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The judicial review in the field of telecommunications: case law examples of confirmations of NRA decisions, annulment of NRA decisions

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The judicial review in the field of telecommunications: case law examples of confirmations of NRA decisions, annulment of NRA decisions

I thank the Organizers of the meeting for this conspicuous occasion,

I am really pleased to be here as a speaker and enrich the debate on such relevant issues, which have a strong domestic significance and an authentically European dimension at the same time.
This Workshop substantiates an opportunity for everybody to cast a bridge among the national legal systems, judicial proceedings and jurisprudence in the matter of electronic communications so as to look at them under an homologous prospective, as it must have been in the intention of the European legislator.

I) The judicial review of the NRA's decisions in the electronic communications: peculiar characters.
The Italian system allocates the review of NRAs' decisions (and namely of "AgCom", the Italian Authority for the Guarantees in the Communications, hereinafter also "Authority") to the Administrative Judge, in his capacity of a specialist having exclusive jurisdiction on the matter (art. 133 par. 1, lett. l), Legislative Decree 2 July 2010, n. 104, *Italian Code of administrative judicial procedure* or *"Code"*); and concentrates all the litigation at the first instance into the functional competence of the Administrative Tribunal of Rome (hereinafter, "TAR Lazio") where I exercise my functions (art. 135, par. 1, lett. b) of *Code*); appeals against decisions of the Tribunal are brought to the cognizance of the Council of State as a second instance judge.

My present task is to offer you an overview of the Italian judiciary production in the matter, which in process of time has been playing a complementary role to the legislator's activity, not only by carving concrete and proper solutions out of general and abstract legal rules, but also, to a certain extent, by assigning an historical content to indeterminate juridical concepts which in this field abound.

Before examining the object, the content and the boundaries of the judicial pronouncements on the AgCom's decisions, we must consider in advance that the exclusive jurisdiction of the judge is a jurisdiction on the legitimacy of the administrative act and not on the merit of the discretionary choice made in the decision, in the meaning that the judge is not allowed to take a decision in the place of the administrative authority.

This general statement, however, needs specifying in the light of some peculiar characters recurring in electronic communication cases.
As a matter of fact telecommunications is a field in which electronics, economics and law reach an advanced stage of "coagulation": juridical, economic and technical

knowledge is so intermingled that the judge is required to be legally correct, economically proper and technically precise at the same time.

A first distinctive trait of the administrative power performed in the matter is the "**technical discretion**" (1), so that the judge is necessarily confronted with the interpretation of rules even in sectors where he surely lacks the specific competence.
In addition to this, a further difficulty descends from the use of plenty of "**indeterminate juridical concepts**", since both E.U. and national rules give juridical relevance to concepts belonging to economics (2).
We recall those concepts implied in the definitions of "significant market power" (art. 17, Legislative Decree *1°August 2003, n. 259 (Code of electronic communications, "CCE")* transposing Directive 2002/21/CE, the "*Framework Directive*") which remands to the other indeterminate concept of "dominant position", used in competition law (3); "cost orientation" (art. 50 CCE) (4), "ladder of investments" (art. 13, para. 6 bis, CCE, providing that Agcom shall promote "competition based on investment" as well as "efficient investment and innovation"), "unfair burden" (art. 12 and 13 of Directive 2002/22/CE , the "*Universal Service Directive*").

While performing this task, however, the judge can count on a peculiar "tool", i.e. his discretionary power to mould the economic concepts implied in the legal texts; by so doing, the judge can reassess the technical choice of the Administration and apply the correct interpretation of the relevant indeterminate juridical concepts to the factual controversy.

Moreover, it is commonplace that judges of the E.U. Member States have to consider and respect the requirements of EU law, even in applying national law.
This is particularly true in matters of strict **European derivation** such as the matter of electronic communications, where the Framework Directive, together with the pertaining Recommendations of the European Commission, draws a fairly definite profile of the regulatory framework; and the field of competition, where the EU Treaty

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1 The technical discretion is connoted by the application of rules of a non-exact science having a certain degree of disputability; it therefore differs from the "technical verification", which is founded on the application of an exact science in order to attain a sure outcome.

