The Ministry of Economic Development (MISE) orders to "*bring into conformity*" some domestic TV re-transmitters but the European Court of Justice disagrees with the measure which is annulled by the Council of State.

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With the decision published on 25 February 2019, following a legal action backed by ANDEC and brought by the undersigned Attorney at Law, the Council of State upheld the appeal filed by the company concerned and " ***...annuls the measure issued on 22/06/2011 by the Ministry of Economic Development, requiring to bring into conformity some audio video re-transmitters... ...and orders that this decision shall be implemented by the administrative authority***".

This decision is significant as it demonstrates that everyone – even Ministries – can make mistakes, and more generally that laws must be interpreted according to the intended purpose and not just literally applied by inertia by those who must enforce them.

Regulatory framework

According to the current RED Directive 2014/53/EU, transposed in Italy by Legislative Decree No. 128 of 22 June 2016, manufacturers can certify and attest the conformity of the equipment without necessarily involving a Notified Body (hereinafter "NB") and thus affix the CE marking under their sole responsibility.

Under the previous R&TTE Directive 1999/5/EC, transposed in Italy by Legislative Decree 269 of 9 May 2001, manufacturers were almost always required – except for equipment not using the radio spectrum, such as land-line phones (now, however, excluded from the RED Directive) – to certify and attest the conformity of the equipment through procedures involving a NB (for which they had to bear the costs) and affix the NB's identification number next to the CE marking.

<u>There was, however, a case in which such requirement did not apply</u>: Annex III to said Directive did in fact provide for the possibility of submitting the equipment to laboratory tests which, if carried out in accordance with the pertinent EN standards, namely harmonized European standards, did not require the involvement of a NB. In such cases, therefore, there was no need to affix any identification number next to the CE marking.

The specific case

Under the R&TTE Directive in force, the Ministry of Economic Development's inspectors found that products covered by the aforesaid legislation marketed by a member of **ANDEC** (National Association of Consumer Electronics Importers and Manufacturers, member of Confcommercio)

who, by having made use of the option provided by Annex III to attest the conformity of the product without the involvement of a NB, did not affix any identification number next to the CE marking (in truth, a NB had been voluntarily consulted by the manufacturer, but its identification number **appeared only on the documentation accompanying the product and not on the equipment or its packaging**). The inspectorate deemed that such information was due and had therefore ordered the administrative seizure of the products considered non-conforming. This was followed by a measure issued by the Ministry of Economic Development (hereinafter the "MISE") requesting *to "bring into conformity*" the products throughout the national territory, in addition to a financial penalty.

Appeal against the measure and the European Court of Justice's decision

The Ministry's measure had been challenged before the Administrative Regional Court (TAR) of Lazio, which ruled in favour of the MISE (see in this regard my article published on issue 32 of 2012 of this magazine, downloadable from my firm's website at the address: https://www.avvocatoiorio.it/wp-content/uploads/2017/03/1.-The-Italian-Administrative-court-rewrites-the-RTTE-Directive.pdf). With the support and backing of ANDEC represented by my law firm, the TAR of Lazio's decision was therefore appealed to the Council of State. In the appeal, it was asked that the issue be referred to the European Court of Justice (hereinafter the "ECJ") as it was a matter of interpreting the R&TTE Directive 1999/5/EC, namely to confirm whether or not the involvement of a NB is always and in any case essential. The Council of State considered the matter raised by the appellant founded and relevant and referred it to the ECJ, which with decision dated 11/07/2018 (Case C-192/17) fully upheld the argument of the ANDEC's member and stated the following: (1) a manufacturer who makes use of the procedure laid down in Annex III to the Directive " *...is not required to consult a notified body ...and, consequently, he is not required to ensure that the CE marking is accompanied by the identification number of that notified body*"; thus, in this case (2) " *...he is not required to ensure that the CE marking is accompanied by the identification number of the notified body that he has voluntarily consulted – despite not being required to do so – in order to confirm the list of essential radio test suites set out in those harmonised standards*".

The Council of State's decision

With the decision published on 25/02/2019, the Council of State ruled as follows:

"18.1 By applying to the specific case the rules identified by the ECJ in the aforementioned decision, the contested measure is illegitimate first of all under a first profile, in the sense that the appellant, contrary to the view advanced by the administration's defence, was not bound to affix on his product the identification number of a notified body for the sole fact of having – voluntarily – involved it to have it certified, and to have shown the identification number of the consulted body in the instruction booklet".

"18.2 The illegitimacy of the measure, moreover, must also be considered under another profile, in the sense that in order to deem necessary affixing the identification number there should first have been verified the impossibility in the abstract to apply to the product the procedure laid down in the second paragraph of Annex III to the Directive based on harmonized rules, namely to verify that this procedure, although theoretically applicable, had not been specifically followed and explain in the statement of reasons the unfavourable outcome of these checks, which in this case has not been done".

"19. The appeal of first instance, overturning the contested decision, must therefore be upheld, with the annulment of the measure challenged in that hearing".

Relevance of the issue

As mentioned, the issue is still important for operators in the sector for at least three reasons: (1) first, because the RED Directive does not have retroactive effect, with the result that equipment subject to the previous R&TTE legislation placed on the EU market up to 12 June 2017 and subsequently marketed until stocks were exhausted, can conform with the previous R&TTE legislation rather than the 'new' RED legislation; (2) because there is a large legacy of equipment placed on the market and marketed before the entry into force of the RED directive, which remain subject to the R&TTE directive and that in the absence of the aforementioned decision by the Council of State would have been at risk of disputes, seizure and possible penalties by the MISE and its inspectorates; (3) and finally because companies that were sanctioned by the MISE on the basis of the erroneous interpretation of the relevant legislation can now take action against the MISE for the repayment of penalties paid and possibly also recover the damages incurred at the time as a result of making the products 'compliant' to what erroneously requested by the MISE, despite the Council of State added that the matter was "*complex and not clear*".

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