Case C-255/21

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:

21 April 2021

Referring Court:

Consiglio di Stato (Italy)

Date of the decision to refer:

25 March 2021

Appellant:

Reti Televisive Italiane SpA (RTI)

Respondent:

Autorità per le Garanzie nelle Comunicazioni – AGCOM

Subject matter of the main proceedings

Appeals brought before the Consiglio di Stato (Council of State, Italy) against three judgments of the Tribunale Amministrativo Regionale per il Lazio (Regional Administrative Court, Lazio, Italy) concerning three decisions of the Autorità per le Garanzie nelle Comunicazioni (the Italian Broadcasting Authority, 'AGCOM') imposing penalties on Reti Televisive Italiane SpA (RTI) for breach of the hourly limit on advertising broadcasting.

Subject matter and legal basis of the reference for a preliminary ruling

The compatibility of the Italian legislation prohibiting excessive advertising with Article 23 of Directive 2010/13/EU, including in the light of recital 43 of Directive 2018/1808/EU and the wording of Article 23 of Directive 2010/13/EU resulting from amendment by Directive 2018/1808, and also the interpretation of those provisions of antitrust law.

Questions referred for a preliminary ruling

(a) For the purposes of the Community rules prohibiting excessive advertising, and

given the general relevance under [EU] law of the concept of the group or single economic entity, which may be gleaned from numerous sources of anti-trust law (and, in so far as is relevant here, from recital 43 of Directive 2018/1808/EU and from the new wording of Article 23 of Directive 2010/13/[EU]),

and notwithstanding the differences which exist under Italian domestic law between the licences [provided for by] Article 5(1)(b) of Legislative Decree No 177/[2005] for television broadcasters and radio broadcasters,

is it consistent with Community law to interpret national law on broadcasting in the sense that Article 1(1)(a) of Legislative Decree No 177/[2005], as amended, in the current wording of 30 March 2010 (implementing Directive 2007/65/EC), implies that the process of convergence of the various forms of communication (electronic communications, publishing, including electronic publishing, and the Internet, in all its applications) is all the more applicable among suppliers of television and radio media, especially when they are already integrated into a connected group of undertakings, and applies generally, with the resulting consequences for the interpretation of Article 38(6) of the abovementioned [legislative decree], such that the 'broadcaster' may also be the group, as a single economic entity, or

on the contrary, in accordance with the abovementioned Community principles and given the independence of the matter of the prohibition on excessive advertising from general anti-trust law, is it not permissible to ascribe relevance, prior to 2018, to the group or to the abovementioned process of convergence and so-called cross-mediality, such that, for the purposes of calculating the limits on advertising broadcasting time, regard is to be had solely to the individual broadcaster, even if it is part of a group (for the reason that such relevance is mentioned only in the consolidated wording of Article 23 of Directive 2010/13/[EU] resulting from Directive 2018/1808/EU)?

(b) In the light of the abovementioned principles of EU law concerning groups and undertakings as a single economic unity,

for the purposes of the prohibition on excessive advertising and the supervening versions of Article 23 [of Directive 2010/13/EU], and

notwithstanding the abovementioned differences between **[OR.20]** licences, may it be inferred from the anti-competitive rules of the [integrated communications system] referred to in Article 43 of Legislative Decree No 177/[2005], that the concept of a group 'media service provider' (or, to use the appellant's words, a 'group publishing undertaking') is relevant for the purposes of the exemption of intra-group cross-medial promotional announcements from the limits on

advertising broadcasting time mentioned in Article 38(6) of Legislative Decree [No 177/2005], or

on the contrary, must such relevance be excluded, prior to 2018, given the independence of television anti-trust law from the rules governing the limits on advertising broadcasting time?

(c) Does the new wording of Article 23(2)(a) of Directive 2010/13/EU recognise a pre-existing principle of antitrust law according to which the group is generally relevant, or is it innovative, and so,

if it is the former, does the new wording describe a legal reality already inherent in EU law — such as will apply even to the case under consideration, which pre-dates the new wording, and such as to affect the interpretations adopted by the [national regulatory authority] and require it in any event to acknowledge the concept of group 'media service provider' — or

if it is the latter, does the new wording preclude recognition of the relevance of the corporate group in cases arising prior to the introduction of that wording, for the reason that, being innovative in scope, it is inapplicable *ratione temporis* to situations arising prior to its introduction?

