ERA
Academy of European Law
7th March 2014- Trier

Telecommunications Law in the European Union
Exchanging experiences among national courts

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Summary

The transition of the terrestrial video broadcasting to the digital era: the Italian experience - critical aspects and clues for a judicial debate

The topic entrusted to me today is "The transition of the terrestrial video broadcasting to the digital era", with particular regard to the Italian experience, in order to point out critical aspects and clues for a fruitful judicial debate in the present Seminary.

Therefore the focus of my presentation will be the Italian process of transition to the digital television with regards to legal profiles, as scanned and moulded by the judicial verdicts.

1. Preliminary remarks

From a technical point of view, radio and video broadcasting forms part of the general notion of telecommunications, as a subclass of the radio communications, these latter being that kind of communications which are realized by the production of electric fields generating waves that propagate in the space without artificial guide; and within radio communications, radio and video broadcasting is a particular form of communication that– for its circular propagation – can be received by an undetermined plurality of subjects.

Owing to their technical characters, electromagnetic waves diffuse in the atmospheric space without respecting the geo-political boundaries of the States, their diffusion being conditioned only by natural or artificial obstacles.

And so the issue at hand, the transition of the terrestrial video broadcasting to the digital era, which has lately interested so many countries, cannot be scrutinized without considering the international legal framework as it has been taking form in the latest years.

2. The international scenario

Under art. 2 of Decision n° 676/2002/CE (the so called decision on radio spectrum) the"radio spectrum" includes radio waves in frequencies between 9 kHz and 3000 GHz; radio waves are electromagnetic waves propagated in space without artificial guide .

At an international level a special body has long since been created, the International Telecommunications Union (ITU), to carry out a planetary planning of the radio spectrum so as to avoid harmful interferences among services performed by way of radio frequencies generated by plants located in places belonging to bordering States

ITU distributes radio frequencies among the possible services to be performed through them, by grouping them in frequency bands having similar technical characters or use, and assigns them to the single participant States. To this purpose the Union adopts a Frequencies Allocation Plan and a Frequencies Allotment Plan.

The frequency bands traditionally devoted to radio and television broadcasting services in Region 1 ITU (where Italy is placed) are: VHF bands, from I to III, and UHF bands, IV and V.

The Participants endeavor to respect the aforesaid instruments of international planning.

3. The Italian situation

3.1 Before the transition to digital

Italy, however, owing to a disorderly, unregulated occupation of the ether intervened in the past decades (1970-80), has not always been able to assure the respect of the international planning, during the analogical regime of broadcasting, and in part, also after the "switch-off" to the digital system.

As a matter of fact, originally the access to radio frequencies had not been disciplined in a systematic way. The acquisition of frequencies had taken place in a factual way and that had caused the creation of analogical multifrequency networks with serious interferential problems.

The factual occupation of the frequencies by private operators and the concentration of most of the best frequencies in the hands of the same group (Fininvest, then Mediaset) had been the object of some decisions of the Constitutional Court (on a remand from Tar Latium), such as C. Cost. n° 826/1988, n. 420/1994, n° 466/2002: the Court had always pointed out that the Italian situation in the television broadcasting sector was against the Constitution, nevertheless it validated the various successive transitory regimes quite on account of their own temporariness.

3.2 The transition to digital

As a matter of fact, in Italy the transition to the television broadcasting system in digital technique has occurred from 2008 to 2012. During this time, however, the rules have changed in progress and this has caused a vibrant litigation before the administrative judge (namely the Regional Administrative Tribunal of Latium - TAR Latium, having a functional competence in this field at first instance, and the Council of State at second instance).

Until 2009 the allotment of frequencies to television operators was based on the principle of conversion "one to one", so that every existing network could be converted into an all-digital network; the digital dividend was only of two networks.

The application of this criterion, however, turned out to be difficult especially for two reasons: the scarcity of frequencies available in comparison with the number of

existing operators and the opening of an infringement procedure against the Italian State for non-compliance with Community law, justified by the existence of obstacles to the entrance of newcomers and to the development of small operators in the market of television networks.

3.3 The case Europa 7

The infringement procedure found a specific precedent in the case Europa 7, the national television private operator most damaged from the application of the transitory regimes, whose decision needed a reference to the European Court of Justice for a preliminary ruling.

