Court of Justice of the European Union: Commission and Court of First Instance Prohibition of DVB-T Subsidies in Berlin-Brandenburg Was Legitimate

IRIS 2011-9:1/3

Peter Matzneller
Institute of European Media Law (EMR), Saarbrücken/Brussels

In a judgment of 15 September 2011 following an appeal procedure, the Court of Justice of the European Union (ECJ) confirmed a ruling of the Court of First Instance of 6 October 2009 (T-21/06), dismissing an action brought by the Federal Republic of Germany (FRG) against a decision of the European Commission (see IRIS 2006-3/5). In November 2005, the Commission had prohibited the granting of subsidies to support the transition from analogue to digital terrestrial television (DVB-T) in Berlin-Brandenburg by the *Medienanstalt Berlin-Brandenburg* (Berlin-Brandenburg Media Authority) because it infringed state aid rules and ordered the repayment of the subsidies (see IRIS 2006-1/8).

In its judgment, the Court of First Instance had essentially found that the Commission had not misused its powers of discretion when assessing the compatibility of the aid with the common market, nor infringed the principles of sound administration or the right to be heard.

The FRG appealed this judgment to the ECJ and argued, firstly, that the Court of First Instance had misjudged the incentive effect of the aid in question and failed to check whether the Commission had made an obvious error of judgment. Secondly, the FRG criticised the way the Court of First Instance had dealt with the alternative measures suggested by the Commission. It argued, on the one hand, that the Commission did not have the power to make such suggestions and, on the other, that the Court of First Instance, by claiming that an aid measure was incompatible with the common market simply because there were supposed alternatives, had infringed the fundamental right of the freedom to pursue an economic activity. Thirdly, it claimed that the Court of First Instance had wrongly assessed the criterion of technological neutrality, since in this case it had not been an appropriate criterion against which to assess the compatibility of the aid in question.

The ECJ disagreed and rejected the FRG's comments about the alternative proposals.

Concerning the incentive effect, the ECJ ruled that the Court of First Instance had in fact dealt with the issue in its judgment - albeit not very clearly - and had

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checked whether the Commission had made an obvious error of judgment.

Finally, the ECJ ruled that the Court of First Instance, in its statement that the aid in question did not fulfil the criterion of technological neutrality, had not excluded the possibility that a subsidy could, in certain circumstances, be aimed at a single type of broadcasting. The Court of First Instance had therefore not made an error when it had stated that the FRG had failed to disprove the Commission's concerns regarding existing restrictions of competition caused by structural issues and to demonstrate that the subsidy in question represented a proportionate means of supporting the transition to DVB-T.

Urteil des EuGH vom 15. September 2011 (C-544/09 P)

http://curia.europa.eu/jurisp/cgi-bin/gettext.pl?where=&lang=de&num=79889084C19090544&doc=T&ouvert=T&seance=ARRET

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