

[DE] Dispute concerning the Allocation of Frequencies for Mobile Telephony Continues

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*Sebastian Schweda
Institute of European Media Law (EMR), Saarbrücken/Brussels*

As some facts remain to be clarified, the Bundesverwaltungsgericht (Federal Administrative Court - BVerwG) has referred a dispute concerning the allocation of frequencies below 1GHz for mobile telephony back to the lower court. In particular, the BVerwG criticised the fact that the existence of spectrum scarcity, which is a necessary precondition for the auction procedure, had not been sufficiently established.

The Bundesnetzagentur (Federal Network Agency - BNetzA), which is responsible for the allocation of radio frequencies, had ordered the allocation by auction of the frequencies previously used by the military (sections 55(9) and 61 of the Telekommunikationsgesetz [Telecommunications Act - TKG]). E-Plus Mobilfunk GmbH & Co. KG, one of four mobile telephone companies in Germany, brought an action against this order before the Verwaltungsgericht Köln (Cologne Administrative Court - VG Köln), claiming that the procedure chosen gave preferential treatment to the two established digital cellular telephone network operators T-Mobile and Vodafone, which for historical reasons had additional frequency allocations below 1GHz. These frequency bands are particularly in demand as they have good propagation characteristics, thus making it possible to operate mobile telephone networks that are wider meshed than in higher frequency bands.

The VG Köln dismissed the complaint in its judgment of 17 March 2010 and the auction, which also covered frequency bands above 1GHz in addition to those in issue, then took place in April and May 2010 in accordance with the rules of procedure laid down by the BNetzA (see also IRIS 2010-6/19). The plaintiff was the only mobile telephone company that failed to acquire frequencies below 1GHz.

In the final appeal on points of law, the BVerwG held that the Cologne court had not sufficiently clarified two issues of fact. Firstly, it had not sufficiently established that at the time of the award decision and with regard to the total number of frequencies available for joint allocation the demand for frequencies exceeded the supply. However, the existence of spectrum scarcity is, according to section 55(9) TKG, a precondition for holding an auction. Secondly, no sufficient examination had been conducted into whether and to what extent frequencies had previously been allocated for use on the same materially and geographically

relevant market without such an auction procedure, even though the outcome of such an examination was crucially important for assessing the suitability of the procedure in the instant case.

As the BVerwG could not clarify the facts itself, it referred the dispute back to the VG Köln.

Pressemitteilung des BVerwG zum Urteil vom 23. März 2011 (Az. 6 C 6.10)

http://www.bverwg.de/enid/9d.html?search_displayContainer=13647

BVerwG press release on the judgment of 23 March 2011 (Case no. 6 C 6.10)

