[IT] Case of Centro Europa 7

IRIS 2008-7:1/25

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On 28 July 1999, the competent Italian authorities granted Centro Europa 7 the terrestrial television broadcasting rights on the national level, authorising the installation and the use of a television network utilising analogue technology, according to the provisions of act 249/1997. The administrative measure did not allocate Centro Europa 7 the specific radio frequencies. In fact, in order to be allocated frequencies for such broadcasting activities, Centro Europa 7 had to await the national allocation plan for radio frequencies. In the event, however, the national allocation plan for radio frequencies for such broadcasting activities was never adopted. In the meantime, some broadcasting stations, without authorisation andunder a provisional regime, made *de facto* use of the frequencies. In fact, a series of national laws succeeded one another consolidating the provisional regime, which prevented Centro Europa 7 from effectively making use of its entitlements, to the benefit of incumbent operators. Centro Europa 7 sought justice before the Italian courts and the highest administrative court, the Consiglio di Stato (Council of State), who then, while reviewing the case, asked the European Court of Justice to rule on the interpretation of the provisions of the EC Treaty on freedom to provide services and competition: Directive 2002/21/EC (Framework Directive), Directive 2002/20/EC (Authorisation Directive), Directive Commission Directive 2002/77/EC ('the Competition Directive') and Article 10 of the ECHR, in so far as Article 6 EU, refers thereto. On 31 January 2008, the Court issued a sentence (see IRIS 2008-3: 5) deeming these transitional arrangements to have been constructed in a manner contrary to the NCRF, which implements provisions of the Treaty, in particular those on the freedom to provide services in the area of electronic communication networks and services. Several provisions of the NCRF do call for objective, transparent, non-discriminatory and proportionate criteria to be observed in the process of allocating and assigning radio frequencies. These criteria are not present in the Italian system of legal transitional arrangements.

After the Court of Justice judgement, on 31 May 2008, the *Consiglio di Stato* passed its ruling on the Centro Europa 7 case. The Italian court decided that the *Consiglio di Stato* cannot replace the Government in the assignment of frequencies and neither can it force the Government to allocate them. The Court ordered the Government to rule on the Centro Europa 7 frequencies request, respecting the criteria that were imposed by the European Court of Justice. The

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Consiglio di Stato deferred the definitive decision on the compensation for damages for the Centro Europa 7 until 16 December 2008. In order to determine the compensation for damages, the Italian court considered it necessary to wait for the government regulation. In fact, the compensation will differ depending on whether or not the frequencies will be assigned to Centro Europa 7. In the first case, the damages will be limited to the loss for the period in which the Centro Europa 7 would have made use of the frequencies. In the second case, the damage will correspond to the value of the company (about EUR 3,5 billion).

Moreover, the *Consiglio di Stato* requested that both parties conform to the following demands before 16 December 2008. The court asked the Italian Ministry to: 1) make clear which frequencies were available after the public competition in 1999 and why these frequencies were not assigned to Centro Europa 7; 2) explain the issue on the alleged expiry in 2005 of the Centro Europa 7 grant (on this question there is another judgement pending). Centro Europa 7 will have to: 1) describe its business from 1999 to 2008; 2) explain the reason why it did not take part in the public competition for the frequencies assignment in 2007. The *Consiglio di Stato* asked the *Autorità Garante per le Comunicazioni* (Italian communications authority) to explain the reasons why the plan for radio frequencies for such broadcasting activities was never adopted. Finally, the *Consiglio di Stato* denied the Centro Europa 7 request to interrupt the Rete 4 transitory permission to make use of the frequencies. Therefore, the Centro Europa 7 case is still in a stalemate, at least for the time being.

Consiglio di Stato, 31 maggio 2008, n. 200802622, 200802623, 200802624, 200802625, 200802626

http://www.giustizia-amministrativa.it/webcds/frmRicercaSentenza.asp

Decisions of Consiglio di Stato of 31 May 2008 n. 200802622, 200802623, 200802624, 200802625, 200802626

Case C-380/05 Centro Europa 7 Srl v Ministero delle Comunicazioni e Autorità per le garanzie nelle comunicazioni and Direzione generale per le concessioni e le autorizzazioni del Ministero delle Comunicazioni (ECJ 31 January 2008), available at:

http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62005J0380:EN:HTML

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