STATE AIDS (BROADCASTING): THE SIC CASE

Subject: State aids
Complaints

Industry: Broadcasting

Parties: SIC - Sociedade Independente de Comunicação SA
Commission of the European Communities
RTP - Radiotelevisão Portuguesa SA (intervener)
Portuguese Republic (intervener)
United Kingdom (intervener)

Source: Judgment of the Court of First Instance, dated 10 May 2000 in Case T-46/97 (SIC - Sociedade Independente de Comunicação SA v Commission of the European Communities)

(Note. This was an application for the annulment of (i) the Commission's decision of 7 November 1996 concerning a proceeding under Article 93 of the EC Treaty (now Article 88 EC) on the financing of public television channels, notified to the applicant on 6 January 1997, and (ii) the decision allegedly contained in a letter from the Commission of 20 December 1996 concerning the complaint by the applicant against RTP - Radiotelevisão Portuguesa SA. The application was largely successful; and the main interest of the case lies in the manner in which the Court interpreted the rules, both of substance and of procedure, on the award of state aids, particularly in the paragraphs of the judgment set out below.)

1. RTP - Radiotelevisão Portuguesa SA, which was formerly a public corporation, has since 1992, the date on which the Portuguese State audiovisual monopoly ended, been a limited liability company with public capital. RTP is the holder of the concession for the Portuguese public television service, and operates Channels 1 and 2 and the Portuguese-language channel RTP Internacional. Whilst private Portuguese television channels are financed exclusively by advertising revenues, RTP receives in addition to such revenues public financing granted annually in connection with its public service obligations, amounting from 1992 to 1995 to between 15% and 18% of its total annual resources.

2. SIC - Sociedade Independente de Comunicação SA is a commercial television company incorporated under Portuguese law, which has been running one of the main private television channels in Portugal since October 1992.

3. On 30 July 1993, SIC referred a complaint to the Commission ('the first complaint) concerning the methods by which RTP's channels were financed and seeking a declaration, first, that a series of measures taken by the Portuguese Republic in favour of RTP was incompatible with the common market within the meaning of Article 92 of the EC Treaty (now, after amendment, Article 87 EC),

and secondly, that there had been an infringement of Article 93(3) of the EC Treaty (now Article 88(3) EC) for failure to give prior notification of the measures complained of ...

70. In the context of Article 93 of the Treaty, a distinction must be drawn between, on the one hand, the preliminary stage of the procedure for reviewing aid under Article 93(3), which is intended merely to allow the Commission to form a prima facie opinion on the character of the measure in question as State aid and the partial or complete conformity of the aid in question with the common market, and, on the other hand, the formal stage of the examination under Article 93(2). It is only in connection with the latter examination, which is designed to enable the Commission to be fully informed of all the facts of the case, that the Treaty imposes an obligation on the Commission to give the parties concerned notice to submit their comments (see, *inter alia*, Case C-198/91, *Cook v Commission*, paragraph 22; Case C-225/91, *Matra v Commission*, paragraph 16).

71. It is settled case-law that the procedure under Article 93(2) is essential whenever the Commission has serious difficulty in determining whether aid is compatible with the common market. It follows that when the Commission gives a favourable decision on aid it may restrict itself to the preliminary examination under Article 93(3) only if it is able to satisfy itself after an initial examination that the aid is compatible with the common market. If, on the other hand, the initial examination leads the Commission to the opposite conclusion or if it does not enable it to resolve all the difficulties involved in determining whether the aid is compatible with the common market, it is under a duty to carry out all the requisite consultations and for that purpose to initiate the procedure under Article 93(2) (*Sytraval and Brink's France*, paragraph 39, and the case-law cited therein).

72. It also follows from that case-law that the Commission is required to initiate the procedure provided for in Article 93(2) of the Treaty if an initial examination does not enable it to resolve all the difficulties raised by the question whether a State measure submitted to it for review constitutes aid for the purposes of Article 92(1) of the Treaty, unless, in the course of that initial examination, the Commission is able to satisfy itself that the measure at issue is in any event compatible with the common market, even if it is aid (Case T-11/95, *BP Chemicals v Commission*, paragraph 166).

73. In this case, it is undisputed that the Commission adopted the Decision without initiating the procedure laid down by Article 93(2) of the Treaty and took the view that the six categories of measure submitted for its assessment did not constitute aid within the meaning of Article 92(1) of the Treaty. It should also be noted that the Commission did not consider whether those measures, if they were to be classified as aid, would be compatible with the common market either under Article 92(2) or (3) of the Treaty, or under Article 90(2) of the Treaty.

