



Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

16 March 2023*

(Reference for a preliminary ruling – Electronic communications networks and services – Directive (EU) 2018/1972 – Article 13 – Conditions attached to the general authorisation – Annex I, Part A, point 4 – Enabling of legal interception by competent national authorities – Article 3 – General objectives – National legislation on the reimbursement of costs associated with interception activities that telecommunications operators are ordered by the judicial authorities to carry out – Absence of full reimbursement mechanism – Principles of non-discrimination, proportionality and transparency)

In Case C-339/21,

REQUEST for a preliminary ruling under Article 267 TFEU from the Consiglio di Stato (Council of State, Italy), made by decision of 11 May 2021, received at the Court on 31 May 2021, in the proceedings

Colt Technology Services SpA,

Wind Tre SpA,

Telecom Italia SpA,

Vodafone Italia SpA

v

Ministero della Giustizia,

Ministero dello Sviluppo Economico,

Ministero dell'Economia e delle Finanze,

Procura Generale della Repubblica presso la Corte d'appello di Reggio Calabria,

Procura della Repubblica presso il Tribunale di Cagliari,

Procura della Repubblica presso il Tribunale di Roma,

Procura della Repubblica presso il Tribunale di Locri,

* Language of the case: Italian.

and

Ministero della Giustizia,

Ministero dello Sviluppo Economico,

Procura Generale della Repubblica presso la Corte d'appello di Reggio Calabria,

Procura della Repubblica presso il Tribunale di Cagliari,

Procura della Repubblica presso il Tribunale di Roma

v

Wind Tre SpA,

THE COURT (Fifth Chamber),

composed of E. Regan, President of the Chamber, D. Gratsias, M. Ilešič (Rapporteur), I. Jarukaitis and Z. Csehi, Judges,

Advocate General: A.M. Collins,

Registrar: C. Di Bella, Administrator,

having regard to the written procedure and further to the hearing on 18 May 2022,

after considering the observations submitted on behalf of:

- Colt Technology Services SpA, by F. Fioretti, M. Giustiniani and N. Moravia, avvocati,
- Wind Tre SpA, by B. Caravita di Toritto, S. Fiorucci and R. Santi, avvocati,
- Telecom Italia SpA, by D. Gallo, G. Vercillo and A. Zoppini avvocati,
- Vodafone Italia SpA, by S. D'Ercole, N. Palombi and F. Pignatiello, avvocati,
- the Italian Government, by G. Palmieri, acting as Agent, and C. Colelli, G. Galluzzo and P. Gentili, avvocati dello Stato,
- the European Commission, by L. Malferrari and P. Messina, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 6 October 2022,

gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Articles 18, 26, 49, 54 and 55 TFEU, Articles 3 and 13 of Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (OJ 2018 L 321, p. 36) and Articles 16 and 52 of the Charter of Fundamental Rights of the European Union ('the Charter').
- 2 The request has been made in several sets of proceedings between (i), on the one hand, Colt Technology Services SpA, Wind Tre SpA, Telecom Italia SpA and Vodafone Italia SpA (together 'the telecommunications operators concerned') and, on the other hand, the Ministero della Giustizia (Ministry of Justice, Italy), the Ministero dello Sviluppo economico (Ministry of Economic Development, Italy) and the Ministero dell'Economia e delle Finanze (Ministry of Economy and Finance, Italy), as well as, in certain cases, depending on the procedure, the Procura Generale della Repubblica presso la Corte d'appello di Reggio Calabria (Public Prosecutor's Office at the Court of Appeal, Reggio Calabria, Italy), the Procura della Repubblica presso il Tribunale di Cagliari (Public Prosecutor's Office at the District Court, Cagliari, Italy), the Procura della Repubblica presso il Tribunale di Roma (Public Prosecutor's Office at the District Court, Rome, Italy), and the Procura della Repubblica presso il Tribunale di Locri (Public Prosecutor's Office at the District Court, Locri, Italy) and between (ii), on the one hand, the Ministero della Giustizia (Ministry of Justice), the Ministero dello Sviluppo economico (Ministry of Economic Development), the Procura Generale della Repubblica presso la Corte d'appello di Reggio Calabria (Public Prosecutor's Office at the Court of Appeal, Reggio Calabria), the Procura della Repubblica presso il Tribunale di Cagliari (Public Prosecutor's Office at the District Court, Cagliari) and the Procura della Repubblica presso il Tribunale di Roma (Public Prosecutor's Office at the District Court, Rome) and, on the other hand, Wind Tre, concerning national legislation which, in return for a fixed annual charge, requires all telecommunications operators active in the national territory to provide, at the request of the judicial authorities, telecommunications interception services.

