

Case C-562/23

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

11 September 2023

Referring court:

Upravno sodišče Republike Slovenije (Slovenia)

Date of the decision to refer:

24 August 2023

Applicant:

T-2 družba za ustvarjanje, razvoj in trženje elektronskih komunikacij in opreme d.o.o.

Defendant:

Agencija za komunikacijska omrežja in storitve Republike Slovenije

Subject matter of the main proceedings

Action before the Upravno sodišče (Administrative Court) seeking the annulment of the decision rejecting a request for the extension of the validity of a decision on the assignment of radio frequencies; European Electronic Communications Code; regulatory predictability for rightholders; clear, precise and unconditional nature of a provision of EU law; direct applicability of provisions of EU law

Subject matter and legal basis of the request

Interpretation of EU law; Article 267 TFEU

Questions referred for a preliminary ruling

1. Are paragraphs (1) and (2) of Article 49 of the EECC Directive [(Directive (EU) 2018/1972 of the European Parliament and of the Council of

- 11 December 2018 establishing the European Electronic Communications Code)] clear, unconditional and sufficiently precise to enable individuals to rely on them in proceedings before national administrative authorities and national courts?
2. Must paragraphs (1) and (2) of Article 49 of the EECC Directive also be applied to the extension of those individual rights of use for the RFS [(radio frequency spectrum)] which were granted prior to the entry into force of the EECC Directive, and what are the general criteria which apply in such a case in order to determine whether an individual right must be extended?
 3. If the answer to Question 2 is in the negative, for the purposes of assessing an appropriate duration of the individual rights of use for the RFS which were granted during the validity of the Authorisation Directive [(Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services)] and therefore in relation to the possibility of an extension of those rights, is it necessary to apply the provision set out in Article 5(2) of the Authorisation Directive or the fourth subparagraph of Article 5(2) of the Directive amending the Authorisation Directive [(Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services)], and are those provisions sufficiently clear, unconditional and precise to permit their use as a basis for assessing the appropriateness of the duration of an individual right of use for the RFS?
 4. If the answer to Question 3 is in the affirmative, what criteria should be applied for the purpose of assessing the appropriateness of the duration of an individual right of use for the RFS or the obligation to extend that right?
 5. If the answer to Question 1, 2 or 3 is in the affirmative, is it necessary, for the purposes of the decision on the extension, to take account of the fact that the possibility of an extension beyond 15 years was expressly excluded by the national provisions in force at the time when that right of use expired?

Provisions of European Union law relied on

Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive), in particular Article 5;

Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on

access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services (Directive amending the Authorisation Directive), in particular Article 3;

Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (EECC Directive), in particular Article 49, Article 50(1) and Article 124.

Provisions of national law relied on

Article 155 of the Constitution of the Republic of Slovenia provides as follows:

‘Laws, other rules and acts of a general nature cannot have retroactive effect. Only the law may provide that some of its specific provisions are to have retroactive effect, where the public interest so requires and provided that this does not affect acquired rights.’

Zakon o elektronskih komunikacijah (Law on Electronic Communications) (‘the ZEKom’)

Article 50 of the ZEKom provided as follows:

‘(1) The decision on the assignment of radio frequencies shall be issued by the Agency for a fixed period, and more specifically for a maximum duration of 15 years, except for the assignment of radio frequencies for aeronautical and maritime mobile radiotelephony services.

...’.

Article 51 of the ZEKom provided as follows:

‘The validity of a decision on the assignment of radio frequencies may be extended at the request of the rightholder if all of the conditions required at the time of the expiry of its validity for the use of those radio frequencies are satisfied.’

Zakon o elektronskih komunikacijah (‘the ZEKom-1’), which replaced the ZEKom on 15 January 2013 and remained applicable until 9 November 2022, because on 10 November 2022 the Zakon o elektronskih komunikacijah (‘the ZEKom-2’), by which the EECC Directive was transposed into national law, entered into force.

Article 53(1) of the ZEKom-1 established the following:

‘The decision on the assignment of radio frequencies shall be issued by the Agency for a fixed period, allowing an appropriate length of time, which is necessary for investment amortisation, and in any case for a maximum duration of

15 years, except for the assignment of radio frequencies intended for aeronautical and maritime mobile radiotelephony services.’

