

Case C-242/23**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:**

18 April 2023

Referring court:

Consiglio di Stato, Italy

Date of the decision to refer:

11 April 2023

Appellant:

Tecno*37

Respondents:

Ministero dello Sviluppo Economico

Camera di Commercio Industria Artigianato e Agricoltura di Bologna

Subject matter of the main proceedings

Appeal brought by a company that had already brought an action at first instance against the judgment of the Tribunale Amministrativo Regionale (Regional Administrative Court; ‘TAR’) for Emilia Romagna, Italy, which had dismissed its action for annulment of a series of administrative decisions that, on the basis of the Italian legislation in force, had proscribed it from pursuing its property brokerage activity on the ground that it was incompatible with its property management activity.

Subject matter and legal basis of the request

Assessment of the conformity of Article 5(3) of Law 39/1989, establishing the incompatibility between property brokerage activity and property management activity, with Article 49 TFEU, Article 59(3) of Directive 2005/36/EC, and Articles 4(8) and 25(1) of Directive 2006/123/EC.

More specifically, on the basis of Article 267 TFEU, the referring court asks (i) whether the current version of the national legislation at issue in the main proceedings, under which the incompatibility between property agency activity and property management activity is to be understood as relating and limited to business activities, is compatible with EU law; (ii) whether Article 59 of Directive 2005/36/EC, Article 25(1) of Directive 2006/123/EC and, more generally, Article 49 TFEU preclude legislation such as that contained in Article 5(3) of Law No 39/1989, which establishes, as a preventive and general provision, incompatibility between property brokerage activity and property management activity, without this being justified by an overriding reason in the public interest or without a demonstration of the proportionality of such general incompatibility with regard to the objective pursued; (iii) whether a property agent may, in any event, also carry on the activity of property manager, except where this activity relates to the property he or she manages since, in such a case, there would be a conflict of interest.

Questions referred for a preliminary ruling

(1) Must Article 5(3) of Law 39/1989 as reworded following infringement proceeding No 2018/2175 now be regarded as fully consistent with [EU] law, in particular in the light of the closure of the infringement proceeding itself?

(2) Do the principles and objectives of Article 59(3) of Directive 2005/36/EC (as amended by Directive 2013/55/[EU]) and Article 25(1) of Directive 2006/123/EC and, more generally, of Article 49 TFEU preclude rules such as the Italian rule contained in Article 5(3) of Law No 39/1989, which establishes, as a preventive and general provision, incompatibility between property brokerage activity and property management activity due to the mere fact that the two activities are carried out jointly and, therefore, without there being any need for chambers of commerce to subsequently ascertain on a case-by-case basis the nature of the brokerage carried out, without this being based on a specifically identified and proved ‘overriding reason in the public interest’ or, in any event, on a demonstration of the proportionality of the general incompatibility provided for with regard to the objective pursued?

(3) Can a property agent in any case also act as a property manager, provided he or she does not seek to sell or purchase the property he or she manages since a conflict of interest would arise in this case?

Provisions of European Union law relied on

TFEU: Article 49

Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications: Article 59(3).

Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market – Article 25(1) and Article 4(8).

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on reform recommendations for regulation in professional services, [Brussels 10.1.2017 COM(2016)820 final; (SWD(2016) 436 final)]

Case-law of the Court of Justice

Judgments of the Court of Justice of 27 February 2020, *Commission v Belgium*, [C-384/18], EU:C:2020:124, paragraphs 48, 52, 55, and 57; of 4 July 2019, *Commission v Germany*, C-377/17, EU:C:2019:562, paragraph 74; of 28 January 2016, *Commission v Portugal*, C-398/14, EU:C:2016:61, paragraph 48; of 24 January 2018, *Commission v Italy*, C-433/15, EU:C:2018:31, paragraph 44.

Provisions of national law relied on

Law No 39/1989: Article 5(3).

