



Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

26 July 2017*

(Reference for a preliminary ruling — Electronic communications networks and services — Telecommunication services — Directives 2002/20/EC, 2002/21/EC and 2002/77/EC — Allocation of the rights to use digital terrestrial broadcasting radio frequencies for radio and television — Annulment of a free of charge on-going selection procedure ('beauty contest') and substitution of a fee-based auction for that procedure — Intervention of the national legislature — Independence of the national regulatory authorities — Prior consultation — Award criteria — Legitimate expectations)

In Case C-560/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Consiglio di Stato (Council of State, Italy), made by decision of 11 June 2015, received at the Court on 30 October 2015, in the proceedings

Europa Way Srl,

Persidera SpA

v

Autorità per le Garanzie nelle Comunicazioni,

Ministero dello Sviluppo economico,

Presidenza del Consiglio dei Ministri,

Ministero dell'Economia e delle Finanze,

intervening parties:

Elettronica Industriale SpA,

Cairo Network Srl,

Tivuitalia SpA,

Radiotelevisione italiana SpA (RAI),

Sky Italia Srl,

* Language of the case: Italian.

THE COURT (Fourth Chamber),

composed of T. von Danwitz, President of the Chamber, E. Juhász, C. Vajda, K. Jürimäe (Rapporteur) and C. Lycourgos, Judges,

Advocate General: J. Kokott,

Registrar: X. Lopez Bancalari, Administrator,

having regard to the written procedure and further to the hearing on 2 February 2017,

after considering the observations submitted on behalf of:

- Europa Way Srl, by A. Terranova, A. Marcantonio, F. Ferraro and R. Mastroianni, avvocati,
- Persidera SpA, by F. Pace, L. Sabelli and B. Caravita di Toritto, avvocati,
- Elettronica Industriale SpA, by L. Medugno, G. Rossi and A. Lauteri, avvocati,
- Cairo Network Srl, by F. Elefante and D. Ielo, avvocati,
- Radiotelevisione italiana SpA (RAI), by G. de Vergottini and P. Cotone, avvocati,
- the Italian Government, by G. Palmieri, acting as Agent, assisted by S. Fiorentino, avvocato dello Stato,
- the European Commission, by L. Nicolae and by L. Malferrari and G. Braun, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 30 March 2017,

gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Articles 56 and 258 TFEU, Articles 3, 5 and 7 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) (OJ 2002 L 108, p. 21), as amended by Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 (OJ 2009 L 337, p. 37) ('the Authorisation Directive'), Articles 3, 6, 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) (OJ 2002 L 108, p. 33), as amended by Directive 2009/140 ('the Framework 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 (OJ 2002 L 249, p. 21, 'the Competition Directive'), and the principles of non-discrimination, transparency, freedom of competition, proportionality, effectiveness, pluralism of information and the protection of legitimate expectations.
- 2 The request has been made in proceedings between Europa Way Srl and Persidera SpA, on the one hand, and the Autorità per le Garanzie nelle Comunicazioni (Communications Regulatory Authority, Italy, 'the AGCOM'), the Ministero dello Sviluppo economico (Ministry of Economic Development, Italy), the Presidenza del Consiglio dei Ministri (President of the Council of Ministers, Italy) and the

Ministero dell'Economia e delle Finanze (Ministry of Economy and Finances, Italy), on the other, concerning the legality of the procedure for the selection of operators to be granted rights to use digital terrestrial broadcasting frequencies for radio and television.

Legal context

- 3 The new common regulatory framework for electronic communications services, electronic communications networks, associated facilities and associated services ('the NCRF') consists of the Framework Directive and four specific directives, including the Authorisation Directive, which are supplemented by the Competition Directive.

The Framework Directive

- 4 Recitals 11 and 21 of the Framework Directive are worded as follows:

'(11) In accordance with the principle of the separation of regulatory and operational functions, Member States should guarantee the independence of the national regulatory authority or authorities with a view to ensuring the impartiality of their decisions. This requirement of independence is without prejudice to the institutional autonomy and constitutional obligations of the Member States or to the principle of neutrality with regard to the rules in Member States governing the system of property ownership laid down in Article [345 TFEU]. ...

...

(21) Member States may use, inter alia, competitive or comparative selection procedures for the assignment of radio frequencies as well as numbers with exceptional economic value. In administering such schemes, NRA should take into account the provisions of Article 8 [of the Framework Directive].'

- 5 According to Article 2(g) of the Framework Directive, the national regulatory authority ('NRA') means 'the body or bodies charged by a Member State with any of the regulatory tasks assigned in that directive and the specific directives. It is apparent from Article 2(l) of the Framework Directive that the Authorisation Directive is included among the specific directives.
- 6 Article 3(3) and (3a) of the Framework Directive was amended by Directive 2009/140. The thirteenth recital of that directive states:

'The independence of the [NRAs] should be strengthened in order to ensure a more effective application of the regulatory framework and to increase their authority and the predictability of their decisions. To this end, express provision should be made in national law to ensure that, in the exercise of its tasks, [an NRA] responsible for ex-ante market regulation or for resolution of disputes between undertakings is protected against external intervention or political pressure liable to jeopardise its independent assessment of matters coming before it. Such outside influence makes a national legislative body unsuited to act as [an NRA] under the regulatory framework. ...'

- 7 Article 3 of the Framework Directive provides:

'1. Member States shall ensure that each of the tasks assigned to [NRAs] in this Directive and the Specific Directives is undertaken by a competent body.

