

Case C-555/23**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:**

4 September 2023

Referring court:

Symvoulío tis Epikrateias (Greece)

Date of the decision to refer:

2 August 2023

Applicant:

Makeleio EPE

Defendant:

Ethniko Symvoulío Radioteliorasis (ESR)

Subject matter of the main proceedings

Application for annulment of Decision No 140/2021 of the Ethniko Symvoulío Radioteliorasis (National Broadcasting Council; ‘ESR’) which imposed on the applicant company the administrative penalty of a fine of EUR 30 000 for broadcasting inappropriate audiovisual content and EUR 30 000 for breach of the duty to respect human dignity and personality, and any other relevant act or omission of the administration.

Subject matter and legal basis of the request

The request for a preliminary ruling, made pursuant to Article 267 TFEU, concerns the interpretation of the provisions of Directive 2010/13 on audiovisual media services, as amended by Directive 2018/1808, in conjunction with Articles 1, 20, 21 and 49 of the Charter of Fundamental Rights of the European Union.

Questions referred for a preliminary ruling

1. Do the objectives of Directive (EU) 2010/13, as amended by Directive (EU) 2018/1808, and therefore its regulatory scope, include (a) ensuring respect for and protection of human value and dignity and (b) preventing the broadcasting of inappropriate content by television service providers and, in particular, content with the characteristics of the content broadcast in the present case by the applicant company?

2. If (a) the obligation to respect and protect human value and dignity and/or (b) the prohibition on broadcasting inappropriate content and, in particular, content with the characteristics of the broadcast in question, come within the regulatory scope of the directive, does national legislation under which those obligations are imposed on all television service providers other than those broadcasting television content solely via the internet run counter to Article 4(1) of the directive in conjunction with the principle of equal treatment enshrined in Articles 20 and 21 of the Charter of Fundamental Rights of the European Union?

3. If the answer to the first two questions is in the affirmative, must the national regulatory authority, in order to ensure the practical effectiveness of the directive, apply the rules of national law imposing without distinction the obligations at issue to all television service providers, even though national law imposes the obligations and associated penalties on all other television service providers, but not on those who broadcast their content exclusively via the internet? Or is the imposition of administrative penalties for breach of those obligations by an internet television broadcast, by way of a broad interpretation or by applying the provisions of national law accordingly, incompatible with the principle *nullum crimen, nulla poena sine lege certa*, enshrined in the first sentence of Article 49(1) of the Charter of Fundamental Rights of the European Union, in conjunction with the principle of legal certainty?

4. If the first question referred for a preliminary ruling is answered in the negative and it is held that (a) the obligation to respect and protect human value and dignity and/or (b) the prohibition on broadcasting inappropriate content (and in particular content such as that of the broadcast in question) do not come within the regulatory scope of the directive within the meaning of Article 4(1), where the law of a Member State imposes those obligations on television service providers via terrestrial broadcast, satellite or broadband networks, with the threat of administrative penalties, but does not include corresponding rules regarding providers of television services via the internet, must Article 2(1) of Directive 2010/13, as currently in force, be understood as meaning that the competent national authority is required to consider imposing administrative penalties for breach of the above rules also in relation to the transmission of internet television broadcasts, on the basis of the principle of equal treatment?

5. If the answer to the fourth question is in the affirmative, does the obligation of the national regulatory authority, based on an interpretation of national law as

set out above and consistent with EU law and, in particular, with the provisions of the directive referred to above, to apply to all television services without distinction, irrespective of their medium of transmission, the rules of national law imposing the obligations in question, comply with the principle *nullum crimen, nulla poena sine lege certa* and the principle of legal certainty, given that those obligations, which are laid down by national law for all other television service providers, do not apply to internet television?

Provisions of European Union law relied on

Articles 1, 20, 21 and 49 of the Charter of Fundamental Rights of the European Union ('the Charter').

Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) (OJ 2010 L 95, p. 1), as amended by Directive 2018/1808/EU of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13 in view of changing market realities (OJ 2018 L 303, p. 69): recitals 10, 16, 34 and 102 to 104 and Articles 1, 2, 4, 6, 28 and 30.

Provisions of national law relied on

Syntagma tis Elladas (Constitution of Greece, 'the Constitution'): Articles 14 (freedom of expression and, in particular, guaranteeing the freedom of the press) and 15 (exemption of television from the provisions protecting the press and placing it under the direct control of the State).