Legal context

European Union law

- 3 According to recital 1 of Directive 2018/1972:

'Directives ... 2002/20/EC [of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive) (OJ 2002 L 108, p. 21)], 2002/21/EC [of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) (OJ 2002 L 108, p. 33)] ... have been substantially amended. Since further amendments are to be made, those Directives should be recast in the interests of clarity.'
- 4 Article 3 of that directive, entitled 'General objectives', provides, in paragraphs 1 and 2 thereof:

'1. Member States shall ensure that in carrying out the regulatory tasks specified in this Directive, the national regulatory and other competent authorities take all reasonable measures which are necessary and proportionate for achieving the objectives set out in paragraph 2. ...

...

2. In the context of this Directive, the national regulatory and other competent authorities as well as [the Body of European Regulators for Electronic Communications (BEREC)], the [European] Commission and the Member States shall pursue each of the following general objectives, which are not listed in order of priority:

...

- (b) promote competition in the provision of electronic communications networks and associated facilities ... and in the provision of electronic communications services and associated services;
- (c) contribute to the development of the internal market by removing remaining obstacles to, ..., investment in, and the provision of, electronic communications networks, electronic communications services, associated facilities and associated services, throughout the [European] Union, ...'

- 5 Article 12 of that directive, entitled 'General authorisation for electronic communications networks and services', provides, in the first sentence of paragraph 1:

'Member States shall ensure the freedom to provide electronic communications networks and services, subject to the conditions set out in this Directive.'

- 6 Article 13 of Directive 2018/1972, entitled 'Conditions attached to the general authorisation and to the rights of use for radio spectrum and for numbering resources, and specific obligations', is worded as follows:

'1. The general authorisation for the provision of electronic communications networks or services and the rights of use for radio spectrum and rights of use for numbering resources may be subject only to the conditions listed in Annex I. Such conditions shall be non-discriminatory, proportionate and transparent. ...

...

3. The general authorisation shall contain only conditions which are specific for that sector and are set out in Parts A, B and C of Annex I and shall not duplicate conditions which are applicable to undertakings by virtue of other national law.

...'

- 7 Annex I to that directive sets out, in Part A and in accordance with its title, the 'General conditions which may be attached to a general authorisation'. Those include, in point 4, the following condition:

'Enabling of legal interception by competent national authorities in accordance with Regulation (EU) 2016/679 [of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ 2016 L 119, p. 1)] and Directive 2002/58/EC [of the European Parliament and of the Council of

12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (OJ 2002 L 201, p. 37)]’.

- 8 Under Article 125 thereof, Directive 2018/1972, *inter alia*, repealed and replaced Directive 2002/20, as amended by Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 (OJ 2009 L 337, p. 37) (‘Directive 2002/20’), and Directive 2002/21, as amended by Directive 2009/140 (‘Directive 2002/21’), with effect from 21 December 2020, references to Directives 2002/20 and 2002/21 being construed as references to Directive 2018/1972 and to be read in accordance with the correlation table in Annex XIII to that directive.

Italian law

- 9 Article 28 of decreto legislativo n. 259 – Codice delle comunicazioni elettroniche (Decree-Law No 259 on the Electronic Communications Code) of 1 August 2003 (GURI No 214 of 15 September 2003; ‘the Electronic Communications Code’), entitled ‘Conditions attached to the general authorisation and to the rights of use for radio frequencies and the rights of use for numbering resources’, in the version applicable to the disputes in the main proceedings, provides in paragraph 1:

‘The general authorisation for the provision of electronic communications networks or services and the rights of use for radio frequencies and for numbering may be subject only to the conditions listed 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 Electronic Communications Code. General authorisations are subject in all cases to condition 11 of Part A of Annex 1.’

- 10 Annex 1 contains an exhaustive list of the conditions which may be attached to general authorisations (Part A), to rights of use for radio frequencies (Part B) and to rights of use for numbering (Part C). Point 11 of Part A of that annex sets out, *inter alia*, the condition of ‘providing services for judicial purposes, as referred to in Article 96 of the [Electronic Communications] Code, from the commencement of the activity’.

