Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 30 March 2017[1]

**Case C-112/16**

**Persidera SpA**
**v**
**Autorità per le Garanzie nelle Comunicazioni and**
**Ministero dello Sviluppo Economico delle Infrastrutture e dei Trasporti**
**(Request for a preliminary ruling**

**from the Consiglio di Stato (Council of State, Italy))**

(Reference for a preliminary ruling — Electronic communications networks and services — Directives 2002/20/EC, 2002/21/EC and 2002/77/EC — Transition from analogue television to digital television — Determination of the number of digital frequencies to be assigned to each owner of analogue frequencies — Taking into account of previously unlawfully used analogue frequencies — Conversion ratio — Conversion factor — Equal treatment, non-discrimination and proportionality)

## I. Introduction

1. The fundamental importance of media pluralism and integrity in a free, democratic society cannot be emphasised enough at the present time. Electronic communications networks and services in particular are now being used by almost everyone on a daily basis and have become indispensable not only to a modern democracy but also to the education of the population and to cultural life in Europe. At the same time, it is becoming increasingly apparent how fragile and fraught with problems the mechanisms that support such networks and services are.

2. In Italy, pluralism in television has been the subject of a number of heated debates in recent decades. It is not surprising, therefore, that the transition from analogue to digital television has also led, in that country, to disputes concerning the fair allocation of new digital television frequencies.

3. The present case is concerned in particular with the allocation of digital frequencies which the State has expressly reserved for the continuation of existing analogue television programmes. Persidera (formerly Telecom Italia Media Broadcasting — TIMB),[2] one of the Italian network operators, feels that it has been placed at a disadvantage by comparison with its competitors — namely, the market leaders Rai and Mediaset — in relation to the conversion of analogue frequencies to digital frequencies.

1 Original language: German.

2 Before the final transition to digital television, Persidera — or TIMB as its predecessor in law — operated two analogue television channels ('La 7' and 'MTV') and two digital television channels ('TIMB1' and 'MBONE') in Italy.

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4. In the present case, the Court will have to clarify what requirements EU law attaches to the fair allocation of frequencies. In so doing, it will have to bear in mind that, in adopting the frequency allocation method which is now at issue, the Italian Republic should have taken into account not least the concerns expressed by the European Commission in ongoing infringement proceedings[3] and a judgment given by the Court on a request for a preliminary ruling.[4]

5. Crucial to the assessment of those issues is the 'new common regulatory framework', which has been in force since 2002 and comprises a number of directives enacted by the EU legislature, and the general principles of EU law.

6. The present proceedings in Case C-112/16 are closely connected to the preliminary ruling proceedings in Case C-560/15, in which I am also delivering my Opinion today. Although the points of law raised in that case relate largely to the same provisions and principles of EU law, they are not concerned with the conversion of old analogue frequencies into new digital frequencies which is at issue here and clearly raise different legal issues in other respects too.

## II. Legal framework

7. The EU-law framework relevant to this case is defined by three directives, adopted in 2002, concerning electronic communications networks and services which together make up the new common regulatory framework for electronic communications services, electronic communications networks, associated facilities and associated services: the Framework Directive (Directive 2002/21/EC),[5] the Authorisation Directive (Directive 2002/20/EC)[6] and the Competition Directive (Directive 2002/77/EC).[7] The first two directives mentioned apply in the version in which they were framed by Directive 2009/140/EC.[8]

### A. Framework Directive (Directive 2002/21)

8. Reference must first be made to recitals 6 and 19 of Directive 2002/21, which are worded, in extract, as follows:

'(6) Audiovisual policy and content regulation are undertaken in pursuit of general interest objectives, such as freedom of expression, media pluralism, impartiality, cultural and linguistic diversity, social inclusion, consumer protection and the protection of minors. …

…

3 Infringement proceedings No 2005/5086 (see in this regard Commission Press Releases IP/06/1019 of 19 July 2006 and IP/07/1114 of 18 July 2007); these proceedings, in which the Commission delivered a reasoned opinion under the first paragraph of Article 258 TFEU (formerly the first paragraph of Article 226 EC) in July 2007, have not as yet been concluded.

4 Judgment of 31 January 2008, *Centro Europa 7* (C-380/05, EU:C:2008:59).

5 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) (OJ 2002 L 108, p. 33).

6 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) (OJ 2002 L 108, p. 21).

7 Commission Directive 2002/77/EC of 16 September 2002 on competition in the markets for electronic communications networks and services (Competition Directive) (OJ 2002 L 249, p. 21).

8 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, amended in OJ 2013 L 241, p. 8, and corrigendum OJ 2013 L 241, p. 8).

(19) Radio frequencies are an essential input for radio-based electronic communications services and, in so far as they relate to such services, should therefore be allocated and assigned by national regulatory authorities according to a set of harmonised objectives and principles governing their action as well as to objective, transparent and non-discriminatory criteria, taking into account the democratic, social, linguistic and cultural interests related to the use of frequency. …'

9. Under the heading 'Policy objectives and regulatory principles', Article 8(1) and (2) of Directive 2002/21 then provides, inter alia, as follows:

'1. Member States shall ensure that in carrying out the regulatory tasks specified in this Directive and the Specific Directives, the national regulatory authorities take all reasonable measures which are aimed at achieving the objectives set out in paragraphs 2, 3 and 4. Such measures shall be proportionate to those objectives.

…

2. The national regulatory authorities shall promote competition in the provision of electronic communications networks, electronic communications services and associated facilities and services by inter alia:

…

(b)

ensuring that there is no distortion or restriction of competition in the electronic communications sector, including the transmission of content;

…

(d) encouraging efficient use and ensuring the effective management of radio frequencies and numbering resources.'

10. Moreover, Article 9 of Directive 2002/21 contains the following provisions on the 'Management of radio frequencies for electronic communications services':

'1. Taking due account of the fact that radio frequencies are a public good that has an important social, cultural and economic value, Member States shall ensure the effective management of radio frequencies for electronic communication services in their territory in accordance with Articles 8 and 8a. They shall ensure that spectrum allocation used for electronic communications services and issuing general authorisations or individual rights of use of such radio frequencies by competent national authorities are based on objective, transparent, non-discriminatory and proportionate criteria.

In applying this Article, Member States shall respect relevant international agreements, including the ITU Radio Regulations, and may take public policy considerations into account.

