



Inadequate legal safeguards in Italy for the allocation of frequencies for digital television broadcasting

In today's **Chamber judgment**¹ in the case of [Europa Way S.r.l. v. Italy](#) (application no. 64356/19) the European Court of Human Rights held, unanimously, that there had been:

a violation of Article 10 (freedom of expression) of the European Convention on Human Rights.

The case concerned the allocation of frequencies for digital television broadcasting. The applicant company had taken part in a bidding process in 2011 which was to allocate digital terrestrial frequencies free of charge. The rules for the process had been set out by AGCOM, the communications regulatory authority. This process had, however, subsequently been suspended by ministerial decree, annulled by a new law in 2012 and replaced with a fee-based selection procedure in 2013. The applicant company challenged these measures in the courts, unsuccessfully.

The Court stressed the important role played by regulatory authorities in upholding and promoting the freedom and pluralism of the media, and the need to ensure their independence.

It found, in particular, that the national courts themselves had refused to apply the 2012 law, finding it to be incompatible with EU law and that applying it would have unlawfully undermined AGCOM's regulatory powers. It was therefore clear that the domestic law did not allow the suspension by ministerial decree and the annulment by the legislature of the original bidding process.

It also found that the applicant company could have reasonably expected that its application for a frequency would be assessed according to the regulatory framework in force at the time. Amending the rules and criteria that AGCOM had legitimately decided in the exercise of its regulatory powers in that process had clearly undermined its independence.

The Court therefore concluded that the legislative and administrative framework on the allocation of digital terrestrial frequencies had not provided adequate safeguards against arbitrariness, in breach of the applicant company's freedom to impart information and ideas.

Principal facts

The applicant, Europa Way S.r.l., is a limited liability company based in Rome. It operates in the television broadcasting sector.

In 2010, following a transition-period from analogue to digital terrestrial television, the Italian communications regulatory authorities (AGCOM) set out rules for the allocation of digital terrestrial frequencies free of charge.

The applicant company took part in a call for bids opened in July 2011, competing for one of the frequencies reserved to new entrants and small operators. The bidding process was, however, suspended by ministerial decree in January 2012, annulled by a new law (Article 3 *quinquies* of Decree-Law no. 16 of 2012) which entered into force in March 2012 and replaced with a fee-based selection procedure in April 2013.

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.

Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

The applicant company challenged these measures in the national courts, arguing in particular that the new law had encroached on the regulatory powers of AGCOM, and was in breach of both the Italian Constitution and the European Convention.

After a preliminary ruling by the Court of Justice of the European Union (the CJEU) requested in these domestic proceedings, in 2018 the *Consiglio di Stato* declined to apply the new law of 2012 because it did not comply with EU law. In particular, the CJEU had stated that it precluded “the annulment, by a national legislature, of an on-going selection procedure for the allocation of radio frequencies conducted by the competent national regulatory authority in circumstances such as those of the case in the main proceedings which was suspended by ministerial order.”

The *Consiglio di Stato* went on to give AGCOM the task of re-examining the regulatory framework retroactively and of deciding whether to retain the original bidding process or to replace it with a fee-based selection procedure. AGCOM confirmed the annulment of the original bidding process, saying that it considered itself bound to comply with the policy directions of Article 3 *quinquies* of Decree-Law no. 16 of 2012.

Ultimately, in October 2019, the *Consiglio di Stato* dismissed the applicant company’s complaints. It found that AGCOM’s decision confirming the fee-based procedure had been taken in full autonomy and independence, bearing in mind the financial interests of the State. It also stated that AGCOM had given sufficient reasons for how the fee-based procedure complied with EU law.

Complaints, procedure and composition of the Court

Relying on Article 10 (freedom of expression), the applicant company complained that the suspension and annulment of the original bidding process had unlawfully undermined its right to impart information and ideas. It argued in particular that the national authorities had interfered with AGCOM’s independent decisions on the allocation of digital terrestrial frequencies and the regulatory framework in place had not ensured adequate protection against arbitrariness in its case.

The application was lodged with the European Court of Human Rights on 12 December 2019.

Judgment was given by a Chamber of seven judges, composed as follows:

Ivana **Jelić** (Montenegro), *President*,
Erik **Wennerström** (Sweden),
Raffaele **Sabato** (Italy),
Frédéric **Krenc** (Belgium),
Davor **Derenčinović** (Croatia),
Alain **Chablais** (Liechtenstein),
Artūrs **Kučs** (Latvia),

and also Ilse **Freiwirth**, *Section Registrar*.

Decision of the Court

Firstly, the Court noted that the rules governing the allocation of frequencies at the time the applicant company had participated in the call for bids had been revoked and replaced by a significantly different procedure. The applicant company’s ability to obtain the rights to use digital terrestrial frequencies had therefore been undermined, amounting to an interference with its freedom to impart information and ideas.

The annulment of the original bidding process had had a clear legal basis, namely Article 3 *quinquies* of Decree-Law no. 16 of 2012. However, the *Consiglio di Stato* had declined to apply this law in its judgment of 2018 because it was incompatible with EU law. It was therefore clear that domestic law,

as interpreted by the *Consiglio di Stato* in the light of the CJEU judgment, did not allow for the suspension by ministerial decree and the annulment by the legislature of the original bidding process. Moreover, even after the *Consiglio di Stato* had declined to apply the new law of 2012, AGCOM had confirmed the annulment of the original bidding process on the basis of that same legislative provision.

The Court therefore considered that the measures interfering with the applicant company's freedom of expression had not complied with the relevant domestic law and had therefore not been lawful within the meaning of Article 10 of the European Convention.

Nor had the "quality of the law" requirement under Article 10 of the Convention been met in the case. The contested measures had stemmed from political concerns raised in parliamentary debates about allocating digital terrestrial frequencies free of charge. They had specifically targeted the selection procedure after it had been launched and participants such as the applicant company had been allowed to bid. The applicant company could therefore have reasonably expected that its application for a frequency would be assessed according to the regulatory framework in force at the time. Amending the rules and criteria that AGCOM had legitimately decided in the exercise of its regulatory powers in that process had clearly undermined its independence.

The Court was not convinced that that independence had been restored in the subsequent proceedings on the case, given that the annulment of the original bidding process had been confirmed on the basis of the same legislative provision which the *Consiglio di Stato* had declined to apply because it would have unlawfully undermined AGCOM's regulatory powers.

The Court concluded that the legislative and administrative framework on the allocation of digital terrestrial frequencies had not provided adequate safeguards against arbitrariness required by the rule of law in a democratic society.

There had been a violation of Article 10 of the Convention.

Just satisfaction (Article 41)

The Court held that Italy was to pay the applicant company 113,828 euros (EUR) in respect of pecuniary damage, EUR 12,000 in respect of non-pecuniary damage and EUR 35,000 in respect of costs and expenses.

The judgment is available only in English.

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