Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

11 September 2025*

(Reference for a preliminary ruling – Electronic communications networks and services – Directives 2002/20/EC, 2002/21/EC and 2002/77/EC – Rights to use digital terrestrial broadcasting radio frequencies for radio and television – Conversion of rights of use – Granting of rights of use – Judicial protection – Independence of national regulatory authorities)

In Joined Cases C-764/23 to C-766/23,

THREE REQUESTS for a preliminary ruling under Article 267 TFEU from the Consiglio di Stato (Council of State, Italy), made by decisions of 1 December 2023, received at the Court on 12 December 2023, in the proceedings

Cairo Network Srl (C-764/23),

Europa Way Srl (C-765/23),

Persidera SpA (C-766/23)

v

Ministero delle Imprese e del Made in Italy (C-764/23 and C-766/23),

Autorità per le Garanzie nelle Comunicazioni,

Presidenza del Consiglio dei Ministri (C-765/23),

Ministero dell'Economia e delle Finanze (C-765/23),

Ministero dello Sviluppo economico (C-765/23),

in the presence of:

Radiotelevisione italiana SpA (RAI),

Persidera SpA (C-764/23 and C-765/23),

Mediaset SpA (C-764/23 and C-765/23),

* Language of the case: Italian.

Elettronica Industriale SpA,

Premiata Ditta Borghini e Stocchetti di Torino Srl,

Europa Way Srl (C-764/23 and C-766/23),

Prima TV SpA,

Associazione di Categoria Aeranti-Corallo (C-764/23),

3lettronica Industriale SpA (C-765/23 and C-766/23),

Espansione Srl (C-766/23),

Cairo Network Srl (C-765/23 and C-766/23),

THE COURT (Third Chamber),

composed of C. Lycourgos (Rapporteur), President of the Chamber, S. Rodin, N. Piçarra, O. Spineanu-Matei and N. Fenger, Judges,

Advocate General: A. Rantos,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Cairo Network Srl, by L.R. Perfetti, avvocato,

– Europa Way Srl, by F. Ferraro and A. Terranova, avvocati,

– Persidera SpA, by E. Apa, M. V. La Rosa, M. Montinari and I. Picciano, avvocati,

– Radiotelevisione italiana SpA (RAI), by G. de Vergottini, E. Lenzi and M. Petitto, avvocati,

– Mediaset SpA and Elettronica Industriale SpA, by C.E. Cazzato, D. Lipani, G.M. Roberti, G. Rossi and M. Serpone, avvocati,

– the Italian Government, by G. Palmieri, acting as Agent, and by S. Fiorentino and G. Galluzzo, avvocati dello Stato,

– the Croatian Government, by G. Vidović Mesarek, acting as Agent,

– the European Commission, by G. Conte and O. Gariazzo, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 27 March 2025,

gives the following

Judgment

1 These requests for a preliminary ruling concern the interpretation of Article 6 and the second subparagraph of Article 19(1) TEU, Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter'), Articles 3, 5, 7 and 14 of Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive) (OJ 2002 L 108, p. 21), as amended by Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 (OJ 2009 L 337, p. 37) ('the Authorisation Directive'), Article 3(3) and (3a), the first subparagraph of Article 4(1) and Articles 8 and 9 of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) (OJ 2002 L 108, p. 33), as amended by Directive 2009/140 ('the Framework Directive'), Articles 2 and 4 of Commission Directive 2002/77/EC of 16 September 2002 on competition in the markets for electronic communications networks and services (OJ 2002 L 249, p. 21) ('the Competition Directive'), recitals 11 and 20 of Decision (EU) 2017/899 of the European Parliament and of the Council of 17 May 2017 on the use of the 470-790 MHz frequency band in the Union (OJ 2017 L 138, p. 131) and Articles 5, 6, 8, 9, 31 and 45 of Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (OJ 2018 L 321, p. 36), as well as the principles of fairness, non-discrimination, transparency, protection of competition, protection of legitimate expectations, proportionality and appropriateness.

2 The requests have been made in proceedings between Cairo Network Srl (C-764/23), Europa Way Srl (C-765/23) and Persidera SpA (C-766/23), on the one hand, and the Ministero delle Imprese e del Made in Italy (Ministry of Enterprise and Made in Italy, Italy) (C-764/23 and C-766/23), the Autorità per le Garanzie nelle Comunicazioni (Communications Supervisory Authority, Italy) ('AGCOM'), the Presidenza del Consiglio dei Ministri (Presidency of the Council of Ministers, Italy) (C-765/23), the Ministero dell'Economia e delle Finanze (Ministry of the Economy and Finance, Italy) (C-765/23) and the Ministero dello Sviluppo economico (Ministry for Economic Development, Italy) (C-765/23), on the other hand, concerning procedures, carried out in the context of the reconfiguration of the 694-790 MHz frequency band ('the 700 MHz frequency band'), for the conversion of existing rights of use for DVB-T multiplexes into rights of use for transmission capacity in DVB-T 2 multiplexes and for the allocation of the latter type of rights of use.

The legal framework

European Union law

The Authorisation Directive

3 Article 3 of the Authorisation Directive sets out the rules for general authorisations of electronic communications networks and services.

4 Article 5(2) and (6) of that directive provides:

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

Without prejudice to specific criteria and procedures adopted by Member States to grant rights of use of radio frequencies to providers of radio or television broadcast content services with a view to pursuing general interest objectives in conformity with 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 Article 9 of [the Framework Directive]. An exception to the requirement of open procedures may apply in cases where the granting of individual rights of use of radio frequencies to the providers of radio or television broadcast content services is necessary to achieve a general interest objective as defined by Member States in conformity with Community law.

…

6. Competent national authorities shall ensure that radio frequencies are efficiently and effectively used in accordance with Articles 8(2) and 9(2) of [the Framework Directive]. They shall ensure competition is not distorted by any transfer or accumulation of rights of use of radio frequencies. For such purposes, Member States may take appropriate measures such as mandating the sale or the lease of rights to use radio frequencies.’

5 Under Article 7(3) of the Authorisation Directive:

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

6 Article 14 of the Authorisation Directive, entitled ‘Amendment of rights and obligations’, provides:

‘1. Member States shall ensure that the rights, conditions and procedures concerning general authorisations and rights of use or rights to install facilities may only be amended in objectively justified cases and in a proportionate manner, taking into consideration, where appropriate, the specific conditions applicable to transferable rights of use for radio frequencies. …

2. Member States shall not restrict or withdraw rights to install facilities or rights of use for radio frequencies before expiry of the period for which they were granted except where justified and where applicable in conformity with the Annex and relevant national provisions regarding compensation for withdrawal of rights.’

The Framework Directive

7 Recital 11 of the Framework Directive reads as follows:

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

8 Under Article 2(g) of that directive, the term 'national regulatory authority' (NRA) means 'the body or bodies charged by a Member State with any of the regulatory tasks assigned in this Directive and the Specific Directives'. It follows from Article 2(l) that the Authorisation Directive is one of the 'specific directives'.

9 Recital 13 of Directive 2009/140, which amended the Framework Directive, states:

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

10 Article 3(1) to (3a) of the Framework Directive provides:

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

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

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

3a. Without prejudice to the provisions of paragraphs 4 and 5, [NRAs] responsible for *ex-ante* market regulation or for the resolution of disputes between undertakings … 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 [NRAs]. …

…’

11 Article 4(1) of that directive states:

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

Pending the outcome of the appeal, the decision of the [NRA] shall stand, unless interim measures are granted in accordance with national law.’

12 Article 8(1) to (4) of that directive provides:

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

…

2. The [NRAs] shall promote competition in the provision of electronic communications networks, electronic communications services and associated facilities and services …

…

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

…

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

…’

13 Article 9(1) of that directive states:

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

In applying this Article, Member States shall respect relevant international agreements, including the [International Telecommunication Union (ITU)] Radio Regulations, and may take public policy considerations into account.’

The Competition Directive

14 Article 2 of the Competition Directive establishes rules relating to exclusive and special rights for electronic communications networks and services.

15 Article 4 of that directive, entitled 'Rights of use of frequencies', provides:

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

Decision 2017/899

16 Recitals 8, 9, 11, 15 and 20 of Decision 2017/899 are worded as follows:

'(8) For Region 1, which includes the [European] Union, the [ITU's] Radio Regulations, adopted by the World Radiocommunication Conference in 2015, provide for the allocation of the 700 MHz frequency band to the broadcasting and mobile (except aeronautical mobile) services on a co-primary basis. The 470-694 MHz … frequency band remains exclusively allocated to the broadcasting services on a primary basis and to wireless audio [programmes and special events (PMSE)] use on a secondary basis.

(9) Rapidly growing wireless broadband traffic and the increasing economic, industrial and social importance of the digital economy make enhanced wireless network capacity a necessity. Spectrum in the 700 MHz frequency band provides both additional capacity and universal coverage, in particular for the economically challenging rural, mountainous and insular areas as well as other remote areas, predetermined in accordance with areas that are a national priority, including along major terrestrial transport paths, and for indoor use and for wide-range machine-type communications. In that context, coherent and coordinated measures for high-quality terrestrial wireless coverage across the Union, building on best national practices for operators' licence obligations, should aim to meet the … objective that all citizens throughout the Union should have access both indoors and outdoors, to the fastest broadband speeds of not less than 30 [megabits per second (Mbps)] by 2020, and should aim to achieve an ambitious vision for a gigabit society in the Union. Such measures will promote innovative digital services and ensure long-term socioeconomic benefits.

