Provisional text

JUDGMENT OF THE COURT (Fifth Chamber)

3 September 2020 (*)

(Reference for a preliminary ruling – Electronic communications – Article 11(2) of the Charter of Fundamental Rights of the European Union – Freedom and pluralism of the media – Freedom of establishment – Article 49 TFEU – Directive 2002/21/EC – Articles 15 and 16 – National legislation prohibiting an undertaking which has significant market power in a sector from establishing a 'significant economic dimension' in another sector – Calculation of revenues received in the electronic communications sector and the media sector – Definition of the electronic communications sector – Restriction to markets which have been subject to ex ante regulation – Account taken of the income of affiliated companies – Fixing of different income thresholds for undertakings active in the electronic communications sector)

In Case C‑719/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio, Italy), made by decision of 26 September 2018, received at the Court on 15 November 2018, in the proceedings

Vivendi SA

v

Autorità per le Garanzie nelle Comunicazioni,

intervening party:

Mediaset SpA,

THE COURT (Fifth Chamber),

composed of E. Regan, President of the Chamber, I. Jarukaitis (Rapporteur), E. Juhász, M. Ilešič and C. Lycourgos, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: R. Şereş, Administrator,

having regard to the written procedure and further to the hearing on 9 October 2019,

after considering the observations submitted on behalf of:

– Vivendi SA, by G. Scassellati Sforzolini, G. Faella, C.F. Emanuele and M. D'Ostuni, avvocati,

– Mediaset SpA, by A. Catricalà, D. Lipani, C.E. Cazzato, G.M. Roberti, G. Bellitti and M. Serpone, avvocati,

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

– the European Commission, by L. Armati, L. Nicolae and L. Malferrari, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 18 December 2019,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 49, 56 and 63 TFEU and Articles 15 and 16 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/EC of the European Parliament and of the Council of 25 November 2009 (OJ 2009 L 337, p. 37), ('the Framework Directive').

2 The request has been made in proceedings between Vivendi SA, on the one hand, and the Autorità per le Garanzie nelle Comunicazioni (Communications Regulatory Authority, Italy) ('AGCOM') and Mediaset SpA, on the other, concerning a provision of Italian law which prohibits an undertaking from receiving revenue in excess of 10% of the total revenues generated in the integrated communications system ('the SIC'), in the case where that undertaking has a share of more than 40% of the total revenues generated in the electronic communications sector.

Legal context

EU law

The Framework Directive

3 Recitals 5, 25 and 27 of the Framework Directive state:

'(5) The convergence of the telecommunications, media and information technology sectors means all transmission networks and services should be covered by a single regulatory framework. … It is necessary to separate the regulation of transmission from the regulation of content. This framework does not therefore cover the content of services delivered over electronic communications networks using electronic communications services, such as broadcasting content, financial services and certain information society services, and is therefore without prejudice to measures taken at [EU] or national level in respect of such services, in compliance with [EU] law, in order to promote cultural and linguistic diversity and to ensure the defence of media pluralism. … The separation between the regulation of transmission and the regulation of content does not prejudice the taking into account of the links existing between them, in particular in order to guarantee media pluralism, cultural diversity and consumer protection.

…

(25) There is a need for *ex ante* obligations in certain circumstances in order to ensure the development of a competitive market. The definition of significant market power in Directive 97/33/EC of the European Parliament and of the Council of 30 June 1997 on interconnection in telecommunications with regard to ensuring universal service and interoperability through application of the principles of open network provision (ONP) [(OJ 1997 L 199, p. 32)] has proved effective in the initial stages of market opening as the threshold for *ex ante* obligations, but now needs to be adapted to suit more complex and dynamic markets. For this reason, the definition used in this Directive is equivalent to the concept of dominance as defined in the case-law of the Court of Justice and the [General] Court …

…

(27) It is essential that *ex ante* regulatory obligations should only be imposed where there is not effective competition, i.e. in markets where there are one or more undertakings with significant market power, and where national and [EU] competition law remedies are not sufficient to address the problem. It is necessary therefore for the [European] Commission to draw up guidelines at [EU] level in accordance with the principles of competition law for national regulatory authorities to follow in assessing whether competition is effective in a given market and in assessing significant market power. …'

4 Article 1 of that directive, headed 'Scope and aim', provides:

'1. This Directive establishes a harmonised framework for the regulation of electronic communications services, electronic communications networks, associated facilities and associated services, and certain aspects of terminal equipment to facilitate access for disabled users. It lays down tasks of national regulatory authorities and establishes a set of procedures to ensure the harmonised application of the regulatory framework throughout the [European Union].

2. This Directive as well as the Specific Directives are without prejudice to obligations imposed by national law in accordance with [EU] law or by [EU] law in respect of services provided using electronic communications networks and services.

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

…'

5 Article 2 of that directive, headed 'Definitions', states:

'…

(c) "electronic communications service" means a service normally provided for remuneration which consists wholly or mainly in the conveyance of signals on electronic communications networks, including telecommunications services and transmission services in networks used for broadcasting, but exclude services providing, or exercising editorial control over, content transmitted using electronic communications networks and services …;

…'

6 Article 15 of the Framework Directive, headed 'Procedure for the identification and definition of markets', provides:

'1. After public consultation including with national regulatory authorities and taking the utmost account of the opinion of [the Body of European Regulators for Electronic Communications (BEREC)], the Commission shall, in accordance with the advisory procedure referred to in Article 22(2), adopt a Recommendation on Relevant Product and Service Markets (the Recommendation). The Recommendation shall identify those product and service markets within the electronic communications sector the characteristics of which may be such as to justify the imposition of regulatory obligations set out in the Specific Directives, without prejudice to markets that may be defined in specific cases under competition law. The Commission shall define markets in accordance with the principles of competition law.

