

Case C-510/23**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:**

8 August 2023

Referring court:

Tribunale Amministrativo Regionale per il Lazio (Italy)

Date of the decision to refer:

2 August 2023

Applicant:

Trenitalia SpA

Defendant:

Autorità Garante della Concorrenza e del Mercato

Subject matter of the main proceedings

Action brought before the Tribunale amministrativo per il Lazio (Regional Administrative Court, Lazio) ('the TAR Lazio') by the company Trenitalia, seeking the annulment of the decision adopted by the Autorità Garante della Concorrenza e del Mercato (National Competition Authority, Italy) ('the AGCM') by which the latter ordered that company to pay a penalty for having implemented an improper commercial practice, prohibited under the Codice del consumo (the Italian Consumer Code).

Subject matter and legal basis of the request

The reference for a preliminary ruling, made by the TAR Lazio, pursuant to Article 267 TFEU, concerns the interpretation of EU law, and in particular Article 11 of Directive 2005/29, in the context of the application of Article 14 of legge 24 novembre 1981, n. 689 (Law No 689 of 24 November 1981) to investigation procedures relating to infringements to the detriment of consumers.

Question referred for a preliminary ruling

‘Must Article 11 of Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005, read in the light of the principles of consumer protection and effectiveness of administrative action, be interpreted as meaning that it precludes national legislation, such as that arising from the application of Article 14 of legge 24 novembre 1981, n. 689 (Law No 689 of 24 November 1981) – as interpreted in the most recent case-law – which requires the Autorità Garante della Concorrenza e del Mercato (National Competition Authority, Italy) to initiate the investigation procedure with a view to establishing an improper (unfair) commercial practice within a time limit of 90 days, starting from the moment the Authority has knowledge of the essential elements of the infringement, the latter of which may be met by the first report of the infringement?’

Provisions of European Union law relied on

Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005, in particular Article 11 thereof.

Provisions of national law relied on

Decreto legislativo 6 settembre 2005, n. 206 (Legislative Decree No 206 of 6 September 2005) (‘the Consumer Code’):

Article 27 (version in force at the time the investigation was opened)

‘1. Autorità Garante della Concorrenza e del Mercato (National Competition Authority, Italy), hereinafter referred to as ‘the Authority’, shall exercise the powers regulated by this article also in its capacity as the authority responsible for implementing Regulation (EC) No 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws, within the limits of the statutory provisions.

1-bis Even in the regulated sectors, pursuant to Article 19(3), competence to intervene in relation to conduct by traders that constitutes improper commercial practice, subject to compliance with the rules in force, shall reside exclusively with the Authority which shall exercise that competence on the basis of the powers referred to in the present article, after seeking the opinion of the relevant regulatory authority.

2. The Authority, either of its own motion or at the request of any interested person or organisation, shall prohibit the continuation of improper commercial practices and eliminate their effects. To that end, the Authority shall make use of the investigative and enforcement powers provided for in Regulation (EC)

No 2006/2004, including in respect of non-cross-border infringements. [...] The Authority's intervention is independent of whether the consumers concerned are in the territory of the Member State where the trader is established or in another Member State. [...]

3. The Authority may, by reasoned decision, order the temporary suspension of improper commercial practices in cases of particular urgency. In any event, it shall notify the trader of the opening of the investigation [...].

9. By the decision prohibiting the improper commercial practice, the Authority shall also impose an administrative fine of EUR 5 000 to EUR 500 000 000, having regard to the seriousness and duration of the infringement. [...]

11. The Authority, by means of its own rules, regulates the investigation procedure in such a way as to ensure the adversarial nature of proceedings, full knowledge of acts and minutes [...]

13. For administrative fines resulting from infringements of this Decree, the provisions of Chapter I, Section I, and Articles 26, 27, 28 and 29 of the Law No 689 of 24 November 1981, as amended, shall be complied with in so far as they are applicable. [...].

