JUDGMENT OF THE COURT (Fourth Chamber)

31 January 2008 *

In Case C-380/05,

REFERENCE for a preliminary ruling under Article 234 EC, from the Consiglio di Stato (Italy), made by decision of 19 April 2005, received at the Court on 18 October 2005, in the proceedings

Centro Europa 7 Srl

v

Ministero delle Comunicazioni e Autorità per le garanzie nelle comunicazioni,

Direzione generale per le concessioni e le autorizzazioni del Ministero delle Comunicazioni,

* Language of the case: Italian.

THE COURT (Fourth Chamber),

composed of K. Lenaerts (Rapporteur), President of the Chamber, G. Arestis, R. Silva de Lapuerta, J. Malenovský and T. von Danwitz, Judges,

Advocate General: M. Poiares Maduro,
Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 30 November 2006,

after considering the observations submitted on behalf of:

— Centro Europa 7 Srl, by A. Pace, R. Mastroianni and O. Grandinetti, avvocati,

— the Italian Government, by I.M. Braguglia, acting as Agent, assisted by P. Gentili, avvocato dello Stato,

— the Commission of the European Communities, by F. Benyon, E. Traversa, M. Shotter and F. Amato, acting as Agents, assisted by L.G. Radicati di Brozolo, avvocato,

after hearing the Opinion of the Advocate General at the sitting on 12 September 2007,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation, in the national terrestrial television broadcasting sector, of the provisions of the EC Treaty on freedom to provide services and competition, 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) ('the Framework Directive'), 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) ('the Authorisation Directive'), 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 Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR'), in so far as Article 6 EU refers thereto.

2 The reference has been made in proceedings between Centro Europa 7 Srl ('Centro Europa 7') and the Ministero delle Comunicazioni, the Autorità per le garanzie nelle comunicazioni and the Direzione generale per le concessioni e le autorizzazioni del Ministero delle Comunicazioni (collectively, 'the defendants in the main proceedings').

Relevant provisions

Community legislation

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 1(1) of the Framework Directive provides as follows:

'This Directive establishes a harmonised framework for the regulation of electronic communications services, electronic communications networks, associated facilities and associated services. It lays down tasks of national regulatory authorities and establishes a set of procedures to ensure the harmonised application of the regulatory framework throughout the Community.'

5 Article 1(3) of the Framework Directive provides:

'This Directive as well as the Specific Directives are without prejudice to measures taken at Community or national level, in compliance with Community law, to pursue general interest objectives, in particular relating to content regulation and audio-visual policy.'

6 Article 2 of the Framework Directive provides:

'For the purposes of this Directive:

(a) "electronic communications network" means transmission systems … which permit the conveyance of signals by wire, by radio, by optical or by other electromagnetic means, including satellite networks, fixed … and mobile terrestrial networks, … networks used for radio and television broadcasting, and cable television networks, irrespective of the type of information conveyed;

…

(c) "electronic communications service" means a service normally provided for remuneration which consists wholly or mainly in the conveyance of signals on electronic communications networks, including telecommunications services and transmission services in networks used for broadcasting …

…'

7 Article 8 of the Framework Directive, entitled 'Policy objectives and regulatory principles', provides:

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

…

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

…

(b) ensuring that there is no distortion or restriction of competition in the electronic communications sector;

…

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

3. The national regulatory authorities shall contribute to the development of the internal market by inter alia:

(a) removing remaining obstacles to the provision of electronic communications networks, associated facilities and services and electronic communications services at European level;

…'

8 Article 9(1) of the Framework Directive provides that 'Member States shall ensure the effective management of radio frequencies for electronic communication services in their territory' and 'that the allocation and assignment of such radio frequencies by national regulatory authorities are based on objective, transparent, non-discriminatory and proportionate criteria'.

9 Article 28(1) of the Framework Directive states that 'Member States shall adopt and publish the laws, regulations and administrative provisions necessary to comply with this Directive not later than 24 July 2003' and 'shall apply those measures from 25 July 2003'.

The Authorisation Directive

10 Article 1 of the Authorisation Directive provides:

'1. The aim of this Directive is to implement an internal market in electronic communications networks and services through the harmonisation and simplification of authorisation rules and conditions in order to facilitate their provision throughout the Community.

2. This Directive shall apply to authorisations for the provision of electronic communications networks and services.'

11 Article 2(1) of the Authorisation Directive provides:

'For the purposes of this Authorisation Directive, the definitions set out in Article 2 of … [the Framework Directive] shall apply.'

12 Article 2(2)(a) of the Authorisation Directive provides that 'general authorisation' means 'a legal framework established by the Member State ensuring rights for the provision of electronic communications networks or services and laying down sector specific obligations that may apply to all or to specific types of electronic communications networks and services, in accordance with this Directive'.

13 Article 3 of the Authorisation Directive, entitled 'General authorisation of electronic communications networks and services', provides:

'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 46(1) of the Treaty.

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 national regulatory authority 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 Authorisation Directive, entitled 'Rights of use for radio frequencies and numbers', reads as follows:

'1. Member States shall, where possible, in particular where the risk of harmful interference is negligible, not make the use of radio frequencies subject to the grant of individual rights of use but shall include the conditions for usage of such radio frequencies in the general authorisation.

