

Case C-766/23**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:**

12 December 2023

Referring court:

Consiglio di Stato (Italy)

Date of the decision to refer:

1 December 2023

Appellant:

Persidera SpA

Respondents:

Autorità per le Garanzie nelle Comunicazioni

Ministero delle Imprese e del Made in Italy

Subject matter of the main proceedings

Appeal brought against two judgments of the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio, Italy), which dismissed several appeals brought by Persidera Spa against decisions relating to the national frequency allocation plan for the digital terrestrial television service and other measures defining the characteristics of that service.

Subject matter and legal basis of the request

Pursuant to Article 267 TFEU, interpretation is sought of the following: Articles 3, 5, 7 and 14 of Directive 2002/20/EC; Articles 3, 8 and 9 of Directive 2002/21/EC; Articles 2 and 4 of Directive 2002/77/EC; Articles 5, 6, 8, 9 and 45 of Directive (EU) 2018/1972; and recitals 11 and 20 of Decision (EU) 2017/899.

Questions referred for a preliminary ruling

1. Must EU law and, in particular, Articles 3(3) and (3a), and 8 and 9 of Directive 2002/21/EC ('the Framework Directive'), as amended by Directive 2009/140/EC, and Articles 5, 6, 8, 9 and 45 of Directive (EU) 2018/1972, be interpreted as precluding a system of the kind introduced in the Italian Republic by Article 1(1031a) of the Legge di Bilancio 2018 (2018 Budget Law), as introduced by Article 1(1105) of the Legge di Bilancio 2019 (2019 Budget Law), which deprives the independent administrative authority of its regulatory functions, or at least significantly limits them, by providing for the award of additional transmission capacity by means of a fee-based procedure, with that award being granted to the highest offer and with the participation of the incumbents?

2. Must EU law, and in particular Articles 8 and 9 of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), Articles 3, 5, 7 and 14 of 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), Articles 2 and 4 of Commission Directive 2002/77/EC of 16 September 2002 on competition in the markets for electronic communications networks and services, recitals 11 and 20 of Decision (EU) 2017/899 and the principles of fairness, non-discrimination, protection of competition and legitimate expectations, be interpreted as precluding a system such as that introduced by the relevant national legislation (Article 1(1030), (1031), (1031a), (1031b) and (1032) of Legge n. 205/2017 (Law No 205/2017)), as well as Decisions Nos 39/19/CONS, 128/19/CONS and 564/2020/CONS of the Autorità per le Garanzie nelle Comunicazioni (Regulatory Authority for Communications) and related measures for assigning rights of use of frequencies for the digital television service, which for the purpose of converting 'rights of use of frequencies' into 'rights of use of transmission capacity' does not require an equivalence-based conversion, but reserves part of that capacity for a fee-based award procedure, by imposing additional costs on the operator so it ensures it retains rights that have been lawfully acquired over time?

3. Must EU law and, in particular, Articles 8 and 9 of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), Articles 3, 5, 7 and 14 of 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), Articles 2 and 4 of Commission Directive 2002/77/EC of 16 September 2002 on competition in the markets for electronic communications networks and services, recitals 11 and 20 of Decision (EU) 2017/899, the principles of fairness, non-discrimination, protection of competition and legitimate expectations, as well as the principles of proportionality and appropriateness, be interpreted as precluding

a system of the kind introduced in the Italian Republic by Article 1(1101) to (1108) of the 2019 Budget Law, Article 1(1030), (1031), (1031a), (1031c), (1032), (1033), (1034) and (1037) of the 2018 Budget Law, by Decisions Nos 39/19/CONS (PNAF), 128/19/CONS and 129/19/CONS of the Regulatory Authority for Communications and related measures for assigning rights of use of frequencies for the digital television service, which does not adopt measures of a structural nature [and –] despite the existence of compensatory and/or non-structural rebalancing measures – in order to remedy the situation of inequality established previously provides for a fee-based procedure that imposes additional costs and charges on the operator; [moreover,] does [EU] law, having regard in particular to the principles of proportionality and appropriateness, as well as the principles laid down in the judgment in *Persidera*, preclude a system such as the one described, particularly in view of the overall evolution of the system and the ‘anomalies’, ‘weaknesses’ and ‘irregularities’ thereof, identified in the national and supranational case-law mentioned in the grounds of this order, or conversely are the non-structural measures adopted by the regulatory authority sufficient to rebalance the system?

