Case Note on Case T-533/10 R, DTS Distribuidora de Televisión Digital vs European Commission

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I. Introduction

The General Court President's order in case T-533/10 R deals with the question as to whether the request for interim measures of DTS Distribuidora de Televisión Digital (hereafter DTS) consisting in the suspension of the implementation of the Commission decision approving the fiscal regime set up by Spain for the financing of the Corporación de Radio y Televisión Espanola SA (RTVE), fulfils the urgency criterion. According to established case-law, this criterion is fulfilled if it is likely that DTS will suffer serious and irreparable damage before the final judgment in the main proceedings. Apart from exceptional circumstances, damage of a purely pecuniary nature does not justify the grant for interim relief since it can be the subject of subsequent financial compensation. DTS's request for relief was dismissed, as the damages suffered consist in a loss of market share, which the President considers to be a damage of a purely pecuniary nature.

II. Facts of the case

The subject of this case is a Commission's decision declaring the financing of RTVE, tasked with the public broadcasting services for radio and television in Spain, compatible with Article 106(2) TFEU. For the purpose of the financing of RTVE, the Spanish government imposed three fiscal measures on the commercial radio and television broadcasters and telecom operators. One of these fiscal measures consists in the obligation to pay 1,5% of the total gross exploitation revenues.

Whereas the first financing system applying to RTVE had been approved by the Commission,[1] the new fiscal regime for RTVE's financing was not notified prior to its implementation. Consequently, the Commission concluded that Spain had applied the new financial regime in violation of Article 108(3) TFEU. However, in the contested decision,[2] the Commission concluded that the financing of RTVE was in compliance with Article 106(2) TFEU. Moreover, the Commission held that the new fiscal measures did not form an integral part of the aid, considered that no close link existed between the tax due by the commercial operators and the financing of the aid attributed to RTVE.[3] The financing of RTVE was held to be independent of the taxes, as the amount of the taxed paid could be higher than the costs of the public services performed by RTVE. On the other hand, if these costs would be higher, a contribution from the general budget of the State would be awarded to compensate the difference between the costs and the revenues of the taxes. Finally, the financing system contained a mechanism to prevent overcompensation of RTVE and the revenues generated by the taxes in surplus of the net costs of RTVE's public service obligation will have to be paid back to the general State budget.

With its request for interim relief, DTS wished to suspend the implementation of the Commission decision approving the new fiscal regime awaiting the outcome of its main action for the annulment of this decision. In its application, DTS claims that it would suffer serious and irreparable damage if the Commission decision would be implemented immediately. This damage would in the first place result in a serious and irreversible loss of market

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1 Decisions of 20 April 2005, case E 8/2005, State aid in favour of the Spanish public television body, RTVE, and of 7 March 2007 case NN 8/07 – financing the mesures of restriction of RTVE personel.

2 Decision 2011/1/EU of 20 July 2010 concerning State aid regime C 38/09 (ex NN 58/09), OJ 2011 L1/9.

3 Joined Cases C-261/01 and C-262/01 *Van Calster* [2003] ECR p. I-12249.

share on the markets where DTS competes with RTVE, i.e. the acquisition of broadcasting rights of sport events and "premium" film rights and the televiewers markets.

Firstly, DTS's claimed that its income would be reduced due to the tax of 1,5% of total revenues limiting its investments in new broadcasting rights and resulting in the loss of a significant part of its current and future subscribers. Secondly, DTS claimed that the revenues transferred to RTVE would enable the latter to invest in attractive "premium" programs and hence increase its share of the audience to the detriment of DTS.

III. The President's approach to solving the case

In the first place, the President's order points to Article 104(2) of the Rules of Procedure of the General Court, which provides that applications for interim measures must state the subject-matter of the proceedings, the circumstances giving rise to urgency and the pleas of fact and law establishing a *prima facie* case for the interim measures applied for. If it can be established that an order for the suspension of the operation of an act, or other interim measures, are justified *prima facie* in fact and in law and are urgent to avoid serous and irreparable harm to the applicant's interest, suspension must be ordered until a decision is reached in the main action. Where appropriate, the judge hearing the application must balance the interests. These conditions are cumulative, so that an application for interim measures must be dismissed where any one of them is not fulfilled.

