Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
of 13 July 2023 [1]

Case C-255/21

Reti Televisive Italiane SpA (RTI)
v
Autorità per le Garanzie nelle Comunicazioni,
Interested parties:
Elemedia SpA,
Radio Dimensione Suono SpA,
RTL 102, 5 Hit Radio s.r.l.

(Request for a preliminary ruling from the Consiglio di Stato (Council of State, Italy))

(Reference for a preliminary ruling – Audiovisual media services – Directive 2010/13/EU – Television advertising – Article 23 – Maximum transmission times for television advertising – Exception for announcements made by the broadcaster in connection with its own programmes – Advertising for a radio station belonging to the same broadcasting group)

I. Introduction

1. Can advertising by a television broadcaster for a radio station belonging to the same broadcasting group constitute 'announcements made by the broadcaster in connection with its own programmes' within the meaning of Article 23(2) of Directive 2010/13/EU on audiovisual media services [2] and, as such, be exempted from counting towards the maximum transmission times for television advertising laid down in that directive? This is, in essence, the question which the Court of Justice of the European Union ('the Court') must answer in the context of the present reference for a preliminary ruling.

[1] Original language: German.

[2] Directive of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) (Codified version) (OJ 2010 L 95, p. 1).

II. Legal framework

A. European Union law

2. In the present case, the relevant European Union legal framework is provided by Directive 2010/13 in its original version ('Directive 2010/13 (old version)') (1). In addition, the referring court raises the question as to the relevance of Directive (EU) 2018/1808 amending Directive 2010/13 in view of changing market realities [3] to the present case, notwithstanding the fact that the amendments introduced by that directive into Directive 2010/13 are not applicable in the main proceedings (2).

1. Directive 2010/13

3. Recitals 5, 21 to 23, 25, 41, 83, 87, 96 and 97 of Directive 2010/13 (old version) are worded, in extracted form, as follows:

'(5) Audiovisual media services are as much cultural services as they are economic services. Their growing importance for societies, democracy – in particular by ensuring freedom of information, diversity of opinion and media pluralism – education and culture justifies the application of specific rules to these services.

…

(21) For the purposes of this Directive, the definition of an audiovisual media service should … be limited to services as defined by the Treaty on the Functioning of the European Union and therefore should cover any form of economic activity, including that of public service enterprises …

(22) For the purposes of this Directive, the definition of an audiovisual media service should cover mass media in their function to inform, entertain and educate the general public, and should include audiovisual commercial communication … That definition should exclude all services the principal purpose of which is not the provision of programmes, i.e. where any audiovisual content is merely incidental to the service and not its principal purpose. Examples include websites that contain audiovisual elements only in an ancillary manner, such as animated graphical elements, short advertising spots or information related to a product or non-audiovisual service. …

(23) For the purposes of this Directive, the term "audiovisual" should refer to moving images with or without sound, thus including silent films but not covering audio transmission or radio services. …

…

(25) The concept of editorial responsibility is essential for defining the role of the media service provider and therefore for the definition of audiovisual media services. …

[3] Directive of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities (OJ 2018 L 303, p. 69).

…

(41) Member States should be able to apply more detailed or stricter rules in the fields coordinated by this Directive to media service providers under their jurisdiction, while ensuring that those rules are consistent with general principles of Union law. …

…

(83) In order to ensure that the interests of consumers as television viewers are fully and properly protected, it is essential for television advertising to be subject to a certain number of minimum rules and standards and that the Member States must maintain the right to set more detailed or stricter rules and in certain circumstances to lay down different conditions for television broadcasters under their jurisdiction.

…

(87) A limit of 20% of television advertising spots and teleshopping spots per clock hour, also applying during "prime time", should be laid down. The concept of a television advertising spot should be understood as television advertising in the sense of point (i) of Article 1(1) having a duration of not more than 12 minutes.

…

(96) It is necessary to make clear that self-promotional activities are a particular form of advertising in which the broadcaster promotes its own products, services, programmes or channels. In particular, trailers consisting of extracts from programmes should be treated as programmes.

(97) Daily transmission time allotted to announcements made by the broadcaster in connection with its own programmes and ancillary products directly derived from these, or to public service announcements and charity appeals broadcast free of charge, should not be included in the maximum amounts of daily or hourly transmission time that may be allotted to advertising and teleshopping.'

4. Article 1 of Directive 2010/13 (old version) lays down definitions and paragraph 1 of that provision is worded, in excerpted form, as follows:

'1. For the purposes of this Directive, the following definitions shall apply:

(a) "audiovisual media service" means:

(i) a service as defined by Articles 56 and 57 of the Treaty on the Functioning of the European Union which is under the editorial responsibility of a media service provider and the principal purpose of which is the provision of programmes, in order to inform, entertain or educate, to the general public …

(ii) audiovisual commercial communication;

(b) "programme" means a set of moving images with or without sound constituting an individual item within a schedule or a catalogue established by a media service provider and the form and content of which are comparable to the form and content of television broadcasting. Examples of programmes include feature-length films, sports events, situation comedies, documentaries, children's programmes and original drama;

(c) "editorial responsibility" means the exercise of effective control both over the selection of the programmes and over their organisation either in a chronological schedule, in the case of television broadcasts, or in a catalogue, in the case of on-demand audiovisual media services. Editorial responsibility does not necessarily imply any legal liability under national law for the content or the services provided;

(d) "media service provider" means the natural or legal person who has editorial responsibility for the choice of the audiovisual content of the audiovisual media service and determines the manner in which it is organised;

(e) "television broadcasting" or 'television broadcast' (i.e. a linear audiovisual media service) means an audiovisual media service provided by a media service provider for simultaneous viewing of programmes on the basis of a programme schedule;

(f) "broadcaster" means a media service provider of television broadcasts;

…

(h) "audiovisual commercial communication" means images with or without sound which are designed to promote, directly or indirectly, the goods, services or image of a natural or legal entity pursuing an economic activity. Such images accompany or are included in a programme in return for payment or for similar consideration or for self-promotional purposes. Forms of audiovisual commercial communication include, inter alia, television advertising, sponsorship, teleshopping and product placement;

(i) "television advertising" means any form of announcement broadcast whether in return for payment or for similar consideration or broadcast for self-promotional purposes by a public or private undertaking or natural person in connection with a trade, business, craft or profession in order to promote the supply of goods or services, including immovable property, rights and obligations, in return for payment;

…'

5. Art. 4(1) of Directive 2010/13 (old version) provides:

'1. Member States shall remain free to require media service providers under their jurisdiction to comply with more detailed or stricter rules in the fields coordinated by this Directive provided that such rules are in compliance with Union law.'