2. Member States shall guarantee the independence of [NRAs] by ensuring that they are legally distinct from and functionally independent of all organisations providing electronic communications networks, equipment or services. Member States that retain ownership or control of undertakings providing electronic communications networks and/or services shall ensure effective structural separation of the regulatory function from activities associated with ownership or control.

3. Member States shall ensure that [NRAs] exercise their powers impartially, transparently and in a timely manner. Member States shall ensure that [NRAs] have adequate financial and human resources to carry out the task assigned to them.

3a. Without prejudice to the provisions of paragraphs 4 and 5, [NRAs] responsible for ex-ante market regulation or for the resolution of disputes between undertakings in accordance with Article 20 or 21 of this Directive shall act independently and shall not seek or take instructions from any other body in relation to the exercise of these tasks assigned to them under national law implementing [EU] law. This shall not prevent supervision in accordance with national constitutional law. Only appeal bodies set up in accordance with Article 4 shall have the power to suspend or overturn decisions by the [NRAs].

...'

8 The first paragraph of Article 4(1) of that directive states:

'Member States shall ensure that effective mechanisms exist at national level under which any user or undertaking providing electronic communications networks and/or services who is affected by a decision of [an NRA] has the right of appeal against the decision to an appeal body that is independent of the parties involved. This body, which may be a court, shall have the appropriate expertise to enable it to carry out its functions effectively. Member States shall ensure that the merits of the case are duly taken into account and that there is an effective appeal mechanism.'

9 According to Article 6 of the directive:

'Except in cases falling within Articles 7(9), 20, or 21, Member States shall ensure that, where [NRAs] intend to take measures in accordance with this Directive or the Specific Directives, or where they intend to provide for restrictions in accordance with Article 9(3) and 9(4), which have a significant impact on the relevant market, they give interested parties the opportunity to comment on the draft measure within a reasonable period.

...'

10 Article 8 of the directive provides, inter alia:

'1. Member States shall ensure that in carrying out the regulatory tasks specified in this Directive and the Specific Directives, the [NRAs] 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 [NRAs] shall promote competition in the provision of electronic communications networks, electronic communications services and associated facilities and services ...

3. The [NRAs] shall contribute to the development of the internal market ...

4. The [NRAs] shall promote the interests of the citizens of the European Union ...'

11 Article 9 of the Framework Directive states:

‘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.

...

3. Unless otherwise provided in the second subparagraph, Member States shall ensure that all types of technology used for electronic communications services may be used in the radio frequency bands, declared available for electronic communications services in their National Frequency Allocation Plan in accordance with [EU] law.

Member States may, however, provide for proportionate and non-discriminatory restrictions to the types of radio network or wireless access technology used for electronic communications services where this is necessary to:

- (a) avoid harmful interference;
- (b) protect public health against electromagnetic fields;
- (c) ensure technical quality of service;
- (d) ensure maximisation of radio frequency sharing;
- (e) safeguard efficient use of spectrum; or
- (f) ensure the fulfilment of a general interest objective in accordance with paragraph 4.

4. Unless otherwise provided in the second subparagraph, Member States shall ensure that all types of electronic communications services may be provided in the radio frequency bands, declared available for electronic communications services in their National Frequency Allocation Plan in accordance with [EU] law. Member States may, however, provide for proportionate and non-discriminatory restrictions to the types of electronic communications services to be provided, including, where necessary, to fulfil a requirement under the [International Telecommunication Union] Radio Regulations.

...

5. Member States shall regularly review the necessity of the restrictions referred to in paragraphs 3 and 4, and shall make the results of these reviews public.

...’

The Authorisation Directive

12 Recitals 11 and 23 of the Authorisation Directive are worded as follows:

‘(11) The granting of specific rights may continue to be necessary for the use of radio frequencies ... Those rights of use should not be restricted except where this is unavoidable in view of the scarcity of radio frequencies and the need to ensure the efficient use thereof.

...

- (23) [NRAs] should ensure, in establishing criteria for competitive or comparative selection procedures, that the objectives in Article 8 of [the Framework] Directive are met. It would therefore not be contrary to this Directive if the application of objective, non-discriminatory and proportionate selection criteria to promote the development of competition would have the effect of excluding certain undertakings from a competitive or comparative selection procedure for a particular radio frequency.'

13 According to Article 3 of that directive:

'1. 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 [52(1) TFEU].

2. The provision of electronic communications networks or the provision of electronic communications services may, without prejudice to the specific obligations referred to in Article 6(2) or rights of use referred to in Article 5, only be subject to a general authorisation. The undertaking concerned may be required to submit a notification but may not be required to obtain an explicit decision or any other administrative act by the [NRA] before exercising the rights stemming from the authorisation. Upon notification, when required, an undertaking may begin activity, where necessary subject to the provisions on rights of use in Articles 5, 6 and 7.

...'

14 Article 5 of the directive provides:

'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:

- avoid harmful interference,
- ensure technical quality of service,
- safeguard efficient use of spectrum, or
- fulfil other objectives of general interest as defined by Member States in conformity with [EU] 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 [the 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 [EU] 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 [the 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 [EU] law.

...

4. ...

With regard to competitive or comparative selection procedures for radio frequencies, Article 7 shall apply.

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.

...'

15 Article 7 of the directive, concerning the procedure for limiting the number of rights of use to be granted for radio frequencies, provides:

'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;
- (b) give all interested parties, including users and consumers, the opportunity to express their views on any limitation in accordance with Article 6 of [the Framework] Directive;
- (c) publish any decision to limit the granting of rights of use or the renewal of rights of use, stating the reasons therefor;
- (d) after having determined the procedure, invite applications for rights of use; and
- (e) review the limitation at reasonable intervals or at the reasonable request of affected undertakings.