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 providing or using networks or services under the general authorisation, 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 Community law, such rights of use shall be granted through open, transparent and non-discriminatory procedures …

…

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 Authorisation Directive, entitled '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, it shall inter alia:

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

…

(c) publish any decision to limit the granting of rights of use, stating the reasons therefore;

(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.

…

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].

…'

16 Article 17 of the Authorisation Directive, entitled 'Existing authorisations', reads as follows:

'1. Member States shall bring authorisations already in existence on the date of entry into force of this Directive into line with the provisions of this Directive by at the latest the date of application referred to in Article 18(1), second subparagraph.

…'

17 Article 18(1) of the Authorisation Directive states that the 'Member States shall adopt and publish the laws, regulations and administrative provisions necessary to comply with this Directive by 24 July 2003 at the latest' and 'shall apply those measures from 25 July 2003'.

The Competition Directive

18 According to points 1 and 3 of Article 1 of the Competition Directive, that directive is to apply to electronic communications networks and electronic communications services, as defined in Article 2(a) and (c) of the Framework Directive.

19 Article 2 of the Competition Directive, entitled '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.

…'

20 Article 4 of the Competition Directive, entitled 'Rights of use of frequencies', states:

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

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.'

21 Article 9 of the Competition Directive provides:

'Member States shall supply to the Commission not later than 24 July 2003 such information as will allow the Commission to confirm that the provisions of this Directive have been complied with.'

National legislation

Law No 249 of 31 July 1997

22 Law No 249 of 31 July 1997 (Ordinary Supplement to GURI No 177 of 31 July 1997) ('Law No 249/1997'), which came into force on 1 August 1998, set up the Autorità per le garanzie nelle comunicazioni (Communications Regulatory Authority; 'the Autorità').

23 Article 2(6) of Law No 249/1997 imposed restrictions on concentrations in the television broadcasting sector, prohibiting the same operator from holding rights permitting it to broadcast at national level on more than 20% of the television channels operating on terrestrial frequencies.

24 Article 3(1) of Law No 249/1997 provided that operators authorised to broadcast under the previous legal framework could continue to broadcast at national and local level until new rights were granted or applications for new rights were rejected but, in any event, not after 30 April 1998.

25 Article 3(2) of Law No 249/1997 provided for the adoption by the Autorità of a national plan for the allocation of radio frequencies for broadcast television ('the national allocation plan for radio frequencies') by 31 January 1998 at the latest and, on the basis of that plan, the allocation of new rights by 30 April 1998 at the latest.

26 According to the information in the decision making the reference, borne out by the observations of the Italian Government and the Commission of the European Communities, the national allocation plan for radio frequencies was adopted on 30 October 1998 by Decision No 68/98 of the Autorità, and that authority adopted, by Decision No 78/98 of 1 December 1998, the regulation concerning the conditions and detailed rules governing the grant of television broadcasting rights on analogue terrestrial frequencies.

27 Article 3(6) of Law No 249/1997 provided for transitional arrangements for the existing national television channels exceeding the limits for concentration imposed in Article 2(6) of that Law ('the channels in breach of the threshold') by allowing those channels to continue to broadcast on terrestrial radio frequencies on a transitional basis after 30 April 1998, in compliance with the obligations imposed on the channels holding rights, provided that the programmes were broadcast on satellite or cable at the same time.

28 Under Article 3(7) of Law No 249/1997, the Autorità was entrusted with determining the period within which, having regard to the real and significant increase in users watching programmes by cable or satellite, the channels in breach of the threshold were to broadcast their programmes only by satellite or cable, thus relinquishing terrestrial radio frequencies.

29 According to the information in the decision making the reference and supported by the observations of the Italian Government and the Commission, by judgment No 466 of the Corte costituzionale (Constitutional Court) (Italy) of 20 November 2002 (GURI of 27 November 2002), that deadline was fixed at 31 December 2003.

Law No 66 of 20 March 2001

30 According to the case-file, under Decree-Law No 5 of 23 January 2001 (GURI No 19 of 24 January 2001, p. 5), converted into law and amended by Law No 66 of 20 March 2001 (GURI No 70 of 24 March 2001, p. 3), the operators lawfully engaged in television broadcasting activities on terrestrial frequencies were authorised to continue to broadcast until the national allocation plan for radio frequencies for digital television was implemented.

Law No 43 of 24 February 2004 and Law No 112 of 3 May 2004

31 Article 1 of Decree-Law No 352 of 24 December 2003 (GURI No 300 of 29 December 2003, p. 4; 'Decree-Law No 352/2003'), converted into law and amended by Law No 43 of 24 February 2004 (GURI No 47 of 26 February 2004, p. 4), authorised the channels in breach of the threshold to continue their broadcasts on the televised analogue and digital networks pending the completion of an inquiry into the development of digital television channels.

32 Law No 112 of 3 May 2004 (Ordinary Supplement to GURI No 82 of 5 May 2004) ('Law No 112/2004') specified the different stages for the launch of the phase of digital broadcasting on terrestrial radio frequencies.