6. Article 23 of Directive 2010/13 (old version) provides as follows:

'1. The proportion of television advertising spots and teleshopping spots within a given clock hour shall not exceed 20%.

2. Paragraph 1 shall not apply to announcements made by the broadcaster in connection with its own programmes and ancillary products directly derived from those programmes, sponsorship announcements and product placements.'

2. Directive 2018/1808

7. Directive 2018/1808 amended some parts of Directive 2010/13. Recitals 1, 3 and 43 in the preamble to that directive are worded, in excerpted form, as follows:

'(1) The last substantive amendment to Council Directive 89/552/EEC, subsequently codified by Directive 2010/13/EU of the European Parliament and of the Council, was made in 2007 with the adoption of Directive 2007/65/EC of the European Parliament and of the Council. Since then, the audiovisual media services market has evolved significantly and rapidly due to the ongoing convergence of television and internet services. …

…

(3) Directive 2010/13/EU should remain applicable only to those services the principal purpose of which is the provision of programmes in order to inform, entertain or educate. The principal purpose requirement should also be considered to be met if the service has audiovisual content and form which are dissociable from the main activity of the service provider, such as stand-alone parts of online newspapers featuring audiovisual programmes or user-generated videos where those parts can be considered dissociable from their main activity. A service should be considered to be merely an indissociable complement to the main activity as a result of the links between the audiovisual offer and the main activity such as providing news in written form. …

…

(43) Transmission time allotted to announcements made by the broadcaster in connection with its own programmes and ancillary products directly derived from those programmes, or to public service announcements and charity appeals broadcast free of charge, with the exception of the costs incurred for the transmission of such appeals, should not be included in the maximum amounts of transmission time that may be allotted to television advertising and teleshopping. In addition, many broadcasters are part of larger broadcasting groups and make announcements not only in connection with their own programmes and ancillary products directly derived from those programmes, but also in relation to programmes and audiovisual media services from other entities belonging to the same broadcasting group. Transmission time allotted to such announcements should also not be included in the maximum amounts of transmission time that may be allotted to television advertising and teleshopping.'

8. Article 1(1)(b) of Directive 2010/13, as amended by Directive 2018/1808, reads as follows:

'For the purposes of this Directive, the following definitions shall apply:

…

(b) "programme" means a set of moving images with or without sound constituting an individual item, irrespective of its length, within a schedule or a catalogue established by a media service provider, including feature-length films, video clips, sports events, situation comedies, documentaries, children's programmes and original drama;'

9. Directive 2018/1808 replaced Article 23 of Directive 2010/13 with the following wording:

'1. The proportion of television advertising spots and teleshopping spots within the period between 6.00 and 18.00 shall not exceed 20% of that period. The proportion of television advertising spots and teleshopping spots within the period between 18.00 and 24.00 shall not exceed 20% of that period.

2. Paragraph 1 shall not apply to:

(a) announcements made by the broadcaster in connection with its own programmes and ancillary products directly derived from those programmes or with programmes and audiovisual media services from other entities belonging to the same broadcasting group;

(b) sponsorship announcements;

(c) product placements;

(d) neutral frames between editorial content and television advertising or teleshopping spots, and between individual spots.'

B. Italian law

10. Decreto legislativo del 31 luglio 2005, n. 177 – Testo unico dei servizi di media audiovisivi e radiofonici (Legislative Decree No 177 of 31 July 2005 consolidating the provisions on audiovisual and radio media services ('Legislative Decree No 177/2005') provides, under Article 38(2), that the transmission of television advertising spots by free-to-air broadcasters, including analogue broadcasters, at national level, other than the holder of the general public radio and television broadcasting service concession, may not exceed 15% of daily programming time and 18% of a given clock hour, and that any advertising in excess thereof, by a maximum of 2% in any hour, must be offset by a reduction in the preceding or following hour.

11. Article 38(6) of Legislative Decree No 177/2005 provides that Article 38(2) does not apply to announcements made by broadcasters, including analogue broadcasters, in connection with their own programmes and ancillary products directly derived from those programmes, or to sponsorship announcements or to product placements.

12. Article 52 of Legislative Decree No 177/2005 governs the penalties for breach of Article 38.

III. Factual background and questions referred for a preliminary ruling

13. Reti Televisive Italiane s.p.a. ('RTI') owns the television channels 'Canale 5', 'Italia 1' and 'Rete 4'. It also owns 80% of the shares in Monradio Srl, which operates the radio station 'R101'; the remaining 20% of the shares are owned by another company belonging to the same broadcasting group.

14. By three decisions of 19 December 2017, notified on 8 January 2018, and each relating respectively to the channels 'Canale 5', 'Italia 1' and 'Rete 4', the Autorità per le garanzie nelle comunicazioni, the Italian Broadcasting Authority, sanctioned RTI for breaches of the maximum advertising times permitted under national law on the basis of Article 38(2) and Article 52 of Legislative Decree No 177/2005. In that respect, it included advertisements transmitted during the programmes broadcast by 'Canale 5', 'Italia 1' and 'Rete 4', that had advertised the 'R101' radio station.

15. RTI brought three separate actions, identical in content, against the three abovementioned decisions before the Tribunale Amministrativo Regionale per il Lazio (Lazio Regional Administrative Court, Italy). According to RTI's submissions, the announcements broadcast by its three television channels related solely to the presentation of 'R101' programmes and they should, therefore, have been classified as announcements made in connection with its own programmes which, pursuant to Article 38(6) of Legislative Decree No 177/2005, are not to be counted for the purposes of the legislative hourly limits on advertising broadcasting.

