Case C-719/18

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:

15 November 2018

Referring court:

Tribunale Amministrativo Regionale per il Lazio (Italy)

Date of the decision to refer:

26 September 2018

Applicant:

Vivendi SA

Defendant:

Autorità per le Garanzie nelle Comunicazioni

Subject matter of the main proceedings

Action for annulment of a decision by the Autorità per le Garanzie nelle Comunicazioni (Communications Regulatory Authority) ('the Authority') stating that, as a result of certain transactions, the position acquired by a company operating in the electronic communications sector is in breach of Article 43(11) of Legislative Decree No 177 of 31 July 2005 consolidating the provisions on broadcasting and audiovisual media services ('the contested decision').

Subject matter and legal basis of the reference

The reference for a preliminary ruling, submitted pursuant to Article 267 TFEU, concerns the possible incompatibility with EU law, in particular with the principles of free movement of capital and freedom to provide services, of the Italian legislation on safeguarding competition and pluralism in broadcasting and audiovisual media services.

Questions referred

- While Member States have the ability to investigate when undertakings have a dominant position (and to impose specific obligations on those undertakings as a result), is Article 43(11) of Legislative Decree No 177 of 31 July 2005, in the version in force on the date of adoption of the contested decision, according to which 'undertakings, including through subsidiaries or affiliates, whose revenues in the electronic communications sector, as defined by Article 18 of Legislative Decree No 259 of 1 August 2003, exceed 40 per cent of the total revenues in that sector, may not earn, within the Integrated Communications System, revenues exceeding 10 per cent of that system' incompatible with EU law and, in particular, with the principle of free movement of capital laid down in Article 63 TFEU?; is Article 43(11) of Legislative Decree No 177 of 31 July 2005 incompatible with EU law and, in particular, with the principle of free movement of capital laid down in Article 63 TFEU, in so far as — through reference to Article 18 of the Codice delle comunicazioni elettroniche (Electronic Communications Code), it restricts the sector in question to the markets susceptible to ex ante regulation, regardless of what commonly happens, which is that information (the pluralism of which the rule is designed to protect) is increasingly conveyed by the use of the Internet, personal computers and mobile telephony, which is sufficient to make it unreasonable to exclude from that sector, in particular, retail mobile telephony services, simply because they operate completely competitively; is Article 43(11) of Legislative Decree No 177 of 31 July 2005 incompatible with EU law and, in particular, with the principle of free movement of capital laid down in Article 63 TFEU, taking into account the fact that the Authority has defined the boundaries of the electronic communications sector, for the purposes of applying Article 43(11) [of Legislative Decree No 177/2005] in the course of the present proceedings, by taking into consideration only the markets where at least one analysis has been carried out since the entry into force of the Electronic Communications Code, that is, from 2003 to date, and with revenues resulting from the last useful assessment, carried out in 2015?

- Do the principles of freedom of establishment and freedom to provide services laid down in Articles 49 and 56 of the Treaty on the Functioning of the European Union (TFEU) [and] Articles 15 and 16 of Directive 2002/21/EC [on a common regulatory framework for electronic communications networks and services] to safeguard pluralism and freedom of expression, together with the EU law principle of proportionality, preclude the application of national legislation concerning public broadcasting and audiovisual media services, such as that of Italy, contained in Article 43(11) and (14) [of Legislative Decree No 177/2005], according to which the revenues relevant for determining the second threshold of 10% can also be applied to undertakings that are not subsidiaries or under a dominant influence, but are even merely 'affiliates' within the meaning of Article 2359 of the Codice Civile (Civil Code) (referred to in Article 43(14) [of Legislative Decree No 177/2005]), even if it is not possible to exert any influence on the information being broadcast by those undertakings?

- Do the principles of freedom of establishment and freedom to provide services laid down in Articles 49 and 56 of the Treaty on the Functioning of the European Union (TFEU) [and] Articles 15 and 16 of Directive 2002/21/EC, together with the principles on safeguarding pluralism of information sources and competition in the broadcasting sector laid down in Directive 2010/13/EU concerning audiovisual media services and in Directive 2002/21/EC, preclude national legislation such as Legislative Decree No 177/2005 which in Article 43(9) and (11) thereof sets very different thresholds (20% and 10% respectively) for 'persons required to be entered in the Register of Communications Operators established under Article 1(6)(a)(5) of Law No 249 of 31 July 1997' (that is, persons who have received a concession or authorisation under the legislation in force, from the Authority or from other competent administrative authorities, and concessionaires of advertising, however transmitted, publishers, and so on, referred to in Article 43(9)) and for undertakings operating in the electronic communications sector, as defined above (covered by Article 43(11))?

