Court of Justice of the European Union: Judgments on State aid and digital terrestrial television operators in Spain

IRIS 2018-2:1/5

Ronan Ó Fathaigh
Institute for Information Law (IViR), University of Amsterdam

On 20 December 2017, the Court of Justice of the European Union (CJEU) delivered three judgments concerning measures implemented by Spain for the deployment of digital terrestrial television ("DTT") in remote and less urbanised areas of Spain. All three judgments concerned a 2013 European Commission decision which found that the Spanish system of granting aid to the operators of the terrestrial television platform for the deployment, maintenance and operation of DTT in remote and less urbanised areas was incompatible with EU state aid rules (see IRIS 2013-7/5). The Commission found that the measure did not respect the principle of technological neutrality, it was not proportionate and was not an appropriate instrument for ensuring that the residents of the areas received free-to-air channels. Notably, the Commission ordered the recovery of incompatible aid from DTT operators.

The first judgment (Joined Cases C-66/16 P to C-69/16 P) concerned the appeal by the Autonomous Communities of the Basque Country, Galicia and Catalonia, and a number of DTT operators. The CJEU rejected all six grounds of appeal put forward by the appellants, which mainly concerned arguments that the General Court, which had upheld the Commission's decision, had erred in its analysis of Member State discretion to define services of general economic interest ("SGEI"), and the first condition laid down in the landmark Altmark judgment that the recipient undertaking must have public service obligations and that the obligations must be clearly defined (see IRIS 2004-7/4 and 2009-5/5). The CJEU held that the General Court had not misconstrued the scope of the review that it had had to carry out in respect of the categorisation of a service as an SGEI by a Member State, since it held that, in the absence of a clear definition of the service at issue as an SGEI in national law, the first Altmark condition was not satisfied. In the second judgment (Case C-81/16 P), the CJEU similarly rejected Spain's appeal in respect of the Commission's decision.

However, in the final judgment (C-70/16 P), the CJEU upheld the appeal by the Autonomous Community of Galicia and the operator Retegal. In particular, the appellants took issue with the General Court for confirming the Commission's analysis concerning the selectivity of the measure at issue, arguing that the Commission's statement of reasons in that connection was inadequate. The CJEU noted that EU law prohibits selective aid - that is to say aid that, under a

particular legal regime, favours certain undertakings or the production of certain goods over others which, in the light of the objective pursued by that regime, are in a comparable factual and legal situation. It added that the examination of the condition relating to the selectivity of an aid measure must be supported by sufficient reasons for allowing a full judicial review of the question of whether the situation of the operators benefiting from the measure was comparable with that of the operators excluded from it. The CJEU observed that the General Court considered that the Commission's statement of reasons indicated that the measure in question benefited only the broadcasting sector and that, within that sector, the measure in question applied only to undertakings active on the terrestrial platform market. The CJEU pointed out that neither the Commission's decision nor the General Court's judgment contained any indication of the reasons why (a) undertakings active in the broadcasting sector should be regarded as being in a factual and legal situation comparable to that of undertakings active in other sectors, and (b) undertakings using terrestrial technology should be regarded as being in a factual and legal situation comparable to that of undertakings using other technologies. The Commission argued that no reasoning was necessary in that regard, because the selectivity condition is automatically satisfied if a measure applies exclusively to a specific economic sector or to undertakings in a particular geographic area. The CJEU noted in that regard that a measure which benefits only one economic sector or some of the undertakings in that sector is not necessarily selective. It is selective only if, within the context of a particular legal regime, it has the effect of conferring an advantage on certain undertakings over others (either in a different sector or the same sector) which are, in the light of the objective pursued by that regime, in a comparable factual and legal situation. In the light of this conclusion, the CJEU set aside the judgment of the General Court and annulled the Commission's 2013 decision, on the basis of the infringement of essential procedural requirements.

Judgment of the Court (Fourth Chamber), Joined Cases C-66/16 P Comunidad Autónoma del País Vasco and Itelazpi v Commission, C-67/16 P Comunidad Autónoma de Cataluña and CTTI v Commission, C-68/16 P Navarra de Servicios y Tecnologías v Commission and C-69/16 P Cellnex Telecom and Retevisión I v Commission, 20 December 2017

http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d2dc30d6a7b60257416f44aca431977e29040991.e34KaxiLc3qMb40Rch0SaxyNahj0?text=&docid=198060&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=460355

Judgment of the Court (Fourth Chamber), Spain v Commission, Case C-81/16 P, 20 December 2017

http://curia.europa.eu/juris/document/document.jsf?text=&docid=198065&pageIndex=0&doclang=en&mode=req&dir=&occ=first&

part=1&cid=460996

Judgment of the Court (Fourth Chamber), Comunidad Autónoma de Galicia and Retegal v Commission, Case C-70/16 P, 20 December 2017

http://curia.europa.eu/juris/document/document.jsf?text=&docid=198062&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=460778

Commission Decision of 19 June 2013 on State aid SA.28599 (C 23/10 (ex NN 36/10, ex CP 163/09)) implemented by the Kingdom of Spain for the deployment of digital terrestrial television in remote and less urbanised areas (outside Castilla-La Mancha)

http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2014:217:FULL&from=EN