II-2.20: The Italian Conseil d'Etat pays little attention to the role of EC Commission.

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Main information

To read the Italian Conseil d'Etat's judgment (in Italian) click here:

The Italian upper administrative court ("Consiglio di Stato") ruled that the *Autorità per le garanzie nelle comunicazioni* ("AgCom" – the Italian Regulatory Authority for electronic communications) is not bound to provide a rigorous justification when issuing decisions not compliant with European Commission's comments.

This judgment is of general interest since, on the basis of a formalistic reasoning, it does not pay adequate attention to the role played by the European Commission in electronic communications' regulatory proceedings at national level.

Under the European regulatory framework (and the multilevel governance system established therein), comments from the European Commission are the main pillar of the horizontal coordination system between the European level and the national level, aimed at creating a competitive common market for electronic communications.

Context and summary

a. The role of the EC Commission in national regulatory proceedings

Under the European regulatory framework,[1] the main responsibility for regulating communications' markets lies with the national regulatory authorities ("NRAs").

Due to Member States' opposition,[2] the regulatory framework has not established a vertical relationship between the European Commission and the NRAs, but instead a complex system of horizontal coordination.[3] The result is an original system of multilevel governance described by a primary Italian scholar as the "*European concert of the telecommunications*".[4]

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1 Directives Nos. 19/2002/EC ("Access"); 20/2002/EC ("Authorization"); 21/2002/EC ("Framework"); and 22/2002/EC ("Universal Service"), as amended in 2009 by Directives Nos. 136/2009/EU ("Citizens' Rights Directive") and 140/2009/EU ("Better Regulation").

2 Electronic communications are historically sensitive for Member States that, in the past, reserved the supply of communications services creating public monopolies (currently, some States have still some economic interests in the sector, like, for example, Germany and Spain).

3 The European Commission's attempt to establish a European market authority with quasi-regulatory competence has been vetoed by other EU Institutions echoing national concerns to lose any control over the sector (*See*: Proposal for a Regulation establishing the European electronic communications market

The European Commission is involved in national regulatory proceedings by way of an automatic consultation mechanism (so-called "Article 7 procedure").[5]

More precisely, under Article 7 of the Framework Directive, NRAs should notify all their main regulatory proposals to the European Commission and other NRAs, which could send their comments within a 30-days time-limit. European Commission's comments are formulated in individual decisions addressed to the concerned NRA, called "Article 7 Decisions" (or also "comments/no comments letter").[6]

Apart from certain specific situations (not relevant for this article),[7] Article 7 Decisions are not binding, but should be taken "*in utmost account*" by NRAs.[8]

Since, "*not all NRAs follow the appropriate regulatory approaches, especially when it comes to remedies for tackling competition problems*"[9], the 2009 amendments have strengthened the role of the European Commission in proceedings aimed at the imposition of remedies. Yet, the European Commission failed again to obtain a veto power over national remedies' proposals. According to the new Article 7 procedure, it could only issue a (non binding[10]) recommendation addressed to the concerned NRA.[11]

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authority, COM(2007) 699 — 2007/0249 (COD). This albeit the European Commission's proposal was relying on an independent cost-benefit analysis which showed that the proposed European authority would be "*cost effective and fully justifiable from a EU budgetary perspective*" (*See*: The European Evaluation Consortium, *Cost benefit analysis of options for better functioning of the internal market in electronic communications*, 2007).

The final compromise has been the establishment of the forum of the European NRAs (BEREC) and of its Office (Regulation No. 2009/1211). BEREC is not an EU body, but it is composed of the heads of the 27 NRAs. It is in charge of providing and disseminating benchmarks and best practices in view of ensuring fair competition and more consistency of regulation on the communications markets. Where there are conflicts between the European Commission and a NRA it should assist them in reaching a common position (*See*: Article 7 of the Framework Directive).