The Commission shall regularly review the Recommendation.

2. The Commission shall publish, at the latest on the date of entry into force of this Directive, guidelines for market analysis and the assessment of significant market power (hereinafter "the Guidelines") which shall be in accordance with the principles of competition law.

3. National regulatory authorities shall, taking the utmost account of the Recommendation and the Guidelines, define relevant markets appropriate to national circumstances, in particular relevant geographic markets within their territory, in accordance with the principles of competition law. National regulatory authorities shall follow the procedures referred to in Articles 6 and 7 before defining the markets that differ from those identified in the Recommendation.

4. After consultation including with national regulatory authorities the Commission may, taking the utmost account of the opinion of BEREC, adopt a Decision identifying transnational markets …'

7 Article 16 of the Framework Directive, headed 'Market analysis procedure', states:

'1. National regulatory authorities shall carry out an analysis of the relevant markets taking into account the markets identified in the Recommendation, and taking the utmost account of the Guidelines. Member States shall ensure that this analysis is carried out, where appropriate, in collaboration with the national competition authorities.

2. Where a national regulatory authority is required under paragraphs 3 or 4 of this Article, Article 17 of Directive 2002/22/EC [of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services] (Universal Service Directive) [(OJ 2002 L 108, p. 51)], or Article 8 of Directive 2002/19/EC [of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities] (Access Directive) [(OJ 2002 L 108, p. 7)] to determine whether to impose, maintain, amend or withdraw obligations on undertakings, it shall determine on the basis of its market analysis referred to in paragraph 1 of this Article whether a relevant market is effectively competitive.

3. Where a national regulatory authority concludes that the market is effectively competitive, it shall not impose or maintain any of the specific regulatory obligations referred to in paragraph 2 of this Article. In cases where sector specific regulatory obligations already exist, it shall withdraw such obligations placed on undertakings in that relevant market. An appropriate period of notice shall be given to parties affected by such a withdrawal of obligations.

4. Where a national regulatory authority determines that a relevant market is not effectively competitive, it shall identify undertakings which individually or jointly have a significant market power on that market in accordance with Article 14, and the national regulatory authority shall on such undertakings impose appropriate specific regulatory obligations referred to in paragraph 2 of this Article or maintain or amend such obligations where they already exist.

…'

The Audiovisual Media Services Directive

8 Recitals 5 and 8 of Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) (OJ 2010 L 95, p. 1) ('the Audiovisual Media Services Directive') state:

'(5) Audiovisual media services are as much cultural services as they are economic services. Their growing importance for societies, democracy – in particular by ensuring freedom of information, diversity of opinion and media pluralism – education and culture justifies the application of specific rules to these services.

…

(8) It is essential for the Member States to ensure the prevention of any acts which may prove detrimental to freedom of movement and trade in television programmes or which may promote the

creation of dominant positions which would lead to restrictions on pluralism and freedom of televised information and of the information sector as a whole.'

Italian law

TUSMAR

9 Decreto legislativo n. 177 – Testo Unico dei Servizi di Media Audiovisivi e Radiofonici (Legislative Decree No 177 consolidating the provisions on broadcasting and audiovisual media services) of 31 July 2005 (Ordinary Supplement to *GURI* No 208 of 7 September 2005), in the version applicable to the dispute in the main proceedings ('TUSMAR'), provides in Article 2(1)(s):

'The "[SIC]" covers the following activities: daily newspapers and periodicals; publication of directories and electronic publications, including via the internet; radio and audiovisual media services; cinema; external advertising; communication initiatives for goods and services; sponsorship.'

10 Article 43 of TUSMAR, headed 'Dominant positions in the [SIC]', provides:

'1. Entities active in the [SIC] shall be required to notify [AGCOM] of agreements and concentrations, in order that the latter may verify compliance with the principles set out in paragraphs 7, 8, 9, 10, 11 and …, in accordance with the procedures laid down in the ad hoc regulation adopted by [AGCOM].

…

5. Adapting to changes in market characteristics, … [AGCOM] shall take the measures necessary to eliminate or prevent the formation of the positions referred to in paragraphs 7, 8, 9, 10, 11 … or any other position detrimental to pluralism. …

7. When fully implementing the national plan for the allocation of digital radio and television frequencies, a single content provider may not – including through companies which may be regarded as being controlled by it or affiliated with it within the meaning of paragraphs 13, 14 and 15 of this article – be the holder of authorisations permitting it to broadcast more than 20% of all television programmes or more than 20% of the radio programmes broadcast via terrestrial radio link at national level on the networks provided for at that level.

8. Until the national plan for the allocation of digital television frequencies is implemented in full, the limit set for the total number of programmes per entity shall be 20%, calculated in relation to the total number of television programmes that, including for the purposes of Article 23(1) of legge n. 112 – Norme di principio in materia di assetto del sistema radiotelevisivo e della RAI-Radiotelevisione italiana SpA, nonche' delega al Governo per l'emanazione del testo unico della radiotelevisione (Law No 112 on regulations and principles governing the set-up of the broadcasting system and RAI-Radiotelevisione italiana SpA, authorising the government to issue a consolidated broadcasting statute) of 3 May 2004 [(Ordinary Supplement to *GURI* No 104 of 5 May 2004)], are licensed or broadcast at the national level on both analogue and digital terrestrial frequencies. Digitally broadcast television programmes may combine to form the basis for calculation where they cover 50% of the population. In determining whether there is compliance with the 20% limit, no account shall be taken of the programmes which make up the simultaneous retransmission of those broadcast in analogue mode. This calculation criterion shall apply only to entities which digitally broadcast programmes covering 50% of the national population.

