Reports of Cases

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

Case C-560/15

Europa Way Srl and
Persidera SpA
v
Autorità per le Garanzie nelle Comunicazioni and Others
(Request for a preliminary ruling

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

(Reference for a preliminary ruling — Electronic communications networks and services — Directives 2002/20/EC, 2002/21/EC and 2002/77/EC — Transition from analogue to digital television — Assignment of digital frequencies to network operators — New digital frequencies ('digital dividend') — Annulment of an ongoing assignment procedure and replacement by a new fee-based tendering procedure — Obligation to hold a prior public consultation — Independent national regulatory authority — Intervention of the national legislature in an ongoing procedure before the regulatory authority)

I. Introduction

1. The transition from analogue to digital television was a technological quantum leap which was achieved without too many hitches in most European private households. For network operators in some places, on the other hand, the legal dimension of the switchover was less trouble-free. From the point of view of EU law, the situation in Italy in particular gave rise to repeated complaints in connection with media pluralism and competition on the television market which have already led to the initiation of infringement proceedings against the Italian Republic [2] and the delivery of a judgment by the Court on a request for a preliminary ruling. [3]

1 Original language: German.

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

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

2. The present case does not concern the assignment of *all* frequencies to be allocated in the transition from analogue to digital television, but only the assignment of frequencies that were newly available as a result of technological progress and were not reserved from the outset for network operators already active on the market. Two Italian network operators, Europa Way and Persidera,[4] have taken legal action challenging the fact that the national procedure for allocating the 'digital dividend'[5] was first suspended by order of the Italian Ministry of Economic Development,[6] then annulled by the Italian legislature and finally reinstated under fundamentally altered conditions.

3. The Court is now called upon to clarify whether and, if so, to what extent those measures encroached upon the powers and independence of the Italian national regulatory authority (the Autorità per le Garanzie nelle Comunicazioni[7] (AGCOM)). It must also be considered whether the new fee-based allocation procedure fulfilled the requirements of EU law and whether, given that the first procedure was not completed, the undertakings concerned had acquired a legitimate expectation of a certain outcome to that procedure which was disappointed as a result of the intervention of the Ministry and the legislature.

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

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

II. Legal framework

6. The EU-law framework relevant to this case is defined by three directives, adopted in 2002, concerning electronic communications networks and services which together make up the new common regulatory framework for electronic communications services, electronic communications networks, associated facilities and associated services: the Framework Directive (Directive 2002/21/EC),[8] the Authorisation Directive (Directive 2002/20/EC)[9] and the Competition Directive (Directive 2002/77/EC).[10] The first two directives mentioned apply in the version in which they were framed by Directive 2009/140.

4 Persidera is the successor in law to Telecom Italia Media Broadcasting (TIMB). Before the final transition to digital television, TIMB operated two analogue ('La 7' and 'MTV') and two digital ('TIMB1' und 'MBONE') television channels in Italy.

5 On the concept of the digital dividend, see recital 26 of Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services (OJ 2009 L 337, p. 37, the corrigendum to which was published in OJ 2013 L 241, p. 8); see also point 1 of the Commission's Communication of 13 November 2007, 'Reaping the full benefits of the digital dividend in Europe: A common approach to the use of the spectrum released by the digital switchover', COM(2007) 700 final.

6 Ministero dello sviluppo economico (MiSE).

7 Communications regulatory authority.

8 Directive 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).

9 Directive 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).

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

A. Framework Directive (Directive 2002/21)

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

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

…

(21) Member States may use, inter alia, competitive or comparative selection procedures for the assignment of radio frequencies as well as numbers with exceptional economic value. ...’

8. Reference must also be made to recital 13 Directive 2009/140, which was amended, inter alia, by Directive 2002/21. That recital states as follows:

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

9. According to the definition in Article 2(g) of Directive 2002/21, for the purposes of the directive,

‘“National regulatory authority” means the body or bodies charged by a Member State with any of the regulatory tasks assigned in this Directive and the Specific Directives.’

10. Article 3 of Directive 2002/21, headed ‘National regulatory authorities’, reads, in extract, as follows:

‘1. Member States shall ensure that each of the tasks assigned to national regulatory authorities in this Directive and the Specific Directives is undertaken by a competent body.

2. Member States shall guarantee the independence of national regulatory authorities …

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

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

…’

11. Under the heading ‘Consultation and transparency mechanism’, Article 6 of Directive 2002/21 provides:

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

National regulatory authorities shall publish their national consultation procedures.

Member States shall ensure the establishment of a single information point through which all current consultations can be accessed.

The results of the consultation procedure shall be made publicly available by the national regulatory authority, except in the case of confidential information in accordance with Community and national law on business confidentiality.’

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

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

…

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

…

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

…

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

13. Finally, Article 9 of Directive 2002/21 contains the following provisions on the ‘Management of radio frequencies for electronic communications services’:

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

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

…

3. Unless otherwise provided in the second subparagraph, Member States shall ensure that all types of technology used for electronic communications services may be used in the radio frequency bands, declared available for electronic communications services in their National Frequency Allocation Plan in accordance with Community law.Member States may, however, provide for proportionate and non-discriminatory restrictions to the types of radio network or wireless access technology used for electronic communications services where this is necessary to:

(a) avoid harmful interference;

…

(e) safeguard efficient use of spectrum; or

(f) ensure the fulfilment of a general interest objective in accordance with paragraph 4.

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

…'

B. Authorisation Directive (Directive 2002/20)

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

'Member States shall ensure the freedom to provide electronic communications networks and services, subject to the conditions set out in this Directive.'

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

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

– 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 Community law.