…

4. …Measures that require an electronic communications service to be provided in a specific band available for electronic communications services shall be justified in order to ensure the fulfilment of a general interest objective as defined by Member States in conformity with Community law, such as, and not limited to:

(a) safety of life;

(b) the promotion of social, regional or territorial cohesion;

(c) the avoidance of inefficient use of radio frequencies; or

(d) the promotion of cultural and linguistic diversity and media pluralism, for example by the provision of radio and television broadcasting services.

…

7. Without prejudice to the provisions of the Specific Directives and taking into account the relevant national circumstances, Member States may lay down rules in order to prevent spectrum hoarding, in particular by setting out strict deadlines for the effective exploitation of the rights of use by the holder of the rights and by applying penalties, including financial penalties or the withdrawal of the rights of use in case of non-compliance with the deadlines. These rules shall be established and applied in a proportionate, non-discriminatory and transparent manner.'

**B. Authorisation Directive (Directive 2002/20)**

11. Article 3(1) of Directive 2002/20 contains the following provision on 'General authorisation of electronic communications networks and services':

'Member States shall ensure the freedom to provide electronic communications networks and services, subject to the conditions set out in this Directive. To this end, Member States shall not prevent an undertaking from providing electronic communications networks or services, except where this is necessary for the reasons set out in Article 46(1) of the Treaty.'

12. Article 5 of Directive 2002/20 contains, inter alia, the following provisions on 'Rights of use for radio frequencies and numbers':

'1. Member States shall facilitate the use of radio frequencies under general authorisations. Where necessary, Member States may grant individual rights of use in order to:

…

– fulfil other objectives of general interest as defined by Member States in conformity with Community law.

2. Where it is necessary to grant individual rights of use for radio frequencies and numbers, Member States shall grant such rights, upon request, to any undertaking for the provision of networks or services under the general authorisation referred to in Article 3, subject to the provisions of Articles 6, 7 and 11(1)(c) of this Directive and any other rules ensuring the efficient use of those resources in accordance with Directive 2002/21/EC (Framework Directive).

Without prejudice to specific criteria and procedures adopted by Member States to grant rights of use of radio frequencies to providers of radio or television broadcast content services with a view to pursuing general interest objectives in conformity with Community law, the rights of use for radio frequencies and numbers shall be granted through open, objective, transparent, non-discriminatory and proportionate procedures, and, in the case of radio frequencies, in accordance with the provisions of Article 9 of Directive 2002/21/EC (Framework Directive). An exception to the requirement of open procedures may apply in cases where the granting of individual rights of use of radio frequencies to the providers of radio or television broadcast content services is necessary to achieve a general interest objective as defined by Member States in conformity with Community law.

…

5. Member States shall not limit the number of rights of use to be granted except where this is necessary to ensure the efficient use of radio frequencies in accordance with Article 7.

6. Competent national authorities shall ensure that radio frequencies are efficiently and effectively used in accordance with Articles 8(2) and 9(2) of Directive 2002/21/EC (Framework Directive). They shall ensure competition is not distorted by any transfer or accumulation of rights of use of radio frequencies. …'

13. Furthermore, on the 'Procedure for limiting the number of rights of use to be granted for radio frequencies', Article 7 of Directive 2002/20 provides as follows:

'1. Where a Member State is considering whether to limit the number of rights of use to be granted for radio frequencies or whether to extend the duration of existing rights other than in accordance with the terms specified in such rights, it shall inter alia:

(a) give due weight to the need to maximise benefits for users and to facilitate the development of competition;

…

3. Where the granting of rights of use for radio frequencies needs to be limited, Member States shall grant such rights on the basis of selection criteria which must be objective, transparent, non-discriminatory and proportionate. Any such selection criteria must give due weight to the achievement of the objectives of Article 8 of Directive 2002/21/EC (Framework Directive) and of the requirements of Article 9 of that Directive.

…'

## C. Competition Directive (Directive 2002/77)

14. Article 2 of Directive 2002/77 is entitled 'Exclusive and special rights for electronic communications networks and electronic communications services' and contains, inter alia, the following provisions:

'…

2. Member States shall take all measures necessary to ensure that any undertaking is entitled to provide electronic communications services or to establish, extend or provide electronic communications networks.

…

4. Member States shall ensure that a general authorisation granted to an undertaking to provide electronic communications services or to establish and/or provide electronic communications networks, as well as the conditions attached thereto, shall be based on objective, non-discriminatory, proportionate and transparent criteria.

…'

15. Finally, Article 4 of Directive 2002/77 contains the following provision on 'Rights of use of frequencies':

'Without prejudice to specific criteria and procedures adopted by Member States to grant rights of use of radio frequencies to providers of radio or television broadcast content services with a view to pursuing general interest objectives in conformity with Community law:

…

2. The assignment of radio frequencies for electronic communication services shall be based on objective, transparent, non-discriminatory and proportionate criteria.'

## III. Facts and main proceedings

16. The transition from analogue to digital television in Italy called for the establishment of a procedure for allocating the new digital broadcasting frequencies, which are more efficient than their analogue counterparts.[9] To that end, on 7 April 2009, the Autorità per le Garanzie nelle Comunicazioni[10] (AGCOM) adopted Resolution 181/09/CONS,[11] in which it laid down the criteria for the complete digitalisation of the terrestrial networks and, at the same time, introduced a mechanism for allocating the frequencies to be assigned for that purpose. That resolution came about against the backdrop of ongoing infringement proceedings[12] whereby the European Commission had urged Italy not to favour analogue television service providers already active on the market when allocating its digital frequencies.

17. Provision for the allocation of digital frequencies henceforth took the form of 21 'multiplexes' for nationwide terrestrial transmission.[13] A multiplex allows a number of audio, video and data signals to be bundled together into a common data stream so as to optimise the exploitation of the frequencies and lines available.

18. In order to ensure that the digital multiplexes were distributed fairly, in such a way as to take into account not only existing analogue television channel operators but also operators which had previously invested in the creation of digital networks, as well as operators wishing to enter the market for the first time, the 21 lots were divided into three groups to be allocated according to different criteria. The resolution also established an upper limit whereby no single network operator was permitted to hold more than five multiplexes in total. The same maximum of five multiplexes had also been called for by the Commission in the aforementioned infringement proceedings.

