[NL] Court Ruling on Broadcasting Licence Fee Calculation

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On 8 January 2015, the College van Beroep voor het bedrijfsleven (CBb), a Dutch court of last instance for certain administrative matters, gave its partial decision in a case concerning the renewal fees for commercial radio broadcasting licences. It found that the calculation method applied to determine this fee was unsuitable for one of the licences and that, as a consequence, the charge levied for that licence was too high.

The Dutch Telecommunications Act (Telecommunicatiewet) contains rules on the allocation of radio broadcasting frequencies. Those frequencies intended for commercial use can be divided amongst market participants through an auction, through a "beauty contest" or on a first-come, first-serve basis. Once these licences expire, the above process may be repeated. As an alternative, however, the licences granted to the previous holder may simply be renewed. In these cases, the Ministry for Economic Affairs must calculate a reasonable licence fee related to "the profit to be expected throughout the licensing period".

Sky Radio BV is a commercial broadcaster that has held a licence for the "A2" frequency block since 2003, which it uses for their station Radio Veronica. While some licences are not tied to specific content requirements, several licences may only be used to broadcast according to specific "format restrictions". In this case, Sky Radio BV was required to play classic pop music ("golden oldies") for most of the day-time. In 2011, the Ministry granted them a renewal of the A2 licence. The renewal fee was calculated to be equivalent to the licence's value for a "fictional, averagely efficient newcomer to that frequency block", as determined through an independent study conducted by three institutes (SEO Economic Research, TNO Information and Communication Technologies and the Institute for Information Law (IViR)). This calculation resulted in a licensing fee of EUR 20,385,000.

Sky Radio BV filed suit against the renewal decision, objecting to the level of this fee. They claimed that it was insufficiently linked to the gain to be expected throughout the licensing period. Sky Radio BV argued that the government study, by examining the spectrum's value to a "fictional, averagely efficient newcomer", failed to take into account factors specific to Radio Veronica which affect the spectrum's value, such as branding and synergy with other broadcasting services.

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Hence, they argued that the model did not reflect the value reduction caused by content restrictions on A2 block. The Court decided in their favour, stating that an abstract value calculation based on fictional market entrants must take into account the effect of content restrictions for it to be in accordance with the Telecommunication Act. The CBb's decision is final, with no further appeal possible.

The CBb is currently re-examining the fee decisions for spectrum blocks A1 (Sky Radio), A3 (Q-music) and A6 (Radio 538).

College van Beroep voor het bedrijfsleven, 8 januari 2015, ECLI:NL:CBB:2015:2

http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:CBB:2015:2

Trade and Industry Appeals Tribunal, 8 January 2015, ECLI:NL:CBB:2015:2

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