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

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

…

4. …

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

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

6. Competent national authorities shall ensure that radio frequencies are efficiently and effectively used …'

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

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

…

(b) give all interested parties, including users and consumers, the opportunity to express their views on any limitation in accordance with Article 6 of Directive 2002/21/EC (Framework Directive);

…

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

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

…’

C. Competition Directive (Directive 2002/77)

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

‘…

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

…

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

…’

18. Finally, Article 4 of Directive 2002/77 contains the following provisions on ‘Rights of use of frequencies’:

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

…

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

III. Facts and main proceedings

19. The transition from analogue to digital television in Italy called for the establishment of a procedure for allocating the new digital broadcasting frequencies, which are more efficient than their analogue counterparts.[11] To that end, on 7 April 2009, the AGCOM adopted Resolution 181/09/CONS,[12] in which it laid down the criteria for the complete digitalisation of the terrestrial networks and, at the same time, introduced a mechanism for allocating the frequencies to be assigned for that purpose. That resolution came about against the backdrop of ongoing infringement proceedings[13] whereby the European Commission had urged Italy not to favour analogue television service providers already active on the market when allocating its digital frequencies.

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

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

13 See footnote 2, above.

20. Provision for the allocation of digital frequencies henceforth took the form of 21 'multiplexes' for nationwide terrestrial transmission.[14] A multiplex allows a number of audio, video and data signals to be bundled together into a common data stream so as to optimise the exploitation of the frequencies and lines available.

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

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

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

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

– Finally, in the *third group*, the remaining five multiplexes, also referred to as the 'digital dividend',[15] were to be allocated as additional new frequencies in accordance with objective, transparent, proportionate and non-discriminatory criteria.

23. In the present case, the dispute in the main proceedings concerns only some of those multiplexes, that is to say those in the third group. These were originally intended to be assigned to the most suitable economic operators free of charge by way of a tendering procedure known as the 'beauty contest'.[16] Following a public consultation, AGCOM finally adopted the rules that would govern that tendering procedure by Resolution 497/10/CONS of 22 September 2010.

24. The tendering procedure itself finally began with the publication on 8 July 2011 of a notice stipulating a deadline of 7 September 2011 for the submission of applications. Europa Way submitted an application for a multiplex for which no other undertaking apart from itself applied. Persidera (formerly TIMB) applied, either alone or in competition with other economic operators,[17] for three multiplexes in all.

14 Some of the parties to the proceedings have spoken of a total of 22 multiplexes, the national court even referring in its fourth question (see point 29 of this Opinion, below) to 25 or 22 'networks'. For the purposes of the present preliminary ruling proceedings, however, those discrepancies are of no consequence. I shall retain the number 21 in my submissions here, not least for reasons of consistency with the facts as they were presented to the Court in Case C-112/16.

15 On the concept of the digital dividend, see footnote 5 above.

16 [German translation of 'beauty contest'].

17 As is clear from the documents before the Court, Persidera submitted joint applications with RAI und Elettronica Industriale (Mediaset) for two lots in the tendering procedure.

25. However, before the contracts were even awarded, the Italian Ministry of Economic Development suspended the procedure for the gratuitous award of multiplexes by decree of 20 January 2012. This was followed by the adoption of Decree-Law (Decreto-legge) No 16/2012,[18] Article 3d[19] of which, first, annulled the already suspended gratuitous award procedure and, secondly, made provision for the establishment within 120 days of a new allocation of frequencies by means of a fee-based public tendering exercise the procedure for which was to be organised by AGCOM. The participants in the unfinished free award procedure were also to be compensated.

26. Thereafter, on 11 April 2013, AGCOM — again after holding a public hearing and consulting the European Commission — adopted Resolution 277/13/CONS, containing the rules applicable to the new tendering procedure. Among other things, that resolution fixed the number of digital multiplexes to be allocated at three and stated that network operators which already held three or more multiplexes were excluded from participating in the tendering procedure.

27. The new procedure was finally introduced with the publication of a notice of 12 February 2014. Cairo Network[20] was the only economic operator to participate in that procedure and was awarded a contract one multiplex on 31 July 2014. Neither Europa Way nor Persidera took part in the new tendering procedure. As is clear from the documents before the Court, the reason for this, in the case of Persidera, was that the undertaking in question already had more than three multiplexes in any event.

28. Europa Way and Persidera brought an action against the annulment of the first tendering procedure before the Tribunale Amministrativo Regionale per il Lazio[21] (TAR), which was however unsuccessful.[22] The dispute is now pending before the Consiglio di Stato,[23] the referring court, to which Europa Way and Persidera have appealed.

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

29. By order of 11 June 2015, received at the Court on 30 October 2015, the Consiglio di Stato stayed the proceedings before it and referred the following questions to the Court for a preliminary ruling under Article 267 TFEU:

‘(1) Do the contested legislation and the consequential implementing measures infringe the rules according to which the functions of regulating the television market are vested in an independent administrative authority (Articles 3 and 8 of Directive 2002/21/EC, … as amended by Directive 2009/140/EC)?

(2) Do the contested legislation and the consequential implementing measures infringe the provisions (Article 7 of Directive 2002/20/EC … and Article 6 of Directive 2002/21/EC …) which provide for prior public consultation by the national independent authority regulating the sector?

(3) Does EU law, and in particular Article 56 TFEU, Article 9 of Directive 2002/21[/EC] …, Articles 3, 5 and 7 of Directive 2002/20[/EC] …, and Articles 2 and 4 of Directive 2002/77[/EC] …, and the principles of non-discrimination, transparency, freedom of competition, proportionality, effectiveness and pluralism of information, preclude annulment of the *beauty contest* procedure — which was commenced in order to remedy, within the system for the allocation of

18 That Decree-Law was passed into law by Law No 44/2012.

19 Article 3d in particular was introduced by the Italian Parliament itself as part of the procedure for converting that Decree-Law into a Law.

20 Cairo Network now operates the ‘La 7’ television channel in Italy.

21 Regional Administrative Court, Lazio.

22 See in this regard judgments Nos 9981/2014 and 9982/2014 of the Tribunale Amministrativo Regionale per il Lazio of 25 September 2014.

