Case C-339/21

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:

31 May 2021

Referring court:

Consiglio di Stato (Italy)

Date of the decision to refer:

11 May 2021

Appellants:

Colt Technology Services SpA

Wind Tre SpA

Telecom Italia SpA

Vodafone Italia SpA

Respondents:

Ministero della Giustizia

Ministero dello Sviluppo Economico

Ministero dell'Economia e delle Finanze

Procura Generale della Repubblica (presso Corte d'appello di Reggio Calabria)

Procura della Repubblica di Cagliari

Procura della Repubblica (presso il Tribunale di Roma)

Procura della Repubblica (presso il Tribunale di Locri)

Subject matter of the main proceedings

Appeal against the judgments of the Tribunale amministrativo regionale del Lazio (Lazio Regional Administrative Court; TAR) dismissing the present appellants' actions against the decreto interministeriale del 28 dicembre 2017 (Interministerial Decree of 28 December 2017). That decree implemented Article 96 of decreto legislativo n. 259 del 2003 ('Codice delle comunicazioni elettroniche') (Legislative Decree No 259/2003; 'the Electronic Communications Code') and laid down the procedures and criteria applying for reimbursement to telecommunications operators for the performance of operations involving the interception of communication flows.

Subject matter and legal basis of the reference

This request for a preliminary ruling concerns the Italian legislation providing that the rate paid to telecommunications operators for the performance of interception activities, which are required to be performed on the basis of requests from the judicial authorities, may be quantified by the competent Ministries in a manner that does not correspond to the principle of full reimbursement of costs. That legislation could be at variance with the EU principles of non-discrimination, protection of competition, freedom of establishment, freedom to conduct business and proportionality of administrative action. The referring court has raised the question of a preliminary ruling under the third paragraph of Article 267 TFEU.

Question referred for a preliminary ruling

Do Articles 18, 26, 49, 54 and 55 TFEU, Articles 3 and 13 of Directive 2018/1972/EU of the European Parliament and of the Council of 11 December 2018, and Articles 16 and 52 of the Charter of Fundamental Rights of the European Union preclude a provision of national law that delegates to the administrative authorities the task of determining the remuneration to be paid to telecommunications operators for the mandatory performance of activities ordered by the judicial authorities consisting in the interception of communication flows, where that provision does not require compliance with the principle of the full reimbursement of the costs actually incurred and duly documented by the operators in relation to those activities and, furthermore, requires that the administrative authorities achieve cost savings compared to previous criteria for calculating remuneration?

Provisions of EU law relied on

- Articles 18, 26, 49, 54 and 55 TFEU.

- Articles 3 and 13 of Directive 2018/1972/EU of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code, and Annex I to that directive.

- Articles 16 and 52 of the Charter of Fundamental Rights of the European Union.

Provisions of national law relied on

- The Interministerial Decree of 28 December 2017, issued by the Ministro della giustizia (Minister for Justice) and the Ministro dello sviluppo economico (Minister for Economic Development), in agreement with the Ministro dell'economia e delle finanze (Minister for Economic Affairs and Finance) – Disposizione di riordino delle spese per le prestazioni obbligatorie (Provisions for Restructuring of Costs for Mandatory Services), in accordance with Article 96 of Legislative Decree No 259/2003.

- Article 28 of Legislative Decree No 259/2003 ('Electronic Communications Code'; 'the ECC'):

'Article 28 – Conditions attached to the general authorisation and to the rights of use for radio frequencies and rights of use for numbering resources.

1. The general authorisation for the provision of electronic communications networks or services and the rights of use for radio frequencies and rights of use for numbering resources may be subject only to the conditions listed respectively in Parts A, B and C of Annex 1. Such conditions shall be non-discriminatory, proportionate and transparent and, in the case of rights of use for radio frequencies, must comply with Article 14 of the ECC. General authorisations are subject in all cases to Condition 11 stated in Part A of Annex 1.'

Annex 1 lays down 'the maximum list of conditions which may be attached to general authorisations (Part A), rights of use for radio frequencies (Part B) and rights of use for numbering resources (Part C) as stated in Articles 28(1) and 33(1) of the ECC'. Part A of the Annex states the 'conditions for general authorisations', including Condition 11, namely 'providing services for legal purposes, as laid down in Article 96 of the ECC, from the commencement of the activities'.

