

Case C-797/23**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:**

21 December 2023

Referring court:

Tribunale Amministrativo Regionale per il Lazio (Italy)

Date of the decision to refer:

12 December 2023

Applicant:

Meta Platforms Ireland Limited

Defendant:

Autorità per le Garanzie nelle Comunicazioni

Subject matter of the main proceedings

Action brought by Meta Platforms Ireland Limited ('the applicant') before the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio) ('the TAR Lazio') against Resolution No 3/23/CONS of the Autorità per le Garanzie nelle Comunicazioni (the Italian Communications Authority) ('AGCOM') which laid down the criteria for determining fair compensation for the online use of press publications

Subject matter and legal basis of the request

The reference for a preliminary ruling, made pursuant to Article 267 TFEU by the TAR Lazio, seeks to ascertain whether Article 43-bis of the legge sul diritto d'autore (the Law on Copyright) and AGCOM Resolution No 3/23/CONS are compatible with (i) Article 15 of Directive (EU) 2019/790 and (ii) the principles of freedom to conduct a business (Articles 16 and 52 of the Charter of Fundamental Rights of the European Union), free competition (Article 109 TFEU) and proportionality

Questions referred for a preliminary ruling

1. May Article 15 [of Directive (EU) 790/2019 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 6/9/EC and 2001/29/EC (the European Union Copyright Directive; ‘the EUCD’)] be interpreted as precluding the introduction of provisions of national legislation, such as those laid down in Article 43-bis of [Law No 633 of 22 April 1941] and those laid down in [Resolution No 3/23/CONS of the Autorità per le Garanzie nelle Comunicazioni of 19 January 2023], in so far as:

(a) for the benefit of publishers and in addition to the exclusive rights referred to in Article 15 of the EUCD, remuneration (fair compensation) obligations are imposed on [information society service providers (ISSPs)];

(b) those ISSPs are required:

- to enter into negotiations with publishers,
- to provide those publishers and the regulatory authority with the information necessary to determine fair compensation, and
- not to restrict the visibility of the publisher’s content in search results pending completion of negotiations;

(c) the regulatory authority (AGCOM) is given:

- supervisory and sanctioning powers,
- the power to identify the benchmark criteria for determining fair compensation,
- the power to determine, in the absence of agreement between the parties, the exact amount of fair compensation;

2. Does Article 15 of the EUCD preclude provisions of national legislation, such as those referred to in Question 1 above, that impose an obligation on [ISSPs] to disclose data, an obligation that is monitored by the national regulatory authority and non-compliance with which leads to administrative penalties becoming applicable?

3. Do the principles of freedom to conduct a business, referred to in Articles 16 and 52 of the Charter of Fundamental Rights of the European Union, of free competition, referred to in Article 109 TFEU, and of proportionality, referred to in Article 52 of the Charter of Fundamental Rights of the European Union, preclude provisions of national legislation, such as those referred to above, which:

(a) introduce rights to remuneration in addition to the exclusive rights referred to in Article 15 of the EUCD, the implementation of which is accompanied by the

imposition, referred to above, of an obligation on [ISSPs] to enter into negotiations with publishers, an obligation to provide publishers and/or the national regulatory authority with the information necessary to determine fair compensation, and an obligation not to restrict the visibility of the publisher's content in search results pending such negotiations;

(b) confer on that national regulatory authority:

- supervisory and sanctioning powers,
- the power to identify the benchmark criteria for determining fair compensation,
- the power to determine, in the absence of agreement between the parties, the exact amount of fair compensation?

Provisions of European Union law relied on

Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, in particular recital 1, recital 83 and Article 15

Charter of Fundamental Rights of the European Union, Articles 16 and 52

Article 109 TFEU

Provisions of national law relied on

Legge 22 aprile 1941, n. 633 (legge sul diritto d'autore) (Law No 633 of 22 April 1941 (the Law on Copyright)), Article 43-bis:

‘1. Publishers of press publications, whether they are individuals or members of an association or consortium, shall have, in respect of the online use of their press publications by providers of the information society services referred to in Article 1(1)(b) of decreto legislativo 15 dicembre 2017, n. 223 (Legislative Decree No 223 of 15 December 2017), including media monitoring and press review undertakings, the exclusive rights of reproduction and communication referred to in Articles 13 and 16.