…

(11) … The [digital terrestrial television (DTT)] and PMSE sectors therefore need long-term regulatory predictability with regard to the availability of sufficient spectrum, so that they can safeguard the sustainable provision and development of their services, in particular free-to-view television, while ensuring an appropriate environment for investments, so that Union and national audiovisual policy objectives such as social cohesion, media pluralism and cultural diversity are met. …

…

(15) Member States should be able to delay, on the basis of duly justified reasons, allowing the use of the 700 MHz frequency band for terrestrial systems capable of providing wireless broadband electronic communications services beyond a common Union deadline of 2020 for up to two years. The reasons for such a delay should be limited to unresolved cross-border coordination issues resulting in harmful interferences, the need to ensure, and the complexity of ensuring, the technical migration of a large amount of the population to advanced broadcasting standards, the financial costs of transition exceeding the expected revenue generated by award procedures and force majeure. Member States should take all necessary steps to minimise resulting harmful interference in the affected Member States. …

…

(20) Member States should adopt coherent national roadmaps to facilitate the use of the 700 MHz frequency band for terrestrial wireless broadband electronic communications services while ensuring continuity for the television broadcasting services that vacate the band. Once such national roadmaps have been adopted, Member States should make them available in a transparent manner within the Union. The national roadmaps should cover activities and timescales for frequency replanning, technical developments for network and end-user equipment, coexistence between radio and non-radio equipment, existing and new authorisation regimes, mechanisms to avoid harmful interference with spectrum users in adjacent bands and information on the possibility of compensation for migration costs, where such costs would arise, in order to avoid, inter alia, costs for end users or broadcasters. Where Member States intend to maintain DTT, the national roadmaps should consider the option of facilitating upgrades of broadcasting equipment to more spectrum-efficient technologies, such as advanced video formats (e.g. HEVC) or signal transmission technologies (e.g. DVB-T2).'

17 Article 1(1) of that decision provides:

'By 30 June 2020, Member States shall allow the use of [the 700 MHz] frequency band for terrestrial systems capable of providing wireless broadband electronic communications services …

Member States may, however, delay allowing the use of the 700 MHz frequency band for up to two years on the basis of one or more of the duly justified reasons set out in the Annex to this Decision. … Where necessary, Member States shall carry out the authorisation process or amend relevant existing rights to use the spectrum in accordance with [the Authorisation Directive], in order to allow such use.

…'

Directive 2018/1972

18 Article 124(1) of Directive 2018/1972 reads as follows:

'Member States shall adopt and publish, by 21 December 2020, the laws, regulations and administrative provisions necessary to comply with this Directive. They shall immediately communicate the text of those measures to the [European] Commission.

Member States shall apply those measures from 21 December 2020.

…’

Italian law

19 Article 1(1031) of Legge No 205 – Bilancio di previsione dello Stato per l’anno finanziario 2018 e bilancio pluriennale per il triennio 2018-2020 (Law No 205 providing for the State budget for the 2018 financial year and the multiannual budget for the 2018-2020 triennium), of 27 December 2017 (GURI No 302 of 29 December 2017), as amended by Legge No 145 – Bilancio di previsione dello Stato per l’anno finanziario 2019 e bilancio pluriennale per il triennio 2019-2021 (Law No 145 on the provisional State budget for the 2019 financial year and the multiannual budget for the 2019-2021 triennium), of 30 December 2018 (GURI No 302 of 31 December 2018) (‘Law No 205/2017’), provides:

‘In line with the objectives of the European and national audiovisual policy for social cohesion, media pluralism and cultural diversity, and with a view to the most efficient management of the radio spectrum permitted by the use of the most advanced technologies, all frequencies assigned nationally and locally for the [DTT] service and allocated in VHF Band III and 470-694 MHz shall be released according to the schedule referred to in paragraph 1032. For the purposes referred to in the first sentence, the rights of use of frequencies owned by national network operators as of the date of entry into force of this law shall be converted into rights of use of transmission capacity in new national DVB-T2 multiplexes, according to the criteria defined by [AGCOM] by 31 March 2019 for the purpose of allocating the rights of use of the frequencies. By 31 March 2019, [AGCOM] shall establish the criteria for the allocation at national level of the rights of use of the frequencies planned pursuant to paragraph 1030 for the [DTT] service to national network operators [in the 470-694 MHz UHF band], taking into account the need to limit any network transformation and implementation costs, reduce the transitional period referred to in paragraph 1032 and minimise the costs and impacts for end users. By 30 June 2019, the Ministry of Economic Development shall grant the rights of use of the frequencies referred to in the third sentence to national network operators on the basis of the criteria defined by [AGCOM] referred to in that sentence. …’

20 Article 1(1031a) of Law No 205/2017 provides:

‘The additional transmission capacity available at national level and the terrestrial frequencies, in addition to those intended for the conversion of the rights of use referred to in paragraph 1031 and planned by [AGCOM] in the [national frequency allocation plan], to be assigned to the [DTT] service for national network operators and the concessionary of the public broadcasting and multimedia service, shall be allocated by means of a fee-based procedure without further calls for tender, held by the Ministry of Economic Development by 30 November 2019, implementing the procedures established by [AGCOM] by 30 September 2019 … on the basis of the following principles and criteria:

(a) to allocate transmission capacity and frequencies on the basis of lots equal in size to half of one multiplex;

(b) to set a minimum bid value on the basis of the market values identified by [AGCOM];

(c) to assess the value of the economic tenders submitted;

(d) to ensure the continuity of the service, the speed of the technological transition and the quality of the technological infrastructure made available by the national network operators active in the sector, including the concessionary of the public broadcasting and multimedia service;

(e) to leverage the experience of national network operators in the sector, with particular reference to the implementation of digital broadcasting networks;

(f) to build structural capacity to ensure radio spectrum efficiency, professionalism and expertise in the sector, technological innovation and optimal, effective and timely use of transmission capacity and additional frequencies;

(g) to make better use of the radio spectrum, taking into account the current broadcasting of high-quality content via [DTT] to the vast majority of the Italian population. …'

21 Article 1(1037) of Law No 205/2017 states:

'Disputes concerning the allocation of rights of use of frequencies, the invitation to tender and the other procedures referred to in paragraphs 1026 to 1036, with particular reference to the procedures for releasing frequencies for the [DTT] service, shall fall within the exclusive jurisdiction of the administrative court … Due to the major national interest in the prompt release and allocation of frequencies, the annulment of acts and measures adopted in the context of the procedures referred to in paragraphs 1026 to 1036 shall not entail compensation or enforcement in a specific form and any reparation due shall only be made in kind. Interim relief shall be limited to the payment of a provisional amount.'

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

22 Cairo Network and Europa Way are DTT network operators which each held the rights to use one DVB-T multiplex. Persidera is a DTT network operator which held rights of use for five DVB-T multiplexes.

23 The Italian legislature considered that the reconfiguration of the 700 MHz frequency band required a certain number of frequencies to be freed up in order to allow the deployment of fifth-generation ('5G') telephony. As a result, the legislature empowered AGCOM to adopt decisions aimed, on the one hand, at converting existing rights to use DVB-T multiplexes into rights to use transmission capacity in DVB-T2 multiplexes and, on the other hand, at allocating, by means of a fee-based procedure, rights to use the additional transmission capacity freed up as a result of the transition between DVB-T and DVB-T2 technologies.

24 To that end, AGCOM has adopted a series of decisions.

25 In particular, in Decision 39/19/CONS it defined a new national frequency allocation plan for DTT. That decision provided for a total of 12 national DVB-T2 multiplexes and configuration parameters on the basis of which the principle of replacing the 20 national DVB-T multiplexes with 10 national DVB-T2 multiplexes was established.

26 In Decision 129/19/CONS, AGCOM defined the criteria for the conversion of rights of use for DVB-T multiplexes into rights of use for transmission capacity in DVB-T2 multiplexes and for the allocation of rights of use for additional transmission capacity at national level.

27 By Decision 562/20/CONS, AGCOM defined the details of the fee-based procedure for the allocation of rights to use that additional transmission capacity. By Decision 564/20/CONS, it initiated that procedure.

28 In application of the conversion criteria defined by AGCOM, Persidera was granted rights to use transmission capacity in 2.5 DVB-T2 multiplexes, while Cairo Network and Europa Way were each granted rights to use transmission capacity in 0.5 multiplexes of that type. At the end of the fee-based procedure for allocation, Cairo Network and Persidera each acquired additional rights to use transmission capacity in 0.5 DVB-T2 multiplexes.

29 Cairo Network, Europa Way and Persidera lodged actions for annulment against a number of acts adopted as part of the procedure for reconfiguring the 700 MHz frequency band, including AGCOM Decisions 39/19/CONS and 129/19 CONS.

30 Those appeals were dismissed by judgments of the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio, Italy).

31 Cairo Network, Europa Way and Persidera appealed against those judgments to the Consiglio di Stato (Council of State, Italy), which is the referring court. In support of their appeals, those companies argued in particular that the Italian legislature had failed to respect AGCOM's independence, that the rights to use DVB-T multiplexes had been infringed and that the procedure for reconfiguring the 700 MHz frequency band had been conducted irregularly, failing to take account of the fact that certain operators had previously unlawfully acquired a favourable position on the DTT market.

32 Taking the view that it was faced with a number of difficulties in interpreting EU law, the Consiglio di Stato (Council of State) questions, in the first place, in Cases C-764/23 and C-765/23, the effectiveness of the judicial protection available to Cairo Network and Europa Way. It doubts whether the exclusion of any possibility of restoring the previous situation or of compensating in kind would make it possible to guarantee sufficient protection for holders of rights to use DVB-T technology frequencies and to safeguard the public interest.

33 In the second place, that court questions whether the Italian legislature excessively reduced AGCOM's margin of discretion, thereby undermining its independence. It points out in that regard that the decisions adopted by AGCOM in the context of the process of reconfiguring the 700 MHz frequency band were significantly influenced by the provisions of the Italian legislation. Thus, the conversion coefficient for rights of use of radio frequencies was determined by AGCOM, in particular with a view to enabling a fee-based procedure ordered by that legislature to be carried out. Furthermore, the legislature made that procedure subject to criteria and principles which it itself determined, in particular by authorising the participation in that procedure of the incumbents.

34 In the third place, the Consiglio di Stato (Council of State) takes the view that the partial nature of the conversion of the previous rights to use radio frequencies, which results from the application of the conversion coefficient set by AGCOM, has placed operators with rights to use a single DVB-T multiplex at a disadvantage, by forcing them to resort to the fee-based procedure for the allocation of rights of use or to conclude agreements between themselves in order to be able to obtain transmission capacity equivalent to those they had before the conversion of their previous rights to use radio frequencies.