2 The category of indeterminate juridical concepts relates to a particular legislative technique – prone to the need of the legal system's flexibility – owing to which the legal provision, in order to identify a fact as productive of juridical effects, does not describe the fact itself in a precise and exhaustive manner but makes a remand to an integrative operation of the interpreter, by using undetermined concepts that will be completed and specified by means of extra-juridical elements or criteria to be inserted into the legal paradigm.

3 The ascertainment of a dominant position under antitrust law demands a multi-factorial investigation and a complex legal evaluation (TAR Lazio, Rome, I, 30.3.2007, No. 2798).

4 According to TAR Lazio, Rome, III-ter, 14.12.2011, No. 9740, the principle that the prices must be oriented to costs is one of the obligations that the Authority can impose, provided that "orientation" is surely not determined in a precise and binding way.

and the EU jurisdictional institutions determine most of the substance of the applicable law.
And with regard to this latter, we must bear in mind that the **value of competition** is well present in the electronic communication sector because the market regulation committed to neutral subjects is aimed also at promoting conditions of competition on the liberalized markets.
Needless to say, then, that the administrative judge may be confronted with the necessity of **reconciling different** and reciprocally interfering if not conflicting **rules**, not only where an antitrust decision is contested, but also when a regulatory act is challenged. ([5])

In the past the judiciary has sometimes shown a shy and reluctant attitude towards the cognizance of the material issues underlying the matter at hand; from then on several steps forward have been taken.

We shall now inspect the most recent Italian jurisprudential attainments in the matter of telecommunications, by considering the following issues: local loop unbundling (LLU) offer, mobile and fixed-line telephony termination, universal service.

II) Local Loop Unbundling (LLU) offer

The general framework
1) the AgCom's decisions Nos 314/09, 731/09 and 121/10

With Decision No. 314/09/Cons) AgCom designated Telecom Italia s.p.a. as an undertaking having significant market power in wholesale markets for the physical network infrastructure access at a fixed location and access to local loop for broadband.
With Decision No. 731/09/Cons the Authority imposed on Telecom the obligation of offering services of unbundled access to local loop *(local loop unbundling*), as well as, under Art. 50 CCE, a price control obligation based on some operational criteria (a BU-LRIC cost model, a long term reduction mechanism – *network cap*).
With Decision No. 121/10 AgCom started a public consultation for the preparation of a cost model under decision No 731/09, establishing the main methodological aspects and gathering information by means of an ample consultation with operators.

The European Commission, notified on the basis of the automatic consultation mechanism provided under Article 7 of the Framework Directive, "*took note of the fact that the Authority held it useful to set an approach path to reach the tariffs calculated on the basis of BU-LRIC model for the years 2010, 2011 e 2012, starting from regulatory prices of 2009, in order to grant regulatory certainty and the possibility of a better planning to operators buying or intending to buy access services to TI*".

5 For a more accurate exam of the issue, see R.PERNA, *The role of courts in reconciling competition, non-competition and constitutional imperatives: the Italian experience, in "Public policies, regulation and economic distress", European University Institute, Workshop organized in Florence, 13-14 July 2012.*

Following up decision No 731/09, decision n. 578/10 defined a BU-LRIC cost model "*determining the incremental costs concerning the offer of access services and an* ***approach path*** *to the price determined by the Model for the year 2012, starting from prices in force in 2009".* In detail the decision stated that "*as for the year 2010, the variations are applied with reference to prices included in the reference offers of 2009 for the same services as approved by the Authority".*

All the referred acts have been contested by several OLO (other licensed operators) of fixed line telephony on the basis of an ample series of legal grounds, claiming that the Authority had illegitimately reduced or eliminated some remedies.