2. Where a Member State concludes that further rights of use for radio frequencies can be granted, it shall publish that conclusion and invite applications for such rights.

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 [the Framework] Directive and of the requirements of Article 9 of that directive.

4. Where competitive or comparative selection procedures are to be used, Member States may extend the maximum period of six weeks referred to in Article 5(3) for as long as necessary to ensure that such procedures are fair, reasonable, open and transparent to all interested parties, but by no longer than eight months.

...'

The Competition Directive

- 16 According to Article 2 of the Competition Directive, concerning ‘exclusive and special rights for electronic communications networks and electronic communications services’:

‘1. Member States shall not grant or maintain in force exclusive or special rights for the establishment and/or the provision of electronic communications networks, or for the provision of publicly available electronic communications services.

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.

...’

- 17 Article 4 of that directive, concerning the rights of use of frequencies, provides:

‘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 [EU] law:

1. Member States shall not grant exclusive or special rights of use of radio frequencies for the provision of electronic communications services.
2. The assignment of radio frequencies for electronic communication services shall be based on objective, transparent, non-discriminatory and proportionate criteria.’

The dispute in the main proceedings and the questions referred for a preliminary ruling

- 18 The dispute in the main proceedings concerns the allocation of new digital broadcasting radio frequencies which were freed up following the transition from analogue to digital television (‘the digital switchover’). Digital technology is characterised by transmission efficiency superior to that of analogue technology in so far as, in contrast to the latter, the former allows several programmes to be broadcast simultaneously on the same radio frequency. The radio frequencies thereby freed up form the ‘digital dividend’.
- 19 The digital switchover began in Italy at a time when proceedings for a declaration of failure to fulfil obligations were pending against that Member State since 2006 with regard to the compatibility of the Italian legislation on the management of radio frequencies for television broadcasting, the digital switchover and the allocation of digital radio frequencies with the provisions of the Framework, Authorisation and Competition Directives. In its reasoned opinion of 19 July 2007, the European Commission, in essence, stated that, in guaranteeing access to the digital radio and television market only to operators already actively using analogue technology, that legislation protected those operators from competition in that market. The Italian Government adopted several measures in order to bring that legislation into line with EU law.

- 20 It is in that context that the AGCOM adopted Resolution 181/09/CONS of 7 April 2009, which was subsequently enacted by legge comunitaria 2008 No 88 (Community law 2008, No 88) of 7 July 2009. In that resolution, the AGCOM set out criteria for the complete digitalisation of the terrestrial networks.
- 21 That resolution provided, in particular, for the allocation of 21 national multiplexes, which enable various signals to be combined into a common flow of data and the transmission of several digital terrestrial television services simultaneously. For the purposes of their distribution between new operators, operators which had created digital networks and those which already operated analogue networks, the multiplexes were divided into three groups that were required to be allocated according to different criteria. It was, in addition, provided that, at the end of the selection procedure, no operator could obtain more than five national multiplexes.
- 22 In particular, the available radio frequencies arising from the digital dividend — the only frequencies at issue in the case in the main proceedings — were required to be allocated free of charge to operators who fulfilled the stipulated conditions at the end of a selection procedure organised according to the ‘beauty contest’ model.
- 23 That ‘beauty contest’ initially concerned five multiplexes, that is signals each able to transmit several digital terrestrial television services simultaneously. Those multiplexes were subdivided into two parts. The three multiplexes comprised in Part A were reserved to new entrants and small operators. They could not be allocated to Radiotelevisione Italiana SpA (RAI), Mediaset or Telecom Italia Media Broadcasting, now Persidera. Part B contained two multiplexes open to any tenderer, subject to the limitation of only one multiplex for RAI and Mediaset.
- 24 The rules for the ‘beauty contest’ were definitively approved in AGCOM Resolution 497/10/CONS of 22 September 2010, following a public consultation and approval of the Digital Frequency Allocation Plan. At that stage, multiplex C1 was added to the five multiplexes mentioned above which were subject to the ‘beauty contest’.
- 25 The Minister for Economic Development published the tender notice on 8 July 2011. Europa Way and Persidera were invited to tender. Each of those companies was, respectively, the only tenderer for one multiplex, but Persidera had tendered for three multiplexes.
- 26 By order of 20 January 2012, the Ministry of Economic Development postponed the ‘beauty contest’. The procedure was ultimately annulled by Article 3d of decreto legge No 16, Disposizioni urgenti in materia di semplificazioni tributarie, di efficientamento e potenziamento delle procedure di accertamento (Decree-Law No 16 concerning urgent provisions on tax simplification, efficiency improvement and the strengthening of investigatory procedures) of 2 March 2012, enacted by Law No 44 of 26 April 2012 (‘Decree-Law No 16/2012’). It was also decided that the ‘beauty contest’ would be replaced by a fee-based public selection procedure, based on award to the highest bidder in accordance with the priorities and the criteria laid down by the AGCOM, and that the participants in the previous selection procedure would be awarded compensation.
- 27 Following a public consultation, the AGCOM adopted Regulation 277/13/CONS of 11 April 2013 laying down rules for the new selection procedure. In that resolution, the AGCOM adjusted the Radio Frequency Allocation Plan, by reducing inter alia the number of radio frequencies for broadcasting digital terrestrial television frequencies from 25 to 22, and set the number of multiplexes for allocation at three. Only new entrants and small operators, to the exclusion of operators already holding three or more multiplexes, were allowed to tender for those multiplexes.

