Court of Justice of the European Union: Licensing of multiplex operators infringed EU law

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In a judgment issued on 23 April 2015 as part of the Commission's infringement proceedings against the Republic of Bulgaria (case C-376/13, ECLI:EU:C:2015:266), the Court held that Bulgaria had infringed its obligations under Authorisation Directive 2002/20/EC, Framework Directive 2002/21/EC and Directive 2002/77/EC on competition in the markets for electronic communication networks and services when granting licences to two multiplex operators. In its judgment, the Court confirmed the alleged breaches of the EU directives. The action had been brought by the European Commission after Bulgaria failed to bring an end to the infringement in the preliminary proceedings.

Bulgaria launched the digitisation of terrestrial broadcasting in 2009 by adopting a digitisation plan and amending the Electronic Communication Act and Broadcasting Act. On the basis of the new provisions, the Bulgarian Communications Regulation Commission initially awarded one licence for two spectrum lots (MFNs) to the operator Towercom Bulgaria EAD on 5 June 2009, followed by another licence for three further lots to Hannu Pro Bulgaria EAD on 22 June 2009, both for a 15-year period.

According to the Commission's application, Bulgaria had failed to meet its obligations under the EU directives. It alleged that the number of undertakings that could be assigned radio frequencies for digital terrestrial broadcasting and authorised to provide the corresponding electronic communication service had been restricted to two multiplex operators under Article 5a(1) and (2) of the transitional and concluding provisions of the Electronic Communication Act. Bulgaria had therefore failed to meet the requirements of Article 2(1) of the Competition Directive. Articles 47a(1) and (2) and 48(3) of the Electronic Communication Act had prohibited undertakings which offer television content from taking part in these tender procedures. Bulgaria had therefore failed to comply with its obligations under Article 7(3) of the Authorisation Directive, Article 9(1) of the Framework Directive and Articles 2(2), 2(4) and 4(2) of the Competition Directive. By prohibiting multiplex operators from establishing electronic communication services for the broadcasting of radio and television programmes under Article 48(5) of the Act, Bulgaria had breached Article 7(3) of the Authorisation Directive, Article 9(1) of the Framework Directive and Articles 2(2) and 4(2) of the Competition Directive.

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The Republic of Bulgaria initially disputed the admissibility of the application on the grounds that, since the Bulgarian Constitutional Court had declared the provisions of Articles 5a and 48(5) of the Act unconstitutional, they were no longer valid. Furthermore, Articles 47a and 48(3) had been amended in accordance with the Commission's recommendations in the preliminary proceedings. Finally, it argued that the opening of a new tender procedure had been provided for in Article 209 of the transitional and concluding provisions of the Act amending the Electronic Communication Act.

Despite Bulgaria's objections, the Court declared the action admissible. Bulgaria had failed to meet its obligations under the EU directives by implementing the aforementioned provisions of the Electronic Communication Act and conducting two tender procedures in 2009. Even if these provisions no longer applied or had been amended, the rights to use the allocated frequencies were still being exploited. The infringement was therefore still taking place. In addition, regardless of whether or not it was a suitable measure to bring an end to the infringement, the new, legally regulated tender procedure had not been carried out in time and could therefore not be taken into account.

During the proceedings, the Republic of Bulgaria once again highlighted the three public interest objectives pursued by the legislative provisions, i.e. to ensure a successful start to the digitisation of terrestrial broadcasting, to guarantee the freedom of information and expression proclaimed in the Constitution, and to safeguard the competitiveness of the multiplex operators. The Commission thought that these objectives could have been met through less restrictive regulations. For example, Bulgaria had given a head-start to the multiplex operators that had been allocated a substantial proportion of the spectrum for a 15-year period. This significantly reduced the opportunity for other players to enter the market or participate under the same conditions for the purposes of Article 1(6) of the Competition Directive.

Court judgment in case C-376/13, European Commission v Republic of Bulgaria, 23 April 2015

http://curia.europa.eu/juris/document/document.jsf?text=&docid=163882&pageIndex=0&doclang=BG&mode=lst&dir=&occ=first&part=1&cid=311673

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