Provisions of European Union law relied on

Articles 3, 5, 7 and 14 of 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).

Article 3(3) and (3a) and Articles 8 and 9 of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), as amended by Directive 2009/140/EC.

Articles 2 and 4 of Commission Directive 2002/77/EC of 16 September 2002 on competition in the markets for electronic communications networks and services.

Articles 5, 6, 8, 9 and 45 of Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (Recast).

Recitals 11 and 20 of Decision (EU) 2017/899 of the European Parliament and of the Council of 17 May 2017 on the use of the 470-790 MHz frequency band in the Union.

Among the many decisions of the Court cited, the following judgments are particularly relevant for a better understanding of the background to the present dispute: 31 January 2008, *Centro Europa 7* (C-380/05); 26 July 2017, *Europa Way and Persidera* (C-560/15); 26 July 2017, *Persidera*, (C-112/16).

Provisions of national law relied on

Several paragraphs of Article 1 of legge del 27 dicembre 2017, n. 205 (Law No 205 of 27 December 2017) (2018 Budget Law), as amended by legge del 30 dicembre 2018, n. 145 (Law No 145 of 30 December 2018), are central to the present case:

Paragraph 1030: ‘By 31 May 2018, the Regulatory Authority for Communications shall adopt the national plan for the allocation of frequencies for the digital terrestrial television service, considering the most advanced codification or standards to allow more efficient use of the radio spectrum and using the technical area criterion for local planning. By 31 January 2019, the Regulatory Authority for Communications shall update the national frequency allocation plan provided for in the preceding paragraph. To avoid radio interference with neighbouring countries, in each coordination area defined by the international agreements signed by the Ministero dello sviluppo economico (Ministry of Economic Development) and by the authorities of neighbouring States in implementation of Decision (EU) 2017/899 of 17 May 2017, referred to in paragraph 1026, only the frequencies assigned to Italy under those agreements shall be subject to planning. (...)’.

Paragraph 1031: ‘In line with the objectives of the European and national audiovisual policy for social cohesion, media pluralism and cultural diversity, and with a view to the most efficient management of the radio spectrum permitted by the use of the most advanced technologies, all frequencies assigned nationally and locally for the digital terrestrial television service and allocated in VHF band III and 470-694 MHz shall be released according to the schedule referred to in paragraph 1032. For the purposes referred to in the first paragraph, the rights of use of frequencies owned by national network operators as of the date of entry into force of this law shall be converted into rights of use of transmission capacity in new national DVB-T2 multiplexes, according to the criteria defined by the Regulatory Authority for Communications by 31 March 2019 for the purpose of allocating the rights of use of the frequencies. By 31 March 2019, the Regulatory Authority for Communications shall establish the criteria for the allocation at national level of the rights of use of the frequencies planned pursuant to paragraph 1030 for the digital terrestrial television service to national network operators, taking into account the need to limit any network transformation and implementation costs, reduce the transitional period referred to in paragraph 1032 and minimise the costs and impacts for end users. By 30 June 2019, the Ministry of Economic Development shall grant the rights of use of the frequencies referred to in the third paragraph to national network operators on the basis of the criteria defined by the authority referred to in that paragraph. The Regulatory Authority for Communications shall determine the economic terms and conditions, based on cost, according to which the concessionary of the public service in the multiplex containing regional information has the obligation to transfer a share of the assigned transmission capacity, and in any event at least one programme, during the transitional period, to each of the parties lawfully operating in the local area

and assigned the rights of use of channels CH 51 and 53 as of the date of entry into force of this law, who shall release their respective rights of use during the transitional period pursuant to paragraph 1032’.