9. Without prejudice to the prohibition on creating dominant positions within the individual markets that make up the [SIC], entities which are required to be entered in the Register of Communications Operators established under Article 1(6)(a)(5) of legge n. 249 – Istituzione dell'Autorità per le garanzie nelle comunicazioni e norme sui sistemi delle telecomunicazioni e radiotelevisivo (Law No 249 establishing the Communications Regulatory Authority and laying down rules relating to the telecommunications and radiotelevision systems) of 31 July 1997 [(Ordinary Supplement to *GURI* No 177 of 31 July 1997)] may

neither directly, nor through controlled or affiliated companies within the meaning of paragraphs 14 and 15, earn revenue exceeding 20% of the total revenues in the [SIC].

10. The revenues referred to in paragraph 9 are those received from public service broadcasting funding, after deduction of the duties payable to the Treasury, from national and local advertising, including in direct form, from teleshopping, from sponsorship, from product dissemination activities at points of sale, with the exception of discounts on prices, from continuous agreements concluded with public entities and from public aid granted directly to the entities carrying on the activities referred to in Article 2(1)(s), from pay-television offers, from subscriptions and sales of newspapers and periodicals, including in direct form, from television products, including printed and audio products marketed in annex, from press agencies operating on a national scale, from electronic publication and publication of directories, including on the internet, from advertising online and on various platforms, whether or not direct, including resources obtained by search engines and social and sharing platforms, and from the use of cinematographic works in various forms accessible to the public.

11. Undertakings the revenue of which in the electronic communications sector as defined in Article 18 of decreto legislativo n. 259 – Codice delle comunicazioni elettroniche (Legislative Decree No 259 establishing the Electronic Communications Code) of 1 August 2003 [(Ordinary Supplement to *GURI* No 214 of 15 September 2003)], including that of subsidiaries or affiliates, exceeds 40% of the total revenues in that sector, may not earn, within the [SIC], revenue exceeding 10% of the total revenues generated in that system.

…

13. For the purposes of determining dominant positions prohibited under this consolidated text in the [SIC], account shall also be taken of shares acquired or, in any event, held by subsidiaries, even indirectly, by fiduciary companies, or through intermediaries. Shareholdings are considered to be acquired when their ownership passes from one entity to another as a result of or in connection with a merger, division, assignment, company transfer or similar transaction concerning those entities. Where there are agreements, of any kind, between the various shareholders concerning the concerted exercise of voting rights or, in any event, the management of the company concerned, distinct from mere mutual consultation between the shareholders, each shareholder shall be deemed to hold all the stocks or shares owned or controlled by the parties involved.

14. For the purposes of the present Consolidated Law, there is control, in particular with regard to entities other than companies, in the cases provided for in the first and second paragraphs of Article 2359 of the Codice civile (Civil Code).

15. Control is considered to exist in the form of the exercise of a dominant influence, in the absence of evidence to the contrary, in any of the following situations:

(a) where there is an entity which, alone or in conjunction with other shareholders, is able to exercise a majority of the votes in ordinary shareholders’ meetings or to appoint or revoke the majority of directors;

(b) where there are, in particular between the members, financial, organisational or economic links capable of producing any of the following effects:

(1) profit and loss transfer;

(2) coordination of the management of an undertaking with that of other undertakings, with a view to pursuing a common objective;

(3) conferral of powers exceeding those inherent in the stocks or shares held;

(4) conferral of powers, as regards the selection of directors and managers of undertakings, on entities other than those so entitled on the basis of the ownership structure;

(c) where there is a relationship of subordination to common management, which may, inter alia, result from the compositional characteristics of the administrative bodies or from other significant qualitative factors.

…'

The Civil Code

11 Article 2359 of the Civil Code, headed 'Controlled companies and affiliated companies', provides:

'The following shall be regarded as controlled companies:

1. companies in which another company holds the majority of the voting rights that may be exercised in ordinary shareholders' meetings;

2. companies in which another company holds sufficient voting rights to exercise a dominant influence in ordinary shareholders' meetings;

3. companies which are under the dominant influence of another company by virtue of specific contractual links.

For the purposes of applying points 1 and 2 of the first paragraph, account shall also be taken of votes available to controlled companies, trust companies and intermediaries; no account shall be taken of votes exercised on behalf of third parties.

Companies over which another company exercises significant influence shall be regarded as affiliates. Such influence shall be presumed where, in ordinary shareholders' meetings, that other company is able to exercise at least one fifth of the voting rights, or one tenth if the company shares are quoted on regulated markets.'

The Electronic Communications Code

12 Article 18 of Legislative Decree No 259 establishing the Electronic Communications Code, in the version applicable to the dispute in the main proceedings ('the Electronic Communications Code'), is headed 'Procedure for listing and defining markets'. It provides as follows:

'1. While taking utmost account of the recommendations in relation to the relevant product and service markets in the electronic communications sector (hereinafter referred to as "the recommendations") and the Guidelines, [AGCOM] shall define the relevant markets in accordance with the principles of competition law and on the basis of the characteristics and structure of the national electronic communications market. [AGCOM] shall follow the procedure provided for in Articles 11 and 12 before defining the markets that differ from those identified in the recommendations.'

