[DE] Legality of Cable Allocation Monopoly Confirmed

IRIS 2000-1:1/16

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In a ruling of 14 September 1999, the Bremen Higher Administrative Court (Oberverwaltungsgericht - OVG) upheld the regulations and practice of cable allocation in the Bremen Bundesland.

At the end of 1997, the Bremen Land Media Authority (Landesmedienanstalt), in accordance with the Bremen Land Media Act (Bremisches LandesmediengesetzBremLMG) had approved a cable allocation system which set out, in order of preference, all channels which were to be included in the cable network. Such a system is only implemented if the available cable capacity is insufficient to accommodate all channels requiring access to the cable network.

A private cable operator appealed against the Bremen Land Media Authority's decision on the grounds that the cable allocation process was the responsibility of private cable operators. The applicant claimed that the cable allocation monopoly was incompatible with basic German laws, the European Convention on Human Rights and European Community law.

The Court disagreed, considering the Bremen Land Media Authority's regulations to be fully justified by the freedom to broadcast provided for in Article 5.1.2 of the Basic Law (Grundgesetz). The belief of the Land legislative body that cable allocation should be the task of a pluralistic body within the Bremen Land Media Authority rather than of cable operators, could not be questioned. Even if it were accepted that the freedom of information was being breached, this would be permissible if cable allocation were carried out by the Land Media Authority in a way which guaranteed plurality. The Court ruled that the cable operator's right of ownership was subject to greater social responsibility since the basic rights of both television broadcasters and viewers depended on the cable network. Therefore, in the Court's opinion, the cable allocation regulations justifiably restricted the cable operators' basic rights of ownership (Article 14.1 of the Basic Law), freedom to choose an occupation (Article 12.1 of the Basic Law), and general freedom of action (Article 2.1 of the Basic Law). Just as a television monopoly, according to Article 10.1, sentence 3 of the European Convention on Human Rights, did not necessarily breach the freedom of expression provided for in Article 10.1, sentences 1 and 2 of the same Convention, so the cable allocation regulations laid down by the Bremen Land Media Authority were permissible under the terms of Article 10.2 of the Convention. Moreover, with reference to the

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freedom to provide services guaranteed in Article 49 of the EC Treaty, the Court found no clear discrimination. If the freedom to provide services had been breached, this was justified anyway, since guaranteeing a pluralistic radio and television system was recognised as a compelling reason in the public interest which warranted the restriction of such freedom. The EC's competition rules were disregarded because the Bremen Land Media Authority was not an "undertaking" in the sense of Article 86.1 of the EC Treaty. Just like the Commission in the Phoenix/ Kinderkanal decision (see IRIS 1999-3:5), the Court did not consider the cable allocation regulations to be "incompatible aid" in the sense of Article 87 of the EC Treaty.

The Bremen Court rejected the applicant's appeal against the decision not to revise the regulations. The case will now be brought before the Federal Administrative Court.

Urteil des OVG Bremen vom 14. September 1999, Az. OVG 1 HB 433/98.

Judgement of the Bremen Higher Administrative Court, 14 September 1999, case no. OVG 1 HB 433/98.

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