



Reports of Cases

JUDGMENT OF THE COURT (Eighth Chamber)

18 July 2013*

(Electronic communications networks and services — Directive 2002/20/EC — Article 12 — Administrative charges imposed on undertakings in the sector concerned — National legislation making operators of electronic communications subject to the payment of a charge intended to cover the operating costs of the national regulatory authorities)

In Joined Cases C-228/12 to C-232/12 and C-254/12 to C-258/12,

REQUESTS for a preliminary ruling under Article 267 TFEU from the Tribunale amministrativo regionale per il Lazio (Italy), made by decision of 22 February 2012, received at the Court on 14 May 2012 (Cases C-228/12 to C-232/12) and 24 May 2012 (Cases C-254/12 to C-258/12), in the proceedings

Vodafone Omnitel NV (C-228/12, C-231/12 and C-258/12),

Fastweb SpA (C-229/12 and C-232/12),

Wind Telecomunicazioni SpA (C-230/12 and C-254/12),

Telecom Italia SpA (C-255/12 and C-256/12),

Sky Italia srl (C-257/12)

v

Autorità per le Garanzie nelle Comunicazioni,

Presidenza del Consiglio dei Ministri (C-228/12 to C-232/12, C-255/12 and C-256/12),

Commissione di Garanzia dell'Attuazione della Legge sullo Sciopero nei Servizi Pubblici Essenziali (C-229/12, C-232/12 and C-257/12),

Ministero dell'Economia e delle Finanze (C-230/12),

in the presence of:

Wind Telecomunicazioni SpA (C-228/12, C-229/12, C-232/12, C-255/12 to C-258/12),

Telecom Italia SpA (C-228/12, C-230/12, C-232/2 and C-254/12),

Vodafone Omnitel NV (C-230/12 and C-254/12),

* Language of the case: Italian.

Fastweb SpA (C-230/12, C-254/12 and C-256/12),

Television Broadcasting System SpA (C-257/12),

THE COURT (Eighth Chamber),

composed of E. Jarašiūnas (Rapporteur), President of the Chamber, A. Ó Caoimh and C.G. Fernlund, Judges,

Advocate General: N. Jääskinen,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- Vodafone Omnitel NV, by M. Libertini and V. Cerulli Irelli, avvocati,
- Fastweb SpA, by G. Nava, F. Pacciani and V. Mosca avvocato,
- Wind Telecomunicazioni SpA, by G.M. Roberti, S. Fiorucci, B. Caravita Di Torito, I. Perego and M. Serpone, avvocati,
- Telecom Italia SpA, by F.S. Cantella, F. Cardarelli and F. Lattanzi, avvocati,
- Sky Italia srl, by O. Grandinetti and R. Mastroianni, avvocati,
- the Italian Government, by G. Palmieri, acting as Agent, and A. De Stefano, avvocato dello Stato,
- the Belgian Government, by J.-C. Halleux and T. Materne, acting as Agents,
- the Netherlands Government, by M. Bulterman and C. Wissels, acting as Agents,
- the Portuguese Government, by L. Inez Fernandes, acting as Agent, and S. Gonçalves do Cabo, advogado,
- the European Commission, by E. Montaguti and L. Nicolae, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

- 1 These requests for a preliminary ruling concern the interpretation of Article 12 of Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services ('the Authorisation Directive') (OJ 2002 L 108, p. 21).
- 2 The requests have been made in 10 sets of proceedings between Vodafone Omnitel NV, Fastweb SpA ('Fastweb'), Wind Telecomunicazioni SpA, Telecom Italia SpA and Sky Italia srl, and the Autorità per le Garanzie nelle Comunicazioni (the Communications Regulatory Authority ('AGCOM')), the

Presidenza del Consiglio dei Ministri (President of the Council of Ministers), the Commissione di Garanzia dell'Attuazione della Legge sullo Sciopero nei Servizi Pubblici Essenziali (Commission guaranteeing the implementation of the Law on strikes in essential public services) and the Ministero dell'Economia e delle Finanze (Ministry of Economy and Finance) concerning the annulment of decisions requiring payment of a contribution by operators providing services or electronic network communications in order to cover all the costs of the national regulatory authority ('the NRA') which are not borne by the budget of the Member State.

Legal context

European Union law

- 3 Recital 30 in the preamble to the Authorisation Directive states:

'Administrative charges may be imposed on providers of electronic communications services in order to finance the activities of the [NRA] in managing the authorisation system and for the granting of rights of use. Such charges should be limited to cover the actual administrative costs for those activities. For this purpose transparency should be created in the income and expenditure of [the NRAs] by means of annual reporting about the total sum of charges collected and the administrative costs incurred. This will allow undertakings to verify that administrative costs and charges are in balance.'

