[DE] Higher Administrative Court rules on the significance of spectrum scarcity for allocation decisions

IRIS 2019-5:1/5

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In a recently published decision of 18 December 2018 (Case no. 5 B 229/18), the Sächsische Oberverwaltungsgericht Bautzen (Saxony Higher Administrative Court Bautzen - OVG) ruled that, if a competitor's complaint about the allocation of broadcast transmission capacity appears unlikely to succeed, the public interest in the provisional allocation of transmission capacity takes precedence over the competitor's interest in suspending the implementation of the allocation decision. Although the decision concerns radio transmission capacity, it contains important general principles for the allocation of broadcasting spectrum by means of selection processes in national broadcasting as a whole.

In the summer of 2017, the Gremienvorsitzendenkonferenz (Conference of Chairpersons of the Decision-Taking Councils - GVK) of the German Landesmedienanstalten (state media authorities) had decided, as part of a tender process, that Antenne Deutschland GmbH & Co. KG (ADG), a joint venture of Media Broadcast Digital Radio GmbH and Absolut Digital GmbH, should be assigned the digital terrestrial transmission capacity to set up a second German DAB+ multiplex platform. The Sächsische Landesanstalt für privaten Rundfunk und neue Medien (Saxony state authority for private broadcasting and new media - SLM), on whose behalf the GVK had been acting, had therefore allocated the spectrum to ADG. However, its decision was contested by Digital Audio Broadcasting Platform DABP GmbH, which had been unsuccessful in the tender process and had requested a temporary injunction, primarily on the grounds that the procedure on which the decision had been based had been flawed. The Verwaltungsgericht Leipzig (Leipzig administrative court) granted the injunction, but only weighed up the application's chances of success in the main proceedings rather than conducting a detailed legal assessment because it deemed the allocation decision to be clearly unlawful and therefore considered that the applicant's interest in its provisional deferment should take precedence.

However, the OVG Bautzen overturned the administrative court's decision, which meant that the allocation decision remained immediately enforceable. Although, in the OVG Bautzen's opinion, the allocation decision was unlawful on account of the alleged procedural failings (but not clearly unlawful, as the administrative court had claimed) and would probably also be classified as unlawful in the main proceedings, there was a predominant interest in declaring it immediately

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enforceable.

The OVG Bautzen stressed that a tender process in which information sent to bidders by the authorities was not put on record failed to meet the requirement (also laid down in EU law) for a fair, transparent process. Deadlines in such a process needed to be consistent, clear and unambiguous. Individual changes could not be made to spectrum bid documents before the mutual agreement procedure provided under the Inter-State Broadcasting Agreement had been instigated.

The OVG Bautzen stated that the enforceability of the decision took precedence mainly on account of the freedom to broadcast enshrined in the Basic Law. The importance to the general public of the effective use of broadcast frequencies, which were socially and economically significant and relevant to the Basic Law, but in short supply, demanded that the allocation decision be implemented, as long as it was not clearly unlawful. The frequencies available to broadcasters constitute a scarce, constitutionally significant commodity and should therefore be used effectively and promptly rather than be left unused during legal proceedings that might last several years. This was particularly true in the context of broadcasting freedom, which was guaranteed under the Basic Law. Plurality of reporting, which was connected to frequency use, was considered especially important for the formation of individual and public opinion. On the other hand, the disadvantages caused to the unsuccessful bidder by the temporary use of the transmission capacity were not a determining factor.

Beschluss des OVG Bautzen vom 19. Dezember 2018

https://www.justiz.sachsen.de/ovgentschweb/document.phtml?id=5337

Decision of the Saxony Higher Administrative Court Bautzen, 19 December 2018

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