With regard to the urgency condition, it falls upon DTS to demonstrate by means of serious evidence that the final judgment in the main proceedings cannot be awaited without suffering serious and irreparable damage. Although it is not necessary for the imminence of the damage to be demonstrated with absolute certainly and it is sufficient to show that damage is foreseeable with a sufficient degree of probability, DTS is required to deliver proof of the facts forming the basis of its claim that serious and irreparable damage is likely.[4]

The President took the view that the damage faced by DTS – the loss of market share – is purely of a pecuniary nature. Since the market share of a company indicates all the products or services that were sold or performed by that company within a certain period, the loss of market share can be translated in financial terms into a loss of revenues as a holder only benefits from its market share when it generates revenues. In that respect, the President points out to the settled case-law according to which damage of a pecuniary nature cannot, except in exceptional circumstances, justify the grant of an interim relief, because such damage can be the subject of subsequent financial compensation and therefore cannot be regarded as irreparable or even as reparable only with difficulty.[5] An exception to this principle is only accepted in case the financial damage would jeopardize the existence of the company before the final judgment in the main proceedings.

In this case, the President held that DTS failed to substantiate that the loss of market share was sufficiently important to imperil DTS's existence, taking account of the size of the company and the characteristics of the group to which it belongs.[6]

Moreover, the President concludes that DTS's existence is not likely to be jeopardised before the final judgment in the main proceedings by pointing out to the following findings. Firstly, DTS's revenues in 2009 amounted to 1,2 billion Euros and the tax DTS had to pay amounted to 4,2 million Euros for 2009 and 12,5 million for 2010. Furthermore, although the number of DTS's subscribers decreased by 9,3% between 2008 and 2009 – which equals a loss of market share of 4,9 points and a loss of revenues of 3,9 points – the President expressed its doubts on the inability of DTS to recuperate the cost of the tax from the remaining 1,8 million subscribers in 2010. Such recuperation would result in a €0,6 increase of the monthly subscription fees – currently €41,1.

In the event that passing on the tax wholly or partially to the subscribers should prove impossible, the President put forward that taking into account the costs of new programs varying from €3 to 30 million per season, a tax of 12,5 million Euros is not likely to significantly affect DTS's competitive position.

Moreover, the President pointed out a recent acquisition by the group to which DTS belongs

4 See para. 26 of the Order and the case-law referred therein.

5 See paras. 29 and 30 of the Order and case T-151/01 R, *Der Grüne Punkt*, [2001] ECR p. II-3295, para. 214.

6 See para. 35 of the Order and the case-law referred therein.

which is likely to reinforce the financial situation of that group. The President therefore considered it unlikely that DTS's existence should be imperiled by the implementation of the contested decision pending the main proceedings.

Finally, regarding DTS's arguments that it would also lose a significant part of its market share due to the fact that the new fiscal regime enabled anti-competitive behaviour of RTVE, in particular the overbidding on broadcasting rights and new programs, the President took the view that DTS had insufficiently substantiated its claims and considered the behaviour described by DTS as purely hypothetical and uncertain future events. Moreover, the President pointed out that DTS was not likely to lose subscribers to the benefit of RTVE since the contracts for broadcasting rights of films and sport events were negotiated on an annual or even multiannual basis. Consequently, the President concluded that DTS's request for interim relief had to be dismissed.

IV. Critique of the President's approach

Among the numerous orders delivered on requests for interim relief, this order does not contain many particular elements that deviate from the settled case-law. However, while in the majority of cases, requests for interim relief in State aid procedures are filed by the beneficiaries of aid schemes that have been found incompatible with the internal market by the Commission, this case is filed by a competitor (DTS) of the beneficiary (RTVE) of the aid that is declared compatible with Article 106(2) TFEU.

The order does not deal with the question as to whether it is likely that DTS's claims in the main proceedings will be awarded, nor does it deal with the admissibility of both DTS's main action and its request for interim relief, although the Commission and Spain have argued the whole or partial inadmissibility of DTS's's request. These questions are to be dealt with under the examination of the *fumus boni iuris* on which the order does not contain any material elements. Therefore, we limit our comments to the following questions that rise when reading the order:

1) Can the loss of market share in all circumstances be considered as a reparable pecuniary damage?
2) From whom should DTS claim damages in the event the Commission's decision is annulled in the main proceedings?