Article 27(1) (version resulting from the amendment of 2021)

‘1. The Autorità Garante della Concorrenza e del Mercato (National Competition Authority, Italy), hereinafter referred to as ‘the Authority’, shall exercise the powers regulated by this article also in its capacity as the authority responsible for implementing Regulation (EU) 2017/2394 of the European Parliament and of the Council of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation (EC) No 2006/2004 within the limits of the statutory provisions [...].’

Law No 689 of 24 November 1981, ‘Amendments to the Criminal System’:

Article 12

‘The provisions of this Chapter shall be complied with, in so far as they are applicable and unless otherwise specified, for all infringements for which the administrative penalty of payment of a sum of money is provided, even where that penalty is not provided for in place of a criminal penalty. [...].’

Article 14

‘The infringement, where possible, shall be immediately challenged before both the infringer and the person which is jointly and severally liable for payment of the sum due in respect of that infringement.

If the immediate challenge has not taken place before all or some of the persons referred to in the preceding paragraph, the details of the infringement must be notified to the persons concerned residing in the territory of the Italian Republic within 90 days and to those residing abroad within 360 days of the assessment.

[...]

The obligation to pay the sum due for the infringement shall be extinguished with regard to the person against whom notification was omitted within the specified period.’

Article 28

‘The right to recover the sums due for the infringements set out in this Law shall be time-barred within five years from the day on which the infringement was committed.

Interruption of the limitation period shall be governed by the rules of the Civil Code’.

Delibera AGCM 1 aprile 2015 n. 25411 (Resolution No. 25411 of the AGCM of 1 April 2015) ‘Regulation on investigation procedures in the field of consumer protection’:

Article 6

‘1. The person responsible for the procedure, after having assessed the information in his or her possession and that brought to his or her attention by the application to intervene referred to in Article 4, shall initiate the investigation in order to verify the existence of unlawful misleading or comparative advertising, referred to in Decreto legislativo sulla pubblicità ingannevole (the Legislative Decree on misleading advertising), or of improper commercial practices, referred to in the Consumer Code. The initiation of the investigation shall be ordered within 180 days of receipt of the application to intervene and that period shall be interrupted in the event information is requested until the receipt of the same.

2. The person responsible for the procedure shall notify the Parties of the initiation of the investigation and inform the other persons concerned who have lodged an application to intervene under Article 4 [...].’

Succinct presentation of the facts and procedure in the main proceedings

- 1 Trenitalia (‘the applicant’) is a public company, wholly owned by Ferrovie dello Stato italiane (which, in turn, is wholly owned by the Ministero dell’economia e delle finanze (Ministry of Economy and Finance, Italy). In 2017, the AGCM found that there was an improper commercial practice to the detriment of consumers put in place by the applicant, the main rail passenger transport

management company operating in Italy. In particular, the search system for purchasing railway tickets on the internet and from automated ticket machines allegedly did not indicate to consumers the travel solutions with regional trains, mainly showing those with (more expensive) high-speed trains.

- 2 Since 2011, the AGCM has received several such reports from consumers. Following those reports, on 21 October 2016, the AGCM acquired for the file a computer program containing all the simulations carried out, between the end of August and the end of September 2016, by its officials in purchasing tickets online on the Trenitalia site. On 15 November 2016, the AGCM notified the applicant of the decision to initiate the procedure. On the same day, it carried out an inspection at the company headquarters which led to the acquisition of documents. The applicant's advisers had the opportunity to access the investigation file on several occasions and to submit pleadings. In addition, the applicant was heard at the hearing.
- 3 Following the lengthy investigation, on 19 July 2017 the AGCM applied a penalty measure against the applicant, imposing a significant fine (EUR 5 000 000). According to the AGCM, the unlawful practice began in 2012 when the computer system in relation to the search for purchasing railway tickets was fully set up, and was still ongoing in 2017, when the penalty measure was applied.
- 4 The applicant challenged that decision, seeking its annulment on the ground that the AGCM had allegedly initiated the procedure for establishing the infringement out of time, that is to say, after the period of 90 days laid down in Article 14 of Law No 689/1981.