19. In particular, the 21 multiplexes were to be assigned as follows:

– In the *first* group, eight multiplexes were to be used exclusively for converting the existing analogue television networks to digital television networks. The conversion was to be based on a fair assignment that would take into account the continuity of television output. Accordingly, each existing analogue television broadcaster was to receive at least one multiplex. Broadcasters with more than one analogue channel were each to receive one multiplex less than their number of analogue channels. So it was, for example, that Rai and Mediaset, which had each previously

9 One of the great advantages of digital television is that — unlike in the case of analogue television — a number of programmes can be transmitted in a single frequency range.

10 Italian communications regulatory authority.

11 That resolution was passed into law by Decreto-legge (Decree-Law) No 59/2008 in conjunction with Law No 101/2008.

12 See footnote 3 above.

13 Some of the parties to the proceedings have spoken of a total of 22 multiplexes. For the purposes of the present preliminary ruling proceedings, however, that discrepancy is of no consequence.

operated three analogue television channels, were assigned two multiplexes each, whereas TIMB, which had previously had a portfolio of two analogue television channels, received one multiplex. Rete A and two other network operators also received one multiplex each.

– In the *second group*, eight multiplexes were to be allocated to network operators which had invested in the creation of digital networks. Rai, Mediaset and TIMB thus received a further two multiplexes each, while Rete A and another network operator were assigned one multiplex each.

– Finally, in the *third group*, the remaining five multiplexes, also referred to as the 'digital dividend',[14] were to be allocated as additional new frequencies in accordance with objective, transparent, proportionate and non-discriminatory criteria.

20. It was on this basis that the Italian Ministry of Economic Development[15] allocated the digital multiplexes.

21. In the present case, the dispute in the main proceedings concerns only some of those multiplexes, that is to say those in the first group. Taking the view that the method for converting analogue frequencies to digital frequencies[16] had placed it at a disadvantage by comparison with its larger competitors, TIMB brought an action before the Tribunale Amministrativo Regionale per il Lazio[17] (TAR) with a view to obtaining an additional multiplex from the aforementioned first group, together with damages.

22. Before the TAR, TIMB argued, inter alia, that the ratio used for converting existing analogue frequencies to new digital frequencies had been less favourable in its case than in the case of Rai and Mediaset. For, whereas TIMB had received one multiplex for two analogue frequencies, giving a conversion ratio of 50%, Rai and Mediaset had each been granted two multiplexes for their respective three analogue television channels, equating to a more favourable ratio of 66.67%. TIMB also complained that, in the case of Rai and Mediaset, the conversion to digital frequencies had taken into account analogue television channels which those two broadcasters had previously operated in breach of the statutory concentration thresholds, and, therefore, unlawfully.

23. Its action at first instance having been unsuccessful,[18] TIMB pursued its search for relief by appealing to the Consiglio di Stato,[19] the referring court. During the appeal proceedings before the Consiglio di Stato, TIMB merged with Rete A, which already held two multiplexes of its own. The new undertaking that resulted from the merger, by the name of Persidera, now holds a total of five multiplexes, which — as already indicated — is the statutory per-operator maximum in Italy.

14 On the concept of the digital dividend, see recital 26 of Directive 2009/140; see also point 1 of the Commission Communication of 13 November 2007, 'Reaping the full benefits of the digital dividend in Europe: A common approach to the use of the spectrum released by the digital switchover', COM(2007) 700 final..

15 Ministero dello sviluppo economico (MiSE).

16 See first indent of point 19 of this Opinion, above.

17 Regional Administrative Court, Lazio.

18 See in this regard Judgment No 1398/2014 of the Tribunale Amministrativo Regionale per il Lazio.

19 Council of State.

## IV. Request for a preliminary ruling and procedure before the Court

24. By order of 2 July 2015, received at the Court on 24 February 2016, the Consiglio di Stato stayed the proceedings before it and referred the following questions to the Court for a preliminary ruling under Article 267 TFEU:

‘(1) Does EU law, in particular Articles 56, 101, 102 and 106 TFEU, Article 9 of Directive 2002/21/EC …, Articles 3, 5 and 7 of Directive 2002/20/EC … and Articles 2 and 4 of Directive 2002/77/EC … and the principles of non-discrimination, transparency, freedom of competition, proportionality, effectiveness and pluralism of information preclude a provision of national law which, for the purposes of determining the number of digital networks to be allocated to operators for the conversion of analogue networks, provides that equal account should be taken of analogue networks operated entirely lawfully and analogue networks that operated in the past in breach of the anti-concentration thresholds laid down by rules of national law and have been the subject of adverse criticism by the Court of Justice or the European Commission or, in any event, operated without being granted the necessary right?

(2) Does EU law, in particular Articles 56, 101, 102 and 106 TFEU, Article 9 of Directive 2002/21 …, Articles 3, 5 and 7 of Directive 2002/20 … and Articles 2 and 4 of Directive 2002/77 … and the principles of non-discrimination, transparency, freedom of competition, proportionality, effectiveness and pluralism of information preclude a provision of national law which, for the purposes of determining the number of digital networks to be allocated to operators for the conversion of analogue networks, takes account of all the analogue networks operated until that point, including those operated in breach of the anti-concentration thresholds laid down by rules of national law that have already been the subject of adverse criticism by the Court of Justice or the European Commission or, in any event, those operated without being granted the necessary rights, and which has the actual effect of reducing the number of digital networks allocated to a multi-network operator, by comparison with those operated under the analogue system, to an extent which is proportionally greater than the reduction imposed on competitors?’

25. In the proceedings before the Court, written observations were submitted by Persidera, Rai and Reti televisive italiane (RTI),[20] the Italian and Slovenian Governments and the European Commission. With the exception of Slovenia, the same parties were also represented at the hearing of 2 February 2017, which took place immediately after the hearing in Case C-560/15.

20 RTI belongs to the Mediaset group.

## V. Assessment

### A. Admissibility of the request for a preliminary ruling

26. In accordance with Article 94 of the Rules of Procedure of the Court of Justice [21] a request for a preliminary ruling must contain, in addition to the questions referred, the necessary information on the factual and legal context of the dispute in the main proceedings. The referring court must also indicate the connection between the provisions of EU law to be interpreted and the dispute in the main proceedings, as well as the reasons which prompted it to inquire about the interpretation or validity of those provisions. According to case-law, the information on the factual and legal context is of particular importance in proceedings relating to competition law. [22]

#### *1. Provisions of primary law not relevant to the judgment to be given*

27. As RTI and the Italian Government rightly submit, the request for a preliminary ruling in the present case does not provide any explanation of how the primary-law provisions of Articles 56, 101, 102 and 106 TFEU are supposed to be relevant to the resolution of the dispute in the main proceedings.