- 28 The call for tenders was published on 12 February 2014. Neither Europa Way nor Persidera took part in the procedure. According to the information in the file submitted to the Court, Persidera was unable to submit an offer due to the number of multiplexes which it already held. Cairo Network Srl, the only tenderer, was awarded one multiplex.
- 29 Europa Way and Persidera brought actions before the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio, Italy) challenging the annulment of the ‘beauty contest’ and its replacement by a fee-based selection procedure.
- 30 Following the dismissal of their actions in judgments of 25 September 2014, Europa Way and Persidera appealed against those judgments to the referring court.
- 31 Before that court, Europa Way submits that the ‘beauty contest’ was intended to address the concerns intimated by the Commission in the course of the proceedings for a declaration of failure to fulfil obligations and to ensure allocation to operators which had been prevented from operating in the market as a result of the irregularities identified by the Commission. That objective and, consequently, the opening of the sector to competition were not achieved. Europa Way also challenges the allocation of radio frequencies to incumbents free of charge.
- 32 Persidera relies, in essence, on similar arguments. It adds that, although the conduct of the ‘beauty contest’ had been agreed with the Commission, the Commission did not validate its annulment and replacement by an auction.
- 33 In those circumstances, the Consiglio di Stato (Council of State, Italy) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:
- ‘(1) Do the contested legislation and the consequential implementing measures infringe the rules according to which the functions of regulating the television market are vested in an independent administrative authority (Articles 3 and 8 of the Framework Directive)?
 - (2) Do the contested legislation and the consequential implementing measures infringe Article 7 of the Authorisation Directive and Article 6 of the Framework Directive, which provide for prior public consultation by the independent [NRA] responsible for the sector?
 - (3) Does EU law, and in particular Article 56 TFEU, Article 9 of the Framework Directive, Articles 3, 5 and 7 of the Authorisation Directive, and Articles 2 and 4 of the Competition Directive, and the principles of non-discrimination, transparency, freedom of competition, proportionality, effectiveness and pluralism of information, preclude discontinuance of the “beauty contest procedure” — which was commenced in order to remedy, within the system for the allocation of digital television frequencies, the unlawful exclusion of operators from the market and to allow access for small operators — and substitution for it of another, fee-based, selection procedure, which provides for the imposition on participants of requirements and obligations not previously required of incumbents, rendering engagement in competitive bidding onerous and uneconomic?
 - (4) Does EU law, in particular Article 56 TFEU, Article 9 of [the Framework] Directive, Articles 3, 5 and 7 of [the Authorisation] Directive, Articles 2 and 4 of [the Competition] Directive, and Article 258 TFEU, and the principles of non-discrimination, transparency, freedom of competition, proportionality, effectiveness and pluralism of information, preclude the re-configuration of the Frequency Allocation Plan, reducing national networks from 25 to 22 (and retention of the same availability of multiplexes for the incumbents), the reduction of [the multiplexes] in the competition to 3 multiplexes, the allocation of frequencies in the VHF-III band involving the risk of severe interference?

- (5) Is the upholding of the principle of the protection of legitimate expectations, as expounded by the Court of Justice, compatible with the discontinuance of the beauty contest procedure which has not allowed the appellants, already admitted to the free procedure, to be sure of being awarded some of the [multiplexes] put out to tender?
- (6) Is the enactment of a provision, such as that contained in Article 3d of Legislative Decree No [16/2012], which is out of harmony with the characteristics of the radio and television market, compatible with EU legislation on the allocation of user rights for frequencies (Articles 8 and 9 of [the Framework] Directive, Articles 5 and 7 of [the Authorisation] Directive, Articles 2 and 4 of [the Competition Directive])?’

Consideration of the questions referred

Admissibility

- 34 In the first place, as the Italian Government and Elettronica Industriale correctly submit, it must be found that it is clear from the very wording of the first, second, fifth and sixth questions that the referring court is asking the Court to rule on the conformity or compatibility of national measures with EU law.
- 35 It is not for the Court, in the context of proceedings under Article 267 TFEU, to rule on the conformity or compatibility of national provisions with EU law. The Court is, however, competent to give the national court full guidance on the interpretation of EU law in order to enable it to determine the issue of conformity or compatibility for the purposes of the case before it (see, to that effect, judgment of 31 January 2008, *Centro Europa 7*, C-380/05, EU:C:2008:59, paragraphs 49 and 50 and the case-law cited, and order of 3 July 2014, *Talasca*, C-19/14, EU:C:2014:2049, paragraph 16 and the case-law cited).
- 36 It is therefore appropriate for the Court, in the present case, to restrict its analysis to the provisions of EU law and provide an interpretation of the national provisions which will be of use to the national court, which has the task of determining the compatibility and conformity of the instruments of national law with EU law, for the purposes of deciding the dispute before it (see, to that effect, judgment of 31 January 2008, *Centro Europa 7*, C-380/05, EU:C:2008:59, paragraph 51).
- 37 In so far as the first, second and sixth questions refer to provisions of EU law, the interpretation of which may be of use to the referring court, those questions are admissible.
- 38 In the second place, the Italian Government and Elettronica challenge the admissibility of the third, fourth and sixth questions and of the second to fourth questions on the ground of incomplete presentation of the factual background and legal context, respectively, of the case in the main proceedings. The Italian Government adds, in essence, that the referring court has failed to set out the reasons underpinning the relevancy of the provisions the interpretation of which that court seeks in disposing of the case in the main proceedings.
- 39 In that regard, it should be noted that, in the context of the cooperation between the Court and the national court and tribunals established by Article 267 TFEU, the need to provide an interpretation of EU law which will be of use to the national court means that the national court is bound to observe scrupulously the requirements concerning the content of a request for a preliminary ruling, expressly set out in Article 94 of the Rules of Procedure of the Court of Justice, of which the referring court should be aware (see, to that effect, judgments of 5 July 2016, *Ognyanov*, C-614/14, EU:C:2016:514, paragraphs 18 and 19 and the case-law cited, and of 27 October 2016, *Audace and Others*, C-114/15, EU:C:2016:813, paragraph 35).