Law No 249 of 31 July 1997

13 Law No 249 of 31 July 1997 indicates in its Article 1(6)(a)(5) that the powers of AGCOM include the following:

'[AGCOM] shall ensure the maintenance of the Register of Communications Operators in which the following are required to be entered in accordance with the present law: operators granted licences or authorisations by [AGCOM] or other competent authorities under the legislation in force, advertising undertakings which are concessionaires for advertising broadcast by means of radio or television equipment or in daily or periodical newspapers, on the internet and other fixed or mobile digital platforms,

undertakings engaged in the production and distribution of radio and television programmes, undertakings publishing daily newspapers, periodicals or reviews, press agencies and undertakings providing telematic and telecommunications services, including electronic and digital publishing. The broadcasting infrastructures operating in the national territory shall also be recorded in the register. [AGCOM] shall adopt a specific regulation governing the organisation and maintenance of the register and establishment of the criteria for determining which entities are required to register, independently of those already entered on the register on the date on which the present Law enters into force.'

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

14 Vivendi, a company governed by French law and entered in the Paris (France) register of companies, is the parent company of a group that is active in the media sector and in the creation and distribution of audiovisual content.

15 Vivendi holds a 23.9% stake in the capital of Telecom Italia SpA, a company which it controls since, in essence, it secured a majority of the voting rights in the general meeting of that company at the vote which took place at the shareholders' meeting on 4 May 2017.

16 On 8 April 2016, Vivendi, Mediaset and Reti Televisive Italiane SpA entered into a strategic partnership agreement under which Vivendi acquired 3.5% of Mediaset's share capital and 100% of Mediaset Premium SpA's share capital, in exchange for transferring 3.5% of its own share capital to Mediaset.

17 In December 2016, as a result of disagreements relating to that agreement, Vivendi launched a hostile acquisition campaign for shares in Mediaset. By 22 December 2016, Vivendi had thus succeeded in securing 28.8% of Mediaset's share capital and 29.94% of the voting rights at Mediaset's shareholders' meetings. That qualified minority shareholding did not, however, enable it to exercise control over Mediaset, which remained under the control of the Fininvest group.

18 Against that background, on 20 December 2016, Mediaset lodged a complaint with AGCOM, alleging that Vivendi had infringed Article 43(11) of TUSMAR ('the provision at issue in the main proceedings'), on the ground that Vivendi's shareholdings in Telecom Italia and in Mediaset meant that Vivendi's revenue in the electronic communications sector, on the one hand, and in the SIC, on the other hand, exceeded, according to Mediaset, the thresholds laid down in that provision, under which undertakings the revenue of which in the electronic communications sector, including that secured through controlled or affiliated undertakings, is greater than 40% of the total revenues generated in that sector, may not earn, within the SIC, revenue exceeding 10% of the total revenues generated in that system.

19 By decision of 18 April 2017 ('the decision of AGCOM'), AGCOM held that Vivendi had infringed the provision at issue in the main proceedings. In that regard, AGCOM noted that (i) Vivendi was a company affiliated with Telecom Italia and Mediaset since it held more than one fifth of the voting rights in the shareholders' meetings of each of those companies, (ii) Vivendi had secured 59% of the revenues generated in the electronic communications sector, which consists of fixed network retail services, fixed and mobile network wholesale services and television broadcasting services for the transmission of content to end users, and (iii) Mediaset had received 13.3% of the revenues generated in the SIC. By that decision, AGCOM also ordered Vivendi to terminate its acquisition of shareholdings in Mediaset or in Telecom Italia within 12 months.

20 In that decision, AGCOM took the view, inter alia, that only markets which had been regulated in accordance with Articles 15 and 16 of the Framework Directive were relevant for the purposes of applying the provision at issue in the main proceedings. It also stated that that provision was intended to protect media pluralism and that its objective in particular was to avoid, in the light of the growing phenomenon of convergence between telecommunications and the media, distorting effects on media pluralism, which may occur where an undertaking with significant market power in the electronic communications sector acquires a 'significant economic dimension' in the SIC. In that context, AGCOM added that the limits laid

down by the provision at issue in the main proceedings were automatic, since they apply independently of any analysis of those distorting effects and irrespective of any consideration relating to competition law.

21 On 6 April 2018, Vivendi complied with the injunction issued to it by AGCOM by transferring to a third company 19.19% of the share capital in Mediaset, representing 19.95% of the voting rights in Mediaset's shareholders' meetings. Vivendi thus retained a direct holding in Mediaset's capital of less than 10% of the voting power in Mediaset's shareholders' meetings.

22 Vivendi nevertheless brought an action against AGCOM's decision before the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio, Italy), the referring court.

23 In that action Vivendi claims, in the first place, that AGCOM incorrectly defined the electronic communications sector in so far as, in calculating the total revenues generated in that sector, AGCOM ought to have taken into consideration all of the markets actually comprising the electronic communications sector and not only some of those markets, namely those which have been the subject of a market analysis decision designed to detect the presence of an operator in a dominant position, to the exclusion of significant markets such as the market for mobile telephone retail services.

24 In the second place, Vivendi submits that AGCOM incorrectly interpreted the concept of 'affiliated company', within the meaning of the third paragraph of Article 2359 of the Civil Code, by taking into account the revenues of the companies belonging to the Mediaset group, whereas these are neither controlled by nor affiliated with Vivendi and Vivendi exercises no 'significant influence' over them within the meaning of that provision.

25 In the third place, Vivendi alleges infringement of Articles 49, 56 and 63 TFEU, in so far as, in its view, AGCOM's decision adversely affected the ability of a company registered in France to acquire a minority shareholding in a company registered in Italy.

26 In the fourth place, Vivendi alleges that the provision at issue in the main proceedings is discriminatory, given that, for certain other operators in the electronic communications sector, it sets the threshold for revenue obtained in the SIC at 20% instead of 10%.

