

Complaint form for breach of EU law

8 / 10

8. Review data

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Representative's details

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Complainant's details

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Correspondence address

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Details of the authority or body

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|-------------------------------|--|
| Name of the authority: | Republic of Italy - Presidenza del Consiglio dei Ministri (C.F. 80188230587) |
| Country: | Italy |

National measures suspected to infringe Union law

National measures suspected to infringe Union law:

1. This complaint is a follow-up to that already filed by the Complainant on 21 July 2020 (the First Complaint) in relation to Art. 35 of Milleproroghe. This complaint shall not be considered as in substitution of the First Complaint. It supplements the previous one. The Complainant confirms each and all of the points raised in the First Complaint. 2. The illegitimate Art. 35 is now also used by the Italian Government to obtain unfair advantages in the context of a negotiation with Autostrade per l'Italia S.p.A.'s (ASPI) controlling shareholders Atlantia S.p.A. (Atlantia). The Government forced Atlantia into a transaction whose terms are disadvantageous to the Company and its international shareholders by allowing the entry of a State-owned company Cassa Depositi e Prestiti (CDP) in ASPI (the Envisaged Transaction). Several declarations of the Government's members stated that should the Envisaged Transaction not be concluded, the Government will revoke the Concession according to the Milleproroghe, i.e. without paying the indemnity owed to Atlantia and its shareholders according to its existing Concession. The Complainant understands that the Government is envisaging two main alternatives to pursue the Envisaged Transaction; both of them would violate the Complainant's rights (as well as of other Atlantia's long term investors; the Investors). 3. The options are: (i) Option A: the sale of ASPI's shares held by Atlantia to CDP, without clarification as to how the price will be calculated; or (ii) Option B: a capital increase of ASPI reserved solely to CDP to the exclusion of the existing shareholders' option rights in ASPI, without clarification as to the subscription price for the new shares to be paid in by CDP. The Envisaged Transaction, by allowing the entry of CDP in ASPI's capital, constitutes a coercive and illegitimate expropriation of assets. Investors will suffer dramatic losses as a result of the Envisaged Transaction being carried out with a total lack of consideration of their rights (although they do not bear any liability in respect of the Morandi Bridge collapse). 4. Since Atlantia is being forced to the Envisaged Transaction to avoid the even worse consequence of an illegitimate revocation, Investors – in their quality of minority shareholders – cannot express any view and will be just passive

spectators (rectius, victims). In particular: (A) Option A: the criteria adopted for the determination of the price of ASPI's shares is unclear and lacks transparency. It is impossible to determine whether the price will be based on a fair market value of ASPI, because such price will not be made through a transaction involving the market (i.e. including the above private and retail investors) and will not be assessed by a third party appraiser of international status. Clearly, this will directly jeopardize the value of the Complainant's (as well as that of the above private and retail investors) investment in Atlantia; (B) Option B entails CDP acquiring its stake in ASPI through an increase of ASPI's share capital reserved solely to CDP but, in any case, Atlantia (and so the Investors) will be diluted in ASPI as if Atlantia were to sell a shareholding in ASPI. Again, the price to be paid in by CDP is unclear and will be formed without involving the market (including the Investors) thus entailing, as in Option A, significant loss of value by a mass of minority investors which do not bear any liability in respect of the Morandi Bridge collapse. 5. Both Option A and Option B should be considered an unlawful expropriation of shareholders' rights. The State is renationalising the largest motorway operator without paying the indemnity owed under the existing Concession and it does so at a price which is unclear, through a transaction not involving the market nor the above private and retail investors. Legally, the damages suffered by Investors in ASPI's equity, Atlantia's equity and ASPI's debt are unfair and disproportionate.

EU law you think has been breached:

1. The Envisaged Transaction, in whatsoever form implemented, would be in blatant breach of a number of EU Law provisions and principles, as provided for by the EU Treaties and the European Court of Justice (ECJ). As mentioned above, the Envisaged Transaction would indeed result in a de facto expropriation of the shareholders' interests in Atlantia and ASPI, without the payment of a fair compensation and without any actual public interest justifying it. 2. The Envisaged Transaction affects rights guaranteed by the EU Internal Market rules and principles, in particular those regarding free movement of capital (Article 63 TFEU). This principle exists to ensure that the rules applicable to an investment are maintained without being changed retroactively and unreasonably. In this case, the Investors relied on the rules of the Concession providing for a given indemnity in case of revocation and Article 35 of Milleproroghe cancelled that indemnity retroactively and unreasonably. Furthermore, the Envisaged Transaction does not involve either the market or the above Investors thus entailing significant losses for those investors without giving them any saying on the Envisaged Transaction. 3. The Envisaged Transaction will result in an unlawful limitation of shareholders' rights according to the SHRD I and SHRD II. SHRDs establish that shareholders cannot suffer any conditioning in their voting rights. The Envisaged Transaction frustrates the