Nomos 4779/2021, Ensomatosi stin ethniki nomothesia tis Odigias (EE) 2010/13 tou Europaikou Koinovouliou kai tou Symvouliou tis 10is Martiou 2010 gia ton syntonismo orismenon nomothetikon, kanonistikon kai dioikitikon diatakseon ton kraton melon schetika me tin parochi ypiresion optikoakoustikon meson, opos echei tropopoiithi me tin Odigia (EE) 2018/1808 tou Europaikou Koinovouliou kai tou Symvouliou tis 14is Noemvriou 2018 kai alles diatakseis armodiotitas tis Genikis Grammateias Epikoinonias kai Enimerosis (Law 4779/2021 transposing into national legislation Directive (EU) 2010/13 of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services, as amended by Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 and other provisions under the competence of the General Secretariat of Communication and Information) (Government Gazette I/27 of 20 February 2021): Articles 2(1) (definitions), 8 (transposition of Article 6 of Directive 2010/13), 33 (conferring on the ESR the power to supervise the application of the rules of the law and to

impose penalties), 36(1) (penalties to be imposed by the ESR in the event of a breach of, inter alia, Article 8 of the law in question).

Nomos 2328/1995, nomiko kathestos tis idiotikis tileorasis kai tis topikis radiofonias, rythmisi thematon tis radiotileoptikis agoras kai alles diatakseis (Law 2328/1995 regarding the legal status of private television and local radio, regulation of the broadcasting market and other provisions) (Government Gazette I/159 of 3 August 1995): Articles 1, 3 and 4.

Nomos 4173/2013, Nea Elliniki Radiofonia, Internet kai Tileorasi (Law 4173/2013 concerning new Greek radio, internet and television) (Government Gazette I/169 of 26 July 2013): Article 3.

Proedriko diatagma 77/2003, kodikas deontologias eidiseografikon kai allon dimosiografikon kai politikon ekpompon (Presidential Decree 77/2003 regarding the code of ethics for news and other journalistic and political broadcasts (Government Gazette I/75 of 28 March 2003): Articles 1-2, 4 and 9.

Nomos 2863/2000, Ethniko Symvoulío Radiotileorasis kai alles arches kai organa tou tomea parochis radiotileoptikon ypíresion (Law 2863/2000 regarding the National Council of Broadcasting and other authorities and bodies in the field of broadcasting services (Government Gazette I/262 of 29 November 2000): Article 4(1).

Nomos 2644/1998, ya tin parochi syndromitikon radiofonikon kai tileoptikon ypíresion kai synafeis diatakseis (Law 2644/1998 on the provision of pay radio and television services and related provisions) (Government Gazette I/233 of 13 October 1998): Articles 1, 10 and 12.

Nomos 3592/2007, Synkentrosi kai adeiodotisi Epicheiriseon Meson Enimerosis kai alles diatakseis (Law 3592/2007 on the concentration and licensing of media enterprises and other provisions (Government Gazette I/161 of 19 July 2007), Articles 1, 11 and 13(5).

Succinct presentation of the facts and procedure in the main proceedings

- 1 On 29 June 2021, the applicant, which is not a traditional television station, broadcast an information and entertainment programme on its website via live streaming. During the broadcast, the journalist presented the news of the visit of representatives of the LGBT+ community to the Prime Minister's office using overtly derogatory, offensive and abusive language about homosexual people, making ironic comments about their sexual orientation and indirectly encouraging verbal and physical attacks against them. Finally, the journalist repeatedly made clear references by name to the sexual orientation of political figures.
- 2 The case was brought before the ESR on the basis of, inter alia, Directive 2010/13, as amended by Directive 2018/1808, and of the provisions of Law