1. Loss of market share, purely pecuniary and reparable?

With its request for interim relief, DTS aiming at preventing irreversible market share losses by suspending the operation of the Commission's decision approving the financing of RTVE.

The President has dismissed DTS's request for interim measures solely on the basis of the absence of urgency, because he considered the loss of market share claimed by DTS as of a purely pecuniary nature which does not, safe in exceptional circumstances in which the existence of the company is jeopardised,[7] qualify as serious and irreparable damage as required under the 'urgency' condition. The reason why damage of a pecuniary nature does not justify interim relief is that it can be the subject of subsequent financial compensation. Hence, the consequences of the operation of the Commission decision before the final judgment in the main proceedings are not considered to be irreparable.

A first point of general criticism concerns the fiction that all damages that can be financially compensated subsequently are considered not to cause irreparable harm. Although damage very often can be translated in financial terms, a financial compensation cannot always restore the original situation, nor does it in all circumstances remedy the effects of the operation of the contested decision in a satisfactory way. DTS's request for interim relief does however not contain particular elements that give rise to abolish this premise underlying the voluminous case-law on applications for interim measures. Therefore, we concentrate our comments on the question as to whether the loss of market share in all circumstances is reparable.

In the first place, we point out that although it is true that the loss of market share is translated into a decrease in revenues, the reasoning according to which such damage can ultimately be compensated seems to be too simplistic. The estimation of the damages suffered due to the loss of market share is

7 Joined cases C-51/90 R and C-59/90 R *Comos-Tank*, [1990] ECR I-2167, paras. 30 and 31 and Case T-301/94 R *Laakman Karton* [1994] ECR II-1279, paras. 23 et seq.

not as mathematical as the order suggests. Certainly, DTS could calculate the difference in its revenues since the fiscal regime was introduced, but how should it estimate the future effects on the companies' revenues? Here, the question arises as to whether the lost market share can be easily regained or whether the loss of this market share is irreversible as it has changed the market structure. The need to prevent irreparable harm caused by irreversible market developments through a suspension of the operation of the contested decision before the final judgment in the main proceedings has been recognised in the case-law.

In the *Magill*-case interim measures were requested in order to suspend the operation of a Commission decision obliging the Irish broadcast channels to supply third parties with their weekly program listings 'forthwith'. The President of the Court held that *"hat obligation might lead to new developments in the market that would subsequently be very difficult, if not impossible, to reverse. In that sense the applicants might suffer serious and irreparable damage if the decision were annulled by the Court."*[8] In the more recent *IMS*-case, the economic value of customers lost to competitors and the commercial difficulties to regain the customers were recognised as legitimate justifications for granting the interim relief requested and suspending the operation of the Commission decision obliging IMS to grant licences to its database with regional sales-data.[9]

These cases demonstrate that the loss of market share can justify the grant of an interim relief, if such a loss is irreversible or very difficult to regain. It is, however, for the applicant of interim relief to demonstrate that it would not be able to regain the market share lost.[10]

Having regard to the afore-mentioned cases, the strict approach of the President on DTS's application – concluding that the loss of market share is to be considered as reparable damage of a pecuniary nature that does not justify the grant of interim relief since DTS's existence is not jeopardised – seems to ignore the question as to whether the loss of market share is irreversible, independently from the question as to whether the applicants existence is imperiled. In his order, the President pointed out that the irreversible loss of market share could only justify the grant of interim relief if the market share at stake was sufficiently important in view of, in particular, DTS's size, and taking account of the characteristics of the group to which DTS belongs.[11] However, it follows from the *IMS*-case that the question of the irreversibility of a loss of market share is to be examined independently from the question as to whether the applicant's existence is jeopardized by the immediate implementation of the contested decision.[12] Although the applicant belongs to a financially viable group due to which its existence will not easily be imperiled, the fact remains that the loss of its market share can be irreversible or is likely to be very difficult to regain.