35 In the fourth place, that court questions whether the Italian authorities have taken sufficient account, in the light of EU law, of the respective situations of each of the operators at issue having regard to the historical development of the Italian audiovisual sector.

36 The organisation of that sector was marked by a number of irregularities, on which the Court ruled in the judgments of 31 January 2008, *Centro Europa 7* (C-380/05, EU:C:2008:59), and of 26 July 2017, *Persidera* (C-112/16, EU:C:2017:597). In view of the various measures that have already been adopted to remedy those irregularities, AGCOM considered that the adoption of structural measures during the process of reconfiguring the 700 MHz frequency band would be inappropriate and would have effects that go beyond the market rebalancing required to remedy those irregularities. It therefore considered it sufficient to provide for asymmetrical rules designed to promote pluralism and competition in the fee-based procedure for the allocation of rights to use radio frequencies. The referring court doubts whether AGCOM's choice is compatible with EU law.

37 In the fifth and last place, in Case C-764/23, that court identified factors which it considered capable of establishing, in relation to Cairo Network, a legitimate expectation worthy of protection. It points out that that company acquired its previous rights to use radio frequencies under a fee-based procedure, the call for applications for which specified that it was aimed at the allocation of rights to use radio frequencies for DVB systems, that is to say, the DVB-T standard, as well as subsequent technological developments, that the successful bidder would obtain a frequency with the same coverage and duration when the frequencies were released for allocation to telecommunications operators, and that the frequency allocated would be for a period of 20 years.

38 In those circumstances, the Consiglio di Stato (Council of State) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling in Case C-764/23:

'(1) Must EU law, and in particular Article 6 and the second [subparagraph] of Article 19(1) TEU, interpreted in the light of Article 47 of the [Charter], the first subparagraph of Article 4(1) of [the Framework Directive], and Article 31 of [Directive 2018/1972], be interpreted as precluding national legislation, such as that laid down in Italian law (Article 1(1037) of [Law No 205/2017]), which, in a situation of EU-wide relevance, limits the effects of actions for annulment, by preventing restitution or specific performance, and confines interim relief to the payment of a provisional amount, thereby undermining effective judicial protection?

(2) Must EU law and, in particular, [Article] 3(3) and (3a) … and [Articles] 8 and 9 of [the Framework Directive], and Articles 5, 6, 8, 9 and 45 of [Directive 2018/1972], be interpreted as precluding a system of the kind introduced in the Italian Republic by Article 1(1031a) of [Law No 205/2017], which deprives the independent administrative authority of its regulatory functions, or at least significantly limits them, by providing for the award of additional transmission capacity by means of a fee-based procedure, with that award being granted to the highest offer and with the participation of the incumbents?

(3) Must EU law, and in particular Articles 8 and 9 of [the Framework Directive], Articles 3, 5, 7 and 14 of [the Authorisation Directive], Articles 2 and 4 of [the Competition Directive], recitals 11 and 20 of [Decision 2017/899] and the principles of fairness, non-discrimination, protection of competition and legitimate expectations, be interpreted as precluding a system such as that introduced by the relevant national legislation (Article 1(1030), (1031), (1031a), (1031b) and (1032) of [Law No 205/2017]), as well as Decisions … 39/19/CONS,

128/19/CONS and 564/[20]/CONS of [AGCOM] and related measures for assigning rights of use of frequencies for the digital television service, which for the purpose of converting "rights of use of frequencies" into "rights of use of transmission capacity" does not require an equivalence-based conversion, but reserves part of that capacity for a fee-based award procedure, by imposing additional costs on the operator so it ensures it retains rights that have been lawfully acquired over time?

(4) Does EU law and, in particular, Articles 8 and 9 of [the Framework Directive], Articles 3, 5, 7 and 14 of [the Authorisation Directive], Articles 2 and 4 of [the Competition Directive], recitals 11 and 20 of [Decision 2017/899], the principles of fairness, non-discrimination, protection of competition and legitimate expectations, as well as the principles of proportionality and appropriateness, preclude [a system] such as that introduced by the relevant national legislation (Article 1(1030), (1031), (1031a), (1031b) and (1032) of Law No 205/2017), as well as Decisions … 39/19/CONS, 128/19/CONS and 564/[20]/CONS of [AGCOM] and related measures assigning rights of use of frequencies for the digital television service, which does not adopt measures of a structural nature in order to remedy the situation of inequality established previously, particularly in view of the irregularities previously found to exist in national and supranational case-law, and does not distinguish the position of an operator that has acquired a frequency following a fee-based competitive procedure with the right to retain that frequency or, conversely, are the non-structural measures adopted by [AGCOM] appropriate and proportionate for the incumbents that originally owned the networks acquired in infringement of competition law?

(5) Does EU law and, in particular, Articles 8 and 9 of [the Framework Directive], Articles 3, 5, 7 and 14 of [the Authorisation Directive], Articles 2 and 4 of [the Competition Directive], recitals 11 and 20 of [Decision 2017/899], the principles of fairness, non-discrimination, protection of competition and legitimate expectations, as well as the principles of proportionality and appropriateness, preclude [a system] such as that introduced by the relevant national legislation (Article 1(1030), (1031), (1031a), (1031b) and (1032) of Law No 205/2017), as well as Decisions … 39/19/CONS, 128/19/CONS and 564/[20]/CONS of [AGCOM] and related measures assigning rights of use of frequencies for the digital television service, which does not take into account the legitimate expectations of an operator who has acquired the right of use of the frequency following a fee-based competitive procedure in which express provision was made for the right to a frequency with similar coverage and of an equivalent duration to that of the right of use?'

39 In those circumstances, the Consiglio di Stato (Council of State) decided to stay the proceedings and, in Case C-765/23, to refer to the Court for a preliminary ruling four questions similar to the first to fourth questions in Case C-764/23.

40 In the same circumstances, the Consiglio di Stato (Council of State) decided to stay the proceedings and, in Case C-766/23, to refer to the Court for a preliminary ruling two questions similar to the second and third questions in Case C-764/23 and the following third question:

'Must EU law and, in particular, Articles 8 and 9 of [the Framework Directive], Articles 3, 5, 7 and 14 of [the Authorisation Directive], Articles 2 and 4 of [the Competition Directive], recitals 11 and 20 of [Decision 2017/899], the principles of fairness, non-discrimination, protection of competition and legitimate expectations, as well as the principles of proportionality and appropriateness, be interpreted as precluding a system of the kind introduced in the Italian Republic by Article 1(1101) to (1108) of [Law No 145/2018,] Article 1(1030), (1031), (1031a),

(1031c), (1032), (1033), (1034) and (1037) of [Law No 205/2017], by Decisions … 39/19/CONS …, 128/19/CONS and 129/19/CONS of [AGCOM] and related measures for assigning rights of use of frequencies for the digital television service, which does not adopt measures of a structural nature [and –] despite the existence of compensatory and/or non-structural rebalancing measures – in order to remedy the situation of inequality established previously provides for a fee-based procedure that imposes additional costs and charges on the operator; [moreover,] does [EU] law, having regard in particular to the principles of proportionality and appropriateness, as well as the principles laid down in the judgment [of 26 July 2017, *Persidera* (C-112/16, EU:C:2017:597)], preclude a system such as the one described, particularly in view of the overall evolution of the system and the "anomalies", "weaknesses" and "irregularities" thereof, identified in the national and supranational case-law mentioned in the grounds of this order, or conversely are the non-structural measures adopted by the regulatory authority sufficient to rebalance the system?'

41 By decision of the President of the Court of 27 February 2024, Cases C-764/23 to C-766/23 were joined for the purposes of the written and oral phases of the proceedings and of the judgment.

The questions referred for a preliminary ruling

The jurisdiction of the Court

42 Radiotelevisione italiana SpA (RAI) claims that the Court does not have jurisdiction to answer the first and fourth questions in Cases C-764/23 and C-765/23 and the third question in Case C-766/23, since, by those questions, the referring court asks the Court to rule on the compatibility of the Italian legislation at issue in the main proceedings with EU law and on the legality of measures adopted by AGCOM.

43 In that regard, it should be noted that the system of cooperation established by Article 267 TFEU is based on a clear separation of functions between the national courts and the Court. In proceedings brought on the basis of that article, the interpretation of provisions of national law is a matter for the courts of the Member States, not for the Court of Justice, and the Court has no jurisdiction to rule on the compatibility of rules of national law with provisions of EU law. However, the Court does have jurisdiction to provide the national court with all the guidance as to the interpretation of EU law necessary to enable the national court to determine whether the national rules are compatible with EU law (see judgments of 21 March 1985, *Celestri & C.*, 172/84, EU:C:1985:137, paragraph 12; of 1 July 2008, *MOTOE*, C-49/07, EU:C:2008:376, paragraph 30; and of 26 July 2017, *Europa Way and Persidera*, C-560/15, EU:C:2017:593, paragraph 35).

44 In the present joined cases, by its questions, the referring court specifically invites the Court to provide such elements of interpretation, with the result that the Court has jurisdiction to answer those questions.

Admissibility

45 RAI and Mediaset SpA contest the admissibility of all or part of the requests for a preliminary ruling.

46 In the first place, RAI and Mediaset submit that the orders for reference do not contain the information necessary to enable the Court to answer all the questions referred. More specifically, first of all, RAI considers that the referring court did not provide a full description of the process of reconfiguring the 700 MHz frequency band. Next, Mediaset claims that that court has not explained why the provisions of EU law referred to in the third questions in Cases C-764/23 and C-765/23 and in the second question in Case C-766/23 are applicable in the present case or why it has doubts as to the compatibility of the Italian legislation at issue in the main proceedings with those provisions. Lastly, according to Mediaset, that court did not provide the Court with sufficient information to enable it to reply to the fifth question in Case C-764/23.