27 AGCOM submits that the legal basis of the prohibition of establishing a 'significant economic dimension' in the SIC, laid down by the provision at issue in the main proceedings, is the principle of media pluralism, enshrined in particular in Article 11 of the Charter of Fundamental Rights of the European Union, and in recital 8 of the Audiovisual Media Services Directive. AGCOM also notes that, according to the Court's case-law, the fundamental freedoms may be restricted in order to ensure media pluralism in the Member States.

28 In that context, the referring court observes that it is necessary to assess the appropriateness and proportionality of the restrictions imposed by the provision at issue in the main proceedings not only in relation to the freedom of establishment, the freedom to provide services and the free movement of capital, but also in relation to principles such as the freedom and pluralism of the media.

29 In those circumstances, the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) While Member States have the ability to investigate when undertakings have a dominant position (and to impose specific obligations on those undertakings as a result), is [the provision at issue in the main proceedings] incompatible with EU law and, in particular, with the principle of free movement of capital laid down in Article 63 TFEU? This question is asked in so far as that provision, by reference to Article 18 of the Electronic Communications Code, restricts the sector in question to the markets susceptible to *ex ante* regulation, despite it being common knowledge that information (the pluralism of which the rule is designed to protect) is increasingly conveyed by the use of the internet,

personal computers and mobile telephony, which is sufficient to make it unreasonable to exclude from that sector, in particular, mobile telephone retail services, simply because they operate entirely competitively. This question is also asked in the light of the fact that, for the purposes of applying [the provision at issue in the main proceedings], AGCOM, [in the course of the main proceedings], defined the electronic communications sector by taking into account only the markets where at least one analysis has been carried out since the entry into force of the [Electronic Communications Code], that is to say, from 2003 to date, and with revenues resulting from the last useful assessment, carried out in 2015.

(2) Do the principles of freedom of establishment and freedom to provide services laid down in Articles 49 and 56 TFEU [and] Articles 15 and 16 of [the Framework Directive], which are intended to safeguard pluralism and freedom of expression, together with the EU-law principle of proportionality, preclude the application of national legislation concerning public broadcasting and audiovisual media services, such as that of Italy, contained in [the provision at issue in the main proceedings] and Article 43(14) [of TUSMAR], according to which the revenues relevant for determining the second threshold of 10% include those of undertakings that are neither subsidiaries nor under a dominant influence, but are merely 'affiliates' within the meaning of Article 2359 of the Codice Civile (Civil Code) (referred to in Article 43(14) [of TUSMAR]), even if it is not possible to exert any influence on the information being broadcast by those undertakings?

(3) Do the principles of freedom of establishment and freedom to provide services laid down in Articles 49 and 56 TFEU [and] Articles 15 and 16 of [the Framework Directive], together with the principles on safeguarding pluralism of information sources and competition in the broadcasting sector laid down by [the Audiovisual Media Services Directive] and by [the Framework Directive], preclude national legislation such as [TUSMAR] which, in Article 43(9) thereof and in [the provision at issue in the main proceedings], sets very different thresholds (20% and 10% respectively) for "entities required to be entered in the Register of Communications Operators established under Article 1(6)(a)(5) of Law No 249 of 31 July 1997" (that is, entities that have received a concession or authorisation under the legislation in force, from AGCOM or from other competent administrative authorities, and concessionaires of advertising, however transmitted, publishers, and so on, referred to in Article 43(9)), on the one hand, and for undertakings operating in the electronic communications sector, as defined above (covered by [the provision at issue in the main proceedings]), on the other?'

Consideration of the questions referred

Admissibility

30 The Italian Government takes the view that the first question is hypothetical, on the ground that, even if the electronic communications sector had been defined more broadly, Vivendi's share for the reference year would, as a result of its control over Telecom Italia, have been equal to 45.9% of the revenues generated in that sector. The threshold of 40% laid down by the provision at issue in the main proceedings would therefore, it submits, have been exceeded in any event.

31 Mediaset claims that the request for a preliminary ruling is inadmissible in its entirety, on the ground that the referring court does not define the national legislative framework in a clear and coherent manner or explain how certain provisions of EU law to which it refers in that request are relevant to the outcome of the dispute in the main proceedings.

32 In that regard, it should be recalled that 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 a rule of EU law, the Court is in principle bound to

give a ruling (judgment of 10 December 2018, *Wightman and Others*, C‑621/18, EU:C:2018:999, paragraph 26 and the case-law cited).

33 It follows that questions relating to EU law enjoy a presumption of relevance. The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (judgment of 10 December 2018, *Wightman and Others*, C‑621/18, EU:C:2018:999, paragraph 27 and the case-law cited).

34 In the present case, with regard to the Italian Government's arguments, it should be noted that the first question referred specifically concerns the compatibility with EU law of the threshold of 40% of the total revenues generated in the electronic communications sector, which is set in order to restrict the access of undertakings active in that sector to the SIC. The fact that, as that Government claims, Vivendi would in any event exceed that threshold has no bearing on the question as to whether the very existence of such a threshold may be regarded as compatible with EU law, which is, in essence, what the referring court seeks to determine. Thus, the first question is not hypothetical within the meaning of the case-law cited in paragraph 33 above.

35 As regards the arguments put forward by Mediaset, it should be noted that, even though, in the request for a preliminary ruling, the referring court mentions certain provisions of EU law without explaining their relevance to the outcome of the dispute in the main proceedings, that request contains sufficient information to make it possible to understand the points of law raised as regards the possible incompatibility of the provision at issue in the main proceedings with the rules of EU law.

36 It follows that the questions referred for a preliminary ruling are admissible.

Substance

Preliminary observations

37 In the first place, it should be noted that the first question referred for a preliminary ruling refers to Article 63 TFEU, relating to the free movement of capital, while the second and third questions refer to Article 49 TFEU, relating to freedom of establishment, and to Article 56 TFEU, relating to the freedom to provide services. Thus, it is appropriate to begin by determining the freedom which is relevant in the present case.