The assessment of the question of the irreversibility of the loss of DTS's market share could be deducted from the President's reasoning with regard to the likelihood that the tax would affect DTS's competitive position significantly. The President contested that the tax would have such an effect, pointing out in the first place DTS's financial situation, the price of programs and the relatively limited amount of the tax to be paid. Furthermore, he pointed out the fact that DTS appeared to be the first broadcaster for paid television in Spain with a market share of 44% in terms of subscribers and 70% in terms of revenues and put forward that it is unlikely that DTS should not be able to "pass on" the costs of the tax to its subscribers. At the same time, the order does not contest the decrease of DTS's subscribers by 9,3% and leaves open the question whether this loss is to be considered as serious and is likely to be irreversible. The fact that DTS's remaining market share is substantial and that it belongs to a financially viable group seems to be decisive for the conclusion that DTS's interest in an interim relief is not urgent.

However, it follows from the settled case-law that if there is a real and tangible risk that the execution of a contested decision could cause serious and irreparable harm to the applicant before judgment in the main action, it must be assessed whether this risk for the applicant is of a nature likely to exceed the inevitable, short-lived disadvantages inherent in the adoption of protective interim measures.

8 Joined cases 76, 77 and 91/89 R *Radio Telefis Eireann and Others* [1989] ECR p. 1141, para. 18 and case T-395/94 R *Atlantic Container Line and Others*, [1995] ECR II-595, para. 55.

9 Case T-184/01 R *IMS Health*, [2001] ECR II-3193 para. 108.

10 See e.g. case T-201/04 R *Microsoft Corporation*, [2004] ECR II-4463, para. 319 and case T-151/01R (fn. 5).

11 Para. 35 and 36 of the Order.

12 Case T-184/01 R *IMS Health*, paras. 123 to 133.

Therefore, in order to determine whether all of the conditions necessary for granting the interim relief sought are satisfied, it is necessary to weigh the interests involved.[13]

On the basis of the foregoing, a separate assessment whether DTS's market share would have to be considered to be irreversibly lost or at least very difficult to recover and an appreciation of the balance of interests if the damage had to be considered serious and irreversible would have made the dismissal of the request for interim relief more balanced.

2. What addressee for DTS's claim for damages?

As the qualification of the loss of market share as a damage of a purely financial nature automatically brings on board the established case-law on the basis of which such damage does not justify interim relief since it can be subject of financial compensation, the question as to whom DTS should address its possible claim for damages is the next to arise. This "financial damage" case-law is based on the premise that damage of a financial nature that is not eliminated by the implementation of the judgment in the main proceedings constitutes an economic loss which may be compensated by the means of redress provided for in Articles 268 and 340 TFEU.[14] However, in the present case, the question is whether DTS would have any redress possibilities on the basis of these provisions or whether it would have to seek damages from the Spanish government or RTVE before the Spanish courts.

In the first scenario, DTS can only claim compensation from the Commission on the basis of the non-contractual liability of the Union as laid down in Articles 268 and 340 TFEU, in case the contested decision has been annulled in the main action. According to established case-law, in order for the Commission to incur non-contractual liability of the Union, the applicant must prove the unlawfulness of the alleged conduct, actual damage and the existence of a causal link between that conduct and the damage pleaded. If any of these conditions is not satisfied, the action must be dismissed in its entirety.[15]

In order to be capable of causing the EU to incur non-contractual liability, the Commission's decision must constitute a sufficiently serious breach of a rule of law intended to confer rights on individuals. The decisive criterion in that regard is whether the Commission manifestly and gravely disregarded the limits of its discretion when assessing the Spanish fiscal regime, taking into account, inter alia, the complexity thereof and the margin of discretion of the Commission.[16]

Whether the Commission's decision, in the event of the annulment thereof by the General Court in the main action, would qualify as a sufficiently serious breach of a rule of law for which the non-contractual liability must be incurred will depend on the grounds for the annulment.[17] We are not aware of any precedents of actions for damages following the annulment of the contested decision in the field of State aid. However, it can be derived from the case-law on actions for damages in competition cases that the possibility cannot be ruled out in principle that manifest and grave defects affecting the economic analysis which underlies a Commission decision can constitute breaches that are sufficiently serious to give rise to the non-contractual liability of the Union.[18]

Yet, it follows from the *IMS*-order that if there is uncertainty on the possibility of a successful action for damages on the basis of the TFEU, for the purpose of a decision on the application for interim relief, it must be assessed whether, at first appearance, the grounds upon which the contested decision might ultimately be annulled in the main action would suffice to constitute a serious breach such that it can be argued that the Commission has manifestly and gravely disregarded the limits on its discretion. [19]