47 In the second place, RAI and Mediaset consider that it is not necessary, for the purposes of deciding the main proceedings, to answer the third and fourth questions in Cases C-764/23 and C-765/23 and the second and third questions in Case C-766/23. The measures already adopted by the Italian authorities were sufficient to remedy the consequences of the past illegalities in the Italian audiovisual sector referred to by the referring court. Moreover, the description of those illegalities in the orders for reference contains errors and approximations. In addition, those questions relate, in part, to the fee-based procedure for the allocation of rights to use transmission capacity in DVB-T2 multiplexes, even though that procedure is not the subject matter of the main proceedings.

48 It should be noted that, according to settled case-law, in the context of the cooperation between the Court and the national courts established by Article 267 TFEU, 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. Consequently, where the questions submitted concern the interpretation of EU law, the Court is in principle bound to give a ruling (see judgments of 21 April 1988, *Pardini*, 338/85, EU:C:1988:194, paragraph 8, and of 24 July 2023, *Lin*, C-107/23 PPU, EU:C:2023:606, paragraph 61).

49 It follows that questions concerning EU law enjoy a presumption of relevance. The Court may refuse to give a ruling on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of EU law that is sought is unrelated to the actual facts of the main action or to 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 (see judgments of 13 July 2000, *Idéal tourisme*, C-36/99, EU:C:2000:405, paragraph 20, and of 24 July 2023, *Lin*, C-107/23 PPU, EU:C:2023:606, paragraph 62).

50 In that context, first, it must be pointed out, as regards the arguments based on the allegedly incomplete nature of the orders for reference, that, according to the settled case-law of the Court, now reflected in Article 94(a) and (b) of its Rules of Procedure, the need to arrive at an interpretation of EU law which is useful to the national court requires that the latter define the factual and regulatory framework in which the questions it asks are placed or, at the very least, explain the factual assumptions on which those questions are based. In addition, it is essential, as Article 94(c) states, that the reference for a preliminary ruling should contain a statement of the reasons which prompted the referring court or tribunal to inquire about the interpretation or validity of certain provisions of EU law, and the relationship between those provisions and the national legislation applicable to the main proceedings (see judgment of 26 January 1993, *Telemarsicabruzzo and Others*, C-320/90 to C-322/90, EU:C:1993:26, paragraph 6; order of

28 June 2000, *Laguillaumie*, C-116/00, EU:C:2000:350, paragraph 16; and judgment of 4 October 2024, *Bezirkshauptmannschaft Landeck (Attempt to access personal data stored on a mobile telephone)*, C-548/21, EU:C:2024:830, paragraph 48).

51 In the present case, the orders for reference set out in detail the factual and regulatory context of the questions referred and the reasons which led the referring court to doubt the compatibility of the Italian legislation at issue in the main proceedings with EU law.

52 It follows that those orders satisfy the requirements laid down in Article 94 of the Rules of Procedure and therefore contain sufficient information to enable the Court to answer those questions.

53 Secondly, it must be observed that the arguments based on the lack of a need to answer some of those questions in order to decide the main proceedings are based, in part, on a description of the factual situation at issue in the main proceedings which differs from that adopted by the referring court. RAI and Mediaset thus criticise the presentation in the orders for reference of past illegalities in the Italian audiovisual sector and their consequences.

54 In the context of the clear separation of functions between the national courts and the Court referred to in paragraph 43 of the present judgment, any assessment of the facts of the case falls within the jurisdiction of the national court, which is responsible for assessing, 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, whilst the Court is empowered to give rulings on the interpretation or the validity of an EU provision only on the basis of the facts which the national court puts before it (see judgments of 16 March 1978, *Oehlschläger*, 104/77, EU:C:1978:69, paragraph 4, and of 20 April 2021, *Repubblika*, C-896/19, EU:C:2021:311, paragraph 28).

55 Consequently, the arguments put forward by RAI and Mediaset relating to their own assessment of past illegalities in the Italian audiovisual sector and their consequences cannot lead to the conclusion that some of the questions raised are inadmissible.

56 Furthermore, the fact that the main proceedings do not directly concern AGCOM's acts governing the fee-based procedure for the allocation of rights to use radio frequencies is not sufficient to demonstrate that the questions referred must be declared inadmissible in so far as they relate to that procedure.

57 It is not disputed that the purpose of those questions is to provide the referring court with information enabling it to assess the compatibility with EU law of the procedure for converting previous rights to use radio frequencies. It is apparent from the orders for reference that, in the context of the reconfiguration of the 700 MHz frequency band in Italy, that procedure is being implemented in coordination with the fee-based procedure for the allocation of rights to use radio frequencies, so that it cannot be held that the aspects of those questions which relate to the latter procedure are manifestly unrelated to the disputes in the main proceedings.

58 Consequently, all the questions referred must be answered.

The substance

59 As a preliminary point, it should be noted that, while the questions referred concern in particular the interpretation of Directive 2018/1972, it follows from Article 124(1) thereof that the Member States are to apply the rules intended to transpose that directive from 21 December 2020. Accordingly, since those questions relate to the compatibility with EU law of Italian legislation adopted before that date, they must be examined on the basis of the EU measures in force before that date.

The first questions in Cases C-764/23 and C-765/23

60 By its first questions in Cases C-764/23 and C-765/23, which are identical, the referring court asks, in essence, whether Article 4(1) of the Framework Directive, read in the light of Articles 6 and 19 TEU and Article 47 of the Charter, must be interpreted as precluding national legislation which, first, limits the effects of actions brought by economic operators against acts relating to the allocation of rights to use radio frequencies, in the context of the reconfiguration of the 700 MHz frequency band, to the award of financial compensation and, secondly, limits the scope of interim measures which may be ordered pending consideration of such an action to the payment of a provision.

61 If those questions refer to Article 6 TEU, it should be noted at the outset that this is a general provision which is irrelevant for the purposes of analysing those questions (see, by analogy, judgment of 23 November 2021, *IS (Illegality of the order for reference)*, C-564/19, EU:C:2021:949, paragraph 98).

62 The first subparagraph of Article 4(1) of the Framework Directive requires Member States to provide for effective appeal mechanisms enabling any user or undertaking providing electronic communications networks or services who is affected by a decision taken by an NRA to appeal against that decision to an independent body which has the appropriate powers to be able to exercise its functions effectively.

63 The second subparagraph of Article 4(1) of that directive provides that, pending the outcome of the proceedings, the decision of the NRA is to stand, unless interim measures are granted in accordance with national law.

64 It follows from the Court's case-law that Article 4 of that directive is an offshoot of the principle of effective judicial protection guaranteed by Article 47 of the Charter and referred to in Article 19(1) TEU, under which it is for the courts of the Member States to ensure judicial protection of the rights which individuals derive from EU law (see, to that effect, judgments of 21 February 2008, *Tele2 Telecommunication*, C-426/05, EU:C:2008:103, paragraph 30, and of 13 October 2016, *Prezes Urzędu Komunikacji Elektronicznej and Petrotel*, C-231/15, EU:C:2016:769, paragraph 20).

65 That being so, Article 4 of that directive does not lay down specific procedural rules for implementing the obligation it imposes on Member States to provide for effective review mechanisms and, in particular, does not define the powers that a national court called upon to rule on an appeal against a measure relating to the allocation of rights to use radio frequencies must have.

66 In the absence of EU rules on the matter, it is for the Member States to define those powers in the context of their procedural autonomy, provided, however, that those powers are not, in situations governed by EU law, less extensive than those which would be available to a court called upon to rule on similar situations subject to national law (principle of equivalence) and that the extent of the same powers does not render impossible in practice or excessively difficult the exercise of the rights conferred by EU law (principle of effectiveness) (see, by analogy, judgment of 13 October 2016, *Prezes Urzędu Komunikacji Elektronicznej and Petrotel*, C-231/15, EU:C:2016:769, paragraph 23 and the case-law cited).

67 With regard to the principle of equivalence, the referring court stated that the system at issue in the first questions in Cases C-764/23 and C-765/23 applies equally to actions based on national law and on EU law.

68 With regard to the principle of effectiveness, it should be noted that the Court ruled, in paragraphs 25 and 31 of its judgment of 13 October 2016, *Prezes Urzędu Komunikacji Elektronicznej and Petrotel* (C-231/15, EU:C:2016:769), that a national court hearing an appeal against a decision of the NRA must be able to annul that decision with retroactive effect if it considers that to be necessary in order to ensure effective protection of the rights of the undertaking which brought the appeal.

69 However, it cannot be inferred from this that the principle of effectiveness necessarily implies that a national court hearing such an appeal must be empowered to annul any decision of an NRA falling within the scope of the Framework Directive.

70 First of all, the question referred in the case which gave rise to the judgment of 13 October 2016, *Prezes Urzędu Komunikacji Elektronicznej and Petrotel* (C-231/15, EU:C:2016:769), sought to determine not whether Article 4(1) of the Framework Directive requires a court hearing an action against a decision of an NRA to have the power to annul that decision, but only whether that provision precludes that power from being conferred, by national legislation, on such a court.

71 Next, that question related explicitly, as the Court pointed out in its reply, to a situation in which the referring court in that case had already established that it was necessary to annul the contested decision in order to safeguard the rights of the undertaking concerned. Conversely, by its first questions in Cases C-764/23 and C-765/23, the referring court specifically invites the Court to assess the extent to which such annulment can be regarded as necessary to safeguard the rights of the applicants in a situation such as that at issue in the main proceedings.

72 Finally, in the case giving rise to the judgment of 13 October 2016, *Prezes Urzędu Komunikacji Elektronicznej and Petrotel* (C-231/15, EU:C:2016:769), the Court was asked about the arrangements for judicial review of a decision requiring the adjustment of tariffs linked to a mobile telephone network. Since such a decision produces effects of a different nature from those of a decision relating to the allocation of rights to use radio frequencies, it cannot be presumed that the powers which the court having jurisdiction must have in order to review actions brought against those two types of decision are necessarily similar.

73 In that context, in order to determine whether a system such as that at issue in the main proceedings is compatible with the principle of effectiveness, it should be borne in mind that each case in which the question arises whether a national procedural provision renders the application of EU law impossible in practice or excessively difficult must be analysed having regard to the place of that provision in the proceedings as a whole, the conduct and particular

features of those proceedings and, where appropriate, the principles underlying the national judicial system, such as the protection of the rights of the defence, the principle of legal certainty and the proper conduct of proceedings (see, to that effect, judgment of 17 May 2022, *Unicaja Banco*, C-869/19, EU:C:2022:397, paragraph 28 and the case-law cited).