23 Council of State.

digital television frequencies, the unlawful exclusion of operators from the market and to allow access for small operators — and substitution for it of another payment-based tendering procedure, which provides for the imposition on participants of requirements and obligations not previously required of incumbents, rendering engagement in competitive bidding onerous and uneconomic?

(4) Does EU law, in particular Article 56 TFEU, Article 9 of Directive 2002/21[/EC] …, Articles 3, 5 and 7 of Directive 2002/20[/EC] …, Articles 2 and 4 of Directive 2002/77[/EC] …, and Article 258 TFEU, and the principles of non-discrimination, transparency, freedom of competition, proportionality, effectiveness and pluralism of information, preclude the re-configuration of the Plan for the allocation of frequencies, reducing national networks from 25 to 22 (and retention of the same availability of multiplexes for the *incumbents*), the reduction of lots in the competition to 3 multiplexes, the allocation of frequencies in the VHF-III band involving the risk of severe interference?

(5) Is the upholding of the principle of the protection of legitimate expectations, as expounded by the Court of Justice, compatible with the annulment of the *beauty contest* procedure which has not allowed the appellants, already admitted to the free procedure, to be sure of being awarded some of the lots put out to tender?

(6) Is the enactment of a provision, such as that contained in Article 3 *quinquies* of Legislative Decree No 16 of 2012, which is out of harmony with the characteristics of the radio and television market, compatible with EU legislation on the allocation of user rights for frequencies (Articles 8 and 9 of Directive 2002/21[/EC] …, Articles 5 and 7 of Directive 2002/20[/EC] …, Articles 2 and 4 of Directive 2002/77[/EC] …)?'

30. In the proceedings before the Court, written observations were submitted by Europa Way, Persidera, RAI, Elettronica Industriale,[24] Cairo Network, the Italian Government and the European Commission. The same parties were also represented at the hearing of 2 February 2017, which took place immediately before that in Case C-112/16.

V. Assessment

A. Admissibility of the request for a preliminary ruling

31. As regards the admissibility of the present request for a preliminary ruling, there is no need to give detailed consideration to Elettronica Industriale's criticism that the referring court has brought directly before the Court questions concerning the compatibility of national law — in particular, Article 3d of Decree-Law No 16/2012 — with EU law. It is sufficient to note in this regard that, while it is true that the Court does not have jurisdiction, in preliminary ruling proceedings, to rule on the compatibility of provisions of national law with EU law or to interpret national legislation or regulations, there is nothing to prevent it, when faced with questions worded to that effect, from giving the referring court any useful guidance on the interpretation of EU law that will enable it to give judgment on the dispute in the main proceedings.[25]

32. I shall look now at a number of other complaints of inadmissibility which have been raised by the parties. These all concern the information which the referring court is expected to provide in its order for reference.

24 Elettronica Industriale belongs to the Mediaset group. The undertaking has presented observations to the Court only on the second, third and fourth questions referred.

25 Settled case-law; see, inter alia, the judgment of 31 January 2008, *Centro Europa 7* (C-380/05, EU:C:2008:59, paragraphs 49 to 51).

33. In accordance with Article 94 of the Rules of Procedure of the Court of Justice,[26] a request for a preliminary ruling must contain, in addition to the questions referred, the necessary information on the factual and legal context of the dispute in the main proceedings. The referring court must also indicate the connection between the provisions of EU law to be interpreted and the dispute in the main proceedings, as well as the reasons which prompted it to inquire about the interpretation or validity of those provisions. According to case-law, the information on the factual and legal context is of particular importance in proceedings relating to competition law.[27]

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

34. First, the request for a preliminary ruling in the present case does not provide any explanation of how the primary-law provisions of Articles 56 and 258 TFEU are supposed to be relevant to the resolution of the dispute in the main proceedings.

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

36. With regard to Article 258 TFEU, it is sufficient to note that this is purely a procedural provision, applicable to infringement proceedings conducted by the Commission and before the Court, which does not support the inference of procedural or material-law requirements governing the allocation of television frequencies by national authorities. While some relevance may in theory attach to the obligation incumbent on the Member States to implement the Court's judgments in infringement proceedings under Article 260(1) TFEU, no such judgment has yet been delivered in infringement proceedings relating to the allocation of television frequencies in Italy.

37. In so far as the referring court, by mentioning Article 258 TFEU, alludes to any obligations that may be incumbent on the Italian Republic to create a situation on the television market which conforms to EU law as it emerges from the judgment in *Centro Europa 7*,[29][30] the Court can adequately address these in its findings relating to Directives 2002/20, 2002/21 and 2002/77. There is no need in this regard for a separate interpretation of Article 258 or Article 260 TFEU.

38. Consequently, the third and fourth questions must be declared inadmissible in so far as they seek an interpretation of Articles 56 and 258 TFEU.

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

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

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

29 Judgment in *Centro Europa 7* (C-380/05, EU:C:2008:59).

30 The fact that infringement proceedings are ongoing before the Commission (see in this regard footnote 2 above) does not in itself impose a legal obligation on the Member State to adopt national measures, provided that the Court has not delivered a judgment finding that there has been a failure to fulfil obligations or made an order for interim measures.

2. Not enough information on individual questions

39. It also remains to be considered whether the request for a preliminary ruling might be declared inadmissible because it contains too little information on the factual and legal background to the questions referred by the national court and their relevance to the judgment to be given. Italy takes the view that this information is lacking in the case of the third, fourth and sixth questions. Elettronica Industriale, for its part, regards the second, third and fourth questions as having been inadequately explained.

40. To my mind, these complaints of inadmissibility call for a qualified response.

41. On the one hand, it is clear that the Consiglio di Stato must assess the legality of the Italian legislature's intervention in an ongoing procedure being conducted by AGCOM with a view to distributing the digital dividend on the television market. That issue is comprehensibly presented in the order for reference. In particular, the factual and legal background to the issue is set out with sufficient precision and the relevance of the associated questions referred (first to fifth questions) to the judgment to be given is also beyond doubt. The Court thus has jurisdiction in this case to provide the referring court with any useful guidance that will enable it to resolve the dispute in the main proceedings from the point of view of EU law.