Paragraph 1031a: ‘The additional transmission capacity available at national level and the terrestrial frequencies, in addition to those intended for the conversion of the rights of use referred to in paragraph 1031 and planned by the Regulatory Authority for Communications in the national frequency allocation plan, to be assigned to the digital terrestrial television service for national network operators and the concessionary of the public broadcasting and multimedia service, shall be allocated by means of a fee-based procedure without further calls for tender, held by the Ministry of Economic Development by 30 November 2019, implementing the procedures established by the Regulatory Authority for Communications by 30 September 2019 pursuant to Article 29 of the codice delle comunicazioni elettroniche (Italian Electronic Communications Code), as provided for in decreto legislativo 1° agosto 2003, n. 259 (Legislative Decree No 259 of 1 August 2003), on the basis of the following principles and criteria: (a) to allocate transmission capacity and frequencies on the basis of multiplexes equal in size to half of one multiplex; (b) to set a minimum bid value on the basis of the market values identified by the Communications Regulatory Authority; (c) to assess the value of the economic tenders submitted; (d) to ensure the continuity of the service, the speed of the technological transition and the quality of the technological infrastructure made available by the national network operators active in the sector, including the concessionary of the public broadcasting and multimedia service; (e) to leverage the experience of national network operators in the sector, with particular reference to the implementation of digital broadcasting networks; (f) to build structural capacity to ensure radio spectrum efficiency, professionalism and expertise in the sector, technological innovation and optimal, effective and timely use of transmission capacity and additional frequencies; (g) to make better use of the radio spectrum, taking into account the current broadcasting of high-quality content via digital terrestrial television to the vast majority of the Italian population. The Ministro dell’economia e delle finanze (Minister for Economic Affairs and Finance) shall be authorised to provide, by decree, for the transfer of revenues, paid into a specific revenue account in the State budget, to specific expenditure accounts in the draft budget of the Ministry of Economic Development, for measures aimed at encouraging the purchase of the television reception equipment referred to in paragraph 1039(c), in accordance with the principle of technological neutrality, and to encourage the experimentation of new television technology, according to operating arrangements and delivery procedures determined by decree of the Ministro dello sviluppo economico (Minister for Economic Development), jointly with the Minister for Economic Affairs and Finance’.

Paragraph 1031b: ‘The duration of the rights of use of the frequencies resulting from the conversion referred to in paragraph 1031 and those resulting from the allocation by means of the procedure referred to in paragraph 1031a shall be

established in accordance with the provisions of the Electronic Communications Code, referred to in Legislative Decree No 259 of 1 August 2003’.

Paragraph 1032: ‘By 30 June 2018, the national calendar shall be determined, following a public consultation, by decree of the Minister for Economic Development. The national calendar shall identify the milestones of the roadmap for the implementation of the objectives of Decision (EU) 2017/899 of 17 May 2017, referred to in paragraph 1026, taking into account the need to set a transitional period, from 1 January 2020 to 30 June 2022, to ensure the release of frequencies by all network operators holding the relevant rights of use at national and local level and the restructuring of the multiplex containing regional information by the concessionary of the public radio, television and multimedia service, in accordance with the following criteria: (a) the identification of the geographical areas in which the national territory is to be divided for the release of frequencies, partly to avoid or reduce radio interference with neighbouring countries using the 700 MHz frequency band for the mobile service with earlier deadlines than Italy; (b) the release, by the deadline referred to in subparagraph (f), by network operators holding local rights of use of all frequencies used as of the date of entry into force of this law and simultaneous activation of the frequencies intended by the national frequency allocation plan for local transmission; (c) the release, by the deadline referred to in subparagraph (f), by the concessionary of the public radio, television and multimedia service, of the frequencies used as of the date of entry into force of this law by the public service multiplex containing regional information and simultaneous activation of the frequencies intended by the national frequency allocation plan for the implementation of the new multiplex with segmentation by macro-area; (d) the release, by the deadline referred to in subparagraph (f), by national operators, of the frequencies in the 702-734 MHz frequency band corresponding to channels CH 50 to 53 and simultaneous activation of the available frequencies, to be identified taking into account the need to reduce disruption for users and ensure business continuity and the release, by the deadline referred to in subparagraph (f), by network operators holding local rights of use of the frequencies corresponding to channels CH 51 and 53 for successive geographical areas, as identified in subparagraph (a), at least during the transitional period from 1 January 2020 to 31 December 2021; (e) the release of the remaining frequencies and activation of the frequencies provided for in the national frequency allocation plan which are the subject of the remaining national rights of use; (f) the determination of the deadlines, at least during the transitional period from 1 January 2020 to 31 December 2021, for the sequence of releases and simultaneous activation of frequencies in accordance with the criteria for national operators holding the rights of use of channels CH 50 and 52 referred to in subparagraph (d), to be implemented for successive geographical areas as identified in subparagraph (a), for the sequence of releases of frequencies in accordance with the criteria for local operators holding the rights of use of channels CH 51 and 53 as referred to in subparagraph (d), to be implemented for successive geographical areas as identified in subparagraph (a), at least during the transitional period from 1 January 2020 to 31 December 2021, and the deadlines for the release of the