4779/2021 transposing those directives into national law. Having accepted that there was a provision of an audiovisual service within the meaning of Directive 2010/13 and Law 4779/2021, the ESR held that the obligation to respect human value and personality and the prohibition on broadcasting inappropriate content, imposed by provisions of national law, must apply to ‘any audiovisual material which is made available to the public via freely accessible websites and which may have an effect on those who watch it comparable to that caused by the transmission of corresponding content by traditional content providers’, and therefore to television broadcasts transmitted over the internet, although the latter are not expressly included within the wording of the relevant national provisions. It then held that the broadcast in question repeatedly referred in an overtly derogatory and offensive manner to a specific population group on the basis of the sexual orientation of its members, encouraging their humiliation and social stigmatisation. It therefore found that the applicant was in breach of the obligations imposed by Article 8 of Law 4779/2021, which transposes into national law Article 6(1) of Directive 2010/13, and of the obligations imposed by Article 1(1) of Law 2328/1995 and by Articles 2(1), 4 and 9(2) of Presidential Decree 77/2003, which require respect for human value and personality and prohibit the broadcasting of inappropriate content such as the broadcast in the present case. In the light of the foregoing, by the contested act, the ESR imposed on the applicant the administrative penalty of a fine of EUR 30 000 for each of the two offences committed, namely infringement of the prohibition set out in Article 8 of Law 4779/2021 on incitement to violence or hatred directed against persons on the grounds of their sexual orientation and breach of the obligation to respect human dignity and the prohibition on broadcasting inappropriate audiovisual content, which are required by the purely national provisions in question.

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

- 3 Law 4779/2021 transposed into Greek law Directive 2010/13, as amended by Directive (EU) 2018/1808 (‘the directive’). Article 33(1) of Law 4779/2021 delegated to the ESR the power to impose penalties for breaches of that law. The ESR is an independent regulatory authority, and the penalties imposed by it are provided for in Article 36(1) of the same law by reference to national legislation laying down specific penalties for breaches of purely national broadcasting legislation.
- 4 In parallel with the law referred to above, the provisions of national laws that pre-date the directives referred to above and that contain independent mandatory and prohibitive rules governing the content of broadcasting services and conferring on the ESR the power to impose the relevant penalties remain in force in the domestic legal order. Those rules include a rule imposing an obligation to respect human value and dignity and a rule directly prohibiting the broadcasting of inappropriate content, as well as associated rules setting out in specific detail the general prohibition on broadcasting inappropriate content. The national legislation

referred to above also contains provisions that lay down precisely the nature of the penalties imposed by the ESR and the method for determining them.

- 5 However, it is clear from a combined reading of the relevant provisions of those legislative instruments that those obligations are provided for in respect of television services transmitted by broadcasters either by means of broadcasting frequencies (analogue or digital) or by satellite, but not in respect of television services supplied over the internet by bodies that are not traditional broadcasters. It is noted that, while the application of the broadcasting legislation, which also imposes the contested obligations referred to above, has been extended under Law 3592/2007 to broadcasting services provided via broadband networks, under Article 15(2) of Law 3592/2007, however, internet television is specifically distinguished from other television services provided via broadband networks and is clearly excluded from the scope of that law. Moreover, through a combined interpretation of Article 3(1)(a) of Law 2328/1995 and Article 3(1), (2) and (3) of Law 4173/2013, the obligations referred to above also apply to the audiovisual content of the websites of television stations that also broadcast their programme via frequencies ('traditional television stations'). Conversely, operators providing television services via the internet which are not traditional television stations are not caught by the provisions of broadcasting law that impose an obligation to respect human value and dignity and prohibit the transmission of inappropriate content and, as a result, the national regulatory authority cannot, by way of a broad interpretation or by applying the provisions of national law by analogy, impose the relevant penalties on them.
- 6 Nevertheless, in the minority opinion of the referring court, as regards the interpretation of national law, it is lawful for the national regulatory authority to impose penalties for the supply of television services via the internet by an operator broadcasting exclusively via the internet, if the obligations arising under Article 15(2) of the Constitution, as further specified in the national legislation, are found to have been breached.
- 7 However, in the majority view of the referring court, the wording of the national provisions does not clearly and unequivocally state that the obligations imposed by those provisions and the resulting penalties are also applicable to television services provided over the internet by a non-traditional television station. The referring court therefore asks whether national legislation under which the obligation to respect and protect human value and dignity and the prohibition on broadcasting inappropriate content applies to all television service providers, except for those broadcasting television services over the internet which are not traditional television stations, is compatible with the EU legal order in the field of the supply of television services.
- 8 It is clear from the provisions of Directive 2010/13, as amended by Directive 2018/1808, and from its recitals, that the purpose of the directive is to apply, in a particularly competitive media landscape, the same rules to actors competing for the same audience (judgment of 21 October 2015, *New Media Online GmbH*,