(d) In any event, and leaving aside the licensing scheme established by Article 5 of Legislative Decree No 177/2005 and the novelty of [the version of] Article 23 [of Directive 2010/13/EU] introduced in 2018, or

in the event that, according to the answer to question (c), the new provision is innovative, rather than recognitive,

are the integrating relationships between television and radio – considered generally under antitrust law – because of the general and transversal applicability of the concepts of economic entity and of group, the key to interpreting the limits on advertising broadcasting time, which thus apply with implicit regard to the group undertaking (or, more precisely, to the relationships of control which exist between the undertakings of the group) and to the functional unity of such undertakings, with the result that the intragroup promotion of television and radio programmes [...][*], or

on the contrary, are such integrating relationships irrelevant in the matter of the limits on advertising broadcasting time, **[OR.21]** such that it must be held that the 'own' programmes referred to in (the original version of) Article 23 [of Directive 2010/13/EU] are [the broadcaster's own] in the sense that they belong solely to the broadcaster which promotes them, rather than to the corporate group as a whole, for the reason that that provision is self-sanding and does not permit of a

[*] Translator's note: the source text appears incomplete at this point.

systemic interpretation such that it might apply to the group considered as a single economic entity?

(e) Lastly, even if it cannot be interpreted as a rule to be construed against the background of antitrust law, is Article 23 [of Directive 2010/13/EU], in its original version, to be understood in any case as an incentivising provision which describes the peculiar characteristic of promotion, which is exclusively informative and is not intended to persuade anyone to purchase goods or services other than the programmes promoted and, as such, is it to be understood as falling outside the scope of the rules on excessive advertising, and therefore applicable, within the limits of undertakings belonging to the same group, at least in the case of integrated cross-medial promotion, or

is it to be understood as a derogation from, and an exception to, the calculation of [the limits on] advertising broadcasting and, as such, as a rule to be interpreted strictly?

Provisions of EU law relied on

Article 23 of Directive 2010/13/EU, both in its original version and in the version resulting from amendment by Directive 2018/1808/EU.

Recital 43 of Directive 2018/1808/EU.

Provisions of national law relied on

Decreto legislativo del 31 luglio 2005, n. 177 – Testo unico dei servizi di media audiovisivi e radiofonici (Legislative Decree No 177 of 31 July 2005 consolidating the provisions on audiovisual and radio media services, 'Legislative Decree No 177/2005'). In particular:

Article 5, which lists the principles with which the system of audiovisual and radio media services must comply, those being (a) the protection of competition within the system of audiovisual and radio media services and mass media and within the market for advertising; the protection of pluralism in the radio and television broadcasting media and the prohibition on establishing or maintaining positions detrimental to such pluralism; (b) the provision of various licences for carrying on the activities of network operator or broadcaster or provider of on-demand audiovisual media services or digital radio broadcaster or provider of interactive services associated with the provision of an authorisation scheme.

Article 38(2), which provides that the transmission of television advertising spots by free-to-air broadcasters, including analogue broadcasters, at national level, other than the holder of the general public radio and television broadcasting service concession, may not exceed 15% of daily programming time and 18% of a

given clock hour, and that any advertising in excess thereof, by a maximum of 2% in any hour, must be offset by a reduction in the preceding or following hour.

Article 38(6), which provides that Article 38(2) does not apply to announcements made by broadcasters, including analogue broadcasters, in connection with their own programmes and ancillary products directly derived from those programmes, or to sponsorship announcements or to product placements.

Article 52, which lays down the penalties for breach of Article 38.

Succinct presentation of the facts and the procedure

1 By three separate decisions, each having similar content, notified on 28 September 2017, the AGCOM imposed penalties on the appellant, RTI, for breach of the hourly limits on advertising broadcasting laid down in Article 38(2) of Legislative Decree No 177/2005. Those three decisions related respectively to the three broadcasters 'Canale 5', 'Italia 1' and 'Rete 4' owned by RTI.

2 In its calculations relating to those limits on advertising broadcasting, the AGCOM included among the advertising spots also the announcements broadcast by the three above-mentioned broadcasters for the promotion of the radio station R101, which is owned by the company Monradio S.r.l., which is in turn controlled by RTI, as to 80% of its capital, and by A. Mondadori Editore S.p.A., as to the remaining 20%. The two latter companies belong to the same corporate group.

3 RTI brought three separate actions, identical in content, against the three above-mentioned decisions before the Tribunale Amministrativo Regionale per il Lazio (Lazio Regional Administrative Court), which however dismissed them. RTI therefore brought an appeal before the referring court.

The essential arguments of the parties in the main proceedings

4 According to the appellant, the announcements broadcast by its three broadcasters related solely to the presentation of R101 programmes and they should, therefore, have been classified as self-promotional announcements not to be counted for the purposes of the hourly limits on advertising broadcasting laid down in Article 38(6) of Legislative Decree No 177/2005.