74 In that regard, as the referring court points out, the award of financial compensation, accompanied, where appropriate, by the payment of a provision, is certainly not such as to ensure, in itself, that the unlawful situation resulting from the unlawful allocation of rights to use radio frequencies is actually called into question and that the operator which brought the action can obtain the grant of the rights to use radio frequencies to which it would be entitled.

75 However, it is important to note that the annulment of an act relating to the allocation of such rights of use or the permanent suspension of the effects of such an act pending a decision on an appeal is likely to have significant consequences for the use of radio frequencies which may, in practice, impede the reconfiguration of the 700 MHz frequency band required by Decision 2017/899.

76 It follows from Article 1(1) of that decision that that reconfiguration, which is intended to allow the use of the 700 MHz frequency band by wireless broadband electronic communications services, should have taken place, in principle, on 30 June 2020 and, at the latest, on 30 June 2022, a postponement of that reconfiguration to the latter date having to be communicated to the other Member States and to the Commission and be based on duly justified grounds.

77 Furthermore, it is apparent from recitals 8, 9 and 15 of that decision that a delay in the release of the 700 MHz frequency band in a Member State is not only likely to hinder the deployment of 5G in that Member State, but is also likely to cause harmful interference in other Member States, a risk which the Croatian Government has also invoked before the Court.

78 The annulment of acts relating to the allocation of rights to use radio frequencies adopted with a view to enabling the reconfiguration of the 700 MHz frequency band would logically entail the reallocation of the radio frequencies concerned to their previous holders, including after the dates mentioned in paragraph 76 of the present judgment, at the risk of nullifying that reconfiguration and thereby undermining the proper functioning of 5G in the European Union.

79 Similarly, a long-term suspension of the effects of acts relating to the allocation of rights to use radio frequencies could either prevent the development of 5G, if the radio frequencies concerned remained covered by prior rights of use, or hinder the continuity of DTT broadcasting, if those radio frequencies were released without making other radio frequencies available to DTT broadcasters to enable them to continue their activities.

80 In addition, while a remedy in kind consisting in the direct reallocation of rights to use radio frequencies that have been improperly allocated might not, in principle, hinder the deployment of 5G, it might, on the other hand, harm the continuity of DTT broadcasting, given the scale of the investment required to operate a DTT broadcasting network, it cannot be ruled out that a subsequent reallocation of rights to use radio frequencies that have already been exercised could undermine the continuity of that broadcasting.

81 In addition, the annulment of an act relating to the allocation of rights to use radio frequencies or a measure of redress in kind consisting of directly reallocating usage rights that have already been allocated could, in certain cases, infringe the rights of operators acting in good faith who have been allocated those usage rights.

82 It should also be noted that the sole purpose of an action such as those at issue in the main proceedings is to defend the interests of economic operators active in the audiovisual sector, interests which should normally be capable of being assessed in substantive terms and, therefore, of giving rise to financial compensation.

83 In those circumstances, the limitation of the powers of the court with jurisdiction to hear appeals against acts relating to the allocation of rights to use radio frequencies, in the context of the reconfiguration of the 700 MHz frequency band, to the award of financial compensation cannot be regarded as necessarily incompatible with the principle of effectiveness.

84 Nevertheless, as the Advocate General noted in point 36 of his Opinion, the award of such compensation is only capable of conferring effective judicial protection on the economic operators concerned in so far as the terms of that compensation make it possible to fully compensate the damage suffered by those economic operators as a result of the application of the act which the competent court has found to be unlawful.

85 With regard more specifically to interim measures, given that the EU legislature has not determined precisely the type of interim measures which must be capable of being granted by the competent court, it must be held that, where the power which that court may exercise following the examination of the action before it has been validly limited to the award of financial compensation, the payment of a provision is sufficient to ensure provisional protection making it possible to anticipate, if necessary, the final outcome of that action.

86 Consequently, the answer to the first questions in Cases C-764/23 and C-765/23 is that Article 4(1) of the Framework Directive, read in the light of Article 19 TEU and Article 47 of the Charter, must be interpreted as not precluding national legislation which, first, limits the effects of actions brought by economic operators against acts relating to the allocation of rights to use radio frequencies, in the context of the reconfiguration of the 700 MHz frequency band, to the award of financial compensation and, secondly, limits the scope of interim measures which may be ordered pending consideration of such an action to the payment of a provision, provided that the terms of that financial compensation make it possible to offset in full the damage suffered by those economic operators as a result of the application of those acts.

The second questions in Cases C-764/23 and C-765/23 and the first question in Case C-766/23

87 By its second questions in Cases C-764/23 and C-765/23 and its first question in Case C-766/23, which are similar, the referring court asks, in essence, whether Articles 3, 8 and 9 of the Framework Directive must be interpreted as precluding a national legislature from providing that the allocation of rights to use additional transmission capacity, released in the context of the transition between two broadcasting technologies, be effected by means of a fee-based procedure of which that legislature itself defines certain characteristics relating to the conditions for the allocation of those rights and to the operators able to participate in that procedure.

88 In the first place, pursuant to Article 3(1) of the Framework Directive, Member States must ensure that each of the tasks assigned to the NRAs in that directive and in the Specific Directives is carried out by a competent body. Moreover, pursuant to Article 3(2) and (3) of that directive, read in the light of recital 11 thereto, the Member States must guarantee the independence of the NRAs so that they may exercise their powers impartially, transparently and in a timely manner (judgment of 26 July 2017, *Europa Way and Persidera*, C-560/15, EU:C:2017:593, paragraph 50 and the case-law cited).

89 While Article 3 of the Framework Directive, in its initial version, was essentially intended, in accordance with recital 11, to guarantee the independence and impartiality of the NRAs by ensuring the separation of regulatory and operational functions, the EU legislature has, with Directive 2009/140 and as stated in recital 13 thereof, to strengthen the independence of NRAs in order to ensure a more effective application of the regulatory framework and to increase their authority and the predictability of their decisions (judgment of 26 July 2017, *Europa Way and Persidera*, C-560/15, EU:C:2017:593, paragraph 51 and the case-law cited).

90 That objective of strengthening the independence and impartiality of NRAs is expressed in Article 3(3a) of the Framework Directive. Pursuant to the first subparagraph of that provision, without prejudice to the cases of consultation and cooperation with other national authorities provided for in that article, NRAs responsible for *ex ante* market regulation or the resolution of disputes between undertakings must act independently and neither seek nor take instructions from any other body with regard to the performance of the tasks assigned to them (see, to that effect, judgment of 26 July 2017, *Europa Way and Persidera*, C-560/15, EU:C:2017:593, paragraph 53).

91 In the second place, it is important to note that the Framework Directive confers on the NRAs specific regulatory tasks, which are established in Articles 8 to 13 of that directive. In accordance with the first subparagraph of Article 9(1) of that directive, the allocation of the spectrum used for electronic communications services and the grant of general authorisations or individual rights of use of radio frequencies are among the specific regulatory tasks incumbent on those authorities (see, to that effect, judgment of 26 July 2017, *Europa Way and Persidera*, C-560/15, EU:C:2017:593, paragraph 54).

92 Consequently, the organisation of procedures for the allocation of rights to use radio frequencies, such as the fee-based procedures for the conversion of previous rights to use radio frequencies and for allocation at issue in the main proceedings, constitutes the exercise of a regulatory task within the meaning of the Framework Directive, which is the responsibility of an NRA.

93 It follows that intervention by a national legislature in the organisation of such procedures is limited by the obligation to respect the independence of the NRA. Thus, the Court has held that the independence of such an authority would be compromised if external entities, such as a national legislature, were permitted to suspend or even annul, outside the supervisory and appeal hypotheses provided for by the Framework Directive, a selection procedure for the allocation of radio frequencies in progress organised under the responsibility of that authority (see, to that effect, judgment of 26 July 2017, *Europa Way and Persidera*, C-560/15, EU:C:2017:593, paragraph 56).

94 That being so, the questions raised in the present joined cases concern the compatibility with EU law of an intervention by a national legislature which does not seek to call into question a procedure for the allocation of rights to use radio frequencies conducted by an NRA after it has been launched, but rather to define, in advance, certain requirements with which the NRA must comply when organising and implementing such a procedure.

95 While the principle of the independence of the NRA in no way prevents it from remaining subject to the law, the fact remains that a national legislature cannot, without disregarding the independence of the NRA, remove from it the powers conferred on it by the Framework Directive and the Specific Directives or exercise those powers in place of the NRA (see, by analogy, judgment of 2 September 2021, *Commission* v *Germany (Transposition of Directives 2009/72 and 2009/73)*, C-718/18, EU:C:2021:662, paragraphs 126 and 130).

96 In that regard, it should be noted that Article 8(1) of the Framework Directive provides that NRAs must, in carrying out their specific regulatory tasks, take all reasonable measures to achieve the objectives set out in that article, which are to promote competition in the provision of electronic communications networks and services, to contribute to the development of the internal market and to support the interests of EU citizens (see, to that effect, judgment of 19 June 2014, *TDC*, C-556/12, EU:C:2014:2009, paragraph 39).

97 In that context, it is for the NRAs, and not for national legislatures, to weigh up the objectives set out in Article 8 of the Framework Directive (see, to that effect, judgment of 3 December 2009, *Commission* v *Germany*, C-424/07, EU:C:2009:749, paragraph 91).

98 However, while Article 9(1) of the Framework Directive does provide that it is for NRAs to allocate rights of use for radio frequencies, that provision also specifies that it is not specifically the responsibility of NRAs, but of 'Member States' more generally, to ensure that such allocation is based on objective, transparent, non-discriminatory and proportionate criteria.

99 The Court has also recognised, on the basis of that provision in particular, that Member States have a margin of discretion to decide to replace a procedure for the free allocation of rights to use radio frequencies with a fee-based procedure for the allocation of such rights, in a context where that decision had been taken by the national legislature (see, to that effect, judgment of 26 July 2017, *Europa Way and Persidera*, C-560/15, EU:C:2017:593, paragraphs 65 and 71).

