

SUMMARIES OF STATE AID JUDGMENTS AT NATIONAL LEVEL

JUDGMENTS SELECTED FROM THE 2009 STUDY ON THE ENFORCEMENT OF STATE AID LAW AT NATIONAL LEVEL

I- Information on the judgment

The Supreme Administrative Court of the Republic of Lithuania (the “Supreme Administrative Court”) (“Lietuvos vyriausioji administracinė teisma”), 05.04.2007, A¹¹-381/2007, TEO LT AB, Bite Lietuva UAB, Omnitel UAB v Competition Council of the Republic of Lithuania (the “Competition Council”)

II- Brief description of the facts and legal issues

The Supreme Administrative Court ruled that the nature and the purpose of the product, i.e. provision of a secure public data transmission network, determines the necessity to monopolise the provision of such services.

Parties:

The applicant: three providers of electronic communication services, i.e. TEO LT AB, Omnitel UAB, and Bite Lietuva UAB;

The defendant: the Competition Council.

Factual background:

Pursuant to the order of the Minister of Internal Affairs No 1V-167 dated 14 May 2004, the public undertaking Infostruktura was authorized to act as an exclusive operator of the secure data transmission network. Consequently, the providers of similar electronic communication services filed a claim to the Competition Council stating that the public undertaking was granted a competitive advantage infringing Article 4 of the Law on Competition of the Republic of Lithuania (the “*Law on Competition*”).

As the Competition Council refused to initiate an investigation, the applicants appealed to the Vilnius County Administrative Court. The Vilnius County Administrative Court rejected all the submissions as unfounded, therefore the applicants appealed the decision of the Vilnius County Administrative Court to the Supreme Administrative Court. However, the Supreme Administrative Court upheld the decision of the Vilnius County Administrative Court.

III- Summary of the Court's findings

Legal issues:

The Vilnius County Administrative Court and the Supreme Administrative Court examined the following issues:

- whether the decision to assign an exclusive operator grants privileges in favour of individual undertakings and/ or discriminates certain undertakings; and
- whether the decision affects the competitive conditions in the relevant market.

According to Article 4 of the Law on Competition, when carrying out the assigned tasks related to the regulation of economic activity within the Republic of Lithuania, public and local authorities shall ensure freedom of fair competition. Public and local authorities shall be prohibited from adopting legal acts or other decisions which grant privileges to or discriminate against any individual undertakings or their groups and which bring about or may bring about differences in the conditions of competition for competitors in the relevant market, except where the difference in the conditions of competition can not be avoided when the requirements of the laws of the Republic of Lithuania are complied with.

The Vilnius County Administrative Court stated that the secure network performs specific functions and its consumers are exclusively institutions of the Republic of Lithuania. Furthermore the network is the only one connected to the networks of the program on the electronic exchange of data among administrations of the European Community. Therefore, the network can not be substituted with other data transmission networks.

The Vilnius County Administrative Court explained that secure data transmission exclusively covers administration of this network and services related to the performance of functions. This network is not a public network of communications, it is separated from internet, and prices are established by the Minister of Internal Affairs with the cooperation of the Competition Council. Specific functions and goals of the secure network determine the attribution of the transmission of data in the secure network services to monopolistic services. The Vilnius County Administrative Court has ruled that services provided by the secured network should not be considered to be products in the free market and this network is assigned to achieve specific goals and not to perform commercial activities.

The Vilnius County Administrative Court recalled that the ECJ in its case law had interpreted Article 86(2) EC (provisions of which correspond to Article 4 of the Law on Competition) stating that in each Member State public undertakings can be awarded exclusive rights of organisation and execution. Implementation of these rights may restrict or eliminate competition. However, it is justified when objectively necessary for the performance of the assigned activities and functions of the particular institution.

The Vilnius County Administrative Court stated that the administration of the secure network is attributed to public services and is not used for commercial activities. The Vilnius County Administrative Court referred to the Rulings adopted by the Government of Lithuania on Providing Information to the European Commission Regarding the State Aid and Article 87(1) EC, and noted that in the market for provision of public monopolistic services there are no competing undertakings, therefore, competition could not be distorted. The exclusive operator was not granted any privileges when operating beyond the boundaries of the secure network.

As a result, the Vilnius County Administrative Court rejected all submissions as unfounded. The Supreme Administrative Court upheld the decision of the Vilnius County Administrative Court. The Supreme Administrative Court concluded that the applicants do not operate in the same market, and therefore do not compete with the exclusive administrator.