Article 54(1), (5) and (6) of that law provided as follows:

‘(1) The validity of the decision on the assignment of radio frequencies, with the exception of decisions on the assignment of radio frequencies for the purpose of ensuring the provision of public communications services to end users, may be extended at the request of the rightholder if all of the conditions required at the time of the expiry of its validity for the use of those radio frequencies are satisfied, and taking into account the purposes set out in Articles 194, 195, 196 and 197 of this Law.

...

(5) If the extension is granted, the Agency shall issue a new decision on the assignment of radio frequencies.

(6) The validity of the decision on the assignment of radio frequencies intended to meet measurement, certification and other radio equipment verification requirements cannot be extended; nor can the validity of the decision on the assignment of radio frequencies intended for public events.’

Article 240 of the ZEKom-1 established that decisions issued on the basis of the ZEKom could be amended, annulled or terminated under the conditions and in the manner laid down by the ZEKom-1.

Article 307 of the ZEKom-2, by contrast, establishes that decisions issued on the basis of the ZEKom-1 and relating to time limits which had not yet expired when the ZEKom-2 entered into force are to be amended, annulled or terminated under the conditions and in the manner laid down by ZEKom-2.

Succinct presentation of the facts and procedure in the main proceedings

- 1 The applicant, [T-2 družba za ustvarjanje, razvoj in trženje elektronskih komunikacij in opreme d.o.o. (T-2, a limited company for the creation, development and marketing of electronic communications and equipment)], was the holder of an individual right of use for the following radio frequencies: from 1935 MHz to 1950 MHz and, in combination, from 2125 MHz to 2140 MHz and from 1910 MHz to 1915 MHz, which were assigned to it for the period from 21 September 2006 to 21 September 2021 by means of a decision intended to ensure public communications services intended for end users (‘the decision on the assignment of radio frequencies’ or ‘the DARF’). By request dated 20 August 2021, the applicant sought the extension of the validity of the DARF in so far as it refers to the pair of duplex frequencies from 1935 MHz to 1950 MHz and from 2125 MHz to 1950 MHz.

- 2 On 1 October 2021, the defendant, the Agencija za komunikacijska omrežja in storitve Republike Slovenije (Agency for Communication Networks and Services of the Republic of Slovenia), rejected the request for the extension of the DARF on the ground that, pursuant to the ZEKom-1, it was not possible to extend beyond 15 years the validity of the DARF intended to ensure communications services to end users. According to the defendant, the provision set out in Article 49 of the EECC Directive, relied on by the applicant, cannot be applied in the context of the extension decision because it is not legally complete. That provision constitutes, in part, an open rule, in so far as it must be supplemented by specific content, and also gives Member States discretionary power as to the manner in which it must be transposed into national law. The Republic of Slovenia, for example, decided that it would not transpose Article 49(2) of the EECC Directive into the new law at all, but provided at the outset for a 20-year period for the duration of rights.
- 3 The defendant contends that, pursuant to Article 49 of the EECC Directive, the automatic extension of rights of use for the RFS, as proposed by the applicant, is not provided for either. In addition, the extension of the duration of individual [rights of use], in accordance with Article 49(3) of the EECC Directive, in order to ensure 20-year regulatory predictability, was provided for for the first time only under that directive. This means, however, that the conditions for the extension must already be known from the time that the rights of use for radio frequencies are granted. The assignment of the radio frequencies in question in 2006 did not require those conditions to be satisfied.

The essential arguments of the parties in the main proceedings

- 4 The applicant has brought an action for annulment of the decision by which the defendant rejected its request for an extension of the validity of the DARF. In the action, it submits that the defendant should, pursuant to Article 49(2) of the EECC Directive, in the case of decisions to assign radio frequencies for which a validity period of 15 years is fixed, have made it possible, before their expiry, to extend them for a further period of 5 years, given that the rules contained in the ZEKom-1 are clearly contrary to the EECC Directive. In its view, the provision set out in Article 49(2) of that directive is clear, precise and unconditional, which is why it is directly applicable and effective. The purpose of that provision is to ensure legal certainty for current rightholders and regulatory predictability for a period of at least 20 years. It submits that, for that reason, the regulator is required, when the rights have been granted for 15 years, to initiate a renewal procedure at least 2 years before the expiry date. The applicant emphasises that the EECC Directive is binding on the Republic of Slovenia from the day of its publication in the Official Journal of the European Union, namely from December 2018. Furthermore, it submits that that directive does not limit the application of Article 49(2) thereof solely to the extension of those individual rights of use for radio frequencies which were granted after the entry into force of that directive, but also applies to rights granted before the directive was adopted which had not yet expired at the time of its entry into force. Therefore, the defendant should, on

