AVV. MAURIZIO IORIO
20122 Milano – Corso di Porta Vittoria , 17
e-mail : m.iorio@avvocatoiorio.it
Pec : maurizio.iorio@milano.pecavvocati.it
Tel . +39 02 36593383 - Fax +39 02 93661351

TO THE *CONSIGLIO DI STATO* [COUNCIL OF STATE]

SITTING AS A COURT

Notice of appeal

On behalf of "*XXXXXXX SPA*" (Tax Code XXXXXXXXXXX – VAT Registration No. XXXXXXXXX) with its place of business at Via xxxxxxxxx – xxx xxxxxxxxxx (xx) in the person of its legal representative Mr. XXXXXXX XXXXXX; the lawyers acting for **"***XXXXXXX SPA***"** are Maurizio Iorio of the Bar of Milan (Tax Code RIOMRZ54C01L219C – fax number for service of notice: 02 93661351; certified electronic mail address: maurizio.iorio@milano.pecavvocati.it) and Alessandro Lembo (Tax Code LMBLSN61P13H501V – fax number for service of notice: 06 36002774; certified electronic mail address: alessandrolembo@ordineavvocatiroma.it) of the Bar of Rome at whose office, in Via G. G. Belli 39, "*XXXXXXX SPA*" elects its address for service for the purposes of these proceedings, as indicated in the authorisation (see opposite),

versus

the ***Ministero dello Sviluppo Economico*** [Ministry of Economic Development] in the person of the Minister at the present time (hereinafter, also, "***MISE"***),

in order to obtain the setting aside and/or variation

of judgement no. 07758/2011 Reg pronounced by the TAR (Regional Administrative Court) of Lazio, Section II (see Annex 1), filed on 06/10/2011, not notified, in which the application, no. 7454/2011 (general number), lodged by the appellant in these proceedings, was refused.

Facts

- In an application, no. 7454/2011, *"XXXXXXX SPA"* (XXXXX) challenged the order – adopted by the Ministero dello Sviluppo Economico (MISE) in its decision of 22nd June 2011 – to "…*make the changes for ensuring conformity of*

the audio video speakers seized and present on Italian territory……" found "*……to be without the number of the notified body on the equipment and on the packaging"*.

- The order by MISE referred to the harmonised regulations of the EU introduced by Directive 99/5/EC (brought into effect in Italy through Legislative Decree no. 269 of 09.05.2001) concerning radio equipment and telecommunications terminal equipment and the mutual recognition of their conformity within the Community.
- "*XXXXXXX SPA*" challenged the above order in the TAR regional administrative court as being unlawful, in that it contravened the law and was ultra vires on the grounds that "*XXXXXXX SPA*" had certified the conformity of the above equipment by applying the rules in Annex III of European directive 1999/5/EC and of Legislative Decree 269/2001, said rules excluding the need for action by a notified body in the procedure to certify conformity of the products when, as in the case in point, the technical tests deemed essential for demonstrating the conformity of the product"……***are defined in the harmonised standards…."*** (Annex III, as cited).
- Moreover, "*XXXXXXX SPA*" additionally challenged the decision by MISE for the following procedural and formal irregularities:

1 – Contravention and misapplication articles of 7 and 10 of Law no. 241 of 7.08.1990; of paragraphs 2 and 3, article 21 of Regulation (EC) no. 765/2008 of the European Parliament and of the Council (which is directly binding on nationals and on all Italian authorities), and for being ultra vires owing to a clear absence of logic, in that the decision challenged had been processed, decided, and issued in violation of the rules governing the participation of the interested party in the administrative proceeding and its right to submit observations and technical reports before the decision is

adopted.

2 – Contravention of the law and misapplication of article 3 of Law no. 241 of 7.08.1990; contravention of paragraph 1, article 21 of Regulation (EC) no. 765/2008; being ultra vires owing to a clear absence of logic and to contradiction in the reasons for the decision challenged, in that there was nothing to indicate the train of logic and the specific motive that, in the particular case, led MISE to treat the provision in annex III no. 1 to Directive 99/5/EC - Legislative Decree 269/2001 as inapplicable and to disregard the content of the EN harmonised standards applied.