2. “Press publication” means a collection composed mainly of literary works of a journalistic nature [...]

3. “Publishers of press publications” means persons who, whether individually, in association or as members of a consortium, publish the publications referred to in paragraph 2 in the course of an economic activity, even if they are established in another Member State.

[...]

8. For the online use of press publications, information society service providers shall pay fair compensation to the persons referred to in paragraph 1. Within 60 days of the date of entry into force of this provision, [AGCOM] shall adopt a regulation identifying the benchmark criteria for determining the fair compensation referred to in the first sentence, taking into account, inter alia, the number of online consultations of the article, the years of activity and the market share of the publishers referred to in paragraph 3 and the number of journalists employed, as well as the costs incurred by both parties in respect of investment in technologies and infrastructure, and the economic benefits accruing to both parties from publication in terms of visibility and advertising revenue.

9. Negotiations, with a view to the conclusion of a contract for the use of the rights referred to in paragraph 1, between information society service providers – including media monitoring and press review undertakings – and the publishers referred to in paragraph 3 shall also take into account the criteria laid down in the regulation referred to in paragraph 8. During the negotiations, information society service providers shall not restrict the visibility of the publishers' content in search results. [...]

10. Without prejudice to the right to bring an action before the ordinary courts referred to in paragraph 11, if no agreement on the amount of compensation is reached within 30 days of the request to open negotiations by one of the parties concerned, either party may apply to [AGCOM] and ask that authority to determine fair compensation, setting out its financial proposal in its request. Within 60 days of the request of the party concerned, [...] [AGCOM] shall indicate, on the basis of the criteria laid down in the regulation referred to in paragraph 8, which of the financial proposals made comply with those criteria or, where it considers none of the proposals to be compliant, it shall set out the amount of fair compensation of its own motion.

11. Where, following the determination of fair compensation by [AGCOM], the parties do not conclude a contract, either party may bring the matter before the chamber of the ordinary court specialising in business matters [...]

12. Information society service providers, including media monitoring and press review undertakings, are required to make available, at the request of the party concerned, [...] or at the request of [AGCOM], the data necessary for the determination of the amount of fair compensation. Compliance with the obligation referred to in the first sentence shall not exempt the publishers referred to in paragraph 3 from the obligation to respect the confidentiality of commercial, industrial and financial information of which they have become aware. Compliance with the obligation imposed on service providers to provide information shall be monitored by [AGCOM]. In the event of failure to provide such data within 30 days of a request made pursuant to the first sentence, [AGCOM] shall impose an administrative fine on the non-compliant entity of up

to 1% of turnover in the last financial year ending prior to the notification of the challenge.

[...]

14. The rights referred to in this Article shall expire two years after the press work is published [...]

Delibera n. 3/23/CONS del 19 gennaio 2023, *Regolamento in materia di individuazione dei criteri di riferimento per la determinazione dell'equo compenso per l'utilizzo online di pubblicazioni di carattere giornalistico di cui all'articolo 43-bis della legge 22 aprile 1941, n. 633* (AGCOM Resolution No 3/23/CONS of 19 January 2023, *Regulation on the identification of benchmark criteria for determining fair compensation for the online use of press publications, as set forth under Article 43-bis of Law No 633 of 22 April 1941*).