The Court of Justice held that art. 49 of the Treaty and, from the date on which they became applicable, the European Directives on electronic communications, as well as Article 4 of the Competition Directive, must be interpreted as precluding, in television broadcasting matters, national legislation, the application of which makes it impossible for an operator holding rights to broadcast in the absence of broadcasting radio frequencies granted on the basis of objective, transparent, non-discriminatory and proportionate criteria (ECG, 31 January 2008, C380-05, "Centro Europa 7" v. Ministry of Communications and Authority for the Guaranties in the Communications).

The Council of State then ordered the Ministry of the Economic Development to pronounce again on the demand for frequencies from Europa 7. The frequency was allotted in 2008 and subsequently supplemented with patch frequencies, also by means of judicial judgements (TAR Latium, ord. n° 1220/2012 and n° 7206/2012 and decision n° 3516/13).

3.4 The "Beauty contest" for the radio frequencies

The case Europa 7 had an impact on the whole use of the radio spectrum.

First of all, it was necessary to plan radio frequencies again in order to gain an extra resource to be allotted to Europa 7 in execution of the judicial orders, and this could be done only by adapting the technologies of use of the low portion of the radio spectrum to those being employed in Europe.

Besides, in order to remedy the infractions contested and close the infringement procedure, in 2009 the Italian Government reached an agreement with the European Commission, transposed into Resolution n° 181/09/Cons of the Authority for the Guaranties of the Communications, containing "Criteria for the complete digitalization of terrestrial television networks". The resolution provided for the calling of a gratuitous competition with the method of the Beauty contest for the allotment of a digital dividend of 6 national networks, 3 of which to be reserved to newcomers and operators having less than 2 networks.

But art 3-quinquies of law decree n° 16/2012 (conv. into l. n° 44/2012) annulled the Beauty Contest in progress; the reasons can be essentially found in the absurdity of

adjudicating 3 networks to incumbents for nothing, and in the envisaged possibility for the State to obtain financial receipts from the execution of a new contest for a valuable consideration.

The Beauty contest has produced a heavy litigation that, however, has had no practical effects since the procedure has been annulled and replaced with an auction which is presently on.

3.5 The onerous auction for the radio frequencies

According to the same art. 3-quinquies, Agcom has then adopted Resolution n° 277/13/Cons, on the execution of a new onerous contest; in comparison with the first contest, many provisions have changed and, in the meanwhile, also the frequencies concerned, as an effect of intervening international decisions on the frequencies for broadband mobile services (LTE - long term evolution) to be supplied by electronic communications operators.

i) As a matter of fact, with some decisions of ITU (see n. ECC/DEC/(09)03 of October 30th 2009) and of the European Commission (see n. 2010/267/EU of May 6th 2010), a portion of the frequency spectrum in band UHF - namely the so called "band 800", from 790 to 862 Mhz, corresponding to channels 61-69 UHF - originally earmarked for television broadcasting services, had already been reserved to the harmonized use for the supply of broadband mobile services (smart-phone and tablets).

As a consequence, following the corresponding amendments brought to the National Frequency Allocation Plan, the radio frequencies in "band 800" have become attributable only to electronic communications operators (supplying LTE services) and cannot be the object of an auction for the radio frequencies.

Incidentally, it must be noticed that, during the progressive digitalization of the different Italian Regions, channels 61-69 had been allocated to the local network operators, whereas channels from 60 UHF downwards had been allocated to national network operators.

And so, when art. 1 of law n° 220/2010 established that the Ministry for the Economic Development should urgently call for an onerous contest for the allocation of frequencies in "band 800" to be used in LTE technology, the local network operators were prejudiced [1]; the same legislative provisions stated that the local operators could voluntarily dismiss the frequencies held in exchange for an economic compensation (the so-called "scrapping" of the radio frequencies), and, in case of an unsuccessful release of frequencies in "band 800", the execution of a contest among broadcasters/ operators of local networks should take place.

[1] In the meantime, the onerous contest for the allocation of frequencies in "band 800" to be used in LTE technology has been concluded in September 2011 and it has produced to the Italian State revenues for about 4 billions euros. The first LTE services have started in the biggest Italian cities, all operators dispose of the frequencies adjudicated and are realizing their networks; for the time being, no profile of oncoming litigation seems to be envisaged.

ii) Later, the final acts of the World Conference on Radio communications in Geneve (WRC-12), held in February 2012, have provided that “the frequency band below 790 MHZ” could be destined to the new broadband mobile services as from the next World Conference in 2015, although with a “co-primary” status with the television broadcasting services. The frequency band in question is the “band 700”, from 694 to 790 MHZ, corresponding to channels UHF 48-60.