3 – Contravention of the law and misapplication of paragraph 4, article 3, of Law no. 241 of 7.08.1990 as well as of paragraph 2, article 21 of Regulation (EC) no. 765/2008 in that in the decision challenged there was no statement of the deadline and the authority to which to appeal.

- The TAR Regional Administrative Court of Lazio, in the judgement hereby challenged, held that *"..... the presence of the notified body responsible for the correctness of the assessment of conformity of the products* ***is obligatory for all equipment that is to use radio frequencies,*** *as is the case in the question under examination"* and, moreover, that "…..*the decision challenged is evidently, by its nature, mandatory and admits of no discretion .... and for this reason the objections advanced of a procedural and formal kind are not decisive"* and it consequently refused the application by the applicant-appellant in these proceedings.

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The judgement described above seriously prejudices the interests of "*XXXXXXX SPA*" not just for the reasons already explained in its application, which was refused, but also because it could, in fact, expose the company in the future to certification burdens that are greater than those as provided in law and which

apply to its competitors operating in other European Union countries; accordingly, it is in the interest of the applicant-appellant in these proceedings to challenge the judgement referred to at the start of this notice of appeal for the following reasons in

Law

1. **Unlawful nature of the judgement challenged because of contravention and/or misapplication of Directive 1999/5/EC as given effect in Italy by Legislative Decree 269/2001.**
   [Judgement is] ultra vires owing to absence of reasons and an intrinsic lack of logic

The sentence challenged is unlawful in that, through an interpretation that is unfounded and arbitrary, it in part "rewrites" a European directive by deeming inoperable an important concession that it contains.

An initial point needs to be made: in accordance with European legislation relating to the "*New Approach"* and the "*New Global Approach"* as in the **Council Resolutions of 7.05.1985 and 21.12.1989** respectively, and in **Decision of 21.12.1990** (*"New Modular Approach"*), which was followed by **Decision 93/465/EEC** and, lastly, by **Decision no. 768/2008/EC** of the European Parliament and the Council "*on a common framework for the marketing of products*", telecommunications equipment, like other product categories, must meet certain "***essential requirements***", laid down in the case in 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 the case of telecommunication products (but not with other products, covered by other directives), 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."* (Annex 2: 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. (The English and Italian texts of the interpretation are appended).

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 identify, downstream, the technical tests previously identified upstream by the EN standards. This principle is currently and consistently applied by all the Member States of the European Union, in the following manner: in the case as in annex III to Directive 99/5/EC, in the presence of EN standards that already specify the necessary technical tests, action by a notified body is not required.

In the judgment challenged hereby the TAR Regional Administrative Court of Lazio, inexplicably and illogically arrives at the very opposite conclusion. After having acknowledged that, in effect, "*…Annex III, relied on by the applicant, provides, in particular, that action by the notified body is obligatory for identifying the essential tests only if they are not defined by the harmonised standards,"* it then continues by noting that *"…….in accordance with article 12, paragraph 1 of the Directive, corresponding to paragraph 1, article 13, of the delegated decree ....* ***the rules provide, to use the exact wording, 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…."*** and, therefore, taking account of *"……the essential guarantee role performed by the notified bodies with regard to the correctness of self-administered procedures, which evidently cannot be entrusted to the mere discretion of the manufacturers concerned",* it draws the conclusion that "*,,,,,,,,****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".

