

Case C-345/24

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:

10 May 2024

Referring court:

Consiglio di Stato (Italy)

Date of the decision to refer:

9 May 2024

Appellant:

Autorità per le Garanzie nelle Comunicazioni (AGCOM)

Respondents:

BRT SpA

Federazione Italiana Trasportatori (FEDIT)

Associazione Italiana dei Corrieri Aerei Internazionali (AICAI)

DHL Express (Italy) Srl

TNT Global Express Srl

Fedex Express Italy Srl

United Parcel Service Italia Srl

Amazon Italia Transport Srl

Amazon Italia Logistica Srl

Amazon EU Sàrl

Subject matter of the main proceedings

Appeal before the Consiglio di Stato (Council of State, Italy) against the judgment of the Tribunale Amministrativo Regionale per il Lazio (Regional Administrative Court, Lazio; ‘the TAR Lazio’), which, in an action brought by the current respondent transport undertakings, had annulled delibera n. 94/22/CONS (Decision No 94/22/CONS) of the Autorità per le Garanzie nelle Comunicazioni (Communications Regulatory Authority, Italy; ‘AGCOM’). That decision had introduced a series of obligations to provide information in the parcel delivery services market.

Subject matter and legal basis of the request

Request for interpretation of Directive 97/67/EC and Regulation (EU) 2018/644 in order to clarify whether they are also applicable to non-cross-border delivery service providers. Possible incompatibility with the principle of non-discrimination and with Articles 14, 114 and 169 TFEU. ‘Implied powers’ as a legal basis for the action of the national regulatory authority at issue in the present case, and the limits imposed by EU law on the power of national regulatory authorities to impose obligations to provide information.

Questions referred for a preliminary ruling

1. Does Regulation (EU) 2018/644 of the European Parliament and of the Council of 18 April 2018 on cross-border parcel delivery services, with regard to the collection of information, apply as such only to cross-border delivery service providers or, in general, to all parcel delivery service providers, subject to specific exclusions relating to individual provisions?
2. If the answer to Question 1 is that it applies only to cross-border delivery service providers, does Directive 97/67/EC, or do the so-called ‘implied powers’, provide the legal basis for the national regulatory authorities to impose, in any event, on delivery service providers, even non-cross-border ones, general obligations to provide information?
3. If the answer to Question 2 is no, must the fact that Regulation (EU) 2018/644 of the European Parliament and of the Council of 18 April 2018 does not apply to non-cross-border delivery providers be regarded as reasonable, non-discriminatory and in accordance with Articles 14, 114 and 169 of the Treaty on the Functioning of the European Union?
4. To what extent (including from the perspective of necessity and proportionality) can the national regulatory authority impose obligations to provide information on parcel delivery service providers and, in particular, is it possible to impose, on all providers without distinction, obligations to provide information concerning:

- (i) the conditions applied to different types of customers;
- (ii) the contracts which govern the relations between the individual undertaking that provides the parcel delivery service and the undertakings which in various ways, according to the specificities of the sector, contribute to providing that service;
- (iii) the economic conditions and the legal protection afforded to workers employed in various capacities in providing the service?

Provisions of European Union law relied on

Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service, as amended by Directive 2008/6/EC of the European Parliament and of the Council of 20 February 2008, and in particular Article 22a thereof.

Directive 2008/6/EC of the European Parliament and of the Council of 20 February 2008 amending Directive 97/67/EC with regard to the full accomplishment of the internal market of Community postal services, and in particular recital 51 thereof.

Regulation (EU) 2018/644 of the European Parliament and of the Council of 18 April 2018 on cross-border parcel delivery services, and in particular Article 4 thereof.

Commission Implementing Regulation (EU) 2018/1263 of 20 September 2018 establishing the forms for the submission of information by parcel delivery service providers pursuant to Regulation (EU) 2018/644 of the European Parliament and of the Council.

Provisions of national law relied on

Decreto legislativo 22 luglio 1999, n. 261 – Attuazione della direttiva 97/67/CE concernente regole comuni per lo sviluppo del mercato interno dei servizi postali comunitari e per il miglioramento della qualità del servizio (Legislative Decree No 261 of 22 July 1999 transposing Directive 97/67/EC on common rules for the development of the internal market of Community postal services and the improvement of quality of service; ‘Legislative Decree No 261/99’), in particular Articles 2 and 14bis.