5 The appellant emphasises that the fact that R101 was owned by a different company, rather than by itself, is irrelevant, since both of them belonged to the same corporate group. The decisive factor is the economic unity of the group publishing undertaking, and not the plurality of the corporate legal entities. The phenomenon whereby multimedia (TV, radio, internet) publishing undertakings are operated, including in the form of a corporate group, is an obvious consequence of digitalisation and 'group' self-promotion is a widespread practice in radio and television markets.

6 The AGCOM, while acknowledging the absence of the subjective element of liability on RTI's part, put RTI on notice to cease the alleged infringements, arguing, in particular, that (i) Legislative Decree No 177/2005 governs the radio broadcaster differently from the television broadcaster, including by means of separate licences, and that, in this instance, the two are owned by different entities, such that the entity having editorial responsibility for the self-promotional content is not the same as the entity responsible for broadcasting the related announcement; (ii) Article 38(6) of Legislative Decree No 177/2005 relates solely to television broadcasters, as is apparent from Article 2 of the consolidated provisions, which draws a distinction between television broadcasters and radio broadcasters and relates self-promotion exclusively to announcements made by the broadcaster in connection with its own programmes; (iii) Article 2(2)(b) of Legislative Decree No 177/2005 excludes from the concept of 'audiovisual media service provider' entities which, as in this instance, merely transmit programmes for which editorial responsibility lies with third parties; (iv) in those instances where the national legislature intended to attribute importance to the phenomenon of the corporate group, it did so by way of express provision, which is not the case for the situation under consideration.

7 Before the Lazio Regional Administrative Court, RTI argued that the principle of '*in dubio pro libertate*', enshrined by the Court of Justice of the European Union, must apply both to the provision of EU law (Article 23 of Directive 2010/13/EU) and to the provision of national law (Article 38 of Legislative Decree No 177/2005) and that, whenever the provision of national law lays down more restrictive rules, which circumscribe the freedom to provide television broadcasting services, they must be interpreted in the more favourable manner. Self-promotional announcements for the benefit of the radio station R101 should not, therefore, be counted for the purposes of the limits on advertising broadcasting.

8 RTI added that the approach taken by the AGCOM – which is based on the fact that the owner of the television channels, RTI, and the owner of the radio station, Monradio, are different companies, despite the link between them arising from the controlling interests – which precludes the announcements from being classified as self-promotional, is contrary to the systemic approach taken in Article 1(2) of Legislative Decree No 177/2005, which aims to govern all supplies of content to the public uniformly, regardless of the means employed or methods used. Indeed, according to RTI, the practice of 'cross-media' self-promotion among television, radio and Internet services is now widespread, irrespective of the plurality of licences.

9 Lastly, RTI asserted that its radio and television programming, and that of its subsidiaries, is the result of integrated and coordinated decision-making and that it and its subsidiaries constitute a single group publishing undertaking that is responsible for both the self-promotional announcements and the programmes to which those announcements relate, irrespective of the plurality of legal entities involved.

10 In dismissing the three actions, the Lazio Regional Administrative Court held that, since Article 38(2) and (5) of Legislative Decree No 177/2005 establishes for television broadcasters maximum time limits on the broadcasting of their own advertising, the concept of 'broadcaster' used in Article 38(6), with reference to self-promotion, solely concerns broadcasters promoting their own programmes. That rule is therefore a derogation from, and an exception to, the rule against excessive advertising, as is indicated by the adjective 'own', which refers to the programmes of a television broadcaster (and not of any radio broadcaster, even if it belongs to the same corporate group).

11 The Lazio Regional Administrative Court also stated that Article 23(2) of Directive 2010/13/EU, in the version then in force, provided for an exemption from the hourly limits on advertising broadcasting for television broadcasters, but only with regard to 'announcements made by the broadcaster in connection with its own programmes and ancillary products directly derived from those programmes, sponsorship announcements and product placements'. Consequently, where the directive refers to a 'broadcaster', it means to refer exclusively to 'a media service provider of television broadcasts' (Article 1(1)(f)) and when it refers to the concept of a 'programme', it refers to 'a set of moving images with or without sound … the form and content of which are comparable to the form and content of television broadcasting'. Thus, neither the EU rules nor the national rules on the matter ever refer to radio broadcasters.