- 40 Thus, first, it is essential, as stated in Article 94(c) of the Rules of Procedure, that the request for a preliminary ruling itself contain a statement of the reasons which prompted the referring court or tribunal to inquire about the interpretation or validity of certain provisions of EU law, and the connection between those provisions and the national legislation applicable to the main proceedings.
- 41 In the present case, it should be noted that the request for a preliminary ruling does not contain any explanation as to how Articles 56 and 258 TFEU are relevant to the outcome of the case in the main proceedings.
- 42 As regards Article 56 TFEU, it is apparent from the documents in the case file submitted to the Court, that the case in the main proceedings is characterised by factors that are all confined within Italy. Article 56 TFEU does not apply to such a situation (see, to that effect, judgment of 15 November 2016, *Ullens de Schooten*, C-268/15, EU:C:2016:874, paragraph 47 and the case-law cited).
- 43 As regards Article 258 TFEU, suffice it to add, as the Advocate General noted in point 36 of her Opinion, that that provision is purely procedural in nature, applicable to proceedings for a declaration of failure to fulfil obligations conducted by the Commission and brought before the Court.
- 44 The third and fourth questions are therefore inadmissible in so far as they seek an interpretation of Articles 56 and 258 TFEU.
- 45 Second, as provided in Article 94(a) of the Rules of Procedure of the Court, it is also essential, that the request for a preliminary ruling itself contain, at least, an account of the facts on which the questions are based.
- 46 In the present case, the referring court has been called on to rule, in the case in the main proceedings, on the legality of the selection procedure for the allocation of digital radio frequencies in the light of the provisions of the NCRF. In so far as the order for reference contains the information needed to ascertain the facts as well as the procedural and substantive conditions relating to that procedure, the general factual background to the case in the main proceedings is stated in sufficient detail to enable the Court to rule on the essence of those questions.
- 47 However, as the Advocate General noted in point 42 of her Opinion, certain questions posed by the referring court refer to factual circumstances which are entirely unsubstantiated and unexplained in the request for a preliminary ruling and on which the Court is therefore unable to rule. That is the case, for instance, of the allusion in the third question, to ‘requirements and obligations not previously required of incumbents’, of the reference, in the fourth question, to ‘the allocation of frequencies in the VHF-III band involving the risk of severe interference’, and the situation on which the sixth question is based, according to which Article 3d of Decree-Law No 16/2012 ‘is out of harmony with the characteristics of the radio and television market’.
- 48 It follows that the third and fourth questions are inadmissible to the extent determined in paragraphs 44 and 47 above. The sixth question is inadmissible in its entirety.

Substance

The first question

- 49 By its first question, the referring court asks, in essence, whether the provisions of the Framework Directive must be interpreted as precluding the annulment, by a national legislature, of an on-going selection procedure for the allocation of radio frequencies conducted by the competent NRA in circumstances such as those of the case in the main proceedings, a procedure which was suspended by ministerial order.