42. On the other hand, there are references in the questions raised to circumstances on which the Court, even on the most favourable reading, cannot comment because the request for a preliminary ruling does not contain even the rudiments of an explanation of those circumstances. I have in mind here, first, the reference made by the Consiglio di Stato to the 'allocation of frequencies in the VHF-III band involving the risk of severe interference' (fourth question) and, secondly, its assessment to the effect that the content of Article 3d of Legislative Decree No 16/2012 is 'out of harmony with the characteristics of the radio and television market' (sixth question).

43. Against that background, I am of the view that the fourth question is partly inadmissible and the sixth question wholly inadmissible.

3. Interim conclusion

44. All things considered, therefore, the third and fourth questions are partly inadmissible. What is more, the sixth question is wholly inadmissible. Otherwise, however, the request for a preliminary ruling must be regarded as admissible.

B. Substantive assessment of the questions referred

45. The comprehensive list of questions referred by the Consiglio di Stato revolves largely around the same issue: whether the intervention by the Italian Ministry of Economic Development and the Italian legislature in an ongoing procedure before the national regulatory authority for the gratuitous allocation of television frequencies, in conjunction with the order to implement a new, fee-based assignment procedure, was compatible with EU law. In essence, the referring court wishes to ascertain whether the Italian legislature infringed various procedural and material requirements applicable under the new common regulatory framework, in particular the EU-law requirement as to the independence of the national regulatory authorities and the principle of the protection of legitimate expectations.

46. As a first step, I shall look at the issue of the intervention by the State authorities in an ongoing procedure, which was the focus of interest in both the written and at the oral procedure before the Court (see in this regard section 1, immediately below). As a second step, I shall turn to a number of other procedural matters which have been raised by the referring court and the parties to the proceedings (see in this regard section 2, further below). As a third and last step, I shall close my examination by considering the material requirements applicable to the second tendering procedure (see in this regard the final section 3).

1. Intervention by the State authorities in an ongoing procedure before the national regulatory authority (first and fifth questions)

47. The issue of intervention by the State authorities in an ongoing procedure before the national regulatory authority, AGCOM, forms the subject of two of the referring court's questions: first, the fifth question, on the principle of the protection of legitimate expectations (see in this regard section (b), further below) and, secondly, the first question, on the powers of a national regulatory authority (see section (a) immediately below). I should say right away that the conduct of the Italian Minister for Economic Development and the Italian legislature in the present case is questionable not so much from the point of view of the protection of legitimate expectations as from the point of the independence enjoyed by the regulatory authority under EU law.

(a) Infringement of the independence of the national regulatory authority (first question)

48. The principle of the independence of national regulatory authorities, to which the national court refers in its first question, is of paramount importance in the new common regulatory framework, particularly following the amendments made to the EU legislation by Directive 2009/140. After all, the introduction of independent regulatory authorities is intended to ensure the permanent creation, in the area of electronic communications networks and services, of a true internal market which is open and characterised by fair competition and in which media pluralism, as one of the fundamental values for co-existence in a democratic society, is strengthened (see also Article 11(2) of the Charter of Fundamental Rights).

49. Accordingly, the Member States have an express obligation to ensure the independence of their national regulatory authorities [31] (Article 3(2) and (3a) of Directive 2002/21 and recital 13 of Directive 2009/140). That independence is expressed not least in the fact that, although the national regulatory authorities may be supervised (Article 3(3a), second sentence), they may not take instructions in relation to the exercise of their tasks (Article 3(3a), first sentence) and their decisions may be suspended or overturned only by the competent appeal bodies on the basis of specific appeals (Article 3(3a), third sentence, of Directive 2002/21).

50. In so far as the Ministry of Economic Development ordered the suspension of AGCOM's first gratuitous frequency allocation procedure and the Italian legislature subsequently provided for the termination of that procedure in Article 3d of Decree-Law No 16/2012, two State authorities intervened in an ongoing procedure before the national regulatory authority despite the fact that they are not empowered to do so under the new common regulatory framework. In particular, in the present case, neither the Ministry nor the legislature acted as the competent supervisory authority (Article 3(3a), second sentence, of Directive 2002/21) or as the competent appeal body ruling on a specific appeal (Article 3(3a), third sentence, of Directive 2002/21). Rather, both authorities exerted influence on the course of that procedure from the outside and, so far as it is possible to tell, for

31 The extent of the independence thus enjoyed by the national regulatory authorities is demonstrated, for example, by the judgment of 3 December 2009, *Commission* v *Germany* (C-424/07, EU:C:2009:749, in particular paragraphs 83, 91, 94, 99 and 106), in which the Court repeatedly emphasises the discretion available to those authorities and their power to balance the various regulatory objectives in question.

purely political reasons. According to the spirit of the new common regulatory framework, however, it is against the exertion of just such politically motivated influence by external parties that the activity of a national regulatory authority is meant to be protected (see once again in this regard the second sentence of recital 13 of Directive 2009/140).

51. I would mention merely in passing that the present case is in no way comparable to the cases in which the Court has recognised that the possibility of withdrawing an invitation to tender need not be limited to exceptional cases or the existence of serious grounds. [32] For, in those judgments, all of which fall within the sphere of public procurement, the invitations to tender in question were each withdrawn by the contracting authority itself, in other words, by the very authority that was conducting the procedure in question under its own responsibility, and not — as here — by another, external authority.

52. All things considered, therefore, conduct such as that of the Italian Ministry of Economic Development and the Italian legislature, whereby an ongoing procedure before the national regulatory authority is first suspended and subsequently terminated has the effect of infringing the independence of that regulatory authority.