12 Lastly, the Lazio Regional Administrative Court stated that the fact that the broadcaster of the announcement and the entity responsible for the programme advertised (the radio station) are different precludes the application of Article 38(6) of Legislative Decree No 177/2005. The fact that the company which owns a television broadcaster carries out management or coordination activities with regard to the owner of a radio station does not, in fact, confer the status of editor on the company owning a television broadcaster, which cannot, therefore, assume editorial responsibility for the latter's programmes. In any event, in the present case, RTI had failed to demonstrate that it had power to intervene effectively in the economic decisions of the subsidiary Monradio or, therefore, that there was a single decision-making centre for the activities of the two broadcasters.

13 The appellant disputes the narrow approach which the Lazio Regional Administrative Court took to the concept of self-promotion, arguing that that approach renders meaningless the exclusion of self-promotional announcements from the calculation of the limits. Self-promotional advertising means that particular form of advertising whereby a broadcaster promotes its own products, services, programmes or channels. At present, that type of advertising is even better defined, in that the limit on advertising time relates solely to the specific categories of 'television advertising spots' and 'teleshopping spots': self-promotional announcements for programmes are thus different from product advertising spots and take up slots in the schedule which are not offered on the market to advertisers but are instead used directly by the broadcaster.

14 In addition, according to the appellant, the stance that self-promotion may relate only to programmes which a broadcaster itself broadcasts is inconsistent with the systemic approach taken by the European Union legislature and in Legislative Decree No 177/2005, which is not platform-specific and does not preclude the same corporate group from being the producer of both television channels and national analogue radio stations or, therefore, cross-media self-promotion.

15 Next, the appellant submits that Article 38 of Legislative Decree No 177/2005, which transposes Article 23 of Directive 2010/13, must be interpreted in accordance with EU law and in the light of the guidance offered by the Court of Justice (in its judgments of 28 October 1999, *ARD*, C-6/98, EU:C:1999:532, paragraphs 29 to 31, and of 24 November 2011, *Commission* v *Spain*, C-281/09, EU:C:2011:767).

16 The appellant adds that integrating relationships between television and radio are governed with regard to the group undertaking, and not the formal structuring of the group as a number of companies. Consequently, the AGCOM is mistaken to regard as irrelevant the unitary nature of the group publishing undertaking: since the domain of administrative offences is governed by the principles of complete and precise definition and of strict legality, and since there is in the present case an absence of any express provision of law, it is not possible to infer any offence of cross-media self-promotion from the legislature's silence on the subject. For that it would be necessary for there to be an express provision derogating from the general relevance which Legislative Decree No 177/2005 accords to the group undertaking.

17 Lastly, the appellant refers to recital 43 of Directive 2018/1808 and to the amendment which that directive made to [Article 23 of Directive 2010/13, which resulted in a new] Article 23(2)(a), even though the facts of the case pre-date that amendment. In accordance with Article 23(2)(a), the limits on advertising time do not apply to 'announcements made by the broadcaster in connection with its own programmes and ancillary products directly derived from those programmes or with programmes and audiovisual media services from other entities belonging to the same broadcasting group'. In its view, those provisions should serve as an aid to construction of the national law, including that previously in force, pursuant to the principle that national law must be interpreted in conformity with EU law.

18 In short, the appellant maintains that the AGCOM interprets the concept of self-promotion of programmes in an unlawful manner inconsistent with EU law, in that it fails to acknowledge the relevance of the group publishing undertaking and, therefore, the possibility of exempting cross-media announcements from the limits on advertising time.

Succinct presentation of the grounds for the reference for a preliminary ruling

19 The referring court states, first of all, that the subject of the dispute is not whether the parent company has power to intervene effectively in the economic decisions of the subsidiary, but whether it is lawful for the parent audiovisual broadcasting company to promote the programmes of the subsidiary radio broadcaster.

20 It also states that the systemic, yet cross-media approach propounded by the appellant might go against the intention of the national legislature when implementing Directive 2010/13, or might even create anti-competitive issues, to the detriment of purely radio broadcasters. The referring court cites, in that connection, a decision of the AGCOM according to which concentrations of television and radio broadcasters is liable to lead to the foreclosure of competitors in the market for advertising on the radio at national level.

21 According to the referring court, the interpretation adopted by the AGCOM and by the Lazio Regional Administrative Court does not appear to be unreasonable, inasmuch as it is based strictly on the provisions of Legislative Decree No 177/2005, which transposes Directive 2010/13, and takes account of the anti-competitive effects that could arise from the appellant's interpretation, in so far as concerns radio broadcasters that are not integrated with television broadcasters or audiovisual media.

22 Having regard to the foregoing, the referring court considers it necessary to make a reference to the Court of Justice for a preliminary ruling.