Court of Justice of the European Communities: Judgment on Must-Carry Obligations and the Freedom to Provide Services

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In 2001, a group of cable operators (UPC, Coditel Brabant SPRL, Brutele and Wolu TV ASBL) brought proceedings before the Belgian *Conseil d'Etat* (Council of State) challenging the obligation imposed on them by Belgian legislation to broadcast, in the bilingual region of Brussels-Capital, television programmes transmitted by certain private broadcasters designated by the State authorities. The cable operators contested their must-carry obligations on the basis of Articles 49 EC and 86 EC (the latter being read in conjunction with Article 82 EC). They argued that the private broadcasters benefiting from the must-carry status enjoyed a special right which, in breach of Articles 82 EC and 86 EC, could distort competition between broadcasters and disadvantage broadcasters established in Member States other than Belgium, while one of those private broadcasters held a dominant position in French-speaking Belgium on the market for pay-TV. They also contended that, in breach of Article 49 EC, the freedom to provide services was being restricted. The national Court conceded that the negotiating position of foreign broadcasters seeking to have their programmes distributed by cable in the bilingual region of Brussels-Capital was indeed weaker than private broadcasters enjoying must-carry status.

In 2006, it referred a set of questions to the ECJ which sought to determine - as summed up by the ECJ - whether article 86 EC must be interpreted as meaning that it precludes legislation of a Member State "which provides that private broadcasters falling under the public powers of that State and which those powers have designated, have the right, by virtue of a must-carry obligation, to have their television programmes broadcast in their entirety by the cable operators which provide services in the relevant part of that State".

The European Court of Justice recalled that the mere creation of a dominant position through the grant of special or exclusive rights within the meaning of Article 86 (1) EC is not in itself incompatible with Article 82. A Member State will be in breach of the prohibitions laid down by those two provisions "only if the undertaking in question, merely by exercising the special or exclusive rights conferred upon it, is led to abuse its dominant position or where such rights are liable to create a situation in which that undertaking is led to commit such abuses". However, the ECJ dismissed the national Court's questions pertaining to

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competition matters as inadmissible because it was not provided with sufficient information to establish whether the conditions relating to the existence of a dominant position or of abusive conduct were satisfied.

The national Court's second set of questions in essence sought an answer to the same question but this time concerning Article 49 EC. The ECJ recalled that the transmission of television signals, including the transmission of such signals by cable television, constitutes as such, a supply of services for the purposes of Article 49 EC. Though it concludes that the Belgian legislation granting certain private broadcasters must-carry status does indeed amount to a restriction on freedom to provide services within the meaning of Article 49 EC, it recalls that such a restriction may be justified only where it serves overriding reasons relating to the general interest, is suitable for securing the attainment of the objective which it pursues and does not go beyond what is necessary in order to attain it. It finds that these three essential points are met by the Belgian legislation at hand and concludes: "Article 49 EC is to be interpreted as meaning that it does not preclude legislation […] which requires, by virtue of a must-carry obligation, cable operators providing services on the relevant territory of that State to broadcast television programmes transmitted by private broadcasters falling under the public powers of that State and designated by the latter, where such legislation:

- pursues an aim in the general interest, such as the retention, pursuant to the cultural policy of that Member State, of the pluralist character of the television programmes available in that territory, and

- is not disproportionate in relation to that objective, which means that the manner in which it is applied must be subject to a transparent procedure based on objective non-discriminatory criteria known in advance." It is for the national Court to determine whether those conditions are satisfied.

Judgment of the Court of justice of the European Communities, United Pan-Europe Communications Belgium and Others, 13 December 2007, C-250/06

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