

Anonymised version

Translation

C-5/22 – 1

Case C-5/22

Request for a preliminary ruling

Date lodged:

3 January 2022

Referring court:

Consiglio di Stato (Italy)

Date of the decision to refer:

31 December 2021

Applicant and appellant:

Green Network SpA

Defendants and respondents:

SF

YB

Autorità di Regolazione per Energia Reti e Ambiente (ARERA)

...

The Consiglio di Stato (Council of State, Italy)

Judicial Section (Sixth Chamber)

has made the following

ORDER

in the appeal ... brought by

Società Green Network S.p.A., ...

v

SF and YB, who have not entered an appearance;

ARERA – Autorità di Regolazione per Energia Reti e Ambiente (the Italian Regulatory Authority for Energy, Networks and the Environment), ...

seeking the setting aside

of Judgment No 1608/2020 of the Tribunale amministrativo regionale per la Lombardia, sede di Milano (Sezione Prima) (Regional Administrative Court for Lombardy, Milan, Italy, First Chamber), delivered in proceedings between the parties on an application for the annulment of the decision adopted by ARERA on 20 June 2019 ... concerning the ‘Imposition of an administrative fine and adoption of a prescriptive order in respect of infringements concerning the terms and conditions of a contract for the supply of electricity and natural gas to final customers’, together with the annulment of any preliminary, related and/or consequential measures ...;

...

1 Succinct presentation of the subject matter of the dispute and the facts

1.1 By the present appeal, the company Green Network S.p.A. seeks the setting aside of Judgment No 1608 of 2020 of the Regional Administrative Court for Lombardy, Milan, dismissing Green Network’s application for the annulment of ARERA’s decision of 20 June 2019 ... (i) imposing an administrative fine on the applicant of EUR 655 000.00, for having provided its customers with contractual information allegedly in breach of the authority’s regulations and (ii) ordering the applicant to reimburse sums charged to its customers by way of ‘administrative management costs’, totalling EUR 13 987 495.22.

1.2 The proceedings which resulted in the decision challenged at first instance arose from a report sent to the authority by the ... Sportello per il consumatore Energia e Ambiente (Consumer advice centre for Energy and the Environment) which indicated that Green Network had been including in its bills a fee, referenced as ‘Article 5’ in connection with its ‘Home Energy Luce’ offer, with which customers had taken issue, finding it unclear. It emerged from subsequent investigations carried out by the authority that that fee was charged not only in connection with the offer just mentioned, but was provided for by Article 5 (or in some cases by Article 4 or Article 7) of Green Network’s general terms and conditions of supply, both for electricity and for natural gas. In particular, according to that contractual term, ‘*administrative management costs are not included in the supply charges and the Supplier may charge the customer a fee not exceeding five euros per month [or ten euros in the case of other contracts] for each customer supply point*’.

1.3 Upon the conclusion of its investigation and after the final hearing of the company, ... the authority imposed on the applicant the abovementioned fine for: the unlawful stipulation of the fee relating to administrative management costs in the general terms and conditions of contract; the failure to mention the fee in the Comparison Table (*'Scheda di confrontabilità'*) or on the platform known as *'Trova Offerte'* [on which consumers may search for the best offers], as well as the applicant's consequently unlawful charging of the fee to final customers, in breach of the provisions of the Codice di condotta commerciale (Code of Business Conduct) and Articles 8 and 11 of the *'Trova Offerte'* regulations. In addition, the authority ordered Green Network to refund its electricity and natural gas customers a sum totalling EUR 13 987 495.22.

Two actions brought before the administrative court of first instance were both dismissed.