investments made by the financial community in Atlantia and ASPI, as mentioned under point 2 above. By threatening the revocation of the Concession if the Envisaged Transaction is not be concluded, the Government is de facto conditioning the freedom of shareholders to adopt independent decisions. The above is a blatant violation of the principles of SHRD I and SHRD II, which are aimed at creating a more predictable, stable and clear regulatory environment to promote investments. 4. Also Art. 2 of TEU is violated by the above for the same reasons: Instead of respecting the principles of legal certainty and legitimate reliance set out by said Article, the Italian Government is improperly using its legislative and executive powers to retroactively change rules and unilaterally impose a given structure to the Envisaged Transaction, which is detrimental to Investors' rights and the market in general. 5. Both Options must be considered as an unlawful expropriation of shareholders' rights, since they result in a substantial decrease of the value of shareholders' investments, without them being paid a proportionate and fair indemnity. Any decision to revoke the Concession or nationalise ASPI would have detrimental effects on the Investors, de facto illegitimately expropriating their shares and any value attached to them. Since the implementation of the Milleproroghe, the value of Atlantia shares have fallen by 40%, representing a €8bn loss for investors in Atlantia such as TCI. Whilst ASPI was valued at €15bn in January 2017 when Silk Road, EDF and Allianz bought a 12% stake, we now estimate that the value of ASPI is €11-12bn, illustrating the losses incurred by investors as a result of the unilateral and retroactive changes implemented through the Milleproroghe. 6. With reference to the specific notion of proportionality applied to ownership rights, the ECJ established that the means deployed and the objective pursued must be in a strict relationship of proportionality. In other words, any restrictions applied to ownership rights must not constitute an unacceptable or disproportionate intervention when compared with the objective pursued. In this case, even assuming that the Government would be acting to pursue a general public interest of the safety of the motorway's system (and it is not clear how it will achieve this by executing the Envisaged Transaction), imposing conditions that jeopardise Investors' rights would still not be a proportionate measure.

Problem description

Please describe the problem:

The Complainant is filing this claim in its capacity of shareholder of Atlantia S.p.A. (Atlantia), the company controlling ASPI, the main Italian motorway concessionaire by virtue of the Concession (granted by the Ministry of Infrastructure and Transports in 2007). In particular, TCI is an institutional, long-term investor, and is a large shareholder of Atlantia. In this regard, it should

be noted that: (i) 12% of ASPI's equity is held by International investors (Allianz from Germany, EDF from France and Silk Road from China) who suffered material losses as a result of the Italian Government's action; (ii) Most of Atlantia's equity value is held by private and retail investors as well as international investors (c. 70%), behind which there are thousands of private and retail investors, who equally suffered material losses; and (iii) ASPI's debt (c. €11bn, partially guaranteed by Atlantia) is represented by listed securities held by major international debt investors, European and Italian financial institutions (e.g. the European Investment Bank and, in Italy, CDP, Banca Intesa, Unicredit), as well as private investors. It must be pointed out that the Envisaged Transaction has been concocted in the context of the illegitimate introduction of Article 35 of the Milleproroghe decree. Atlantia and ASPI are forced to accept the Envisaged Transaction as well as all terms and conditions imposed by the Government under the threat of a revocation. Instead of acting within the boundaries of the existing rules and laws, the Italian Government is improperly using its legislative and executive powers to retroactively change rules and unilaterally impose a given structure. Such structure entails a price (either a sale price or a dilution price as the case may be) which is unclear, its determination does not involve the market (and, therefore, the above private and retail investors) to the Envisaged Transaction, which is detrimental to Investors' rights and the market in general. Moreover, the entry of State-controlled CDP into ASPI, since is carried out under the threat of a revocation and at unfavourable conditions for the Investors, will discourage the entry of other private investors, thus further limiting the free movement of capitals. Therefore, the Envisaged Transaction is in blatant violation of the EU Law, by unlawfully obliterating Investor's rights. The Milleproroghe is illegitimate and is used as a threat to coercively impose the Envisaged Transaction upon all parties concerned and thus bypassing the rule of law. Not to mention that, according to the Government, with the execution of the Envisaged Transaction ASPI will have to waive its right to challenge the Milleproroghe accepting to change the Concession accordingly, thus depriving ASPI of the right to make recourse to justice. At the same time, Investors are not in the position to intervene on Atlantia's decision as to the acceptance of the Envisaged Transaction because the decision will be taken between CDP and Atlantia's board (who is representing Atlantia as controlling shareholder of ASPI) without any intervention by the above private and retail investors in Atlantia (who, as said, do not bear any liability in respect of the Morandi Bridge collapse) Therefore, TCI (as well as other investors) can only seek protection from this Commission according to the EU Law. Should a prompt intervention be denied, this would entail irreversible damages for the Investors, which already have witnessed a dramatic impairment of their investments.