The essential arguments of the parties in the main proceedings

- 5 According to the applicant, the preliminary investigation stage – the stage prior to notification of the initiation of the procedure, one during which, without an adversarial procedure, the AGCM collects the first evidence in order to verify the actual existence of the infringement – continued for more than four years, during which the AGCM did not carry out any act to verify the reports received. Furthermore, the acquisition made in October 2016 demonstrates the relative simplicity of the investigations to be carried out, reinforcing the argument that the AGCM's failure to act was unlawful and, therefore, that Article 14 of Law No 689/1981 had been infringed.
- 6 In the applicant's view, the AGCM's conduct is also in clear contrast with Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('the ECHR') and Article 41 of the Charter of Fundamental Rights of the European Union ('the Charter') in that the rights of defence and legitimate expectations of the accused party, which cannot be subject to a penalty procedure when the news of the infringement dates back more than 90 days, are breached.

- 7 However, the AGCM considers that the time limit of 90 days is not applicable to proceedings in the field of consumer protection. The only obligation specified is that of initiating the investigation within a reasonable period of time starting from when it had knowledge of the infringement. In the present case, that was complied with, taking into account the inconsistency in the reports of the facts under investigation, which were such as to require a careful assessment in order to verify that it was not a random malfunction but a prohibited practice. Moreover, the last act of the preliminary investigation was carried out on 21 October 2016, within a period, in any case, of less than 90 days with respect to the opening of the procedure.

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

- 8 The referring court notes that, on the basis of a recent, now settled, line of case-law, the period of 90 days laid down in Article 14 of Law No 689/1981 is considered to be applicable to the initiation of the AGCM's investigation procedure. That interpretation, which affords greater protection for the authors of unlawful conduct to the detriment of consumers, is based on the quasi-criminal classification of the penalties imposed by the AGCM. That classification stems from the obligation to comply with the principles laid down in Article 6 of the ECHR and Article 41 of the Charter, which require the infringement to be challenged immediately ('promptly', according to the language of the ECHR), in order to ensure equality of arms and to prevent that the time elapsed may be to the detriment of the accused.
- 9 It follows that, once the preliminary investigation stage has been completed, the AGCM is required to challenge the infringement within 90 days, by notifying the decision initiating the investigation. The 90 days do not necessarily start to run from the first report of the infringement, but rather at the conclusion of the assessment carried out in the preliminary investigation stage, rather, from the completion of the collection of the factual elements necessary to challenge the infringement. The conclusion of the assessment is subject to review by the administrative court (which decides on the legality of the AGCM's acts, including penalties), which may verify whether, on a certain date, the challenge could reasonably be made.
- 10 The referring court notes, however, that, if Article 14 of Law No 689/1981 is applied mechanically, exceeding the time limit for bringing a challenge, even by only one day, results in the annulment of the AGCM's decision before the courts, essentially nullifying the latter's actions. Moreover, under the *ne bis in idem* principle (relevant under Article 50 of the Charter), it is not possible to re-open at a later stage a new investigation for the same case, even in the event of a permanent infringement, in other words, for cases where the undertaking has never interrupted the improper commercial practice.

