[CZ] Court Decision on the Czech Broadcasting Act

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A Czech operator of an electronic services network applied for a broadcasting license. The Czech Broadcasting Council refused his petition with reference to Article 17 paragraph 4 of the Czech Broadcasting Act which states the following:

“Licences for radio or television broadcasting disseminated solely by digital transmitters or registrations to operate retransmissions disseminated only digitally [Section 2 paragraph 1, point g), Section 26 and subsequent] may not be awarded to entrepreneurs who provide electronic communications networks (hereafter only “electronic communications network entrepreneurs”) or to groups of electronic communications network entrepreneurs or persons who are financially or personally connected to such entrepreneurs”.

The operator filed a complaint with the Prague Municipal Court against the decision of the Broadcasting Council. The plaintiff alleged a conflict of the above provision with Community Law. The Municipal Court discontinued the procedure and proposed to the Czech Constitutional Court that it should cancel Article 17 paragraph 4 as not being in harmony with Community Law.

The Constitutional Court refused to cancel the provision of the Broadcasting Law and referred to the resolution of the Constitutional Court No. Pl. ÚS 19/04 of 21 February 2006 which states:

"Since 1 May 2004 every public authority is obliged to apply Community Law in preference to Czech law, if the Czech law is in conflict with Community law.”

The application of this principle in practice has the effect of an obligation to keep a national standard, which is inconsistent with a Community standard unapplied. This also applies to the administrative authority in regard to its conclusions.

The Prague Municipal Court then annulled the original decision of the Broadcasting Council. The Court stated that the consequence of an ex-ante regulation is the strictest penalty on stakeholders, i.e., the absolute prohibition of a business in a particular area only on the assumption that it could lead to distortion of competition. This would result in the use of excessive means to attain a given objective. The prohibition is applied outright without qualified examination which is contrary to the principle of proportionality.

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The Court considered that it is a national measure which may constitute an obstacle to the exercise of fundamental freedoms guaranteed by the EC Treaty which is not suitable for securing the attainment of the objective pursued and which goes beyond what is necessary to achieve the objective. Based on these considerations the Court concluded that the provisions of Article 17 paragraph 4 were contrary to Community Law and should not be applied.

The Ministry of Culture and the Ministry of Industry and Trade understood the difficulties of this provision with respect to its compatibility with Community Law and proposed the deletion of the provision in Article 17 paragraph 4 of the Broadcasting Act. The Government approved the proposals and forwarded those to Parliament for further consideration.

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Decision of the Prague Municipal Court of 17 February 2010, No. 5 Ca 168/2007

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