33 Article 23 of Law No 112/2004 provides:

'1. Until the national allocation plan for radio frequencies for digital television has been implemented, the operators exercising, on any basis, television broadcasting

activities at national or local level who fulfil the conditions necessary to obtain authorisation for experimental digital broadcasting on terrestrial frequencies, under … Decree-Law No 5 [of 23 January 2001], now, after amendment, Law No 66 [of 20 March 2001], may carry out, including by simultaneous repeats of programmes already broadcast using analogue technology, the experimentation in question, until the conversion of the networks has been completed, and apply, from the date of entry into force of this Law, … for the licences and authorisations necessary to broadcast using digital technology on terrestrial frequencies.

2. Experimental digital broadcasting may be carried out by means of installations lawfully exercising analogue activities on the date of the entry into force of this Law.

3. In order to allow digital networks to be set up, transfers of installations or branches of undertakings between operators lawfully televising at national or local level shall be authorised, on condition that acquisitions are intended for digital broadcasting.

…

5. With effect from the date of entry into force of this Law, the licence to operate a television network shall be issued, upon request, to persons lawfully engaged in television broadcasting pursuant to a grant of rights or under the general consent provided for in subparagraph 1, where they show that they have attained a coverage of not less than 50% of the population or of the local catchment area.

…

9. In order to facilitate the conversion of the analogue system to the digital system, the broadcasting of television programmes shall be carried on through installations lawfully operating on the date of the entry into force of this Law …'

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

34 The dispute in the main proceedings relates to compensation for the harm which Centro Europa 7 claims to have suffered as a result of the fact that the defendants in the main proceedings did not allocate to it radio frequencies for terrestrial analogue television broadcasting.

35 On 28 July 1999, Centro Europa 7 was granted by the competent Italian authorities, pursuant to Law No 249/1997, rights for terrestrial television broadcasting at national level authorising the installation and use of a television network using analogue technology. For the allocation of radio frequencies, the rights referred to the national allocation plan for radio frequencies, which was adopted on 30 October 1998. According to the national court, however, that plan has not been implemented, with the result that, although it has rights, Centro Europa 7 has never been in a position to broadcast for lack of radio frequencies.

36 Centro Europa 7 brought an action before the Tribunale amministrativo regionale (Regional Administrative Court) del Lazio (Italy) seeking, inter alia, a declaration that it was entitled to the allocation of frequencies and to compensation for the damage suffered.

37 That court dismissed that application by judgment of 16 September 2004.

38 According to the decision making the reference, in the appeal brought by Centro Europa 7 against that judgment before the Consiglio di Stato (Council of State) (Italy), the defendants in the main proceedings invoke against it, inter alia, Law No 112/2004.

39 While stating, in that decision, that it restricted its examination to Centro Europa 7's application for damages and did not intend to rule at that stage on the application for the grant of radio frequencies, the Consiglio di Stato observes that the failure to allocate radio frequencies to Centro Europa 7 was caused by essentially legislative factors.

40 It notes that Article 3(2) of Law No 249/1997 enabled the 'de facto users' of radio frequencies, authorised to carry on their activity under the earlier system, to continue broadcasting until new rights were granted or applications for new rights were rejected and, in any event, not after 30 April 1998.

41 It notes, also, that Article 3(7) of Law No 249/1997 authorised the continuation of those broadcasts by referring back to the Autorità to fix a deadline, on the sole condition that the programmes are broadcast simultaneously on terrestrial radio frequencies and by satellite or cable. In the absence of a date fixed by the Autorità, the Corte costituzionale set 31 December 2003 as the date by which the programmes broadcast by the channels in breach of the threshold would have to be broadcast only by satellite or cable, so that, according to the national court, the radio frequencies to be allocated to Centro Europa 7 would be freed up.

42 According to the national court, that deadline was, however, not complied with following the intervention of the national legislature, as Article 1 of Decree-Law No 352/2003, now Law No 43 of 24 February 2004, extended the activities of the channels in breach of the threshold pending the completion of an inquiry by the Autorità into the development of digital channels, then by virtue of Law No 112/2004, in the light of, inter alia, Article 23(5) thereof.

43 Law No 112/2004 extended, by a general authorisation mechanism, the possibility for the channels in breach of the threshold to continue to broadcast on the terrestrial radio frequencies until the national allocation plan for radio frequencies for digital television was implemented, with the result that those channels were not required to free up the radio frequencies intended for allocation to the rights holders.

44 According to the national court, that Law therefore had the effect of blocking the radio frequencies intended for allocation to the rights holders and of preventing operators other than those de facto broadcasting on terrestrial frequencies from participating in the digital television experimentation.

45 Since Centro Europa 7 disputed the compatibility of Decree-Law No 352/2003 and Law No 112/2004 with Community law, the Consiglio di Stato asks whether the Italian legislation, starting from Law No 249/1997, is compatible with the Treaty provisions on freedom to provide services and on competition, Articles 8 and 9(1) of the Framework Directive, Articles 5, 7 and 17 of the Authorisation Directive and the principle of pluralism of information sources, part of Article 10 of the ECHR, as a general principle of Community law.

46 In those circumstances, the Consiglio di Stato decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Does Article 10 of the ECHR, as referred to in Article 6 of the [EU] Treaty, guarantee pluralism in the broadcasting sector, thus requiring the Member States to secure pluralism and competition in the sector based on an antitrust system which, in step with technological development, secures network access and a multiplicity of operators and renders duopolistic market behaviour unlawful?