the basis of that provision of the EECC Directive, have also made it possible, from 21 December 2020, for the holders of rights granted to them for a period of less than 20 years to extend their validity to 20 years. The same applies to the applicant, inasmuch as the 15-year period for which it received the radio frequencies at issue expired on 21 September 2021, with the result that, when the EECC Directive entered into force or when the period for its transposition ended, the applicant's right had not yet expired. The applicant claims that the Administrative Court should annul the contested decision and refer the case back to the defendant for a new decision.

- 5 In its defence, the defendant contends that Article 49(2) of the EECC Directive is a rule of conditional application and that it gives the Member States discretionary power, inasmuch as it does not require them to grant an automatic extension. The defendant also contends that the extension of the duration of individual [rights of use] for wireless broadband electronic communications services is provided for in order to ensure 20-year regulatory predictability only for those radio frequencies which have been assigned since the entry into force of the EECC Directive and that that provision cannot be applied retroactively. The defendant emphasises that the conditions for granting the extension should already have been known at the time when the right of use for the radio frequencies was granted, and therefore on 9 June 2006 when the public call for tenders for the frequencies in question was published in the Official Gazette of the Republic of Slovenia. Since the aforementioned public call for tenders and subsequently the DARF did not provide for the possibility of extension, the DARF in question, in the light of the wording of Article 49 of the EECC Directive, cannot be extended.

Succinct presentation of the reasoning in the request for a preliminary ruling

- 6 In the present case, the question arises as to whether it is necessary to ensure the full effectiveness of the EECC Directive by extending the DARF, or whether the rules on the duration of individual rights of use for the RFS laid down by that directive apply only to those rights which have been granted after the entry into force of that directive. If this is not the case, the question arises as to whether the full effectiveness of the Authorisation Directive must be ensured by considering whether the DARF at issue should be extended.
- 7 The decisive legal circumstances relevant to the present case are as follows:
1. the defendant adopted the DARF on 21 September 2006 for a period of 15 years, that is, until 21 September 2021;
 2. on the date on which the right was granted, namely 21 September 2006, the Authorisation Directive was in force in the European Union. That directive provided that the duration of the right of use, where it is granted for a specific period, must be appropriate for the service in question; however, in the Republic of Slovenia, the ZEKom was in force, which allowed the extension of any DARF

beyond 15 years if all of the conditions which were required at the time of the expiry of that decision for the use of those radio frequencies were satisfied;

3. on 21 September 2021, when the DARF expired, the EECC Directive was in force in the European Union. That directive does not expressly dictate the manner in which the Member States must regulate the extension of individual rights of use for the RFS which were not granted during the validity of that directive but before it, and which were still valid at the time when that directive entered into force;

4. on 21 September 2021, the Republic of Slovenia had to apply the ZEKom-1, which, in the case of an individual right of use for the RFS granted in order to ensure public communications services to end users, expressly excluded the possibility of an extension beyond 15 years;

5. at the time when the DARF ceased to be valid (21 September 2021), the Republic of Slovenia had not yet transposed the EECC Directive into its legal system, which it should have done by 20 December 2020.

8 Therefore, the decision in the present case depends entirely on whether Article 49(1) and (2) of the EECC Directive is directly applicable, so that the right of use must, as a rule, after the expiry of a period of 15 years, be extended for a further 5 years, and whether the aforementioned rule (also) applies to those individual rights of use for the RFS which arose prior to the entry into force of the EECC Directive and which had not yet expired at the time of the entry into force of that directive, or whether Article 5 of the Authorisation Directive is directly applicable to those rights which are still in existence and whether it is necessary, at the time of the expiry of the DARF, to assess the appropriateness of its duration or an appropriate period for investment amortisation, on the ground that that provision precludes a national provision pursuant to which an extension beyond 15 years is excluded without regard to the appropriateness of the duration or to investment amortisation.

