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**Article (Published version)  
(Refereed)**

**Original citation:**

Ibáñez Colomo, Pablo (2016) State aid as a tool to achieve technology neutrality - Abertis Telecom, SA and Retevisión I, SA v commission - case T-541/13 - annotation by Pablo Ibáñez Colomo. *European State Aid Law Quarterly*, 15 (3). pp. 440-445. ISSN 16195272

DOI: [10.21552/estal/2016/3/11](https://doi.org/10.21552/estal/2016/3/11)

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Available in LSE Research Online: December 2016

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# State Aid as a Tool to Achieve Technology Neutrality

Annotation on the Judgment of the General Court of the European Union (Fifth Chamber) of 26 November 2015 in Case T-541/13 *Abertis Telecom, SA and Retevisión I, SA v Commission*

Pablo Ibáñez Colomo\*

*In Abertis (a representative judgment of a saga of similar cases), the General Court dismissed an action for annulment against a Commission decision finding that the measures in support for the deployment of a digital terrestrial television network in Spain amounted to unlawful and incompatible State aid. According to the Commission, the support measures were not granted in accordance with the principle of technology neutrality, insofar as they excluded technologies such as satellite. In addition, it held that the Member State could not invoke the Altmark case law, or Article 106(2) TFEU, insofar as the operators had not been entrusted with a public service mission. This is so in spite of the fact that the Spanish Telecommunications Act explicitly referred to the transmission of broadcasting signals as a service of general economic interest. The analysis of the Commission was, by and large, validated by the General Court. The appeal against the judgment, in this and in similar cases, is currently pending.*

*Keywords: SGEI; Altmark; Technology Neutrality; Networks.*

## I. Introduction

Technology neutrality is enshrined in EU law. It was one of the fundamental guiding principles of the EU Regulatory Framework for electronic communications.<sup>1</sup> When this legislative package was adopted in 2002, the process of technological convergence was already well under way. As a result, cable television networks could be used for the provision of telecommunications services and, conversely, legacy telecommunications infrastructure can be used to provide audiovisual content. The two industries – telecommunications and audiovisual – have been transformed in the course of the past decades by digitisation. Against this background, telecommunications regulation was re-crafted to ensure that remedial action by authorities would not discriminate by favouring some technologies over others.<sup>2</sup>

By and large, audiovisual activities are left outside the scope of the EU Regulatory Framework.<sup>3</sup> Thus, the principle of technology neutrality to television

and related activities has found its way through other instruments. As this annotation reveals, State aid law has become one of them. The Commission has made use of its powers to enforce Articles 107(1) and 108(3) TFEU to take action against regulation which, it believes, discriminates among technologies used for the transmission of audiovisual services and amounts to the award of State aid. An obvious example in this sense is *Mediaset*, where the Commission challenged the award of subsidies to end-users for the acquisition of digital decoders insofar as satellite transmissions

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1 See in particular the Directive 2002/20/EC of the European Parliament and the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services, as amended by Directive 2009/140/EC [2002] OJ L108/33, hereinafter ‘the Framework Directive’.

2 Ibid, Article 8(1), which refers to the “desirability of making regulations technologically neutral”.

3 Ibid, Article 2(b), which leaves outside of its scope “services providing, or exercising editorial control over, content transmitted using electronic communications networks and services”.

were excluded from the measure.<sup>4</sup> The judgment of the General Court (hereinafter ‘GC’) in *Abertis*,<sup>5</sup> which is taken as a representative example of a saga of similar cases, provides another example of this trend. The judgment is of particular interest insofar as it engages with the idea that technology neutrality is a general principle of EU law and one that Member States should respect as a rule. The analysis of the Commission suggests that the operation of a service of general economic interest (hereinafter ‘SGEI’) within the meaning of Article 106(2) TFEU presupposes the adoption of technologically neutral regulation. This position is remarkable considering the discretion that Member States enjoy in this regard. Even though this understanding of the principle of technology neutrality was not entirely validated, the GC dismissed the action for annulment in its entirety. At the time of the preparation of this annotation, the appeal brought by the applicants before the Court of Justice of the European Union (hereinafter ‘the Court’) is pending.<sup>6</sup>

