

A Plea for a More Refined State Aid Law Approach after a Crude Switch Over to Digital Television

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ECJ Judgment of 15 September 2011, Case C-544/09 P *Germany v Commission*.

The judgment strengthens competition between infrastructure solutions under the terms of State aid law.

Legal context

The judgment is based on an appeal brought by the Federal Republic of Germany (plaintiff) against the judgment of the Court of First Instance (CFI) delivered on 6 October 2009 in Case T-21/06 (*Germany v Commission*). The form of order sought was to set aside the judgment of the CFI and to annul Commission Decision C(2005)3903 of 9 November 2005 on State aid which the plaintiff has implemented for the introduction of digital terrestrial television (DVB-T) in Berlin-Brandenburg.

Facts of the appeal

The appeal's case relates to an action brought by the plaintiff against the Commission's decision of 9 November 2005 in State aid case C-25/2004 on the introduction of digital terrestrial television (DVB-T) in Berlin-Brandenburg. The action was dismissed by the CFI as unfounded. The Commission had decided that the aid granted was incompatible with the common market under Article 107 (3)(c) TFEU. The plaintiff has presented five grounds of appeal alleging that the CFI failed to recognise a misuse of powers on the part of the Commission. According to the plaintiff, the CFI erred:

1. In denying the incentive effect of the measure by focusing only on the very limited period of the switch-over from analogue terrestrial transmission to DVB-T, instead of considering the cost of the measure as a whole to those broadcasters in receipt of aid;

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2. In overextending the Commission's assessment criteria under Article 107(3)(c) TFEU by accepting that the Commission could dismiss the suitability of the aid measure solely on the ground that the same objective would be attained by means of alternative regulatory measures;
3. In misjudging the relevance of EU fundamental rights when considering Article 107(3)(c) TFEU, rights which, as part of primary law, are binding on all institutions of the European Union in respect of all acts;
4. By referring to alternative regulatory measures, in that the CFI failed to recognise that regulatory measures also affect trading conditions and competition. The broad assumption that any regulatory measure would have a lesser effect on such legal interests than aid means that an unlawfully stringent standard is imposed under Article 107(3)(c) TFEU;
5. By adopting the principle of technological neutrality developed by the Commission without recognising that its effect is to dismiss the purpose of the measure pursued by the German authorities in this case. Technological neutrality is an appropriate criterion against which to review compatibility only if the switch-over to digital broadcasting is, by itself, the purpose of the support. In the case of support for the switch-over to DVB-T in Berlin-Brandenburg, however, it was that platform specifically which, for various reasons, was intended to be supported, no support being required for cable or satellite. Member States have a degree of discretion in setting the legitimate objective of aid measures.

Upholding the judgment of the CFI, all five grounds of appeal have been dismissed by the ECJ. According to the ECJ:

1. The lack of the incentive effect, and therefore of necessity (proportionality), of the aid measure is evidenced by an agreement of 13 February 2002 under which the private broadcasters (and later aid recipients) declared to switch to digital terrestrial television before the aid scheme was introduced (ECJ judgment, para. 46).
2. The Commission's assessment criteria under Article 107(3)(c) TFEU with regard to alternative regulatory measures do not overextend the TFEU's State aid control provisions and the parameters of what the Commission may review. The CFI simply exemplified the test of necessity (proportionality) under Article 107(3)(c) TFEU by referring, *inter alia*, to alternative regulatory measures (ECJ judgment, paras 67, 68).