Delibera n. 94/22/CONS, dell’Autorità per le Garanzie nelle Comunicazioni (AGCOM), del 31 marzo 2022, recante ‘Obblighi regolamentari nel mercato dei servizi di consegna dei pacchi’ (AGCOM Decision No 94/22/CONS of 31 March

2022 on regulatory obligations in the parcel delivery services market), in particular Articles 1 and 2.

Succinct presentation of the facts and procedure in the main proceedings

- 1 Following a complex and lengthy procedure, during which several decisions were adopted concerning analyses and public consultations on the parcel delivery services market, AGCOM adopted Decision No 94/22/CONS of 31 March 2022 on regulatory obligations in the parcel delivery services market. It introduces certain ‘symmetric’ obligations to provide information, that is to say, obligations imposed on all operators of a certain size operating in the parcel delivery services market, and ‘asymmetric’ obligations to provide information, imposed solely on Amazon.
- 2 The ‘symmetric’ obligations to provide information are purportedly intended to increase the level of monitoring in the market concerned, owing to the lack of transparency found therein. In particular, they are obligations imposed on all persons authorised to provide the public with parcel delivery postal services which employ, in postal activities, at least 50 employees and have achieved, for at least three consecutive years, an annual turnover relating to activities falling within the scope of postal services, as defined in Article 1(2)(a) of Legislative Decree No 261/1999, in excess of EUR 10 million.

Those symmetric obligations to provide information concern: information on the economic conditions of the services offered to the public; the economic conditions of reference (average prices) for certain groups of business customers identified on the basis of annual turnover; the contracts in force governing commercial relations with the undertakings in the sector, with which they have directly entered into a contract, which contribute to the provision of the postal service; a declaration on compliance with working conditions, with regard to all persons involved in the provision of the service and at all levels of the network organisation; and the standard framework contracts used for personnel belonging to the different categories at each organisational level.

- 3 On the other hand, as regards the ‘asymmetric’ obligations to provide information, these are obligations that AGCOM decided to impose only on Amazon because of the critical points arising from the analysis of the parcel delivery services market.

In particular, Amazon, in addition to the information listed above, must provide AGCOM with the following information: the average price applicable to retailers (‘retail’) participating in Amazon’s logistics programme (so-called ‘FBA’) for the delivery service; the average unit price paid to ‘Delivery Service Providers’ (DSPs) for the delivery service; and the average unit price paid to other delivery operators for the delivery service.

- 4 AGCOM Decision No 94/22/CONS was challenged, by four separate actions, before the TAR Lazio by Associazione Italiana dei Corrieri Aerei Internazionali

(AICAI), DHL Express Italy, TNT Global Express, Fedex Express Italy, United Parcel Service Italia, BRT and Federazione Italiana Trasportatori (FEDIT) (together, ‘operators other than Amazon’), as well as by Amazon Italia Transport, Amazon Italia Logistica and Amazon EU (together, ‘Amazon’).

- 5 The TAR Lazio, by four separate judgments, upheld the four actions and annulled AGCOM Decision No 94/22/CONS. The reasons for upholding those actions were, however, different. In the three proceedings brought by operators other than Amazon, that court noted, in the first place, the lack of a proper preliminary investigation for the AGCOM decision. In particular, AGCOM had allegedly introduced obligations to provide information in B2B (‘business-to-business’) sectors in which the preliminary investigation carried out had not identified any issues which would justify regulatory intervention. In the proceedings brought by Amazon, on the other hand, the reason for upholding the action was not the lack of preliminary investigation, since issues had in fact arisen in the B2C (‘business-to-consumer’) sector, but rather the alleged lack of a ‘sound’ legal basis.
- 6 By four separate appeals, AGCOM challenged those TAR Lazio annulment judgments before the Council of State, the referring court.

The essential arguments of the parties in the main proceedings

- 7 In the appeal in which the respondent is Amazon, AGCOM criticises the judgment of the TAR Lazio in so far as it considers, first, that AGCOM does not have the power to impose regulatory obligations (symmetric or asymmetric) on Amazon and, secondly, that Decision 94/22/CONS did not state, with sufficient clarity, the legal basis for the decision to impose those obligations to provide information.
- 8 As regards Regulation No 2018/644, AGCOM submits, in the first place, that that regulation does not apply exclusively to cross-border parcel delivery service providers but instead, in general, to parcel delivery service providers, including Amazon, since that company uses international delivery networks for the delivery of goods sold by third parties and the companies of the Amazon group may be classified as postal operators. Secondly, the scope of application of that regulation is not limited to traditional business models, but is instead extended to alternative business models, including e-commerce platforms. Thirdly, the fact that Amazon does not carry out cross-border parcel delivery activities does not preclude the application of the regulation to it, since, where the regulation intended to refer specifically to (only) cross-border providers, it did so expressly (as in Article 5 on cross-border tariffs, whereas Article 4, on ‘Provision of information’, is addressed without distinction to all parcel delivery service providers). Fourthly, the TAR Lazio wrongly ruled out that that regulation could constitute a valid basis for the exercise of AGCOM’s regulatory power vis-à-vis Amazon in the light of the fact that it is a non-cross-border operator. Finally, AGCOM has the power to lay down rules on regulatory oversight on the basis of Directive 97/67/EC and Legislative Decree No 261/1999, and on the basis of Regulation 2018/644 which, in