1.4 ... The appellant has put forward the following grounds of appeal:

- the judgment is vitiated by error in so far as it held the fine imposed for the allegedly incorrect compilation of the Comparison Table and the resulting alleged infringement of the Code of Business Conduct to be lawful;
- the judgment is vitiated by error in so far as it held the fine imposed for the alleged infringement of the Trova Offerte regulations to be lawful;
- the judgment is vitiated by error in so far as it held the fine imposed to be lawful on the ground that the Article 5 fee duplicates the PCV charge (retail charge, *prezzo commercializzazione vendita*, for electricity) and the QVD charge (household retail charge, *Quota Vendita al Dettaglio*, for natural gas);
- the judgment is vitiated by error in so far as it held to be lawful the heavy fine imposed, in view of the alleged severity of the infringements, the identity and the functions of the agent;
- the judgment is vitiated by error in that it held to be lawful ARERA's decision in so far as it recognised the powers of the authority itself to issue an order against Green Network to reimburse third parties, and it requests the referral to the Court of Justice of the European Union (CJEU) of the related questions for a preliminary ruling.

ARERA ... seeks the dismissal of the appeal. It has also brought a cross-appeal, challenging Section I.2 of the judgment under appeal, on the ground that it infringes Article 2(12)(h) and (l) of Law No 481/1995 ... **[along with other provisions of national law]** and Directives 2009/72/EC, 2009/73/EC and (EU) 2019/944.

... *[procedure]*

1.5 By Decision No 8717 of 30 December 2021, an interim ruling, this court dismissed the grounds of appeal relating to the imposition of the administrative fine of EUR 655 000.00.

By the present order a reference is made to the Court of Justice of the European Union for a preliminary ruling, in the terms set out in the abovementioned interim ruling, on the questions raised in the fifth ground of appeal, which concern the lawfulness of the contested measure in so far as it ordered the reimbursement of sums that had been charged to customers by way of ‘administrative management costs’, amounting to EUR 13 987 495.22 in total.

2 *The grounds for the request for a preliminary ruling*

... [summary of the Court’s case-law on the obligation to request a preliminary ruling]

2.2 In the present case, first of all, the question is *prima facie* relevant, inasmuch as the argument directly concerns the existence, under the provisions of EU law relied upon, of the power exercised by means of the order to reimburse the sum referred to in the contested measure.

Secondly, it does not appear that the provisions on which the appellant relies have yet been interpreted by the Court of Justice in connection with the admissibility of a prescriptive power such as that at issue.

Thirdly, the answer is not sufficiently clear one way or the other, given both the vagueness of the matters mentioned by the State representative to support the existence of the contested power and the unusual nature of that power, as it has been described by the respondent ARERA.

3 *EU law*

3.1 In so far as relevant EU law is concerned, the most relevant legislation is that which, in the field of consumer protection with the aim of improving or completing the competitive markets in electricity, provides for the duties and powers of the regulatory authorities in the liberalised services markets, and in particular Article 37 of Directive 2009/72/EC of 13 July 2009.

More specifically, of relevance is Article 37(1)(i) – ‘*monitoring the level of transparency, including of wholesale prices, and ensuring compliance of electricity undertakings with transparency obligations*’ – and Article 37(1)(n), which provides for the regulatory authority’s role in ‘*helping to ensure, together with other relevant authorities, that the consumer protection measures, including those set out in Annex I, are effective and enforced*’. Annex I states that customers have a right to a contract that specifies, inter alia, ‘*any compensation and the refund arrangements which apply if contracted service quality levels are not met, including inaccurate and delayed billing*’.

Also relevant is Article 37(4), which provides that *‘Member States shall ensure that regulatory authorities are granted the powers enabling them to carry out the duties referred to in paragraphs 1, 3 and 6 in an efficient and expeditious manner. For this purpose, the regulatory authority shall have at least the following powers: ... (d) [the power] to impose effective, proportionate and dissuasive penalties on electricity undertakings not complying with their obligations under this directive or any relevant legally binding decisions of the regulatory authority or of the Agency, or to propose that a competent court impose such penalties. This shall include the power to impose or propose the imposition of penalties of up to 10% of the annual turnover of the transmission system operator on the transmission system operator or of up to 10% of the annual turnover of the vertically integrated undertaking on the vertically integrated undertaking, as the case may be, for non-compliance with their respective obligations pursuant to this directive’.*

