European Commission: Letter of Formal Notice to Italy concerning Rules on Electronic Communications

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On 19 July 2006, the European Commission issued a letter of formal notice in respect of Italy's alleged breach of the EC rules on electronic communications set out in Directives 2002/21/EC (the Framework Directive), 2002/20/EC (the Authorisation Directive) and 2002/77/EC (the Competition Directive). The Commission's decision to initiate an infringement procedure follows a complaint from an Italian consumers' association (*Altroconsumo*) concerning the Italian regulatory framework governing the transition from analogue to digital broadcasting established by Law no. 112/2004 (the "Gasparri" Law - see IRIS 2004-6: 12), which was subsequently included in Legislative Decree no. 117/2005 (the Broadcasting "Single Text" - see IRIS 2005-9: 14). In the Commission's view, the Italian legislation is not in conformity with EC law insofar as it unduly restricts the provision of broadcasting services and accords unjustified advantages to existing analogue operators. The Commission's arguments are threefold as, allegedly, the Italian broadcasting legislation failed to comply with the general authorisation regime under the Authorisation Directive; disregarded the provisions governing the management of frequencies under the Framework Directive and the Authorisation Directive and infringed the provisos on the granting of special rights set out in the Competition Directive.

As to the first issue, Article 3(2) of the Authorisation Directive prescribes that the provision of electronic communications networks or services may only be subject to a general authorisation and that the ensuing rights may be exercised even in the absence of a decision by the relevant National Regulatory Authority. Nonetheless, Articles 23(5) and 25(12) of the "Gasparri" Law provide that until the switch-off - scheduled for 31 December 2008 - operators must obtain, in addition to the general authorisation under Article 15(1) of the "Single Text", an individual broadcasting licence which may only be granted to undertakings that are already carrying out broadcasting activities and that cover no less than 50 per cent of the population. Hence, the Commission concluded that the Italian legislation falls foul of Article 3(2) of the Authorisation Directive insofar as it requires would-be broadcasters to obtain an individual licence rather than a general authorisation and prevents new entrants from accessing the digital broadcasting market.

As regards the management of frequencies under Italian law, the Commission held that Article 27(3) of the "Single Text" and Article 23(3) of the "Gasparri" Law

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infringe the non-discrimination principle stated in Article 9(1) of the Framework Directive and Articles 5(2) and 7(3) of the Authorisation Directive, insofar as they have the effect of preventing undertakings not currently broadcasting from acquiring and using frequencies for the set-up of digital broadcasting networks. As a result, whilst the current broadcasting operators (RAI, Mediaset and TelecomItalia/LA7) have acquired a number of frequencies in excess of what is necessary to substitute their analogue programs with digital ones, new entrants are in fact prevented from penetrating the market. The Commission then assessed whether the Italian provisions, which appear to be designed to facilitate analogue/digital simulcasting by current analogue operators, could be objectively justified in light of the transition to digital broadcasting. Although this effort could amount to a legitimate aim, the Commission took the view that the Italian measures created unnecessary and disproportionate restrictions insofar as they do not limit the number of frequencies the current broadcasters can acquire to what is strictly necessary to substitute their analogue programmes with digital ones and they do not oblige analogue operators to return the frequencies currently used for analogue broadcasting that will be freed after the switch-off.

Finally, the Commission considered that, contrary to Articles 2 and 4 of the Competition Directive which require Member States not to grant or maintain special rights in respect of electronic communication networks, several provisions of Italian law afforded special rights, thus providing a competitive advantage to existing analogue broadcasters. Indeed, Article 25 (11) of the “Gasparri” Law allows, until the date of the switch-off, existing operators to continue analogue terrestrial broadcasting even in the absence of the attendant analogue licence (this is the case, for instance, of Rete 4), to the detriment of others (notably Europa 7) that have obtained such a licence but are effectively prevented from broadcasting due to the lack of frequencies. In addition, Article 2-bis(1) of Law 66/2001, Article 23(1) of the “Gasparri” Law and Article 25(1) of the “Single Text” allow only those operators already active in analogue broadcasting to engage in digital experimentation, thus granting them a clear competitive advantage in the new digital market over operators not currently engaged in analogue broadcasting. Article 23(5) of the “Gasparri” Law and Article 25(1) of the “Single Text” further increase the lead of existing analogue operators over new entrants insofar as only the former can apply, respectively, for digital network operator and digital terrestrial broadcasting licences.

Furthermore, pursuant to Article 23(3) of the Gasparri Law , only operators already transmitting in analogue can engage in trading for frequencies and broadcasting installations for the purpose of setting up digital networks; existing operators are also allowed to convert all their analogue networks into digital networks and obtain licences for each of them including those for which they have not obtained an analogue licence. The Commission then considered whether these provisions could be justified in view of general interest objectives under

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Article 4(1) of the Competition Directive; although ensuring the smooth switchover from analogue to digital broadcasting could be characterised as a general interest aim, the Commission concluded that the Italian measures fell outside the ambit of Article 4(1) insofar as they did not provide that, after the switch-off, broadcasters that obtain digital network operator licences have to return the frequencies used for analogue broadcasting, thus depriving their competitors of the digital dividend deriving from the bigger capacity of digital networks.

Italy now has two months to submit observations on the concerns expressed by the Commission, which may then decide to issue a reasoned opinion under Article 226 of the EC Treaty. However, the Minister of Communications, Paolo Gentiloni, has publicly endorsed the Commission's view and declared that the recently appointed Italian Government is already working on some amendments to the broadcasting legislation in force with a view to bringing it into line with Community law.

"Competition: Commission requests Italy to comply with EU rules on electronic communications", press release of 19 July 2006, IP/06/1019

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