- Article 96 of that Legislative Decree:

'Article 96 – Mandatory services

1. Services for legal purposes performed on the basis of requests for interception and information made by the competent judicial authorities shall be mandatory for

operators; the times and methods shall be agreed with those authorities until the decree described in paragraph 2 is approved.

2. For the purposes of adopting the fixed annual charge for the mandatory services described in paragraph 1, a decree shall be issued before 31 December 2017 by the Minister for Justice and the Minister for Economic Development, in agreement with the Minister for Economic Affairs and Finance, to implement the revision of the items in the list laid down in the decreto del Ministro delle comunicazioni 26 aprile 2001 (Decree of the Minister for Communications of 26 April 2001), published in the Gazzetta Ufficiale (Official Gazette) No 104 of 7 May 2001. The Decree:

(a) shall lay down the types of mandatory services and shall determine the corresponding rates, taking into account changes in costs and services, so as to achieve a cost saving of at least 50% compared with the rates applied. The rate shall include the costs for all services simultaneously activated or used by each network identity;

(b) shall identify the parties required to perform mandatory interception services, including among service providers, where their infrastructures permit network access or the distribution of information or communication content, and those that provide electronic communication services or applications on any basis, even if these are used through non-own access or transport networks;

(c) shall establish the obligations of parties required to perform mandatory services and the procedures for performance of those services, including compliance with uniform IT procedures in the transmission and management of administrative communications, with regard also to the stages prior to the payment of those services.

3. Non-compliance with the obligations laid down in the decree described in paragraph 2 shall result in the application of Article 32(2), (3), (4), (5) and (6).

4. Until the decree described in paragraph 2 is issued, information relating to telephone traffic shall be released free of charge. Services provided for judicial purposes other than those listed in the first sentence shall continue to be subject to the list adopted by Decree of the Minister for Communications of 26 April 2001, published in the Official Gazette of the Italian Republic No 104 of 7 May 2001.

5. For the purposes of enabling payment for the services covered by paragraph 2, the operators must negotiate interconnection arrangements among themselves to guarantee the supply and interoperability of the services. The Ministry may intervene if necessary at its own initiative or, if no agreement is reached among the operators, at the request of one of their number.'

Outline of the facts and the main proceedings

1 By separate legal actions, the telecommunications operators Colt Technology Services SpA, Wind Tre SpA, Telecom Italia SpA and Vodafone Italia SpA brought actions before the Tribunale amministrativo regionale del Lazio (Lazio Regional Administrative Court; 'the Lazio TAR') challenging the Interministerial Decree of 28 December 2017 issued by the Minister for Justice and the Minister for Economic Development, in agreement with the Minister for Economic Affairs and Finance, implementing Article 96 of the ECC and thus laying down the procedures and criteria applying for reimbursement to telecommunications operators for the performance of operations involving the interception of communication flows.

2 Those telephone operators challenged that text on the basis that, in comparison with the previous regulatory provisions imposed on the basis of the Ministerial Decree of 26 April 2001, the amount of the reimbursement would be significantly reduced (in fact by 90%), to such a point that it would not even make it possible to cover the costs for the performance of the interception activities. Vodafone Italia SpA also requested that the matter be referred for a preliminary ruling to the Court of Justice of the European Union.

3 The Lazio TAR rejected all the criticisms raised by the appellant companies, taking the view that it had not been established that the rates set by the decree were not sufficient to reimburse the costs incurred by the operators in the performance of the interception activities. For that reason, that court refused to accept that the conditions for referral to the Court of Justice of the European Union had been met.

4 The abovementioned telecommunications operators appealed to the Consiglio di Stato (Council of State, Italy), reiterating the challenges and applications already made in the proceedings at first instance.

5 On 23 March 2020 the Council of State delivered a judgment raising a question for a preliminary ruling in fulfilment of the duty laid down in the third paragraph of Article 267 TFEU, submitting to the Court of Justice the elements of a possible conflict between EU law and the Italian legislation cited by Vodafone Italia SpA.

6 In an order of 26 November 2020, the Court of Justice held that the request for a preliminary ruling was 'manifestly inadmissible', expressly reserving the Council of State's right to 'submit a new request for a preliminary ruling containing the information that will enable the Court to provide an effective response to the question raised'.