(2) Do the provisions of the … Treaty which secure freedom to provide services and competition, on the interpretation provided by the Commission in the interpretative communication of 29 April 2000 on grants of rights under Community law, require the principles governing that matter to be capable of ensuring equal non-discriminatory treatment, as well as transparency, proportionality and respect for the rights of individuals; and are those provisions and principles of the Treaty infringed by Article 3(7) of Italian Law No 249/1997, and by Article 1 of Decree-Law [No 352/2003], inasmuch as those provisions enabled individuals operating networks in breach of the limits laid down by competition law to continue to operate, thereby excluding operators, such as the appellant undertaking, which, though in possession of the relevant rights granted following a regular competitive procedure, were unable to carry on the activity in respect of which such rights were granted because of a failure to allocate frequencies owing to their insufficient number or scarcity as a result of the continued exercise of rights by the owners of networks in breach of the limits on concentrations under antitrust law?

(3) With effect from 25 July 2003, does Article 17 of [the Authorisation Directive] render that directive directly effective in the internal legal order and oblige a

Member State which has granted broadcasting rights (right to install networks or provide electronic communication services or the right to use frequencies) to bring them into line with Community rules; and does that entail the need actually to allocate the frequencies necessary for carrying on the activity in question?

(4) Do Article 9 of [the Framework Directive] and Article 5 of the Authorisation Directive providing for transparent and non-discriminatory public procedures (Article 5) conducted on the basis of objective, transparent, non-discriminatory and proportionate criteria (Article 9) preclude a system providing for general authorisation under national law (Article 23(5) of Law No 112/2004); by permitting the continued operation, under that system of networks in breach of limits and not selected under a competitive procedure, do those provisions ultimately impinge on the Community-law rights under (Article 17(2) of the … Authorisation Directive) of other undertakings which are prevented from operating even though they have been successful in competitive procedures?

(5) Do Article 9 of the [Framework Directive], the second subparagraph of Article 5(2) and Article 7(3) of the Authorisation Directive, and Article 4 of the [Competition Directive], require the Member States to arrange for the cessation, at least as from 25 July 2003 (see Article 17 of the Authorisation Directive), of a situation of de facto use of frequencies (use of facilities without grant of rights or authorisations issued following a selection procedure), on the basis of the broadcasting system already in place, so that broadcasting cannot be undertaken where there is no proper planning in regard to matters concerning the airwaves and no logical increase in pluralism, in contravention of rights awarded by the Member State following a public procedure?

(6) Is the derogation in the second subparagraph of Article 5(2) of the … Authorisation Directive, and in Article 4 of the [Competition Directive], available to be relied on by the Member State solely in order to protect pluralism of information and to guarantee the protection of cultural or linguistic diversity and not in favour of operators of networks in breach of the antitrust limits laid down in national competition legislation?

(7) In order to benefit from the derogation under Article 5 of [the Authorisation Directive], does the Member State have to indicate the objectives actually pursued by the national derogatory rules?

(8) May that derogation be applied, in addition to the case of the concessionary of the public broadcasting service (RAI in Italy), in favour also of private operators who have been unsuccessful in competitive procedures and to the detriment of undertakings who may have duly been granted rights following a competitive procedure?

(9) Under Community rules (primary and secondary legislation) on workable competition in the broadcasting sector, ought the national legislature to have avoided extending the old transitory analogue system on the advent of the terrestrial digital system (and the attendant generalised transition to digital)? Only if analogue broadcasting is ended and replaced by the switch to digital will it be possible to reallocate frequencies freed for various uses. If terrestrial digital is merely operated alongside analogue, there will be an attendant accentuating of the scarcity of available frequencies owing to the existence of analogue and digital transmission in parallel (simulcast)?

(10) Lastly, is the pluralism of sources of information and of competition in the broadcasting sector, which is guaranteed by European law, secured by national rules, such as Law No 112/2004 providing for a new limit of 20 per cent of resources linked to a new very wide criterion (the ICS — integrated communications system — Article 2(g) and Article 15 of Law No 112/2004)? This criterion also brings in activities which do not affect media pluralism, whereas under antitrust law the "relevant market" is constructed normally by differentiating the markets in the broadcasting sector by drawing a distinction between pay TV and non-pay TV operating via the airwaves (reference is made inter alia to [Commission Decision of 21 March 2000 declaring a concentration to be compatible with the common market (Case No COMP/JV. 37 — BSKYB/Kirch Pay TV], based on [Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings] Merger Procedure 21/03/2000 and [Commission Decision of 2 April 2003 declaring a concentration to be compatible with the common market and the EEA Agreement (Case No COMP/M. 2876 — Newscorp/Telepiù), based on [Regulation No 4064/89].'

The questions

47 By its questions, the national court asks the Court, essentially, to rule on the interpretation of the provisions of the Treaty on freedom to provide services and competition, the Framework Directive, the Authorisation Directive, the Competition Directive and Article 10 of the ECHR, in so far as Article 6 EU refers thereto.