Provisions of EU law relied on

In the order for reference, reference is made to the principles of free movement of capital, freedom of establishment and freedom to provide services laid down in Articles 63, 49 and 56 of the Treaty on the Functioning of the European Union.

In that order, reference is also made to the four directives on electronic communications adopted by the European Parliament and the Council on 7 March 2002, namely:

– Directive 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive) (OJ 2002 L 108, p. 7).

– Directive 2002/20/EC on the authorisation of electronic communications networks and services (Authorisation Directive) (OJ 2002 L 108, p. 21).

– Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive) (OJ 2002 L 108, p. 51).

– Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services (Framework Directive) (OJ 2002 L 108, p. 33). In particular, Article 15, relating to the 'Procedure for the identification and definition of markets', and Article 16, concerning the 'Market analysis procedure', are relevant here.

Reference is also made to 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).

Provisions of national law relied on

In the order for reference, reference is made, first, to the principles that safeguard, at a constitutional level, pluralism in the mass media. In this respect, the reference point is Article 21 of the Italian Constitution, which enshrines the principle of freedom of thought as expressed through 'speech, writing and any other form of communication'. On the basis of that standard, the case-law of the Corte costituzionale (Constitutional Court) has formulated the principle of pluralism, distinguishing between 'internal' pluralism, understood as the opening of the information media to various political and cultural trends, and 'external' pluralism, which does not relate to the content of the messages sent, but is intended to avoid a single undertaking being able to restrict the activities of other operators through the acquisition of a dominant position.

Legislative Decree No 177 of 31 July 2005 consolidating the provisions on broadcasting and audiovisual media services contains various rules designed to combat dominant positions. In particular, Article 43 of that legislative decree, entitled 'Dominant positions within the Integrated Communications System', contains a series of restrictions addressed to persons operating in the broadcasting and audiovisual media market and, at the same time, confers on the competent Authority significant powers to oversee compliance with those restrictions. That article refers to concepts directly taken from the rules on safeguarding competition, with the major difference being that while the latter seeks to sanction the abuse of a dominant position in a given market, the consolidated provisions on broadcasting and audiovisual media services prohibit the acquisition of any dominant position where it is considered likely, in itself, to undermine the pluralism of information.

The verification of the existence of dominant positions does not occur within markets already defined by law, but is linked to the analysis of the Sistema Integrato delle Comunicazioni (Integrated Communications System) [('the SIC')], that is to say, of the economic sector which — pursuant to Article 2(1)(s) of the consolidated provisions referred to above — 'includes the following: daily newspapers and periodicals; annual and electronic publications, including via the Internet; radio and audiovisual media services; cinema; external advertising; communication initiatives for goods and services; sponsorship'.

The Authority's monitoring activity is regulated by Article 43(2) of the consolidated provisions. Pursuant to that provision, the Authority must first identify the individual market making up [the SIC], 'in accordance with the principles laid down in Articles 15 and 16 of Directive 2002/21/EC'. Once that market has been identified, the Authority verifies the existence of a dominant

position, or a position which is otherwise detrimental to pluralism, 'taking into consideration, inter alia, in addition to revenues, the level of competition within the system, the barriers to entering that system, the undertaking's economic efficiency level, and the quantitative indicators regarding the broadcasting of radio and television programmes, publications, and cinematographic and phonographic works'.

Article 43(9) [of Legislative Decree No 177/2005] provides that 'without prejudice to the ban on creating dominant positions within the individual markets that make up the Integrated Communications System, persons required to be entered in the Register of Communications Operators established under Article 1(6)(a)(5) of Law No 249 of 31 July 1997 may neither directly, nor through subsidiaries or affiliates within the meaning of paragraphs 14 and 15, earn revenues exceeding 20 per cent of the total revenues of the Integrated Communications System'.

Article 43(11) [of that legislative decree], the interpretation of which is at the core of the present dispute, provides that 'undertakings, including through subsidiaries or affiliates, whose revenues in the electronic communications sector as defined by Article 18 of Legislative Decree No 259 of 1 August 2003 exceed 40 per cent of the total revenues in that sector, may not earn, within the Integrated Communications System, revenues exceeding 10 per cent of that system'.