remaining frequencies and activation of the frequencies provided for by the national frequency allocation plan, which are the subject of the remaining rights of use referred to in subparagraphs (b), (c) and (e). By 15 April 2019, the Minister for Economic Development shall update the decree referred to in the previous paragraph’.

With regard to the four decisions of the Regulatory Authority for Communications (‘AGCOM’) referred to in the second and third questions referred for a preliminary ruling, their content essentially consists of a rewording, consistent with the detailed technical data, of the guidelines set by the national legislature in the abovementioned paragraphs of the 2018 Budget Law.

Succinct presentation of the facts and procedure in the main proceedings

- 1 This case is the latest chapter in an affair that began prior to 2000. The protagonists are operators that, like Persidera, have been unsuccessful in their attempts to set up a nationwide analogue television broadcasting service, unable to overcome the insurmountable obstacle that the Corte costituzionale (Constitutional Court, Italy) has described as the ‘de facto use of frequencies (use of facilities without grant of rights or authorisations issued), with no logical increase in pluralism in the distribution of frequencies and no proper planning in regard to matters concerning the airwaves. Moreover, said use has been, on several occasions [and] for long periods of time, justified after the fact and remedied by allowing individual private broadcasters to continue their activities’.
- 2 The Italian Constitutional Court has intervened several times in the matter, declaring unconstitutional a set of rules that prevented the effective implementation of the principle of information pluralism. On each occasion, the legislature was forced to amend the existing legislation, the distorting effects of which were temporarily prolonged each time without a definitive answer to the question being possible.
- 3 This anomalous situation continued even during the switchover from analogue to digital transmission, since when it lay down the rules for the switchover, the Italian legislature took as its starting point the very situation in which both the Italian Constitutional Court and the Court of Justice had found defects which had still not been fully resolved (see the three judgments of the Court of Justice cited above).
- 4 Therefore, in a situation that had still not been clearly defined, the 2018 Budget Law was passed which, among the many measures, sought, on the one hand, to allocate frequencies in the 700 MHz frequency band (694-790 MHz) to terrestrial systems capable of providing wireless broadband electronic communication services, and on the other hand, to provide the broadcasting system with a new structure on a digital terrestrial platform (national and local).

- 5 The national authorities adopted the relevant measures, giving AGCOM the power to adopt the new national frequency allocation plan and criteria for converting the rights of use of frequencies of the national network operators that already held them into rights of use of transmission capacity, ensuring the transition from national multiplexes based on DVB-T technology to new national multiplexes based on DVB-T2 technology. Under those provisions, the authority drew up the 2019 national frequency allocation plan (approved by AGCOM Decision No 39/19/CONS) for a total of 12 new national DVB-T2 frequencies. Configuration parameters were also set for the conversion/direct assignment of only 10 DVB-T2 multiplexes converting the 20 national DVB-T networks.
- 6 The referring court points out that the resulting national frequency allocation plan was drawn up with considerable difficulty when determining the conversion factor to be used to govern the transition from the previous transmission capacity held by the operators to the new transmission capacity: AGCOM, while trying to avoid excessive fragmentation of the market, was unable to decide on the conversion factor solely for technical reasons since, had it done so, it could not have made the frequency package (or ‘digital dividend’) available to the legislature to be allocated by means of a fee-based procedure, as specifically provided for in the 2018 Budget Law.