C-347/14, EU:C:2015:709, paragraph 22). In order to achieve that purpose, the directive has chosen two methods: first, the adoption of certain basic content rules (coordinated rules), the uniform application of which the Member States are required to ensure in respect of all audiovisual media service providers within their jurisdiction, and, second, the adoption of rules on the configuration of the market for audiovisual media services within the Member States, in order to guarantee the basic principles of EU law which must be applied in that market. Furthermore, when interpreting the earlier Directive 89/552, the Court of Justice held that ‘the Directive does not completely harmonise the rules relating to the areas to which it applies, but ... lays down minimum rules for broadcasts which emanate from the European Union and which are intended to be received within it’ (judgment of 22 September 2011, *Mesopotamia Broadcast and Roj TV*, C-244/10 and C-245/10, EU:C:2011:607, paragraph 34). The obligations at issue (respect for human value and dignity and the prohibition on broadcasting inappropriate content) are not contained in the coordinated rules of Directive 2010/13 or expressly imposed by the rules adopted by the Greek legislature when transposing the directive into Greek law. However, in the case in the main proceedings, the ESR imposed two separate fines for television content broadcast by a non-traditional television station via the internet which not only contained incitement to violence or hatred directed against persons on the basis of their sexual orientation, in breach of Article 6 of the directive, but also offended human dignity, in breach of the rules of purely national broadcasting law that lay down obligations to respect human dignity and to refrain from or avoid broadcasting inappropriate content. It is therefore crucial to determine whether the objective of ensuring respect for human value and dignity and preventing the broadcasting of inappropriate content is one of the directive’s objectives.

- 9 The referring court unanimously considers that the above question must be answered in the affirmative, since it follows from the provisions of Directive 2010/13, taken as a whole and interpreted in the light of Article 1 of the Charter, which enshrines human dignity as a fundamental principle of EU law and as a fundamental right, that the coordination, by means of the directive, of a basic set of rules on the content of television broadcasts – which must apply without distinction to all television broadcasts irrespective of the medium of transmission – seeks to ensure a minimum level of respect for human value and dignity and a minimum level of content quality, including at least the protection of the reputation and good name of those referred to in broadcasts (see Article 28 of the directive). Consequently, although the directive does not standardise the two obligations at issue, they come within its objectives and are therefore covered by its regulatory scope. That is, moreover, apparent from both the letter and the spirit of certain rules laid down in the directive, irrespective of whether the content of an audiovisual service falls within the coordinated sectors (Articles 28 and 30(2) of Directive 2010/13). However, since that interpretation of the directive is not beyond doubt, the national court must refer the first question for a preliminary ruling.

- 10 Where a Member State chooses to adopt, under Article 4(1) of Directive 2010/13, stricter or more detailed rules for audiovisual service providers than those laid down by the directive, it has an obligation to respect the principle of equal treatment, which is a general principle of EU law, enshrined in Articles 20 and 21 of the Charter, and which requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified (see judgment of 18 July 2013, *Sky Italia Srl*, C-234/12, EU:C:2013:496, and, as regards the principle of equal treatment, judgment of 14 September 2010, *Akzo Nobel Chemicals and Akros Chemicals Ltd*, C-550/07 P, EU:C:2010:512, paragraphs 54 and 55 and the case-law cited). If it is accepted that the obligations at issue come within the regulatory scope of the directive, the referring court asks whether Article 4(1) of the directive, in conjunction with the principle of equal treatment, must be interpreted as precluding national legislation that imposes the obligations referred to above and the corresponding penalties on all television service providers other than those broadcasting their programmes only via the internet. It is on those grounds that the national court has referred the second question for a preliminary ruling.
- 11 If the first two questions are answered in the affirmative, the referring court asks what the national regulatory authority should do. On the basis of the principle of practical effectiveness and in order to achieve the purpose of the directive, namely to prevent the broadcasting of television content that is offensive to human dignity and the quality of which is substandard, the national regulatory authority should, in principle, when interpreting national law in accordance with the requirements of EU law, apply the obligations laid down in purely national law and consider imposing the relevant penalties without distinction on all broadcasters of television content, irrespective of the means of transmission. However, the first sentence of Article 49(1) of the Charter enshrines the principle *nullum crimen nulla poena sine lege*. The Court of Justice has held that that provision is also applicable in the case of administrative penalties (judgment of 24 March 2021, *Prefettura Ufficio territoriale del governo di Firenze*, C-870/19 and C-871/19, EU:C:2021:233, paragraph 49) and has held that a penalty, even of a non-criminal nature, cannot be imposed unless it rests on a clear and unambiguous legal basis. Furthermore, the principle of legal certainty, which, according to settled case-law, forms part of the legal order of the European Union and which the Member States must observe in the exercise of the powers conferred on them by directives, requires that legislation must be clear and precise and that its application must be foreseeable by those subject to it. The requirement of legal certainty must be observed all the more strictly in the case of rules liable to entail financial consequences, in order that those concerned may know precisely the extent of their obligations (judgment of 16 September 2008, *Commissioners of Her Majesty's Revenue & Customs v Isle of Wight Council and Others*, C-288/07, EU:C:2008:505, paragraphs 47 and 48). Therefore, the extension to internet television, on the basis of an interpretation of national law in conformity with EU law, of the obligation to respect human value and dignity and/or the prohibition on the broadcasting of inappropriate content, as well as the imposition of the relevant penalties, may infringe the principle *nullum crimen nulla poena sine lege certa*.