The jurisdiction of the Court and the admissibility of the questions

48 As a preliminary point, it must be stated, first, that by some of its questions the national court is inviting the Court to give a ruling on the compatibility with Community law of certain provisions of the Italian legislation relevant in this case.

49 It is not the task of the Court, in preliminary ruling proceedings, to rule upon the compatibility of provisions of national law with Community law or to interpret national legislation or regulations (see Case C-151/02 *Jaeger* [2003] ECR I-8389, paragraph 43, and Case C-237/04 *Enirisorse* [2006] ECR I-2843, paragraph 24 and the case-law cited).

50 The Court has, however, repeatedly held that it is competent to give the national court full guidance on the interpretation of Community law in order to enable it to determine the issue of compatibility for the purposes of the case before it (see, inter alia, Case C-292/92 *Hünermund and Others* [1993] ECR I-6787, paragraph 8, and *Enirisorse*, paragraph 24).

51 It is therefore appropriate for the Court, in the present case, to restrict its analysis to the provisions of Community law by providing an interpretation of them which will be of use to the national court, which has the task of determining the compatibility of the provisions of national law with Community law, for the purposes of deciding the dispute before it.

52 Secondly, it must be recalled that, according to settled case-law, it is solely for the national court before which the 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 (Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 59, and Case C-466/04 *Acereda Herrera* [2006] ECR I-5341, paragraph 47).

53 None the less, the Court has no jurisdiction to give a preliminary ruling on a question submitted by a national court where it is quite obvious that the ruling sought by that

court on the interpretation of a Community rule 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 (*Bosman*, paragraph 61; *Acereda Herrera*, paragraph 48; and Joined Cases C-94/04 and C-202/04 *Cipolla and Others* [2006] ECR I-11421, paragraph 25).

54 In that regard, the decision making the reference must set out the precise reasons why the national court was unsure as to the interpretation of Community law and why it considered it necessary to refer questions to the Court for a preliminary ruling. Against that background, it is essential that the national court provide at the very least some explanation of the reasons for the choice of the Community provisions which it requires to be interpreted and of the link it establishes between those provisions and the national legislation applicable to the dispute in the main proceedings (order in Case C-167/94 *Grau Gomis and Others* [1995] ECR I-1023, paragraph 9; Joined Cases C-453/03, C-11/04, C-12/04 and C-194/04 *ABNA and Others* [2005] ECR I-10423, paragraph 46; Joined Cases C-338/04, C-359/04 and C-360/04 *Placanica and Others* [2007] ECR I-1891, paragraph 34; and Case C-295/05 *Asemfo* [2007] ECR I-2999, paragraph 33).

55 It must be stated, however, that as regards its tenth question, the national court does not give any indication as to the Community provisions which it requires to be interpreted or any explanation of the link it establishes between those provisions and the dispute in the main proceedings or the subject-matter of that dispute.

56 The tenth question is for that reason inadmissible.

57 Thirdly, the need to provide an interpretation of Community law which will be of use to the national court makes it necessary that the referring court should define the factual and legislative context of the questions it is asking or, at the very least,

explain the factual circumstances on which those questions are based (see Joined Cases C-320/90 to C-322/90 *Telemarsicabruzzo and Others* [1993] ECR I-393, paragraph 6; Case C-341/95 *Bettati* [1998] ECR I-4355, paragraph 67; Case C-67/96 *Albany International* [1999] ECR I-5751, paragraph 39; and *Cipolla and Others*, paragraph 25).

58 Those requirements are of particular importance in the area of competition, which is characterised by complex factual and legal situations (see *Telemarsicabruzzo and Others*, paragraph 7; *Bettati*, paragraph 68; and *Albany International*, paragraph 39).

59 In this case, as the Advocate General notes in point 27 of his Opinion, it seems that, by asking for an interpretation of the provisions of the Treaty on competition in its second question, the referring court has in mind, essentially, Article 86(1) EC, read in conjunction with Article 82 EC.

60 In accordance with the Court's case-law, a Member State infringes the prohibitions laid down by those two provisions where the undertaking in question, merely by exercising the special or exclusive rights conferred on it, is led to abuse its dominant position or where such rights are liable to create a situation in which that undertaking is led to commit such abuses (Joined Cases C-180/98 to C-184/98 *Pavlov and Others* [2000] ECR I-6451, paragraph 127; Case C-475/99 *Ambulanz Glöckner* [2001] ECR I-8089, paragraph 39; and Case C-451/03 *Servizi Ausiliari Dottori Commercialisti* [2006] ECR I-2941, paragraph 23).

61 However, the decision making the reference does not contain any indication regarding, inter alia, the definition of the relevant market, the calculation of the market shares held by the various undertakings operating on that market, and the supposed abuse of a dominant position.

62 Consequently, it must be held that, in so far as it relates to the Treaty provisions on competition, the second question is inadmissible (see, to that effect, Case C-134/03 *Viacom Outdoor* [2005] ECR I-1167, paragraphs 25 to 29).

63 The ninth question must be regarded as being inadmissible on the same grounds.

64 Fourthly, it is necessary to determine whether the Court has jurisdiction in the present case to give a ruling on Article 49 EC, since it is common ground that all aspects of the main proceedings are confined within only one Member State.