16. On the other hand, the Lazio Regional Administrative Court considered that announcements made in connection with the programmes of a *radio* broadcaster could not constitute announcements made by a *television* broadcaster in connection with its 'own programmes', even if that radio broadcaster belonged to the same corporate group as the television broadcaster. Consequently, it dismissed the actions brought by RTI.

17. RTI therefore brought an appeal before the referring court, the Consiglio di Stato (Council of State, Italy).

18. RTI submitted, first, that the fact that 'R101' belonged to a company other than RTI itself was irrelevant, since both of them belonged to the same corporate group. For the purposes of determining whether the exception exempting self-promotion from being counted towards the maximum advertising times was applicable, the decisive factor was the economic unity of the publishing group and not the plurality of the corporate legal entities.

19. Moreover, the practice of 'cross-media' self-promotion between television, radio and internet services is now widespread. According to RTI's submissions, that is also confirmed by recital 43 of Directive 2018/1808 and by the amendment made by that directive to Article 23(2)(a) of Directive 2010/13. This was because, even if that amendment was not yet applicable in the present case, it was nevertheless relevant to the interpretation of the earlier applicable law.

20. In those circumstances, the Consiglio di Stato (Council of State) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling, by the request for a preliminary ruling of 25 March 2021, received on 21 April 2021:

'(a) For the purposes of the Community rules prohibiting excessive advertising, and given the general relevance under [EU] law of the concept of the group or single economic entity, which may be gleaned from numerous sources of anti-trust law (and, in so far as is relevant here, from recital 43 of Directive 2018/1808/EU and from the new wording of Article 23 of Directive 2010/13/[EU]), and notwithstanding the differences which exist under Italian domestic law between the licences [provided for by] Article 5(1)(b) of Legislative Decree No 177/[2005] for television broadcasters and radio broadcasters, is it consistent with [EU] law to interpret national law on broadcasting in the sense that Article 1(1)(a) of Legislative Decree No 177/[2005], as amended, in the current wording of 30 March 2010 (implementing

Directive 2007/65/EC), implies that the process of convergence of the various forms of communication (electronic communications, publishing, including electronic publishing, and the Internet, in all its applications) is all the more applicable among suppliers of television and radio media, especially when they are already integrated into a connected group of undertakings, and applies generally, with the resulting consequences for the interpretation of Article 38(6) of the abovementioned [legislative decree], such that the "broadcaster" may also be the group, as a single economic entity, or on the contrary, in accordance with the abovementioned Community principles and given the independence of the matter of the prohibition on excessive advertising from general anti-trust law, is it not permissible to ascribe relevance, prior to 2018, to the group or to the abovementioned process of convergence and so-called cross-mediality, such that, for the purposes of calculating the limits on advertising broadcasting time, regard is to be had solely to the individual broadcaster, even if it is part of a group (for the reason that such relevance is mentioned only in the consolidated wording of Article 23 of Directive 2010/13/[EU] resulting from Directive 2018/1808/EU)?

(b) In the light of the abovementioned principles of EU law concerning groups and undertakings as a single economic unity, for the purposes of the prohibition on excessive advertising and the supervening versions of Article 23 [of Directive 2010/13/EU], and notwithstanding the abovementioned differences between licences, may it be inferred from the anticompetitive rules of the [integrated communications system] referred to in Article 43 of Legislative Decree No 177/[2005], that the concept of a group "media service provider" (or, to use the appellant's words, a "group publishing undertaking") is relevant for the purposes of the exemption of intra-group cross-medial promotional announcements from the limits on advertising broadcasting time mentioned in Article 38(6) of Legislative Decree [No 177/2005], or on the contrary, must such relevance be excluded, prior to 2018, given the independence of television anti-trust law from the rules governing the limits on advertising broadcasting time?

(c) Does the new wording of Article 23(2)(a) of Directive 2010/13/EU recognise a pre-existing principle of antitrust law according to which the group is generally relevant, or is it innovative, and so, if it is the former, does the new wording describe a legal reality already inherent in EU law – such as will apply even to the case under consideration, which pre-dates the new wording, and such as to affect the interpretations adopted by the [national regulatory authority] and require it in any event to acknowledge the concept of group "media service provider" – or if it is the latter, does the new wording preclude recognition of the relevance of the corporate group in cases arising prior to the introduction of that wording, for the reason that, being innovative in scope, it is inapplicable *ratione temporis* to situations arising prior to its introduction?

(d) In any event, and leaving aside the licensing scheme established by Article 5 of Legislative Decree No 177/2005 and the novelty of [the version of] Article 23 [of Directive 2010/13/EU] introduced in 2018, or in the event that, according to the answer to question (c), the new provision is innovative, rather than recognitive, are the integrating relationships between television and radio – considered generally under antitrust law – because of the general and transversal applicability of the concepts of economic entity and of group, the key to interpreting the limits on advertising broadcasting time, which thus apply with implicit regard to the group undertaking (or, more precisely, to the relationships of control which exist between the undertakings of the group) and to the functional unity of such undertakings, with the result that the intragroup promotion of television and radio

programmes …,[4] or on the contrary, are such integrating relationships irrelevant in the matter of the limits on advertising broadcasting time, such that it must be held that the "own" programmes referred to in (the original version of) Article 23 [of Directive 2010/13/EU] are [the broadcaster's own] in the sense that they belong solely to the broadcaster which promotes them, rather than to the corporate group as a whole, for the reason that that provision is self-standing and does not permit of a systemic interpretation such that it might apply to the group considered as a single economic entity?

(e) Lastly, even if it cannot be interpreted as a rule to be construed against the background of antitrust law, is Article 23 [of Directive 2010/13/EU], in its original version, to be understood in any case as an incentivising provision which describes the peculiar characteristic of promotion, which is exclusively informative and is not intended to persuade anyone to purchase goods or services other than the programmes promoted and, as such, is it to be understood as falling outside the scope of the rules on excessive advertising, and therefore applicable, within the limits of undertakings belonging to the same group, at least in the case of integrated cross-medial promotion, or is it to be understood as a derogation from, and an exception to, the calculation of [the limits on] advertising broadcasting and, as such, as a rule to be interpreted strictly?'

21. In the proceedings before the Court, written observations were submitted by RTI, Elemedia and others (parties to the main proceedings), Italy, Poland and the European Commission. With the exception of Poland, those parties were also represented at the hearing held on 14 September 2022.

