

**BVerwG, Urteil vom 31. März 2004, - Az. 6 C 11.03 -**

The plaintiff and the summoned third party are organizations providing telecommunications services. They had an agreement on the interconnection of their networks. In 1999 this agreement was terminated by the plaintiff. When negotiations on the conclusion of a new agreement failed the regulatory authority intervened and issued an official order setting the terms of further interconnection. The order mainly drew upon a draft agreement which the plaintiff had presented during the course of the negotiations. However, a few provisions - inter alia the termination clause - had been deleted by the authority.

After the administrative tribunal of first instance had approved of the order the plaintiff appealed to the Federal Administrative Court submitting that the termination clause was in accordance with German law and, thus, the authority had not been entitled to delete it.

The Federal Administrative Court dismissed the case without referring the matter to the ECJ for a preliminary ruling. The Court argued that the authority was not bound by draft agreements presented by one of the parties nor was she obliged to include a termination clause either since the decision on the terms of an interconnection agreement was of discretionary nature. In her decision the authority was to weigh and balance the interests of the network operators and the interests of the public/the end-users, esp. the public need for open networks, interoperability and adequate, secure and efficient interconnection as laid down by Art. 3(2) Directive 90/387/EEC of 28 June 1990 and Art. 3 (2), 9 Directive 97/33/EC of 30 June 1997.

In the respective case the court found that the authority had exercised her discretion in accordance with national and Community law. A termination clause had not been required to preserve the rights of the operators since in urgent cases the German Civil Code provided for the extraordinary termination of contracts irrespective of their individual terms.