4 CASSESE, *Il concerto regolamentare europeo delle telecomunicazioni*, 2002.

5 *See*: KRUEGER, *Review of developments in Art. 7 procedures*, 2008.

6 From 2003 to 2010, the European Commission has reviewed more than 1000 notifications from NRAs and issued comments on about 60% of them (*Source*: European Commission's Communication on market reviews under the EU Regulatory Framework (3rd report), 2010, COM(2010) 271 final).

7 Namely, the identification of dominant companies; the definition of markets not indicated in the *ad hoc* European Commission's recommendation on relevant markets for regulatory purposes; and the imposition of not-standard remedies, such as the functional separation (*See*: Article 7.4 of the Framework Directive; and Article 8 of the Access Directive).

8 *See*: Court of First Instance, orders dated July 12, 2007, case T-109/06, *Vodafone*; and dated February 22, 2008, case T-295/06, *BASE*.

9 *See*: European Commission's Communication on market reviews under the EU Regulatory Framework (3rd report), 2010, *cit.*

However, Article 7 Decisions and Recommendations (albeit not binding) are the main pillar of the abovementioned complex system of horizontal coordination between the European Commission and NRAs aiming at ensuring a consistent regulatory approach within the European Union.[12] As stated by an Austrian judge, "*the Art 7 procedure highlights the emerging of the European legal space*", where "*the application of large parts of Community law is left to the Member States and their authorities*".[13]

b. The AgCom's regulation of fixed termination rates

Termination is the wholesale service which the called-party's operator provides to the calling-party's operator for terminating a call on its network. Termination services are provided both by fixed and mobile operators in case of incoming calls from other networks (the following representation shows the provision of termination services in case of fixed-to-mobile call and the underlying economic relationship).

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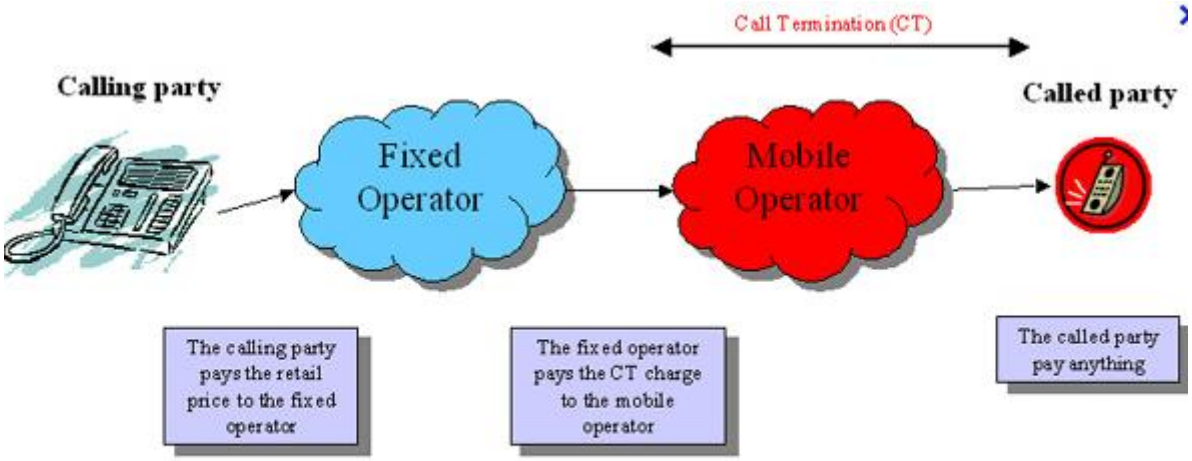
10 Under Article 288 of TFEU, recommendations have not binding force upon their addressees (for recommendations adopted by the European Commission under the electronic communications framework, *See*: Court of Justice, judgment of November 13, 2007, case C-55/06, *Arcor*).

11 More precisely, in case of "*serious doubts*" on the compatibility of the national proposal with EU Law and the internal market, the European Commission could open a "Phase II investigation" during which the NRA could not adopt the proposal (standstill obligation). During the Phase II investigation also the BEREC is involved. It should issue an opinion on the European Commission's doubts, and assist the European Commission and the concerned NRA in finding a compromise.