Article 18 of Legislative Decree No 259 of 1 August 2003 laying down the Electronic Communications Code provides that 'the Authority ... shall define the relevant markets in accordance with the principles of competition law and based on the characteristics and structure of the national electronic communications market'.

In order to verify the existence of dominant positions, the concepts of subsidiaries and affiliates are important. In that regard, reference is made to Article 2359 of the Civil Code, according to which 'the following shall be regarded as subsidiaries ... companies which are under the dominant influence of another company', while 'companies over which another company exercises significant influence shall be regarded as affiliates. Such influence shall be presumed where, in ordinary shareholders' meetings, that other company is able to exercise at least one fifth of the votes, or one tenth if the company shares are listed on the stock exchange'.

Lastly, some cases of corporate control are identified in Article 43(13), (14) and (15) [of Legislative Decree No 177/2005] in order to verify in-depth and not just formalistically the person actually responsible for companies involved in concentrations and agreements, and to allow an investigation into dominant positions in relation to the entire corporate group.

Succinct presentation of the facts and the procedure in the main proceedings

1 Vivendi SA ('the applicant') is a company governed by French law, entered in the Registre du Commerce et des Sociétés à Paris (Paris Trade and Companies Register) and listed on Euronext Paris and the head of an industrial group active in the media sector and in the creation and distribution of audiovisual content.

2 That company, following certain market transactions, came to hold 23.94% of the share capital in Telecom Italia SpA ('Telecom') and 28.8% of the share capital in Mediaset SpA ('Mediaset'), together with 29.9% of the voting rights in the latter company.

3 On 20 December 2016 Mediaset informed the Autorità per le Garanzie nelle Comunicazioni ('AGCom') of the infringement by the applicant of Article 43(11) of Legislative Decree No 177 of 31 July 2005 consolidating the provisions on broadcasting and audiovisual media services (Testo Unico dei servizi di media audiovisivi e radiofonici) ('TUSMAR') in so far as the share capital held by the latter in the companies Telecom and Mediaset had exceeded the limits set by that provision.

4 By Decision No 178/17/CONS of 18 April 2017, AGCom stated that the applicant, due to the aforementioned shareholdings, was in breach of Article 43(11) TUSMAR, ordering that party to remedy the infringement within 12 months.

5 The applicant complied with AGCom's provisions and requested certain information from that authority that was, however, not provided. In particular, the applicant was denied access to the names of the other operators taken into consideration by AGCom in calculating the size of the electronic communications sector and [the SIC] and was unable to gain access to information regarding the revenues of individual operators in so far as, according to AGCom, such information constitutes a 'secret pertaining to undertakings' commercial strategies'.

6 The applicant brought an action before the Tribunale Amministrativo Regionale per il Lazio (Regional Administrative Court, Lazio) ('the referring court') seeking annulment of the decision referred to above.

Essential arguments of the parties in the main proceedings

Arguments of the applicant

7 The applicant complains, first, that its rights of the defence have been infringed by AGCom, which did not consult that party before adopting the decision in question and had not previously made available information relating to the size of the electronic communications sector, the operators forming part of the SIC and their respective revenues.

8 The applicant also submits that AGCom wrongly applied to the present case the concept of corporate affiliation referred to in the third paragraph of Article 2359 of the Civil Code, under which ‘companies over which another company exercises significant influence shall be regarded as affiliates’. According to the applicant, in order to assess whether there was infringement of Article 43(11) TUSMAR, AGCom should have taken into consideration only the requirements laid down in Article 43(14) and (15) thereof, to be considered as independent of those laid down in the provision of the Civil Code cited above. The applicant also notes that it was considered in the contested decision that the applicant obtained revenues in the SIC exceeding the quota of 10% — in breach of Article 43(11) TUSMAR — due to an alleged affiliation with the company Mediaset, which, however, is not active in the SIC, while the applicant exercises no influence over other active companies within the same group.