28. With specific regard to Article 56 TFEU, it should be noted that all aspects of the main proceedings are confined within only one Member State and that, in this case (unlike the situation that obtained in *Centro Europa 7*), the referring court does not wish to avail itself of the prohibition on reverse discrimination which is contained in the Italian Constitution. [23] It is not therefore apparent how the Court can contribute towards the resolution of the dispute in the main proceedings by providing the interpretation of Article 56 TFEU requested.

29. So far as concerns the provisions on competition law contained in Articles 101, 102 and 106 TFEU, it is sufficient to note that these relate to the conduct of undertakings, whereas the present case is concerned with the conduct of State authorities in the allocation of television frequencies. It is true that the first paragraph of Article 102 TFEU in conjunction with Article 106(1) TFEU prohibits the Member States from creating a situation which makes it easier for certain undertakings — in this case, Rai and Mediaset — to abuse the collective dominant position they allegedly occupy on the market. [24] However, it would be going too far to regard the conduct of Rai and Mediaset as being probably, let alone inevitably, anticompetitive on the sole ground that the Italian national authorities may have acted improperly in the allocation of digital frequencies.

30. In so far as the referring court mentions only *competition* in general, the Court can adequately address this in its findings relating to Directives 2002/20, 2002/21 and 2002/77. There is no need in this regard for a separate interpretation of Articles 101, 102 and 106 TFEU.

21 The Court emphasises the need to comply with Article 94 of the Rules of Procedure in, for example, the order of 12 May 2016, *Security Service and Others* (C-692/15 to C-694/15, EU:C:2016:344, paragraph 18). Even before then, the requirements laid down by settled case-law as being applicable to the admissibility of requests for a prelimiminary ruling were formulated in the same terms; see, inter alia, the judgments of 24 April 2012, *Kamberaj* (C-571/10, EU:C:2012:233, paragraph 42), and of 21 December 2016, *Vervloet and Others* (C-76/15, EU:C:2016:975, paragraphs 56 and 57).

22 See to that effect the order of 8 October 2002, *Viacom* (C-190/02, EU:C:2002:569, paragraphs 21 and 22), as well as the judgments of 26 January 1993, *Telemarsicabruzzo and Others* (C-320/90 to C-322/90, EU:C:1993:26, paragraph 7), of 31 January 2008, *Centro Europa 7* (C-380/05, EU:C:2008:59, paragraph 58), of 21 November 2013, *Deutsche Lufthansa* (C-284/12, EU:C:2013:755, paragraph 20), and of 13 February 2014, *Airport Shuttle Express and Others* (C-162/12 and C-163/12, EU:C:2014:74, paragraph 38).

23 Judgment of 31 January 2008, *Centro Europa 7* (C-380/05, EU:C:2008:59, paragraphs 64 to 71, in particular paragraph 69).

24 See to this effect the judgments of 18 June 1991, *ERT* (C-260/89, EU:C:1991:254, paragraph 37); of 31 January 2008, *Centro Europa 7* (C-380/05, EU:C:2008:59, paragraph 60); and of 1 July 2008, *MOTOE* (C-49/07, EU:C:2008:376, paragraph 50); see also my Opinion in *Taricco and Others* (C-105/14, EU:C:2015:293, point 60).

31. Consequently, the questions referred must be declared inadmissible in that they seek an interpretation of Articles 56, 101, 102 and 106 TFEU.

### *2. Relevance of the questions referred to the judgment to be given from the point of view of Persidera*

32. The Italian Government further considers that the request for a preliminary ruling is not relevant to the judgment to be given because Persidera has in any event since acquired the maximum obtainable number of five multiplexes containing digital television broadcasting frequencies.

33. It is true that a request for a preliminary ruling must be regarded as inadmissible if it is apparent that the dispute in the main proceedings has been disposed of.[25] In this instance, however, there is insufficient evidence that the dispute in the main proceedings has been so disposed of, let alone that this is manifestly the case. On the contrary, it follows from the documents before the Court that Persidera is asking the national courts not only to grant it another digital multiplex but also to award it damages. Since it cannot be ruled out that that undertaking may be awarded damages for the Italian authorities' unlawful conduct in the past, it must to that extent continue to be presumed that the questions referred are relevant to the judgment to be given.[26]

34. In the light of the foregoing, the Italian Government's objection that the dispute in the main proceedings has been disposed of must be rejected.

### *3. Enough information on the alleged unlawfulness of two television channels*

35. Finally, it remains to be considered whether the request for a preliminary ruling may have to be declared inadmissible because it contains an inadequate explanation of how, as Persidera alleges, the operation of two of the television channels with which it is in competition is unlawful. That unlawfulness is the premiss on which the entire request for a preliminary ruling is based, both the first and second questions referred being expressly predicated upon it.

36. Admittedly, the order for reference made by the Consiglio di Stato is not a model of clarity and precision in this regard. One would be forgiven for wishing that it had explained the cause and effect of the alleged unlawfulness in a more specific and structured manner. As it is, however, the order for reference contains only very scant factual and legal information in this respect.

37. I nonetheless take the view that the request for a preliminary ruling — notwithstanding its undeniable shortcomings — expresses with sufficient clarity the nature of the unlawfulness alluded to. The issue here, as the wording of the two questions itself shows, is an alleged 'breach of the anti-concentration thresholds laid down by rules of national law' and the fact that the aforementioned television channels are 'operated without being granted the necessary rights'.

25 Judgments of 20 January 2005, *García Blanco* (C-225/02, EU:C:2005:34), and of 24 October 2013, *Stoilov i Ko* (C-180/12, EU:C:2013:693), as well as the order of 14 October 2010, *Reinke* (C-336/08, EU:C:2010:604).

26 Judgments of 7 September 1999, *Beck and Bergdorf* (C-355/97, EU:C:1999:391, paragraph 22); of 16 June 2015, *Gauweiler and Others* (C-62/14, EU:C:2015:400, paragraph 25); of 6 September 2016, *Petruhhin* (C-182/15, EU:C:2016:630, paragraph 20); and of 21 December 2016, *Vervloet and Others* (C-76/15, EU:C:2016:975, paragraph 57).