The essential arguments of the parties in the main proceedings

- 7 The referring court focuses exclusively on the complaints made by Persidera which, like other operators (such as Cairo Network in Case C-764/23, currently pending), criticises the technical aspects of the refarming procedure established by the national frequency allocation plan, highlighting the unlawfulness of the planning, for the digital terrestrial television service, of 10 national mux (in the UHF band) and 4 local mux (in the UHF band), and of a regionalised mux in the VHF band, resulting in a drastic 50% reduction in the current national mux (from 20 to 10), contrary to the principle of efficiency of the television spectrum. Persidera further submits that the technical assessment is incorrect.
- 8 The implementation of this legislation had led to Persidera being allocated spectral resources (2.5 DVB-T2 multiplexes) that were not considered equivalent to those it already managed (5 DVB-T multiplexes). According to Persidera, that allocation had resulted in a loss of transmission capacity and territorial coverage, causing material injury in economic and competitive terms. Persidera further submitted that the measures were unlawful in so far as they did not award it any compensation, only the possibility of obtaining an additional ½ DVB-T2 multiplex through participation in the fee-based selection procedure laid down in Article 1(1031a) of the 2018 Budget Law.

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

- 9 As to the **first question**, the Council of State uses the explanations specifically requested from AGCOM to justify the choices made by that authority regarding the criteria for converting the rights of use of the old frequencies into the corresponding rights for the new frequencies. Although those explanations confirm that the technical solutions that had to be adopted were extremely complex, they also reveal the decisive influence of the policy adopted by the legislature, in particular with Article 1(1031) and (1031a) of the 2018 Budget Law (cited above). The referring court has doubts as to whether the highly detailed content of those provisions has substantially respected AGCOM's fundamental prerogatives. As an NRA, AGCOM should always be, according to EU law (see, in particular, the Framework Directive and the European Electronic Communications Code cited above), completely autonomous and independent of the legislative, to be able to contribute to the effective implementation of that 'economic democracy' which is essential so that every operator can have the same opportunity to compete within a free market. The referring court is concerned that, because the applicable provisions themselves determine the size of the multiplexes to be allocated as well as the related procedural rules, AGCOM's discretion has been unlawfully curtailed.
- 10 As to the **second question**, the referring court points out that the political choices made by the legislature – in the form of the rules inserted in the 2018 Budget Law and subsequent amendments (see above; in particular, Article 1(1031a)), requiring AGCOM to reorganise the frequency allocation plan so that not all the previous grants made are converted, but a significant share are reserved for allocation by means of a 'fee-based procedure without further calls for tender' (the 'external dividend') – entailed, for an entity that already owned digital terrestrial frequencies, for the allocation of which that entity had already had to incur significant expenses in the past, the curtailment of the previous rights and the need to pay additional amounts simply to retain an equivalent transmission capacity to its existing capacity. In the opinion of the Council of State, this is neither consistent with the relevant EU legislation (in particular, the relevant provisions of the Framework Directive and the Authorisation Directive), nor with the principles of equal treatment, non-discrimination, protection of competition and legitimate expectations. When specifically questioned about the issue, AGCOM also disclosed to the referring court that 'the technical discretion exercised by [AGCOM, by means of the decisions referred to in the third question,] in identifying the conversion factor between [old and new digital] networks [was] inevitably influenced and constrained by the provisions of the 2018 Budget Law'.
- 11 As to the **third question**, the referring court refers first of all to the historical precedents set in the judgment in Case C-112/16, cited above, which involved Persidera itself. To address the imbalances identified on that occasion, AGCOM planned to allocate, by means of a fee-based selection procedure, four lots equivalent to four general rights of use of frequencies, each of a size equal to half a national DVB-T2 multiplex. The four lots were divided into three categories: P1

(one lot); P2 (one lot); P3 (two lots). AGCOM provided that Persidera could bid (unlike the incumbent broadcasters RAI and Mediaset) for lots P2 and P3 (but not for P1, reserved for new entrants and single-network operators), in order to make up for the competitive advantage gained unlawfully by RAI and Mediaset. However, according to Persidera, whose position appears to be shared by the referring court, that solution did nothing to address the abovementioned imbalances, contrary to the principles and rules of Union law on the matter, since: (i) it resulted in a partial conversion of the previous rights (as an external dividend), intended for the fee-based procedure (see second question); (ii) only the fee-based procedure was used as a rebalancing measure for the various positions by adopting asymmetric rules, which meant that Persidera could only make good the historical imbalance by incurring additional costs, without being compensated for what it had previously acquired.

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