- 11 Article 96 of that code, entitled ‘Mandatory Services’, states:

‘1. Services for judicial 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 decree of the Ministro delle Comunicazioni (Minister for Communications, Italy) of 26 April 2001, published in GURI 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 among those that provide electronic communications 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.

...'

- 12 In accordance with Article 96(2), the mandatory services provided by telecommunications operators and the corresponding rates were specified by the decreto interministeriale del Ministro della Giustizia e del Ministro dello Sviluppo Economico di concerto con il Ministro dell'Economia e delle Finanze – Disposizione di riordino delle spese per le prestazioni obbligatorie di cui all'articolo 96 del decreto legislativo n. 259 del 2003 (interministerial decree of the Minister for Justice and the Minister for Economic Development in agreement with the Minister for Economy and Finance – Provisions for the reorganisation of expenses for the mandatory services referred to in Article 96 of Decree-Law No 259/2003) of 28 December 2017 (GURI No 33 of 9 February 2018; 'interministerial decree of 28 December 2017').

The disputes in the main proceedings and the question referred for a preliminary ruling

- 13 Under Italian law, in particular Article 96 of the Electronic Communications Code, telecommunications operators are required, in the event of a request from the judicial authorities, to carry out interception of communications (voice, computer, telematic and data), in return for a fixed annual charge.
- 14 As part of their activities, the telecommunications operators concerned were required to provide interception operations of that kind. Pursuant to Article 96(2), the amounts which they received for that purpose and which had initially been established by decree of the Minister for Communications of 26 April 2001 were amended by the interministerial decree of 28 December 2017.
- 15 In accordance with that provision, the amendment consisted, inter alia, in a reduction of at least 50% of the reimbursements of the costs associated with those interception operations.

- 16 The telecommunications operators concerned have, by separate actions brought before the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio, Italy), sought annulment of the interministerial decree of 28 December 2017, claiming that the fees which the Italian authorities must pay to them under that decree do not fully cover the costs incurred in providing the mandatory services relating to the interception of electronic communications ordered by the competent national judicial authorities.
- 17 By judgments Nos 4594/2019, 4596/2019, 4600/2019 and 4604/2019 of 9 April 2019, that court dismissed those actions on the ground that it had not been established that the rates determined by that decree were insufficient to offset the costs incurred by operators in carrying out interception operations.
- 18 The telecommunications operators concerned and, as regards judgment No 4604/2019, which had upheld Wind Tre's action in part on another ground, the Ministry of Justice, the Ministry of Economic Development, the Public Prosecutor's Office at the Court of Appeal, Reggio Calabria, the Public Prosecutor's Office at the District Court, Cagliari and the Public Prosecutor's Office at the District Court, Rome, lodged appeals against those judgments before the Consiglio di Stato (Council of State, Italy), which is the referring court.
- 19 By a decision of 13 February 2020, that court made a request for a preliminary ruling to the Court of Justice concerning the interpretation of Articles 18, 26 and 102 et seq. TFEU. Since that request for a preliminary ruling did not satisfy the requirements laid down in Article 94 of the Rules of Procedure of the Court of Justice, it was rejected as manifestly inadmissible by the order of 26 November 2020, *Colt Technology Services and Others* (C-318/20, not published, EU:C:2020:969).
- 20 Following the resumption of the main proceedings, the referring court still considers itself bound, in its capacity as a court of last instance, to make a further reference to the Court of Justice for a preliminary ruling in order to obtain a correct interpretation of the relevant EU law for the purposes of the disputes before it.
- 21 In that regard, it states that it has doubts concerning the relationship between Article 13 of Directive 2008/1972 and certain rules of primary EU law.
- 22 It states that the telecommunications operators concerned maintain before it that the contested national legislation (i) leads to discrimination on the grounds of the size of the undertaking, as small undertakings are proportionally less penalised than large operators, (ii) gives rise to discrimination on grounds of nationality, since undertakings not established in Italy are treated more favourably than operators established in Italy, (iii) distorts competition at EU level since it introduces an undue structural barrier to access to the Italian market for foreign operators and (iv) infringes the freedom to pursue a commercial activity by making a substantive expropriation of the entrepreneurial capacities of private economic operators which is disproportionate to the public interest objective relied upon.
- 23 The referring court notes, however, that, under Article 13 of, and Annex I to, Directive 2008/1972, the general authorisation to provide electronic communications services may be subject under national law to the condition that interceptions ordered by the judicial authorities are carried out and that the only limit laid down, in general terms, in Article 13 is that the conditions provided for must be non-discriminatory, proportionate and transparent.