The judgment: TAR Lazio No 6321/2012

TAR Lazio rejected all the appeals upholding the validity of Agcom's decisions.
On deciding the appeal placed by Fastweb ([6]), the Judge established some principles that can be usefully recalled in reference to: **the extension of the judicial** review on the acts of NRAs, the **notion of market analysis** and the aims pursued with the imposition of regulatory remedies.
First and foremost TAR Lazio outlined the *thema decidendum* of the litigation, specifying that Fastweb in essence "*claimed that, although agreeable in the intent, the actual implementation of a BU-LRIC model for the definition of values necessary for the application of the network cap, had been operated so as to pervert its meaning by way of a hybrid methodology which considered not merely the costs of an efficient operator but the real costs of TI, thus absorbing into the model inborn elements of inefficiency peculiar to the incumbent".*

Secondly, the Judge stated in advance that "*AgCom's activity is characterized by a very high level of technical discretion, whose judicial review must tend to verify the reliability of the evaluations made, in respect of the correctness of the criteria used and applied; provided that scientific evaluations peculiar to the sector have a certain degree of disputability, the administrative Judge shall blame the sole evaluation falling outside the ambit of disputability; acting differently he would replace the disputable appreciation of the administration with his own and as much disputable appreciation".*

As for the aims pursued through the imposition of regulatory obligations on the incumbent, the first instance court specified that they are "*remedies vis-à-vis (for) the incumbent operator in markets for wholesale access, in his vest of owner of the copper network used for the nationwide connection of 23 millions of end users to the line connection … since this network is not economically replicable on the part of OLO, they are forced to buy intermediate accesses from TI (which, in its turn, is obliged to sell), in order to offer vocal phony and broadband access services to their clients. The imposition of remedies to encourage competition in the fixed line telephony sector however cannot mean that such a situation establishes as an ordinary way of intervention of the Authority, since it would deter the incumbent from further investing and in the meanwhile would encourage OLO to rely on a sure technical approach which allows them to reach their customers, instead of arranging in their turn to invest also in infrastructures and to climb up the so called ladder of investments ".*

6 Tar Lazio, III ter, 11.7.2012, No 6321; the 2nd instance judgment is pending.

To this latter end we incidentally notice the difficulty for the judge to determine precisely the steps of the ladder that must be climbed by the alternative operators in order to justify the progressive reduction or elimination of remedies on the part of the Authority, which, in the absence of sure and predetermined parameters, is a highly debatable question.

With particular reference to new generation networks, the Judge also held that "Agcom has moreover imposed on Telecom the obligation of consenting access to its infrastructures to alternative operators so as to let them install their own cables, having considered that in any case TI is in a position of competitive infrastructural advantage and having deemed of primary importance that also OLO realized their own fiber access networks".

2) the AgCom's decision No 14/09
The judgments: TAR Lazio No. 4722/2010 - Council of State No 2439/2011

In a former case, the Council of State ([7]) confirmed the legitimacy - already stated in the first instance judgment ([8]) - of decision No 14/09/Cir of 24 March 2009, which had approved the reference offer of Telecom Italia for wholesale services of full unbundling access to metal loops and subloops for the year 2009, providing - and it was the first time in the Italian regulation - an increase in the monthly fee due by OLO for the supply of the service in question.

In the claimants' assumptions particular relevance was to be laid on the ground of the alleged retroactivity of the new price at 1st January 2009, against the adoption of the AgCom's decision only in March.

The Judge of appeal, having considered that with a previous decision TI had been designated as an undertaking having a significant market power, subject to a series of regulatory obligations - among which the presentation, within 31 October of each year of a reference offer for the wholesale services of full unbundling of local loop for the subsequent year - noticed in the merits that another decision (No 4/06/ Cons of 12 January 2006), not contested by the claimants, established "*the annual validity of the approved offer and its entering into effect as from 1st January of the year of reference*"; and pointed out that the date of 1st January – "*far from indicating, as assumed by appellants, a deadline for the conclusion of the procedure for the approval of the offer - irrefutably indicates the starting date from which the offer and the pertaining conditions, as coming out however after the exercise of the public power of approval conferred on AgCom, must have effect. Hence as the first Court recognized, under art. 46, co. 2, CCE AgCom exercises a function of control on the content of the reference offer by adopting in the end an act representing a condition for the effectiveness of the offer and thus intended to operate ex tunc.*"

[7] Consiglio di Stato, VI, 20.4.2011, No. 2439.

