Case C-765/23

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

Applicant:

Europa Way Srl

Defendants:

Autorità per le Garanzie nelle Comunicazioni

Presidenza del Consiglio dei ministri

Ministero dell'Economia e delle Finanze

Subject matter of the main proceedings

Appeal brought against a judgment of the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio, Italy), which dismissed an appeal brought by Europa Way against decisions relating to the 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 6 and 19 TEU; Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter'); Articles 3, 5, 7 and 14 of Directive 2002/20/EC; Articles 3, 4, 8 and 9 of Directive 2002/21/EC; Articles 2 and 4 of Directive 2002/77/EC;

Articles 5, 6, 8, 9, 31 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 Article 6 and the second part of Article 19(1) TEU, interpreted in the light of Article 47 of the Charter of Fundamental Rights of the European Union, the first subparagraph of Article 4(1) 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), and Article 31 of Directive (EU) 2018/1972, be interpreted as precluding national legislation, such as that laid down in Italian law (Article 1(1037) of Legge n. 205/2017 (Law No 205/2017)), which, in a situation of EU-wide relevance, limits the effects of actions for annulment, by preventing restitution or specific performance, and confines interim relief to the payment of a provisional amount, thereby undermining effective judicial protection?

2. 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?

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 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?

4. Does 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, preclude [a system] such as that introduced by the relevant national legislation (Article 1(1030), (1031), (1031a), (1031b) and (1032) of Law No 205/2017), as well as Decisions Nos 39/19/CONS, 128/19/CONS and 564/2020/CONS of the Regulatory Authority for Communications and related measures assigning rights of use of frequencies for the digital television service, which does not adopt measures of a structural nature in order to remedy the situation of inequality established previously, particularly in view of the irregularities previously found to exist in national and supranational case-law, and does not distinguish the position of an operator that has acquired a frequency following a fee-based competitive procedure with the right to retain that frequency or, conversely, are the aforementioned non-structural measures adopted by the sector's regulatory authority appropriate and proportionate?

Provisions of European Union law relied on

Article 6 and the second part of Article 19(1) TEU.

Article 47 of the Charter.

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), the first subparagraph of Article 4(1) 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, 31 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

Article 2058 of the codice civile (Italian Civil Code): 'The injured party may apply for compensation in a specific form, where possible in whole or in part. Nevertheless, the court may order the reparation to be made in kind, if compensation in a specific form is excessively onerous for the debtor'.

Article 30 of decreto legislativo del 2 luglio 2010, n. 104 (codice del processo amministrativo italiano) (Legislative Decree No 104 of 2 July 2010 (Italian Code of Administrative Procedure)): '1. The action for performance may be brought at the same time as another action, or separately in cases of exclusive jurisdiction and in the cases referred to in this article. 2. An award of damages may be sought for wrongful injury caused by the unlawful exercise of administrative activities or failure to exercise mandatory activities. In cases of exclusive jurisdiction, damages may also be sought for infringement of subjective rights. If the conditions provided for in Article 2058 of the Italian Civil Code are satisfied, a specific form of damages may be sought. 3. The application for damages for infringement of legitimate interests shall be made within a period of one hundred and twenty days from the date on which the event occurred or from when the measure that directly caused the loss became known. In assessing the compensation, the court shall take into account all the factual circumstances and the parties' behaviour as a whole. It shall exclude damages for any losses that could have been avoided by exercising normal diligence, including through recourse to the available remedies. 4. For compensation for any loss that the applicant can prove it has suffered as a result of failure to meet the deadline for the conclusion of the proceedings, whether intentional or unintentional, the time limit referred to in paragraph 3 may not commence until the non-compliance has ceased. In any event, the time limit referred to in paragraph 3 shall commence one year after the expiry of the time limit for compliance. 5. Where an action for annulment has been brought, the application for damages may be made during the proceedings or within one hundred and twenty days from the date on which the relevant judgment takes effect. 6. Any application for damages for infringement of

legitimate interests or, in matters of exclusive jurisdiction, of subjective rights shall fall within the exclusive jurisdiction of the administrative court'.

Those two articles are relevant to the first question, as they set out the general rules that Europa Way would like to see applied in its case.

Below are several paragraphs from Article 1 of legge del 27 dicembre 2017, n. 205 (legge di bilancio per il 2018) (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), which form the main subject of the questions referred for a preliminary ruling:

Paragraph 1030: 'By 31 May 2018, the Communications Regulatory Authority 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 Communications Regulatory Authority 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 Communications Regulatory Authority by 31 March 2019 for the purpose of allocating the rights of use of the frequencies. By 31 March 2019, the Communications Regulatory Authority 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 Communications

Regulatory Authority 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 Communications Regulatory Authority 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 Communications Regulatory Authority 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'.

Paragraph 1037: 'The allocation of rights of use of frequencies, the invitation to tender and the other procedures referred to in paragraphs 1026 to 1036, with particular reference to the procedures for releasing frequencies for the digital terrestrial television service, shall fall within the exclusive jurisdiction of the administrative court and the functional competence of the Regional Administrative Court of Lazio. Due to the major national interest in the prompt release and allocation of frequencies, the annulment of acts and measures adopted in the context of the procedures referred to in paragraphs 1026 to 1036 shall not entail compensation or enforcement in a specific form and any reparation due shall be made in kind. Interim relief shall be limited to the payment of a provisional amount'.

