to fulfil the obligation laid down therein.

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