8 Tar Lazio, III ter, 26.3.2010, No. 4722.

III) Telephony termination service

1) The Regulation of termination rates

Termination is the wholesale service which the called-party's fixed or mobile operator provides to the calling-party's operator for terminating a call on its network.
Since call termination can only be supplied by the network provider to which the called-party is connected, it follows that on its own network the called-party's operator enjoys a monopoly on the market for terminating calls.
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. Without price regulation, the terminating operator would thus be free to charge excessive and discriminatory tariffs.

This is the reason why the European Commission intervened in the matter of termination rates in 2009 having 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**,** the Commission adopted a specific Recommendation on the regulatory treatment of fixed and mobile termination rates. ([9])
Under this Recommendation NRAs are required to set efficient and symmetric rates, i.e. rates based only on the costs likely to be incurred by an efficient operator and equal for all operators notwithstanding their different dimension, market share, and date of entry into the market.
Any deviation from a single efficient and symmetric cost level should be based on objective cost differences outside the control of operators. With regard to fixed networks, the Commission has not identified any "objective cost difference" outside the control of the operator; while for mobile networks "uneven spectrum assignment" may be considered an exogenous factor which results in per-unit-cost differences between mobile operators.
Accordingly, tariffs asymmetry should strictly remain an exception subject to precise conditions.

2)Mobile termination rates: the AgCom's decision Nos 667/08 and 621/11 The judgments: TAR Lazio No 1336/2011 and No 8381/2012

On the basis of the second market analysis for mobile termination services (concluded with Decision No. 667/08/Cons) AgCom decided to set a symmetric tariff applicable as from 2012 to all the 4 mobile network operators active in Italy.
The smallest of them, H3G ([10]), has contested Decision No. 667/08/Cons owing to the fact that it imposed a scheduled reduction of tariffs for the operator in question as from

[9] Commission Recommendation of 7 May 2009 on Regulatory Treatment of Fixed and Mobile Termination Rates in the E.U.

1 July 2010 in order to reach a total symmetry among operators in a reasonable time, despite the fact that it was a new comer in the mobile calls market.
The 1st instance Court rejected the claim on the basis of the recognized full legitimacy of the contested deliberation, arguing that AgCom had made a correct use of the indicator of the costs borne by an efficient operator, and considering that H3G was not a new comer any more since it had entered the market several years before. ([11])

However, during the third market review, AgCom proposed to allow H3G to charge higher tariffs until January 2014; this extension of the tariff asymmetry was motivated on the basis of significant differences in the spectrum assignment. ([12])

The European Commission contested this proposed extension by means of an "Article 7 decision" ([13]); in essence, the European Institution reminded that "*the asymmetry, although permissible in exceptional circumstances, should be adequately and thoroughly justified."* In the present case, there seemed to be no "*objective cost differences which are outside the control of the operators concerned"*, since the spectrum assignment took place in Italy through a "*market-based mechanism*".

Only partially however did AgCom comply with the Commission's comments and, with Decision No. 621/11/CONS, prolonged tariff asymmetry, albeit only until July 2013 (which represented a closer deadline than that initially proposed).
The other mobile operators have contested on the merits the economic benefits granted to H3G.

With judgment n. 8381 of October 10, 2012, TAR Lazio upheld their appeals and annulled *in parte qua* the abovementioned decision.
In reaching this conclusion, the judge relied on the 2009 Commission's Recommendation on termination tariffs, pointing out that tariff asymmetry should be temporary and limited to a period of 4 years following the entry into the market of the concerned operator.
In the present case, H3G was not a new comer any more since it had entered the market ten years before; in addition, it had obtained its frequencies through a competitive auction: this excluded any unjust discrimination in the spectrum assignment.
AgCom also violated the Recommendation by postponing the symmetry up to July 2013 (the recommendation set December 2012 as a deadline), and had not replied adequately

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[10] For a wide review of the Italian case law in the field of electronic communications, we allow ourselves to remand to R. PERNA, *Interim measures and retroactive effect of remedies*, in "Implementing the revised regulatory framework in electronic communications", Seminar organized by ERA in Brussels, 28 November 2011.