Initial wording of the provision:

‘3. The pursuit of the activity of property brokerage shall be incompatible with:

- a) any public or private employment, with the exception of employment with undertakings or companies whose purpose is to carry on property brokerage;
- b) with membership of other professional associations, orders, rolls or registers and the like;
- c) engaging in independent business operations related to the specific type of brokerage activity to be pursued’.

The wording resulting from an amendment introduced following infringement proceedings initiated by the European Commission against Italy on 19 July 2018 (2018/2175), by Law 37/2019, Disposizioni per l’adempimento degli obblighi derivanti dall’appartenenza dell’Italia all’Unione europea – Legge europea 2018 (Law No 37/2019, Provisions for the fulfilment of obligations arising from Italy’s membership of the European Union – European Law 2018):

Article 2. Regulations concerning the profession of property broker:

‘3. The pursuit of the activity of property brokerage is incompatible with the pursuit of business activities involving the production, sale, representation, or promotion of goods in the same commercial sector in which brokerage activity is carried on, and with activity carried on as an employee of a public or private body, or as an employee of a banking, financial, or insurance institution other than

brokerage undertakings, or with the pursuit of intellectual professions in the same commercial sector in the context of which the activity of brokerage is carried on and, in any case, in the event of a conflict of interest.

Wording following a new amendment introduced, following the same infringement proceedings, by Law 238/2021, Disposizioni per l'adempimento degli obblighi derivanti dall'appartenenza dell'Italia all'Unione europea – Legge europea 2019-2020 (Law No 238/2021, Provisions for the fulfilment of obligations arising from Italy's membership of the European Union – European Law 2019-2020):

Article 4. Provisions on cooperation with assistance centres for the recognition of professional qualifications:

'3. The pursuit of the activity of property brokerage is incompatible with the pursuit of business activities involving the production, sale, representation, or promotion of goods in the same commercial sector in which brokerage activity is carried on, or with the status of employee of an entrepreneur, and with activity carried on as an employee of a public body or as an employee or collaborator in undertakings providing financial services as laid down in Article 4 of Legislative Decree No 59 of 26 March 2010, or with the pursuit of intellectual professions in the same commercial sector in the context of which the activity of brokerage is carried on and, in any case, in the event of a conflict of interest.'

The text currently in force results from the adoption of Law 118/2022, which added paragraph 3-bis:

'3. The pursuit of the activity of property brokerage is incompatible with the pursuit of business activities involving the production, sale, representation, or promotion of goods in the same commercial sector in which brokerage activity is carried on, or with the status of employee of an entrepreneur, and with activity carried on as an employee of a public body or as an employee or collaborator in undertakings providing financial services as laid down in Article 4 of Legislative Decree No 59 of 26 March 2010, or with the pursuit of intellectual professions in the same commercial sector in the context of which the activity of brokerage is carried on and, in any case, in the event of a conflict of interest.

3-bis. By way of derogation from paragraph 3, pursuit of the activity of property agent shall be compatible with that of employee or collaborator in undertakings carrying on the activity of credit brokerage governed by Articles 128-sexies et seq. of the Consolidated Law on Banking and Credit, referred to in Legislative Decree No 385 of 1 September 1993. The pursuit of the activity of credit brokerage shall remain subject to the relevant sector-specific rules and related control'.

