[AT] Cross Promotion Ban Legitimate

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According to a decision by the Austrian Verfassungsgerichtshof (Constitutional Court - VfGH), the ban on television advertising of radio stations operated by the public service broadcaster Österreichische Rundfunk (ORF) does not violate the broadcaster's freedom of expression.

In the decision contested by the ORF, the relevant supervisory body, the Bundeskommunikationssenat (Federal Communications Office), had found that the broadcaster had infringed Article 13(9) of the Gesetz über den Österreichischen Rundfunk (Austrian Broadcasting Act - ORF-G) by showing an advertisement on its TV channel ORF1 for a competition being run by the Ö3 radio station. A text showing the broadcast times and logo of the Ö3 radio station had appeared, with the text read aloud by a voice over. The ORF argued that the ban enshrined in Article 13(9) ORF-G, under which cross promotion is unlawful unless it refers to specific programme content, breached its freedom of expression and was discriminatory.

In the VfGH's view, the decision did not infringe the rights of the ORF. The Court ruled that the advertising restrictions, designed to protect private competitors, were reasonable in accordance with Article 10 of the ECHR. In view of the ORF's dominant position in the terrestrial TV and radio markets, an absolute ban was a reasonable means of limiting the resulting synergy effects. The fact that a certain amount of self-advertising was permitted insofar as individual programme content could legally be announced did not therefore mean that such restrictions were unreasonable. Although restricting when and how much self-advertising is allowed might be a more lenient measure, the structural advantage represented by the ORF's involvement in the radio and TV markets meant that a total ban was more appropriate. The ORF's argument that Article 13(9) ORF-G did not refer to a particular form of advertising, but more generally to "neutral content", was not convincing. The ban did not concern "pure content", but merely the promotion of ORF radio and TV channels by the respective other medium. The law defined self-advertising as measures designed to promote the provision of services. Neutral, informative references should not therefore be categorised as prohibited advertising per se.

The VfGH also ruled that the ban was not discriminatory. The ORF's argument that Article 11.2.1 of the Privatfernsehgesetz (Private Television Act - PrTV-G), banning so-called cross-ownership of national terrestrial television and radio, was

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unjustifiably discriminatorya notion which was linked to certain threshold values in the non-national TV sector - was unconvincing. These provisions were meant to prevent close interconnections between media; however, the admissibility of "cross promotion" was not covered by these regulations. In addition, the continuing dominant market position of the ORF was a practical reason for differential treatment. Neither had the legislator discriminated against the ORF in an unobjective way, since foreign broadcasters that were able to practise cross promotion in the Austrian radio and TV markets without restriction under Austrian law and which enjoyed a similarly strong market position could apparently be ignored at the present time.

Erkenntnis des Verfassungsgerichtshofs vom 8. Oktober 2003, Geschäftszahl B1540/02

Decision of the Constitutional Court, 8 October 2003, case no. B1540/02

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