- 24 Thus, it takes the view that neither the relevant secondary EU law nor the general principles of the FEU Treaty to which the telecommunications operators concerned refer require full reimbursement of the costs actually incurred by operators in carrying out such interceptions and, therefore, that they do not preclude a provision of national law which does not provide for such full reimbursement and which, moreover, links the revision of the reimbursements that may be granted to an objective of reducing expenditure.
- 25 In particular, it points out that the rates laid down in general terms by the Electronic Communications Code are entirely comparable for all operators offering services in Italy; that they must be calculated by the administration taking into account both changes in costs and technological progress which has made certain services less expensive, and the fact that those services pursue aims of an overriding public interest and can be provided only by telecommunications operators; and that those rates are public. The condition attached to the general authorisation to provide electronic communications networks and services at issue in the main proceedings is therefore, in the referring court's view, non-discriminatory, proportionate and transparent, in accordance with Article 13. Furthermore, and in any event, the prior installation of the facilities necessary for interceptions of that kind is an inevitable intrinsic cost of the commercial activity of providing electronic communications services, since the provision of such services is, as matters currently stand, subject to a general authorisation and that authorisation is subject to the condition at issue.
- 26 In those circumstances the Consiglio di Stato (Council of State) decided to stay the proceedings and referred the following question to the Court of Justice for a preliminary ruling:
- 'Do Articles 18, 26, 49, 54 and 55 TFEU, Articles 3 and 13 of Directive [2018/1972] and Articles 16 and 52 of the [Charter] 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?'

Admissibility of the request for a preliminary ruling

- 27 The Italian Government challenges the admissibility of the request for a preliminary ruling. First, the Consiglio di Stato (Council of State), by not referring to any reasonable doubt as to the interpretation to be given to EU law, used the preliminary ruling mechanism provided for in Article 267 TFEU in a manner contrary to that which the Court recently clarified in the judgment of 6 October 2021, *Consorzio Italian Management and Catania Multiservizi* (C-561/19, EU:C:2021:799). Second, the question referred is hypothetical. The Consiglio di Stato (Council of State) did not provide the factual evidence showing that the rates set by the legislation at issue are insufficient to remunerate the operators. Thus, it is only in the event of non-remunerative rates that the question referred would be relevant.
- 28 In that regard, it should be recalled that, admittedly, a national court against whose decisions there is no judicial remedy under national law may, in compliance with the conditions referred to in paragraphs 40 to 46 of the judgment of 6 October 2021, *Consorzio Italian Management and Catania Multiservizi* (C-561/19, EU:C:2021:799), refrain from referring to the Court a question

concerning the interpretation of EU law and take upon itself the responsibility for resolving it where the correct interpretation of EU law is so obvious as to leave no scope for any reasonable doubt (see, to that effect, judgment of 6 October 2021, *Consorzio Italian Management and Catania Multiservizi* C-561/19, EU:C:2021:799, paragraphs 39 and 47 and the case-law cited).

- 29 However, the claim that the answers to the questions referred are clear in no way prevents a national court from making a reference for a preliminary ruling to this Court (see, to that effect, judgment of 11 September 2008, *UGT-Rioja and Others*, C-428/06 to C-434/06, EU:C:2008:488, paragraphs 42 and 43).
- 30 Furthermore, in so far as the Italian Government submits that the question referred is hypothetical because it is, in its view, based on the incorrect premiss that the reimbursements provided for by the national legislation at issue in the main proceedings do not make it possible to cover the costs actually incurred by the operators concerned, it should be recalled that, in proceedings under Article 267 TFEU, the Court is empowered to give rulings on the interpretation of EU legislation only on the basis of the facts which the national court puts before it (judgment of 12 January 2023, *DOBELES HES*, C-702/20 and C-17/21, EU:C:2023:1, paragraph 85 and the case-law cited). Consequently, it is not for the Court to call into question the factual premiss on which the request for a preliminary ruling is based.
- 31 Thus, questions on the interpretation of EU law referred by a national court in the factual and legislative context which that court is responsible for defining, and the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (judgment of 27 October 2022, *Climate Corporation Emissions Trading*, C-641/21, EU:C:2022:842, paragraph 23 and the case-law cited).
- 32 In the present case, it must be noted that, in so far as the question referred concerns the interpretation of Articles 18, 26, 49, 54 and 55 TFEU and Articles 16 and 52 of the Charter, the referring court has not specified either the reasons which prompted it to inquire about the interpretation of those provisions or the link it establishes between them and the national legislation applicable to the disputes in the main proceedings, with the result that the Court does not have before it the factual or legal material necessary to give a useful answer to the question referred in so far as it concerns those provisions. By contrast, in so far as it concerns the provisions of Directive 2018/1972, the request for a preliminary ruling not only specifies the relevant matters of fact and law, but also sets out the reasons why the referring court is uncertain about them. In addition, the relationship between those doubts and the subject matter of the disputes in the main proceedings, the reality of which, moreover, is not disputed, is clear from that request.
- 33 Therefore, in so far as it relates to Directive 2018/1972, the request for a preliminary ruling is admissible.