## II. Regulatory Background

The background to the judgment in *Abertis* is a series of measures adopted by the Spanish government in the context of the digitisation of the transmission of terrestrial television services. Their origin can be traced back to Law 10/2005 on Urgent Measures for the Promotion of Digital Terrestrial Television, Liberalisation of Cable TV and Support of Pluralism.<sup>7</sup> Other related measures include Royal Decree 944/2005 approving the General Regulations for the delivery of digital terrestrial television service;<sup>8</sup> Or-

der ITV 2476/2005; and Royal Decree 920/2006.<sup>9</sup> For technical reasons, the process of digitisation requires the adaptation of the network used for the transmission of terrestrial signals. The technical challenge was addressed in Spain by dividing up the territory in three areas:

- Area I, covering 96% of the Spanish territory (for private terrestrial broadcasters) and 98% (for public service operators) was not deemed to require the award of subsidies of similar measures, as the costs were born by the broadcasters themselves;
- Area II covers 2.5% of the territory that was traditionally reached by terrestrial television but that required important investments to ensure the successful transition to digital transmissions; and
- Area III, which covers the remaining 1.5% of the Spanish territory and for which terrestrial television was ruled out as unworkable.

On the basis of the legislative instruments mentioned above, several Spanish regional and local authorities supported the development of the digital terrestrial network within Area II. These measures were contested by SES Astra, a satellite operator, which filed a complaint before the European Commission (hereinafter ‘the Commission’). Pursuant to the complaint, the plan for the transition to digital amounted to unlawful State aid within the meaning of Article 107(1) TFEU. The fundamental claim of the satellite operator was that the legislative measures had excluded other means of transmission. The Commission opened the formal investigation procedure in September 2010, and adopted its decision on 19 June 2013.<sup>10</sup> It found the measures in support of the tran-

4 Case C-403/10 P *Mediaset SpA v Commission* [2011] ECLI-533.

5 Case T-541/13 *Abertis Telecom, SA and Retevisión I, SA v Commission* [2015] ECLI-898. This judgment is one of a saga of parallel challenges against a Commission decision. See Case T-461/13 *Spain v Commission* [2015] ECLI-891; Case T-462/13 *Comunidad Autónoma del País Vasco and Itelazpi v Commission* [2015] ECLI-902; Joined Cases T-463/13 and 464/13 *Comunidad Autónoma de Galicia and Retegal v Commission* [2015] ECLI-901; Case T-465/13 *Comunidad Autónoma de Cataluña and CTTI* [2015] ECLI-900; Case T-487/13 *Navarra de Servicios y Tecnologías* [2015] ECLI-899.

6 Case C-69/16 P *Cellnex Telecom and Retevisión I v Commission*, pending. See also, other challenges have been brought against the GC judgments dismissing challenges brought against the Commission decision. See, Case C-66/16 P *Comunidad Autónoma del País Vasco and Itelazpi v Commission*, pending; Case C-67/16 P *Comunidad Autónoma de Cataluña and CTTI v Commission*, pending; Case C-68/16 P *Navarra de Servicios y Tecnologías v Commission*, pending; Case C-70/16 P *Comunidad Autónoma de*

*Galicia v Commission*, pending; Case C-81/16 P *Spain v Commission*, pending.

7 Law 10/2005, available at <<https://www.boe.es/buscar/doc.php?id=BOE-A-2005-10069>> Last accessed on 21 September 2016.

8 Royal Decree 944/2005, available at <[https://www.boe.es/diario\\_boe/txt.php?id=BOE-A-2014-9667](https://www.boe.es/diario_boe/txt.php?id=BOE-A-2014-9667)> Last accessed on 21 September 2016.

9 Royal Decree 920/2006, available at <<https://www.boe.es/boe/dias/2006/09/02/pdfs/A31532-31538.pdf>> Last accessed on 21 September 2016.

10 *State aid implemented by the Kingdom of Spain for the deployment of digital terrestrial television in remote and less urbanised areas*, European Commission, Decision 2014/489/EU of 19 June 2013 OJ L217/52. A second decision concerning the Spanish region of Castilla-La Mancha would follow. See *State aid implemented by the authorities of Castilla-La Mancha for the deployment of digital terrestrial television in remote and less urbanised areas* European Commission, Decision 2016/1385 of 1 October 2014 [2016] OJ L222/52.

sition to digital terrestrial television (hereinafter ‘DTT’) to amount to incompatible State aid insofar as they were adopted in breach of the principle of technology neutrality. It ordered the recovery of the sums awarded in breach of Article 108(3) TFEU.