- 4 Article 12 of that directive, entitled 'Administrative charges', is worded as follows:

'1. Any administrative charges imposed on undertakings providing a service or a network under the general authorisation or to whom a right of use has been granted shall:

- (a) in total, cover only the administrative costs which will be incurred in the management, control and enforcement of the general authorisation scheme and of rights of use and of specific obligations as referred to in Article 6(2), which may include costs for international cooperation, harmonisation and standardisation, market analysis, monitoring compliance and other market control, as well as regulatory work involving preparation and enforcement of secondary legislation and administrative decisions, such as decisions on access and interconnection; and
- (b) be imposed upon the individual undertakings in an objective, transparent and proportionate manner which minimises additional administrative costs and attendant charges.

2. Where [the NRAs] impose administrative charges, they shall publish a yearly overview of their administrative costs and of the total sum of the charges collected. In the light of the difference between the total sum of the charges and the administrative costs, appropriate adjustments shall be made.'

Italian law

- 5 Article 2(38) of Law No 481 on 'Rules relating to competition and the regulation of public utility services – the creation of regulatory authorities for public utility services' (legge n. 481 – Norme per la concorrenza e la regolazione dei servizi di pubblica utilità – Istituzione delle Autorità di regolazione dei servizi di pubblica utilità) of 14 November 1995 (GURI No 270 of 18 November 1995) provided that independent authorities were to be partly financed by a sum levied under the heading of a special item in the State budget and, for the remainder, by a contribution which could not exceed 0.1% of the

earnings from the previous financial year, paid by the operators providing that service. The amount of that contribution and the arrangement for its payment were established by ministerial decrees issued each year for that purpose.

- 6 Article 6(2) of Law No 249 establishing the Communications Regulatory Authority and laying down rules relating to the telecommunications and radiotelevision systems (legge n. 249 – Istituzione dell'Autorità per le garanzie nelle comunicazioni e norme sui sistemi delle telecomunicazioni e radiotelevisivo) of 31 July 1997 (GURI No 177 of 31 July 1997) expressly mentioned the contribution system already established for the other authorities and also provided for the possibility to use that instrument to introduce, should the need arise and according to criteria taking account of running costs, a payment for the services provided by AGCOM in order to meet its legal obligations, including keeping registers of operators.
- 7 Legislative Decree No 259 establishing the Electronic Communications Code (decreto legislativo, n. 259 – Codice delle comunicazioni elettroniche) of 1 August 2003 (GURI No 214 of 15 September 2003) designated AGCOM as the NRA.
- 8 Article 12(1) of the Authorisation Directive was transposed in Italian law by Article 34(1) of the Electronic Communications Code, worded as follows:

'In addition to the contributions referred to in Article 35, administrative charges may be imposed on undertakings providing networks or services by virtue of the general authorisation or to which a right of use has been granted covering only the administrative costs incurred in the management, control and enforcement of the general authorisation scheme and of rights of use and of specific obligations as referred to in Article 28(2), which may include costs of international cooperation, harmonisation and standardisation, market analysis, monitoring compliance and other market controls, as well as regulatory work involving preparation and enforcement of secondary legislation and administrative decisions, such as decisions on access and interconnection. The administrative charges shall be imposed upon the individual undertakings in an objective, transparent and proportionate manner which minimises additional administrative costs and attendant charges.'

- 9 Italian law distinguishes between administrative charges relating to the exercise of decision-making tasks falling within the competence of the Ministero per lo Sviluppo Economico (Ministry of Economic Development) and the contribution from operators intended to cover the costs of regulatory activities related to the general authorisation scheme carried out entirely by AGCOM.
- 10 The rules governing the payment of a contribution for the benefit of the independent authorities (including AGCOM) was amended by Law No 266 laying down provisions for drawing up the annual and multiannual budget of the State (Law on Finances 2006) (legge n. 266 – Disposizioni per la formazione del bilancio annuale e pluriennale dello Stato (legge finanziaria 2006) of 23 December 2005 (GURI No 302 of 29 December 2005, Ordinary Supplement No 211 ('Law No 266/2005')).
- 11 Article 1(65) of Law No 266/2005 provides:

'From 2007 onwards, the operating expenses ... of [AGCOM] shall, in so far as they are not covered by funding from the national budget, be financed by the relevant market in the manner laid down in the rules in force. The amount of the contributions shall be determined by decision of each authority, within the limits provided for by law. The contributions shall be paid directly to the relevant authority.'