- 50 In that regard, in the first place, it should be noted that, under Article 3(1) of the Framework Directive, the Member States are to ensure that each of the tasks assigned to the NRAs in that directive and the specific directives is undertaken by a competent body. In addition, in accordance with Article 3(2) and (3) of the Framework Directive, read in the light of recital 11 thereof, the Member States must guarantee the independence of the NRAs so that they may exercise their powers impartially, transparently and in a timely manner (see, to that effect, judgments of 3 December 2009, *Commission v Germany*, C-424/07, EU:C:2009:749, paragraph 54; of 17 September 2015, *KPN*, C-85/14, EU:C:2015:610, paragraph 54, and of 19 October 2016, *Ormaetxea Garai and Lorenzo Almendros*, C-424/15, EU:C:2016:780, paragraph 33).
- 51 While, in its initial version, the aim of Article 3 of the Framework Directive was essentially, as stated in recital 11 thereof, to guarantee the independence and impartiality of NRAs by ensuring that regulation and operation are functionally separate, the intention of the EU legislature was, by means of Directive 2009/140 and as stated in recital 13 thereof, to strengthen the independence of NRAs in order to ensure a more effective application of the regulatory framework and to increase their authority and the predictability of their decisions (judgments of 28 July 2016, *Autorità per le Garanzie nelle Comunicazioni*, C-240/15, EU:C:2016:608, paragraphs 32 and 34, and of 19 October 2016, *Ormaetxea Garai et Lorenzo Almendros*, C-424/15, EU:C:2016:780, paragraph 45).
- 52 Recital 13 of Directive 2009/140 states, to that end, that express provision should be made in national law to ensure that, in the exercise of its tasks, an NRA responsible for ex-ante market regulation or for resolution of disputes between undertakings is protected against external intervention or political pressure liable to jeopardise its independent assessment of matters coming before it.
- 53 That objective of strengthening the independence and impartiality of NRAs is expressed in Article 3(3a) of the Framework Directive (judgment of 19 October 2016, *Ormaetxea Garai and Lorenzo Almendros*, C-424/15, EU:C:2016:780, paragraph 47). In accordance with the first paragraph of that provision, without prejudice to cases in which consultation and cooperation with other national authorities are required under Article 3(4) and (5), the NRAs responsible for ex-ante market regulation or for resolution of disputes between undertakings must act independently and cannot seek or take instructions from any other body in relation to the exercise of the tasks assigned to them. That provision nevertheless provides for the possibility of supervision in accordance with national constitutional law and specifies that only appeal bodies set up in accordance with Article 4 of the Framework Directive are to have the power to suspend or overturn decisions by the NRAs.
- 54 In the second place, it is important to note that the Framework Directive confers on the NRAs specific regulatory tasks, which are established in Articles 8 to 13 of that directive. In accordance with the first paragraph of Article 9(1) of the directive, it is for those authorities to allocate the spectrum used for electronic communications services and to issue general authorisations or individual rights of use of such radio frequencies.
- 55 Consequently, the conduct of a selection procedure for the allocation of digital radio frequencies, such as the ‘beauty contest’ at issue in the main proceedings, falls within the scope of the exercise of a regulatory task, within the meaning of the Framework Directive, for which an NRA is competent.
- 56 The independence of such an authority would be jeopardised if external bodies, such as the Minister for Economic Development and the Italian legislature in the case in the main proceedings, were permitted to suspend, or even annul, an on-going selection procedure for the allocation of radio frequencies conducted under the auspices of that authority, other than in the cases of supervision and appeal referred to in the first paragraph of Article 3(3a) of the Framework Directive.
- 57 It is clear from the documents submitted to the Court that, in the circumstances of the case in the main proceedings, following the Ministry of Economic Development, the Italian legislature intervened in an on-going selection procedure conducted by the AGCOM and discontinued that procedure. It is

common ground that the legislature and ministry did not act as appeal bodies within the meaning of Article 4 of the Framework Directive, which have, under Article 3(3a) of the directive, the exclusive power to suspend or overturn decisions by the NRAs. The requirements relating to the independence of NRAs therefore preclude such intervention.

- 58 In the light of the foregoing considerations, the answer to the first question is that Article 3(3a) of the Framework Directive must be interpreted as precluding the annulment, by a national legislature, of an on-going selection procedure for the allocation of radio frequencies conducted by the competent NRA in circumstances such as those of the case in the main proceedings which was suspended by ministerial order.

The second question

- 59 Since the second question concerns the same measures as the first question, and in the light of the answer to the first question, there is no need to answer the second question.

The third and fourth questions

- 60 By its third and fourth questions, which it is appropriate to consider together, the referring court wishes to know, in essence, whether Article 9 of the Framework Directive, Articles 3, 5 and 7 of the Authorisation Directive and Articles 2 and 4 of the Competition Directive must be interpreted as precluding a selection procedure free of charge for the allocation of radio frequencies, which had been commenced in order to remedy the unlawful exclusion of certain operators from the market, from being replaced by a fees-based procedure initiated under an amended Radio Frequency Allocation Plan subsequent to a reduction in the number of those frequencies.
- 61 As a preliminary point, it should be noted that Article 8 of the Framework Directive places on the Member States the obligation to ensure that the NRAs take all reasonable measures aimed at promoting competition in the provision of electronic communications services, ensuring that there is no distortion or restriction of competition in the electronic communications sector and removing remaining obstacles to the provision of those services at European Union level (judgments of 31 January 2008, *Centro Europa 7*, C-380/05, EU:C:2008:59, paragraph 81; of 3 December 2009, *Commission v Germany*, C-424/07, EU:C:2009:749, paragraph 92, and of 7 November 2013, *UPC Nederland*, C-518/11, EU:C:2013:709, paragraph 50).
- 62 In accordance with Article 8(1) of the Framework Directive, in carrying out their regulatory tasks specified in that directive and, inter alia, in the Authorisation Directive, the NRAs are to take all reasonable measures which are aimed at achieving the objectives set out in Article 8(2) to (4) of the Framework Directive, namely to promote competition in the provision of electronic communications networks and electronic communications services, to contribute to the development of the internal market and to promote the interests of the citizens of the European Union (see, to that effect, judgments of 19 June 2014, *TDC*, C-556/12, EU:C:2014:2009, paragraph 39, and of 15 September 2016, *Koninklijke KPN and Others*, C-28/15, EU:C:2016:692, paragraph 46).
- 63 Under Article 4(2) of the Competition Directive, the second paragraph of Article 5(2) and Article 7(3) of the Authorisation Directive and Article 9(1) of the Framework Directive, rights of use for radio frequencies need to be allocated on the basis of criteria which must be objective, transparent, non-discriminatory and proportionate. That latter condition requires that those criteria be appropriate for securing attainment of the objective pursued and do not go beyond what is necessary for attaining it (see, to that effect, judgment of 23 April 2015, *Commission v Bulgaria*, C-376/13, not published, EU:C:2015:266, paragraphs 65 and 84).