We must point out that the absence of definition of the inferior limit of “band 700” and the co-primary status with television broadcasting services, together with the adjournment after year 2015 of the re-allocation of channels, on one hand leaves a certain margin of manouvre to the National States, on the other hand let the general situation unsettled .

From the preamble of Resolution n° 277/13/Cons on the onerous contest auction, it seems that the Authority would destine channels 57-60 UHF to LTE services, as from January 2017, whereas the remaining channels in “band 700” possibly interested by the re-allocation required by the ITU, would be left to the new services only as from 2020.

For the abovementioned reasons a conspicuous part of the frequencies already included in the Beauty contest have been left aside, in order to use them to solve “Some critical aspects” (All. 1 to Resolution n° 277/13/Cons, p. 2), to help the “gradual release of channels 57-60 by 2016” and “to solve the problems of international coordination of multiplex of RAI “, making these resources no more contestable by newcomers and minor operators.

The new auction will be reserved to newcomers, minor operators and operators exercising no more than 2 networks; the contest shall concern three multiplex, one of them (lotto C2) consisting of frequencies VHF – III (channels 6 and 7).
Incumbents (Mediaset, Telecom, RAI) shall not take part in the procedure (art. 4, par. 1, Resolution n° 277/13/Cons).

The exclusion of the incumbents from the onerous contest will not jeopardize their position, because it will be somehow counterbalanced by a foreseeable conversion of multiplex operated by them from the obsolete technology DVB-H into technology DVB-T **(**Tar Latium, dec. n° 749/2013**).** This conversion will let the incumbents reach gratuitously the “cap” of 5 multiplex per operator, required by the European Commission and introduced with Resolution n° 277/13/Cons (art. 7, par. 6).

On the contrary, on account of their different starting positions, no newcomer or other participant in the contest will be able to equalize this cap, with the final frustration of the pro-competitive redressing of the sector, which was the primary object of the Community infraction procedure still open against the Italian Government and to which the new auction was supposed to remedy.

APPENDIX

The transition of the terrestrial video broadcasting to the digital era as articulated in the judgements of the administrative Courts

In Italy, legal disputes in the matter of allotment of radio frequencies to be exercised in digital technology, as brought to the cognizance of the administrative judge (TAR Latium at first instance, Council of State at second instance), can be divided into three groups: claims on the allotment of frequencies to national operators, claims on allotment procedures towards local operators until 2010 and claims on allotment procedures towards local operators after 2010.

National operators have had recourse to Tar Latium essentially to gain additional networks or frequencies than those already attributed by the Ministry of the economic development.

In case *Telecom Italia Media Broadcasting*, after the digitalization the operator had got 4 multiplex in Sardinia whereas in the remaining part of the Country only 3 multiplex; and so it claimed the allotment of a fourth multiplex all over the Country, to this aim starting a very complex litigation in which it contested the assignment of frequencies to all the other national operators. The Court confirmed the rightness of the allotments to Telecom, included the reduction from 4 to 3 multiplex, because after the opening of the Community infringement procedure against the Italian State, the allotment of frequencies has no more been realized according to the principle "one to one", but only with the guarantee to the existing operators to obtain the necessary capacity to go on diffusing all the programs previously broadcasted and in the same geographical areas (TAR Latium, dec. n° 1398/2014).

In case *RAI Radiotelevisione Italiana* the operator complained that 2 out of 5 allotted multiplex did not assure the necessary covering. One of the 2 multiplex in question carries programs of the television public service, which must have a universal covering, whereas the other national multiplex must serve no less than 80% of the population and all the capitals of province. TAR ordered the Administration to re-examine the allotment of frequencies to RAI which were not coordinated with the surrounding Countries or did not assure the covering established by law, in the absence of alternative or supplementary frequencies (TAR Latium, ord. n° 4168/ 2012).

The broadcaster *Rete A* complained that the frequencies allotted for its second multiplex were not apt to assure the covering of 80% of the population. In the precautionary phase of the administrative proceedings TAR ordered the temporary

allotment to Rete A of patch frequencies in areas where interferences with other Countries were found, until the Ministry of the economic development, at the end of the necessary international negotiations, could make the allotted frequencies fully utilizable (TAR Latium, ord. n° 3681/2012).

Litigations of local operators on allotment procedures of frequencies up to 2010 has mainly concerned the problem of preserving the same service areas in the transition from analogical to digital television.