12 Article 1(66) of Law No 266/2005 provides:

‘For the first year of application, 2006, the amount of the contribution to be paid by the economic operators in the communications sector ... shall be 0.15% of earnings as recorded in the last set of approved company accounts before the entry into force of this law. For subsequent years, [AGCOM] may vary the amount and manner of payment of the contribution in accordance with Article 1(65), up to a maximum of 0.2% of earnings as recorded in the last set of approved company accounts before the adoption of the decision.’

13 The amount and method of payment of the contribution laid down in Article 1(66) of Law No 266/2005, were set annually by the following decisions of AGCOM: for 2006, Decision No 110/06/CONS, for 2007 Decision No 696/06/CONS, for 2008, Decision No 604/07/CONS, for 2009, Decision No 693/08/CONS, for 2010, Decision No 722/09/CONS, for 2011, Decision No 599/10/CONS, and Decision No 650/11/CONS for 2012.

14 The relevant rules were then supplemented by Article 2(241) of Law No 191 laying down provisions for drawing up the annual and multiannual budget of the State for 2010 (Law on Finances 2010) (legge n. 191 – Disposizioni per la formazione del bilancio annuale e pluriennale dello Stato (legge finanziaria 2010) of 23 December 2009 (GURI No 302 of 30 December 2009), which provided for the transfer of part of the sums received by AGCOM to the other independent national administrative authorities.

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

15 Since 1996, the operators making available public utility services in Italy have been liable to pay a compulsory contribution for the operating costs of the authorities monitoring those services. Operators which provide electronic communications services or networks are also covered by that regulation.

16 The obligation on operators in the electronic communications sector to pay a contribution for the functioning of the authorities regulating public utility services was introduced by Law No 481/1995 of 14 November 1995. Following an amendment to that law, in force since 2007, the operating costs of monitoring authorities such as AGCOM, which are not borne by the State budget, are covered by operators from the sector falling within the competence of those authorities. The amount of that contribution is set by a decision of the authority concerned, up to a maximum legal limit of 0.2% of turnover of those operators. The contribution is paid directly to AGCOM.

17 In that context, AGCOM is authorised to determine the amount and methods of payment of the contribution by documents of a regulatory nature which must be submitted to the President of the Council of Ministers for approval.

18 Other provisions were subsequently introduced by the Law drawing up provisions for the annual and multiannual budget of the State (Law on Finances) 2010, which, first, again reduced the share of financing of AGCOM’s operating costs payable by the State and, second, also provided, until 2012, for a system of transfer of financing of certain national authorities, including AGCOM, to other national authorities.

19 In that context, AGCOM carried out an investigation to verify compliance with the contribution obligations laid down by Law No 266/2005 by operators providing electronic communications services or networks.

- 20 As a result of that investigation AGCOM served on Vodafone Omnitel NV, Fastweb, Wind Telecomunicazioni SpA, Telecom Italia, and Sky Italia srl a decision informing each of those companies that, with respect to the period from 2006 to 2010, part of the contributions due for their operating costs had not been paid, and informed them of the amounts to be paid within 30 days. Those operators then brought actions to annul those decisions before the referring court. According to the orders for reference, the applicants in the main proceedings challenge the amounts claimed, arguing that the charge covers items which are not directly related to the operating costs incurred by that authority for the purposes of the regulation *ex ante* of the market which leads to the grant of authorisations.
- 21 In the orders for reference, the Tribunale amministrativo regionale per il Lazio, carrying out an analysis of Article 12 of the Authorisation Directive and recital 13 in the preamble to Directive 2009/14/EC of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services (OJ 2009 L 337, p. 37), states that the national rules at issue in the actions before it provides, by way of charges imposed on private operators in the regulated sector, for all AGCOM's costs not covered by State financing to be covered by a mechanism based on earnings deriving from sales and services of those operators, which enables the contribution required from each of them to be adjusted according to its economic capacity. According to that court, it is clear from European Union law that the administrative charges imposed on the operators are justified only with respect to costs actually incurred by the NRAs, and not for all types of activities, but for activities regulating the market *ex ante* leading to the grant of authorisations. Thus, that court takes the view that the charges levied by AGCOM should be limited to the amount of the costs incurred for the purposes of that regulation.
- 22 In those circumstances, the Tribunale amministrativo regionale per il Lazio decided to stay the proceedings and refer to the Court of Justice for a preliminary ruling the following question, which is identically worded in Cases C-228/12 to C-232/12 and C-254/12 to C-258/12:
- ‘Are the Community provisions in the sector, and in particular the provisions of [the Authorisation] Directive ... to be interpreted as precluding the national rules referred to, in particular Law [No 266/2005], with particular regard to the manner in which those provisions are actually applied by legislature provisions?’
- 23 By order of the President of the Court of 15 June 2012, Cases C-228/12 to C-232/12 and C-254/12 to C-258/12 and were joined for the purposes of the written and oral procedure and of the judgment.