- 64 In the first place, it is therefore clear from those provisions that allocation of radio frequencies free of charge is not one of the principles provided for by the NCRF on the basis of which selection procedures must be conducted.
- 65 On the contrary, first, it is to be noted that it is apparent from recital 21 of the Framework Directive and Article 7(4) and recital 23 of the Authorisation Directive that the selection procedures for the allocation of radio frequencies may be of a competitive or comparative nature. The Member States therefore enjoy, in accordance with the objectives and obligations laid down by the Framework Directive and the specific directives, unfettered discretion as to the establishment of competitive or comparative procedures, whether they be free of charge or fee-based. Second, it must be held that, in the light of the need to ensure the effective management of radio frequencies and of their important social, cultural and economic value, which the Member States must take into account under Article 9(1) of the Framework Directive, and of the spectrum scarcity of those radio frequencies, a fee-based allocation may prove justified.
- 66 It follows that the provisions of the NCRF do not preclude the conduct of a fee-based selection procedure for the allocation of radio frequencies, provided, however, that that procedure is based on objective, transparent, non-discriminatory and proportionate criteria, and that it is in conformity with the objectives laid down in Article 8(2) to (4) of the Framework Directive. It is for the referring court to ascertain whether the selection procedure at issue in the main proceedings is in conformity with those requirements. The Court may nevertheless provide it with all the guidance on points of interpretation which may be of assistance to it to that end.
- 67 First, having regard to the objective of promoting competition, set out in Article 8(2) of the Framework Directive and to the requirements of the principle of proportionality, the sum required for eligibility for the allocation of radio frequencies must be set at an appropriate level to reflect, in particular, the value of the use of those radio frequencies, which requires account to be taken of the economic and technical situation and the competitiveness of the market in question (see, by analogy, judgments of 10 March 2011, *Telefónica Móviles España*, C-85/10, EU:C:2011:141, paragraphs 27 and 28, and of 21 March 2013, *Belgacom and Others*, C-375/11, EU:C:2013:185, paragraphs 50 and 51).
- 68 In that regard, although the holding of an auction may constitute an appropriate method for determining the value of the radio frequencies (see, to that effect, judgment of 21 March 2013, *Belgacom and Others*, C-375/11, EU:C:2013:185, paragraph 52), it must nevertheless be ensured that the fee charged for participation in the auction is not set at a level which would have the effect of impeding the access of new operators to the market (see, to that effect, judgment of 10 March 2011, *Telefónica Móviles España*, C-85/10, EU:C:2011:141, paragraph 30). The latter consideration is of even greater importance in the situation, mentioned by the referring court, where the allocation of new radio frequencies is intended to remedy the unlawful exclusion of operators from the market.
- 69 Second, as regards the requirement that the selection procedure must be based on non-discriminatory criteria, it should be noted that the general principle of equal treatment 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 (judgment of 16 December 2008, *Arcelor Atlantique et Lorraine and Others*, C-127/07, EU:C:2008:728, paragraph 23 and the case-law cited). The comparability of situations must be assessed in particular in the light of the subject matter and purpose of the measure in question. The principles and objectives of the field to which that measure relates must also be taken into account (see, to that effect, judgment of 16 December 2008, *Arcelor Atlantique et Lorraine and Others*, C-127/07, EU:C:2008:728, paragraph 26 and the case-law cited).
- 70 In the present case, it should be noted, first, that it has been indicated to the Court that the digital radio frequencies were allocated free of charge to incumbents so as, depending on the circumstances, to ensure the continuity of television output or to reward investment already made in digital technology, whereas the radio frequencies of the digital dividend, aimed, in particular, at new entrants

and small operators, were subject to a fee-based selection procedure. However, as the Advocate General noted in point 87 of her Opinion, in the light of the objectives thus set out, those two categories of operator are not, in principle, in a comparable situation, so that a potential difference in treatment is not contrary to the principle of equal treatment.

- 71 Second, it is to be noted that the principle of equal treatment also does not preclude a Member State, which previously allocated radio frequencies free of charge, from subjecting the allocation of new digital radio frequencies to a fee-based selection procedure. Given the technological differences characterising, on the one hand, analogue radio frequencies and, on the other, digital radio frequencies, the principle of equality of treatment does not require that they be treated identically for the purpose of their allocation.
- 72 In the second place, it should be noted that, where the granting of rights of use for radio frequencies needs to be reduced, Article 7(3) of the Authorisation Directive provides that the Member States are to grant such rights on the basis of selection criteria which must be objective, transparent, non-discriminatory and proportionate. Such criteria must, in addition, give due weight to the achievement of the objectives of Article 8 of the Framework Directive and of the requirements of Article 9 thereof. In that regard, it is clear from recital 11 of the Authorisation Directive that those rights of use should not be reduced, except where this is unavoidable in view of the scarcity of radio frequencies and the need to ensure their efficient use.
- 73 It follows that, in principle, the provisions of the NCRF permit, in principle, a the reduction of the number of rights of use to be granted for radio frequencies, in view of the scarcity of radio frequencies and the need to ensure their efficient use. Those provisions nevertheless subject that reduction to the condition that it be necessary and proportionate, that it does not run counter to the objectives set out in Article 8 of the Framework Directive, including promoting competition in the provision of networks, and that the grant of rights of use be based on objective, transparent, non-discriminatory and proportionate selection criteria.
- 74 In the present case, subject to verification by the referring court, it should be noted that it appears from the documents in the case file before the Court that the decision was taken to reduce the number of available radio frequencies resulting from the digital dividend following advice from the International Telecommunication Union, due to the risk of interference.
- 75 As the Advocate General stated in point 95 of her Opinion, such considerations may, in principle, justify a reduction in the number of radio frequencies put out to tender in accordance with the conditions set out in paragraph 73 above.
- 76 However, it is for the referring court to ascertain whether, as certain parties have submitted before the Court, the analogue television incumbents were favoured in the digital switchover through the allocation of a number of radio frequencies greater than that which was necessary for continuing their programmes, whereas the reduction in the number of radio frequencies affected the radio frequencies put out to tender for new operators.
- 77 In the light of the foregoing considerations, the answer to the third and fourth questions is that Article 9 of the Framework Directive, Articles 3, 5 and 7 of the Authorisation Directive and Articles 2 and 4 of the Competition Directive must be interpreted as not precluding a selection procedure free of charge for the allocation of radio frequencies, which has been commenced in order to remedy the unlawful exclusion of certain operators from the market, from being replaced by a fees-based procedure commenced under an amended Radio Frequency Allocation Plan after to a reduction in their number, provided that the new selection procedure is based on objective, transparent, non-discriminatory and proportionate criteria and that it is in line with the objectives laid down in Article 8(2) to (4) of the Framework Directive. It is for the referring court to ascertain, taking into