38 In that regard, it should be noted, first of all, that the order for reference does not contain any specific information to suggest that the case in the main proceedings concerns the cross-border supply of services. Accordingly, the Court will not examine Article 56 TFEU in the context of this reference for a preliminary ruling.

39 Next, concerning the freedom of establishment and the free movement of capital, it must be borne in mind that, as regards the question whether national legislation comes within the scope of either of those freedoms, it is clear from well-established case‑law that the purpose of the legislation concerned must be taken into consideration (see, to that effect, judgment of 13 November 2012, *Test Claimants in the FII Group Litigation*, C‑35/11, EU:C:2012:707, paragraph 90 and the case-law cited).

40 Thus, national legislation intended to apply only to those acquisitions of shareholdings which enable the holder to exert a definite influence on a company's decisions and to determine its activities comes within the scope of Article 49 TFEU on freedom of establishment (judgment of 13 November 2012, *Test Claimants in the FII Group Litigation*, C‑35/11, EU:C:2012:707, paragraph 91 and the case-law cited).

41 By contrast, national provisions which apply to shareholdings acquired with the sole intention of making a financial investment without any intention to influence the management and control of the undertaking

concerned must be examined exclusively in the light of the free movement of capital (judgment of 13 November 2012, *Test Claimants in the FII Group Litigation*, C‑35/11, EU:C:2012:707, paragraph 92 and the case-law cited).

42 In the present case, the objective of Article 43 of TUSMAR is to monitor concentrations in the SIC in order to avoid the creation of 'dominant positions', within the meaning of Italian law, in each of the markets which make up the SIC. In other words, the purpose of that article, which includes the provision at issue in the main proceedings, is, overall, to set limits on the control which may be exercised over companies active in the SIC.

43 In that regard, the provision at issue in the main proceedings, which prevents a company the revenue of which in the electronic communications sector exceeds 40% of the total revenues generated in that sector from earning revenue in the SIC that corresponds to more than 10% of the total revenues generated in that system, allows limits to be placed on such control.

44 Furthermore, first, the acquisition of 23.94% of Telecom Italia's capital enabled Vivendi to obtain a majority of the voting rights in Telecom Italia's shareholders' meetings and, subsequently, to acquire control of that undertaking, a situation which comes within the scope of freedom of establishment. Second, it is apparent from the file before the Court that the objective pursued by Vivendi when it acquired Mediaset's shares was not to make a mere financial investment, but to intervene in the management of Mediaset and to acquire a significant share of the Italian media sector.

45 Thus, in the light of the general objective of Article 43 of TUSMAR and the purpose of the acquisition of the shareholdings at issue in the main proceedings, which is to exert a definite influence on Mediaset's decisions and the determination of its activities, within the meaning of the case-law referred to in paragraph 40 above, the present case must be examined in the light of the provisions of the FEU Treaty on freedom of establishment.

46 In the second place, it must be noted that the second and third questions referred for a preliminary ruling refer to Articles 15 and 16 of the Framework Directive, the principle of proportionality and the principle of competition in the television broadcasting sector referred to in the Audiovisual Media Services Directive and in the Framework Directive.

47 In that regard, it should be observed, first, that both the Framework Directive and the Audiovisual Media Services Directive effect a non-exhaustive harmonisation of national rules in their respective fields, leaving the Member States with a margin of discretion to adopt decisions at national level. In particular, in accordance with Article 1(3) of the Framework Directive, the Member States remain competent to pursue general interest objectives, in particular relating to content regulation and audiovisual policy, having due regard for EU law.

48 Second, it is not apparent from the order for reference to what extent the provision at issue in the main proceedings might conflict with Articles 15 and 16 of the Framework Directive, the principle of proportionality and the principle of competition in the television broadcasting sector referred to in the Audiovisual Media Services Directive and in the Framework Directive. Those articles and principles are mentioned in the order for reference without any explanation as to what connection they have with the questions referred.

49 Thus, even though certain provisions of those two directives may, where appropriate, be taken into account in the examination of the questions referred for a preliminary ruling, those questions do not in fact relate to the obligations which may arise from those articles and principles. By contrast, they raise the question of the extent to which the provision at issue in the main proceedings exceeds the discretion granted to the Member States by the Framework Directive and the Audiovisual Media Services Directive, which makes necessary an examination in the light of the primary law, in this case Article 49 TFEU.

Consideration of the questions referred

50 By its three questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 49 TFEU must be interpreted as precluding legislation of a Member State which has the effect of preventing a company registered in another Member State, the revenue of which in the electronic communications sector, as defined for the purposes of that national legislation, including through controlled or affiliated companies, is in excess of 40% of the total revenues in that sector, from earning, within the SIC, revenue exceeding 10% of the total revenues generated in that system.

51 In that regard, it must be borne in mind that Article 49 TFEU precludes any national measure which, even if applicable without discrimination on grounds of nationality, is liable to hinder or render less attractive the exercise by EU nationals of the freedom of establishment guaranteed by the FEU Treaty, and that such restrictive effects may arise, inter alia, where, on account of national legislation, a company may be deterred from setting up subsidiary bodies, such as permanent establishments, in other Member States and from carrying on its activities through such bodies (judgment of 10 May 2012, *Duomo Gpa and Others*, C‑357/10 to C‑359/10, EU:C:2012:283, paragraph 35 and the case-law cited).