3. The allegation of misjudging the relevance of the fundamental rights of the European Union when considering Article 107(3)(c) TFEU is inadmissible, because it had been raised for the first time in the appeal proceedings, and not in the proceedings before the CFI (ECJ judgment, para. 63).
4. The plaintiff's plea that the CFI failed to recognise that alternative regulatory measures would also distort competition, is not relevant (ECJ judgment, para. 71) due to the very hypothetical nature of the argument.
5. The legal principle of technological neutrality has not been observed. Under the Commission's Communication on the transition from analogue to digital broadcasting of 17 September 2003 (COM(2003) 541 final), affirming the legal principle of technological neutrality, Member States have to safeguard non-discrimination between electronic communication networks (ECJ judgment, para. 77) keeping in mind that 'analogue and digital TV are provided on various networks, mainly cable, satellite and terrestrial (over VHF and UHF frequency bands). Digital audio-visual content can be also supported by the internet and, still marginally, Digital Subscriber Lines (DSL) networks. Each network has specific strengths and weaknesses. So television switchover is a "multi-network" or "multi-platform" process and digital TV is not synonymous with digital terrestrial TV.' (para. 1.1, COM(2003) 541 final) Under the rules of burden of proof, the plaintiff has not provided evidence for the necessity (proportionality) of the selective (technologically not neutral) aid measures for the switch-over to DVB-T in Berlin-Brandenburg and (implicitly) for its assumption that no support was required for cable or satellite (ECJ judgment, para. 80).

Analysis

The ECJ judgment reflects the state of the art of jurisprudence on infrastructure funding in a straightforward manner. Of course, from the perspective of a 'Less and Better Target-Oriented State Aid' approach, the judgment falls short of being an in-depth analysis.

If State aid, as regulation in general, is intended to remedy market failures, as distinguished sharply from *government failures*, due to, *inter alia*, externalities, public goods, imperfect competition, natural monopolies, asymmetric information, etc., it appears crucial to define and analyse precisely the environment of the respective failure, that is the neighbouring, as well as upstream and downstream relevant markets. These

neighbouring/upstream/downstream market environments are rather complex, as described in the above mentioned COM (2003) 541 final. First of all, without a clear definition and analysis of the various relevant upstream and neighbouring network markets (i.e. cable, satellite, terrestrial, and/or DSL) distortions of competition by public funding cannot be minimised. The lack of methodology is not only apparent in the case law, but also evidenced by the Commission's standards on infrastructure funding, for example in its guidelines for the application of State aid rules in relation to the rapid deployment of broadband networks ([2009] OJ C 235/7) or its guidelines on the financing of airports and start-up aid to airlines departing from regional airports ([2005] OJ C 312/1). However, without a general (not a mere sector specific) methodology of defining and analysing the neighbouring, as well as upstream and downstream relevant markets (from the perspective of the directly funded markets and vice versa), a correct assessment of favouring and distortive effects under State aid law is not possible. The State aid law balancing test requires the measuring and weighting of positive and negative effects caused by State funding, thus necessitating a distinguished analysis of the effects on consumers and producers, upstream and downstream. This exercise is crucial, if the vertically integrated infrastructure producer (as a direct beneficiary of upstream funding) is active, as well, on downstream (services) markets.

If upstream public funding artificially decreases the price level below the competitive analogue (cost oriented) price, for example in fixed broadband retail services markets benefitting from upstream funded (fixed) infrastructures owned by municipal network companies, consumers are not willing to consider

alternative products, for example mobile broadband services, which they would have demanded as substitutable, if the fixed broadband services were offered at a higher, non-funded, competitive analogue market price. The same reasoning applies to the public funding of the switch-over to DVB-T. Under State aid driven terms, the relevant DVB-T retail markets are defined too narrowly, as important substitutes (cable, satellite, fixed, or mobile broadband services, 'triple play options') are not included in the consumers' choice. Only permanent substitutability challenges between different, albeit convergent, digital infrastructure solutions overcome traditional path dependencies. State aid to DVB-T could hinder technological innovation of cable, satellite, fixed, or mobile broadband and/or 'triple play' products if consumers did not choose more innovative products because DVB-T was not priced properly under State funded conditions.

Practical significance

By strengthening the general principle of technological neutrality of (upstream) infrastructure funding under State aid driven terms, *inter alia* under Article 107 (3)(c) TFEU, the ECJ has sent an appropriate signal to the Member States' political class of infrastructure junkies who often favour specific infrastructure solutions depending on the respective industries' 'old boys' networking. The practical significance of the ECJ judgment can, therefore, be identified in strengthening competition between infrastructure solutions.

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