38. Moreover, as is clear from the documents before the Court, the two television channels alleged to be operating unlawfully are 'RAI 3', owned by the State television broadcaster Rai, and 'Rete 4', owned by the private Mediaset group. Persidera argues in essence that the fact that those two channels were taken into account at the time of the transition from analogue to digital television had the effect of affording unjustified preferential treatment to Rai and Mediaset as compared with their smaller competitors. Rai and Mediaset thus received more digital frequencies in the form of multiplexes than was their actual entitlement.

39. The Court therefore has enough information on this matter to be able to give a useful answer to the questions referred. This is also apparent not least from the observations which the many parties to the present proceedings have submitted before the Court.[27]

40. So far as concerns the alleged unlawfulness of two television channels, therefore, the request for a preliminary ruling must be regarded as admissible.

41. Moreover, that position is in no way altered by the fact that several parties to the proceedings — namely Rai, RTI and the Italian Government — emphatically maintain that there has in fact been no unlawful conduct in relation to 'RAI 3' and 'Rete 4'. After all, it is settled case-law[28] that, so far as concerns the factual and legislative context relevant to the dispute in the main proceedings, the Court is bound only by the referring court's description, the accuracy of which it does not review,[29] even where that description is called into question by some of the parties to the proceedings (in this case, Rai, RTI and Italy).

### *4. Interim conclusion*

42. All things considered, therefore, the request for a preliminary ruling is inadmissible only in so far as it relates to Articles 56, 101, 102 and 106 TFEU. Otherwise, however, it must be regarded as admissible.

## B. Substantive assessment of the questions referred

43. Both the facts in the main proceedings and the applicable law are characterised by their considerable complexity. Unfortunately, the submissions of neither the referring court nor the parties to the proceedings were able to shed any light on matters. If anything, they had the effect of making the case unnecessarily complicated and distracting attention from its essential features.

44. As I have already indicated, the present case must be viewed against the backdrop of the transition from analogue to digital television in Italy and, from a legal point of view, casts light on one aspect of that transition, being exclusively concerned with the calculation of the number of digital broadcasting frequencies to be allocated to network operators previously active on the analogue television market. To what extent was it permissible, in calculating the digital frequencies to be allocated, to take account of the number of analogue television programmes previously broadcast by the undertakings concerned? Was it permissible for allegedly unlawfully operated analogue television channels to be included in the calculation (first question), and was it permissible for that calculation to lead arithmetically to different conversion ratios depending on the network operator concerned (second question)?

27 See to this effect, inter alia, the judgment of 18 October 2011, *Boxus and Others* (C-128/09 to C-131/09, C-134/09 and C-135/09, EU:C:2011:667, paragraph 27).

28 See, inter alia, the judgments of 25 January 2011, *Neukirchinger* (C-382/08, EU:C:2011:27, paragraph 41), and of 6 October 2015, *Târșia* (C-69/14, EU:C:2015:662, paragraph 13).

29 Settled case-law: see, for example, the judgments of 13 October 2016, *Polkomtel* (C-231/15, EU:C:2016:769, paragraph 16), and of 31 January 2017, *Lounani* (C-573/14, EU:C:2017:71, paragraph 56).

45. In my view, the two questions raised by the Consiglio di Stato are so closely connected as to make it appropriate to consider them together.

### *1. The relevant provisions and principles of EU law*

46. Of primary relevance to the answer to be given to the two questions referred are various provisions of secondary law under the new common regulatory framework, namely Articles 8 and 9 of Directive 2002/21, Articles 3, 5 and 7 of Directive 2002/20 and Articles 2 and 4 of Directive 2002/77. Taken together, all of those provisions give expression to the principle that, while the Member States enjoy some discretion in the allocation of frequencies, they must nonetheless exercise that discretion in accordance with the general EU-law principles of non-discrimination, transparency and proportionality, being required also to ensure that the frequencies are administered and used efficiently and to take due account of media pluralism.

47. The aforementioned provisions and legal principles must be observed not only during the first allocation of frequencies but also during any further allocation of frequencies — and thus, for example, during the transition from analogue to digital frequencies at issue here.[30] For, on the one hand, the new common regulatory framework is applicable to all procedures culminating in the allocation of frequencies.[31] The EU-law objective of permanently creating a situation which satisfies the requirements of the new common regulatory framework would otherwise be unachievable. On the other hand, and more specifically, the transition to the new technology of digital television did in fact lead to the first allocation of this new type of broadcasting frequency.

48. In the present case, the method employed in Italy to convert the previously used analogue television frequencies to digital frequencies was clear and comprehensible. Consequently, the issue is not so much any lack of transparency in the conversion procedure. It has to do rather with the fact that, because of the *conversion method* chosen by the national authorities in Italy, Persidera feels that it was placed *at a disadvantage* by comparison with its larger competitors — namely, Rai and Mediaset. Ultimately, therefore, the dispute revolves around the principle of equal treatment or non-discrimination,[32] in the application of which the other principles underpinning the new common regulatory framework, as well as considerations of proportionality, also play an important role, of course.

49. Like all general principles of EU law, both the principle of equal treatment and the principle of proportionality must be observed by the Member States when implementing EU law.[33] The Member States must not rely on an interpretation of the relevant directives which would be in conflict with the general principles of EU law.[34] Moreover, the new common regulatory framework itself recalls that

30 See, similarly, the judgment of 21 March 2013, *Belgacom and Others* (C-375/11, EU:C:2013:185, paragraphs 37 to 39), concerning the application of Directive 2002/20 to the renewal of previously allocated rights of use for radio frequencies.

31 This is implicit, for example, in Article 7(2) of Directive 2002/20, which refers to ‘further’ rights of use for radio frequencies.

32 On this principle, see for example the judgment of 12 September 2006, *Eman and Sevinger* (C-300/04, EU:C:2006:545, paragraph 57); for the sake of simplicity, I shall henceforth refer throughout to the principle of equal treatment.

33 See, fundamentally, with respect to observance of the general principles of EU law, the judgments of 10 March 2009, *Heinrich* (C-345/06, EU:C:2009:140, paragraph 45, second sentence), and of 26 April 2005, *‘Goed Wonen’* (C-376/02, EU:C:2005:251, paragraph 32); more specifically, with respect to the principle of equal treatment, see the judgment of 11 July 2006, *Chacón Navas* (C-13/05, EU:C:2006:456, paragraph 56, first and second sentences), and, with respect to the principle of proportionality, the judgments of 10 March 2005, *Tempelman and van Schaijk* (C-96/03 and C-97/03, EU:C:2005:145, paragraphs 46), and of 9 March 2010, *ERG and Others* (C-379/08 and C-380/08, EU:C:2010:127, paragraph 86).