That resolution:

- identifies the criteria to be used to determine the amount of fair compensation (Article 4); these include the definition of a calculation basis using the advertising revenue of information society service providers ('ISSPs') resulting from the online use of the publisher's press publications;
- lists the obligations to make the data available;
- defines AGCOM's inspection powers and provides for the imposition of an administrative fine on non-compliant entities (Article 5);
- governs the procedure for asking AGCOM to determine the amount of fair compensation and the rules of the relevant procedure, including the possibility for that authority to set that amount unilaterally (Articles 8 to 12)

Succinct presentation of the facts and procedure in the main proceedings

- 1 The applicant provides European users, including Italian users, with a range of online services, including Facebook, accessible via the website www.facebook.com and via applications for mobile devices. Some press publishers share extracts from or links to their content on their Facebook Page, together with a link that directs users to the publisher's website. Individual Facebook users may thus access complete publications on that website and may also comment on the publisher's post or share it on their own Facebook profile, thus generating additional traffic to the publisher's website.
- 2 Article 1 of Legislative Decree No 177 of 8 November 2021 inserted an Article 43-bis into the Law on Copyright. On 19 January 2023, on the basis of, inter alia, paragraph 8 of Article 43-bis, AGCOM adopted Resolution No 3/23/CONS.

- 3 Taking the view that that legislation is contrary to EU law and to the Italian Constitution, the applicant has brought an action against the resolution in question before the TAR Lazio. AGCOM and the Federazione Italiana Editori Giornali (the Italian Federation of Newspaper Publishers) have joined the proceedings, contending that the action should be dismissed.

The essential arguments of the parties in the main proceedings

- 4 The applicant submits that Article 43-bis of the Law on Copyright, on the basis of which Resolution No 3/23/CONS was adopted, differs significantly from Article 15 of Directive 2019/790 in the following respects:

- it introduces a right to remuneration (‘fair compensation’) for newspaper publishers, not provided for in Article 15;
- it lays down significant restrictions on the contractual freedom of economic operators;
- it provides for the possibility to ask AGCOM to determine the amount of fair compensation, in the event that negotiations between the parties fail, on the basis of a set of vague and arbitrary criteria;
- it introduces an obligation not to restrict the visibility of publishers’ content in search results during the negotiations, and imposes data disclosure obligations on ISSPs;
- it grants AGCOM sanctioning powers with regard to the obligations imposed on ISSPs to make data available.

- 5 In support of its action, the applicant relies, inter alia, on the following pleas in law:

- (a) Incompatibility of Article 43-bis of the Law on Copyright and Resolution No 3/23/CONS with EU law.

The applicant states that, while Article 15 of Directive 2019/790 gives newspaper publishers the contractual freedom to decide whether to refuse or grant a free licence, Article 43-bis [of the Law on Copyright] has introduced a right to remuneration which takes the form of an obligation to contract that significantly restricts the contractual freedom of economic operators and to which an obligation to make payment is linked. The applicant also alleges infringement of the prohibition on ‘gold plating’ (introducing or maintaining regulatory levels above the minimum levels required by the European directives), resulting in the reduction of competition to the detriment of undertakings and citizens, and infringement of the freedom to conduct a business. Furthermore, in the applicant’s view, the obligations imposed on ISSPs are in breach of the principle of

proportionality and impede, or render significantly less attractive, the provision of services in Italy by companies established in other Member States.

(b) Breach of the ‘country of origin’ principle and the principle of free movement of services, whereby an ISSP is subject to the legislation and jurisdiction of the authorities of the Member State in which it is established (and not to the different laws and authorities of the Member States of the European Union in which it provides services). However, the applicant argues that Article 43-bis and Resolution No 3/23/CONS impose on ISSPs not established in Italy, such as the applicant, national obligations additional to those imposed by the Member State of establishment.

(c) Failure to notify the European Commission under Directive 2015/1535: the applicant submits that Article 43-bis and Resolution No 3/23/CONS do not apply to it since they were not notified to the Commission under Articles 5 and 6 of Directive 2015/1535, even though they established a technical regulation requiring prior notification.