Application to open the oral part of the procedure

- 24 By letter lodged at the Court Registry on 8 March 2013, Fastweb requested the opening of the oral part of the procedure arguing the occurrence of a new fact which is of such a nature as to be a decisive factor to the decision of the Court. Fastweb stated that, on 29 November 2012, after the closure of the written part of the procedure in the present cases, AGCOM published a communication to the Italian Government calling on it not to maintain the national rules providing for the system of financing for AGCOM on the ground that it is not compatible with European Union law.
- 25 In that connection, it must be observed that, in accordance with Article 76(2) of its Rules of Procedure, on a proposal from the Judge-Rapporteur and after hearing the Advocate General, the Court may decide not to hold a hearing if it considers, on reading the written pleadings or observations lodged during the written part of the procedure, that it has sufficient information to render a ruling.

- 26 Furthermore, it must be recalled that, under Article 83 of those rules, the Court may at any time, after hearing the Advocate General, order the opening or reopening of the oral part of the procedure, in particular if it considers that it lacks sufficient information or where a party has, after the close of that part of the procedure, submitted a new fact which is of such a nature as to be a decisive factor for the decision of the Court.
- 27 In the present case, the Court considers, after hearing the Advocate General, that it has all the information necessary to answer the question referred by the referring court and that the new fact referred to by Fastweb is not of such a nature as to be a decisive factor to the reference for a preliminary ruling.
- 28 Accordingly, there is no need to grant Fastweb's request for the opening of the oral procedure.

The question referred for a preliminary ruling

Admissibility

- 29 The Italian Government expresses doubts as to the admissibility of the requests for a preliminary ruling, observing that the orders for reference do not contain a sufficient description of the factual background and Italian legislation applicable in the disputes in the main proceedings.
- 30 In that connection, it must be observed that, according to settled case-law of the Court, the need to provide an interpretation of European Union law which will be of use to the national court makes it necessary that the national court should define the factual and legislative context of the questions it is asking or, at the very least, explain the factual circumstances on which those questions are based (Case C-134/03 *Viacom Outdoor* [2005] ECR I-1167, paragraph 22; Case C-217/05 *Confederación Española de Empresarios de Estaciones de Servicio* ECR I-11987, paragraph 26; and Case C-94/07 *Raccanelli* [2008] ECR I-5939, paragraph 24).
- 31 The information provided in orders for reference must not only be such as to enable the Court to reply usefully but must also enable the governments of the Member States and other interested parties to submit observations pursuant to Article 23 of the Statute of the Court of Justice of the European Union (order of 2 March 1999 in Case C-422/98 *Colonia Versicherung and Others* [1999] ECR I-1279, paragraph 5; Case C-20/05 *Schwibbert* [2007] ECR I-9447, paragraph 21; and *Raccanelli*, paragraph 25).
- 32 In the present case, the presentation, in the orders for reference, of the facts forming the basis of the disputes in the main proceedings, while admittedly succinct, and the description of the applicable national law have enabled the parties to the main proceedings and the governments of the Member States to submit observations on the question referred, as evidenced by the written observations lodged at the Court by the parties to the main proceedings and the Italian, Belgian, Dutch and Portuguese Governments and the European Commission.
- 33 In those circumstances, the reference for a preliminary ruling must be held to be admissible.

Substance

- 34 By its first question, the referring court asks essentially whether European Union law must be interpreted as meaning that it precludes legislation of a Member State, such as that at issue in the main proceedings, pursuant to which undertakings providing electronic communications services or

networks are liable to pay a charge, intended to cover all the costs incurred by the NRA which are not financed by the State, the amount of which is determined in accordance with the earnings of those undertakings.