100 Therefore, in view of the roles thus conferred on NRAs and the political bodies of Member States respectively, it must be considered that the principles governing the organisation of procedures for the allocation of rights of use for radio frequencies, which must ensure compliance with the requirements set out in Article 9(1) of the Framework Directive, may be defined by a national legislature.

101 At the same time, given that the intervention of that legislature in the organisation of those procedures cannot go so far as to deprive the NRA of its specific task of regulation in that area, that legislature cannot adopt rules that would result in the NRA no longer having substantial discretion in defining the technical details of the procedure for granting those rights and would therefore be limited to implementing a procedure defined by that legislature.

102 While it is for the referring court to examine whether that requirement is satisfied in the main proceedings, the Court may, however, in the context of the judicial cooperation established by Article 267 TFEU, on the basis of the information in the file, provide that court with information

on the interpretation of EU law that may be useful to it in assessing the effects of a particular provision of EU law (see, to that effect, judgment of 19 December 2024, *Vivacom Bulgaria*, C-369/23, EU:C:2024:1043, paragraph 41).

103 In that regard, it should first be noted that, as is apparent from the case-law cited in paragraph 99 of the present judgment, a national legislature is, in principle, free to opt, if it considers it appropriate, for a fee-based procedure for the allocation of rights to use radio frequencies.

104 In view of the margin of discretion available to a national legislature, it cannot be considered, in a situation such as that at issue in the main proceedings, where a technological transition involves the allocation of new multiplexes with a transmission capacity significantly greater than that of the multiplexes previously allocated, that the choice of whether to allocate the rights to use the additional transmission capacity resulting from that transition free of charge or for a fee should necessarily fall within the sphere of competence of the NRA.

105 Next, as regards the details of the fee-based procedure for the allocation of those rights of use, it is apparent from the orders for reference that the Italian legislature has laid down a series of principles governing that procedure. Those principles essentially concern the definition of the size of the lots allocated under that procedure, the obligation to determine a minimum value for bids and the setting of a series of objectives to be taken into account when selecting bids.

106 In view of the general nature of those principles, it appears, at first sight, that the establishment of such principles by a national legislature does not have the effect of depriving the NRA of a substantial margin of discretion in determining the precise details of the fee-based procedure for the allocation of rights to use radio frequencies, in particular as regards the minimum value of bids, the specific criteria on the basis of which bids should ultimately be assessed and the weighting of those criteria, or the possibility of laying down asymmetrical rules for access to that procedure.

107 While it is true that principles such as those at issue in the main proceedings seem to imply, as the referring court points out, that operators historically dominant in the audiovisual sector of the Member State concerned may participate in the procedure for the allocation of rights to use radio frequencies, that circumstance is not sufficient to demonstrate that the NRA has no substantial margin of discretion in the organisation of that procedure, as is confirmed by the fact that AGCOM ultimately decided that only some of the lots could be allocated to those operators and that it established rules designed to favour other operators.

108 Finally, if it is apparent from the orders for reference that the national legislature's decision to organise a fee-based procedure for the allocation of rights to use radio frequencies was taken into account, alongside other factors, when the NRA defined the terms for converting previous rights to use radio frequencies, such consideration is simply a consequence of that legislature's power to opt for a fee-based procedure for the allocation of rights to use radio frequencies in a context in which the available transmission capacity has objectively increased. Therefore, such a circumstance cannot be regarded as establishing that the national legislature has infringed upon the NRA's powers.

109 In the light of the foregoing, the answer to the second questions in Cases C-764/23 and C-765/23 and to the first question in Case C-766/23 is that Articles 3, 8 and 9 of the Framework Directive must be interpreted as meaning that they do not preclude a national legislature from providing that the allocation of rights to use additional transmission capacity, released in the context of the

transition between two broadcasting technologies, is to be carried out by means of a fee-based procedure, certain characteristics of which relating to the conditions for the allocation of those rights and to the operators eligible to participate in that procedure are defined by that legislature itself, provided that the legislature confines itself to defining principles which do not have the effect of depriving the NRA of a substantial margin of discretion in defining the technical details of the procedure for allocating those rights and which require it to confine itself to implementing a procedure defined by that legislature.

The third and fifth questions in Case C-764/23, the third question in Case C-765/23 and the second question in Case C-766/23

110 By its third and fifth questions in Case C-764/23, its third question in Case C-765/23 and its second question in Case C-766/23, which should be examined together, the referring court asks, in essence, whether Articles 8 and 9 of the Framework Directive, Articles 3, 5, 7 and 14 of the Authorisation Directive, Articles 2 and 4 of the Competition Directive and the principle of the protection of legitimate expectations must be interpreted as precluding national legislation on the allocation of rights to use radio frequencies which, during a technological transition accompanying the reconfiguration of the 700 MHz frequency band, does not provide for an equivalence-based conversion of previous rights to use radio frequencies and thus requires an operator wishing to retain its transmission capacity to participate in a fee-based procedure or to enter into an agreement with another operator.

111 As a preliminary point, it should be noted that Article 3 of the Authorisation Directive, which lays down rules on general authorisations applicable to electronic communications networks and services, and Article 2 of the Competition Directive, which lays down rules on exclusive and special rights for such networks and services, do not contain any useful guidance for answering those questions.

112 That being said, it should be noted that neither the Framework Directive, nor the Authorisation Directive, nor the Competition Directive contains any provision explicitly laying down a general obligation to convert existing rights to use radio frequencies into equivalent rights when those rights have to be reallocated in the context of a technological transition.

113 Admittedly, Article 14(1) of the Authorisation Directive provides that rights to use radio frequencies may be modified only in objectively justified cases and to a reasonable extent. Furthermore, Article 14(2) of that directive provides that those rights of use may be restricted or withdrawn before the expiry of the period for which they were granted only in justified cases.

114 However, a situation such as that at issue in the main proceedings, in which a Member State is required to reconfigure the 700 MHz frequency band and wishes, at the same time, to make a technological transition from DVB-T to DVB-T2 broadcasting standards, involves both a reduction in the number of multiplexes that can be allocated to economic operators for the purpose of DTT broadcasting and a significant change in the transmission capacity in each multiplex made available to those operators.

115 Consequently, such a situation must be regarded as constituting a case in which the modification, restriction or withdrawal of existing rights to use radio frequencies may be justified under Article 14 of the Authorisation Directive.

116 That article cannot therefore be interpreted as requiring Member States, in such a situation, to guarantee the preservation of all existing rights to use DVB-T multiplexes by converting them into rights to use DVB-T2 multiplexes.

117 Furthermore, while Decision 2017/899 establishes rules governing the reconfiguration of the 700 MHz frequency band, which necessarily involves a partial reallocation of rights to use radio frequencies, it must be noted that this decision does not at all provide that such reallocation should necessarily involve an equivalence-based conversion of existing rights to use radio frequencies, including when such reallocation is combined with a technological transition, as envisaged in recital 20 of that decision.

118 However, it cannot be inferred from the foregoing that Member States have, in a situation such as that at issue in the main proceedings, entirely discretionary power to allocate rights to use DVB-T2 multiplexes.

119 It follows from Article 4(2) of the Competition Directive, the second subparagraph of Article 5(2) and Article 7(3) of the Authorisation Directive, and Article 9(1) of the Framework Directive that rights to use radio frequencies must be allocated on the basis of objective, transparent, non-discriminatory and proportionate criteria. Those criteria must be complied with not only at the time of the initial allocation of radio frequencies, but also at the time of any subsequent allocation, renewal or conversion of radio frequencies in the context of a technological transition (see, to that effect, judgment of 26 July 2017, *Persidera*, C-112/16, EU:C:2017:597, paragraphs 39 and 40).

120 While a free allocation of new rights to use radio frequencies to operators who held previous rights to use radio frequencies, as envisaged by the referring court, may be compatible with that requirement (see, to that effect, judgment of 26 July 2017, *Europa Way and Persidera*, C-560/15, EU:C:2017:593, paragraph 70), it does not follow from the Court's case-law that such a conversion of those rights of use necessarily follows from that requirement.

121 On the contrary, the Court has emphasised that the free allocation of rights to use radio frequencies is not one of the principles laid down by EU law on the basis of which selection procedures must be organised (see, to that effect, judgment of 26 July 2017, *Europa Way and Persidera*, C-560/15, EU:C:2017:593, paragraph 64).

122 Therefore, while the provisions referred to in paragraph 119 of the present judgment do not, in principle, preclude Member States from implementing the reconfiguration of the 700 MHz frequency band by combining a procedure for the partial conversion of previous rights to use radio frequencies with a fee-based procedure for the allocation of rights to use radio frequencies, they do, however, require that those procedures be conducted on the basis of objective, transparent, non-discriminatory and proportionate criteria and that they comply with the objectives set out in paragraph 96 of the present judgment (see, by analogy, judgment of 26 July 2017, *Europa Way and Persidera*, C-560/15, EU:C:2017:593, paragraph 66).

123 The referring court expresses doubts, in the first place, as to the decision to convert all the previous rights to use radio frequencies by using a single coefficient, pursuant to which a right to use a DVB-T multiplex is converted into a right to use transmission capacity in 0.5 DVB-T2 multiplexes, without providing for a more favourable system for economic operators which held rights of use for only one DVB-T multiplex ('small operators').

124 With regard to those doubts, which essentially concern the requirement, referred to in paragraph 119 of the present judgment, that a conversion procedure must be based on non-discriminatory criteria, it should be noted that the general principle of equal treatment requires not only that comparable situations should not be treated differently, but also that different situations should not be treated equally unless such treatment is objectively justified. The comparability of situations must, in particular, be determined and assessed in the light of the object and purpose of the measure establishing the distinction in question. In addition, the principles and objectives of the field to which that act relates must be taken into consideration (see, to that effect, judgment of 26 July 2017, *Europa Way and Persidera*, C-560/15, EU:C:2017:593, paragraph 69).