9 It is not disputed that the Republic of Slovenia failed to transpose the EECC Directive into its legal system in a timely manner. For that reason, the Administrative Court has doubts as to the unconditional and precise nature of the provisions set out in the first, second, third and fourth subparagraphs of Article 49(2) of the EECC Directive. For the purposes of the decision in the present case, the decisive factor is how the concept of 'regulatory predictability for rightholders' is to be interpreted. The applicant interprets it as meaning that the right must be granted for a period of 15 years, and that the 20-year predictability is ensured by recognition of the need to extend that right by a further 5 years in accordance with the requirements laid down in Article 49(1) of that directive, unless it is established that that extension would not be in line with the general criteria laid down in point (a) or point (b) of the third subparagraph of Article 49(2) thereof, or unless the competent authority has initiated enforcement action against the holder for non-compliance with the conditions attached to the rights of use, within the meaning of the fourth subparagraph of Article 49(2).

- 10 In the referring court's view, it is not clear whether the Member States are free to determine the conditions under which they will ensure the 20-year predictability of the right of use, that is, the conditions under which they will, where they decide that the validity of that right is 15 years, guarantee an extension of that right for a further 5 years. In addition, that court also questions whether the EECC Directive is sufficiently precise for it to be able to base its decision thereon.
- 11 The question is therefore whether that directive authorises the Member States to decide which conditions they will take into consideration when extending the right. The third subparagraph of Article 49(2) of the EECC Directive in particular points in this direction, providing that the Member States, before granting the right, are to make available to all interested parties the general criteria for an extension of the duration of rights of use, and subsequently specifies the requirements to which such general criteria may relate. If the conditions laid down by that directive applied directly, the provision of particular access to those criteria would not be necessary, as it must be considered that the criteria, if they appear in a rule that has already been published, are known or must be known to those for whom they are intended.
- 12 On the other hand, the [referring] court questions whether the directive itself already lays down general conditions that must be satisfied in the context of extension (ensuring competition, effective use of the RFS, promoting innovation and investments, invested capital). Above all, however, it seems to that court that it is unclear whether the State may decide, on the basis of its own discretionary assessment, that the extension depends on the extent of the investments in infrastructure, or whether the directive itself already provides that that condition, and therefore the amortisation of the invested capital, is essential for the extension, as this view emerges in both paragraph (1) and paragraph (2) of Article 49; it also questions the nature of the relationship between the different criteria, in other words, which criterion must take precedence over the others, or whether the Member States are free to define this aspect (only) when transposing the directive.
- 13 In the event that the Court of Justice answers in the affirmative the question whether Article 49(1) and (2) of the EECC Directive has direct effect in vertical legal relationships, the Administrative Court also asks whether that directive imposes 20-year predictability or a 5-year extension of a 15-year right (subject to certain conditions) for individual rights of use for the RFS which were granted prior to the entry into force of that directive. Article 124 of the EECC Directive does not lay down transitional arrangements for those rights, and the referring court is not in a position to infer the purpose of that directive in relation to those relationships, including from its recitals. The fact that that directive does not apply retroactively could at most be inferred from the third subparagraph of Article 49(2) thereof, which provides that the extension criteria must be known before the rights are granted, and from the fourth subparagraph of that provision, according to which the extension procedure is to begin at the latest two years

before the expiry. For rights which expire earlier than two years after the entry into force of the EEC Directive, it is not possible to ensure that period.

- 14 In addition, the [referring] court questions whether, in the light of the provision set out in Article 50(1) of the EEC Directive, the extension decision may be affected by the fact that the possibility of extending the right was expressly excluded by virtue of the law in force at the time when that right expired.
- 15 In the event of a negative answer to the question whether the EEC Directive applies to the extension of rights of individual use for the RFS granted prior to the entry into force of that directive, the Administrative Court questions whether the same effect as that required by that directive must be ensured on the basis of the rule, in force at the time of the granting of the right, laid down in Article 5(3) of the Authorisation Directive, according to which the duration of the right must be appropriate for the service in question, or must take account of the fact that an appropriate period is necessary for investment amortisation, where that provision is unconditional and clear and does not require the adoption of any act of the institutions of the European Union or of the Member States. The Administrative Court is aware of the case-law of the Court of Justice which, in Case C-205/20, held that the provision set out in Article 20 of [Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System], according to which the financial penalties provided for must be effective, proportionate and dissuasive, has direct effect. Appropriateness and proportionality are comparable concepts in terms of clarity and the absence of conditionality. If the abovementioned provisions of the Authorisation Directive or the Directive amending the Authorisation Directive must be applied, the referring court questions which criteria must be applied for the extension of an individual right of use for the RFS.