- 35 In that connection, it must be recalled that the Authorisation Directive not only lays down the rules governing the procedures for granting general authorisations or rights to use radio frequencies or numbers and the content of those authorisations, but also rules setting out the nature and scope of the financial payments related to those procedures which Member States may impose on undertakings in the electronic communications services sector (see, by analogy, Joined Cases C-292/01 and C-293/01 *Albacom and Infostrada* [2003] ECR I-9449, paragraphs 35 and 36; Case C-284/10 *Telefónica de España* [2011] ECR I-6991, paragraph 18; and Case C-71/12 *Vodafone Malta and Mobisle Communications* [2013] ECR, paragraph 20).
- 36 The legal framework ensuring freedom to provide electronic communications networks and services established by the Authorisation Directive would be rendered redundant if Member States were free to establish the financial charges to be borne by undertakings in the sector (see, by analogy, *Albacom and Infostrada*, paragraph 38, and *Telefónica de España*, paragraph 19).
- 37 The administrative charges imposed on undertakings providing a service or network in order to finance the NRA's activities in managing the authorisation system and granting rights of use are governed by Article 12 of the Authorisation Directive, which Directive 2009/14, mentioned by the referring court, does not amend in any way.
- 38 It follows from the wording of Article 12(1)(a) of the Authorisation Directive that Member States may impose on undertakings providing a service or a network under the general authorisation or to whom a right to use radio frequencies or numbers has been granted only the total administrative costs covering the management, control and enforcement of the general authorisation scheme and of rights of use and of specific obligations as referred to in Article 6(2) thereof, which may include costs for international cooperation, harmonisation and standardisation, market analysis, monitoring compliance and other market control, as well as regulatory work involving preparation and enforcement of secondary legislation and administrative decisions, such as decisions on access and interconnection.
- 39 Such charges may cover only the costs relating to the activities set out in the preceding paragraph, which cannot include expenditure relating to other tasks (see, by analogy, Joined Cases C-392/04 and C-422/04 *i-21 Germany and Arcor* [2006] ECR I-8559, paragraphs 29, 32, 34 and 35, and, and *Telefónica de España*, paragraph 23).
- 40 Therefore, as the referring court observes, the charges imposed pursuant to Article 12 of the Authorisation Directive are not intended to cover all the administrative costs incurred by the NRA.
- 41 Furthermore, the Authorisation Directive does not lay down either the method for determining the amount of administrative charges which may be imposed pursuant to Article 12 thereof or the means of collecting those charges. However, first of all, it is clear from Article 12(2) of that directive, read in the light of recital 30 in the preamble thereto, that those charges must cover the actual administrative costs relating to the activities mentioned in paragraph 38 of this judgment and must be in balance with those costs. Thus, the totality of the income obtained by the Member States from the charge concerned cannot exceed the total costs relating to those activities (see, by analogy, *Telefónica de España*, paragraph 27). Second, Article 12(1)(b) of the Authorisation Directive requires the Member States to impose the administrative charges upon undertakings in an objective, transparent and proportionate manner.
- 42 It follows from all of the foregoing considerations that, although it is open to the Member States to impose a charge on undertakings providing electronic communications services or networks in order to finance the NRA's activities, that charge must be exclusively intended to cover the costs relating to

the activities mentioned in Article 12(1)(a) of the Authorisation Directive, that the totality of the income obtained from that charge must not exceed the amount of the costs relating to those activities and that the charge should be imposed upon individual undertakings in an objective, transparent and proportionate manner, which is for the national court to ascertain.

- 43 Having regard to all of those considerations, the answer to the question referred is that Article 12 of the Authorisation Directive must be interpreted as meaning that it does not preclude legislation of a Member State, such as that at issue in the main proceedings, pursuant to which undertakings providing electronic communications services or networks are liable to pay a charge intended to cover all the costs incurred by the NRA which are not financed by the State, the amount of which being determined according to the income received by those undertakings, provided that that charge is exclusively intended to cover the costs relating to the activities mentioned in Article 12(1)(a), that the totality of the income obtained in respect of that charge does not exceed the total costs relating to those activities and that that charge is imposed upon individual undertakings in an objective, transparent and proportionate manner, which is for the national court to ascertain.

Costs

- 44 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national 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 (Eighth Chamber) hereby rules:

Article 12 of Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services ('the Authorisation Directive') must be interpreted as meaning that it does not preclude legislation of a Member State, such as that at issue in the main proceedings, pursuant to which undertakings providing electronic communications services or networks are liable to pay a charge intended to cover all the costs incurred by the NRA which are not financed by the State, the amount of which being determined according to the income received by those undertakings, provided that that charge is exclusively intended to cover the costs relating to the activities mentioned in Article 12(1)(a), that the totality of the income obtained in respect of that charge does not exceed the total costs relating to those activities and that that charge is imposed upon individual undertakings in an objective, transparent and proportionate manner, which is for the national court to ascertain.

[Signatures]