[11] Tar Lazio, III ter, 11.2. 2011, No 1336; the decision was also confirmed by the judge of appeal (Cons. Stato, 23.5.2011, No 3106).

[12] For a detailed analysis of the question we remand to F. MARINI BALESTRA, *Rassegna del diritto delle comunicazioni*, 11/2012, Giustamm - Rivista internet di diritto pubblico.
[13] SG-Greffe (2011) D/10210 of June 23, 2011.

to the Commission's comments raised in the abovementioned "Article 7 decision" (in essence, TAR Lazio contested a lack of motivation).
On this occasion the national judge expressly claimed that the Commission's Recommendation and "Article 7 decisions" could not simply be discarded by the NRA on the ground that they are not formally binding. NRAs should instead provide a thorough motivation in case they intend not to comply with them since these acts are aimed at establishing a common market for communication services.
As the doctrine has jotted down, this judgments went a step further towards 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).([14])

As a fringe notation, we can observe that in similar cases, the main issue for the Court is what a cost-oriented price exactly is; a second question which may be prospected to the judge, however, is whether the model of cost adopted by the Authority can exercise an anticompetitive effect on the relevant market vis-à-vis the smallest operators.
The first issue raises a problem of filling with content an indeterminate juridical concept; the second issue raises a pure technical question which admits debatable answers.
And so the Judge, when required to appreciate the consistency of a regulatory act establishing symmetric tariffs with the principles of the competition law, by moulding indeterminate juridical concepts and sifting technical evaluations, might venture to hold that converging to the symmetric prices would be a consistent and logical process only if it could be assumed during an ex ante examination that the development of the operator's market shares might trend towards equalization, so that by the time the termination rates become symmetrical the operator's market share and turnover will be the same as the others'. (15)

3) Fixed termination rates: AgCom's decisions Nos 179/10 and 229/11 The judgments: TAR Lazio No 9739/2011 – Council of State No 2802/2012

AgCom notified to the European Commission a proposal to maintain fixed 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). ([16])
The European Commission addressed two different Article 7 Decisions to AgCom.([17])

14 F. MARINI BALESTRA, quot.

15 G. A. KOVACS, *The assessment of the merits, the appropriate expertise and the deference to NRAs* , in "Implementing the revised regulatory framework in electronic communications", Seminar organized by ERA in Brussels, 28 November 2011.

16 For a thorough examination of the controversy, we make reference to F. MARINI BALESTRA, *The Italian Conseil d'Etat pays little attention to the role of EC Commission in the e-communications proceedings*, The Journal of Regulation, May 2012, II-2-20.

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

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 (addressing AgCom's intention to extend the application of the asymmetric regime also to 2011), the European Institution 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 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.
Those decisions have been appealed by the Italian incumbent, Telecom Italia, before the administrative judge; TI claimed that the Authority had not paid adequate attention to the European Commission's comments, and had dismissed them without any economic or technical sound justification.

TAR Lazio delivered a judgment upholding Telecom Italia's appeal. ([18]) Also in this case, the Judge stated that AgCom did not duly justify why it did not comply with the European Commission's comments. According to the pronouncement, the Authority did not demonstrate that alternative operators had not benefited from economies of scale and/or were subject to different cost conditions.
This judgment was however reversed in appeal.
The 2nd instance Judge 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 had 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).

The judgment on fixed termination rates was based on formalistic grounds (the not-binding nature of European Commission's "Article 7 Decisions" and Recommendations) while set aside the substantial issues at stake, since it maintained regulatory inconsistencies in the common market by allowing the persistence of Italian

[18] Tar Lazio, III ter, 17.11.2011, No 9739.
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.

fixed termination rates not complying with the principles enshrined in the European Recommendation.

