Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

26 July 2017*

(Reference for a preliminary ruling — Electronic communications — Telecommunication services — Directives 2002/20/EC, 2002/21/EC and 2002/77/EC — Equal treatment — Determination of the number of digital radio frequencies to be granted to each operator which already has analogue radio frequencies — Taking into consideration analogue radio frequencies used unlawfully — Correspondence between the number of analogue radio frequencies held and the number of digital radio frequencies obtained)

In Case C-112/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Consiglio di Stato (Council of State, Italy), made by decision of 2 July 2015, received at the Court on 24 February 2016, in the proceedings

**Persidera SpA**

v

**Autorità per le Garanzie nelle Comunicazioni,**

**Ministero dello Sviluppo Economico delle Infrastrutture e dei Trasporti,**

intervening parties:

**Radiotelevisione italiana SpA (RAI),**

**Reti Televisive Italiane SpA (RTI),**

**Elettronica Industriale SpA,**

**Television Broadcasting System Spa,**

**Premiata Ditta Borghini e Stocchetti di Torino Srl,**

**Rete A SpA,**

**Centro Europa 7 Srl,**

**Prima TV SpA,**

**Sky Italia Srl,**

* Language of the case: Italian.

**Elemedia SpA,**

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:

– Persidera SpA, by F. Pace, L. Sabelli and B. Caravita di Toritto, avvocati,

– the Italian Government, by G. Palmieri, acting as Agent, assisted by S. Fiorentino, avvocato dello Stato,

– Radiotelevisione italiana SpA (RAI), by G. de Vergottini, avvocato,

– Reti Televisive Italiane SpA (RTI), by L. Medugno, G. Rossi, I. Perego, G.M. Roberti and M. Serpone, avvocati,

– Elettronica Industriale SpA, G. Rossi and L. Medugno, avvocati,

– the Slovenian Government, by A. Vran, acting as Agent,

– the European Commission, by L. Nicolae, 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, 101, 102 and 106 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'), Article 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 and pluralism of information.

2 The request has been made in the course of proceedings between Persidera SpA, on the one hand, and the Autorità per le Garanzie nelle Comunicazioni (Communications supervisory authority, Italy) ('AGCOM') and the Ministero dello Sviluppo economico, delle Infrastrutture e dei Trasporti (Ministry for Economic Development, Infrastructure and Transport, Italy), on the other, concerning the assignment of rights to use radio frequencies for digital terrestrial television broadcasting.

## 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 Article 2(g) of the Framework Directive defines the 'national regulatory authority' (NRA) as 'the body or bodies charged by a Member State with any of the regulatory tasks assigned in this Directive and the Specific Directives'. It is clear from Article 2(l) that the Authorisation Directive is included among the 'Specific Directives'.

5 Article 8(1), first subparagraph, and Article 8(4)(b) of that directive provide the following:

'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.

…

4. The [NRAs] shall promote the interests of the citizens of the European Union by inter alia:

…

(b) ensuring a high level of protection for consumers …'

6 Article 9(1) and (2) of that directive provides:

'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 [International Telecommunications Union] Radio Regulations, and may take public policy considerations into account.

2. Member States shall promote the harmonisation of use of radio frequencies across the [European Union], consistent with the need to ensure effective and efficient use thereof and in pursuit of benefits for the consumer such as economies of scale and interoperability of services. In so doing, they shall act in accordance with Article 8a and with the Decision No 676/2002/EC (Radio Spectrum Decision).'

***The Authorisation Directive***

7 Under Article 3 of the Authorisation 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.

…’

8 Article 5 of that 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.

…

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 [the Framework Directive]. They shall ensure competition is not distorted by any transfer or accumulation of rights of use of radio frequencies. For such purposes, Member States may take appropriate measures such as mandating the sale or the lease of rights to use radio frequencies.'

9 Article 7 of that directive, relating to 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;

…

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.'

***The Competition Directive***

10 Article 2 of the Competition Directive, concerning exclusive and special rights for electronic communications networks and electronic communications services, provides:

'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.

…'

11 Article 4 of that directive which concerns user rights for 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**

12 The dispute in the main proceedings concerns the assignment of radio frequencies for digital terrestrial television broadcasting for the benefit of operators which already had analogue broadcasting radio frequencies and operated analogue channels. Digital technology is characterised by its superior transmission efficiency compared with that of analogue technology in that, unlike analogue, it allows the simultaneous transmission of a number of programmes on the same radio frequency. The radio frequencies thus freed up constitute the 'digital dividend'.

