[AT] State Not Liable for Broadcasting Monopoly

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On 7 October 2003, the Austrian Verfassungsgerichtshof (Constitutional Court - VfGH) rejected a claim under state liability law for compensation for misplaced investments in the establishment of a private television company.

Back in 1996, the plaintiff had wanted to operate private television in Austria as a partner of RTS Radio- und Fernsehproduktions GmbH (RTS). However, it had been denied a licence to manage and broadcast television channels because of the monopoly held at the time by the public service broadcaster Österreichische Rundfunk (ORF). RTS had then established ICS Broadcasting Ltd. in London and obtained from the responsible British authority a Europe-wide satellite licence "to broadcast programmes for Austrians in Europe". The plan was to broadcast digitally from London a channel produced in Austria via the SES-ASTRA satellite system. The channel would be available directly via individual satellite dishes or via Austrian cable networks and shared receivers. To this end, contracts had already been negotiated with cable operators, investments had been made in order to raise capital and partnership agreements had been signed regarding shareholdings in ICS. On 12 September 1996, a ministerial Cable Broadcasting Bill, drawn up by the Constitutional Department of the Bundeskanzleramt (Federal Chancellery), was distributed to interested parties for evaluation. The Bill prohibited the retransmission of TV channels from abroad whose content was specifically aimed at the Austrian public and whose operators had established themselves abroad in order to circumvent Austrian legislation. It also banned the sale and marketing of technical devices designed to decode such channels. The draft never entered into force. However, the partners of ICS withdrew from the project. On account of its outstanding debts, the plaintiff was prevented from applying for a terrestrial analogue TV frequency in 2001 because it did not meet the legal requirements regarding financial suitability (see IRIS 20024:5, IRIS 2001-7:7). The plaintiff therefore sought compensation on both counts, claiming that Austria had breached EC law by allowing the broadcasting monopoly.

The VfGH decided that it was not competent to decide on the second claim for compensation. Such claims were the responsibility of the civil courts. However, this was not the case if the disputed action could be directly attributed to the legislature - as with the first claim for compensation for the withdrawal of partners following the publication of the Bill and the failure to establish a private TV market. However, in the Court's view, there were no grounds for such a claim. The

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claim for compensation under Community law had to be based, inter alia, on a sufficiently proven breach of applicable Community legislation. However, the Court did not believe that the ORF's monopoly of the TV market constituted a breach of applicable EC legislation. According to the ruling of the ECJ in the ERT case (C-260/89), the freedom to provide services was not incompatible with the existence of a TV monopoly on non-financial grounds in the public interest. However, a breach would be committed if such a monopoly led to discrimination against foreign TV programmes. The VfGH ruled that the ORF's objective of unbiased reporting fulfilled a public task that reflected the variety of opinions present in public life. In the Court's view, the broadcasting monopoly had not been organised in a discriminatory manner through the transposition into Austrian law of Articles 4.1, 4.2 and 5 of Directive 89/552/EEC ("Television without Frontiers").

The Court also decided that the plaintiff had no greater claim against the state under Art. 10 ECHR, which it had also cited, than under Art. 2.2 of the "Television without Frontiers" Directive, which contained the minimum regulations necessary to ensure the free transmission of TV channels. This rule did not affect the Member States' responsibility for regulating legal or official licences.

Erkenntnis des Verfassungsgerichtshofs vom 7. Oktober 2003, Geschäftszahl A11/01

Decision of the Constitutional Court, 7 October 2003, case no. A11/01

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