For the above reasons, the national court has referred the third question for a preliminary ruling.

- 12 If the first question referred for a preliminary ruling is answered in the negative, the referring court asks whether the national regulatory authority is required to apply the national provisions imposing the obligations in question without distinction to all television service providers under its jurisdiction, and therefore also to internet television service providers, on the basis of an interpretation of Article 2(1) of Directive 2010/13 according to which 'each Member State shall ensure that all audiovisual media services transmitted by media service providers under its jurisdiction comply with the rules of the system of law applicable to audiovisual media services intended for the public in that Member State'. The referring court considers that that provision, interpreted also in the light of the objective pursued by the directive, must be interpreted as meaning that, if a Member State chooses to impose its own rules which go beyond the obligations that have been coordinated under the directive, it is obliged to apply the principle of equal treatment, in the sense that, having regard also to the technological neutrality of the directive, it is not permissible to apply those rules only to certain television service providers and to exclude others solely on the basis of the criterion of the means of transmission of content, without there being any objective reason to make such a distinction.
- 13 Therefore, where the law of a Member State requires terrestrial, satellite and pay-TV broadcasts to comply with the rules prohibiting qualitatively substandard programmes and requiring respect for human value, with the threat of administrative penalties, but does not contain equivalent rules as regards internet television broadcasts, the competent national authority is obliged, applying the principle of equal treatment, to consider imposing administrative penalties for breach of the above rules also in respect of transmissions of an internet television broadcast. However, since that interpretation is not beyond doubt (the Court has not yet interpreted the relevant provision of the directive), the national court has referred the fourth question for a preliminary ruling.
- 14 If the fourth question referred for a preliminary ruling is answered in the affirmative, the question arises whether the obligation of the national regulatory authority, on the basis of an interpretation of national law which is consistent with EU law, to apply uniformly and indiscriminately the rules imposing the obligations at issue to all television services, irrespective of the means of transmission, is compatible with the principle *nullum crimen, nulla poena sine lege certa*, since the obligations in question, which are laid down by national law for other television service providers, do not apply to internet television. It is for that reason that the national court has referred the fifth question for a preliminary ruling.
- 15 According to the national court, the questions referred for a preliminary ruling are relevant to the resolution of the dispute in the main proceedings, since, if the national regulatory authority is obliged to consider imposing a penalty on internet

television content providers for breach of the obligation to respect human value and dignity and/or the prohibition on broadcasting inappropriate content, even though national law does not contain a provision to that effect for internet broadcasters, then the ESR was right to hold in principle that such obligations also applied to those providers and that it, as the national regulatory authority, could consider imposing the relevant penalties. However, if EU law does not preclude national legislation exempting internet television from the obligations at issue or, in any event, if EU law does not permit those obligations to be extended to internet television without an express national provision in that regard, then the application for annulment in the main proceedings should be granted.

WORKING DOCUMENT