13 In Italy, the transition from analogue television to digital television ('the digital transition') began when proceedings against that Member State for failure to fulfil its obligations had been pending since 2006; those proceedings concerned the compatibility of Italian legislation on the management of radio frequencies for television broadcasting, digital transition and the assignment of digital radio frequencies, with the provisions of the Framework Directive and the Authorisation and Competition Directives. In a reasoned opinion of 19 July 2007, the European Commission, in essence, found that that legislation, by allowing only operators which were already broadcasting in analogue mode to have access to the digital radio and television market, shielded them from competition on that market. The Italian Government adopted a number measures in order to make that legislation compatible with EU law.

14 It was in that context that AGCOM adopted Decision 181/09/CONS of 7 April 2009 which was subsequently converted into law by legge No 88 (Law No 88) of 7 July 2009. By that decision, AGCOM laid down the criteria for the complete digitalisation of the terrestrial networks for television.

15 That decision made provision, inter alia, for the assignment of 21 national multiplexes, which made it possible to regroup different signals within one common data flux and to support a number of digital terrestrial television services at the same time. For the purposes of allocating those multiplexes among the new operators, the operators which had created digital networks and the operators which already managed analogue networks, those multiplexes were divided into three groups to be assigned in accordance with different criteria. In addition, it was also stipulated that, at the end of the selection procedure, no operator could obtain more than five national multiplexes.

16 Only one of those three groups is the subject of the main proceedings. That group is composed of eight multiplexes which were intended to be used for the conversion of existing analogue channels into digital networks. Given the number of digital radio frequencies available, which was below the number of channels, Decision 181/09/CONS used the so-called 'fair' conversion criterion, based on the continuity of programmes broadcast in analogue. In addition, it was stipulated that each operator already active on the analogue market was to be assigned at least one multiplex. On that basis, three multiplexes were assigned to single network operators. Five multiplexes were allocated among the

multi-network operators. In that way, Radiotelevisione italiana SpA (RAI) and Mediaset, which each ran three analogue channels, were assigned two multiplexes, while Telecom Italia Media Broadcasting, which ran two analogue channels, received one multiplex.

17 Telecom Italia Media Broadcasting brought an action before the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio, Italy) seeking annulment of the decisions allocating those multiplexes and the decisions which were used as a legal basis for those decisions. By its action, that company requested that its right to obtain an additional multiplex be recognised, and that the relevant authorities be directed to assign that multiplex or that they be ordered to pay damages to that company.

18 Following the dismissal of its action by judgment No 1398/2014, Telecom Italia Media Broadcasting brought an appeal against that judgment before the referring court.

19 During the proceedings, Telecom Italia Media Broadcasting became Persidera, following a capital contribution from Rete A Spa. The latter company owned the rights to use two national multiplexes. As a consequence of that operation, Peridera is in possession of five national multiplexes. Thus, it has reached the maximum permitted threshold, referred to in paragraph 15 above.

20 Before the referring court, Persidera challenges, inter alia, the criterion applied in order to convert the existing analogue channels into digital networks. It relies on a number of provisions of EU law and claims that the principles of equal treatment and proportionality have been infringed. First, it claims that it had a 50% conversion factor applied to it, as only one analogue channel out of two was converted into a digital network, while RAI and Mediaset had the benefit of a 66% conversion factor, as two analogue channels out of three were converted into digital networks. Secondly, it takes issue with the fact that, as regards those two operators, unlawfully operated channels were taken into consideration for the purposes of the conversion.

21 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) Does EU law, in particular Articles 56, 101, 102 and 106 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 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 … 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 [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 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 … 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?'

## Consideration of the questions referred

### *Admissibility*

22 In the first place, the Italian Government observes that the request for a preliminary ruling concerns a hypothetical problem and is not decisive for the outcome of the dispute in the main proceedings. According to that government, the purpose of the action in the main proceedings is to obtain an additional multiplex. As it is, Persidera has reached the maximum permitted threshold of five multiplexes.

23 In that regard, it must be borne in mind that, in the context of the cooperation between the Court and the national courts provided for in Article 267 TFEU, it is solely for the national court before which a dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of EU law, the Court is in principle bound to give a ruling (judgment of 6 September 2016, *Petruhhin*, C-182/15, EU:C:2016:630, paragraph 19 and the case-law cited).