4 National law

4.1 In so far as concerns the content of the provisions of national law implementing the abovementioned EU legislation that are relevant in the present case, the rules applied by the authority make reference to the prescriptive power referred to in Article 2(20)(d) of Law No 481/1995, set out as following in the decision imposing the reimbursement order at issue: *‘(d) to order the entity providing the service to cease any conduct prejudicial to the rights of users and to impose, pursuant to paragraph 12(g), an obligation to pay compensation’.*

Article 2(12)(g) of Law No 481/1995, in turn, entrusts the authority with the following tasks: *to monitor performance of the services, with powers of inspection, access, acquisition of documents and all useful information, and to determine the cases where compensation is automatically payable by the entity providing the service to the user where that entity fails to observe contractual terms and conditions or provides the service at lower levels of quality than those stipulated in the service regulations referred to in paragraph 37, or in the programme contract, or as referred to in point (h)’.*

In implementation of those provisions, the authority penalised the contractual provision referred to in the facts and ordered that customers be reimbursed the sums they had been charged on that account.

5 Relevant principles and the consistency with EU law of the prescriptive power exercised by the authority.

Having identified the relevant materials in the present case, it is appropriate to recall the existing principles of EU law referred to.

In general terms, Directive 2009/72 is aimed essentially at creating an open and competitive internal market in the electricity sector, where every consumer has a free choice of supplier and every supplier may freely provide services to its customers, to create a level playing field in the electricity market, to ensure a

secure supply of energy and to combat climate change. In order to pursue those objectives, Directive 2009/72 confers wide powers on the national regulatory authority to regulate and monitor the market in electricity (see the judgment of 11 June 2020, [*Prezident Slovenskej republiky*, C-378/19, EU:C:2020:462, paragraph 23]).

With particular reference to the provision in question, it has been held that Article 37 of Directive 2009/72 does not require Member States necessarily to confer competence on the electricity market regulatory authority to settle disputes between household customers and transmission and distribution system operators. Under that directive, Member States may confer competence to settle disputes between customers and electricity undertakings out of court upon an authority other than the regulatory authority, provided that it is independent and exercises that competence by implementing rapid, effective, transparent, simple and inexpensive procedures for the handling of complaints, enabling disputes to be settled fairly and promptly (judgment of 23 January 2020, [*Energiavirasto*, C-578/18, EU:C:2020:35, paragraph 39]).

According to the appellant's arguments, the domestic legislation that has been applied, in so far as it is understood as permitting the order requiring the reimbursement of sums of money paid under private contractual relationships, is contrary to EU law, which precludes any such extension of the authoritative power entrusted to the regulatory authority.

- 6 For all the foregoing reasons, the court thus considers that the issues raised deserve to be addressed in a preliminary ruling of the Court of Justice on the following question:

'1. Are the provisions of EU law contained in Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 – and in particular in Article 37(1) and (4), governing the powers of the regulatory authorities, and in Annex I – to be interpreted as including a prescriptive power exercised by the Italian electricity market regulatory authority (Autorità di Regolazione per Energia Reti e Ambiente) (ARERA), in relation to companies operating in the electricity sector, whereunder the authority may order such a company to reimburse customers, including former customers and customers in arrears, sums of money paid by such customers to cover administrative management costs, pursuant to a contractual term that has been penalised by the authority?

2. Are the provisions of EU law contained in Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 – and in particular in Article 37(1) and (4), governing the powers of the regulatory authorities, and in Annex I – to be interpreted as including, within the scope of any compensation and the refund arrangements which apply to customers in the electricity market if contracted service quality levels are not met by the market operator, the reimbursement of moneys paid by such customers that are expressly governed by a contractual term in an agreement that has been signed and accepted and bear

no relationship to service quality itself but are stipulated as covering the economic operator's own administrative management costs?'

... stays the present proceedings ... *[procedure]*

FOR THOSE REASONS

the Consiglio di Stato, Judicial Section (Sixth Chamber), makes the present interlocutory order and requests the secretariat to send the case file to the Court of Justice of the European Union, pursuant to Article 267 of the Treaty on the Functioning of the European Union,

Rome ... 16 December 2021 ...

WORKING DOCUMENT