[ES] The Granting of Private TV Licences by the Government in 1989 Considered Lawful by Supreme Court

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After the adoption of the Private TV Law in 1988, the Spanish Government, then the Socialist party (PSOE), opened a procedure to grant the three licences provided for. Article 19, par 3. of the Act stipulates that no natural or legal person can own, directly or indirectly more than 25% of the capital of a licensee company, so several joint ventures were created to bid for the licences. Finally, four media ventures competed for the three licences: Antena Tres TV (Godó Group, Prensa Española); Gestevisión-Tele Cinco (Berlusconi, ONCE); Canal Plus (Canal Plus France, PRISA Group), and Univisión (Zeta Group, News International). The Council of Ministers took its decision in 1989, and the latter was finally the one left without a licence. Consequently, Univisión decided to challenge the Government´s decision before the Supreme Court, which recently, more than eight years later, has taken a decision, stating that the Government's decision at the time had been lawful.

In its judgement, the Supreme Court rejected Univisión´s claims, although the judgement has some controversial aspects.

Univisión challenged the Government´s decision to grant licences to Gestevisión-Tele Cinco and to Canal Plus.

In regard to Gestevisión-TeleCinco, Univisión alleged that one of its members, the ONCE group (a non-profit organisation of Spanish blind people, dependent on the Ministry of Social Affairs, which gets its revenues from a public lottery) controlled de facto 40% of the shares, which is more than the legal limit of 25%, which means that the licence would have been unduly granted. The Supreme Court decided that this statement had not been proved. Another judicial investigation opened in July 97 by the Audiencia Nacional against Gestevisión for an alleged fiscal fraud, is currently studying the share that was really held by the ONCE. This new investigation also covers Berlusconi´s participation in the society, because he allegedly got to control later up to 80% of the society.

Gestevisión strongly denies all these charges, and as for the alleged breach of the capital share limit, it says that all the share transfers had been expressely notified and approved by the Telecoms Ministry. Furthermore Gestevisión says that,

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according to the Private TV Act, if the capital share limit is surpassed, Gestevisión should be officially warned of this fact, after which it would then have a period of one month to make the necessary changes in order to come back in line with the legal provisions. In relation with Canal Plus, Univisión complained that Canal Plus was granted a licence although the prior official reports stated that Univisión´s proposal was better, and although Canal Plus is a pay-TV broadcaster.

It must be explained here, that terrestrial broadcasting in Spain is regarded as a public service and that therefore, the licences were meant to be granted to broadcasters who could be expected to offer a public service. Therefore, according to Univisión (that proposed a free-to-air TV programme), a licence given to a pay-TV was contrary to the public service naturem aimed at, and was forbidden by the tender conditions and by Spanish law. This problem does no longer exist today, at least not in relation with satellite pay-TV, since in Spain, satellite TV is no longer regarded as a public service, or with cable pay-TV, whose regulation expressely allows the licencees to ask for remuneration.

The Supreme Court decided it was possible to grant a licence to a pay-TV broadcaster. It based itself on a broad interpretation of Article 32 of the 1980 Television Act (Law 4/1980). This article stipulated that public service TV may get its revenues from the State, from advertising, from the sale of its products and from licence fees due for the ownership of TV sets. The Supreme Court considers, in an analogical interpretation, that it was possible that Canal Plus could ask for a fee. Univisión had contested this possibility arguing that Article 32 only applied to public TV, as private TV is regulated in a different law; that the fee mentioned in Article 32 had never existed in practice in Spain; and furthermore, that Canal Plus fee was not related with the ownership of the TV sets, but with the provision of TV services, and that the imposition of this fee was in any case against Spanish tax law regulating licence fees. The Supreme Court rejected this line of reasoning; it affirmed that the Government's decision was right, as several ministerial reports had stated, and also considers that asking for a fee was an economically sound option too, as it left more room for the other TV´s to compete for the advertising market, thus ensuring the viablity of them all. The Supreme Court also said that the official reports adopted before the decision stated that both options got very similar qualifications, although they represented very different models, and that the Government had a right to choose the one that it thought better to accomplish the public service duties involved.

Sentencia del Tribunal Supremo, Sala de lo Contencioso-Administrativo, de 22 de Septiembre de 1997

Judgement of the Supreme Court, Administrative Law Chamber, 22 September 1997

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