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Court of Justice of the European Union

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Advocate General's Opinion in Case C-719/18
Vivendi SA v Autorità per le Garanzie nelle Comunicazioni

Advocate General Campos Sánchez-Bordona proposes that the Court of Justice declare that the Italian legislation preventing Vivendi from acquiring 28% of the share capital of Mediaset is contrary to EU law

That legislation disproportionately hinders the freedom of establishment in view of the objective of protecting information pluralism

In 2016, the French company Vivendi SA ('Vivendi'), which is the parent company of a group active in the media sector and the audiovisual content creation and distribution sector, began a hostile campaign to acquire shares in Mediaset Italia Spa ('Mediaset'), an Italian company operating in the same sector and controlled by the Fininvest group,¹ having acquired 28.8% of its share capital, equivalent to 29.94% of its voting rights.

Mediaset complained to the Autorità per le Garanzie nelle Comunicazioni (Italian Communications Regulator; 'AGCom'), accusing Vivendi of infringing Italian legislation, which, in the interests of safeguarding information pluralism, prohibits a company from receiving, directly or indirectly, through controlled or affiliated companies,² revenues accounting for more than 20% of the total revenues in the 'Integrated Communications System'. That percentage drops to 10% where that company simultaneously holds a share of more than 40% of the total revenues in the Italian electronic communications sector. That applied to Vivendi, which already held a prominent position in the Italian electronic communications sector owing to its controlling interest in Telecom Italia SpA ('TIM').

In 2017, the AGCom stated that Vivendi had infringed Italian legislation by acquiring the abovementioned shares in Mediaset, and ordered it to bring that infringement to an end.

Vivendi discharged the order of the AGCom, transferring ownership of 19.19% of Mediaset's shares to an independent company, while also appealing against the AGCom's decision before the Tribunale Amministrativo Regionale per il Lazio (Regional Administrative Court, Lazio, Italy), seeking to have it annulled. In that context, that court essentially asks the Court of Justice whether Italian legislation restricting access to the SIC by companies present in the electronic communications sector is compatible with EU law.

In today's Opinion, Advocate General Manuel Campos Sánchez-Bordona takes the view that in the present case it is necessary to assess whether Italian legislation is compatible with the freedom of establishment (Article 49 of the Treaty on the Functioning of the European Union, 'TFEU'), since the backdrop to the dispute between Vivendi and Mediaset is the French conglomerate's intention to intervene in Mediaset's management and thereby to gain a significant share of the Italian media market, rather than merely investing in acquiring shares.

¹ The majority shareholder of Fininvest SpA, the parent company of the Fininvest group, is Mr. Silvio Berlusconi (Case [C-219/17](#), *Silvio Berlusconi and Others v Banca d'Italia and Others*, see press release No. [93/18](#) and No. [205/18](#)).

² Under Italian law, companies on which another company exercises a considerable influence are to be regarded as affiliated companies. Such influence is presumed to be present where the company can exercise at least one fifth of the voting rights, or one tenth if it holds shares listed on regulated markets.

The Advocate General notes that a number of provisions in **Italian legislation restrict the opportunities for companies from other Member States to gain entry to the Italian media sector, thus affecting the freedom of establishment.**

Next, the Advocate General observes that **protecting information pluralism** (Article 11 of the Charter of Fundamental Rights of the European Union) constitutes an overriding reason in the public interest, the protection of which **may, in theory, justify the adoption of national measures that restrict freedom of establishment.**

According to the Advocate General, in principle, the Italian legislation is an appropriate means of attaining that objective, at least ideally, because it prevents a single company from acquiring, in its own right or through its subsidiaries, a substantial (20%+) share of the media market and prevents companies which already hold a dominant position in the electronic communication services sector (TIM, for example, as the sector leader) from taking advantage of that fact in order to strengthen their position in the media sector.

However, the Advocate General points out that, in addition to being suitable for doing so, such **national legislation must also be proportionate to the objective of protecting information pluralism, that is to say, it must not go beyond what is necessary in order to attain it.**

Although it is for the national court to consider the proportionality of the measure under examination in relation to the aims in pursuit of which that measure was adopted, the Advocate General proposes that the Court of Justice provide useful indications in that regard. In that context, the Advocate General observes, first, that the **Italian legislation defines the electronic communications sector too restrictively, excluding new markets that have become the main means of accessing the media (retail mobile telephony services, internet-related electronic communications services and satellite broadcasting services).** Secondly, in the opinion of the Advocate General, the proportionality requirements might not be compatible with the **very low percentage of revenues (10%) in the SIC** that is laid down as a ceiling for companies whose revenues in the electronic communications sector account for more than 40% of the total revenues in that sector. Thirdly, the Advocate General considers that it is **disproportionate to calculate the revenue of 'affiliated companies' as if they were 'controlled companies'** when, as seems to be the case in the present instance, the company (Vivendi), which has a share of voting rights in another company (Mediaset) that is greater than the figures mentioned above, is not effectively in a position to exert a considerable influence on the latter.

NOTE: The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of EU law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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The [full text](#) of the Opinion is published on the CURIA website on the day of delivery.

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