CJEU rules that the provision of Italian law constitutes a restriction on freedom of establishment and is contrary to EU law

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On 3 September 2020, the Court of Justice of the European Union (CJEU) - Case C-719/18 - ruled that the provision of Article 43, paragraph 11 of the TUSMAR (Consolidated Law on Media Services) is contrary to EU law, constituting a restriction on freedom of establishment while not being suitable for achieving the objective of the protection of pluralism of information.

According to the said provision, adopted in 2005, it is forbidden for any company whose revenues in the electronic communications sector (including those obtained through subsidiary or affiliated companies) exceed 40% of the overall revenues generated in the sector, to earn revenues within the Integrated Communications System (the SIC) exceeding 10% of the total revenues generated in the SIC.

The rationale behind this provision is to avoid the creation of dominant positions in each of the markets which make up the integrated communications system, with the aim of safeguarding pluralism of information. The SIC is an economic basket that gathers various areas of activity that relate to audiovisual and radio media services; daily and periodical publishing (including press agencies); yearbook publishing; electronic publishing and online advertising; cinema; outdoor advertising; communication initiatives for products and services; and sponsorship. The issue originates from a complaint submitted to Agcom by Italian media company Mediaset for the alleged violation of the aforementioned provision. On 8 April 2016, Mediaset entered into a strategic partnership agreement with the French company Vivendi, through which Vivendi acquired 3.5% of Mediaset’s share capital and 100% of the Mediaset Premium SpA. Due to disputes relating to this agreement, in December 2016 Vivendi launched a hostile acquisition campaign to obtain Mediaset shares, which resulted in Vivendi obtaining 28.8% of Mediaset’s share capital.

By means of Resolution No. 178/17/CONS (see IRIS 2017-6/24 and IRIS 2017-9/24), Agcom established that Vivendi, by exerting control over its subsidiary Telecom Italia, held more than 40% of the electronic communications sector in Italy, meaning that its revenues may exceed 10% of the total SIC revenues. Therefore, Agcom ordered Vivendi to terminate the acquisition of shares in Mediaset or Telecom Italia within twelve months.

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In April 2018, Vivendi, while complying with Agcom's order and transferring 19.19% of Mediaset's shares to a third company, challenged this decision before the Regional Administrative Court of Lazio (TAR Lazio), who asked the CJEU whether the freedom of establishment enshrined in Article 49 of the Treaty on the Functioning of the European Union (TFEU) precludes legislation of a member state which prevents a company registered in another member state, whose revenues in the electronic communications sector at national level, including through subsidiaries or affiliates, exceed 40% of the total revenues generated in that sector, from earning, within the SIC, revenue exceeding 10% of the total revenues generated in this system.

The Court found that Article 49 of the TFEU precludes any national measure which is liable to hinder or render less attractive the exercise by EU nationals of the freedom of establishment guaranteed by the TFEU. The Court furthermore found that this is the case with the provision of Article 43 of the TUSMAR, in line with which a prohibition was imposed on Vivendi from retaining its shareholdings in Mediaset and Telecom Italia, that is, requiring it to put an end to this situation in one or other of those companies.

Furthermore, the judgment states that although a restriction on the freedom of establishment may, in principle, be justified by an objective in the general interest, such as the protection of pluralism of information and the media, the provision of Article 43 is not appropriate for achieving that objective.

With specific reference to electronic communications services, the judgement affirms a clear distinction between the production of content and the transmission of content, stating that the companies active in the electronic communications sector which control the transmission of content do not automatically have control over the production of that content. In addition, the Court notes that the provision in question defines the electronic communications sector too restrictively, since it excludes markets of increasing importance for the transmission of information, such as retail services for mobile phones and other electronic communications services connected to the Internet and satellite broadcasting services.

Finally, the judgement notes that the thresholds of 10% of the SIC revenues and 40% of the electronic communications sector revenues set by Italian law bear no relation to the risk to media pluralism, since these thresholds do not make it possible to determine whether and to what extent a company is actually able to influence the content of the media.

It is now up to the TAR Lazio to establish the modalities for the implementation of the CJEU judgement. The hearing is set for 13 December 2020. At the same time, it is also possible that the Italian Parliament modifies this provision, found to be contrary to EU law; the opportunity could come by the end of the year through the 2019 European Delegation Law, the legislative instrument that transposes

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European directives into the Italian legal system, including Directive 2018/1808 (AVMSD).

Judgment in Case C-719/18 Vivendi SA v Autorità per le Garanzie nelle Comunicazioni

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