The interpretation above appears, above all, to be illogical: as observed by the Commission, in fact, if the essential radio tests referred to in annex III are defined by the authorised standards, there is in effect no real scope for the presumed "*....discretion of the manufacturers concerned"* nor still less for any " *essential guarantee role with regard to the correctness of the self-administered procedures".*

It is worth pointing out in this connection that even when it is involved, a notified body merely selects the radio test suites to be carried out, but takes no part in them or carries them out directly, given that no legal provision, either regulatory or technical, imposes this in the instant case (see line one, paragraph two of Annex III to Directive 99/5/EC: *"For each type of apparatus, all essential radio test suites must be carried out* ***by the manufacturer or on his behalf****....").*

Moreover, the judgement is at odds not just with the interpretation that the European Commission gives in this connection, but with the letter and the aim of Directive 2009/5/EC and, more generally, with the Community rules on technical harmonization.

- The main point to be made, in fact, is that Directive 2006/95/EC (regarding "lower voltage") and Directive 2008/104/EC (regarding "electromagnetic compatibility"), both of which are also applicable to telecommunications products and expressly referred to in Directive 1999/5/EC (in recitals 10-11-39-46 and, in particular, in article 10.2) **DO NOT provide –** other than voluntarily (Directive 2008/104/EC = Legislative Decree 194/07 Annex III) or in the case solely of disputes (Directive 2006/95/EC = Legislative Decree 791/1977 article 6.2) **– for action by notified bodies with supervisory functions"** …. *with regard to the correctness of the self-*

administered procedures" to which the judgment challenged refers. Indeed, even in Decision no. 768/2008/EC of the European Parliament and the Council *"on a common framework for the marketing of products",* cited above, third party involvement in the conformity certification procedures is regarded as a possibility (Article 4. c) and, in annex II, module A, it clearly lays down two *"self-administered" "Internal Production Control Procedures"* in which the manufacturer is entrusted with certifying the conformity of its products without action by a notified body being obligatory (see Article 4 both of Module A1 and of Module A2).

- Seeking the involvement of a notified body is clearly burdensome and Community rules in the matter of requirements and conformity of products is intended to reduce the burdens on firms to the very minimum, especially in relation to small and medium-sized enterprises, by limiting the requirements and the certification procedures to the bare minimum, even where there is provision for action by notified bodies: "*Community legislation should take account of the specific situation of small and medium-sized enterprises as regards administrative burdens..... Community legislation should provide for the situation of such enterprises to be taken into account in setting the rules for the selection and implementation of the most appropriate conformity assessment procedures and concerning the obligations placed on conformity assessment bodies to operate in a proportionate manner in relation to the size of undertakings and to the small serial or non-serial nature of the production concerned...."* (**Decision no. 768/2008/EC, recital no. 50**); *....."....the essential requisites relevant to a class of radio equipment and telecommunications terminal equipment should depend on the nature and the needs of that class of equipment.....these requirements must be applied with discernment in order not to inhibit technological innovation or the meeting of*

the needs of a free-market economy" (**Directive 99/5/CE, recital no. 13)**.

- In that it is inconsistent with the letter and the purpose of Directive 99/5/EC and with the applicable Community rules, the position taken in the judgement challenged is untenable, namely, that action by a notified body is, purportedly, always necessary in that *"...the self-administered procedures...."* provided for in annex III when there are EC standards that stipulate the technical tests to be carried out "….*evidently cannot be entrusted to the mere discretion of the manufacturers concerned"*. Quite the reverse, the very opposite holds true: action by a notified body is necessary only when expressly required by the law.

Accordingly, given that the duty of the court is to *"…….interpret its own national law in the light of the letter and the purpose of the directive in order to achieve the result sought by the latter..."* (see, as universally representative, Judgement no. 106/89 of 13.11.1994 by the European Court of Justice) an Italian court is in no position to interpret a part of the second paragraph of annex III to Directive 99/5/EC **in way that effectively repeals it**, that is, where it states "***except where the test suites are defined in the harmonised standards".***

The matter, however, does not stop there: **the interpretation in the judgement challenged is not even consistent with the Italian law that gives effect to Directive** 99/5/EC. As already noted, in fact, paragraph three, annex III of Legislative Decree 269/2001 includes clarification that is additional to the original text of the directive (see the wording in bold): *the manufacturer or his authorised representative established in the European Union or the person responsible for placing the apparatus on the market shall declare that the tests have been carried out and that the apparatus complies with the essential requirements; during the course of the manufacturing process he shall affix the*

identification number of the notified body ***if it has been involved in the procedure"****.*

