April 2012 – Market Place (Magazine)

The TAR of Lazio "rewrites" the EU Directive on Telecommunications in favor of the Notified Bodies

by Maurizio Iorio , lawyer ©

The title of this article refers to a very questionable judgment of October 2011 of " TAR LAZIO " (the Regional Administrative Court of Lazio which is the main Italian administrative court of first instance) that leaves extremely perplexed , issued in response to the appeal of a ministerial order (with a separate penalty to the dealer) notified to a manufacturer for an alleged formal defect in the CE marking of a home video sender , technically judged however fully conform .

To understand what we're talking about, however, we need to step back and briefly review the relevant legislation.

Telecommunications equipment, like other product categories, must meet certain "***essential requirements***", laid down in the in the point by Directive 1999/5/EC (brought into effect in Italy though Legislative Decree no. 269 of 09/05/2001) . Said requirements (safety of the user, not harmful to the network, safeguards for privacy, prevention of fraud, access to emergency services, and others) are in most cases "incorporated" into European harmonised technical standards ("EN standards") with the consequence that conformity to EN standards, where these exist and are applied, certifies conformity with said essential requisites.

In particular, manufacturers who intend to release telecommunications equipment onto the market are, above all, required to first make sure of the conformity of the equipment with said requisites and to certify it themselves, compulsorily, by carrying out three operations: (a) reproducing the EC marking on the equipment, on the packaging, and on the accompanying documentation, (b) drawing up a declaration of conformity and including it along with each item of equipment and, (c) preparing a manufacturing document to be held available for the authorities.

In addition to the above self-certification, which is sufficient for equipment that does not use radio frequencies (such is the case, for example, with traditional telephones with cords), the law also requires further certification and/or validation by a qualified body, recognized for this purpose throughout the EU, called a "notified body", in accordance with one of the procedures stipulated in annexes III, IV, V, to Directive 99/5/EC (and therefore to Legislative Decree 269/2001). In such cases the action of the Notified Body must be made clear by displaying, alongside the CE marking, the international identification number assigned to the Body on the equipment, on its packaging, and on the accompanying documentation.

In one case, however, action by a Notified Body is not necessary. This is what is provided in annex III to the Directive and to Legislative Decree 269/2001, namely: "…..*for each type of apparatus, all essential radio test suites must be carried out by the manufacturer or on his behalf.*

The identification of the test suites that are considered to be essential is the responsibility of a notified body chosen by the manufacturer except where the test suites are defined in the harmonised standards". Accordingly, where there are EN standards that indicate the technical tests that the manufacturers must carry out and document in order to assess the conformity of their products for themselves, notified bodies do not take part in the procedure. In this case Italian law is yet more explicit than the above directive, it being clearly stated in annex III to Legislative Decree 269/2001 that the identification number of the notified organism must be affixed by **manufacturers only** *"…if it has been involved in the procedure".*

However, Directive 1999/5/EC contains an apparent inconsistency in that paragraph 1, article 12 (this, too, was reproduced, almost identically, in article 13.1 of Legislative Decree 269/01) establishes, without distinctions, that "*Where the procedures identified in Annex III, IV or V are used, the marking shall be accompanied by the identification number of the notified body….."* without making any allowance for the case, provided as an exception, in annex III and referred to above.

That inconsistency was resolved by the EU Commission through an interpretation of the directive: "*….if the essential radio test suites are chosen from a harmonised standard, a notified body does not intervene in the conformity assessment process. In that case there is no notified body which exercises on of the relevant tasks foreseen in article 10 of the Directive……The affixing of the notified body number makes him responsible. Such a responsibility he can only exercise, when he played a role in the conformity assessment process…….3 Conclusion When a harmonised standard contains the essential radio test suites a manufacturer, which chooses to use them does not need to affix a notified body number on the equipment."* (European Commission, Enterprise and Industry Directorate General, Interpretation of Directive 1995/5/EC http://ec.europa.eu/enterprise/sectors/rtte/documents/interpretation/index_en.htm#h2-1.).