It does not seem very likely that DTS could successfully claim compensation from the Commission on the basis of Articles 268 and 340 TFEU. Apart from the arguments that could be put forward by the Commission to contest the unlawfulness of the decision in a possible action for

13 Case T-184/01 (fn. 13), paras. 117, 132 and 133 and the case-law referred to therein.

14 Case T-184/01 R (fn. 13), para. 119 and the case-law referred to therein.

15 See amongst others case T-176/01 *Ferriere Nord*, para. 176.

16 See e.g. case T-351/03 *Schneider Electric* [2007] ECR II-02237, paras. 114-116.

17 Case T-212/03 *My Travel Group*, [2008] ECR II-1967.

18 Case T-212/03 (fn. 18), para. 80.

19 Case T-184/01 R (fn. 13), para. 120 and the case-law referred to therein.

damages, it could contest the causal link between its decision and the damage claimed by DTS since the Commission only approved a regime that was proposed by the Spanish government. It could therefore be argued that the damages followed from the implementation of the regime of the Spanish government and not from the Commission's decision as such. This is also clearly demonstrated by the fact that the regime was already implemented prior to the Commission's decision.

In the event DTS would seek for damages from the Spanish government, the latter could in turn argue that the Commission decision has caused the damage, since the implementation of the fiscal regime is not possible without the approval of the Commission. However, by doing so, the Spanish government would deny that the fiscal regime was applied before the contested decision was adopted. Moreover, since the Commission concluded that the new fiscal measures did not form an integrated part of the aid to RTVE, the Commission decision does not form a constitutive element for the implementation of the fiscal regime. Therefore, we consider it likely that DTS can only successfully claim compensation before the national courts. In that respect, we refer to the *IMS*-order which states that "it is clearly not possible, nor indeed appropriate, for the judge hearing the present application for interim relief to speculate on the likelihood of adequate redress being obtained by IMS before the national courts."[20] The same applies with regard to a possibility for DTS to claim damages from RTVE. This possibility does not seem very likely, as RTVE – although it benefits from the new fiscal regime – had no role or say in the introduction of that regime. Moreover, in exchange for the new financing system, RTVE's commercial activities and hence its revenues from these activities have been restricted to a minimum level with the introduction of the new fiscal regime.

To conclude, the President of the General Court, in his decision on DTS's application for interim relief, should at least have assessed whether on first analysis, the grounds upon which the contested decision might ultimately be annulled suffice for an adequate redress on the basis of the non-contractual liability of the Union laid down in Articles 268 and 340 TFEU. As it is likely that the outcome would be negative, a motivation of the dismissal not only based on the absence of urgency, but also on the basis of the substance, the *fumus boni iuris*, and possibly the balance of interest, would have resulted in a more balanced order.

V. Conclusions and outlook

The assumption underlying the present order on DTS's request for interim relief denies in the first place the need to examine whether the loss of market constitutes an irreversible harm, independently from the question as to whether the existence of the applicant is jeopardised. In the second place, the order can only be based on the assumption that all damage of a pecuniary nature following from State aid decisions can be subject to a claim for financial compensation if the means of redress provided for in the Articles 268 and 340 TFEU are available for the applicant's damage. In case of doubt, as in the case of DTS, it would have been necessary to conduct a *prima facie* assessment of whether DTS is likely to succeed in an action for damages in case of annulment of the contested decision in the main action. If the result of such assessment is negative, a dismissal based on the absence of urgency due to the pecuniary nature of the damage alone can, in our view, not be considered to be a balanced decision.

We appreciate that a dismissal solely on the basis of the urgency can be an efficient way of dealing with the numerous applications for interim relief. However, a degeneration of the case-law on interim measures in which the standard reasoning from the established case-law is applied irrespective of the particularities of the applicant's situation and his possibility to have recourse to an action for damages, must be prevented. Therefore, every dismissal of an application requires a careful substantiation. Although this also requires the applicants to provide sufficient information on their particular situation and to draft their application carefully, we believe that in some cases a dismissal of the application for interim measures on the basis of the *fumus boni iuris* and the balance of interests and not on the urgency-condition only, would lead to a more balanced case-law. If this approach would have been followed in the current order, the substantiation of the dismissal would have been more balanced in our view.

20 Case T-184/01 R, para. 119.