It is plainly obvious that if, systematically and regardless of the circumstances, the involvement of a notified body were required in the procedure – even if only in the role of "*supervisor*" in order to avoid "*the mere discretion of the manufacturers concerned"* (to use the unflattering expression in the judgment herein challenged) – affixing the identification number of the notified body could not be made contingent on whether the latter "*...has been involved in the procedure*".

* * *

Accordingly, in the case under examination the action of the notified body was not obligatory, and the order of MISE challenged by "*XXXXXX Spa"* in its application to the TAR Regional Administrative Court of Lazio **is NOT by its nature such as to be mandatory and admit of no discretion; it should therefore be set aside and/or varied both for reasons to do with the serious formal and procedural flaws as submitted in points 1, 2, and 3 of that application, and for the substantive flaws as submitted in point 4 of the same,** all of which are concisely summarised above under "FACTS".

2. Request to the Court of Justice of the European Union for a preliminary ruling pursuant to article 267 of the TFEU

Given that the decision on the merits of the challenge in this notice of appeal by XXXXXX Spa depends on a proper interpretation of paragraph 2, annex III of Directive 1999/5/EC with reference to paragraph 2, article 12 of the directive, having taken note that on this point there is no settled case law by the Court of Justice, and – naturally – without prejudice to the possibility that the *Consiglio di Stato,* on the basis of the submissions and reasons for appeal as above, holds that the proper application of EU law in accordance with the arguments of the

applicant-appellant is so unequivocally evident as to exclude any reasonable doubt, this party requests a preliminary ruling under article 267 of the TFEU as to the interpretation of Directive 1995/5/CE with reference to the following questions:

(1) Should Directive 1999/5/EC be interpreted in the sense that manufacturers that use the procedure in paragraph 2, annex III, must, even where there are harmonised rules that define the essential radio test suites to be carried out, resort to a notified body and accordingly include the notified body's identification number alongside the CE marking regarding conformity with the essential requisites as in the said directive?

(2) If the reply to question (1) above is negative and manufacturers – after using the procedure in paragraph 2, annex III, in the presence of harmonised rules that define the essential radio test suites to be carried out – have nevertheless voluntarily approach a notified body with a request that it confirm the list of said tests, must they include, alongside the CE marking regarding conformity with the essential requisites as in the said directive, the notified body's identification number?

(3) If the reply to question (2) above is negative and manufacturers – after using the procedure in paragraph 2, annex III, in the presence of harmonised rules that define the essential radio test suites to be carried out and subsequently approaching a notified body, on a voluntary basis, with a request that it confirm the list of said tests – then voluntarily include on the documentation accompanying the product, alongside the CE marking, the aforesaid body's identification number, must they show its identification number on the product and on its packaging as well?

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For all the reasons stated above, the applicant-appellant XXXXX Spa, with the

lawyers acting for it as indicated above, requests the adoption of the following

Decisions

May it please the *Consiglio di Stato*, before which this matter has been brought, having rejected submissions to the contrary

(1) to order that the trial papers to be referred to the European Union Court of Justice for a preliminary ruling so that there be an examination of the preliminary questions 1, 2, and 3 in point 2 of this appeal, such as they are formulated by the applicant or shall be better formulated by the *Consiglio di Stato*, they being raised pursuant to article 267 of the Treaty on the Functioning of the European Union

(2) by way of the main application, to set aside and/or to vary judgment no. 07758/2011 by the TAR Regional Administrative Court of Lazio, Section II and, as an effect, to uphold the appeal by the party appearing as applicant in the first instance proceedings

(3) Costs, charges, and fees to go with the decision.

Milan – Rome

Maurizio Iorio (lawyer) Alessandro Lembo (lawyer)