(b) The EU-law principle of the protection of legitimate expectations (fifth question)

53. Expanding upon the first question just discussed, the fifth question seeks to clarify whether the Italian State infringed the EU-law principle of the protection of legitimate expectations by terminating the first, unfinished procedure for allocating television frequencies from the digital dividend.

54. As the Court has already repeatedly held, the principle of the protection of legitimate expectations is a fundamental principle of the European Union. [33] However, that principle can be successfully relied on only where the person concerned has been given precise, unconditional and consistent assurances originating from authorised, reliable sources. [34]

55. It is quite clear that no such assurances were given in this case. After all, the participants in the first tendering procedure, which was later annulled, were given no commitments by the competent Italian authorities that were such as to support the inference that those undertakings would be awarded the contract for certain television frequencies from the digital dividend. More specifically, and contrary to a view expressed at the hearing, the mere fact that a participant's tender has been declared admissible is not in itself a reliable indication that the participant will be awarded the contract at the end of the procedure.

56. Some of the interested parties — in particular, Europa Way, which was the only operator to apply for one of the multiplexes concerned — may at the time have entertained serious hopes of being awarded a contract. However, for as long as the tendering procedure remained unfinished and no licenses had been granted, those mere hopes could not crystallise into a legitimate expectation of a certain outcome to the procedure. After all, the fact that a tenderer participates in a procedure does not in itself provide any form of guarantee nor justify any legitimate expectation that it will be successful in that procedure.

32 Judgments of 16 September 1999, *Fracasso and Leitschutz* (C-27/98, EU:C:1999:420, paragraph 25), 18 June 2002, *HI* (C-92/00, EU:C:2002:379, paragraph 40), and 11 December 2014, *Croce Amica One Italia* (C-440/13, EU:C:2014:2435, paragraph 31).

33 Judgments of 5 May 1981, *Dürbeck* (112/80, EU:C:1981:94, paragraph 48), and 24 March 2011, *ISD Polska and Others* (C-369/09 P, EU:C:2011:175, paragraph 122).

34 Judgments of 14 June 2016, *Marchiani* v *Parliament* (C-566/14 P, EU:C:2016:437, paragraph 77), and 19 July 2016, *Kotnik and Others* (C-526/14, EU:C:2016:570, paragraph 62); see also the judgments of 22 June 2006, *Belgium and Forum* 187 v *Commission* (C-182/03 and C-217/03, EU:C:2006:416, paragraph 147), and 16 December 2008, *Masdar (UK)* v *Commission* (C-47/07 P, EU:C:2008:726, paragraphs 81 and 86).

57. Consequently, in a situation such as that in the present case, any complaints based on the EU-law principle of the protection of legitimate expectations can have no prospect of success.

2. A number of other procedural issues (second question)

58. In its second question, and to some extent its first question, the Consiglio di Stato asks about a number of procedural requirements applicable under the new common regulatory framework. Those questions seek to clarify whether a legislative measure such as Art 3d of Decree-Law No 16/2012 infringed the EU-law requirement of prior public consultation (see in this regard section (a), immediately below), and whether, in adopting that measure, the Italian legislature performed regulatory tasks which the new common regulatory framework reserves for the national regulatory authorities (see in this regard section (b), further below).

(a) The requirement of prior public consultation

59. The public consultation to which the Consiglio di Stato refers in its second question is required, pursuant to Article 7(1)(b) of Directive 2002/20 in conjunction with Article 6 of Directive 2002/21, in cases where a Member State is considering whether to limit the number of rights of use to be granted for radio frequencies. All participants, including users and consumers, are to be consulted.

60. It is common ground that the second, new tendering procedure eventually made available fewer television frequencies than the first, annulled procedure, with bids now being invited for three rather than the original five digital multiplexes. This amounted to a limitation of the number of rights of use to be granted for radio frequencies, within the meaning of Article 7(1)(b) of Directive 2002/20, such as to make it necessary to hold a public consultation as provided for in Article 6 of Directive 2002/21.

61. As is clear from the documents before the Court, and as was confirmed at the hearing, however, that limitation of the number of multiplexes to be allocated was not triggered by the Italian legislature itself immediately upon adopting Article 3d of Decree-Law No 16/2012, but only later by AGCOM when it implemented the second tendering procedure.

62. Contrary to the view which the Commission appears to take, the order from the legislature that the new allocation of frequencies to be carried out must be fee-based also does not constitute a limitation of the *number* of available frequencies, which alone is subject under Article 7(1)(b) of Directive 2002/20 to an obligation to hold a consultation as provided for in Article 6 of Directive 2002/21.

63. It follows that, in this case, the obligation to hold a consultation pursuant to Article 7(1)(b) of Directive 2002/20 in conjunction with Article 6 of Directive 2002/21 fell not to the legislature but exclusively to AGCOM, which, moreover, so far as can be told from the account of the facts given in the order for reference, discharged that obligation before adopting its Resolution 277/13/CONS. [35]

64. There is therefore nothing to indicate that the aforementioned EU-law obligation to hold a consultation was infringed.

(b) Alleged exercise of regulatory tasks by the national legislature

65. The first question also calls for an examination of whether, by ordering that a new, fee-based allocation procedure be conducted, the Italian legislature itself performed the tasks of a national regulatory authority.

35 See in this regard point 26 of this Opinion, above.

66. Such conduct would be permissible only within very narrow parameters, as the Court established not least in *Base and Others*.[36] The scope in EU law for regulatory tasks to be performed by the national legislature is likely to be even more limited if not completely non-existent following the entry into force of amending Directive 2009/140, the preamble to which makes it clear that 'a national legislative body [is] unsuited to act as a national regulatory authority under the regulatory framework', since there would otherwise be a risk of political pressure and external influence being exerted on the exercise of regulatory tasks.[37]

67. No general definition of the concept of *regulatory tasks* to be carried out by one or more national regulatory authorities (see Article 2(g) of Directive 2002/21)[38] is given in any of the directives under the new common regulatory framework. It is clear, however, that by no means *all* the tasks and obligations which must be performed at national level under that regulatory framework must be assigned to the regulatory authorities.