With regard to the three resolutions of the Communications Regulatory Authority ('AGCOM') referred to in the third and fourth 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 the owner of the current Europa Way network, 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 On 7 April 2009, AGCOM adopted a resolution (181/09/CONS) laying down the criteria for the complete digitalisation of terrestrial networks. That resolution provided, in particular, for the allocation of 21 national multiplexes, which enable various signals to be combined into a common flow of data and the transmission of several digital terrestrial television services simultaneously. For the purposes of their distribution between new operators, operators which had created digital networks and those which already operated analogue networks, the multiplexes were divided into three groups that were required to be allocated according to different criteria. It was, in addition, provided that, at the end of the selection procedure, no operator could obtain more than five national multiplexes. In particular, the available radio frequencies arising from the digital dividend (in other words, the resulting frequencies after the allocation of frequencies to all operators) were required to be allocated free of charge to operators who fulfilled the stipulated conditions at the end of a selection procedure organised according to the 'beauty contest' model (a call for tenders in which only companies with certain characteristics can participate; also referred to as the 'free of charge selection procedure'). The rules would also have guaranteed small operators the right to be allocated the necessary frequencies. Europa Way was invited to tender.

5 However, by order of 20 January 2012, the Ministry of Economic Development postponed the 'beauty contest' and replaced it with a fee-based selection procedure, which Europa Way did not take part in. Europa Way chose instead to appeal against the decision to annul the 'beauty contest' before the administrative court. The relevant measures were initially held to be unlawful (including in the abovementioned judgment of the Court of Justice in Case C-560/15) and the acts in question were annulled. However, AGCOM subsequently confirmed its choice of a fee-based selection procedure, a choice that the Consiglio di Stato (Council of State, Italy) considered justified since it was not 'the result of a heteronomous constraint [imposed by the legislature], but of the conviction that the financial interest, already expressed by the legislature, was an interest worthy of consideration'.

6 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) regarding the remaining frequencies available for the transmission service (174-230 MHz and 470-694 MHz). 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.

7 The plan drawn up in those circumstances thus raises several critical issues, which form the basis of the questions referred for a preliminary ruling in the present case. The new rules, by ignoring the irregularities already identified by the national and EU courts, do not seem to structurally address those anomalies; they do not reserve special attention for operators who have already acquired a frequency for consideration, expecting to be able to retain that frequency; they preclude free conversion procedures, but conversely impose a fee-based procedure and require the operator in question, vis-à-vis the rights already acquired, to bear additional costs; they appear to limit unduly the power of discretion of the authority in charge of managing the broadcasting system, which should instead operate with complete independence; lastly, they undermine, by an exemption, the compensatory effects of any actions for annulment.

The essential arguments of the parties in the main proceedings

8 Europa Way complains of several breaches of the relevant EU rules. Principally, the new Italian legislation curtails the independence of the national regulatory authority ('the NRA'), which is forced to accept without criticism the position of the Italian public administration; it equates the networks unlawfully owned by the former monopoly holders, still in a dominant position on the market ('the incumbents'), with those owned lawfully by other operators; lastly, it breaches the principle of continuity of supply, given that Europa Way, due to the criteria adopted for the digital switchover, had seen its frequency reduced by half, despite consistently providing the required analogue service.

9 The defendants disagree with all the complaints put forward and request that the appeal be declared inadmissible and unfounded.

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

10 As to the **first question**, the referring court has doubts as to whether the choice made by the legislature in Article 1(1037) of the 2018 Budget Law complies with the principle of effective legal protection, to which every EU citizen is entitled under Article 47 of the Charter. By precluding any type of compensation or

enforcement in a specific form as a means of redress potentially available to the operator concerned (contrary to that ordinarily provided for by the Italian Civil Code and Code of Administrative Procedure; see above), and by limiting that redress to monetary compensation, the legislature has designed a remedy which is incapable of compensating the economic operator for the damage caused by unlawful measures. The operator's objective is to be assigned the rights of use of radio frequencies, a situation requiring huge financial resources and complex corporate structures equipped to handle specific technology. The referring court has doubts as to whether the injury caused by the unlawful obstacles to reaping the benefits of such a commitment can be satisfied by a simple reparation in kind. Furthermore, the applicable legislation overlooks the fact that, apart from the operator's interest, those activities are in the general interest of the community, ensuring both social cohesion and the cultural advancement of society. According to the national court, it seems unreasonable to invoke the 'major national interest in the prompt release and allocation of frequencies' as the justification for that exemption, as the national rules at issue do.

11 As to the **second 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 the undisputed fact 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.

12 As to the **third 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' – 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 maintain 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 resolutions 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'.

13 As to the **fourth question**, the referring court describes the complex events, never fully clarified, that have influenced regulatory development in the market for television broadcasting frequencies in Italy in recent decades (for more information, see the three judgments cited above in Cases C-380/05, C-560/15 and C-112/16). The Italian Government, repeatedly reminded by both national and EU courts of its duty to regulate the market in accordance with objective, transparent and non-discriminatory criteria, has never really managed to correct all the anomalies resulting from previous political choices. Moreover, in the opinion of the referring court, it has been unable to take advantage of the opportunity afforded to that end by the need to reorganise the market in order to make the transition from old to new transmission technologies. In summary, the referring court submits that: under Article 1(1031a) of the 2018 Budget Law, and as a result of the choices made by AGCOM, the previous rights were partially converted to form a frequency package to be allocated by means of a fee-based procedure; an operator who had acquired the rights of use of the frequencies was also required to undergo a conversion/allocation procedure which in practice curtailed the rights previously obtained; only the fee-based procedure was used as a rebalancing measure for the various positions, with asymmetrical rules that required less established operators in the market to incur additional costs to reach the minimum level necessary to maintain the positions they had previously managed to acquire.