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

- 6 The referring court notes that Article 43-bis of the Law on Copyright has introduced provision for fair compensation, the determination of which is the subject of negotiations between the parties (ISSPs and publishers). Failure to reach an agreement, after 30 days have elapsed, gives each party the option of approaching AGCOM, which, within 60 days of being so approached, is to indicate, on the basis of the criteria laid down in Resolution No 3/23/CONS, which of the financial proposals made complies with those criteria, or, where it considers none of the proposals to be compliant, is to set out the amount of fair compensation of its own motion. According to the referring court, the determination of fair compensation by AGCOM may introduce a restriction on the parties’ contractual freedom and may infringe the principle of freedom to conduct a business.
- 7 It also notes that Article 43-bis of the Law on Copyright introduces a third party, namely AGCOM, with the following powers: regulatory powers (identifying the benchmark criteria for determining fair compensation); decision-making powers (setting the amount of fair compensation); executive powers (imposing an obligation on the parties to make available ‘the data necessary for the determination of the amount of fair compensation’) and sanctioning powers.
- 8 The referring court notes that it is apparent from a comparison with Directive 2019/790 that Article 43-bis strengthens the EU regulatory framework, not only by inserting a fundamental economic aspect (which is not provided for in Article 15 of the directive) but also by laying down a set of obligations for ISSPs and powers for the national regulatory authority, which not only have no basis in EU law, but also, above all, raise doubts as to the compatibility of the Italian legislation with that directive.

- 9 The referring court observes that such doubts have also been raised by the Autorità Garante della Concorrenza e del Mercato (the Italian Competition Authority), which has stated that the provision contained in Article 43-bis appears to exceed the limits set by the EU legislature by introducing elements not provided for by EU law and by providing for negotiating mechanisms that restrict the contractual freedom of economic operators. That authority has also stated that Directive 2019/790 is sufficiently detailed and that any additional level of regulation could compromise the homogeneity of the application of that directive in the Member States.
- 10 The referring court then refers to the judgment of the Court of Justice in Case C-401/19 (in particular, paragraphs 32, 46, 63, 65, 66 and 67) concerning the interpretation of Article 17 of Directive 2019/790 and, therefore, the obligations of online content-sharing service providers for the purposes of copyright protection. The referring court considers that Articles 15 and 17 of that directive are very similar, and stresses that the judgment referred to above points out the key importance of compliance with the principle of proportionality.
- 11 In particular, the referring court points out that the Court of Justice has stated that ‘where several fundamental rights and principles enshrined in the Treaties are at issue, the assessment of observance of the principle of proportionality must be carried out in accordance with the need to reconcile the requirements of the protection of those various rights and principles at issue, striking a fair balance between them’ (paragraph 66) and that, ‘in order to satisfy the requirement of proportionality, the legislation which entails an interference with fundamental rights must lay down clear and precise rules governing the scope and application of the measure in question and imposing minimum safeguards, so that the persons whose exercise of those rights is limited have sufficient guarantees to protect them effectively against the risk of abuse. That legislation must, in particular, indicate in what circumstances and under which conditions such a measure may be adopted, thereby ensuring that the interference is limited to what is strictly necessary’ (paragraph 67).
- 12 The referring court considers that it is essential to verify the compatibility of the provisions of national legislation with the principle of proportionality, as interpreted by the Court of Justice. According to the referring court, the setting of fair compensation, payable by ISSPs to publishers, might not be proportionate, not only with regard to the protection of the right to communication and/or information, but also, above all, with regard to the homogenisation of press publications (protected by provision for fair compensation, in addition to exclusive rights), in relation to copyright-protected content (which is also published online). The referring court considers that the significant powers of intervention granted to AGCOM might also be characterised as disproportionate.
- 13 A comparison between the provision laid down in Article 15 of Directive 2019/790 and the provisions contained in Article 43-bis of the Law on Copyright and AGCOM Resolution No 3/23/CONS leads the TAR Lazio to make a reference

to the Court of Justice for a preliminary ruling. The questions which it has identified are, in its view, relevant for the purpose of resolving the dispute before it.

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