### III. Commission Decision

In its decision, the Commission presented the legislative instruments adopted by the central government and the measures implemented at the regional and local level as forming the basis of the same scheme.<sup>11</sup> Similarly, it did not dispute that the measures globally made a technological choice in favour of DTT. In support of this conclusion, the Commission argued that the primary legislative instrument refers explicitly to terrestrial transmission and to the fact that the vast majority of tenders organised at the regional level for the implementation of the plan of the central government were also awarded to project relying upon terrestrial technologies.<sup>12</sup> Another question that did not leave any scope for discussion in the Commission’s view is the involvement of State resources in the measures.<sup>13</sup> As opposed to a mere transfer within authorities, the measures ultimately benefited the operators of terrestrial networks.

More detailed was the analysis of whether the measures granted a selective advantage to the said operators. In this regard, the Commission noted that the network operators benefitted either directly or indirectly from the transfer of State resources aimed at the expansion or the upgrading of the network. Abertis and Retevisión, as the main operators of DTT infrastructures in Spain, were understood to be the main beneficiaries of the plans of the Spanish government.<sup>14</sup> However, they were not deemed to be the only recipients of aid. In some regions, public undertakings were entrusted with the mission of extending the coverage of the network.<sup>15</sup> The measures were, in addition, deemed to be selective insofar as they only benefitted firms operating terrestrial transmission infrastructure in the broadcasting sector.<sup>16</sup>

The crucial – and most interesting in theory and practice – issue relates to whether the contentious measures met the conditions set out by the Court in *Altmark*<sup>17</sup> and/or whether they qualified as an SGEI within the meaning of Article 106(2) TFEU. The example of the Basque country was put forward as an example by the Spanish government.<sup>18</sup> In this regard,

the Commission argued that the measures do not conform to the first *Altmark* condition, that is, that the recipient undertakings are entrusted with a set of well-defined public service obligations.<sup>19</sup> On the one hand, it is acknowledged in the decision that telecommunications services – a legal concept that comprises the operation of terrestrial networks – are services of general economic interest in accordance with national legislation. On the other hand, the Commission considered that transmission activities are not as such defined as a public service in the Spanish Telecommunications Act of 2003. In addition, it concluded that the relevant legislation does not specifically refer to terrestrial transmission as an SGEI.<sup>20</sup> The fourth *Altmark* condition was not deemed to be fulfilled either.<sup>21</sup>

The Commission also rejected arguments relating to the compatibility of the measures with Articles 107(3) and 106(2) TFEU. As far as the first is concerned, the decision did not dispute that the measures sought to address a well-defined objective that is in the common interest and that there is a market failure in the industry that could have the effect of depriving a significant part of the population from access digital television. However, the Commission concluded that intervention by the Spanish government took place in breach of the principle of technology neutrality.<sup>22</sup> It is worth noting in this regard that the decision is based on the idea that this is a principle of general application in EU State aid law. According to the Commission, tenders such as the one at stake in the case should be technologically neutral, unless there is *ex ante* evidence suggesting that only one technology could have been selected.<sup>23</sup> As far as

11 Commission Decision 2014/489/EU (n10), [90-93].

12 Ibid., [92].

13 Ibid., [95-96].

14 Ibid., [10].

15 Ibid., [101, 105].

16 Ibid., [113].

17 Case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH, and Oberbundesanwalt beim Bundesverwaltungsgericht* [2003] ECLI-415.

18 Commission Decision 2014/489/EU (n10), [114].

19 Ibid., [119].

20 Ibid., [120].

21 Ibid., [126-127].

22 Ibid., [153-167].

23 Ibid., [154].

Article 106(2) TFEU is concerned, the Commission noted that it is not applicable in the case for the same reasons that the *Altmark* conditions were not deemed to be fulfilled.<sup>24</sup>

## IV. Judgment

Several challenges, by private firms and public authorities, were brought against the decision adopted by the Commission.<sup>25</sup> The challenge brought by Abertis and Retevisión raised four main pleas in law, one relating to the qualification of the measures as State aid within the meaning of Article 107(1) TFEU; one relating to their qualification as new aid; and two concerning the assessment of the compatibility of the measures with the internal market. These pleas were dismissed in their entirety by the GC, and the applicants were ordered to pay the costs. The remainder of this annotation focuses on the analysis of the conditions set out in Article 107(1) TFEU – in particular in relation to the application of the *Altmark* conditions to the facts of the case – and on the analysis of the compatibility of the measures with the internal market.