74. It is therefore necessary to see whether, in so far as they concern the four categories of measure concerned in this action, the assessments on which the Commission relied in order to adopt a decision favourable to those measures at

the conclusion of the preliminary examination stage were sufficiently complex to justify initiating the procedure under Article 93(2) of the Treaty.

75. As regards, first, the grants paid by the Portuguese State to RTP by way of compensation, the Commission found in the Decision that they did not constitute aid within the meaning of Article 92(1) of the Treaty because they were intended to offset the actual cost of meeting the public service obligations assumed by RTP. It should be remembered in particular that, with regard to the compensation paid from 1993 to 1995, the Commission took the view that 'the financial advantage resulting [from those] transfers did not exceed what was strictly necessary in order to meet the public service obligations required by the terms of the concession (see paragraph 22 above). In respect of 1992, the Commission also relied on the absence of over-compensation, such absence being deduced from the small amount of the compensation paid to RTP that year, in concluding that the compensation did not constitute aid.

76. Article 92(1) of the Treaty provides that save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market.

77. The Court has consistently held that the aim of that provision is to prevent trade between Member States being affected by advantages granted by public authorities which, in various forms, distort or threaten to distort competition by favouring certain undertakings or certain products (Case C-387/92, *Banco Exterior de España v Ayuntamiento de Valencia*, paragraph 12; *SFEI*, paragraph 58).

78. In order to determine whether a State measure constitutes aid, therefore, it is necessary to establish whether the recipient undertaking receives an economic advantage which it would not have obtained under normal market conditions (*SFEI*,paragraph 60; Case C-342/96, *Spain v Commission*, paragraph 41; Case C-256/97, *DM Transport*, paragraph 22).

79. In this case, as the Commission itself stated in the Decision, the grants paid each year to RTP by way of compensation have the result of giving that undertaking a financial advantage.

80. The Decision also indicates that the grants paid to RTP between 1992 and 1995 represented between 15% and 18% of its annual resources, while at the same time RTP also enjoyed advertising revenue like other television channels with which it is in direct competition in the advertising market.

81. Therefore, in so far as the Commission found in the Decision that RTP enjoyed a financial advantage as a result of the grants in question, which appear to be capable of distorting existing competition with other television operators, the validity of its assessment that those measures did not constitute State aid was, at the least, capable of raising serious difficulties.

82. The fact that, according to the Decision, the grants were merely intended to offset the additional cost of the public service tasks assumed by RTP cannot prevent them from being classified as aid within the meaning of Article 92 of the Treaty.

83. Article 92(1) of the Treaty does not distinguish between measures of State intervention by reference to their causes or aims but defines them in relation to their effects (Case C-56/93, *Belgium v Commission*, paragraph 79; Case C-241/94, *France v Commission*, paragraph 20). It follows that the concept of aid is an objective one, the test being whether a State measure confers an advantage on one or more particular undertakings (Case T-67/94, *Ladbroke Racing v Commission*, paragraph 52).

84. As the case-law shows, the fact that a financial advantage is granted to an undertaking by the public authorities in order to offset the cost of public service obligations which that undertaking is claimed to have assumed has no bearing on the classification of that measure as aid within the meaning of Article 92(1) of the Treaty, although that aspect may be taken into account when considering whether the aid in question is compatible with the common market under Article 90(2) of the Treaty (*FFSA*, paragraphs 178 and 199, confirmed by the order in Case C-174/97 P, *FFSA v Commission*, paragraph 33). It should be noted that, in this case, unlike the *FFSA* case, the Commission did not apply the derogation allowed for by Article 90(2) of the Treaty in its Decision, nor, a fortiori, did it apply the specific conditions laid down by that provision, which, moreover, it does not claim to have done.

85. It follows that the assessment on which the Commission relied in concluding that the grants to RTP by way of compensation did not constitute aid presented serious difficulties which, to the extent that the compatibility of those grants with the common market was not established, required the initiation of the procedure under Article 93(2) of the Treaty. ■

The Plasterboard Cartel Case

Since the autumn of 1998 the Commission has been investigating the existence of a possible price-fixing cartel in the market of plasterboard (a plaster product used in the construction industry). Following a thorough investigation that included inspections at the premises of several plasterboard producers in the course of 1998 and 1999, the Commission recently sent a Statement of Objections to five companies. The Commission will not yet reveal the identity of the companies concerned. It is for them to decide whether or not to do so.

(Source: Commission Memorandum 01/149, dated 23 April 2001.)