68. It is true that the directives contain many provisions which are specifically concerned with the activities of the national regulatory authorities and the tasks reserved for them (see, inter alia, Article 3(1), (3) and (3a), Article 6(1) and Article 8(1), last subparagraph, and (2) of Directive 2002/21). However, at least as many provisions are directed in a very general fashion at 'the Member States', which, within the framework of their institutional autonomy,[39] are free to decide for themselves which national body is to be entrusted with the tasks in question.

69. The first sentence of Article 9(1) of Directive 2002/21 warrants special mention here. This, in a very general fashion, entrusts the *Member States* (and not specifically the *national regulatory authorities* or the *competent national authorities*) with the effective management of radio frequencies and, in that connection, calls upon them to take due account of the fact that radio frequencies are a public good that has an important social, cultural and economic value (see also recital 21 of Directive 2002/21).

70. While it is for the national legislature, taking into account all the provisions of EU law, to define the general framework for the creation and operation of electronic communications networks and services, it falls to the national regulatory authorities, acting within that framework, to make decisions in individual cases, to settle disputes and, by way of *ex ante* regulation, to determine the modus operandi of such networks and services (see also to this effect Article 3(3a) of Directive 2002/21 and the second sentence of recital 13 in the preamble to Directive 2009/140).

71. However, the determination as to whether, in a Member State, digital television frequencies are to be allocated free of charge or for a fee is not a decision in an individual case, nor an aspect of the mode of operation of the communications networks and services concerned, but, rather, a political decision of principle in the taking of which the national authorities must take due account not least of the high economic value of those frequencies (see Article 9(1), first sentence, and recital 21 of Directive 2002/21).

72. As the Italian Government and Cairo Network rightly submit, such a decision of principle is not a regulatory task within the meaning of Article 2(g) of Directive 2002/21. It could therefore be made by the national legislature and did not necessarily have to be reserved for the national regulatory authority, AGCOM.

36 See in this regard the judgment of 6 October 2010, *Base and Others* (C-389/08, EU:C:2010:584, paragraphs 26 to 30).

37 Third sentence of recital 13 of Directive 2009/140.

38 On the option open to Member States to assign regulatory tasks to a number of national bodies, as part of the institutional autonomy which they enjoy, see the judgments of 6 March 2008, *Comisión del Mercado de las Telecomunicaciones* (C-82/07, EU:C:2008:143, paragraphs 18, 19 and 24), 6 October 2010, *Base and Others* (C-389/08, EU:C:2010:584, paragraph 26), 17 September 2015, *KPN* (C-85/14, EU:C:2015:610, paragraph 53), and 19 October 2016, *Ormaetxea Garai and Lorenzo Almendros* (C-424/15, EU:C:2016:780, paragraph 30).

39 On the institutional autonomy of the Member States, see recital 11 of Directive 2002/21.

3. The material requirements applicable to the second tendering process (third, fourth and sixth questions)

73. By its third, fourth and sixth questions, the referring court wishes in essence to ascertain whether the annulment of the first tendering procedure by the Italian legislature and, in particular, the subsequent implementation of a second tendering procedure under fundamentally altered conditions were compatible with various material provisions and principles of EU law.

74. Some of these questions are, as I have submitted above,[40] wholly or partly inadmissible. To that extent, I shall deal with them below only in the alternative. Also, given the extensive overlap between the points of substance central to those questions, I consider it appropriate to examine them together and to focus their analysis on the key aspects of the legal issues they raise.

75. The Consiglio di Stato seeks in essence to ascertain whether the Italian State infringed the aforementioned provisions by carrying out a new, fee-based tendering procedure for the purposes of allocating the digital dividend and, in so doing, reduced the number of digital multiplexes to be allocated from five in the original tendering procedure to three in the new one.

76. The substantive rules governing the allocation of television frequencies are laid down primarily in various secondary-law provisions of the new common regulatory framework, namely Articles 8 and 9 of Directive 2002/21, Articles 3, 5 and 7 of Directive 2002/20 and Articles 2 and 4 of Directive 2002/77. Taken together, all of those provisions give expression to the principle that, while the Member States enjoy some discretion in the allocation of frequencies, they must nonetheless exercise that discretion in accordance with the general EU-law principles of non-discrimination, transparency and proportionality, being required also to ensure that the frequencies are administered and used efficiently and to take due account of media pluralism.

(a) Fee-based nature of the allocation under the second tendering procedure

77. At the centre of the dispute between the parties is the fact, at issue in the second, third and sixth questions, that the allocation of frequencies under the new, second tendering procedure became fee-based after the Italian legislature had annulled the preceding, first tendering procedure before it could be concluded. While Europa Way and Persidera consider the now fee-based allocation of television frequencies to be contrary to EU law, all the other parties take the opposite view.

– In principle, no EU-law requirement for allocation to be free of charge

78. As the Commission in particular rightly submits, none of the provisions of the new common regulatory framework makes it compulsory for television frequencies to be allocated free of charge and only on the basis of the applicant's suitability (by means of a 'beauty contest', for example). On the contrary, the reference to 'competitive or comparative selection procedures' in Article 5(4) and Article 7(4) of Directive 2002/20 is formulated in a sufficiently open fashion to be able to accommodate both gratuitous and fee-based allocation models.