7 The proceedings having resumed, the appellant companies have made a further request for a preliminary ruling to the Court of Justice.

8 The Council of State once again has raised the question of a preliminary ruling under the third paragraph of Article 267 TFEU.

Principal arguments of the parties to the main proceedings

9 The appellants submit that Article 96 of Legislative Decree No 259/2003, in so far as it provides that the rate payable to telecommunications operators for the performance of mandatory interception activities may be quantified by the competent ministries in a manner that is not based on the principle of full reimbursement of costs, is at variance with EU law, in that:

- it makes it mandatory for telecommunications operators to perform interception activities ordered by the judicial authorities, with any failure to perform those activities subject to heavy administrative penalties, and potentially even the withdrawal of authorisations;

- it requires that the rates to be paid to the operators for the performance of interception activities be set administratively so as to 'achieve a cost saving of at least 50% compared with the rates' applied until now. This not only fails to allow operators to make any profit but even prevents them from covering the related costs, given that the performance of the services in question would require specific investments and the deployment of otherwise unnecessary personnel.

10 This would represent:

(a) discrimination on the grounds of size, as smaller companies would be proportionally less penalised than larger operators, such as the appellants;

(b) discrimination on the grounds of nationality, because companies not established in Italy would be favoured over operators established in Italy, such as the appellants;

(c) a distortion of competition with repercussions across the continent, given that the establishment of foreign companies in the Italian market and, more generally, entry into that market by new entrants would be made structurally less convenient, because of the uneconomic nature of the interception activities resulting from the Italian legislation in question;

(d) a substantive expropriation of the entrepreneurial capacities of private economic operators completely disproportionate to the public interest objective to be achieved.

11 Essentially, according to the appellants, the intrinsic uneconomical nature of the performance of interception activities based on the contested Italian legislation:

(a) would weigh more than proportionately on larger operators, which, precisely because of the broader user bases they have under contract, would be more likely to receive interception requests from the judicial authorities, with the consequent impact of the uneconomic nature of those activities being exponential;

(b) would more than proportionally burden operators established in Italy, because foreign operators able to apply tariff reductions for roaming could offer cheaper services to Italian customers who buy foreign SIM cards. Specifically, these operators could:

(b1) either limit the overall uneconomic impact of interception activities, because of the turnover achieved with customers in the countries where they are established;

(b2) or even exclude it altogether, in cases where SIM cards can be purchased in the country of establishment without prior verification of personal identity. In such cases, the Italian judicial authorities would not be able to link the SIM to a specific name and would thus find it practically impossible to order interceptions;

(c) would introduce an undue structural difficulty of access to the Italian market for foreign operators interested in establishing themselves there and, more generally, for those wishing to enter the market from scratch; at the same time, it would lead 'downstream' to a likely increase in the tariffs applied to end customers (since operators would need to recoup the costs incurred in carrying out interception services at a loss);

(d) would place the cost of providing a service of public interest almost entirely on private entities operating on a profit-making basis in a competitive market, in breach of the right to freely exercise an economic activity, a fundamental right within the EU.

12 Conversely, according to the appellants, the only pricing method compatible with EU law would be one providing for full coverage of costs actually incurred by telecommunications operators in relation to the interception activities carried out at the behest of the judicial authorities.

13 For their part, the respondent institutions submit that the claims made by the appellants are unfounded, because the following would not be reimbursable:

- costs associated with the use of technical equipment and the adoption of operating methods that are no longer justifiable in technological terms;

- costs arising from the use of equipment that is already needed to provide normal commercial services to users (such as distribution infrastructure);

- costs of presenting those costs in the financial statements, as these would be the company's own operating expenses and not cost items strictly related to the service.

14 In terms of personnel costs, reimbursable costs would only include those that could be identified on a flat-rate basis in the light of the number of days of interceptions carried out over the year and the mean duration of the individual interception operations.

15 Essentially, the 50% cost-saving objective compared to the previous situation, imposed by law, would therefore be achieved mainly through technological changes. Moreover, the costs calculated by extrapolation by the special working group set up at the Ministry of Justice 'taking into account changes' in current technology have been subject to 'reductions' in order to achieve the minimum level of cost savings required by the national lawmakers ('50% compared with the rates applied' previously).