As it has been observed, the pronouncement showed little consideration for the system of horizontal coordination between the European Commission and NRAs, peculiar to the electronic communications sector and aimed at preventing legal acts from being in contradiction with Community Law. ([20])

IV) Universal Service

1) The general framework
The Directive 2002/22/CE

Under art. 1 of Directive 2002/22/CE ("Universal Service Directive") and art. 53 CCE, in the sector of electronic communications the "Universal service" defines "*the minimum set of services of specified quality to which all end-users have access, at an affordable price in the light of specific national conditions, without distorting competition*"; in the Italian legal system, as allowed by art. 8 of the Directive, Telecom Italia has been designated to guarantee the provision of universal service, which does not include mobile and personal communication services but only telephone services at a fixed location.

The same Directive (Artt. 12 and 13) – like others in force in the past (Art. 4-quarter of Directive 90/338/CEE; Art. 5 of Directive 97/33/CEE, as recalled by Art. 4 Directive 98/10/CEE) – establishes that ANRs shall verify whether "*the provision of universal service as set out […….] may represent an unfair burden on undertakings designated to provide universal service"*; as a matter of fact, these latter might be held to provide universal services also in non-profitable areas or towards non-profitable end-users categories, or at non-remunerative economic conditions, with investments which would have not been made if the undertakings had not been obliged.

In this case, ANR shall calculate the "net costs" of the provision of the universal service, i.e. the commercial losses of the designated undertaking deriving from the fulfilment of the obligations in question and decide (under Art. 13, para 1b), "*to share the net cost of universal service obligations between providers of electronic communications networks and services"*, thus imposing a **sharing mechanism** of those costs on the other operators. Although the Directives indicate some items to be included in the calculation of the net costs (Ann. 4 to Universal Service Directive), a univocal concept of "unfair burden" actually lacks; moreover, it is not clarified which categories of operators may be exempted by the contribution and, in particular, whether the automatic extension of the contribution obligation is to be referred also to mobile operators.

Some clues could be deduced from the European Commission's Communication dated

[20] Again F. MARINI BALESTRA, *The Italian Conseil..*, quot..

27 November 1996, concerning the evaluation criteria of national rules for calculation of costs and financing of universal service, where it was noticed that community law allows "*to impose contributions on providers of voice telephony services only in proportion to the utilization by the latter of public networks of telecommunications*", i.e. on the basis of the interconnection between the interested different networks. In other words, the traffic generated by the interconnection among the networks of different operators expressed an indicator of the "degree of substitutability" between fixed-line and mobile telephony; and so the Communication provided for a possible extension of contribution obligations also to mobile operators, establishing that, to this end, member States should take into account "*… inter alia, the degree of substitutability between mobile phone and fixed line voice telephony".*

In a subsequent Communication dated 11 March 1997, on the application of competition rules to agreements in the matter of access in telecommunication sector, the Commission pointed out that "*different telecommunication services are deemed to be substitutable if they show a sufficient degree of interchangeability for the end-user, i.e. if an effective competition exists among the different providers of those services*".

And so in the Community perspective the following principle emerged that the imposition on mobile operators of contribution obligations for financing the universal service should be linked to the existence of a sufficient degree of substitutability between the two kinds of telephony service, fixed-line and mobile.

Also the past national rules, under certain conditions, provided for a justified extension to mobile operators of the contribution obligations, in consideration of the degree of penetration between the two markets.

2) The application of the net costs sharing mechanism

The judgments: Council of State Nos 535/2010, 644/2010, 281/2010 and 243/2010

The Council of State's decisions have faced the issue of the legitimacy of the extension to mobile operators of the contribution obligation to financing the burden of the universal service for the years 1999-2003 on the basis of arguments still valid in the present legal framework which mostly reproduces the preceding one.

With different appeals the mobile operator Vodafone Omnitel had contested, as from 2000, the AgCom's decisions approving the net costs sharing mechanism of the universal service, respectively for the years 1999, 2000, 2002 and 2003, and imposing on Vodafone a certain amount of contributions, totally equal to 40 million euros.

