

Judgment of the Court (Fourth Chamber) of 26 July 2017 (request for a preliminary ruling from the Consiglio di Stato — Italy) — Persidera SpA v Autorità per le Garanzie nelle Comunicazioni, Ministero dello Sviluppo Economico delle Infrastrutture e dei Trasporti

(Case C-112/16) ⁽¹⁾

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

(2017/C 309/11)

Language of the case: Italian

Referring court

Consiglio di Stato

Parties to the main proceedings

Applicant: Persidera SpA

Defendants: Autorità per le Garanzie nelle Comunicazioni, Ministero dello Sviluppo Economico delle Infrastrutture e dei Trasporti

Intervening parties: Radiotelevisione italiana SpA (RAI), Reti Televisive Italiane SpA (RTI), Elettronica Industriale SpA, Television Broadcasting System Spa, Premiata Ditta Borghini e Stocchetti di Torino Srl, Rete A SpA, Centro Europa 7 Srl, Prima TV SpA, Sky Italia Srl, Elemedia SpA

Operative part of the judgment

1. Article 9 of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), as amended by Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009, Articles 3, 5 and 7 of Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive), as amended by Directive 2009/140, and Articles 2 and 4 of Commission Directive 2002/77/EC of 16 September 2002 on competition in the markets for electronic communications networks and services must be interpreted to the effect that they preclude a national provision which, for the purposes of converting existing analogue channels into digital networks, takes into consideration unlawfully managed analogue channels, where that leads to an unfair competitive advantage being prolonged, or even reinforced.
2. The principles of non-discrimination and proportionality must be interpreted to the effect that they preclude a national provision which, on the basis of the same conversion criterion, leads to a proportionately larger reduction in the number of digital networks assigned compared with the number of analogue channels operated to the detriment of one operator compared to its competitors, unless it is objectively justified and proportionate to its objective. The continuity of television output constitutes a legitimate objective capable of justifying such a difference in treatment. However, a provision which would lead to operators already present on the market being assigned a number of digital radio frequencies which is greater than the number that is sufficient to ensure the continuity of their television output would go beyond what is necessary to achieve that objective and would, thus, be disproportionate.

⁽¹⁾ OJ C 175, 17.5.2016.