Consideration of the question referred

- 34 As a preliminary point, it should be noted that the referring court seeks an interpretation of the provisions of Directive 2018/1972. However, it is apparent from the file before the Court that the national legislation applicable to the disputes in the main proceedings transposed a directive prior to Directive 2018/1972, namely Directive 2002/20, and that that previous directive was, in accordance with Article 125 of Directive 2018/1972, repealed and replaced by that directive only with effect from 21 December 2020; in other words, this was after the adoption of the interministerial decree of 28 December 2017 and the commencement, by the telecommunications operators concerned, of their actions before the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio) seeking the annulment of that decree.
- 35 Should the referring court ultimately find that the disputes in the main proceedings fall within the scope of Directive 2002/20, it must be stated that the answer given in the present judgment would be transposable to that earlier measure. As is apparent from recital 1 thereof, Directive 2018/1972, in particular, recast the four earlier directives, as amended, which governed the electronic communications networks and services sector, including Directive 2002/20, without introducing any amendments, of relevance to the present case, to the provisions whose interpretation is necessary in order to resolve the disputes in the main proceedings, whether it be their wording, context or objective.
- 36 In particular, the first and second sentences of Article 13(1), Article 13(3) and point 4 of Part A of Annex I to Directive 2018/1972 reproduce, without any substantive changes relevant to the present case, the provisions of Article 6(1) and (3), and point 11 of Part A of the Annex to Directive 2002/20 respectively.
- 37 Moreover, of the two provisions of Directive 2018/1972 mentioned by the referring court in its question, only Article 13 appears to be directly relevant for the resolution of the disputes in the main proceedings, even though the analysis of the question must take account of the objectives established in Article 3 of that directive. By contrast, it is point 4 of Part A of Annex I to Directive 2018/1972 which lays down the condition in relation to which the national legislation at issue in the main proceedings was adopted.
- 38 Therefore, it must be found that, by its question, the referring court asks, in essence, whether Article 13, read in the light of Article 3 of Directive 2018/1972, and point 4 of Part A of Annex I to that directive must be interpreted as precluding national legislation which does not require full reimbursement of the costs actually incurred by providers of electronic communications services when they enable the legal interception of electronic communications by the competent national authorities.
- 39 According to settled case-law, in interpreting provisions of EU law, it is necessary to consider not only their wording but also the context in which they occur and the objectives pursued by the rules of which they are part (judgment of 20 June 2022, *London Steam-Ship Owners' Mutual Insurance Association*, C-700/20, EU:C:2022:488, paragraph 55 and the case-law cited).
- 40 It should be borne in mind that the first sentence of Article 13(1) of Directive 2018/1972 provides that the general authorisation for the provision of electronic communications networks or services may be subject only to the conditions listed in Annex I to that directive, the second sentence of that provision stating that those conditions are to be non-discriminatory,

proportionate and transparent. Article 13(3) also states that the general authorisation is to include only conditions which are specific to the sector concerned and which are set out in Parts A to C of Annex I to Directive 2018/1972. Those conditions include, in point 4 of Part A listing the general conditions which may be attached to such a general authorisation, the condition of enabling legal interception by the competent national authorities.

