Court of Justice of the European Communities: UTECA v. Administración General del Estado

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In spring 2007, the Spanish *Tribunal Supremo* (Supreme Court) referred to the Court of Justice of the European Communities (ECJ) for a preliminary ruling a case involving an action brought by the *Unión de Televisiones Comerciales Asociadas* (Association of Spanish Commercial Televisions - UTECA) against Spanish national legislation implementing the EC Television without Frontiers (TwF) Directive. The legislation in question involves the Royal Decree 1652/2004 and the corresponding legislative provisions on which the decree is based, which require television operators to earmark 5% of their operating revenue for the previous year for the funding of full-length and short cinematographic films and European films made for television and to allocate 60% of that funding to the production of films the original language of which is one of the official languages of Spain. UTECA sought to have the decree declared inapplicable on the grounds of infringement of Community law. These claims were opposed by the *Administración General del Estado* (General State Administration). The ECJ was asked by the Spanish Supreme Court to assess the compatibility of the national provisions with the TwF Directive, as well as with Article 12 EC Treaty on the prohibition of discrimination on the grounds of nationality and Article 87 EC Treaty on State aid.

The Court first clarified that, pursuant to Article 3(1) TwF Directive, Member States are free to lay down more detailed or stricter rules with regard to television broadcasting bodies under their jurisdiction, provided that they respect the fundamental freedoms guaranteed by the Treaty. According to the Court, the measure requiring the allocation of 5% of operating revenue for the pre-funding of European cinematographic films and films made for television does not endanger these freedoms. By contrast, the obligation to reserve 60% of that 5% of operating revenue for the production of films of which the original language is one of the official languages of Spain does constitute a restriction on the freedom to provide services, the freedom of establishment, the free movement of capital and the freedom of movement for workers. As such, the provision may only be permitted 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 this objective. In the present case, the cultural aim of Spanish multilingualism provides such a defence, while, according to the ECJ, the measures under examination were also appropriate and

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proportionate in relation to this aim.

With regard to Article 12 EC, the Court pointed out that, in relation to the freedom of movement for workers, the right of establishment, the freedom to provide services and the free movement of capital, the principle of non-discrimination has been implemented by specific provisions of the EC Treaty (i.e., Articles 39(2) EC, 43 EC, 49 EC and 56 EC respectively). Since the Spanish national legislation does not seem to contravene these provisions, no breach of Article 12 can be said to have taken place either.

Finally, as concerns compatibility with EC State aid law, the ECJ recalled that classification as State aid requires that all conditions set out in Article 87 be met. Hence, (a) there must be an intervention by the State or through State resources; (b) the intervention must be liable to affect trade between Member States; (c) it must confer an advantage on the recipient; and (d) it must distort or threaten to distort competition. In the case at issue, the Court ruled that it is not apparent how the measure disputed constitutes an advantage granted either directly or indirectly by the State or through State resources. Moreover, since the measure applies to television operators, it does not appear that the advantage in question is dependent on the control exercised by the public authorities over such operators. Consequently, the measures adopted by the Royal Decree 1652/2004 and the legislative provisions on which the decree is based should not be considered to be aid within the meaning of Article 87(1) EC.

As a result, according to the preliminary ruling of the ECJ, a measure adopted by a Member State which requires television operators to earmark 5% of their operating revenue for the pre-funding of European cinematographic films and films made for television and, more specifically, to reserve 60% of that 5% for works of which the original language is one of the official languages of that Member State does not infringe Community law.

Case C-222/07 UTECA v. Administración General del Estado (ECJ 5 March 2009)

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