IV. Analysis

22. By its five questions referred for a preliminary ruling, which are to be answered together, the referring court essentially seeks to ascertain whether advertising by a television broadcaster on behalf of a radio station belonging to the same corporate group can fall within the exception provided for under Article 23(2) of Directive 2010/13 (old version), which provides that 'announcements made by the broadcaster in connection with its own programmes' do not count towards the limits on advertising broadcasting time laid down in paragraph 1 of that article.

23. In that context, the referring court refers, first, to the concept of an 'undertaking' as an economic entity, as characterised in the field of EU anti-trust law,[5] as well as to the amendment of Article 23(2) of Directive 2010/13 by Directive 2018/1808.

24. In contrast to Article 23(2) of Directive 2010/13 (old version), which exempted only 'announcements made by the broadcaster in connection with its own programmes' from being counted towards the limits on advertising broadcasting time laid down in paragraph 1, Article 23(2)(a) of Directive 2010/13, as amended by Directive 2018/1808, provides that ' announcements made by the broadcaster … in connection with programmes and audiovisual media services from other entities belonging to the same broadcasting group' may also benefit from this exemption. It is true that the amendments made to Directive 2010/13 by Directive 2018/1808 had not yet become applicable in respect of the present case. This is because the more recent Directive 2018/1808 entered into force only as of 18 December 2018, whereas the contested

[4] Translator's note: The sentence here is obviously incomplete.

[5] See judgment of 27 April 2017, *Akzo Nobel and Others* v *Commission* (C-516/15 P, EU:C:2017:314, paragraphs 46 to 48 and the case-law cited).

decisions at issue in the main proceedings were made on 19 December 2017 and notified on 8 January 2018. However, the referring court raises the question as to whether the amendment made to Article 23 of Directive 2010/13 by Directive 2018/1808 expresses a general principle of law which could also affect the interpretation of Directive 2010/13 (old version).

25. Secondly, by its question (e), the referring court requests a preliminary ruling as to the upstream question of whether 'announcements made by the broadcaster in connection with its own programmes' should in fact be regarded as advertising covered by the provisions of Article 23 of Directive 2010/13 (old version) governing the limits on advertising broadcasting time.

26. I will therefore address, first, the concept of self-*promotion* within the meaning of Directive 2010/13 (old version) and explain that 'announcements made by the broadcaster in connection with its own programmes' within the meaning of Article 23(2) of that directive constitute such self-promotion (A). I will then clarify that the question as to whether announcements made in connection with the programmes of a radio media service can constitute 'announcements made by the broadcaster in connection with its own programmes' within the meaning of Article 23(2) of Directive 2010/13 (old version) is to be answered in the negative, without there being any need to answer the question as to whether announcements made in connection with the programmes of a broadcaster belonging to the same group can be classified as 'own programmes'. This is because an announcement made in connection with a radio media service programme cannot, as a general rule, be an announcement made in connection with a 'programme' or an 'audiovisual media service' as defined in Directive 2010/13 (old version) (B). It is therefore only in the alternative that I shall address, lastly, the question regarding the relevance of the concept of a broadcasting group within the context of the dispute in the main proceedings (C).

A. The concept of 'self-promotion' within the meaning of Directive 2010/13 (old version)

27. By its question (e), the Consiglio di Stato (Council of State) asks whether Article 23 of Directive 2010/13 (old version) is 'to be understood … as an incentivising provision which describes the peculiar characteristic of promotion, which is exclusively informative and is not intended to persuade anyone to purchase goods or services other than the programmes promoted and, as such, is … to be understood as falling outside the scope of the rules on excessive advertising'.

28. However, it is clear from Article 1(1)(h) and (i) of Directive 2010/13 (old version) that that question must be answered in the negative. It follows from those provisions that announcements made in connection with programmes of a television broadcaster are to be classified as television advertising. Hence, they are exempted from being counted towards the limits on advertising broadcasting time only if they are announcements made by a television broadcaster in connection with its own programmes.

29. Article 1(1)(h) of Directive 2010/13 (old version) defines 'audiovisual commercial communication' as meaning 'images with or without sound which are designed to promote, directly or indirectly, the goods, services or image of a natural or legal entity pursuing an economic activity. Such images accompany or are included in a programme in return for payment or for similar consideration or for self-promotional purposes. Forms of audiovisual commercial communication include, inter alia, television advertising …'.

30. According to Article 1(1)(i) of Directive 2010/13 (old version) 'television advertising' means 'any form of announcement broadcast whether in return for payment or for similar consideration or broadcast for self-promotional purposes by a public or private undertaking or natural person in connection with a trade, business, craft or profession in order to promote the supply of goods or services … in return for payment.'

31. The transmission of television signals, including the transmission of such signals by cable television, constitutes a service within the meaning of Article 56 TFEU.[6] This was expressly stated in recital 6 of the preamble to Directive 89/552/EEC[7] – 'Television without Frontiers', which was the predecessor of Directive 2010/13. Recitals 21 and 35 of Directive 2010/13 (old version) also refer to the 'services' covered by the concept of audiovisual media services and by that directive. Furthermore, according to Article 1(1)(a)(i), an 'audiovisual media service' means a service as defined by Articles 56 and 57 TFEU, the principal purpose of which is the provision of programmes, in order to inform, entertain or educate, to the general public.

32. Announcements made in connection with the programmes of a broadcaster are therefore designed to promote services within the meaning of Article 1(1)(h) of Directive 2010/13 (old version) and are thus to be classified as 'audiovisual commercial communication' as defined in that provision. Similarly, such announcements fall within the concept of 'television advertising' as defined in Article 1(1)(i) of Directive 2010/13 (old version), since they constitute an announcement broadcast for self-promotional purposes by a public or private undertaking in connection with a business, in order to promote the supply of services in return for payment.