Article 4(5), expressly recognises that national regulatory authorities may impose obligations to provide information additional to those laid down in that regulation.

- 9 As regards Directive 97/67/EC, AGCOM submits that the TAR Lazio misinterpreted that Directive by stating that its purpose was to address ‘specific cross-border issues’. According to AGCOM, the objectives and scope of application of Directive 97/67/EC are, on the contrary, much wider, since it aims to improve postal services offered within Europe for the delivery of correspondence and packages and to harmonise the rights enforceable by European citizens, with regard to both national and cross-border postal services. AGCOM is therefore entitled to adopt regulatory remedies in order to carry out the tasks thus allocated, including the promotion of competition and the protection of users of postal services. In addition, there is no specific obligation to indicate, explicitly and on pain of annulment of the measure adopted, the regulatory source of the exercise of the power.
- 10 As regards the basis for the regulatory power exercised by Decision No 94/22/CONS, AGCOM asserts that it acted lawfully within the scope of the powers conferred on it by Directive 97/67/EC and by the national implementing legislation (Legislative Decree No 261/99). The fact-finding powers available to it as a national regulatory authority were exercised on the basis of those regulatory measures and on the basis of Regulation No 2018/644, in which those powers were subsequently confirmed and detailed further.
- 11 The tasks assigned to AGCOM by the national implementing legislation, such as the function of ‘promoting competition’ (Article 2(4)(d) of Legislative Decree No 261/1999), activities of ‘analysing and monitoring postal markets, in particular as regards the price of services’ (Article 2(4)(g) of Legislative Decree No 261/1999) and, more generally, ‘regulating postal markets’ [Article 2(4)(a) of Legislative Decree No 261/1999], cannot be carried out without correct and complete knowledge of the markets.
- 12 In addition, as stated in recital 51 of Directive 2008/6/EC, national regulatory authorities for the postal sector ‘need to gather information from market players in order to carry out their tasks effectively ...’.
- 13 In the present case, AGCOM maintains that it carried out an analysis of the parcel delivery services market which revealed a lack of transparency regarding the conditions for offering delivery services at national level, as well as a lack of transparency regarding the structure of the network and compliance with the working conditions of the personnel employed in the various stages of providing the postal service.
- 14 In the light of those critical points, as well as the evolution of the parcel delivery services market (the growth of the B2C market and the prospect of its further development, the role of platforms, the very high number of operators, and the forms of organisation of the undertaking and of the work which do not correspond

to the arrangements normally applied in the sector), AGCOM therefore considered that ‘an increase in the level of regulatory oversight is necessary for more effective monitoring of the parcel delivery market, enabling regulatory interventions aimed at promoting competition and preventing situations of distortion from arising’.

- 15 The decision at issue is therefore allegedly justified in so far as it seeks to promote competition: the obligations to provide information are intended to strengthen competitiveness by increasing transparency for the benefit of consumers and small and medium-sized enterprises.
- 16 In the TAR Lazio judgment in relation to Amazon, AGCOM then notes that there is an error in the part which states that the additional obligations to provide information must in any event serve to improve cross-border delivery services in accordance with Regulation 2018/644.
- 17 AGCOM submits that the imposition of the obligations to provide information laid down in the decision addresses the findings in the national market and the related specific objectives pursued by it (constant and timely monitoring of all the internal dynamics of the parcel delivery market and, in particular, of the factors that most affect the competitive capacity of the operators, such as prices and working conditions). Consequently, the view of the TAR Lazio that Regulation No 2018/644 alone is the basis for the regulatory power exercised in Decision No 94/22/CONS and that the ‘necessity’ of the regulatory measures laid down therein is to be assessed solely on the basis of that regulation and the objectives set out therein is incorrect, illogical and unreasonable.
- 18 Moreover, AGCOM considers that the judgment under appeal is incorrect also in so far as it rules out that, in the present case, the imposition of the obligations to provide information at issue may be justified by the theory of so-called ‘implied powers’. In its view, although, as a general rule, a strict application of the principle of legality requires that primary legislation expressly confers regulatory powers on the independent authorities, the fact remains that the basis for those powers may be inferred implicitly from legislative provisions aimed at defining the tasks and objectives of those authorities.
- 19 In the judgments delivered in the proceedings brought at first instance by operators other than Amazon, the TAR Lazio did not have doubts as to the existence of the power of AGCOM to impose, in general, obligations to provide information on postal operators, but rather, in addition to noting the lack of a proper preliminary investigation, instead had doubts, in the specific case, as to the necessity and proportionality of the general obligations to provide information set out in Article 1 of Decision No 94/22/CONS.
- 20 Nevertheless, in the three appeals against the three judgments cited above, AGCOM puts forward a ground of appeal concerning the legal basis of the power exercised by the adoption of Decision No 94/22/CONS. In that regard, it submits