This summary has not been prepared by DG Competition or any other service of the Commission. The content of this judgment and this summary have not in any way been approved by the Commission and should not be relied upon as a statement of the Commission's or DG Competition's views.

I- Information on the judgment

The Supreme Administrative Court of the Republic of Lithuania (the “Supreme Administrative Court”) (“Lietuvos vyriausiasis administracinis teismas”), 28.10.2005, A⁵-1627/2005, Tieskelis AB v State Tax Inspectorate under the Ministry of Finance of the Republic of Lithuania (the “State Tax Inspectorate”)

II- Brief description of the facts and legal issues

The Supreme Administrative Court ruled that the local tax administrator had adopted a reasonable and legitimate decision when refusing to grant a request for release from the payment of delay charges.

Parties:

The applicant: an undertaking operating in the sector of manufacture of articles of concrete, cement and plaster, Tieskelis AB;

The defendant: the State Tax Inspectorate.

Factual background:

In 2001 considering the economic situation, the Lithuanian Parliament approved the possibility to grant State aid to undertakings that had concluded tax loan agreements by releasing them from payment of delay charges.

Tieskelis AB applied to the local tax administrator and requested to be released from the payment of delay charges in the amount of approximately EUR 295,000. Tieskelis AB relied on the relevant provisions of the Law on Tax Administration of the Republic of Lithuania (the “*Law on Tax Administration*”) providing that taxpayers shall be released from the payment of delay charges on condition that they have proved they are not liable for the infringement of the law.

The local tax administrator refused to grant the request concluding that delayed payments were due to failure to settle bills by clients and were not related to the grounds for release from the payment of delay charges. The State Tax Inspectorate upheld the decision of the local tax administrator, therefore, the claimant appealed to the Vilnius County Administrative Court. The court of first instance partly upheld the appeal and obliged the State Tax Inspectorate to repeat the investigation of the case. The State Tax Inspectorate appealed the decision to the Supreme Administrative Court which approved the State Tax Inspectorate's decision to refuse to grant request.

III- Summary of the Court's findings

The Supreme Administrative Court examined the following issues:

- which laws are applicable when considering the release from payment of delay charges; and
- whether the grounds for release from payment of delay charges existed in the case at issue.

In dealing with the first issue, the Supreme Administrative Court determined that laws effective at the time of application for release from the payment of delay charges are applicable considering a possibility of release.

The Supreme Administrative Court further decided that the applicant had not proved that the deadlines for paying taxes were missed and tax laws were infringed through no fault of the applicant. Even facing financial difficulties, the applicant was able to pay taxes on time, however had chosen to be late to pay taxes. The taxpayer is responsible for the proper performance of tax related obligations, therefore, payment of delay charges is related only to an unlawful conduct of the taxpayer and not to the performance of contractual obligations by the third persons.

The Supreme Administrative Court concluded that the circumstances pointed out by the applicant (i.e. delayed payments due to failure to settle bills by clients) were not related to the grounds for release from payment of delay charges pursuant to the Law on Tax Administration.

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I- Information on the judgment

The Constitutional Court of the Republic of Lithuania (the “Constitutional Court”) (“Lietuvos Respublikos Konstitucinis Teismas”), 21.12.2006, 30/03, Constitutionality of the Law on Lithuanian National Radio and Television

II- Brief description of the facts and legal issues

The Constitutional Court ruled that the national public broadcaster has a special constitutional mission, therefore, the State has a responsibility to ensure its operation by proper financing, provided certain conditions are met.

Parties:

The applicant (the petitioner): a group of Members of the Seimas of the Republic of Lithuania (the Parliament);

The defendant: -

Factual background:

The petitioner applied to the Constitutional Court with requesting an investigation whether certain provisions of the Law on Lithuanian National Radio and Television are not in conflict with relevant stipulations of the Constitution of the Republic of Lithuania (the “*Constitution*”) and in particular:

- i. whether Articles 6(1), (3) and (4) and Article 15(1) of the Law on Lithuanian National Radio and Television to the extent it provides that the Lithuanian National Radio and Television is funded from the receipts obtained for advertising and from commercial activity; Article 15(2) to the extent it provides that the National Radio and Television of Lithuania shall implement commercial activity independently, are not in conflict with Articles 46(2), (3) and (4) of the Constitution;
- ii. whether Article 5(5) of the Law on the Lithuanian National Radio and Television to the extent it provides that the Lithuanian National Radio and Television shall have a priority right to the newly co-ordinated electronic communication channels (radio frequencies); Item 3 of Article 10(1) of the Law on the Lithuanian National Radio and Television, Article 31(4) of the Law on Provision of Information to the Public to the extent it provides that channels (radio frequencies) for broadcasting programmes of the Lithuanian National Radio and Television are assigned without a tender are not in conflict with Article 29(1) and Article 46(2), (3) and (4) of the Constitution.