125 In that regard, it follows from the Court's case-law that the application of different conversion coefficients to operators in a comparable situation constitutes a difference in treatment between those operators (see, to that effect, judgment of 26 July 2017, *Persidera*, C-112/16, EU:C:2017:597, paragraph 49).

126 Furthermore, the Court has held that operators who have operated analogue channels are, in principle, in a comparable situation for the purposes of converting those channels to digital networks (see, to that effect, judgment of 26 July 2017, *Persidera*, C-112/16, EU:C:2017:597, paragraph 47).

127 However, it cannot be ruled out that operators who have rights to use several DVB-T multiplexes may, in view of their transmission capacity and their position in the audiovisual sector, be regarded as being in a different situation from that of small operators for the purposes of converting those rights of use.

128 In order to assess whether such an assessment is justified in the light of the objectives of a procedure for converting existing rights to use radio frequencies, it should be noted that that procedure must comply with all the objectives set out in Article 8 of the Framework Directive, which were recalled in paragraph 96 of the present judgment, and the need for effective management of radio frequencies, as required by Article 9(1) of that directive (see, to that effect, judgment of 26 July 2017, *Persidera*, C-112/16, EU:C:2017:597, paragraph 51).

129 In the present case, the difference, as envisaged by the referring court, between the situation of operators who have rights to use several DVB-T multiplexes and that of small operators is that the application of a single conversion coefficient could hinder the latter's ability to continue their activities, so that treating those situations differently would be consistent with the objective of promoting competition in the provision of electronic communications networks and services.

130 Since that objective is one of the objectives referred to in Article 8 of the Framework Directive and must therefore be taken into account when defining the criteria for allocating rights to use radio frequencies, it is for the referring court to determine whether the application of a conversion coefficient more favourable to small operators would indeed have been necessary, in view of their specific situation, in order to promote competition in the Italian audiovisual sector following the reconfiguration of the 700 MHz frequency band, without disregarding the principle of proportionality by producing effects that go beyond what is necessary to promote such competition.

131 While it is for the referring court to make such an assessment, the Court may, as is apparent from paragraph 102 of the present judgment, in the context of the judicial cooperation established by Article 267 TFEU, on the basis of the information in the file, provide that court with information on the interpretation of EU law which may be useful to it in assessing the effects of a particular provision thereof.

132 In that regard, first, it is apparent from the orders for reference that the application of a coefficient that is more favourable to small operators would ensure that they could continue to operate independently after the reconfiguration of the 700 MHz frequency band, given that it would not be technically possible to broadcast independently without having access to a complete DVB-T2 multiplex and that the application of a single conversion coefficient to all operators means that a small operator would not have rights to use a complete DVB-T2 multiplex.

133 However, secondly, since it follows from paragraphs 112 to 117 of the present judgment that EU law does not impose an obligation of equivalence-based conversion of previous rights to use radio frequencies in a situation such as that at issue in the main proceedings, the referring court must, in order to assess the consequences of the technical impossibility of dividing the radio frequencies at issue, take into consideration not only the effects of the only procedure for converting previous rights to use radio frequencies, but also those of all the procedures put in place by the Italian authorities to ensure the reconfiguration of the 700 MHz frequency band and the technological transition between the DVB-T and DVB-T2 broadcasting standards.

134 It follows from the orders for reference and the observations submitted to the Court that those authorities have put in place various mechanisms designed to enable small operators to have preferential access to the resources necessary to supplement the right to use transmission capacity in 0.5 DVB-T2 multiplexes obtained, free of charge, as part of the procedure for converting previous rights to use radio frequencies. The authorities concerned have thus, first of all, defined the details of the fee-based procedure for the allocation of rights of use, then authorised the operators concerned to conclude agreements with a view to combining their respective rights to use transmission capacity in a DVB-T2 multiplex, and finally launched a new procedure to enable two small operators to access rights to use transmission capacity in a DVB-T2 multiplex that had not initially been allocated.

135 On the basis of the requests for a preliminary ruling and the observations submitted to the Court, it appears, subject to verification by the referring court, that the various mechanisms put in place by the Italian authorities to preserve the activities of small operators have functioned effectively, each of them having been used, according to the information submitted to the Court, by some of the small operators active in the Italian audiovisual sector in order to continue their activities after the reconfiguration of the 700 MHz frequency band.

136 Thirdly, as regards compliance with the principle of proportionality, it should be noted, on the one hand, that the referring court appears to envisage applying a specific conversion coefficient to small operators, which would enable each small operator, after conversion of the previous rights to use radio frequencies, to have the right to use a multiplex. In view of the characteristics of DVB-T2 multiplexes indicated by the referring court, the application of such a conversion coefficient would have led to a significant increase in the transmission capacity of those small operators.

137 Such an increase cannot be regarded as normally resulting from a procedure for converting rights to use radio frequencies. The Court has, moreover, already held that a measure which would result in operators already present on the market being allocated a number of radio frequencies greater than that which would be sufficient to ensure the continuity of their service could be disproportionate and hinder access to the market for new operators (see, to that effect, judgments of 26 July 2017, *Europa Way and Persidera*, C-560/15, EU:C:2017:593, paragraph 76, and of 26 July 2017, *Persidera*, C-112/16, EU:C:2017:597, paragraph 53).

138 On the other hand, it appears from the information contained in the orders for reference on the number of DVB-T2 multiplexes available and the number of operators holding rights to use DVB-T multiplexes that granting a DVB-T2 multiplex to each of the small operators would also have entailed a significant reduction in the transmission capacity of the other operators.

139 Such a difference in treatment between the various types of operators present on the same market could, in view of its consequences, constitute a proportionate measure only if it appeared to be indispensable for preserving competition in the audiovisual sector in question.

140 In the second place, the referring court questions whether the absence of equivalence-based conversion of prior rights to use radio frequencies is compatible with the principle of the protection of legitimate expectations.

141 According to settled case-law of the Court, the principle of the protection of legitimate expectations is one of the fundamental principles of the European Union and must be observed not only by the EU institutions, but also by Member States in the exercise of the powers conferred on them under EU directives (judgment of 26 July 2017, *Europa Way and Persidera*, C-560/15, EU:C:2017:593, paragraph 79 and the case-law cited).

142 The right to rely on that principle extends to any person in a situation in which an administrative authority has caused that person to entertain expectations which are justified by precise assurances provided to him or her. In whatever form it is given, information which is precise, unconditional and consistent and comes from authorised and reliable sources constitutes assurances capable of giving rise to such expectations (judgment of 26 July 2017, *Europa Way and Persidera*, C-560/15, EU:C:2017:593, paragraph 80 and the case-law cited).

143 However, an economic operator may not place reliance on there being no legislative amendment whatever, but can call into question only the arrangements for such an amendment (judgment of 20 December 2017, *Global Starnet*, C-322/16, EU:C:2017:985, paragraph 47 and the case-law cited).

144 Consequently, the mere fact that an operator holds rights to use radio frequencies cannot give rise to a legitimate expectation that those rights will remain intact and that, in the event of technological transition, they will necessarily be converted to enable it to use new radio frequencies offering equivalent or superior transmission capacity. It is clear from paragraphs 114 to 116 of the present judgment that a technological transition such as that at issue in the present joined cases constitutes, on the contrary, a situation which may justify, under Article 14 of the Authorisation Directive, the modification, restriction or withdrawal of existing rights to use radio frequencies.

145 By contrast, an operator is entitled to invoke the principle of the protection of legitimate expectations if an administrative authority has provided it with specific, unconditional and consistent assurances that any technological transition would not call into question the rights of use of radio frequencies allocated to it or that, in such a case, it would be entitled to a conversion of those rights of use in order to ensure that it had transmission capacity at least equivalent to that which it had under those rights of use.

146 In the present case, the referring court notes that Cairo Network acquired its rights to use radio frequencies in a fee-based procedure, the call for applications for which specified that it was for the allocation of rights to use frequencies for DVB systems, that is to say, the DVB-T standard, but also its subsequent technological developments, that the successful bidder would obtain a frequency with the same coverage and duration at the time of the release of the frequencies for their allocation to telecommunications operators, and that the frequency would be allocated for a period of 20 years.

147 Such indications must be regarded, as the Advocate General noted in point 68 of his Opinion, as sufficient to enable the operator who received them to rely on the principle of the protection of legitimate expectations with regard to the maintenance or equivalence-based conversion of the rights it acquired during the reconfiguration of the 700 MHz frequency band, as during the technological transition from DVB-T to DVB-T2 standards.

148 In the light of the foregoing, the answer to the third and fifth questions in Case C-764/23, the third question in Case C-765/23 and the second question in Case C-766/23 is that Articles 8 and 9 of the Framework Directive, Articles 5, 7 and 14 of the Authorisation Directive, Article 4 of the Competition Directive and the principle of the protection of legitimate expectations must be interpreted as not precluding national legislation on the allocation of rights to use radio frequencies which, during a technological transition accompanying the reconfiguration of the 700 MHz frequency band, does not provide for the equivalence-based conversion of previous rights to use radio frequencies and thus requires an operator wishing to retain its transmission capacity to participate in a fee-based procedure or to enter into an agreement with another operator, provided that such conversion is not necessary to preserve competition in the relevant market and that the operators concerned have not received precise, unconditional and consistent guarantees from the administrative authorities regarding the maintenance of their transmission capacity in the event of a reconfiguration of rights to use radio frequencies.

The fourth questions in Cases C-764/23 and C-765/23 and the third question in Case C-766/23

149 By its fourth questions in Cases C-764/23 and C-765/23 and its third question in Case C-766/23, which should be examined together, the referring court asks, in essence, whether Articles 8 and 9 of the Framework Directive, Articles 3, 5, 7 and 14 of the Authorisation Directive and Articles 2 and 4 of the Competition Directive must be interpreted as precluding a system for reconfiguring rights to use radio frequencies that does not include structural measures designed to compensate for illegalities relating to previous procedures for allocating such rights or to past conditions for the use of radio frequencies.