- 11 Next, the referring court recalls that Article 27 of the Consumer Code implements Article 11 of Directive 2005/29, which provides that Member States shall ensure that ‘adequate and effective means exist to combat unfair commercial practices’. However, there is no provision anywhere in the Directive for a time limit for the initiation of the investigation, nor does there appear to be in the other consumer protection rules.
- 12 It also stresses the complexity of the AGCM’s activity, which must already carry out a considerable number of checks at the preliminary investigation stage in order to be able to formulate the challenge correctly. According to the referring court, there is a clear parallel between the penalty measures taken by the AGCM in the field of consumer protection and those in the field of antitrust infringements. In that regard, it notes that the European Commission is required to conclude the procedure (understood as the preliminary investigation and the actual investigation stage) within a *reasonable time* (judgment of 15 October 2002, [*ICI v Commission*], C-254/99, ECLI:EU:C:2002:582). According to the referring court, that principle must be applied by analogy to the area of consumer protection, since the harmonisation in the field of unfair commercial practices is aimed at ‘directly protect[ing] consumer economic interests [...] [and] also indirectly protect[ing] [...] their competitors [...] thus guarantee[ing] fair competition’ in the market (recital 8 of Directive 2005/29/EC).
- 13 Therefore, given that the AGCM’s investigation procedures involve objective difficulties, it is clear that the strict imposition of a time limit may hinder the activity of consumer protection, with the risk of undermining the proper application of the relevant national and EU law.
- 14 Furthermore, the strict application of Article 14 of Law No 689/1981 could also affect the autonomy of the AGCM. The imposition of a time limit of 90 days translates, in practice, into the obligation to initiate investigations according to a purely chronological criterion, thus restricting the AGCM’s discretion. In addition, it would be forced to pursue in parallel multiple proceedings which, because of their large number, could compromise the successful outcome of investigations, leaving some unfair practices essentially unpunished.
- 15 As regards the undertaking’s right of defence, the referring court notes, first of all, that the imputability of the penalties imposed by the AGCM to the quasi-criminal field (on the basis of the principles established by the case-law of the European Court of Human Rights, known as the ‘*Engel* criteria’) determines as a logical consequence compliance with the guarantees, including the procedural guarantees, referred to in Article 6 of the ECHR and Article 41 of the Charter. In particular, these include the obligation, on the part of the public authority, to conclude the procedure swiftly, by initiating as soon as possible the adversarial process with the person to be penalised in order to allow him or her an adequate defence. However, the referring court notes that Article 14 of Law No 689/1981, as interpreted and applied, goes further, by establishing a genuine irrebuttable presumption of infringement of the trader’s right of defence, linked to the expiry of the time limit,

without it being necessary to prove the actual harm suffered by the late initiation of the investigation procedure.

- 16 At the same time, the referring court notes that, in practice, a belated challenge to the infringement does not necessarily adversely affect the right of defence of undertakings: except in specific cases where the impossibility of submitting evidence to the AGCM is established, it should be noted that throughout the preliminary investigation stage, the undertakings might even derive a competitive advantage from the commission of the infringement.
- 17 The referring court then notes that it is precisely the criminal nature in the broad sense of the penalty which justifies the existence of a secret stage, in other words, without an adversarial process, during which the AGCM is required to gather all the elements necessary to bring the challenge: limiting the preliminary investigation stage to cursory checks leads to an unreasonable restriction of the AGCM's action, which might not be able to reconstruct the infringement correctly and completely. Moreover, excessively moving forward the opening of the procedure increases the risk that the AGCM will not acquire the relevant evidence.
- 18 As regards the protection of legitimate expectations, the referring court notes that, given that the moment from which the time limit must be calculated is not fixed, but depends on specific factors on a case-by-case basis, such as whether or not the report is complete, it does not, in any event, appear to adequately guarantee the legitimate expectations of the persons on whom penalties are imposed. In addition, it is often argued that inaction on the part of the AGCM harms public interests, so that the period is also set in order to encourage prompt enforcement action, thus avoiding consolidation of reliance on the undertaking. However, the application of a time limit for the initiation of the investigation procedure, as regards unlawful conduct which is still ongoing, appears contradictory and illogical, in so far as it makes it substantially impossible for the AGCM to prevent unlawful acts which continue to harm the public interest.
- 19 Lastly, in relation to the requirement of legal certainty, the referring court notes that the Italian legal system already provides, precisely in order to avoid challenges arising after an excessively long period, for a different limitation period of five years from the cessation of the unlawful conduct (Article 28 of Law No 689/1981).