34 See the judgments of 6 November 2003, *Lindqvist* (C-101/01, EU:C:2003:596, paragraph 87), of 26 June 2007, *Ordre des barreaux francophones et germanophone and Others* (C-305/05, EU:C:2007:383, paragraph 28, second sentence); of 21 December 2011, *NS* (C-411/10 and C-493/10, EU:C:2011:865, paragraph 77); and of 19 September 2013, *Review Commission* v *Strack* (C-579/12 RX-II, EU:C:2013:570, paragraph 40).

primary-law requirement, at secondary-law level, and, in particular, gives specific expression to it in Article 8(1), Article 9(1), second sentence, and recital 19 of Directive 2002/21, Article 5(2), second subparagraph, and Article 7(3) of Directive 2002/20, and, finally, Article 2(4) and Article 4(2) of Directive 2002/77.[35]

### *2. The principle of equal treatment*

50. The EU-law principle of equal treatment, which has now also been established in Articles 20 and 21 of the Charter of Fundamental Rights, requires that comparable situations must not be treated differently and different situations must not be treated in the same way unless such treatment is objectively justified.[36]

#### *(a) Difference of treatment*

51. The comparability of situations must be assessed in particular in the light of the subject matter and purpose of the measure in question. In that context, the principles and objectives of the field to which the act relates must be taken into account.[37]

52. In the present case, therefore, the situation of Rai, Mediaset and Persidera must be examined from the point of view of the allocation of the eight multiplexes in the first group of digital television frequencies.[38] As already indicated, those frequencies served to ensure the continuity of television output and were to be allocated only to network operators whose portfolio had previously included analogue television channels.

53. In relation more specifically to the allocation of those eight multiplexes and the objectives pursued by them, Rai, Mediaset and Persidera were, so far as it is possible to tell, in an absolutely comparable situation. All three undertakings had previously operated analogue television channels in Italy. Under the Frequency Allocation Plan drawn up for Italy, therefore, those undertakings were each entitled to apply for digital frequencies from the first group of eight multiplexes that would enable them to continue broadcasting their respective television programmes.

54. There is no doubt that, from a *formal* point of view, there was no difference of treatment as between Rai, Mediaset and Persidera in the above context. On the contrary, the same conversion method was applied to all previous operators of analogue television channels in Italy. Under that method, all network operators which had previously supplied analogue television services received at least one multiplex, and, of those, the ones which had previously owned more than one analogue television channel were each allocated one multiplex less than the actual number of their analogue channels.

35 Article 2(4) and Article 4(2) of Directive 2002/77 speak of ‘proportionate’ criteria, which is effectively a reference to the principle of proportionality.

36 Judgments of 16 December 2008, *Arcelor Atlantique et Lorraine and Others* (C-127/07, EU:C:2008:728, paragraph 23); of 14 September 2010, *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission* (C-550/07 P, EU:C:2010:512, paragraphs 54 and 55); and of 21 December 2016, *Vervloet and Others* (C-76/15, EU:C:2016:975, paragaph 74).

37 Judgments of 16 December 2008, *Arcelor Atlantique et Lorraine and Others* (C-127/07, EU:C:2008:728, paragraphs 25 and 26); of 1 March 2011, *Association belge des Consommateurs Test-Achats and Others* (C-236/09, EU:C:2011:100, paragraph 29); of 11 July 2013, *Ziegler* v *Commission* (C-439/11 P, EU:C:2013:513, paragraph 167); and of 6 November 2014, *Feakins* (C-335/13, EU:C:2014:2343, paragraph 51).

38 See in this regard point 19 of this Opinion, above.

55. However, the principle of equal treatment applies not only to formal (direct) differences of treatment but also to *material* (indirect) differences of treatment, whereby the application of an apparently neutral criterion actually has a particularly adverse effect on a certain person or a certain group of persons.[39]

56. In the present case, the aforementioned conversion method was particularly disadvantageous to Persidera (formerly TIMB), which, unlike the two large network operators Rai and Mediaset, had previously had not three but only two analogue television channels in its portfolio. For, whereas the conversion rate applied to both Rai and Mediaset worked out at 66.67%. (each of them having been awarded two digital multiplexes for their respective three analogue television channels), the conversion rate applied to Persidera — formerly TIMB — came to only 50% (TIMB having been granted one digital multiplex for its two analogue television channels).

57. Consequently, the method used by Italy to convert existing analogue frequencies into new digital broadcasting frequencies led to a manifest difference in the treatment of Persidera as compared with its two larger competitors Rai and Mediaset not in relation to the *conversion method*, it is true, but certainly in relation to the *conversion result* achieved.

### *(b) Justification*

58. The new common regulatory framework expressly allows the national authorities to adopt measures in pursuit of objectives in the general interest when allocating and using frequencies (see in particular Article 9(1), second subparagraph, and Article 4(2) of Directive 2002/21 and Article 5(1), second sentence, last indent, and (2), second subparagraph, of Directive 2002/20.[40]

59. In the proceedings before the Court, the difference of treatment described above was justified, in essence, on two grounds. First, the Italian State sought to ensure the continuity of television output.[41] Secondly, it was impossible to achieve exactly the same conversion rate for every network operator because, since the frequencies were indivisible, no undertaking could be allocated fractions of multiplexes. I shall turn now to look at each of those two objectives separately, and shall be submitting the measures taken to attain them to a proportionality test.

60. Pursuant to the principle of proportionality, which is one of the general principles of EU law, measures adopted to achieve the legitimate objectives pursued by the legislation in question must not go beyond what is appropriate and necessary for achieving those objectives, it being necessary to ensure that, where there is a choice between several appropriate measures, recourse is had to the least onerous, and that the disadvantages caused are not disproportionate to the aims pursued.[42]

39 See to this effect, for example, from the point of view of the principle of non-discrimination in relation to the free movement of workers, the judgment of 14 February 1995, *Schumacker* (C-279/93, EU:C:1995:31, paragraph 49). On the concepts of formal and material discrimination, see also the Opinions of Advocate General Lagrange in *Italy* v *Commission* (13/63, EU:C:1963:9) and of Advocate General VerLoren van Themaat in *Seco und Desquenne & Giral* (62/81 and 63/81, EU:C:1981:305).