33. Seeking – as RTI does – to draw an ostensible distinction between, on the one hand, neutral announcements of a purely informative nature and, on the other hand, advertising in the sense of promoting a product or service is therefore fallacious. Even if announcements made in connection with the programmes of a broadcaster are informative, they are nevertheless aimed at encouraging viewers to watch those programmes and thus at the supply of services in return for payment. Moreover, the exception provided for under Article 23(2) of Directive 2010/13 (old version) would be unnecessary if 'announcements made by the broadcaster in connection with its own programmes' actually fell completely outside the scope of the concept of television advertising and thus outside the scope of Article 23(1).

34. Likewise, the fact that Article 23(2) of Directive 2010/13 (old version) refers to '*announcements* made by the broadcaster in connection with its own programmes',[8] rather than to '*advertisements* issued by the broadcaster in connection with its own programmes', is insufficient to call into question the classification of such announcements as self-promotion and thus as television advertising. On the contrary, the term 'announcements in connection with its own programmes' is simply a synonym for 'advertisements in connection with its own programmes'. This is confirmed by the fact that the French version of Article 23(2) of Directive 2010/13 (old version) uses the formulation '*messages diffusés par l'organisme de radiodiffusion télévisuelle en ce qui concerne ses propres programmes*'. In the French version of the directive, the term

6 See judgment of 13 December 2007, *United Pan-Europe Communications Belgium and Others* (C-250/06, EU:C:2007:783, paragraph 28 and the case-law cited).

7 Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities (OJ 1989 L 298, p. 23).

8 See also, for example, DE: '*Hinweise des Fernsehveranstalters auf eigene Sendungen*', FR: '*messages diffusés par l'organisme de radiodiffusion télévisuelle en ce qui concerne ses propres programmes*' and IT: '*annunci dell'emittente relativi ai propri programmi*'.

'*messages*' is found in recital 85 in conjunction with '*publicitaires*' ('*messages publicitaires*'), whereas in other language versions terms such as 'advertising' or 'insertion of spot advertising' [9] are used there.

35. Accordingly, recital 96 of Directive 2010/13 (old version) also clarifies that 'self-promotional activities are a particular form of advertising in which the broadcaster promotes its own products, services, programmes or channels'. Furthermore, with regard to the previous Directive 89/552, the Court has explained that incentives to watch the other programmes of a broadcaster constitute advertising. [10]

36. Moreover, contrary to the argument advanced by RTI, it cannot be inferred from the second sentence of recital 96 of Directive 2010/13 (old version) – which states that 'in particular, trailers consisting of extracts from programmes should be treated as programmes' – that announcements concerning future programming do not fall within the concept of advertising. This is because the broadcasting of trailers is designed to promote services (namely those programmes from which the extracts have been made to form the trailers) (Article 1(1)(h) of Directive 2010/13 (old version)). Likewise, it is also an announcement broadcast in order to promote the supply of those services (Article 1(1)(i)). As Italy submitted during the hearing, it must therefore be assumed that broadcasting trailers constitutes advertising for the corresponding programmes. Consequently, trailers also are only covered by the exception provided for under Article 23(2) if those trailers are for the 'own' programmes of the television broadcaster transmitting them.

37. Contrary to RTI's submissions, the question of whether the broadcaster is a free-to-air broadcaster or a fee-based private broadcaster is of no relevance to the criterion that the services are to be supplied in return for payment. This is because free-to-air broadcasters are usually financed by advertising. Self-promotion is aimed at achieving higher audience ratings, which are an essential basis of assessment for the price of advertising time. Hence, broadcasting advertisements for free-to-air programmes also constitutes an announcement aimed at indirectly promoting the provision of advertising services in return for payment.

38. It is true that, according to case-law, programmes broadcast by public radio broadcasting bodies that are financed by radio broadcasting contributions set and levied by the state, or by means of state subsidies, do not constitute a supply of services effected for consideration within the meaning of VAT law. [11]

39. However, this does not mean that announcements made in connection with the programmes of such radio broadcasting bodies are neither 'audiovisual commercial communication' nor 'television advertising' within the meaning of Article 1(1)(h) and (i) of Directive 2010/13 (old version), at least in cases where those radio broadcasting bodies also broadcast advertising in return for payment. [12] Point (i) expressly refers also to public undertakings. Furthermore, recital 21 clarifies that the definition of an 'audiovisual media service' should cover services as defined by the Treaty on the Functioning of the European Union and therefore should cover any form of economic activity, including that of public service enterprises.

[9] See, for example, DE: '*Werbeeinschübe*', EN: '*advertising*' and IT: 'pubblicità'.

[10] Judgment of 18 October 2007, *Österreichischer Rundfunk* (C-195/06, EU:C:2007:613, paragraph 45).

[11] See judgments of 22 June 2016, *Český rozhlas* (C-11/15, EU:C:2016:470, paragraphs 23 to 28, 36 and operative part), and of 16 September 2021, *Balgarska natsionalna televizia* (C-21/20, EU:C:2021:743, paragraphs 32 to 34, 39 and point 1 of the operative part).

[12] The question of how to assess the particular case of self-promotion by a public broadcaster that is purely tax-funded and does not broadcast any advertising for third parties can remain open. In any event, a particular case of that kind is not at issue in the present proceedings.

40. That is logical. Designing the specific form of the rules governing advertising time differently to reflect the different financing models of different broadcasters may be justified in view of the fact that those broadcasters are in different situations in that respect.[13] However, there is no apparent reason to exempt a certain group of television broadcasters in principle and a priori from the rules governing television advertising. This is because the objective of protecting consumers, as television viewers, from excessive advertising, which underlies the directives on the provision of audiovisual media services,[14] should apply to all television broadcasters that broadcast advertising for third parties.

41. All of the above confirms that announcements made in connection with the programmes of a broadcaster constitute television advertising. Television advertising is exempted from being counted towards the limits on advertising broadcasting time laid down in Article 23(1) of Directive 2010/13 (old version) only in cases where it constitutes 'announcements made by the broadcaster in connection with its own programmes', as stipulated in the second paragraph of that provision.

42. The exemption of self-promotion from being counted towards the limits on advertising broadcasting time is a privilege granted to television broadcasters by the legislator. It appears to be justified, on the one hand, by the particular importance of these broadcasters for the public interest, which is emphasised in particular in recital 5 of Directive 2010/13 (old version) (freedom of information, diversity of opinion and media pluralism). On the other hand, it is to be assumed that television broadcasters do not make excessive use of the privilege allowing them to broadcast (gratuitous) self-promotion, since doing so could compromise the attractiveness of their programmes for viewers (and thus also, indirectly, their revenue from paid advertising services).