In other terms, if there are EN standards that already state the *"the essential radio test suites"* to be carried out there is, in the view of the Commission, **no role and, therefore, no scope for action by a notified body in accordance with the law**. It is entirely evident that in such cases the notified body could certainly not act as " the great translator of Homer ' s translators " and identify, downstream, the technical tests previously identified upstream by the EN standards.

We come now to our case. An Italian manufacturer / importer had purchased in China and imported into Italy with his trademark a model of home TV signal repeater whose compliance with legislation under examination had been established in accordance with the procedure laid down in Annex III and, as all necessary technical tests were already identified by the EN standards , there was neither scope for activity nor need for a notified body. Nevertheless, for marketing reasons, the Chinese OEM supplier had asked a prestigious notified body to reiterate in a "legal opinion" the

list of necessary technical tests . So the Italian manufacturer/importer had voluntarily reported the notified body's international identification number along with the CE mark on the documentation accompanying each product alone, but - because this action was not mandatory but a voluntary one - not on the other two locations provided for in the case of CE marking : on the apparatus and on the packaging . If he hadn't done it !

In this era of economic crisis , where companies are struggling to stay on the market , products are not always technically compliant , foreign operators are not always transparent in their business practices , in August 2011 the ministerial supervisory authorities found the time to inspect at a dealer ' s premises the products marketed by the Italian importer , to find them fully safe and technically compliant , to verify compliance of the relevant accompanying documentation but to find them "……not to carry the number of the notified body on the equipment and on the packaging". So , the Italian producer / importer found himself ordered to "…*make the changes for ensuring conformity of the audio video speakers seized and present on Italian territory……*" meaning all products already sold to his many dealers scattered throughout Italy.

Hence the appeal in the TAR regional administrative court against the above order " *issued pursuant to Legislative Decree 269/2001* " notified to the manufacturer/ importer by the Ministry of Economic Development - Department of Telecommunications.

All, unfortunately, useless.

Indeed , by judgment dated 6.10.2011 no. 07758/2011 (Reg. Ric. No. 07454 / 23011) the Lazio Regional Administrative Court not only dismisses the appeal but goes even further, even denying producers being allowed not to involve a notified body in the presence of EN standards that already state the essential radio test suites to be performed , as follows : " *Actually ..... Annex III invoked by the applicant provides that the intervention of notified body is required for the identification of the essential radio test suites only if they are not defined by the harmonized standards, as it occurs instead in the present case* (…) *The Directive in concern however further provides that < ... where the procedures identified in Annex III, IV or V are used, the marking shall be accompanied by the identification number of the notified body (Art. 12, § I, second paragraph, of Directive)* > " . The TAR then continues as follows: *"…. notified bodies , subject to periodic audits by the government ... shall maintain an essential role of guaranteeing the correctness of the self-managed processes ... consequently, the presence of the notified body responsible for the correctness of the conformity assessment (and, therefore, the indication of its identification number) is obligatory for all equipment that is to use radio frequencies, as is the case in the question under examination ".*

Therefore, the TAR Lazio, after remarking a contradiction between what is stated at Annex III of Directive 1999/5/EC and what is specified in art. 12 , and reiterated the important role attributed to

the responsibility of the notified body , does not share the assumption of the Commission by which *".... such a responsibility he can only exercise, when he played a role in the conformity assessment process " ;* on the contrary, as said , TAR Lazio believes that " *… the presence of the notified body responsible for the correctness of the conformity assessment is obligatory for all equipment that is to use radio frequencies , as is the case in the question under examination* " .

In other terms , regarding Annex III to the Directive TAR maintains not so much that once a Notified Body is involved in the procedure – although in the instant case such an involvement is actually not required by law - its identification number should be displayed alongside the CE marking on the equipment, on its packaging and on the accompanying documentation , but it claims that , despite the clear wording of Annex III, in the case of telecommunication equipment using radio frequencies a notified body should be always involved in the conformity assessment procedure , irrespective of being the test suites already defined in existing harmonised standards : to sum up , the exemption given in Annex III would be - seems to understand - a blunder, a mistake of the European law maker and as such it should not even be taken into consideration.

Despite Directive 1999/5/CE .

Despite its interpretation by the Commission.

And with all due respect to " the great translator of Homer ' s translators " .

Maurizio Iorio

Lawyer in Milan

President of Andec – Confcommercio