Succinct presentation of the reasons for the request for a preliminary ruling

16 The referring court notes that, according to secondary EU legislation (Article 13 of Directive 2018/1972/EU of the European Parliament and of the Council of 11 December 2018 and Annex I to that directive), a general authorisation to provide communications services may be subject under national law to a requirement to perform interceptions ordered by the judicial authorities.

17 Such authorisations are subject only to the restriction stated generally in Article 13 for all conditions, namely that they must be 'non-discriminatory, proportionate and transparent'.

18 The secondary EU law applicable in such cases does not therefore expressly require that the national law provide for the full reimbursement of the costs incurred by the telecommunications operator in relation to the performance of interceptions ordered by the judicial authorities.

19 The appellants submit that the requirement under EU law for costs to be covered in full – namely all costs specifically incurred by telecommunications operators for the performance of the interception activities – should be implicitly but unambiguously inferred from the following:

- consideration of the 'general objectives' sought by Directive 2018/1972/EU, primarily 'promoting competition', 'contributing to the development of the internal market', 'facilitating convergent conditions for investment', and 'ensuring … there is no discrimination' (see Article 3);

- a systematic reading of the original EU legislation and, more specifically, the integrated, reciprocal consideration of the general principles of non-discrimination, protection of competition, freedom of establishment, freedom to conduct business and proportionality of administrative action enshrined in the Treaties.

20 The referring court asserts that neither the secondary EU legislation applicable in the case nor the general principles laid down in the Treaties cited by the appellants require the full reimbursement of the costs actually incurred (and duly documented) by operators in performing the interception activities and, therefore, do not preclude national provisions that fail to include such full reimbursement

and, furthermore, require an administrative review of the rates to be paid to the operators in order to achieve 'a cost saving'.

21 It held that:

(a) first, Directive 2018/1972/EU does not expressly require Member States to make full reimbursement of costs to operators, and it can therefore be inferred that the implicit intention was to leave discretion to the Member States in this respect;

(b) furthermore, that directive permits Member States to require that telecommunications operators perform interception activities legally ordered by the judicial authorities: because those activities are imposed by law for primary, overriding and indispensable public interest purposes, they may not be subject to financial constraints except to a limited extent, all the more so if such constraints are laid down for the benefit of private entities operating, subject to administrative authorisation, in regulated markets;

(c) more generally, it is true that, according to secondary EU law, the conditions that may be imposed on general authorisations to provide telecommunications services, including the obligation to carry out interception activities, must be 'non-discriminatory, proportionate and transparent', but it is equally true that the rates generally laid down by Legislative Decree No 259/2003 for the performance of interception activities:

(c1) are absolutely the same for all operators – large and small, domestic and foreign – offering services in Italy, so there is no technical or legal limitation on free competition and market entry, much less any direct or indirect discrimination on grounds of company size or nationality (the rates are therefore 'non-discriminatory');

(c2) must be calculated by the authorities 'taking into account changes in costs'; on the other hand, these services, which are essential in achieving general purposes of primary public interest, may only be provided by telecommunications operators (the rates are therefore generally 'proportionate');

(c3) are public and accessible to everyone, because they are laid down in a formal administrative measure (the rates are therefore 'transparent');

(d) in legal terms, the cost reimbursed is not necessarily and solely based on the actual costs effectively incurred, but also on the hypothetical costs borne by a model operator adopting the best technological and organisational solutions available on the basis of the knowledge at the time; moreover, based on the applicable EU and Italian legislation, a telecommunications operator is required to consent to performing interceptions, and therefore has – in legal terms – on the one hand an obligation (in the public interest) to put in place an organisational structure that makes it possible for these activities to be carried out as smoothly, effectively and efficiently as possible, and on the other hand a duty (in its own interest) to reduce the corresponding costs as much as possible;

(e) lastly, from a systematic value-based point of view, the original EU law (see Article 4(2) TEU, Article 4(2)(j) TFEU, Article 72 TFEU, Article 82 TFEU and Article 84 TFEU) recognises, directly or indirectly, the structural primacy of certain essential public interests of the Member States, including the prosecution of criminal offences, for which it is valuable and, often, essential to capture conversations: however, because such conversations can only be captured with the cooperation of telecommunications operators, the Member State need only provide a set of rules that is clear, uniform for all operators active within the domestic market and reasonably capable of making the performance of this activity economically viable.