As mentioned above, in both Option A and Option B the Italian Government, in order to pursue a mere political and economic interest, will carry out an unlawful expropriation of Investors' interests in ASPI and Atlantia. This expropriation is in blatant violation of the EU Law. According to the law, any expropriation must be justified by reasons of public interest, must be carried out following (i) a transparent administrative procedure and (ii) upon payment of an indemnity proportionate to the value of the expropriated asset. None of these circumstances occur in the case at issue. Even assuming that the Government would be acting to pursue a general public interest of the safety of the motorway's system (and it is not clear how it will achieve this by executing the Envisaged Transaction), imposing conditions that jeopardise Investors' rights would still not be a proportionate measure. In fact, there is no evidence demonstrating that the management of the infrastructure by State-owned companies would improve safety: by way of example, in April 2020 another bridge in Aulla collapsed and it was managed and maintained by State-owned company ANAS. Moreover, should the Government aim at actually pursuing safety objectives, the Concession already contains specific inspection powers (and duties) as well as the power to order certain interventions. The exercise of these powers (indeed very rarely exercised before the collapse) would allow the Government to obtain the execution of more intensive maintenance activities by the concessionaire (i.e. ASPI), thus constituting a fair and legitimate way to pursue the public interest to safety, without violating the EU Law and the shareholders' rights. Therefore, also on the basis of what specified in the First Complaint (CHAP(2020)02070), we believe that would be appropriate for the Commission to intervene in this situation and convince the Italian Government to ensure that the EU principles mentioned above are fully respected. This will allow for any further damages and/or impairment to the value of the investments held by TCI (and by all the other Investors) to be limited to those already suffered. Such intervention should focus on the amendment and cancellation of Article 35 of Milleproroghe since it is in blatant violation of the EU principles. Furthermore, the Commission's intervention is required in order to assist the Italian Government in any negotiations with Atlantia and ASPI. The Commission's intervention is aimed at ensuring a fair negotiation. In particular, any agreement with the Italian Government must provide (1) for a transparent and market-oriented approach to the governance of the "new" ASPI including, among other things, through the appointment of experienced, independent board members to oversee and supervise management; and (2) a procedure which is fully transparent and managed through reputable independent financial intermediaries thereby ensuring, amongst other things, that any transaction involving ASPI's shares is carried out under fair market conditions and preserving the value of the investments held by

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| Does the Member State concerned receive (or could it receive in future) EU funding relating to the subject of your complaint?: | shareholders, avoiding further damages and impairments. |
| Does your complaint relate to a breach of the EU Charter of Fundamental Rights?: | No |
| Please explain how EU law is involved and which fundamental right has been breached: | Yes |
| | <p>The actual terms and conditions of the Envisaged Transaction are still not known. In any case, under Option A and Option B, the value of the shares of the Investors will be significantly affected. Therefore, the Envisaged Transaction blatantly deny any substantial and procedural fundamental prerogatives and guarantees set out by the Charter and by the jurisprudence of the European Court of Human Rights (ECHR). In this perspective, the Envisaged Transaction constitutes an infringement of the right to property, as foreseen in Article 17(1) of the Charter. It is indeed a basic principle of EU law that a national measure may restrict the right to property only if it does “not constitute in relation to the aim pursued a disproportionate and intolerable interference, impairing the very substance of the right guaranteed” (Case T-55/08 UEFA v Commission [2011]). ASPI investors had at least legitimate expectations with regard to the clauses protecting the concessionaire and its investors from unilateral ex post intervention on the key terms of the concession contract. Those legitimate expectations are such that, in case of violation, this would also entail a breach of the right of property safeguarded by Article 17 of the Charter of Fundamental Rights. As a matter of law, this right includes both the legal title on the concerned assets as well as its effective enjoyment and exploitation of same (ECHR in Pine Valley Developments v Ireland (1991). According to such provision, fair compensation must be paid in good time for a deprivation of property, meaning that a person may be deprived of his property ‘only in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for [its] loss’. As to the legitimate expectation principle, the scope of ECHR includes economic rights deriving from administrative concessions as well as expectations deriving from contractual relationships between the parties.</p> |

Supporting documents

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| List of documents: | <p>Between December 2019 and July 2020, TCI tried to contact the following authorities in order to be heard in relation to the Atlantia / ASPI dossier: 1) Letter to the Ministry of Finance Mr. Gualtieri on 21 July 2020; 2) Letter to the Ministry of Transports Mrs. De Micheli on 21</p> |
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July 2020; 3) Letter to the General Director of Treasury Mr. Rivera on 21 July 2020; 4) Letter to the Ministry of Finance Mr. Gualtieri on 13 December 2019; 5) Letter to the Prime Minister Mr. Conte on 10 December 2019; 6) Letter to the Ministry of Transports Mr. De Micheli on 13 December 2019; and 7) Letter to the Ministry of Finance Mr. Gualtieri on 10 January 2020.

Previous attempts to solve the problem

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| Have you already taken action in the Member State concerned to try to solve this problem?: | No |
| Why didn't you take any action to tackle your problem in the Member State concerned?: | No remedy is available for the problem: No remedy is available for the problem |
| Have already contacted any of the following EU institutions or services dealing with problems of this nature?: | European Commission:European Commission |
| Ares: | Ares(2020)3173016 |
| CHAP: | (CHAP(2020)02070) |
| Are you aware of any action in the Member State concerned covering the issue you raise in this complaint?: | No |

« **Back** **Next** »

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