### 1. Qualification of the Measures as Aid

Abertis and Retevisión argued that the Commission erred in law by failing to conclude that the measures fulfilled the conditions set in *Altmark*. The analysis of the GC starts by noting the discretion that Member States enjoy when deciding which activities are to be entrusted with public service obligations, and the fact that the Commission is only entitled to call

into question the qualification of an activity as an SGEI where there is a manifest error of assessment.<sup>26</sup> The marginal control of Member States' choices comprises, in particular, the definition of an SGEI obligation.<sup>27</sup> In this regard, the GC rejected the arguments of the applicants, insofar as their activity – the operation of a DTT network at the national level – had not been defined as an SGEI within the meaning of EU law.

In this regard, the GC dismisses the idea that the express designation of an activity as an SGEI in national legislation is sufficient to satisfy the first *Altmark* condition, or Article 106(2) TFEU. The judgment suggests, in line with the position of the Commission, that the meaning attached to the notion of SGEI in the Spanish Telecommunications Act differs from the understanding of the notion in EU law. In particular, it points out that the Spanish legislation refers to the provision of services in a freely competitive market, as opposed to the entrustment of specific undertakings with the public service obligation, as required, in its view, by *Altmark*.<sup>28</sup> In addition, it holds (as the Commission did in its decision) that the contentious measures are at odds with the logic of Spanish Telecommunications Act, which endorsed the principle of technology neutrality.<sup>29</sup> The GC also concluded that nothing in the instruments adopted by regional or local authorities, other than the Basque Country, suggested that the network operators had been entrusted with a mission in the public interest.<sup>30</sup>

The GC also upholds the Commission arguments relating to the difference to be drawn between the provision of broadcasting services, which would qualify as a public service in accordance with the relevant legislation, and the operation of the transmission infrastructure.<sup>31</sup> The fourth argument related to the principle of technology neutrality as such. According to Abertis and Retevisión, a proper analysis of the question would have considered whether the choice of a particular technology is manifestly incorrect.<sup>32</sup> In the absence of a manifest error, in other words, a breach of the principle of technology neutrality would not be sufficient to qualify the measures as State aid. The GC – and this is a remarkable aspect of the judgment – appears to suggest that, as a rule, Member States need to consider the principle of technology neutrality where they designate an activity as an SGEI.<sup>33</sup> At the same time, it holds that, in the specific context of this case, the Commission had not es-

24 *Ibid.*, [172].

25 See above, (n5). The challenge against the decision concerning Castilla-La Mancha is still pending before the GC. See Case T-38/15 *Telecom Castilla-La Mancha v Commission*, pending and above, (n10).

26 *Abertis* (n 10), [79-80].

27 *Ibid.*, [81].

28 *Ibid.*, [86].

29 *Ibid.*, [87].

30 *Ibid.*, [95].

31 *Ibid.*, [98].

32 *Ibid.*, [104].

33 *Ibid.*, [105].

tablished to the requisite legal standard that a manifest error had been committed on the part of the Member State.<sup>34</sup> In spite of this fact, the GC concludes that the first *Altmark* condition is not met in the absence of a clear and precise entrustment of an SGEI obligation.<sup>35</sup> As a result, no error of law had been committed by the Commission when concluding that the measure gave a selective advantage to the operators of the terrestrial network.<sup>36</sup> For the same reasons, the GC rules out the applicability of decision 2012/21 to the case.<sup>37</sup>

## 2. Compatibility Assessment

The principle of technology neutrality played an important role in the assessment of the compatibility of the measure with the internal market. In this regard, the GC holds that the applicants failed to establish that the Commission had committed a manifest error when concluding that the measures could not be justified insofar as they were at odds with the principle of technology neutrality.<sup>38</sup> The GC also rejects arguments seeking to show that terrestrial technology was the most effective and the most appropriate in Spain, given the economic and legal context in which broadcasters operate. In this regard, it concludes that none of the reports produced by the parties in support of their conclusions showed that the compatibility assessment of the Commission was manifestly incorrect.<sup>39</sup> It also rejects the arguments claiming that competition had not been distorted within the meaning of Article 107(3)(c).<sup>40</sup> Finally, the GC rules that the measures could not be qualified as an existing aid in view of the transformation that the sector and the measures adopted to support the transmission across the whole territory had undergone.<sup>41</sup>

## V. Analysis

The GC ruling is remarkable in that it engages with two questions that are only controlled for manifest errors and that overlap, at least to some extent, with one another. This is a factor that complicates considerably the analysis. On the one hand, Member States enjoy discretion when designating some activities as SGEIs. As a result, one would expect Member States' choices in this sense to be challenged, or second-guessed, in relatively exceptional circumstances, in-

cluding in the context of Article 106(2) TFEU. On the other hand, the assessment of the compatibility of State aid by the Commission is only subject to limited review by the EU courts. As a result, its decisions finding the incompatibility of a measure with the internal market can only be expected to be annulled by the EU courts in exceptional circumstances, including – again – in the context of Article 106(2) TFEU.<sup>42</sup> In *Abertis*, this overlap has been decided in favour of the Commission. This outcome may be perceived as counterintuitive if one considers that it is for the authority to show that the conditions of Article 107(1) TFEU are met and that a justification only comes into play once it is established that the measure amounts to State aid. The outcome, however, may be explained by the way in which the GC interpreted the scope of the 'manifest error' test.