that the TAR Lazio, starting from the incorrect assumption that that legal basis is to be found solely in Regulation 2018/644, carried out the assessment on the basis of the regulatory intervention and the necessity and proportionality of the obligations to provide information imposed by adopting as the sole parameter of reference that regulation and not also, and not even, Directive 1997/67/EC (in particular Article 22a, introduced by Directive 2008/6/EC) and the national implementing legislation (Legislative Decree No 261/99), as well as recital 51 of Directive 2008/6/EC.

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

- 21 The referring court has doubts, first of all, as to the existence and possible extension of AGCOM's power to impose obligations to provide information such as those at issue in the present case, in particular on providers of non-cross-border delivery services such as Amazon.
- 22 Those doubts stem from the fact that AGCOM, in the appeal pleadings referred to above, maintains that its powers (also) derive from certain 'recitals' of Directive 97/67/EC and Regulation No 2018/644, and, in particular, from recital 51 of Directive 2008/6/EC. Reliance on 'recitals' may reveal the difficulty in identifying a clear and explicit rule on which the powers exercised could be based. The abovementioned legislation, on that point, may seem vague and not entirely precise.
- 23 In that regard, the other decisions of AGCOM in which the complex procedure leading up to Decision No 94/22/CONS unfolded do not provide clarity either. It is apparent from some of those decisions that AGCOM even explicitly ruled out that the power to impose obligations to provide information arises from Regulation 2018/644, whereas, in the present case, it asserts the opposite.
- 24 Another issue in relation to which the referring court has doubts concerns Article 9 of Directive 97/67/EC. That article provides that 'for services which fall outside the scope of the universal service, Member States may introduce general authorisations to the extent necessary to guarantee compliance with the essential requirements'.
- 25 The essential requirements are defined in Article 2, paragraph 1, point 19 of the Directive, which reads as follows:

'essential requirements: general non-economic reasons which can induce a Member State to impose conditions on the supply of postal services. These reasons are the confidentiality of correspondence, security of the network as regards the transport of dangerous goods, respect for the terms and conditions of employment, social security schemes, laid down by law, regulation or administrative provision and/or by collective agreement negotiated between national social partners, in accordance with Community and national law and, where justified, data protection, environmental protection and regional planning.

Data protection may include personal data protection, the confidentiality of information transmitted or stored and protection of privacy’.

- 26 Whilst in relation to Amazon the issue is whether AGCOM has any legal basis to intervene whatsoever, in relation to the other operators which are parties to the remaining appeals the issue instead concerns how far AGCOM may go in establishing obligations to provide information. There is a need to clarify, in essence, whether the obligations imposed by AGCOM may be justified by one of the essential requirements listed in Article 2, point 19, of Directive 97/67/EC and whether they are proportionate, in so far as they are suitable for securing the objectives pursued and those objectives cannot be achieved by more limited obligations.
- 27 In that regard, it should be recalled that Article 14bis of Legislative Decree No 261/1999, implementing Article 22a of Directive 97/67/EC, provided for a typical informational power which may be exercised individually and must, in each case, respect the principle of proportionality. AGCOM may collect information from operators in order to be able to carry out the assigned tasks effectively, by addressing each of the operators whose activities are considered to be of interest for the actual exercise of the functions specifically allocated by the European and national legislature, and on the basis of relevant grounds and timely requests.
- 28 It is not clear, according to the referring court, whether those rules also allow for the possibility of imposing generalised obligations to provide information or whether they may constitute the legal basis for the exercise of those powers.