To this purpose, the administrative judge has affirmed the principle that in the transition to the digital video broadcasting the preservation of areas already served in analogical technology should be granted to operators; and that the preservation of such areas should be verified in reality, also taking into account the factual existing situations and, namely, the situation of the receiving plants installed by the users (TAR Latium, dec. n° 9837/ 2011; id., n° 8612/2011).

The preservation of areas already served in analogical technology has been an issue faced in the administrative proceedings also in the precautionary phase. In such occurrences, Tar Latium has ordered the Administration a new examination of the situation of the claimant operator, which in some cases has brought to the temporary allotment of free frequencies on a non interferential basis.

The litigation of local operators on allotment procedures to local operators after 2010 has been more complex and is still in progress.

At the end of 2010 the Italian Government had to release the frequencies in “Band 800”, in order to devote them to the broadband mobile services.

In the regions not yet digitalized the switch off of analogical transmissions has taken place without allotting frequencies in “band 800”. In the precautionary phase of the administrative proceedings, also in this case the Court has ordered the Administration a new examination of the situation of the claimant operators (Council St., ord. n° 1296/2012; TAR Latium, ord. n° 2174/2012, id., n° 3046/2012). In the merit, however, the only case so far decided has seen the confirmation, on the part of the Court, of the rightness of the Administration’s behaviour (TAR Latium, dec. n° 5795/2013).

It rested to solve the problem of releasing the frequencies in “band 800” in the regions already digitalized.

First and foremost, legislative provisions introduced a form of voluntary release of such frequencies to the State for a valuable consideration.

The role of the administrative judge, in this case, has been decisive in order to grant the largest participation to the procedure for the release of frequencies, having verified that the reaction of local operators to the invitation of the Ministry had first been tepid. And so with interim measures TAR Latium ordered the Ministry to re-open the terms for local broadcasters to assent the release, as it would correspond to the general interest to the widest participation of the operators (TAR Latium, ord. n°

1978/2012 and n° 1979/2012). Such measures made it possible to maximize the participation and, as an effect, to bound the litigations on the following procedures for the making of classifications of operators in the areas already digitalized.

Then, only in areas where the voluntary release of band 800 had not been completed, the Ministry initiated procedures of elimination. To this regard, the guidelines of the judiciary in the precautionary phase has been more articulated.

In some cases the Administration has been ordered a new examination of the situation of the claimant operators (Council St., ord. n° 770/2013; id., n° 1033/2013; TAR Latium, ord. n° 274/2013, id., n° 1044/2013), id., n° 1558/2013) or even of the opponent operators (TAR Latium, ord. n° 274/2013).

In other cases the Court has authorized the operator to go on using the frequency previously held (Council St., ord. n° 1196/2013; id., n° 1620/2013, n° 2552/2013; TAR Latium, ord. n° 266/2013, id., n° 546/2013, n° 547/2013, n° 1271/2013, n° 1559/2013, n° 5188/2013), or to occupy another resource having the same characteristics, to be identified by the Ministry (TAR Latium, n° 571/2013; id., n° 851/2013 and n° 4987/2013).

Questions underlying these cases have not yet been examined on the merits.

CONCLUSIONS AND ISSUES FOR DEBATE

In Italy, the transition of video broadcasting to the digital system has suffered from factual circumstances and has been somehow hindered by legal criticalities linked to the previous disorderly, unregulated asset of the ether, which had been objet of factual occupation in the absence of a general, systematic regulation.

This situation has caused:

1. A heavy and cumbersome legislative and administrative route towards the switch off from analogical to digital television. **How has Your country experienced the transition to digital?**

2. The saturation of the frequencies in the ether, with unavoidable, hard-to-tackle transboundary interferential situations. **Has Your country experienced such interferential problems?**

3. A heavy, difficult and vibrant ligation before the administrative judiciary, on the part of all kind of operators, national and local, incumbents and minor operator.
   As an effect the judge has played a central role in the definition of the market of digital definition.
   What is your judicial experience in the matter?
   Which kind of role is really to be attributed to the judge in this sector, in controversies where radio frequencies, which are a public and scarce and so a contestable resource, are demanded by different operators, each alleging a plausible preferential title (the area of service already exercised, the prior use of the transmitting plant, the good faith in using the radio frequencies)?
   Is the judge a neutral examiner of the legitimacy and legality of the acts of the Administrations involved in the allocation and allotment procedures, or is he somehow a sort of Super Authority which recognizes and grants the rights of the claimants, till he comes himself to assign the right channel to the just operator?

And with this final, evocative and provocative question I close my intervention and thank the Organizers and all the Participants for the courteous attention.

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