40 See also recital 36 of Directive 2009/140.

41 Rai also refers to its particular public-service obligation. However, since this factor is not specifically addressed by the referring court, I too shall not be examining it in detail below. I would simply make the point here that my submissions on ensuring the continuity of television output, in particular in relation to proportionality, are also transposable to the allocation of frequencies with a view to ensuring the provision of services in the public interest.

42 Judgments of 11 July 1989, *Schräder HS Kraftfutter* (265/87, EU:C:1989:303, paragraph 21); of 3 July 2003, *Lennox* (C-220/01, EU:C:2003:390, paragraph 76); and of 10 March 2005, *Tempelman and van Schaijk* (C-96/03 and C-97/03, EU:C:2005:145, paragraph 47); see, to the same effect, the judgments of 9 March 2010, *ERG and Others* (C-379/08 and C-380/08, EU:C:2010:127, paragraph 86), and of 16 June 2015, *Gauweiler and Others* (C-62/14, EU:C:2015:400, paragraphs 67 and 91).

61. Significantly more elegant but substantively identical is the wording of the settled case-law of the French courts, for example, to the effect that a measure must be 'appropriate, necessary and proportionate to the objective it pursues'.[43] Similarly concise is the formula coined by German case-law, which requires that an interference with fundamental rights 'must serve a legitimate purpose and be an appropriate, necessary and reasonable means of achieving that end'.[44]

62. Since the present case is concerned with media freedom and pluralism of the media, which are fundamental values of co-existence in a democratic society (see also Article 11(2) of the Charter of Fundamental Rights), the examination of proportionality must be subject to strict criteria.[45] A difference of treatment is therefore acceptable only if it is indispensable for the purposes of attaining objectives in the general interest in a consistent and systematic manner.

*(i) Ensuring the continuity of television output*

63. First of all, as far as ensuring the continuity of television output is concerned, this is a legitimate interest on which the national authorities may rely when preparing their Frequency Allocation Plans.

64. That continuity contributes in particular towards consumer protection, which features prominently, inter alia, in recital 6 of Directive 2002/21 and is also reflected in the requirement to 'maximise benefits for users' (Article 7(1)(a) of Directive 2002/20). It is thus easier for consumers not only to exercise their fundamental right to freedom of information (Article 11(2), second sentence, of the Charter of Fundamental Rights) but also to satisfy their cultural needs if, despite the transition from analogue to digital television, they continue to have access to their normal television channels.

65. It may well be in the interests of the continuity of television output for the competent national authorities to reserve a group of digital multiplexes for network operators whose portfolios previously included analogue television channels and to hold out to each of them the prospect of receiving enough digital frequencies to be able to maintain its previous analogue output in digital form.

66. According to settled case-law, however, a measure is appropriate for ensuring attainment of the objective pursued only if it genuinely reflects a concern to attain it in a consistent and systematic manner.[46]

43 In the French original, 'adaptée, nécessaire et proportionnée à la finalité qu'elle poursuit'; see, for example, Conseil constitutionnel (French Constitutional Court), Decisions No 2015-527 QPC of 22 December 2015 (FR:CC:2015:2015.527.QPC, paragraphs 4 and 12) and No 2016-536 QPC of 19 February 2016 (FR:CC:2016:2016.536.QPC, paragraphs 3 and 10); similarly, see Conseil d'État (French Council of State), judgment No 317827 of 26 October 2011 (FR:CEASS:2011:317827.20111026).

44 See in this regard, for example, the more recent case-law of the German Bundesverfassungsgericht (Federal Constitutional Court), such as *BVerfGE* 120, 274, 318 et seq. (DE:BVerfG:2008:rs20080227.1bvr037007, paragraph 218). 'Reasonable' is here synonymous with 'proportionate *stricto sensu*'.

45 See to this effect the judgment of 8 April 2014, *Digital Rights Ireland and Others* (C-293/12 and C-594/12, EU:C:2014:238, paragraph 47), where the Court points out that the extent of the legislature's discretion may prove to be limited, depending on a number of factors including, in particular, the area concerned, the nature of the right at issue guaranteed by the Charter, the nature and seriousness of the interference and the object pursued by the interference.

46 Judgments of 10 March 2009, *Hartlauer* (C-169/07, EU:C:2009:141, paragraph 55); of 17 November 2009, *Presidente del Consiglio dei Ministri* (C-169/08, EU:C:2009:709, paragraph 42); and of 13 July 2016, *Pöpperl* (C-187/15, EU:C:2016:550, paragraph 34). This case-law on the fundamental freedoms must also apply, at secondary-law level, to the new common regulatory framework, particularly since the latter is intended to give effect to the fundamental freedoms.

67. Should it prove to be the case in the dispute in the main proceedings, on the basis of the — in some instances, not yet reached — findings of the referring court, that, in so far as they received three multiplexes each, Rai and Mediaset were awarded too many digital frequencies because they acquired more than they needed to be able to continue to operate their existing analogue television channels,[47] whereas Persidera received fewer digital frequencies than it needed or, at least, its allocation was not as generous, then the conversion method applied by the Italian authorities would lack consistency and would not in that event stand up to a proportionality test.

68. What is more, the allocation of too many digital frequencies to the two market leaders RAI and Mediaset would be anticompetitive. Among the fundamental objectives of the new common regulatory framework, after all, are the promotion of competition (see in particular Article 7(1)(a) of Directive 2002/20 and Article 8(2) of Directive 2002/21)[48] and the avoidance of distortion of competition in the area of electronic communications networks and services (see in particular Article 5(6) of Directive 2002/20 and Article 8(2)(b) of Directive 2002/21), coupled with efforts to promote media pluralism (see in this regard the third subparagraph of Article 8(1), point (d) of the second subparagraph of Article 9(4) and recital 6 of Directive 2002/21 and Article 11(2) of the Charter of Fundamental Rights). Competition and media pluralism are very specifically reflected in the freedom guaranteed under EU law to provide electronic communications networks and services (Article 3(1) of Directive 2002/20 and Article 2(2) of Directive 2002/77). In this regard, the national authorities are expressly required to ensure that competition is not distorted by any accumulation of rights of use of radio frequencies (Article 5(6), second sentence, of Directive 2002/20) and may adopt measures against spectrum hoarding (Article 9(7) of Directive 2002/21).