52 That is that case of the provision at issue in the main proceedings, since it prohibits any undertaking, whether or not established in the national territory, the revenue of which in the electronic communications sector as defined for the purposes of that provision represents 40% of the total revenues generated in that sector, from exceeding the threshold of 10% of the revenues generated in the SIC and, therefore, from taking control, as the case may be, of another undertaking established in that territory which carries on activities there.

53 Thus, in the present case, as is apparent from paragraphs 17 to 20 above, when Vivendi acquired 28.8% of Mediaset's share capital and 29.94% of the voting rights in Mediaset's shareholders' meetings, AGCOM prohibited Vivendi, on the basis of that provision, from retaining the shareholdings that it had acquired in Mediaset or that it held in Telecom Italia and ordered Vivendi to cease to hold those shares in one or other of those undertakings in so far as they exceeded the thresholds laid down in that provision.

54 The provision at issue in the main proceedings thus restricted Vivendi's freedom to establish itself in Italy, by preventing it from exerting a greater influence on Mediaset's management by acquiring more shares than it had envisaged. It therefore constitutes a restriction on the freedom of establishment, within the meaning of Article 49 TFEU.

55 According to the Court's settled case-law, such a restriction on freedom of establishment is permissible only if it is justified by overriding reasons in the public interest. It is further necessary that it should be appropriate for ensuring the attainment of the objective in question and not go beyond what is necessary to attain that objective (judgment of 25 October 2017, *Polbud – Wykonawstwo*, C‑106/16, EU:C:2017:804, paragraph 52 and the case-law cited).

56 In that regard, in relation to, in the first place, the existence of overriding reasons in the public interest, it is apparent from the information provided by the referring court and from the observations submitted to the Court that the provision at issue in the main proceedings was adopted in order to ensure pluralism of information and of the media. Article 43(5) of TUSMAR also provides that AGCOM must adopt the measures necessary to eliminate or prevent the formation of the positions contemplated by, inter alia, the provision at issue in the main proceedings, or of any other position detrimental to pluralism.

57 The Court has held that the safeguarding of the freedoms protected under Article 11 of the Charter of Fundamental Rights, which in paragraph 2 thereof refers to the freedom and pluralism of the media, unquestionably constitutes a legitimate aim in the general interest, the importance of which in a democratic and pluralistic society must be stressed in particular, capable of justifying a restriction on freedom of establishment (see, to that effect, judgment of 22 January 2013, *Sky Österreich*, C‑283/11, EU:C:2013:28, paragraph 52 and the case-law cited).

58 Protocol No 29 on the system of public broadcasting in the Member States, annexed to the EU and FEU Treaties, also refers to media pluralism, stating that 'the system of public broadcasting in the Member

States is directly related to the democratic, social and cultural needs of each society and to the need to preserve media pluralism'.

59 In the present case, the restriction on freedom of establishment resulting from the provision at issue in the main proceedings could therefore, in principle, be justified by an overriding reason in the public interest, namely the protection of pluralism of information and the media.

60 As regards, in the second place, the proportionate nature of that restriction in relation to the objective pursued, it must be observed that Article 43(9) of TUSMAR provides that entities which are required to be entered in the Register of Communications Operators are prohibited from generating more than 20% of the total revenues generated in the SIC, thereby establishing a general rule intended to apply only to entities that are active in the electronic communications sector.

61 In addition, the provision at issue in the main proceedings introduces an even more specific rule than that laid down in Article 43(9) of TUSMAR, concerning only entities in the electronic communications sector, as defined for the purposes of that provision, earning more than 40% of the total revenues generated in that sector and prohibits such entities from earning more than 10% of the total revenues generated in the SIC.

62 That provision thus, in essence, precludes a single undertaking from acquiring, by itself or through its subsidiaries, a large part of the media sector in Italy when it already has significant market power in the electronic communications sector in that Member State.

63 Since a prohibition such as that which arises from the provision at issue in the main proceedings amounts to a derogation from the principle of the freedom of establishment, it is for the national authorities to demonstrate that that provision is consistent with the principle of proportionality, that is to say, that it is appropriate and necessary in order to achieve the declared objective, and that that objective could not be achieved by prohibitions or restrictions that are less extensive, or that have less of an effect on the exercise of that freedom (see, by analogy, judgment of 23 December 2015, *Scotch Whisky Association and Others*, C‑333/14, EU:C:2015:845, paragraph 53 and the case-law cited).

64 In the present case, it should be noted that it is apparent from recital 5 of the Framework Directive that, indeed, there are links between the two sectors referred to in the provision at issue in the main proceedings, given the convergence of the telecommunications, media and information technology sectors.

65 As the Advocate General observed, in essence, in point 74 of his Opinion, given the proximity between the electronic communications services sector and the media sector, it may, in principle, be accepted that certain limits may be imposed on the possibility for undertakings which already occupy a 'dominant position' in the first sector to take advantage of that position in order to strengthen their position in the second.

66 However, the Court has held that the various directives comprising the new regulatory framework applicable to electronic communications services, which include the Framework Directive, make a clear distinction between the production of content, which involves editorial responsibility, and the transmission of content, which does not entail any editorial responsibility, content and transmission being covered by different measures which pursue their own specific objectives (see, to that effect, judgment of 13 June 2019, *Google*, C‑193/18, EU:C:2019:498, paragraph 31 and the case-law cited).

67 By reason of that clear distinction between the production of content and the transmission of content, undertakings active in the electronic communications sector which control the transmission of content do not necessarily have control over its production, which involves editorial responsibility.

68 In the present case, the provision at issue in the main proceedings does not refer to those links between the production of content and the transmission of content, and it is also not worded in such a way as to apply specifically in relation to those links.

