[AT] KommAustria rejects application for national radio licence

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On 29 March 2018, KommAustria, Austria's regulatory authority for audiovisual media including radio, rejected applications by Antenne "Österreich" und Medieninnovationen GmbH for a nationwide commercial terrestrial radio broadcasting licence in accordance with sentences 1 and 2 of Article 28c(2) of the Austrian Privatradio-Gesetz (Private Radio Broadcasting Act - PrR-G) (Case no. KOA 1.010/18-010).

In the proceedings, Antenne "Österreich" und Medieninnovationen GmbH had argued that it met the requirements to hold a nationwide radio broadcasting licence under Article 28c(2) PrR-G. The applicant's service would be accessible to more than 60% of the Austrian population on account of its own licences combined with those that, if it were granted a nationwide licence, would be transferred to it by Entspannungsfunk Gesellschaft mbH (for Central Upper Austria, Klagenfurt), Radio Oberland GmbH (for Tirol-Oberland), Außerferne Medien Gesellschaft mbH (for Außerfern/Reutte), Alpenfunk GmbH (for Salzburg), Schallwellen Lounge GmbH (for Graz) and Weststeirische Regionalfernseh GmbH (for the Köflach area).

The regulatory authority rejected the applications on the grounds that, according to the PrR-G, licences could only be transferred to the holder of a nationwide licence (and therefore the respective transmission capacities could only be allocated under that licence) if they had not expired when the regulator decided on the application for a nationwide licence. In addition, the requirement that 60% of the population must be covered and that broadcasting operations must have been in place for at least two years both had to be met in relation to the licences already held by the applicant and those being transferred to it by third parties; furthermore, if a new licence was being granted to the same licence-holder, the duration of broadcasting operations should be calculated from the date on which the new licence came into force.

In light of this, KommAustria held that, when determining whether the requirement for 60% of the Austrian population to be covered was met, licences (and transmission capacities allocated to these licences) could only be taken into account if they were still valid when the regulatory authority took its decision and if broadcasting operations under those licences had been in place for at least two

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years. Although the regional licences already held by the applicant, combined with those transferred to it by third parties, covered 64% of the population, KommAustria concluded, on the basis of its aforementioned interpretation of the law, that the previous licence for Central Upper Austria held by Entspannungsfunk Gesellschaft mbH could not be taken into account because it had expired on 25 January 2018. The current licence for Central Upper Austria held by Entspannungsfunk Gesellschaft mbH could also not be taken into account because broadcasting operations under this licence had not yet been in place for two years. If the coverage rate of this licence was deducted from the total figure, only 55.3% of the Austrian population was covered, a figure that fell below the 60% threshold.

Article 28c(3) of the PrR-G is relevant in cases such as this. This provision states that, when calculating the coverage rate, regional licences that were due to be transferred should be included if they expire "within six months following the filing of the application due to lapse of time". While the applicant considered this condition to be met, the regulatory authority argued that this could only be treated as a 'catch-all' provision designed to ensure that KommAustria, for example, could not block the granting of nationwide licences by delaying the issue of regional licences.

As the proceedings continue, with a court interpretation of this rule likely to be published, the case is expected to have far-reaching effects on the commercial radio market in Austria. It seems that KommAustria has already begun preparing for this eventuality, since its detailed reasoning and justification of its decision under constitutional law suggests that it is expecting this decision to be challenged before the courts, possibly including the Constitutional Court.

Bescheid der KommAustria, KOA 1.010/18-010

https://www.rtr.at/de/m/KOA101018010/36759_KOA%201.010_18-010%20anonymisiert.pdf

Decision of KommAustria, KOA 1.010/18-010

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