69. If, however, the two undertakings which are by far the largest active on the Italian television market — Rai and Mediaset — are allocated more digital multiplexes than they need to be able to maintain their previous analogue television output, this is liable to lead to an accumulation of frequencies in the hands of the two market leaders and to strengthen further their already robust competitive position in relation to their smaller competitors,[49] a situation which will have the effect of limiting consumer choice and, ultimately, weakening media pluralism too.

70. Competition would be particularly adversely affected if the premiss expressly set out by the Consiglio di Stato in the order for reference were to prove to be true, according to which account was also taken of two unlawfully operated television channels (‘RAI 3’ and ‘Rete 4’) when the analogue television frequencies were converted to digital television frequencies for the benefit of RAI and Mediaset[50]. For, in that event, RAI and Mediaset, as the two Italian market leaders, would owe their particularly favourable conversion rate of 66.67% (two digital multiplexes having been allocated to each of them for their respective three analogue television channels), ultimately, to unlawful conduct. Such an advantage, which would effectively stem only from the perpetuation of an unlawful situation, would have to be regarded as anticompetitive.

47 A number of parties to the proceedings have commented, both in the written and in the oral procedure before the Court, that digital frequencies allow a number of television programmes to be broadcast at the same time. It has been submitted that one digital multiplex can be used to broadcast up to four or even six programmes, depending on the quality of tranmission. This begs the question as to whether the allocation of just one digital multiplex each would not have been sufficient to enable RAI and Mediaset to maintain their previous television output, which, according to the information supplied by the parties to the proceedings, comprised three analogue channels each. At the hearing, RAI and Mediaset took issue with that view. It is a matter ultimately for the referring court to make all the appropriate findings of fact in relation to this issue and to draw the necessary conclusions from them. It will be necessary to take into account in this regard the fact that the digital frequencies in the first group, at issue here, were intended to be used only for the *continuation* but not the *extension* or fundamental *improvement* of the previous television output (other than any improvement that might follow from the conversion to digital transmission itself).

48 See also the judgment of 23 April 2015, *Commission* v *Bulgaria* (C-376/13, EU:C:2015:266, paragraph 69).

49 See also in this regard the judgment of 31 January 2008, *Centro Europa 7* (C-380/05, EU:C:2008:59, paragraphs 98 and 99), in which the Court points out that measures which have the effect of freezing the structures of the national market and protecting the position of the operators already active on that market are incompatible with the directives of the new common regulatory framework.

50 It is not for the Court in preliminary ruling proceedings to consider whether the television channels ‘RAI 3’ and ‘Rete 4’ were or are in fact operated unlawfully. For the purposes of these proceedings, however, the Court must proceed on the premiss formulated by the Consiglio di Stato and make its assessment on that basis.

71. Both the allocation of too many digital frequencies to Rai and Mediaset, if that is the case, and the fact that account was taken, if indeed it was, of unlawfully operated television channels in the conversion of analogue frequencies to digital frequencies would run directly counter to the objective, laid down by the EU legislature, of promoting competition in the area of electronic communications networks and services and strengthening media pluralism.

72. In those circumstances, the objective of ensuring the continuity of television output cannot be relied on as a ground of justification for the difference of treatment as between Rai and Mediaset, on the one hand, and Persidera, on the other.

*(ii) Preserving the indivisibility of frequencies*

73. The indivisibility of frequencies is a material constraint which, by definition, could and should also have been taken into account at the time of the switchover from the old system of analogue broadcasting frequencies to the new system of digital frequencies. At the end of the day, the avoidance of fractional awards in the allocation of frequencies is part and parcel of the efficient administration and use of television frequencies, which the Member States must strive to ensure in accordance with Article 8(2)(d) and Article 9(1) and Article 9(4), second subparagraph, (c), and Article 9(4), second subparagraph, (d) of Directive 2002/21 and Article 5(2), first subparagraph, (5) and (6), first sentence, of Directive 2002/20.

74. There is no doubt that the award of a third digital multiplex to Rai and Mediaset respectively made it possible to allocate the eight available multiplexes in the first group to all the network operators so entitled while at the same time preserving the indivisibility of those multiplexes and avoiding the occurrence of any fractional awards.

75. However, the aforementioned assignment of a third digital multiplex to Rai and Mediaset respectively was not the only possible way of preserving the indivisibility of frequencies. On the contrary, that concern could also have been addressed by other means having fewer adverse effects on competition.

76. In particular, the Italian authorities could have allocated any surplus multiplexes from the first group,[51] in accordance with objective criteria, to the network operator or operators best able to use those frequencies in such a way as to strengthen competition and continue to broadcast their existing analogue television programmes. It is by no means certain that the two market leaders RAI and Mediaset would have been the best able for these purposes.

77. Alternatively, and subject to further findings by the referring court, the Italian authorities could have assigned any surplus multiplexes from the first group to a number of network operators for their common use, on condition that each network operator would be able to use the digital frequencies contained in those multiplexes to broadcast its television programmes on certain, pre-determined days of the week or at certain pre-determined times.

78. In the light of the argument put forward by all of the parties to the proceedings that each digital multiplex allows a number of television programmes to be broadcast at the same time, the referring court will also have to examine whether the same multiplex could be used to transmit a number of television programmes broadcast by different service providers.

79. In any event, it must be concluded that the objective of preserving the indivisibility of frequencies is not sufficient to justify a difference of treatment such as that at issue here between Rai and Mediaset, on the one hand, and Persidera, on the other.

51 See again, in that regard, point 19 of this Opinion, above.

## VI. Conclusion

80. In the light of the foregoing submissions, I propose that the Court answer the questions referred for a preliminary ruling by the Consiglio di Stato Council of State, Italy) as follows:

Articles 8 and 9 of Directive 2002/21, Articles 3, 5 and 7 of Directive 2002/20 and Articles 2 and 4 of Directive 2002/77 preclude a national method for allocating digital television frequencies whereby the two market leaders receive more digital frequencies in relation to the number of their previous analogue television channels than their smaller competitors, unless such an approach is justified in order to achieve legitimate objectives in the general interest.

Such legitimate objectives include ensuring the continuity of television output and preserving the indivisibility of television frequencies. A difference in the treatment of network operators which is based on those objectives must, however, be strictly confined within the bounds of what is necessary in order to achieve those objectives in a consistent and systematic manner, taking into account the need for competition and media pluralism underlying the three directives.

Competition would be particularly adversely affected if the national method for allocating digital television frequencies, by taking into account previously unlawfully operated analogue television channels, had the effect of conferring more digital frequencies on the two market leaders than on their smaller competitors.