69 That provision prohibits, in absolute terms, entities the revenue of which in the electronic communications sector, as defined for the purposes of that provision, is greater than 40% of the total revenues generated in that sector, from earning within the SIC revenue exceeding 10% of the total revenues generated in that system.

70 Thus, in order to determine whether a provision such as the provision at issue in the main proceedings is appropriate for attaining that specific objective, which seeks to prevent the negative aspects of convergence between the electronic communications sector and the SIC, it is necessary to assess the link between, on the one hand, the thresholds referred to in that provision and, on the other hand, the risk to media pluralism.

71 As regards, first of all, the definition of the electronic communications sector, it is apparent from the request for a preliminary ruling that AGCOM defines that sector restrictively as encompassing the markets susceptible to *ex ante* regulation.

72 As is apparent from Articles 15 and 16 of the Framework Directive, read in the light of recitals 25 and 27 thereof, those markets are those of the electronic communications sector in general, including the new markets, on which there is no effective competition, which have been identified by the Commission as relevant product or service markets with a view, where appropriate, to the introduction by the competent national authorities of *ex ante* regulatory obligations designed to supplement the rules of competition law in order to resolve the difficulties which exist on those markets (judgment of 3 December 2009, *Commission* v *Germany*, C‑424/07, EU:C:2009:749, paragraphs 56 and 64).

73 It is therefore apparent that the mechanism of *ex ante* regulatory obligations is intended to resolve specific problems arising on specific markets in the electronic communications sector and not to ensure pluralism in the media sector by making it possible to identify, from among the undertakings which already have significant market power in the electronic communications sector, those which might achieve a ‘significant economic dimension’ in the SIC.

74 As the Advocate General observed, in essence, in points 51, 52, 79 and 80 of his Opinion, by limiting the definition of the electronic communications sector to the markets susceptible to *ex ante* regulation, the provision at issue in the main proceedings, as interpreted by AGCOM, excludes from the electronic communications sector markets which are of increasing importance for the transmission of information, namely mobile telephone retail services or other electronic communications services linked to the internet and satellite broadcasting services. These, however, have become the main avenue of access to media, with the result that there is no justification for excluding them from that definition.

75 As regards, next, the threshold of 10% of total revenues generated within the SIC, mentioned in the provision at issue in the main proceedings, it should be observed that the issue of whether or not an undertaking earns revenue equivalent to 10% of the total revenues generated in the SIC is not, in itself, an indication of the risk of influencing media pluralism. It is apparent from Article 2(1)(s) of TUSMAR that the SIC includes a wide range of different markets. Thus, if the total revenue earned by an undertaking in the SIC were to be concentrated in just one of the markets making up that system, with the result that the rate achieved for that market was significantly higher than 10%, but remained below 10% when all the markets making up the SIC were taken into consideration, the fact that the 10% threshold of total revenue generated in the SIC was not achieved would not be such as to exclude all risk to pluralism of the media. Similarly, in the event that the threshold of 10% of total revenue generated in the SIC were reached, but that 10% of revenue were shared between each of the markets comprising the SIC, the fact that the 10% threshold had been reached or exceeded would not necessarily point to a risk to media pluralism.

76 Finally, as regards the fact that, for the purpose of identifying the revenue earned by an undertaking in the electronic communications sector or in the SIC, AGCOM takes into consideration not only revenue obtained through ‘controlled’ companies, but also that obtained through ‘affiliated’ companies, over which the undertaking concerned exercises a ‘significant influence’, within the meaning of the third paragraph of Article 2359 of the Civil Code, it must be observed that it is apparent from the request for a preliminary

ruling that such a practice is likely to lead to revenue being taken into consideration twice and thus to a distortion of the calculation of revenue generated in the SIC. The same revenue of a company active in the SIC might therefore be taken into account both for the calculation of the income of an undertaking which is its minority shareholder and in calculating the revenue of an undertaking which is its majority shareholder and actually controls it.

77 In addition, it must be observed that ‘control’ exercised over an ‘affiliated company’ is based on a broad presumption that one company exercises ‘significant influence’ over another company where the first can exercise one fifth of the voting rights in the shareholders’ meetings of the second company, or one tenth if the company shares are quoted on regulated markets. Such circumstances do not, however, appear to make it possible to establish that the first company can actually exert an influence on the second in such a way as to undermine the pluralism of information and of the media.

78 Thus, in a situation such as that in the main proceedings, treating a ‘controlled company’ in the same way as an ‘affiliated company’ when calculating the revenue of an undertaking in the electronic communications sector or the SIC does not appear reconcilable with the objective pursued by the provision at issue in the main proceedings.

79 Consequently, that provision cannot be considered to be appropriate for attaining the objective which it pursues, in so far as it sets thresholds which bear no relation to the risk to media pluralism, since those thresholds do not make it possible to determine whether and to what extent an undertaking is actually in a position to influence the content of the media.

80 In the light of all of the foregoing considerations, the answer to the questions referred is that Article 49 TFEU must be interpreted as precluding legislation of a Member State which has the effect of preventing a company registered in another Member State, the revenue of which in the electronic communications sector, as defined for the purposes of that legislation, is in excess of 40% of the total revenues generated in that sector, from earning, within the SIC, revenue which exceeds 10% of the total revenues generated in that system.

Costs

81 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 (Fifth Chamber) hereby rules:

Article 49 TFEU must be interpreted as precluding legislation of a Member State which has the effect of preventing a company registered in another Member State, the revenue of which in the electronic communications sector, as defined for the purposes of that legislation, is in excess of 40% of the total revenues generated in that sector, from earning, within the integrated communications system, revenue which exceeds 10% of the total revenues generated in that system.

[Signatures]

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* Language of the case: Italian.