- 41 It follows from the wording of those provisions that, beyond the obligation, incumbent upon Member States which decide to attach the condition set out in point 4 of Part A of Annex I to Directive 2018/1972 to the general authorisation for the provision of electronic communications networks or services, to impose that condition in a non-discriminatory, proportionate and transparent manner, the EU legislature neither imposed nor excluded reimbursement, by the Member States concerned, of the costs that would be incurred by the undertakings concerned when they enable legal interception in accordance with the terms of that condition.
- 42 Therefore, in the absence of clarification in that regard in Directive 2018/1972, the Member States have discretion in the matter. Consequently, Article 13 and point 4 of Part A of Annex I cannot be read as meaning that those provisions require the Member States to provide for the reimbursement – a fortiori full reimbursement – of any such costs.
- 43 That reading of those provisions is supported both by the context in which they occur and by the objectives pursued by Directive 2018/1972. In particular, first, although the first sentence of Article 12(1) of that directive – reproducing the content of the first sentence of Article 3(1) of Directive 2002/20 – provides that Member States are to ensure the freedom to provide electronic communications networks and services, it follows from the very wording of Article 12(1) that that freedom may be exercised only subject to the conditions laid down in Directive 2018/1972. It cannot therefore result in a reimbursement obligation incumbent upon the Member States, in the manner claimed by the telecommunications operators concerned.
- 44 Second, nor can such an obligation be inferred from the general objectives set out in Article 3 of Directive 2018/1972, which the Member States are, through the national regulatory authorities and other competent authorities, required to ensure. That is true, in particular, of the objective of promoting competition in the provision of electronic communications services provided for in Article 3(2)(b) and of the objective of developing the internal market provided for in Article 3(2)(c), which were previously set out, in essence, in Article 8(2) and (3) of Directive 2002/21. Their wording does not reveal any intention on the part of the EU legislature to limit the Member States' discretion in implementing the condition provided for in point 4 of Part A of Annex I to Directive 2018/1972, apart from the requirements referred to in paragraphs 41 and 42 above.
- 45 Thus, since that discretion must be exercised in accordance with the principles of non-discrimination, proportionality and transparency, it is necessary, if Article 13, read in the light of Article 3 of Directive 2018/1972, and point 4 of Part A of Annex I to that directive are not to preclude national legislation such as that at issue in the main proceedings – which does not require full reimbursement of the costs actually incurred by the providers of electronic communications services when they enable the legal interception of electronic communications by the competent national authorities – that that legislation complies with those principles.
- 46 In the present case, it is apparent from the request for a preliminary ruling and from the file before the Court that, first, the reimbursements provided for by the national legislation at issue in the main proceedings in relation to the condition of enabling legal interception, which is attached to

the general authorisation in Italy and whose compliance with Directive 2018/1972 is not disputed, are comparable for all operators offering electronic communications services in Italy, since the reimbursements are provided for on the basis of fixed unit rates, determined by type of interception service carried out.

- 47 Second, as the referring court has stated, those rates must, according to the applicable Italian legislation, be calculated by the authorities by taking account of technological progress in the sector which has made certain services less expensive, and of the fact that those services are essential to the pursuit of general aims of an overriding public interest and that they can be provided only by telecommunications operators.
- 48 Third, the referring court stated that, in accordance with that legislation, those rates are fixed by means of a formal administrative act, which is published and freely accessible.
- 49 In those circumstances, it appears that the national legislation at issue in the main proceedings, in so far as it provides for the reimbursements at issue, is in fact non-discriminatory, proportionate and transparent, which is, however, for the referring court to ascertain.
- 50 Furthermore, that court has also inquired whether it is possible for a Member State which has provided for the reimbursement of the costs incurred by providers of electronic communications services, where in accordance with Directive 2018/1972 they enable legal interception, to reduce the level of reimbursement previously granted, with the objective of reducing public spending; it should be added, in that regard, that, in view of the discretion afforded to the Member States in the implementation of the condition laid down in point 4 of Part A of Annex I to Directive 2018/1972, that directive cannot preclude such a reduction, provided that the national legislation at issue is non-discriminatory, proportionate and transparent.
- 51 In the light of all the foregoing considerations, the answer to the question referred is that Article 13, read in the light of Article 3 of Directive 2018/1972, and point 4 of Part A of Annex I to that directive must be interpreted as not precluding national legislation which does not require full reimbursement of the costs actually incurred by providers of electronic communications services when they enable the legal interception of electronic communications by the competent national authorities, provided that that legislation is non-discriminatory, proportionate and transparent.

Costs

- 52 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fifth Chamber) hereby rules:

Article 13, read in the light of Article 3 of Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code, and point 4 of Part A of Annex I to that directive,

must be interpreted as not precluding national legislation which does not require full reimbursement of the costs actually incurred by providers of electronic communications

services when they enable the legal interception of electronic communications by the competent national authorities, provided that that legislation is non-discriminatory, proportionate and transparent.

[Signatures]