43. By the last part of question (e), the referring court asks whether Article 23(2) of Directive 2010/13 (old version) is a derogating provision that must therefore be interpreted strictly. In that regard, RTI asserts that the Court's case-law in *ARD* specifies that restrictions on the fundamental freedom to broadcast television programmes must be given a restrictive interpretation.[15] In that judgment, however, the Court merely clarified that such a restriction is to be interpreted strictly if it is not drafted in clear and unequivocal terms.

44. However, the restriction laid down in Article 23(1) of Directive 2010/13 (old version) on the proportion of broadcasts for television advertising spots and teleshopping spots, which is at issue in the present case, is drafted in clear and unequivocal terms. It expresses the principle that, in the area of television advertising, the freedom to provide services is restricted. This is because the basic rule in that respect is not free, unlimited broadcasting, but its temporal limitation in the interests of consumers as television viewers, which is emphasised in recital 83 of Directive 2010/13 (old version). As the Court has held, the meaning of the definition of 'television advertising' in particular must be assessed with regard to that objective.[16] Similarly, Article 23(2), which provides that 'announcements made by the broadcaster in connection with its own programmes' are not covered by the limits on broadcasting time, is drafted in clear and unequivocal terms.

[13] See, by analogy, judgment of 18 July 2013, *Sky Italia* (C-234/12, EU:C:2013:496, paragraphs 18 to 23).

[14] See judgments of 18 October 2007, *Österreichischer Rundfunk* (C-195/06, EU:C:2007:613, paragraphs 26 to 28), and of 18 July 2013, *Sky Italia* (C-234/12, EU:C:2013:496, paragraph 17 and the case-law cited), as well as recital 83 of Directive 2010/13 (old version).

[15] Judgment of 28 October 1999, *ARD* (C-6/98, EU:C:1999:532, paragraphs 29 to 31).

[16] See the references cited in footnote 14.

45. Even for the purposes of interpreting the directive in the light of the fundamental freedoms, there are no apparent indications to suggest that the advertising restriction laid down in Article 23(1) of Directive 2010/13 (old version) constitutes a disproportionate restriction on the freedom to provide services. As the Court itself has already held, the rules on the television advertising limits laid down by the directives on the supply of audiovisual media services are intended to establish a balanced protection, on the one hand, of the financial interests of television broadcasters and advertisers, and, on the other hand, of the interests of rights holders, namely writers and producers, in addition to consumers as television viewers. To that extent, they may justify restrictions on the freedom to provide services in relation to television advertising. [17]

46. Accordingly, the restriction on the freedom to provide advertising services laid down in Article 23(1) of Directive 2010/13 (old version) is not to be given a particularly restrictive interpretation, and the exception regarding announcements made in connection with 'own' programmes, as laid down in the second paragraph of that provision, is not to be given a particularly broad interpretation. On the contrary, both paragraphs are to be interpreted in accordance with their wording as well as the purpose and scheme of Directive 2010/13 (old version). [18]

B. The concept of 'programme' as defined by Directive 2010/13 (old version)

47. By its questions (a) to (d), the referring court seeks, in essence, to ascertain whether announcements made by a television broadcaster in connection with the programmes of a radio broadcaster belonging to the same media group can fall within the concept of 'announcements made by the broadcaster in connection with its own programmes' as referred to in Article 23(2) of Directive 2010/13 (old version).

48. That this is not the case in principle is already clear from that definition, read in conjunction with the definition of the concept of 'programme' laid down in Article 1(1)(b) of Directive 2010/13 (old version) and, additionally, with the definition of the concept of 'television broadcasting' or 'television broadcast' laid down in point (e) of the same provision.

49. It is apparent from those definitions that a 'programme' means a 'set of moving images with or without sound' and that 'television broadcasting' or a 'television broadcast' means an 'audiovisual media service provided by a media service provider for simultaneous viewing of programmes on the basis of a programme schedule'. In that regard, announcements made in connection with programmes or broadcasts of a radio broadcaster which contain only sound and no image cannot constitute 'announcements … in connection with its own programmes' within the meaning of Article 23(2) of Directive 2010/13 (old version).

50. That is logical given that radio broadcasting services are not even covered by the scope of the directives on audiovisual media services. In that regard, the Commission had originally included radio broadcasting in its 1984 Green Paper entitled 'Television without Frontiers'. [19] The Commission's original proposal for Directive 89/552 – 'Television without Frontiers' also

[17] See judgments of 23 October 2003, *RTL Television* (C-245/01, EU:C:2003:580, paragraph 71 and the case-law cited), and of 18 July 2013, *Sky Italia* (C-234/12, EU:C:2013:496, paragraph 18 and the case-law cited).

[18] See, to that effect, judgment of 24 November 2011, *Commission* v *Spain* (C-281/09, EU:C:2011:767, paragraphs 48 and 49).

[19] See Television without Frontiers, Green Paper on the establishment of the common market for broadcasting, especially by satellite and cable, COM(84) 300 final.

provided for this.[20] However, notably at the insistence of the German *Bundesländer* (federal states), which feared for their regulatory powers in that area, radio broadcasting was ultimately removed from the scope of Directive 89/552.[21] That also remained the case upon the adoption of Directive 2010/13. According to recital 23 of that directive, the term 'audiovisual' should refer to moving images with or without sound, thus including silent films but not covering audio transmission or radio services. As Elemedia observed at the hearing in the present proceedings, that remains the case following the amendment of that directive by Directive 2018/1808 (see Article 1(1)(b) of Directive 2010/13 as amended by Directive 2018/1808).

51. As Elemedia has also observed, radio services, on the one hand, and audiovisual media services, on the other hand, continue to be separate markets despite cross-mediality and convergence of audiovisual services. Hence, it is probably for that reason also that the EU legislator chose to continue to exclude radio broadcasting services from the scope of Directive 2010/13 as amended by Directive 2018/1808, despite that convergence, which the Commission itself had addressed in a Green Paper in 2013[22] and which is mentioned in recital 1 of Directive 2018/1808.