24 It follows that questions on the interpretation of EU law referred by a national court in the factual and legislative context which that court is responsible for defining and the accuracy of which is not a matter for this Court to determine, enjoy a presumption of relevance. The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (judgments of 14 April 2016, *Polkomtel*, C-397/14, EU:C:2016:256, paragraph 37 and the case-law cited, and of 13 October 2016, *Prezes Urzędu Komunikacji Elektronicznej and Petrotel*, C-231/15, EU:C:2016:769, paragraph 16).

25 In the present case, it is clear from the order for reference that the action brought by Persidera seeks, not only the assignment of an additional multiplex, but also an award for damages. By its action, Persidera disputes the compatibility with EU law of the rules applied to the conversion of the analogue channels into digital networks, and the questions asked are specifically intended to ensure that the referring court is able to assess that compatibility and the claim for damages. In those circumstances, it is not obvious that the dispute in the main proceedings is hypothetical.

26 In the second place, the Italian Government and Reti Televisive Italiane SpA claim, in essence, that the Court does not have before it all the factual and legal elements needed to provide a useful answer to the questions asked.

27 In that regard, it must be recalled that 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).

28 Thus, it is essential, as is stated in Article 94(c) of the Rules of Procedure, that the reference for a preliminary ruling itself must contain a statement of the reasons which prompted the national court to inquire about the interpretation or validity of certain provisions of EU law, and the relationship between those provisions and the national legislation applicable to the case before the referring court.

29 It is also essential, as is provided for in Article 94(a) of the Rules of Procedure, that the order for reference itself contains, at least, an account of the facts on which the questions are based. In accordance with the case-law of the Court, those requirements are of particular importance in the area of competition, where the factual and legal situations are often complex (see, to that effect, judgment of 31 January 2008, *Centro Europa 7*, C-380/05, EU:C:2008:59, paragraph 58 and the case-law cited, and order of 12 December 2013, *Umbra Packaging*, C-355/13, not published, EU:C:2013:867, paragraph 23 and the case-law cited).

30 In the present case it should first be noted that the request for a preliminary ruling contains no explanation as to the relevance of Articles 56, 101, 102 and 106 TFEU to the resolution of the dispute in the main proceedings.

31 It is clear from the information submitted to the Court that the dispute in the main proceedings is characterised by factors which are all confined to the Italian State. As it is, 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).

32 Moreover, the order for reference contains no element of fact or law which makes it possible to assess whether and to what extent one of the operators at issue in the main proceedings operating analogue channels may be qualified as an undertaking for the purposes of Article 106 TFEU, and whether and to what extent the national legislation at issue in the main proceedings, which was applied for the purposes of the digital transition, may grant to such an undertaking special rights which infringe Articles 101 TFEU and 102 TFEU.

33 Secondly, it must be observed that the questions raised are based on the factual premiss that some analogue channels taken into consideration for the purposes of the conversion were managed irregularly or unlawfully, that is to say, in breach of the anti-concentration thresholds or without a licence. It is true that the referring court provides no details in relation to that premiss which, moreover, is disputed by the Italian Government, Reti Televisive Italiane and RAI.

34 However, apart from the fact that, in accordance with the case-law cited in paragraph 24 above, it is not for the Court to verify the accuracy of the facts described by the referring court, it must be pointed out that the questions referred do not concern the regularity of the operation of the analogue channels at issue in the light of the NCRF. The questions concern the issue whether analogue channels which were allegedly operated irregularly may be taken into account in the same way as regularly operated channels for the purposes of their conversion into digital networks. As the Advocate General stated in points 37 to 40 of her Opinion, the Court is in a position to provide a useful answer to the referring court on the basis of the information in the file sent by that court, and by starting from the factual premiss, which only that court may, as appropriate, cast doubt upon, that analogue channels were operated irregularly or unlawfully in the light of national law and/or the provisions of the NCRF.

35 It follows from the foregoing that the questions raised are inadmissible inasmuch as they concern the interpretation of Articles 56, 101, 102 and 106 TFEU.

***Substance***

36 By its questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 9 of the Framework Directive, Articles 3, 5 and 7 of the Authorisation Directive, Articles 2 and 4 of the Competition Directive and the principles of non-discrimination and proportionality must be interpreted to the effect that they preclude a national provision which, for the purposes of converting existing analogue channels into digital channels, takes unlawfully managed analogue channels and lawfully managed analogue channels into consideration and which, whilst applying the same conversion criterion to both, leads to a proportionately larger reduction in the number of digital networks assigned compared to the number of analogue channels operated to the detriment of one operator compared to its competitors.