account all the relevant circumstances of the case, whether the conditions set out in the fee-based selection procedure are such as to allow an actual entry of new entrants into the digital television market without unduly favouring analogue or digital incumbents.

The fifth question

- 78 By its fifth question, the referring court asks, in essence, whether the principle of legitimate expectations must be interpreted as precluding the discontinuance of a selection procedure for the allocation of radio frequencies on the sole ground that operators, such as the applicants in the main proceedings, which had been invited to tender and, as the only tenderers, would have been granted rights to use digital terrestrial broadcasting frequencies for radio and television had the procedure not been annulled.
- 79 According to settled case-law of the Court, the principle of the protection of legitimate expectations is one of the fundamental principles of the European Union (judgment of 14 March 2013, *Agrargenossenschaft Neuzelle*, C-545/11, EU:C:2013:169, paragraph 23 and the case-law cited) and must be observed not only by the EU institutions, but also by Member States in the exercise of the powers conferred on them under EU directives (judgment of 9 July 2015, *Salomie and Oltean*, C-183/14, EU:C:2015:454, paragraph 30 and the case-law cited).
- 80 The right to rely on that principle extends to any person in a situation in which an administrative authority has caused that person to entertain expectations which are justified by precise assurances provided to him (judgment of 9 July 2015, *Salomie and Oltean*, C-183/14, EU:C:2015:454, paragraph 44 and the case-law cited). In whatever form it is given, information which is precise, unconditional and consistent and comes from authorised and reliable sources constitutes assurances capable of giving rise to such expectations (judgment of 17 March 2011, *AJD Tuna*, C-221/09, EU:C:2011:153, paragraph 72 and the case-law cited).
- 81 In the present case, it is clear from the documents provided to the Court that the applicants in the main proceedings participated in the ‘beauty contest’. They base their argument on the fact that, as the only tenderers for certain multiplexes, they had to have been awarded at least one multiplex each. It is, however, common ground that, during that procedure, no radio frequency was awarded to them. Subject to verification by the referring court, it also does not appear from the documents in the case file that they had been given precise, unconditional assurances as to the future allocation of the multiplexes in question.
- 82 However, failing any precise assurances originating from an authorised reliable source, the mere fact that an operator is invited to tender for the allocation of digital radio frequencies, such as the ‘beauty contest’ at issue in the main proceedings, is not capable of leading him to entertain reasonable expectations. That is the case even in a situation where the operator participates in the procedure as the sole tenderer for the award of a multiplex.
- 83 In the light of the foregoing considerations, the answer to the fifth question is that the principle of legitimate expectations must be interpreted as not precluding the annulment of a selection procedure for the allocation of radio frequencies on the sole ground that operators, such as the applicants in the main proceedings, had been invited to tender and, as the only tenderers, would have been granted rights to use digital terrestrial broadcasting frequencies for radio and television had the procedure not been annulled.

Costs

- ⁸⁴ Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

1. **Article 3(3a) of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), as amended by Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009, must be interpreted as precluding the annulment, by a national legislature, of an on-going selection procedure for the allocation of radio frequencies conducted by the competent national regulatory authority in circumstances such as those of the case in the main proceedings which was suspended by ministerial order.**
2. **Article 9 of Directive 2002/21, as amended by Directive 2009/140, Articles 3, 5 and 7 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), as amended by Directive 2009/140, and 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, must be interpreted as not precluding a selection procedure for the allocation of radio frequencies free of charge, which was commenced in order to remedy the unlawful exclusion of certain operators from the market, from being replaced by a fees-based procedure initiated under an amended Radio Frequency Allocation Plan subsequent to a reduction in their number, provided that the new selection procedure is based on objective, transparent, non-discriminatory and proportionate criteria and that it is in line with the objectives laid down in Article 8(2) to (4) of Directive 2002/21, as amended. It is for the referring court to ascertain, taking into account all the relevant circumstances of the case, whether the conditions set out in the fee-based selection procedure are such as to allow an actual entry of new entrants into the digital television market without unduly favouring analogue or digital incumbents.**
3. **The principle of legitimate expectations must be interpreted as not precluding the annulment of a selection procedure for the allocation of radio frequencies on the sole ground that operators, such as the applicants in the main proceedings, had been invited to tender and, as the only tenderers, would have been granted rights to use digital terrestrial broadcasting frequencies for radio and television had the procedure not been annulled.**

[Signatures]