European Court of Human Rights: Moving goalposts in frequency allocation procedure leads to a violation of freedom of expression

IRIS 2026-1:1/9

Tarlach McGonagle
Institute for Information Law (IViR), University of Amsterdam

The European Court of Human Rights judgment in *Europa Way S.r.l. v. Italy* of 27 November 2025 provides interesting insights into how the foreseeability of licensing procedures and the independence of national regulatory authorities can affect the right to freedom of expression of broadcasting companies. The Court held unanimously that there had been a violation of Article 10 of the European Convention on Human Rights (ECHR).

Legislative background and facts

In a 2009 resolution, the *Autorità per le garanzie nelle comunicazioni* (the Italian communications regulator, AGCOM) set out the criteria for the complete digitalisation of terrestrial networks. Digital frequencies would be allocated free of charge under a "beauty contest" bidding model to operators who met the conditions set out in the selection procedure. This arrangement was subsequently enshrined in law to ensure a more solid legal basis for opening the market to new operators. Detailed procedural rules were developed and published, pursuant to which the applicant company was the only bidder for one of the available frequencies.

During parliamentary debates, some MPs criticised the free-of-charge allocation of frequencies and called for a selection procedure for frequencies to be allocated in return for payment. The Ministry of Economic Development subsequently suspended and then annulled the bidding process and replaced it with a fee-based selection procedure. These changes were also given effect in legislative amendments.

The applicant company took legal action challenging the suspension and annulment of the original bidding process and its replacement with a fee-based selection procedure, first in the Lazio Regional Administrative Tribunal and on appeal to the *Consiglio di Stato* (Council of state). The latter sought a preliminary ruling from the Court of Justice of the European Union (CJEU) on the interpretation of EU law on matters of competition and electronic communications. The CJEU held that the EU's Framework Directive precluded the annulment of an ongoing selection procedure such as in the present case. It added that member states

enjoy “unfettered discretion” in organising competitive procedures in the context of allocating audiovisual resources, as long as they are based on objective, transparent, non-discriminatory and proportionate criteria. It also found that the applicant company could not claim an entitlement to the frequency for which it had bid.

The *Consiglio di Stato* ruled partly in favour of the applicant company and declined to apply the legislative provision that violated the Framework Directive. AGCOM reacted by confirming the replacement of the original bidding procedure with the fee-based procedure. The *Consiglio di Stato* dismissed the company’s remaining complaints.

The merits

At the time of the annulment of the original bidding process, even though the applicant company was the only participant allowed to bid, it had not received precise, unconditional assurances that it would be awarded any frequencies. The allocation of frequencies was subject to a positive assessment by a commission confirming that the applicant company met a number of technical and financial requirements. In light of these circumstances and following the finding of the CJEU, the Court agreed with the Italian Government that, pending that assessment, the applicant company could not claim to be entitled to the frequency it had applied for.

Nevertheless, the Court did find that there had been an interference with the applicant company’s right to freedom of expression. The annulment of the bidding process in which the applicant had participated and its replacement with a new procedure with significantly different conditions and criteria for allocation had the effect of undermining the company’s ability to obtain use rights over digital terrestrial frequencies, and was thus an interference with its freedom to impart information and ideas.

Under the third sentence of Article 10(1), states are allowed to regulate how broadcasting is organised in their territories, especially in its technical aspects, but licensing systems or other such procedures must comply with the requirements of Article 10(2). The Court pointed out that the state’s negative obligation not to interfere with the right to freedom of expression is linked to its positive obligation to ensure a proper legal and administrative framework to guarantee media pluralism.

In assessing whether the interference in the present case was prescribed by law, the Court recalled that the notion of law comprises statute law, judge-made law and rules of international law. Statute law includes lower-ranking statutes and regulations made by professional regulatory bodies under independent rule-making powers delegated to them by parliament. The Court also recalled that

“prescribed by law” refers to quality of law as the law in question should be accessible and foreseeable as to its effects. Foreseeability further implies that the law is compatible with the rule of law, meaning that there must be adequate safeguards in domestic law against arbitrary interferences by public authorities. In matters with implications for fundamental rights, any legal discretion granted to public authorities must be clearly delineated in terms of its scope and how it is exercised. In respect of licensing or allocation procedures, for instance, the criteria must be applied in a way that provides sufficient guarantees against arbitrariness.

On the back of a detailed consideration of the legislative and administrative decisions made by the Italian authorities, the Court concluded that the contested measures failed to comply with domestic law and therefore could not be considered to have been “prescribed by law”. The Court then went on to articulate an important principle: “in the audiovisual media sector, and particularly in the context of the allocation of audiovisual resources, regulatory governance by an independent authority exercising clearly defined powers delegated by the legislature constitutes one of the main safeguards against arbitrary interference with the right to impart information and ideas”. The Court then unpacked this principle further, drawing on relevant recommendations and a declaration by the Council of Europe’s Committee of Ministers. Those texts underscore states’ obligation to devise an appropriate legislative framework to ensure that the independence of regulatory authorities is not only guaranteed in law, but also borne out in practice.

In the instant case, the Italian legislature had given AGCOM the power to regulate procedures for the allocation of digital terrestrial frequencies. The detailed criteria developed by AGCOM for that purpose were enshrined in law to give them a stronger legal basis. The Court held that the subsequent suspension by ministerial decree and then the annulment by legislation of the original bidding process constituted an interference with AGCOM’s functioning, which undermined its independence.

All of this led the Court to conclude that the legislative and administrative framework governing the allocation of digital terrestrial frequencies was not foreseeable and failed to provide adequate safeguards against arbitrariness. The interference with the applicant company’s freedom of expression therefore did not meet the standard of lawfulness required under the ECHR as it did not comply with relevant domestic law nor with the "quality of law" requirements. The Court accordingly found that Article 10 had been breached without the need to determine whether the interference pursued a legitimate aim or was necessary and proportionate.

As a post-scriptum, IRIS readers may be interested to learn that the Court cited passages from the 2019 IRIS Special, *The independence of media regulatory*

authorities in Europe.

Europa Way S.r.l. v. Italy, no. 64356/19, 27 November 2025 ECLI:CE:ECHR:2025:1127JUD006435619

https://hudoc.echr.coe.int/?i=001-246134