52. The interpretation advocated by RTI, according to which advertising by a television broadcaster for programmes or broadcasts of a radio broadcaster could also be exempted, as self-promotion, from being counted towards the limits on advertising broadcasting time, would thus be an impermissible extension of the scope of Directive 2010/13. Such an extension could lead to distortions of competition to the detriment of radio media services not forming part of a corporate group that includes television broadcasters, and thus to distortions of competition on a market which, according to the legislator's intention, falls completely outside the scope of the EU rules on audiovisual media services.

53. Consequently, the question of whether announcements made in connection with programmes of a radio broadcaster fall within the scope of Article 23(2) of Directive 2010/13 (old version) is not affected by the latitude granted to Member States under Article 4(1), as explained by recitals 41 and 83. According to that provision, they may provide for both stricter and more detailed rules within the threshold laid down in Article 23 of Directive 2010/13 (old version).[23] In the present case, however, it is necessary to ascertain which programmes are covered by the limits on broadcasting time, and thus to determine the EU legal framework within which the Member States actually have any regulatory scope in the first place.

54. Announcements made by a television broadcaster in connection with programmes or broadcasts of a radio broadcaster that contain only sound and no images cannot therefore be regarded as announcements made in connection with 'programmes' within the meaning of Article 23(2), read in conjunction with Article 1(1)(b) of Directive 2010/13 (old version).

[20] See, in particular, Article 21 of the Commission proposal, as well as of the amended proposal, for a Council Directive on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of broadcasting activities, COM(86) 146 final and COM(88) 154 final.

[21] See, in that regard, Bundesverfassungsgericht (Federal Constitutional Court, Germany), judgment of 22 March 1995, 2 BvG 1/89, BVerfGE 92, 203 – EC Television Directive, paragraphs 39 and 40.

[22] See Green Paper on Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values, COM(2013) 231 final.

[23] See judgment of 18 July 2013, *Sky Italia* (C-234/12, EU:C:2013:496, paragraphs 13 and 14); see also judgment of 17 February 2016, *Sanoma Media Finland – Nelonen Media* (C-314/14, EU:C:2016:89, paragraphs 33, 55 and 60).

55. It is true that radio stations now also have websites on which their programmes are available, often accompanied by images. However, if those audiovisual elements are merely incidental and serve only to complement the principal activity of the radio broadcaster, those elements cannot transform radio broadcasts into 'audiovisual media services' that would fall within the scope of Directive 2010/13 (old version).

56. Thus, in a case concerning videos that were accessible via the website of the online version of a newspaper, the Court held that such videos can be included in the concept of 'programme' within the meaning of Article 1(1)(b) of Directive 2010/13 (old version), provided that their form and content are comparable to the form and content of television broadcasting. This could potentially be the case for radio broadcasts accompanied by images.

57. However, the Court clarified that the videos in question are covered by the concept of 'audiovisual media service' within the meaning of Article 1(1)(a)(i) (and thus by the scope of the directive) only if the service consisting of making those videos available constitutes a principal purpose in its own right that is dissociable from the provider's actual activity, and is not merely an indissociable complement to that activity (see also recital 22). That is not the case where the audiovisual content is not the principal purpose, as in the case of websites that contain audiovisual elements only in an ancillary manner. [24]

58. Hence, despite the audiovisual elements it contains, the website of a radio station is not to be regarded as an audiovisual media service if those elements are merely incidental and serve only to complement the radio service. Accordingly, announcements made in connection with programmes of a radio broadcaster can also only be 'announcements made … in connection with … programmes' within the meaning of Article 23(2) of Directive 2010/13 (old version), if those programmes are an independent audiovisual media service that is dissociable from the actual activity of the radio broadcaster.

59. It is for the referring court to assess whether the 'R101' programmes advertised in the present case contained audiovisual elements and, if so, whether these elements merely constituted a complement to the radio programmes in question or were a separate audiovisual media service. Based on the information available to the Court and the oral arguments presented at the hearing, there is no evidence to suggest that the latter is the case.

60. In any event, announcements made in connection with programmes of a radio broadcaster can only constitute 'announcements made by the broadcaster in connection with its own programmes' within the meaning of Article 23(2) of Directive 2010/13 (old version), if they are not merely announcements made in connection with 'programmes' but are also announcements made in connection with 'own' programmes within the meaning of the directive. It is to this second criterion that I now turn.

C. The concept of an 'own programme' within the meaning of Directive 2010/13 (old version)

61. According to RTI's submissions, it suffices that both broadcasters belong to the same group in order for the announcements made by a television broadcaster in connection with the programmes of another broadcaster to be regarded as 'announcements … in connection with its own programmes' within the meaning of Article 23(2) of Directive 2010/13 (old version). That

[24] Judgment of 21 October 2015, *New Media Online* (C-347/14, EU:C:2015:709, paragraphs 24, 26, 33, 34 and 37 and operative part). This case-law has been incorporated into recital 3 of Directive 2018/1808.

follows from the concept of an undertaking as a single economic entity, as developed by the Court in the field of anti-trust law, which is now also recognised in Article 23(2)(a) of Directive 2010/13 as amended by Directive 2018/1808.

62. Following the amendment of Article 23(2) of Directive 2010/13 (old version) by Directive 2018/1808, it is no longer only 'announcements made by the broadcaster in connection with its own programmes' but also 'announcements made by the broadcaster … in connection with programmes and audiovisual media services from other entities belonging to the same broadcasting group' that are exempt from being counted towards the limits on advertising broadcasting time laid down in paragraph 1 of that provision.

63. Recital 43 of Directive 2018/1808 suggests, however, that this is a new provision and thus a change to the previous legal situation. That recital states that 'many broadcasters are part of larger broadcasting groups and make announcements not only in connection with their own programmes …, but also in relation to programmes and audiovisual media services from other entities belonging to the same broadcasting group' and that the 'transmission time allotted to such announcements should also not be included in the maximum amounts of transmission time that may be allotted to television advertising and teleshopping'.

64. Article 23(2)(a) of Directive 2010/13, as amended by Directive 2018/1808, which had not yet become applicable at the time of the facts of the present case (see point 24 of this Opinion), cannot therefore be regarded as a clarification of the pre-existing legal situation.