65 National legislation such as that at issue in the main proceedings, which applies without distinction to Italian nationals and to nationals of other Member States, is generally likely to fall within the scope of the provisions on freedom to provide services established by the Treaty only to the extent to which it applies to situations related to intra-Community trade (see, to that effect, Case 286/81 *Oosthoek's Uitgeversmaatschappij* [1982] ECR 4575, paragraph 9, and Case C-6/01 *Anomar and Others* [2003] ECR I-8621, paragraph 39).

66 It is possible, in the main proceedings, that undertakings established in Member States other than the Italian Republic have been or would be interested in providing the services concerned (see, to that effect, Case C-87/94 *Commission* v *Belgium* [1996] ECR I-2043, paragraph 33, and Case C-458/03 *Parking Brixen* [2005] ECR I-8585, paragraph 55).

67 The finding of a link with intra-Community trade will be presumed if the market in question has a certain cross-border interest (Case C-507/03 *Commission* v *Ireland* [2007] ECR I-9777, paragraph 29), which it is for the national court to determine.

68 In any event, it is necessary to answer the second question referred to the Court in this case since it relates to Article 49 EC.

69 Such a reply might be useful to the national court if its national law were to require that an Italian national must be allowed to enjoy the same rights as those which a national of another Member State would derive from Community law in the same situation (Case C-448/98 *Guimont* [2000] ECR I-10663, paragraph 23; Joined Cases C-515/99, C-519/99 to C-524/99 and C-526/99 to C-540/99 *Reisch and Others* [2002] ECR I-2157, paragraph 26; *Anomar and Others*, paragraph 41; *Servizi Ausiliari Dottori Commercialisti*, paragraph 29; and *Cipolla and Others*, paragraph 30).

70 Consequently, the Court has jurisdiction to give a ruling on the interpretation of Article 49 EC.

71 The second question is therefore admissible in so far as it relates to Article 49 EC.

The second, fourth and fifth questions

72 The second, fourth and fifth questions all relate, essentially, to whether the provisions of Article 49 EC or the NCRF preclude, in television broadcasting matters, national

legislation the application of which means that it is impossible for an operator holding rights to broadcast without the allocation of broadcasting radio frequencies.

73 It is true that, in respect of the second question, the Court can answer from the point of view of Article 49 EC only in so far as that question relates to Italian legislation, namely Article 3(7) of Law No 249/1997, which pre-dates the application of the NCRF, as is clear from Article 28(1) of the Framework Directive, Article 18(1) of the Authorisation Directive and Article 9 of the Competition Directive.

74 Likewise, the fourth and fifth questions refer only to the NCRF, since they concern national legislation subsequent to the date of application of the NCRF, namely the provisions of Law No 112/2004.

75 First, however, the second question also relates to Italian legislation subsequent to the applicability of the NCRF, namely Article 1 of Decree-Law No 352/2003.

76 Secondly, as pointed out by the Commission in its observations to the Court, the NCRF implemented provisions of the Treaty, in particular those on freedom to provide services, in the area of electronic communications networks and services, as defined in Articles 2(a) and (c) of the Framework Directive, Article 2(1) of the Authorisation Directive and points 1 and 3 of Article 1 of the Competition Directive.

77 The second, fourth and fifth questions must therefore be dealt with together, since the answers relating to the NCRF are relevant only from its date of application, as set out in Article 28(1) of the Framework Directive, Article 18(1) of the Authorisation Directive and Article 9 of the Competition Directive.

78 In order to provide an answer which is of use to the national court, it should be recalled that the Treaty does not require national monopolies having a commercial character to be abolished completely, but requires them to be adjusted in such a way as to ensure that no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of Member States (Case C-189/95 *Franzén* [1997] ECR I-5909, paragraph 38 and the case-law cited).

79 However, Article 49 EC precludes the application of any national rules which have the effect of making the provision of services between Member States more difficult than the provision of services purely within one Member State (Joined Cases C-544/03 and C-545/03 *Mobistar and Belgacom Mobile* [2005] ECR I-7723, paragraph 30).

80 In the area of electronic communications networks and services, those principles were implemented by the NCRF.

81 Article 8 of the Framework Directive places on the Member States the obligation to ensure that the national regulatory authorities 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 level.

82 Likewise, Article 2(2) of the Competition Directive requires the Member States to 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.

83 Article 3(1) of the Authorisation Directive also enjoins the Member States to ensure the freedom to provide electronic communications networks and services and prohibits them from preventing an undertaking from providing those networks or services, except where this is necessary for the reasons set out in Article 46(1) EC.

84 For that purpose, Article 3(2) of the Authorisation Directive states that the provision of electronic communications networks or electronic communications services may be subject only to a general authorisation.

85 On that point, it must be stated that, in the area of television broadcasting, freedom to provide services, as enshrined in Article 49 EC and implemented in this area by the NCRF, requires not only the grant of broadcasting authorisations, but also the grant of broadcasting radio frequencies.

86 An operator cannot exercise effectively the rights which it derives from Community law in terms of access to the television broadcasting market without broadcasting radio frequencies.

87 To that end, Article 9(1) of the Framework Directive provides that the 'Member States shall ensure the effective management of radio frequencies for electronic communication services in their territory'.