79. A *fee-based* allocation of frequencies is by no means inconceivable, bearing in mind, moreover, the EU-law requirement laid down in the first sentence of Article 9(1) of Directive 2002/21 to the effect that Member States must take due account of the fact that radio frequencies are a public good that has an important social, cultural *and economic value*.[41]

40 See points 33 to 44 of this Opinion, above.

41 See to this effect the judgment of 10 March 2011, *Telefónica Móviles España* (C-85/10, EU:C:2011:141, paragraph 27).

80. The formulation of the framework conditions applicable to a fee-based allocation of frequencies must of course take into account the other assessment criteria referred to by the EU legislature, in particular competition. Among the fundamental objectives of the new common regulatory framework, after all, are the promotion of competition (see in particular Article 7(1)(a) of Directive 2002/20 and Article 8(2) of Directive 2002/21)[42] and the avoidance of distortion of competition in the area of electronic communications networks and services (see in particular Article 5(6) of Directive 2002/20 and Article 8(2)(b) of Directive 2002/21), coupled with efforts to promote media pluralism (see in this regard the third subparagraph of Article 8(1), point (d) of the second subparagraph of Article 9(4) and recital 6 of Directive 2002/21 and Article 11(2) of the Charter of Fundamental Rights). Competition and media pluralism are very specifically reflected in the freedom guaranteed under EU law to provide electronic communications networks and services (Article 3(1) of Directive 2002/20 and Article 2(2) of Directive 2002/77).

81. In the light of the foregoing, the fee for the allocation of digital television frequencies, as well as any reserve price in cases where such frequencies are auctioned, must be moderate, so that undertakings already active on the television market and those intending to enter the market for the first time, whatever their size, still have sufficient resources to be able to invest in the necessary technologies and provide high-quality content.[43] Furthermore, the national regulatory authority must ensure that participation in such an allocation procedure is open only to undertakings which — when measured against objective, transparent, non-discriminatory and proportionate criteria — offer every guarantee of being suitable and reliable operators of electronic communications networks on a media market characterised by competition and pluralism.

82. It cannot be assumed, however, that competition and pluralism on the television market are achievable only if frequencies are allocated free of charge.[44]

83. In particular, the new common legal framework does not support the inference of any kind of *obligation* on Italy to forego a fee for the allocation of digital frequencies. Nor is any other conclusion to be drawn from the fact, highlighted by the national court and a number of parties to the proceedings, that the digital dividend allocation at issue here serves ultimately to correct a situation in Italy which is contrary to EU law and has been censured as such by the Court of Justice in the judgment in *Centro Europa 7*[45] and by the Commission in ongoing infringement proceedings.[46] For, in discharging their obligation to eliminate the situation that is contrary to EU law,[47] the competent authorities in Italy enjoyed a discretion[48] which included more than just one option in terms of how to proceed — and, therefore, options other than the gratuitous allocation of frequencies.

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

43 See to this effect the judgments of 10 March 2011, *Telefónica Móviles España* (C-85/10, EU:C:2011:141, paragraph 28), and 21 March 2013, *Belgacom and Others* (C-375/11, EU:C:2013:185, paragraphs 50 and 51).

44 See also in this regard the judgment of 10 March 2011, *Telefónica Móviles España* (C-85/10, EU:C:2011:141, paragraph 29), which states that too low a charge risks undermining the efficient use of radio frequencies, which are a scarce resource.

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

46 On those infringement proceedings, see points 2 and 30 of this Opinion, above.

47 Judgment of 21 June 2007, *Jonkman and Others* (C-231/06 to C-233/06, EU:C:2007:373, paragraphs 37 and 38).

48 As the Court held in connection with the licensing of games of chance, appropriate courses of action for eliminating the unlawful exclusion of certain economic operators, at least prospectively, could be the revocation and redistribution of the old licences or the award by public tender of an adequate number of new licences; see the judgments of 6 March 2007, *Placanica* (C-338/04, C-359/04 and C-360/04, EU:C:2007:133, paragraph 63), 16 February 2012, *Costa* (C-72/10 and C-77/10, EU:C:2012:80, paragraph 52), and 22 January 2015, *Stanley International Betting and Stanleybet Malta* (C-463/13, EU:C:2015:25, paragraph 35).

– No discrimination against new network operators in favour of old

84. The referring court also voices the concern that the charging of a fee specifically for the television frequencies in the third group of digital multiplexes,[49] at issue here, might discriminate against new network operators in favour of undertakings already active on the market (the 'incumbents'), in particular the market leaders Rai and Mediaset. The latter, after all, as Europa Way and Persidera also submit, acquired their television frequencies from the first and second groups, without providing any financial consideration at the time of taking possession of those rights of use.

85. According to settled case-law, the EU-law principle of equal treatment or non-discrimination,[50] which has now also been established in Articles 20 and 21 of the Charter of Fundamental Rights and, moreover, is reflected in the new common regulatory framework,[51] 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.[52]

86. The comparability of situations must be assessed, in particular, in the light of the subject matter and purpose of the act in question. In this regard, account must be taken of the principles and objectives of the field to which the act concerned relates.[53]

87. In the present case, the gratuitous assignment of digital television frequencies in the first and second groups to Rai and Mediaset served the twofold objective of ensuring the continuity of television output in Italy and rewarding the investment already made in digital technology.[54] The undertakings already active on the television market and the undertakings entering the market for the first time are not in a comparable situation so far as that objective is concerned.

88. In the light of the foregoing, there is insufficient evidence — at least on the basis of the information available to the Court — of any discrimination between these two groups of undertakings.

89. I would add that the assurance of continuity of television output at least also constitutes an objective in the general interest which appears in principle to be capable of justifying any difference of treatment, in so far as that difference of treatment falls strictly within the bounds of what is necessary, taking into account the need for competition and media pluralism, to attain that objective in a consistent and systematic manner.[55]

90. It is worth noting here that, in Italy, annual licence fees are charged for the use of *all* digital television frequencies.[56] In reality, therefore, not even the undertakings that were already active on the market before the transition to digital television (the 'incumbents') are able to use their digital frequencies for free, inasmuch as they make periodic payments to the State for using them. The fee paid by a network operator which has been awarded new digital frequencies in the third group (the

49 On the division of the frequencies to be allocated into three groups of digital multiplexes, see point 22 of this Opinion, above.

50 On this principle, see, for example, the judgment of 12 September 2006, *Eman and Sevinger* (C-300/04, EU:C:2006:545, paragraph 57).

