



C/2024/2406

8.4.2024

**Request for a preliminary ruling from the Consiglio di Stato (Italy) lodged on 12 December 2023 —
Cairo Network Srl v Ministero delle Imprese e del Made in Italy, Autorità per le Garanzie nelle
Comunicazioni**

(Case C-764/23, Cairo Network)

(C/2024/2406)

Language of the case: Italian

Referring court

Consiglio di Stato

Parties to the main proceedings

Appellant: Cairo Network Srl

Respondents: Ministero delle Imprese e del Made in Italy, Autorità per le Garanzie nelle Comunicazioni

Questions referred

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),⁽¹⁾ and Article 31 of Directive (EU) 2018/1972,⁽²⁾ 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,⁽³⁾ 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),⁽⁴⁾ 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,⁽⁵⁾ 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

⁽¹⁾ OJ 2002 L 108, p. 33.

⁽²⁾ Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (Recast)

⁽³⁾ Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services. (OJ 2009 L 337, p. 37)

⁽⁴⁾ OJ 2002 L 108, p. 21.

⁽⁵⁾ OJ 2002 L 249, p. 21

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 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 non-structural measures adopted by the Regulatory Authority for Communications appropriate and proportionate for the incumbents that originally owned the networks acquired in infringement of competition law?
5. 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 take into account the legitimate expectations of an operator who has acquired the right of use of the frequency following a fee-based competitive procedure in which express provision was made for the right to a frequency with similar coverage and of an equivalent duration to that of the right of use?