88 Similarly, Article 5(1) of the Authorisation Directive states that, where possible, Member States may not, in particular where the risk of harmful interference is negligible, make the use of radio frequencies subject to the grant of individual rights of use but are to include the conditions for usage of such radio frequencies in the general authorisation.

89 Moreover, point 1 of Article 4 of the Competition Directive prohibits the Member States from granting exclusive or special rights of use of radio frequencies for the provision of electronic communications services.

90 In the present case, the national court questions the Court on the criteria applied for the grant of radio frequencies for the purpose of operating on the analogue television broadcasting market.

91 The national court is not questioning the Court on the criteria which have been applied, pursuant to Law No 249/1997, for the grant of rights to operate on the analogue television broadcasting market. Nor are those criteria disputed by Centro Europa 7, either before the national court or in the observations it has submitted to the Court, since Centro Europa 7 was granted rights in accordance with those criteria.

92 There is therefore no need for the Court to give a ruling on those criteria.

93 The national court has doubts as to the compatibility of Law No 249/1997 with Community law only in so far as Article 3(7) of that Law set up transitional arrangements in favour of the incumbent networks, which had the effect of preventing operators without radio frequencies, such as Centro Europa 7, from accessing the market in question.

94 The national court is also questioning the Court on the criteria applied, pursuant to Law No 112/2004, for granting rights to operate on the digital and analogue television broadcasting market, only in so far as those criteria consolidated the transitional arrangements structured in favour of the existing networks in Article 1 of Decree-Law No 352/2003, which had the effect of precluding the grant to operators of radio frequencies for the purpose of operating on the analogue television broadcasting market, even though they had been granted rights under Law No 249/1997.

95 In that regard, the successive application of the transitional arrangements structured in favour of the incumbent networks in Article 3(7) of Law No 249/1997 and Article 1 of Decree-Law No 352/2003 had the effect of preventing operators without broadcasting radio frequencies from accessing the market in question.

96 The view must also be taken that, by issuing a general authorisation to operate on the broadcasting services market only to the incumbent networks, Article 23(5) of Law No 112/2004 consolidated the restrictive effect confirmed in the preceding paragraph.

97 First, by limiting de facto the number of operators able to broadcast on the market in question, those measures are and/or were likely to hinder the provision of services in the area of television broadcasting.

98 Secondly, those measures have and/or have had the effect of freezing the structures on the national market and protecting the position of the operators already active on that market.

99 Consequently, Article 49 EC and, from the date on which they became applicable, Article 9(1) of the Framework Directive, Article 5(1) of the Authorisation Directive and point 1 of Article 4 of the Competition Directive preclude such measures unless they are justified.

100 In that respect, it is clear from the case-law of the Court that a licensing system which restricts the number of operators in the national territory is capable of being justified by general-interest objectives (see, to that effect, *Placanica and Others*, paragraph 53), on condition that the restrictions resulting from them are appropriate and do not go beyond what is necessary to attain those objectives.

101 Thus, the NCRF expressly allows the Member States, under Article 1(3) of the Framework Directive, to adopt or maintain, in compliance with Community law, provisions pursuing general-interest objectives, in particular relating to audio-visual policy.

102 Likewise, the first subparagraph of Article 5(2) of the Authorisation Directive allows the Member States to grant rights to the use of radio frequencies on an individual basis with a view to complying with the objective of the efficient use of radio frequencies, as referred to by the Framework Directive.

103 However, as the Advocate General stated in points 34 and 37 of his Opinion, in order for such arrangements, which generally adversely affect Article 49 EC and the NCRF, to be justified they must not only comply with general-interest objectives but also

be structured on the basis of objective, transparent, non-discriminatory and proportionate criteria (see, to that effect, *Placanica and Others*, paragraph 49 and the case-law cited).

104 Accordingly, Article 9(1) of the Framework Directive provides that the Member States are to ensure that the allocation and assignment of radio frequencies by the national regulatory authorities are based on objective, transparent, non-discriminatory and proportionate criteria.

105 Furthermore, where it is necessary to grant individual rights to the use of radio frequencies, those rights must be granted, under the second subparagraph of Article 5(2) of the Authorisation Directive, 'through open, transparent and non-discriminatory procedures'.

106 Likewise, pursuant to Article 7(3) of the Authorisation Directive, '[w]here 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'.

107 That requirement is backed up by point 2 of Article 4 of the Competition Directive, under which 'the assignment of radio frequencies for electronic communication services shall be based on objective, transparent, non-discriminatory and proportionate criteria'.

108 In the main proceedings, according to the information supplied by the national court, under Law No 249/1997 the allocation of radio frequencies to a limited number of operators was not carried out in accordance with such criteria.

109 First, those radio frequencies were allocated de facto to the incumbent networks under the transitional arrangements adjusted in Article 3(7) of Law No 249/1997, even though some of those networks had not been granted rights under that Law.

110 Secondly, operators such as Centro Europa 7 were not allocated radio frequencies even though they had been granted rights under that Law.

111 Consequently, irrespective of the objectives pursued by Law No 249/1997 with regard to the system for the grant of radio frequencies to a limited number of operators, the view must be taken that Article 49 EC precluded such a system.

