Court of Justice of the European Communities: Decision on the Regulation of Conditional Access Services for Digital Television

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On 22 January 2002, the European Court of Justice (ECJ), in a preliminary ruling, answered the questions raised by the Spanish Tribunal Supremo (Supreme Court) on the interpretation of some provisions of European Law relating to the regulation of conditional access services for digital television. Those questions were raised in administrative law proceedings brought by the Spanish digital platform Canal Satélite Digital (CSD) before the Supreme Court for a declaration that some sections of the Spanish Decree 136/1997 (which deals with conditional access services for digital television, CAS) were void.

According to CSD, the Spanish Decree 136/1997 unduly obliged CAS operators to register details of themselves and of their equipment, decoders and systems in a compulsory official register, with such registration being conditional on a prior technical report from the national authorities on compliance with certain requirements laid down in the national legislation. CSD considered that this provision restricted the free movement of goods.

Moreover, CSD claimed that the Spanish legislation (namely, the Single Additional Provision of Decree-Law 1/1997, on the incorporation into Spanish Law of Directive 95/47/EC on the use of standards for the transmission of television signals) unduly restricted its freedom to provide CAS services, as that provision stated that CAS operators were entitled to market their equipment, decoders and systems only after successfully completing the registration procedure.

The Spanish Government challenged CSD's interpretation of the legislation concerned, as it considered that there was no violation of EC law, and that the entry in the register did not constitute a precondition for marketing decoders or carrying on the business of the CAS operator, since that registration did not create, or alter, rights and was simply intended to establish, for the information of third parties, that the operators were complying with European legislation.

The Spanish Supreme Court had doubts as to the correct interpretation of the relevant Community Law, and it decided to refer some questions to the ECJ for a preliminary ruling.

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The ECJ, in answering those questions, ruled that national legislation which makes the marketing of equipment, decoders or digital transmission and reception systems for television signals and the provision of related services by CAS operators subject to a prior authorisation procedure restricts both the free movement of goods and the freedom to provide services. These legislative restrictions might be justified if they pursue a public interest objective recognised by Community law and comply with the principle of proportionality.

In determining whether national legislation complies with the principle of proportionality, a national court has to take into account, inter alia, that a prior administrative authorisation scheme has to be based on objective, non-discriminatory criteria which are known in advance, and it shall not essentially duplicate controls which have already been carried out in the context of other procedures, either in the same State or in another Member State. Moreover, a prior authorisation procedure will only be necessary where subsequent control must be regarded as being too late to be effective. Such a procedure shall not, on account of its duration or the costs to which it gives rise, deter the operators concerned from pursuing their business plan.

Now, the Spanish Supreme Court, in accordance with the principles laid down by the ECJ in its judgment, will rule on whether some provisions of the Spanish Decree 136/1997 shall be declared void. It is necessary to bear in mind that these provisions only govern the structure and operation of the register. The requirement to register (and the sanctions in case of breach of this obligation) were established by the Additional Provision of Decree-Law 1/1997, which can only be declared void by the Constitutional Court and which, in any case, was completely amended by Act 17/1997 and Decree-Law 16/1997.

Case C-390/99, Canal Satélite Digital SL v. Administración General del Estado, Judgment of the European Court of Justice of 22 January 2002

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