In essence, the claimant objected that the two kinds of services, fixed-line and mobile, did not belong to a single market and, in consequence, the degree of substitutability between the two services - required by the relevant regulation for the contribution obligation in question – had not been reached.

TAR Lazio ([21]) rejected the claims by considering insignificant the fact that, in an antitrust perspective, the two services belonged to different markets, if the dynamics of one market are susceptible of affecting those of the other, by reducing the margins of gain and influencing the strategic and operational choices of the respective competitors; at the same time, it would be arbitrary to consider the two services substitutable only where the end-user completely drops the one (fixed-line telephony) for the benefit of the other, since such situation may recur also when in his daily life the end-user is in a position to use both services, depending on momentary needs, having at his disposal an additional (the mobile one) and – in terms of efficiency – fully equivalent service.

The Judge of appeal capsized the perspective and annulled the Agcom's decisions *inter alia* on the basis of the following arguments:

(i) "*on facing the issue of the substitutability of fixed-line and mobile telephony services, the Authority should have verified the condition of competition both on a technical basis, and in the perspective of supply and demand, in a relevant qualified market sector where the different offers of fixed-line and mobile telephony operators come to clash*";

(ii)under this perspective the criterion making reference to the "erosion of market shares" of the designated operator, in itself attributable also to other factors, could not be deemed suitable;

(iii)the enquire could not restrict itself only to non profitable areas, i.e. those in which the operator would have not invested if he had not been obliged, since, in this way, the relevant market area would be identified with the sole uncomfortable areas of the country mostly situated on the mountains, with a low density of population and poor income, not considering instead that "*the offer in competition of the two systems of fixed-line and mobile telephony takes place anywhere in the country and is not conditioned by the geographical configuration and the quality of the end-users";*

(iv)accordingly, the choice of the criterion of "substitution revenues" turned out manifestly unreasonable on the part of AgCom; in fact in the scenario simulated by the Authority (i.e. the deactivation in those areas of the fixed-line telephony), the option for the mobile services would have not represented a free and aware behaviour of the end-user but a choice imposed by the real factual circumstances, and so the criterion did not express a physiological dynamic of the market;

(v) irrelevant as well was the reference to the so called "network externalities", i.e. to advantages that mobile operators took from the utilization of fixed-line infrastructures realized by Telecom in the mentioned non-remunerative areas, since the interdependence relationship between the services is relevant only from a technical point of view, flowing back to origination and termination costs of the calls, but does not offer any answer for the behaviour of operators and end-users in the different markets and for the degree of substitutability of the services.

21 Tar Lazio, III ter, Nos 11258/08, 11260/07, 11261/07, 2839/08.

In essence, the Judge of appeal stated that, in order to verify the applicability to mobile operators of the net costs sharing mechanism of the universal service, there must be a rigorous proof of the perfect substitutability between the two kinds of services or else the determination – to be conducted in accordance with antitrust criteria – of a single relevant market including both services.

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Dear Chairman, dear Participants,

A close observation of the jurisprudential attainments registered in the matter at hand bears out the distinctive role that the administrative judge has been lately playing in the fields of telecommunications, through a resolute, progressive affirmation of his position of "*peritus peritorum",* despite the cumbersome technicalities underlying his cases.

The Judge plays a complementary role to the legislator's activity, not only by carving concrete and proper solutions out of general and abstract legal rules, but also, to a certain extent, by assigning an historical content to indeterminate juridical concepts which in this field abound.

While performing this task, the judge can count on a peculiar "tool", i.e. his discretionary power to mould the economic concepts implied in the legal texts; by so doing, the judge can reassess the technical choice of the Administration and apply the correct interpretation of the relevant indeterminate juridical concepts to the factual controversy.

In this way the judicial decisions come to hold a supplementary position towards the texts of the law and the electronic communications regulation rises to a *corpus juris* partly of jurisprudential source.