The petitioner stated that financing of the Lithuanian National Radio and Television did not correspond to the conditions established in the case law of the ECJ regarding the granting of State aid to public broadcasters. In the opinion of the petitioner, the State aid granted to one undertaking when the same economic activity is carried out by other undertakings with no support from the State can not be constitutionally justified.

The petitioner claimed that the EC State aid is justified only in the field of culture and heritage protection, however information and education based commercials per se are not attributed to this area. The scope of State aid should be limited to the activities related to the development of national culture, i.e. the mission which is not performed by commercial broadcasters. Moreover, State aid is

permitted when it is actually necessary and does not impair the expansion of the broadcasting market on the national and EU level. According to the petitioner, despite the fact that activities of the public broadcaster are not limited to the provision of public services, the non-differentiated model of financing is applied. As a result, there is no direct link between State financing and activities pursued by the public broadcaster. The petitioner concluded that the essence of the petition is the right of the public broadcaster to engage in commercial activities and to obtain income from commercial advertising (and at the same time receive State financing) in the light of the principles of fair competition.

III- Summary of the Court's findings

Legal issues:

In the constitutional justice case with reference to State aid, the Constitutional Court recalled that the issues related to the public broadcaster, i.e. mission of the public broadcaster, assignment of radio frequencies, financing and broadcasting of commercials, are regulated by the EC competition and State aid provisions. The Constitutional Court has declared that it is clear from the EC Treaty that State aid for operation of an undertaking or manufacturing of certain products may be justified, should it be necessary to provide services of a general interest.

The Constitutional Court considered that the public broadcaster operates in the same market as commercial broadcasters, which render services of transmission of audio and visual content. The public broadcaster competes with these private broadcasters for the audience of listeners and viewers in the "dualist" (public broadcaster and private broadcasters) system. The Constitutional Court emphasised that the public broadcaster should ensure the public interest, i.e. the interest of the society to be informed stipulated in the Constitution. This mission distinguished the public broadcaster from commercial ones.

The Constitutional Court recalled that the ECJ held in its case law that State aid for the services provided by recipient undertakings in order to discharge public services defined in Article 86 EC is not to be assessed as the State aid under Article 87 EC, provided certain conditions are met (Case C-280/00, *Altmark Trans GmbH, Regierungspräsidium Magdeburg v. Nahverkehrsgesellschaft Altmark GmbH* [2003] ECR I-7747). The conditions are as follows:

- First, a recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined.
- Second, the parameters on the basis of which compensation is calculated must be established in advance in an objective and transparent manner, to avoid it conferring an economic advantage which may favour the recipient undertaking over competing undertakings.
- Third, compensation cannot exceed what is necessary to cover all or part of costs incurred in connection with discharge of public service obligations, taking into account relevant receipts and reasonable profit from discharge of such obligations.
- Fourth, the level of compensation needed must be determined on the basis of analysis of costs that a typical undertaking, which is well run and adequately provided with means of transport so as to be able to meet necessary public service requirements, would have incurred in discharging these obligations, taking into account relevant receipts and reasonable profit from discharge of such obligations.

Moreover, the Constitutional Court recalled that the CFI in its case-law held that in order to determine whether a State measure constitutes aid, it is necessary to establish whether the recipient undertaking receives an economic advantage which it would not have obtained under normal market conditions (T-46/97, SIC - Sociedade Independente de Comunicação SA v. Commission of the European Communities [2000] ECR II-2125). The Constitutional Court considered that in the referred case, financial aid to the Portuguese radio and television had to ensure that this broadcaster, unlike others, would discharge a public function.

The Constitutional Court summarised that according to the EC law, states may fund the services of the public broadcaster. State financing to broadcasters should be necessary in order to render clearly defined public services. State financial support may not be bigger than necessary to cover expenses for public services. Services may be funded only when conditions of financing do not distort competition and do not harm general interests. Radio frequencies are distributed according to objective, transparent and non-discriminatory criteria following the principle of proportionality. Different legal regulation for assignment of radio frequencies is justified when it relates to the general interest. Consequently, advertising on television programmes of the national broadcaster is permissible, however, State institutions must establish requirements for broadcasting of commercials.

The Constitutional Court concluded that the analysed provisions with reference to the operation of the Lithuanian National Radio and Television were not in conflict with the Constitution.

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