37 In the first place, it must be recalled 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 EU 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).

38 In accordance with paragraph 1 of that article, the NRAs, when performing their regulatory tasks specified in the Framework Directive and, in particular, in the Authorisation Directive, must take all reasonable measures to achieve the objectives defined in paragraphs 2 to 4 of that article, which entail promoting competition in the provision of electronic communications networks and services, contributing to the development of the internal market and promoting 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).

39 Under Article 4(2) of the Competition Directive, Article 5(2), second paragraph, and Article 7(3) of the Authorisation Directive, and Article 9(1) of the Framework Directive, the rights to use radio frequencies must be assigned on the basis of objective, transparent, non-discriminatory and proportionate criteria. That condition means that those criteria are to be appropriate for attaining their objective, and do not go beyond what is necessary in order to attain that objective (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).

40 As the Advocate General stated in point 47 of her Opinion, those criteria must be respected, not only during the initial assignment, but also with every subsequent assignment, renewal or, as in the circumstances of the main proceedings, a conversion of the radio frequencies as part of the digital transfer.

41 Finally, it is apparent from Article 5(6) of the Authorisation Directive that the NRAs are to ensure that competition is not distorted, in particular, by any accumulation of rights of use of radio frequencies.

42 It follows from those provisions that the NCRF is based, inter alia, on an objective of effective and undistorted competition, and aims to develop that competition while respecting, in particular, the principles of equal treatment and proportionality.

43 In that respect, it has already been held that the provisions of the NCRF, in particular Article 9(1) of the Framework Directive, Article 5(1) of the Authorisation Directive and Article 4(1) of the Competition Directive, preclude national measures which have the effect of freezing the structures of the national market and protecting the position of national operators already active on that market, by

preventing or restricting the access of new operators to that market, unless those measures are justified by objectives of general interest and structured on the basis of objective, transparent, non-discriminatory and proportionate criteria (see, to that effect, judgment of 31 January 2008, *Centro Europa 7*, C-380/05, EU:C:2008:59, paragraphs 95 to 107).

44 It must be acknowledged that it would also be contrary to the provisions of the NCRF to prolong, or even reinforce, for the benefit of an operator already present on the market, an unfair competitive advantage obtained in breach of the legal requirements and contrary to the objective of effective and undistorted competition, whilst preventing or restricting the access of new operators to the market.

45 It follows that, as the Advocate General stated, in essence, in point 70 of her opinion, the provisions of the NCRF preclude taking into account, for the purposes of the digital conversion, unlawfully operated analogue channels, where that leads to an unfair competitive advantage being prolonged, or even reinforced.

46 In the second place, in order to provide the referring court with a useful answer and in the event that that court finds that all the channels have been lawfully operated, it should be recalled that the general principle of equal treatment, as a general principle of EU law, 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 (see 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 the situations must be determined and assessed in particular in the light of the subject matter and purpose of the measure in question. The principles and the objectives of the field to which the act 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).

47 First, it must be stated, as did the Advocate General in point 53 of her Opinion, that operators such as Persidera, RAI and Mediaset which operated digital networks in Italy are, in principle, in a comparable situation for the purposes of the conversion of those channels into digital networks at the time of the digital transfer.

48 Secondly, it is clear from the information submitted to the Court that the analogue channels operated by those multi-network operators were converted into digital networks in accordance with the so-called ‘fair’ conversion criterion referred to in paragraph 16 above. Thus, it is apparent from the order for reference that the number of channels operated by each operator was converted into as many digital networks after subtracting one channel. Consequently, Persidera, which operated two analogue channels, was assigned one digital network, while RAI and Mediaset, which each operated three analogue channels, received two digital networks apiece. In other words, whereas the conversion rate applied to both Rai and Mediaset was 66.67%, each of them having been awarded two digital networks for their three analogue channels, the conversion rate applied to Persidera was only 50%, since it was awarded only one digital network for its two analogue channels. The application of the same measure of removing an analogue channel during the digital conversion thus resulted in the application of different conversion rates which affected Persidera more than RAI and Mediaset.

49 In those circumstances, as the Advocate General stated in points 54 to 57 of her Opinion, it must be considered that a national provision such as the one at issue in the main proceedings amounts to a difference in treatment between competing operators placed in a comparable situation.

