

[DE] Berlin Administrative Court rules on regional advertising ban

IRIS 2024-8:1/21

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In a recently published decision of 22 April 2024 (Case No. 32 K 1/23), the *Verwaltungsgericht Berlin* (Berlin Administrative Court - VG Berlin) upheld a complaint concerning a breach of the ban on regional advertising lodged by a *Landesmedienanstalt* (state media authority) against a national television broadcaster. It held that the advertising ban, enshrined in the German *Medienstaatsvertrag* (state media treaty - MStV), was not unconstitutional. However, a different court had previously found that the ban, which was also the subject of a 2021 European Court of Justice ruling in the *Fussl Modestraße Mayr* case (C-555/19, ECLI:EU:C:2021:89), contravened EU law.

Article 8(11) MStV states that the transmission of non-national (e.g. regional) advertising in a national broadcasting service is, in principle, prohibited. Exceptions only apply if the *Länder* permit it in their broadcasting laws in general or on a case-by-case basis, which has happened only occasionally. In May 2016, in spite of the ban, which applied in Berlin and was defined using identical wording in Article 7(11) of the *Rundfunkstaatsvertrag* (state broadcasting treaty - RStV) at the time, a national television broadcaster licensed in Berlin had broadcast separate regional advertising during several programmes in Baden-Württemberg, Hessen and North Rhine-Westphalia. The broadcaster had informed the relevant state media authority, *Medienanstalt Berlin-Brandenburg* (mabb), and asked for a test case to be brought because it considered the ban on regional advertising unconstitutional. Following proceedings involving the *Kommission für Zulassung und Aufsicht* (Commission on Licensing and Supervision - ZAK), the mabb decided that the broadcaster had infringed Article 7(11) RStV and had therefore breached the conditions of its broadcasting licence (Article 20(1) RStV, now Article 52(1) MStV). Its licence only covered nationwide broadcasting and, since advertising was part of its programming, the transmission of regional advertising was excluded.

Meanwhile, the lawfulness of the regional advertising ban was also scrutinised by the *Landgericht Stuttgart* (Stuttgart Regional Court - LG Stuttgart) in a civil law dispute between an Austrian advertiser and a broadcaster. As part of these proceedings, the European Court of Justice issued a ruling on 3 February 2021, stating that it was true that neither Article 4(1) of the Audiovisual Media Services Directive nor fundamental rights and freedoms, including the principle of equal

treatment, precluded national legislation prohibiting regional advertising per se. However, such legislation needed to comply with the proportionality principle and the ECJ expressed particular doubt as to whether the ban was an appropriate means of protecting media diversity, especially since no such ban applied to online service providers, for example. In the end, however, it was the national courts' responsibility to judge whether the proportionality principle had been breached. The LG Stuttgart therefore ruled that the ban was incompatible with EU law and therefore inapplicable (IRIS 2022-2:1/18). However, this does not mean that it was abolished at the national level, since only the *Bundesverfassungsgericht* (Federal Constitutional Court) can take such a decision. The *Länder*, which are responsible for the relevant legislation, are still currently considering the consequences of the ruling.

The VG Berlin, however, reached a different conclusion to the LG Stuttgart and did not consider the ban on regional advertising to be unconstitutional. Rather than infringing broadcasting freedom, it thought it was an acceptable means of protecting such freedom. When regulating broadcasting, the legislator had a broad scope of discretion. Judicial control was limited to determining whether an appropriate allocation of the constitutional positions concerned had been carried out. In this case, the legislator had met this requirement. The VG Berlin did not think the assessment of whether the ban was a suitable means of protecting diversity had been "obviously incorrect". In particular, the assumption that the emergence of competitors with a wide reach on the regional advertising market would cause many regional media advertising customers to migrate to nationwide broadcasters, which could damage the refinancing and journalistic quality of regional publishers and broadcasters and thereby harm diversity, was not open to challenge. The fact that no similar ban applied to online media was irrelevant and did not mean that broadcasters were unfairly disadvantaged. Despite increasing media convergence, broadcasting and online services were different types of media. They could therefore be regulated differently on cultural grounds, since it would be wrong to only take economic factors into consideration. The court's reasoning therefore reflects the situation at the EU level, where broadcasting and online services are (or can be) governed by different regulations.

VG Berlin 32. Kammer, ECLI:DE:VGBE:2024:0422.32K1.23.00

<https://gesetze.berlin.de/bsbe/document/NJRE001576665>

Berlin Administrative Court, 32nd chamber, ECLI:DE:VGBE:2024:0422.32K1.23.00