9 The applicant maintains that the contested decision defined the electronic communications sector far too restrictively, on the basis of an incorrect interpretation of the reference — contained in Article 43(11) TUSMAR — to Article 18 of Legislative Decree No 259 of 1 August 2003 laying down the Electronic Communications Code. According to the interpretation adopted by AGCom, the electronic communications sector would not include all the markets that are a part of it in reality, but only those which have been the subject, in the past, of a decision to analyse the market in order to verify the presence of a dominant operator. The restrictive definition of the electronic communications sector, resulting from an incorrect interpretation of the combined provisions of Article 43(11) TUSMAR and Article 18 of the Electronic Communications Code, led to the exclusion of certain important markets, such as the mobile telephony services market, thereby distorting the quantification of the revenues that were attributed to the applicant. According to that party, AGCom has confused the concept of ‘electronic communications sector’ with that of ‘relevant markets’. The reference to Article 18 of the Electronic Communications Code should be interpreted as meaning that since the ‘relevant markets’ fall within the broader sector of ‘electronic communications’, they must be defined on the basis of that article, meaning that AGCom should have taken into account all the markets falling within the electronic communications sector.

10 The applicant also submits that the interpretation of Article 43(11) TUSMAR adopted by the contested decision infringes the principle of the free movement of capital as enshrined in Article 63 TFEU. According to the applicant, AGCom used the powers conferred on it by Article 43(11) TUSMAR to achieve a purpose other than that provided by law, namely blocking the acquisition of a minority shareholding in an Italian company — Mediaset — by an operator in another Member State.

11 Furthermore, the interpretation of Article 43(11) TUSMAR used in the contested decision would lead to an infringement of the principle of freedom to provide services as enshrined in Article 56 TFEU, given that an undertaking holding minority shares in companies active in the electronic communications sector and

in the SIC would have revenue from those companies, in which it is merely a shareholder, ascribed to it, encountering restrictions that are, accordingly, neither appropriate nor proportionate. The applicant also complains that there is unequal treatment of operators holding a share of more than 40% of the electronic communications sector (which would be prevented from earning revenues exceeding 10% of the SIC) and other operators (those required to be entered in the Register of Communications Operators established under Article 1(6)(a)(5) of Law No 249 of 31 July 1997), subject to the limit of 20% of SIC revenues under Article 43(9) [of Legislative Decree No 177/2005].

Arguments of the defendants

12 In response to the pleas in law put forward by the applicant, the defendants, namely Mediaset and AGCom, put forward similar arguments in their defence. First, as regards the alleged infringement of the applicant's rights of the defence, both the parties referred to above assert that the contested decision was issued at the end of a procedure in which AGCom had almost no discretion, given the binding nature of the provisions to be applied.

13 Regarding the applicability to Article 43 TUSMAR of the concept of corporate affiliation referred to in Article 2359 of the Civil Code, they emphasise the express reference made to that latter provision in Article 43(12) and (14) [of Legislative Decree No 177/2005], and the clear intention of the national legislature to lay down, in addition to the rules laid down by the Civil Code, further cases of corporate control. Thus, it is clear from the wording of Article 43 TUSMAR that, in all cases where there is a relationship of control or of affiliation, the revenues from the subsidiary or affiliate are traced back, by way of a legal fiction, to the companies holding a share in the capital of that company.

14 Regarding the restricted definition of the electronic communications sector, the defendants contend that in light of the reference to Article 18 of the Electronic Communications Code, that sector is identified by reference to the 'relevant markets', that is to say, the markets susceptible to ex ante regulation in so far as they present risks to competition.

15 Lastly, as regards the alleged infringement of the fundamental principles of free movement of capital and freedom to provide services, AGCom and Mediaset observe that the ban laid down by Article 43(11) TUSMAR is based on the principle of the protection of pluralism, recognised by Article 11 of the Charter of Fundamental Rights of the European Union and Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Those parties emphasise in that regard that EU rules in the field of electronic communications and of competition make it possible to limit the aforementioned fundamental freedoms in order to guarantee pluralism in Member States. Such a limitation is justified by the case-law of the Court of Justice, according to which the protection of pluralism is an overriding reason justifying a restriction on the fundamental freedoms (see, to that effect, judgments of 13 December 2007,

United Pan-Europe Communications Belgium and Others, C-250/06, EU:C:2007:783; of 25 July 1991, *Collectieve Antennevoorziening Gouda*, C-288/89, EU:C:1991:323; and of 3 February 1993, *Veronica Omroep Organisatie*, C-148/91, EU:C:1993:45).

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

16 The referring court, in the light of the national and EU law referred to and the arguments of the parties, considers it necessary to assess whether the restrictions imposed by Article 43(11) TUSMAR are appropriate and proportionate in the light of the principles of EU law relating to the freedom of establishment and the free movement of capital, which contrast with equally relevant and recognised principles such as freedom and pluralism of information.