65. Nor, contrary to the arguments advanced by RTI, can this new rule be understood as the expression of a general principle according to which the undertakings in a group form a single economic entity, within which liability for the actions of a subsidiary must be imputed to the parent company.

66. In support of that argument, RTI pleads both anti-trust law,[25] as well as the example taken from public procurement law, according to which groups of economic operators may, in certain cases, draw upon the capacities of members of the group for the purposes of performing public contracts.[26] However, those concepts are based on legal and organisational interconnections between the undertakings, which justify a reciprocal attribution of actions and capacities within the business unit, and which can be explained on the basis of the regulatory environment prevailing in the respective legal spheres of anti-trust law and public procurement law.[27] Their logic may be applicable to the audiovisual media services sector if an undertaking from that sector has to be assessed from the perspective of anti-trust law or participates in a public procurement procedure.

67. However, for the purposes of answering the question of when a television broadcaster's programme is to be regarded as an 'own programme', Directive 2010/13 (old version) focuses, in contrast to the concepts that I have just discussed, not on the legal and organisational structures

[25] See the judgment previously cited in footnote 5 of 27 April 2017, *Akzo Nobel and Others* v *Commission* (C-516/15 P, EU:C:2017:314, paragraphs 46 to 48 and the case-law cited).

[26] See the fourth subparagraph of Article 63(1) read in conjunction with Article 19(2) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65).

[27] Article 83(4) to (6), read in conjunction with recital 150 of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ 2016 L 119, p. 1, corrected in OJ 2018 L 127, p. 2) also shows that the concept of an 'undertaking' in the field of anti-trust law is not automatically transferable to other regulatory situations in cases where that is not expressly regulated; see, in that regard, Opinion of Advocate General Campos Sánchez-Bordona in *Deutsche Wohnen* (C-807/21, EU:C:2023:360, points 44 to 50).

and interconnections of undertakings, but rather on the editorial responsibility for the programmes in question. As recital 25 states, the concept of editorial responsibility is essential for defining the role of the media service provider and therefore for the definition of audiovisual media services. Accordingly, Article 1(1)(a)(i) provides that an 'audiovisual media service' is a service which is under the editorial responsibility of a media service provider. According to point (d) of that provision, a 'media service provider' means the natural or legal person who has editorial responsibility for the choice of the audiovisual content of the audiovisual media service and determines the manner in which it is organised. According to point (f) of that provision, a 'broadcaster' means a media service provider of television broadcasts.

68. Article 1(1)(c) of Directive 2010/13 (old version) provides that 'editorial responsibility' means the exercise of effective control both over the selection of the programmes and over their organisation either in a chronological schedule, in the case of television broadcasts, or in a catalogue, in the case of on-demand audiovisual media services. In that regard, editorial responsibility does not necessarily imply any legal liability under national law for the content or the services provided.

69. Contrary to the arguments advanced by RTI at the hearing in the present proceedings, that concept of editorial responsibility within the meaning of Directive 2010/13 (old version) cannot be equated with the type of control that the Court has relied on in order to hold that a parent company and a subsidiary form a single economic entity. In that respect, the Court relied on the fact that, although having a separate legal personality, a subsidiary does not determine independently its own conduct on the market, but essentially carries out the instructions given to it by the parent company, having regard especially to the economic, organisational and legal links between those two legal entities. [28]

70. Despite the possible existence of such links between RTI and the broadcasters which it owns, it seems unlikely, as Italy observed at the hearing, that a holding company such as RTI would determine the specific content of the programmes and the detailed selection of the broadcasts of those broadcasters. According to Elemedia, RTI is merely a financial holding company that holds stakes in several broadcasters, each of which has editorial responsibility for its own programmes.

71. By contrast, RTI argued that it is not merely a financial holding company, but that it ultimately determines the editorial line of all the companies in the group. According to RTI's submissions, that is to be equated with editorial responsibility within the meaning of Directive 2010/13 (old version). In that respect, it relies in particular on the Court's conclusion in the case *Baltic Media Alliance* that editorial responsibility means that the person has power to make a final decision as to the audiovisual offer as such. [29]

72. Ultimately, it will therefore be a matter for the referring court to determine whether the control exercised by RTI over both the programmes and the programming of 'R101' (the radio station for whose programmes the advertisements were broadcast) as well as over the programmes of 'Canale 5', 'Italia 1' and 'Rete 4' (the television channels which broadcast advertisements for 'R101') is to be equated with 'editorial responsibility' within the meaning of Directive 2010/13 (old version).

[28] See judgment of 27 April 2017, *Akzo Nobel and Others* v *Commission* (C-516/15 P, EU:C:2017:314, paragraph 52 and the case-law cited).

[29] Judgment of 4 July 2019, *Baltic Media Alliance* (C-622/17, EU:C:2019:566, paragraph 43).

73. Only if that is determined to have been the case, not only for the channels 'Canale 5', 'Italia 1' and 'Rete 4' but also for 'R101', could the announcements made in connection with the relevant programmes of 'R101' constitute 'announcements made by the broadcaster in connection with its own programmes' within the meaning of Article 23(2) of Directive 2010/13 (old version) – always assuming that those programmes do in fact constitute 'audiovisual media services' within the meaning of the directive (see points 61 and 62 above).

V. Conclusion

74. In the light of the foregoing considerations, I propose that the Court should answer the questions referred for a preliminary ruling by the Consiglio di Stato (Council of State, Italy) as follows:

Article 23(2), read in conjunction with Article 1(1)(a) to (f) as well as (h) and (i) of Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive), in the version prior to the amendment by Directive (EU) 2018/1808,

must be interpreted as meaning that announcements made by a television broadcaster in connection with programmes or broadcasts of a radio broadcaster are not covered by the concept of 'announcements made by the broadcaster in connection with its own programmes' within the meaning of that provision. There is an exception to this only if the programmes advertised are independent audiovisual media services within the meaning of Article 1(1)(a)(i) that are dissociable from the principal purpose of the activity of the radio broadcaster and for which the television broadcaster has editorial responsibility within the meaning of Article 1(1)(c).