112 The same conclusion must be drawn as regards the system for the grant of radio frequencies to a limited number of operators under Law No 112/2004, in the sense that that scheme was not implemented on the basis of objective, transparent, non-discriminatory and proportionate criteria, in breach of Article 49 EC and, from the date on which they became applicable, Article 9(1) of the Framework Directive, the second subparagraph of Article 5(2) and Article 7(3) of the Authorisation Directive and point 2 of Article 4 of the Competition Directive.

113 Under Law No 112/2004, radio frequencies were granted to the incumbent operators and the latter were authorised to broadcast under the transitional arrangements adjusted in Article 1 of Decree-Law No 352/2003, which merely extended the transitional arrangements set up by Law No 249/1997.

114 In any event, the restrictions established above cannot be justified by the need to ensure a swift transformation to digital television broadcasting.

115 Irrespective of whether such an objective may constitute a general-interest objective capable of justifying such restrictions, it is clear, as the Commission rightly pointed out in the observations which it submitted to the Court, that the Italian legislation, in particular Law No 112/2004, does not merely allocate to the incumbent operators a priority right to obtain radio frequencies, but reserves them that right exclusively, without restricting in time the privileged position assigned to those operators and without providing for any obligation to relinquish the radio frequencies in breach of the threshold after the transfer to digital television broadcasting.

116 Having regard to all of the foregoing considerations, the answer to the second, fourth and fifth questions, taken together, must be that Article 49 EC and, from the date on which they became applicable, Article 9(1) of the Framework Directive, Article 5(1), the second subparagraph of Article 5(2) and Article 7(3) of the Authorisation Directive and Article 4 of the Competition Directive must be interpreted as precluding, in television broadcasting matters, national legislation the application of which makes it impossible for an operator holding rights to broadcast in the absence of broadcasting radio frequencies granted on the basis of objective, transparent, non-discriminatory and proportionate criteria.

The first and third questions

117 By its first question, the national court asks the Court, essentially, to state whether the provisions of Article 10 of the ECHR, in so far as Article 6 EU refers thereto, preclude, in television broadcasting matters, national legislation the application of which makes it impossible for an operator holding rights, such as Centro Europa 7, to broadcast without the grant of broadcasting radio frequencies.

118 By its third question, the national court questions the Court in regard to the obligation, arising from the possible direct effect of Article 17 of the Authorisation Directive from the date on which it became applicable, on the Member State which has granted rights for television broadcasting activity, to bring those rights into line with Community law and, therefore, to allocate to Centro Europa 7 the broadcasting radio frequencies necessary for it to carry on that activity.

119 By those questions, the national court is thus seeking to determine whether there are infringements of Community law for the purpose of ruling on an application for compensation for the losses flowing from such infringements.

120 It follows from the answer to the second, fourth and fifth questions that Article 49 EC and, from the date on which they became applicable, Article 9(1) of the Framework Directive, Article 5(1), the second subparagraph of Article 5(2) and Article 7(3) of the Authorisation Directive and Article 4 of the Competition Directive must be interpreted as precluding, in television broadcasting matters, national legislation the

application of which makes it impossible for an operator holding rights to broadcast in the absence of broadcasting radio frequencies granted on the basis of objective, transparent, non-discriminatory and proportionate criteria.

121 That answer, by itself, thus enables the national court to rule on the application made by Centro Europa 7 for compensation for the losses suffered.

122 Consequently, regard being had to the Court's answer to the second, fourth and fifth questions, it is not necessary to rule on the first and third questions.

The sixth, seventh and eighth questions

123 By its sixth, seventh and eighth questions, the national court questions the Court, essentially, in regard to the conditions for the application by the Member States of the derogation laid down in the second subparagraph of Article 5(2) of the Authorisation Directive and Article 4 of the Competition Directive.

124 It follows from the answer to the fourth and fifth questions that, from the date on which they became applicable, the second subparagraph of Article 5(2) of the Authorisation Directive and Article 4 of the Competition Directive must be interpreted as precluding, in television broadcasting matters, national legislation the application of

which makes it impossible for an operator holding rights to broadcast in the absence of broadcasting radio frequencies granted on the basis of objective, transparent, non-discriminatory and proportionate criteria.

125 Accordingly, it follows from that reply that compliance with objective, transparent, non-discriminatory and proportionate criteria constitutes a necessary condition for the application of the derogation laid down in the second subparagraph of Article 5(2) of the Authorisation Directive and Article 4 of the Competition Directive.

126 There is therefore no need to rule on any other potential conditions for the application of that derogation, such as those referred to in the sixth, seventh and eighth questions.

127 Consequently, having regard to the Court's answer to the fourth and fifth questions, taken together with the second question, there is no need to give a ruling on the sixth, seventh and eighth questions.

Costs

128 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:

Article 49 EC and, from the date on which they became applicable, Article 9(1) of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), Article 5(1), the second subparagraph of Article 5(2) and Article 7(3) 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), and Article 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 precluding, in television broadcasting matters, national legislation the application of which makes it impossible for an operator holding rights to broadcast in the absence of broadcasting radio frequencies granted on the basis of objective, transparent, non-discriminatory and proportionate criteria.

[Signatures]