

[IT] Supreme Court rules again on the digital terrestrial television channels line-up

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By the judgment handed down on 15 November 2016 and published on 20 January 2017 (no. 1547/2017), the Italian Supreme Court (Joint Sections) has written the last chapter of the seven-year-old battle (see IRIS 2016-3/23) over the Regulation on the digital terrestrial television channel line-up ("LCN"), adopted in 2010 by the Italian Communication Authority (AGCOM) by resolution no. 366/2010/CONS.

The saga that has (likely) ended up with such a decision began right after the approval of the LCN regulation, which was challenged by several local broadcasters who alleged that LCN positions had not been allocated in accordance with the relevant law. The Council of State, the highest administrative court in Italy, took four decisions in August 2012 voiding the LCN regulation in its entirety. Then, in October 2012, AGCOM issued a draft of the new LCN regulation that was eventually adopted after a public consultation in March 2013 (resolution no. 237/13/CONS). This second LCN regulation was also challenged by some broadcasters as it assigned the positions 7, 8 and 9 to national channels rather than to local channels. According to AGCOM, there were no grounds for attributing these positions otherwise, as their allocation was based on the preferences of Italian viewers. Upon a complaint filed by Telenorba, a large local broadcaster, the Council of State, by decision no. 6021/2013, partially invalidated the second LCN regulation, finding that AGCOM had not complied with the principles laid down by the Council of State judgments of 2012. By the same decision, the Council of State appointed an extraordinary commissioner ("commissario ad acta") to amend the LCN plan in accordance with the criteria set forth in the previous decisions. According to the highest administrative court, after the invalidation of the first numbering plan and in order to adopt the new LCN plan, AGCOM should have carried out a survey on viewers' preferences in 2010, when the first LCN regulation was adopted. The same decision is at the roots of two different proceedings. On the one hand, the decision was appealed before the Supreme Court. In judgment no. 1836/2016, the Supreme Court found that, from a practical point of view, it would have been impossible for AGCOM, in 2013, to draft the plan according to viewers' preferences in 2010; in the view of the Supreme Court, the analogue switch-off which had occurred in the period in-between had significantly affected users' habits and this meant that (i) it was practically impossible for AGCOM to carry out such a survey on choices as they were before the switch off;

and (ii) it was necessary for AGCOM to consider the impact of the transition on viewers' preferences in order to release the new LCN plan.

In the meantime, however, the extraordinary commissioner appointed by the Council of State had taken a resolution on April 2015 whereby she held that even adopting the point of view of viewers' preferences in 2010, positions 7, 8 and 9 would have been correctly allocated to national channels.

Telenorba then asked the Council of State to invalidate the extraordinary commissioner's resolution. The highest administrative court delivered its decision two days after the Supreme Court judgment on the appeal of decision no. 6021/2013, rejecting the complaint and upholding the extraordinary commissioner's resolution which had, in the meantime, been deprived of any power as a consequence of Supreme Court judgment no. 1836/2016.

Even this Council of State decision has been challenged before the Supreme Court. In this last chapter of the saga, the Supreme Court has found that the voidance of decision no. 6021/2013 of the Council of State has triggered a situation where all the acts and activities carried out on that legal basis no longer have effect. Nor is it possible, in the Supreme Court's view, to challenge the extraordinary commissioner's resolution, which is no longer effective. Consequently, the Court ruled that Telenorba cannot obtain the LCN positions assigned to national channels.

Suprema Corte di Cassazione, sezioni unite, sentenza n. 1547 del 20 gennaio 2017

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Italian Supreme Court, Joint Sections, decision no. 1547 of 20 January 2017