12 In the words of the previous European Commissioner to Information Society, "*the spirit of a single market where close cooperation and consultation among national regulators and the Commission should help to avoid diverging regulatory approaches that could create obstacles for the single telecoms market*" (Press Release dated 25.6.2009 No. IP/09/1008).

13 HANDSTANGER, *The assessment of the Commission's Comment/No comments letters in judicial practices - The Austrian experience (Austrian Administrative Court - Judgment No 2004/03/0210, 28/2/2007)*, European Commission's seminar on *Legal Issues in EU Telecommunications Policy*, December 1, 2008.



Source: Arcep

Call termination can only be supplied by the network provider to which the called-party is connected. Consequently, the called-party's operator enjoys a monopoly on the market for terminating calls on its own network.

Under the prevailing "calling party" principle in Europe, the calling-party pays entirely for the call, and the wholesale termination rate paid by the originating operator is normally passed on to its end customer. As the called-party is not billed for incoming calls, it is generally indifferent to the termination rates set by its network provider (*i.e.*, by the terminating operator). Without price regulation, the latter operator is thus free to charge excessive and discriminatory tariffs.

In 2009 the European Commission observed that "*inconsistencies in the regulation of voice call termination rates still exist*" across Member States, "*the magnitude of which cannot be solely explained by differences in underlying costs*" borne by operators for the provision of termination services. To tackle those inconsistencies, it adopted a specific recommendation on termination, which requires NRAs to set symmetric rates (*i.e.*, equal for all operators notwithstanding their different dimension, market share, and date of entry to the market[14]), based only on the costs likely to be incurred by an efficient operator.[15]

Despite this recommendation on termination rates, AgCom notified to the European Commission a proposal to maintain asymmetric rates for the years 2010-2011 by allowing alternative fixed operators to charge higher (almost the double) rates than the Italian fixed former incumbent (Telecom Italia).

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[14] According to the recommendation, asymmetry might be temporarily justified only in exceptional situations by objective cost differences outside the control of the operators concerned.

[15] Recommendation of May 7, 2009 on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU, OJ 20.5.2009 L 124/67.

The European Commission addressed two different Article 7 Decisions to AgCom (under the old rules applicable *ratione temporis*).[16]

In the first Decision, it mildly "*invites AGCOM to impose an obligation to charge tariffs corresponding to cost-orientation in an efficient manner, by way of a procedure which does not impose an undue procedural burden on smaller* [alternative operators], *but sets a cost-oriented symmetric termination rate to be applied to all operators, thereby applying the Termination Rates Recommendation*".

In the second Decision (facing AgCom's intention to extend the application of the asymmetric regime also to 2011), the European Commission was more aggressive by stating that AgCom's proposal could have lead "*to higher and asymmetric rates for* [alternative operators] *in 2011, not reflecting the case of an efficient operator contrary to what is foreseen in the Termination Rates Recommendation*". The European Commission therefore insisted "*on its previous comments and urge*[d] *AGCOM to set the tariffs of all fixed network operators in a symmetric way at the level of an efficient operator at the earliest possible time*".

Notwithstanding those criticisms, AgCom went ahead with its proposals, and issued Decisions Nos. 179/10/CONS and 229/11/CONS which set asymmetric rates for fixed termination services for 2010-2011, respectively.[17]

Those decisions were appealed by Telecom Italia before the administrative judge. Telecom Italia claimed that AgCom did not pay adequate attention to the European Commission's comments, and dismissed them without any economic or technical sound justification.

c. The judgments

The administrative court of first instance ("TAR Lazio") delivered a judgment upholding Telecom Italia's appeal.[18] TAR Lazio stated that AgCom has not duly justified why it did not comply with the European Commission's comments (under Italian Administrative Law, lack of motivation could invalidate an administrative decision).