150 As a preliminary point, it should be noted that Article 3 of the Authorisation Directive, which lays down rules on general authorisations applicable to electronic communications networks and services, and Article 2 of the Competition Directive, which lays down rules on exclusive and special rights for those networks and services, do not contain any useful guidance for answering those questions.

151 Article 8 of the Framework Directive places on the Member States the obligation to ensure that the NRAs take all reasonable measures aimed at promoting competition in the provision of electronic communications services, ensuring that there is no distortion or restriction of competition in the electronic communications sector and removing remaining obstacles to the provision of those services at EU level (judgment of 26 July 2017, *Persidera*, C-112/16, EU:C:2017:597, paragraph 37 and the case-law cited).

152 As noted in paragraphs 96 and 119 of the present judgment, NRAs must, in performing their task of allocating rights of use for radio frequencies, take all reasonable measures to achieve the objectives set out in Article 8 of the Framework Directive and carry out such allocation on the basis of objective, transparent, non-discriminatory and proportionate criteria.

153 Furthermore, it follows from Article 5(6) of the Authorisation Directive that NRAs must ensure that competition is not distorted, in particular by the accumulation of rights to use radio frequencies.

154 The Court has inferred from those provisions that the new regulatory framework common to electronic communications services, electronic communications networks and associated facilities and services is, in particular, based on an objective of effective and undistorted competition and aims to develop that competition while respecting, in particular, the principles of equal treatment and proportionality (judgment of 26 July 2017, *Persidera*, C-112/16, EU:C:2017:597, paragraph 42).

155 More specifically, the Court ruled that Article 9(1) of the Framework Directive, Article 5(1) of the Authorisation Directive and Article 4(1) of the Competition Directive preclude national measures which have the effect of freezing the structures of the national market and protecting the position of national operators already active on that market, by preventing or restricting the access of new operators to that market, unless those measures are justified by objectives of general interest and structured on the basis of objective, transparent, non-discriminatory and proportionate criteria (judgment of 26 July 2017, *Persidera*, C-112/16, EU:C:2017:597, paragraph 43 and the case-law cited).

156 The Court further considered that it would also be contrary to EU law to maintain or even strengthen, for the benefit of an operator already present on the market, an unfair competitive advantage obtained in breach of legal requirements and contrary to the objective of effective and undistorted competition, whilst preventing or restricting access of new operators to the market (judgment of 26 July 2017, *Persidera*, C-112/16, EU:C:2017:597, paragraph 44).

157 As noted by the referring court, the Court concluded from those considerations that illegally operated analogue channels should not be taken into account in a procedure for converting rights to use radio frequencies carried out in the context of the digital transition, since the conversion of the usage rights in question would lead to the prolongation or even strengthening of an unfair competitive advantage (see, to that effect, judgment of 26 July 2017, *Persidera*, C-112/16, EU:C:2017:597, paragraph 45).

158 While that solution is logically transposable in the context of a procedure for converting rights to use radio frequencies, it should be noted that the situation at issue in the main proceedings is clearly distinct from that at issue in the case that gave rise to the judgment of 26 July 2017, *Persidera* (C-112/16, EU:C:2017:597).

159 It is apparent from the orders for reference that all the DVB-T multiplexes whose rights of use were the subject of the conversion procedure at issue in the main proceedings were, prior to the reconfiguration of the 700 MHz frequency band, operated in accordance with the applicable Italian rules.

160 However, it cannot be entirely ruled out that, even in such a situation, the NRA may be required, in order to achieve the objective of effective and undistorted competition referred to in paragraph 154 of the present judgment, to adopt measures that appear necessary to remedy significant distortions of competition resulting from illegalities relating to previous procedures for the allocation of rights to use radio frequencies or to past conditions for the use of radio frequencies.

161 That would be the case if it were established that such distortions of competition were likely to persist in the sector concerned after the reconfiguration of the 700 MHz frequency band.

162 Nevertheless, it cannot be considered that EU law requires NRAs, in order to remedy such distortions of competition, to give preference to structural measures involving changes to the allocation of rights to use radio frequencies. On the contrary, compliance with the principle of proportionality allows NRAs to adopt such measures only where more limited measures would not be likely to enable them to achieve the objectives referred to in paragraph 96 of the present judgment.

163 It is therefore for the referring court to determine whether there are grounds for challenging AGCOM's assessment that the measures already adopted by the Italian authorities are sufficient to remedy the significant distortions of competition that could result from the illegalities relating to previous procedures for the allocation of rights to use radio frequencies or to past conditions for the use of radio frequencies, committed in the Italian audiovisual sector.

164 While it is for the referring court to carry out that assessment, the Court may, as is apparent from paragraphs 102 and 131 of the present judgment, in the context of the judicial cooperation established by Article 267 TFEU, on the basis of the information in the file, provide that court with information on the interpretation of EU law which may be useful to it in assessing the effects of a particular provision thereof.

165 In the present case, the referring court refers to several illegalities that may have had an impact on the Italian audiovisual sector. First, at the time when television was broadcast in analogue format, RAI and Mediaset each allegedly operated a channel in an irregular manner. Next, at the same time, Centro Europa 7 Srl, to which Europa Way is affiliated, was allegedly granted a television broadcasting licence without being allocated a frequency enabling it to carry out its activities. Finally, during the digital transition, the Italian legislature allegedly unlawfully cancelled a procedure for the allocation of rights to use radio frequencies, and the Italian authorities allegedly used a method of converting previous rights to use radio frequencies that was unfavourable to Persidera.

166 However, that court does not explain how those past illegalities continue to have a significant effect on competition between operators in the Italian audiovisual sector. Nor do such effects appear from the file before the Court. On the contrary, it is apparent from that file that, even before the reconfiguration of the 700 MHz frequency band, Europa Way held rights to use a DVB-T multiplex enabling it to carry on its business and that Persidera held rights to use the maximum number of DVB-T multiplexes that an operator could operate under Italian law.

167 Furthermore, the orders for reference indicate that the Italian authorities have adopted numerous measures designed to remedy the effects of the illegalities referred to in paragraph 165 of the present judgment, in particular by imposing specific obligations on RAI and Mediaset and by organising procedures for the allocation of rights to use radio frequencies that include measures favouring operators who were adversely affected by those illegalities or who did not have a strong presence in the Italian audiovisual sector. Measures of that kind also appear to have been envisaged during the reconfiguration of the 700 MHz frequency band, since the fee-based procedure for the allocation of rights to use radio frequencies established on that occasion included certain rules designed to favour small operators and Persidera.

168 In those circumstances, it is not apparent from the information available to the Court that the characteristics of a situation such as that at issue in the main proceedings would justify the adoption of structural measures involving changes to the allocation of rights to use radio frequencies in order to remedy the consequences of past illegalities. It is therefore for the referring court to ascertain whether it is apparent from evidence which it has not mentioned in the orders for reference that the adoption of structural measures would be necessary for that purpose.

169 Therefore, the answer to the fourth questions in Cases C-764/23 and C-765/23 and to the third question in Case C-766/23 is that Articles 8 and 9 of the Framework Directive, Articles 5, 7 and 14 of the Authorisation Directive and Article 4 of the Competition Directive must be interpreted as not precluding a system for reconfiguring rights to use radio frequencies that does not include structural measures designed to compensate for illegalities relating to previous procedures for the allocation of such rights or to past conditions for the use of radio frequencies, provided that other measures adopted by the competent authorities are sufficient to remedy the significant distortions of competition that could result from those illegalities.

Costs

170 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 (Third Chamber) hereby rules:

1. **Article 4(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), as amended by Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009, read in the light of Article 19 TEU and Article 47 of the Charter of Fundamental Rights of the European Union,**

   must be interpreted as not precluding national legislation which, first, limits the effects of appeals brought by economic operators against acts relating to the allocation of rights to use radio frequencies, in the context of the reconfiguration of the 694-790 MHz frequency band, to the award of financial compensation and, secondly, limits the scope of interim measures that may be ordered pending the examination of such an action to the payment of a provision, provided that the terms of that financial compensation make

it possible to fully compensate the damage suffered by those economic operators as a result of the application of those acts.

2. **Articles 3, 8 and 9 of Directive 2002/21, as amended by Directive 2009/140,**

   must be interpreted as not precluding a national legislature from providing that the allocation of rights to use additional transmission capacity, released in the context of the transition between two broadcasting technologies, is to be carried out by means of a fee-based procedure, the characteristics of which, as regards the conditions for the allocation of those rights and the operators eligible to participate in that procedure, are defined by that legislature itself, provided that the legislature confines itself to defining principles which do not have the effect of depriving the national regulatory authority [1] of a substantial margin of discretion in defining the technical details of the procedure for allocating those rights and which require it merely to implement a procedure defined by that legislature.

3. **Articles 8 and 9 of Directive 2002/21, as amended by Directive 2009/140, Articles 5, 7 and 14 of Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive), as amended by Directive 2009/140, Article 4 of Commission Directive 2002/77/EC of 16 September 2002 on competition in the markets for electronic communications networks and services, and the principle of the protection of legitimate expectations**

   must be interpreted as not precluding national legislation on the allocation of rights to use radio frequencies which, during a technological transition accompanying the reconfiguration of the 694-790 MHz frequency band, does not provide for an equivalence-based conversion of previous rights to use radio frequencies and thus requires an operator wishing to retain its transmission capacity to participate in a fee-based procedure or to enter into an agreement with another operator, provided that such conversion is not necessary to preserve competition in the relevant market and that the operators concerned have not received specific, unconditional and consistent guarantees from the administrative authorities that their transmission capacity will be maintained in the event of a reconfiguration of rights to use radio frequencies.

4. **Articles 8 and 9 of Directive 2002/21, as amended by Directive 2009/140, Articles 5, 7 and 14 of Directive 2002/20, as amended by Directive 2009/140, and Article 4 of Directive 2002/77**

   must be interpreted as not precluding a system for reconfiguring rights to use radio frequencies that does not include structural measures designed to compensate for illegalities relating to previous procedures for allocating such rights or to past conditions for operating radio frequencies, provided that other measures adopted by the competent authorities are sufficient to remedy the significant distortions of competition that could result from those illegalities.

[1] See first reading.

[Signatures]