51 See in particular Article 9(1), second sentence, and recital 19 of Directive 2002/21, Article 5(2), second subparagraph, and Article 7(3) of Directive 2002/20, as well as Article 2(4) and Article 4, point 2, of Directive 2002/77.

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

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

54 See in this regard point 22 of this Opinion, above. This point was made by a number of parties at the hearing too.

55 I shall look at this issue in more detail in my Opinion of today's date in the parallel *Persidera* case (C-112/16, points 63 to 72).

56 A number of parties have made this point, in both the written and the oral procedures before the Court, without being contradicted by Europa Way and Persidera.

digital dividend), on the other hand, is offset against its licence fees for the following years.[57] In those circumstances, it can be assumed that the fact that the allocation of digital television frequencies in the third group is fee-based does not give rise to excessive adverse effects on competition or media pluralism.

(b) Limiting the number of digital frequencies to be allocated

91. In addition to the fee-based nature of the allocation of frequencies, a further, incidental, issue which has been raised in the proceedings before the Court is the fact that fewer digital multiplexes were made available for allocation in the second tendering procedure than in the first, cancelled procedure, that is to say only three instead of the original five. This issue is touched upon in the referring court's fourth question.

92. Limiting the number of frequencies that are made available is permissible provided that this is necessary to ensure the efficient use of the frequency spectrum, takes place in accordance with objective and transparent criteria and satisfies the principles of non-discrimination and proportionality (see, in particular, Article 9(3), second subparagraph, and Article 4 of Directive 2002/21, and Article 5(4), second subparagraph, (5) and (6) and Article 7(3) of Directive 2002/20[58]).

93. According to information to the same effect provided by a number of parties to the proceedings, the reduction of the digital dividend frequencies to be allocated by two to only three digital multiplexes in the present case was due to two circumstances: first, following advice from the International Telecommunication Union (ITU), certain frequencies were henceforth no longer to be made available to television but were to be reserved for telecommunications. Secondly, there was a serious risk of interference in the case of certain frequencies.[59]

94. It is the task not of the Court of Justice but of the referring court to examine whether these assertions are correct and whether the principles of objectivity, transparency, non-discrimination and proportionality were observed when the number of available digital multiplexes was reduced from five to three in the particular group of frequencies to be allocated which is at issue here, the third group — that is to say, in the particular context of the digital dividend.

95. For the purposes of the present preliminary ruling proceedings, it is sufficient to say that the aforementioned concerns (to take account of the advice from the ITU and avoid interference) lie in the general interest and are such as to justify a reduction in the number of digital television frequencies put out to tender (see also Article 9(1), second subparagraph, and (4) of Directive 2002/21 and Article 5(1), first indent, of Directive 2002/20), provided that the digital dividend frequencies which then remain available are sufficient to satisfy the need for competition and media pluralism and to enable undertakings to enter the market for the first time in significant numbers.

96. In examining the proportionality of the measures to cut the number of available digital multiplexes from five to three, the referring court will have to give careful consideration to whether, instead of reducing the digital dividend (in other words, the third-group digital frequencies at issue here[60]), reducing the number of other multiplexes to be allocated (in other words, the digital frequencies in the first or second group) would not have been an equally effective — if not better — way of taking account of the ITU's advice and avoiding interference. After all, as I explain in more detail in Case

57 According to the Italian Government's submission at the hearing before the Court; it will be for the referring court to verify the accuracy of this information.

58 See also the judgment of 31 January 2008, *Centro Europa 7* (C-380/05, EU:C:2008:59, paragraph 100).

59 Slovenia also drew attention to the issue of interference in its observations in Case C-112/16.

60 On the division of the frequencies to be allocated into three groups of digital multiplexes, see, again, point 22 of this Opinion, above.

C-112/16,[61] it is not inconceivable that Rai and Mediaset were awarded too many digital frequencies, from the first group in particular, meaning that a reduction of the number of multiplexes to be allocated from that group might have had a less dramatic impact on competition in the television market and on media pluralism than in the context of the third, digital-dividend group.

VI. Conclusion

97. In the light of the foregoing submissions, I propose that the Court's answer to the request for a preliminary ruling from the Consiglio di Stato should be as follows:

(1) The fact that an ongoing procedure for the allocation of digital television frequencies which is being carried out by the national regulatory authority is, on the order of other State bodies not acting as competent supervisory authorities or appeal bodies, first suspended and later cancelled altogether, is incompatible with Article 3(2) and (3a) of Directive 2002/21/EC, as amended by Directive 2009/140/EC.

(2) The EU-law principle of the protection of legitimate expectations does not prohibit a procedure for the gratuitous allocation of digital television frequencies which is ongoing before the national regulatory authority from being cancelled and replaced with a new procedure for the fee-based allocation of such frequencies which is conducted before the same authority.

(3) The national legislature does not perform any regulatory tasks and, moreover, is not subject to the consultation obligations laid down in Article 7(1)(b) of Directive 2002/20/EC in conjunction with Article 6 of Directive 2002/21 when providing for the fee-based allocation of digital television frequencies.

(4) Article 9 of Directive 2002/21, Articles 3, 5 and 7 of Directive 2002/20 and Articles 2 and 4 of Directive 2002/77/EC do not preclude the following measures:

   (a) limiting the digital television frequencies specifically made available for smaller network operators and new market participants in order to take account of requirements in the public interest or recommendations based on the relevant international agreements or to avoid interference, provided that the principle of proportionality is observed and it does not become excessively difficult for new market participants to enter the market;

   (b) the fee-based allocation of digital television frequencies, in so far as, in their allocation, and, in particular, in the setting of the fee, the principles of transparency, non-discrimination and proportionality are observed, and it is ensured that such allocation duly operates to promote competition on the television market and media pluralism.

61 See in this regard my Opinion of today's date in *Persidera* (C-112/16, in particular paragraphs 67 to 71).