The judgment appears to be based on the idea that there are some matters relating to SGEIs over which Member States do not enjoy discretion. The GC indeed suggests that the entrustment of an undertaking with a public service mission, and the general economic nature of the service are not merely controlled for manifest errors, but can be fully reviewed by the Commission and courts. It is particularly notable that the Spanish Telecommunications Act expressly recognised the activities as an SGEI but the Member State was not given any leeway in this sense. The reference in legislation to the nature of the service was deemed insufficient to conclude that terrestrial network operators had been entrusted with a public service mission. In this sense, the Commission distinguished between the two, even though they are generally understood to be synonymous concepts, in the sense that an SGEI corresponds roughly to the

34 *Ibid.*, [106].

35 *Ibid.*, [110].

36 *Ibid.*, [112].

37 *Ibid.*, [114].

38 *Ibid.*, [124].

39 *Ibid.*, [136].

40 *Ibid.*, [146-151].

41 *Ibid.*, [158-159].

42 A statistical analysis performed by this author confirms this view. In the period between 2004 and 2011, no single decision was found to be annulled by the EU courts on grounds that the compatibility assessment was incorrect. See P Ibáñez Colomo, 'State Aid Litigation before EU Courts (2004-2012): A Statistical Overview' (2013) 4 *Journal of European Competition Law and Practice* 469.

notion of public service as used in national legal systems.<sup>43</sup>

This is a question that will be addressed by the Court as it is the single point of law raised by the appellants.<sup>44</sup> They argue, *inter alia*, that the GC erred in law by ‘exceeding the boundaries’ of the ‘manifest error’ test and by ‘failing to recognise’ that the definition and the entrustment of an SGEI does not require a particular instrument or formula. These are questions that have already been abundantly examined by the Court – and, to a large extent, appeared to have been long settled in the case law – but that will be revisited on appeal. One of the most intriguing aspects of the decision concerns the argument raised by the Commission whereby the technologi-

cally neutral wording of the Spanish Telecommunications Act precludes the qualification of the activities at stake in the case as an SGEI. From this perspective, the fact that terrestrial networks are not mentioned expressly in the relevant legislation would limit the discretion of the Member State when deciding how to organise an SGEI.

In relation to other aspects pertaining to the issue of technology neutrality, the position taken by the GC nuances that of the Commission. The authority appeared to take the view in its decision that, by failing to endorse the principle of technology neutrality, a Member State would be committing a manifest error that would vitiate the designation of a particular activity as an SGEI. While it did not have any practical consequences, the GC appears to have ruled out this interpretation of *Altmark* and Article 106(2) TFEU. Even though it endorses, as a matter of principle, the idea of technology neutrality, the GC holds, contrary to the Commission, that the choice of a particular technology for the provision of an SGEI does not, in all cases, amount to a manifest error of assessment on the part of the Member State. According to the GC, the Commission should have considered whether the choice of a particular technology is objectively justified in light of the discretion enjoyed by Member States in relation to the question.

43 See in this sense J Faull and A Nikpay, *The EU Law of Competition* (Oxford University Press 2014), para 6.149.

44 Case C-69/16 P: Appeal brought on 5 February 2016 by Cellnex Telecom S.A. and Retevisión I, S.A. against the judgment of the General Court (Fifth Chamber) delivered on 26 November 2015 in Case T-541/13, *Abertis Telecom S.A. and Retevisión I v Commission* [2016] OJ C118/17. Other challenges have been brought against the GC judgments dismissing other challenges brought against the Commission decision. See Case C-66/16 P *Comunidad Autónoma del País Vasco and Itelazpi v Commission*, pending; Case C-67/16 P *Comunidad Autónoma de Cataluña and CTTI v Commission*, pending; Case C-68/16 P *Navarra de Servicios y Tecnologías v Commission*, pending; Case C-70/16 P *Comunidad Autónoma de Galicia v Commission*, pending; Case C-81/16 P *Spain v Commission*, pending.