More precisely, TAR Lazio acknowledged that Article 7 Decisions are not binding, but AgCom is bound to provide "*rigorous justification*" in order to not implement them. According to TAR Lazio, AgCom has not demonstrated that alternative operators have not benefited from economies of scale and/or are subject to differing cost conditions.

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16 *See*: Article 7 Decisions addressed to Italy dated 19.3.2010, SG-Greffe(2010)D/3536; and dated 4.4.2011, SG-Greffe(2011)D/5455. Actually, the European Commission asked even earlier to AgCom to set a regulatory path toward symmetry (*See*: Article 7 Decisions dated 24.5.2006, SG-Greffe(2006)D/202771; and dated 7.11.2008, SG-Greffe(2008)D/206734).

17 Available at www.agcom.it.

18 Judgment dated November 17, 2011 No. 9739 (available at http://www.giustizia-amministrativa.it/WEBY2K/intermediate.asp?Reg=Lazio&Tar=Roma).

Hence, TAR Lazio's judgment went a step further toward the creation of "*the European legal space*" since, by raising NRA's burden of proof, rendered *de facto* Article 7 Decisions quasi-binding (and, in any case, a legality parameter for national decisions).

However, this innovative judgment has been reversed in appeal.

On May 15, 2012 Consiglio di Stato delivered a judgment upholding the validity of AgCom's decisions.

More precisely, the upper administrative judge started by remembering that European recommendations are not binding, and that national judges are not bound to set aside national decisions not complying with them.

It went on by stating that AgCom has duly justified the extension of the asymmetric regime up to 2011 on the grounds of some technical reasons,[19] in compliance with the same timing prescribed by the recommendation (which set 2012 as the last deadline for setting tariffs symmetry). This motivation is surprising since the same European Commission complained that AgCom's decisions were "*contrary*" to the recommendation, and urged AgCom to set immediately symmetric tariffs.

Brief commentary

The Consiglio di Stato's judgment is unsatisfactory since it does not allow the European decisions to reach their *effet utile*. Lagging behind formalistic grounds (the not-binding nature of European Commission's Article 7 Decisions and recommendations), it ignored the substantial issues at stake.

On one hand, it created (*rectius*, maintained) regulatory inconsistencies in the common market by allowing the persistence of Italian termination rates which are not compliant with the principles enshrined in the European recommendation. The latter principles are expressly aimed at eliminating any divergence in the regulatory treatment of termination services.

On the other hand, it ignored the peculiarity of the horizontal coordination system between the European Commission and NRAs in the electronic communications sector, and that "ex-ante *co-ordination helps to avoid legal acts being in contradiction with Community law*".[20]

Conversely, the judgment of first instance delivered by TAR Lazio sorted out an original way to enforce the European comments within the framework of Italian Administrative Law (as mentioned it "raised" the burden of justification in case of AgCom's not compliance with

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19 The judge observed that AgCom and operators were carrying out technical proceedings on the definition of internet-protocol interconnection standards, which are preliminary to the definition of symmetric termination rates in the new technological scenario. The judge however overlooked that this technical work is irrelevant for the setting of rates applicable to termination services rendered on the existing networks.

20 HANDSTANGER, *cit.*

European comments). As such, it was a step toward "*the European legal space*" where national judges are called to ensure the full application of European Law.[21]

Happily, Consiglio di Stato's judgments – albeit authoritative – are binding neither for itself nor for other judges: a *revirement* is highly welcomed!

[21] It is noteworthy to mention that, according to press news (*See*: *Belgian court upholds call-termination decision*, Mlex of May 22, 2012), the Brussels Court of Appeal on the same topic (termination rates) has recently stated "*that while recommendations do not lead to a direct legal constraint, they are 'not deprived of all legal effect, and national judges are required to take the recommendations into account,' particularly where the aim of the recommendation is to clarify the implementation of EU law that does carry legal constraint*".