Succinct presentation of the facts and procedure in the main proceedings

- 1 After receiving an alert, on 17 March 2020, the Director of the General Competition Division of the Ministero per lo sviluppo economico (Ministry of Economic Development; 'MISE') invited the Camera di commercio, industria, artigianato e agricoltura (Chamber of Commerce, Industry, Crafts and Agriculture; 'CCIAA') of Bologna, Italy to submit observations on the possible incompatibility and/or conflict of interests of the appellant company, Tecno*37, arising from its combining the activities of property brokerage and property management. The competent authority initiated an investigation under Article 5(3) of Law No 39/89, as amended by Law No 37/2019. Tecno*37 was asked, in particular, to specify whether the property management activity it carried on was of a business or non-business nature.
- 2 The relevant administrative decisions showed that Tecno*37 managed 39 condominiums and that the income generated was significantly higher than that resulting from the activity of property brokerage. The simultaneous exercise of the two occupations and the existence of a situation of incompatibility under Article 5(3) of Law No 39/89 in its current wording were established. The property management activity pursued was found to be of a professional rather than a sporadic or occasional nature, meaning that it was typically entrepreneurial (due to the requirements of cost-effectiveness, organisation, and continuity), as the individual company was operating with three employees plus an additional unit. Consequently, the CCIAA registered the individual property management company in the registro economico amministrativo (Economic and Administrative Register; 'REA') and prohibited any further property brokerage activity, annotating the cessation in the REA.
- 3 Tecno*37 challenged the relevant measures before the TAR, which dismissed the action by judgment No 7/2022.
- 4 Specifically, that court held that: (i), it was apparent from the findings provided by the Italian Revenue Agency that the management activity carried on by Tecno*37 was entrepreneurial, generating a much greater income than its property brokerage activity; (ii) Article 5 of Law No 39/89 must be interpreted as meaning that a true conflict of interests must be avoided by means of a case-by-case examination of the situations concerned, since it is not acceptable to identify abstract and absolute incompatibilities; (iii) from this point of view, the action taken by the CCIAA in the examination procedure is correct, and the conclusions are persuasive. The incompatibility arises primarily from the amount of revenue generated by the property management activity, which is carried on predominantly as a business using dedicated structures and human resources. Consequently, there is a risk that the property units managed may be unduly favoured compared with other available properties, resulting in a breach of the requirements of neutrality and impartiality specific to brokers, whose task it is to promote the conclusion of the transaction. The large number of buildings – each consisting of numerous apartments – where the applicant holds the position of property manager may in

fact hinder, if the brokerage activity is carried on at the same time, unbiased and impartial selection of appropriate proposals for clients.

- 5 Tecno*37a brought an appeal against the judgment of the TAR before the referring court, the Consiglio di Stato (Council of State).

The essential arguments of the parties in the main proceedings

- 6 In support of the action at first instance, the following pleas in law were raised, in particular and as far as is relevant here:

infringement of Articles 3, 41, 97 and 117 of the Italian Constitution, Article 5(3) of Law No 39/89, Articles 1, 3, and 6 of Law No 241/90, Articles 4(3) and 47 TFEU, breach of the principles of non-discrimination, proportionality, and appropriateness of the conditions of access to professions and services resulting from Directives 2005/36 and 2006/123, misuse of powers arising from a failure to investigate and state reasons for the alleged conflict of interest constituting an overriding reason in the public interest, and lack of proportionality.

- 7 More specifically, according to the appellant, Article 5(3) of Law No 39/89 was interpreted as establishing an abstract and absolute incompatibility between the two activities, contrary to a proper approach that complies with the principles of EU law, according to which case-by-case investigations are necessary to determine the actual existence of a conflict of interest.

- 8 Tecno*37 appealed against the TAR judgment on the following grounds.

- 9 In its first ground of appeal, the appellant again relies on the pleas relied on at first instance. More specifically, the applicant alleges infringement of Articles 4(3) and 47 TFEU and breach of the EU law principles of non-discrimination, proportionality, and appropriateness of the conditions of access to professions and services resulting from Directives 2005/36 and 2006/123. The appellant further alleges misuse of powers due to failure to investigate and failure to state reasons regarding the alleged existence of a conflict of interest capable of constituting, according to the European directives, an overriding reason in the public interest sufficient to make the alleged incompatibility between property agent and property manager proportionate.