50 Thirdly, it is apparent from the observations submitted to the Court that the so-called ‘fair’ conversion criterion was justified by the need to ensure the continuity of television output. In addition, the difference in treatment was caused by the physical constraints connected with the fact that it is technically impossible to divide the radio frequencies.

51 In that regard, as the Advocate General stated in point 64 of her Opinion, it must be considered that the continuity of television output contributes to consumer protection which, moreover, is expressly listed among the objectives laid down in Article 8(4) of the Framework Directive. Therefore, the aim of the continuity of television output may be taken into account by the NRAs during the conversion of the existing analogue channels into digital networks, whilst ensuring that that conversion is consistent with all the objectives referred to in Article 8 of the Framework Directive and the need for effective management of the radio frequencies, as is required by Article 9(1) of that directive.

52 It is true that the conversion of existing analogue channels into digital networks is capable of ensuring the continuity of television output previously broadcast using analogue technology.

53 However, a measure which would lead to operators already present on the market being assigned a number of digital radio frequencies which is greater than the number that is sufficient to ensure the continuity of their television output would go beyond what is necessary to achieve that objective and would, thus, be disproportionate.

54 It is necessary to point out again that, during the conversion of the existing analogue channels into digital networks, the NRA must take into consideration the physical constraints connected with the fact that it is technically impossible to divide the radio frequencies at issue. In such a situation, the aim of encouraging efficient use and ensuring the effective management of radio frequencies, as provided for, in particular, in Article 8(2)(d) of the Framework Directive, may, for the purposes of avoiding fractional results, justify the assignment of a lower or a higher number of digital networks compared with the number of analogue channels operated.

55 In the present case, it follows from the information submitted to the Court that a digital multiplex makes it possible to transmit five to six channels with a quality of transmission that is identical to that of analogue transmission, or to transmit three digital channels in high definition, that is to say, with more advanced technology. As the Advocate General stated in point 67 of her Opinion and subject to verification by the referring court, it thus appears that a single multiplex may have been sufficient to enable operators such as RAI and Mediaset to ensure the continuity of their three analogue channels with a comparable quality, and that the assignment of a second multiplex went beyond what was necessary for that purpose. In addition, as is apparent from point 79 of the Opinion, preserving the indivisibility of radio frequencies does not appear to justify sufficiently the difference in treatment at issue in the main proceedings, that being a matter for the referring court to determine.

56 Having regard to the foregoing considerations, the questions referred are to be answered as follows:

– Article 9 of the Framework Directive, Articles 3, 5 and 7 of the Authorisation Directive, Articles 2 and 4 of the Competition Directive must be interpreted to the effect that they preclude a national provision which, for the purposes of converting existing analogue channels into digital networks, takes into consideration unlawfully managed analogue channels, where that leads to an unfair competitive advantage being prolonged, or even reinforced;

– the principles of non-discrimination and proportionality must be interpreted to the effect that they preclude a national provision which, on the basis of the same conversion criterion, leads to a proportionately larger reduction in the number of digital networks assigned compared with the number of analogue channels operated to the detriment of one operator compared to its competitors, unless it is objectively justified and proportionate to its objective. The continuity of television output constitutes a legitimate objective capable of justifying such a difference in treatment. However, a provision which would lead to operators already present on the market being assigned a number of digital radio frequencies which is greater than the number that is sufficient to ensure the continuity of their television output would go beyond what is necessary to achieve that objective and would, thus, be disproportionate.

## Costs

57 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 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), as amended by Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009, 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 Directive 2002/77/EC of 16 September 2002 on competition in the markets for electronic communications networks and services must be interpreted to the effect that they preclude a national provision which, for the purposes of converting existing analogue channels into digital networks, takes into consideration unlawfully managed analogue channels, where that leads to an unfair competitive advantage being prolonged, or even reinforced.**

2. **The principles of non-discrimination and proportionality must be interpreted to the effect that they preclude a national provision which, on the basis of the same conversion criterion, leads to a proportionately larger reduction in the number of digital networks assigned compared with the number of analogue channels operated to the detriment of one operator compared to its competitors, unless it is objectively justified and proportionate to its objective. The continuity of television output constitutes a legitimate objective capable of justifying such a difference in treatment. However, a provision which would lead to operators already present on the market being assigned a number of digital radio frequencies which is greater than the number that is sufficient to ensure the continuity of their television output would go beyond what is necessary to achieve that objective and would, thus, be disproportionate.**

[Signatures]