- 10 In the first ground of appeal, more specifically, the appellant submits that the TAR applied Article 5(3) of Law No 39/89 as a ‘risk prevention’ measure containing a provision of abstract and general incompatibility and considering solely the extreme hypothesis in which the broker merges the functions of property manager and broker in relation to the same property, which is not relevant in this case. However, that court should have recognised the fundamental unlawfulness of the challenged measures, as they were based on the assumption that the provision must be applied in such a way as to extend incompatibility in a general and

indistinct manner to all cases when the two activities are carried on jointly without there being any need to verify the specifics of the brokerage services provided.

- 11 In addition, the TAR put forward an interpretation of Article 5 of Law No 39/89 to the effect that the incompatibility between the two activities of estate agent and property manager arises from the mere fact that they are carried out jointly as an undertaking, since the high number of property units managed constitutes a potential risk of conflict of interest to the detriment of one of the property brokers' clients. However, this interpretation is in open conflict with the principles laid down by the Court of Justice in its judgment No 384 of 27 February 2020. What counts for the purposes of compliance with Article 5(3) of Law No 39/89, in an interpretation consistent with EU law, is not ascertaining the number of properties brokered or the number of properties managed (as, on the contrary, the CCIAA of Bologna mistakenly did, in compliance with the interpretation of the MISE and with the aim of qualifying the activity as entrepreneurial), but rather the determination in specific terms of whether the two activities overlap in relation to the same property.
- 12 The supposed business or non-business nature of the applicant's brokerage activity, as determined by the CCIAA from income data obtained from the Revenue Agency and also described by the court of first instance as an appropriate indicator of an actual conflict of interest, is neither relevant nor pertinent to the decision. The business or non-business nature of property brokerage does, in itself, have any qualified legal relevance. It is irrelevant for the purposes of determining a public interest constituting an overriding reason in the public interest (see paragraph 48 of judgment No 384 of the Court of Justice of 27 February 2020) capable of justifying the introduction of a general prohibition on engaging in multidisciplinary activity.
- 13 Moreover, the second ground of appeal also alleges, inter alia, infringement of the European principles of non-discrimination, proportionality, progressivity, and appropriateness of penalties.

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

- 14 Where a property agent simultaneously performs the role of both property agent and property manager, there is a potential risk of bias in favour of the properties he or she manages, which may result in the loss of impartiality inherent to a broker. A property manager who manages multiple condominiums may tend to steer potential buyers towards the units located within the properties he or she manages, consequently neglecting other equally appealing housing opportunities.
- 15 On the other hand, from the consumer's point of view, it could be more advantageous to have a single professional figure assisting the buyer both at the time of purchase and in the subsequent property management phase, since there are, in fact, multiple ways to circumvent incompatibilities (family relationships,

etc.), resulting in doubling the number of professional figures involved and, therefore, the costs for the end user.

- 16 The new rules contained in Article 5(3) of Law No 39/1989 guarantee consumer protection via a clause which prevents any real conflict of interest between the broker and the object of the brokerage itself. The incompatibility becomes relative and proscribes simultaneously acting as a broker (which figure, according to the Civil Code, stands at an equal distance between the parties) and a party (in a substantial sense, as producer or dealer in the goods or services to be brokered or, in a formal sense, as an agent or representative of such goods). In any case, the incompatibility is limited to business activities and no longer, as in the provision at issue in the infringement proceeding, to every kind of activity carried on, including on a professional or even salaried basis.
- 17 The requested interpretation is necessary for the following reasons:
- the appellant relied on the protection of individual rights recognised by EU law and claimed that there has been a breach of the principles and rights of the European Union;
 - the Court has a monopoly on the interpretation of EU law and, consequently, the compatibility of the internal rules of individual Member States with EU law;
 - the referring court, while ruling out the presence of conditions for proceeding with the direct disapplication of the challenged national legislation, considers that there is an issue of interpretation relating to the exact scope of interpretation to be accorded to legislative acts of the European Union and, consequently, to the compatibility of a national legislative measure with those acts;
 - the question is relevant and decisive for the resolution of the dispute and does not appear to have been interpreted directly by the Court;
 - the referring court is the court of last instance, and the appellant has made a specific request for a reference to be made.