

## [DE] Discussion on Broadcasting Time for Independent Third Parties, Part 1

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The entry into force on 1 January 1997 of the Rundfunkstaatsvertrag (the Agreement between the Federal States on Broadcasting RstV), in the form of its third amendment, introduced new rules on the protection of diversity of opinion into Germany's broadcasting regulations. Part of this series of standards was a measure to attribute broadcasting time to third parties as a means of ensuring diversity (see IRIS 1997-2: 13 and IRIS 1997-3: 13). These so-called third parties are required to be totally independent of the main programme organiser. Under section 31, paragraphs 1 and 3 of the RstV, the makers of the window programme must be editorially independent from those of the main programme. The cause of the current administrative disputes is the renewed licensing of third-party suppliers in Rhineland-Palatinate and Lower Saxony, against which the defeated co-applicant, Focus TV Produktions GmbH (Focus TV), has objected.

Just recently, the Rhineland-Palatinate Oberverwaltungsgericht (Administrative Court of Appeal OVG) has given two decisions on applications for temporary relief, in which, in considering the question of the independence of the Development Company for Television Programs (DCTP) from the broadcaster, SAT 1, the Court gave more thorough consideration to the meaning of the concept of programme organiser. In connection with this case, it said that it might be plausible to argue that mere formal criteria such as being a licence holder might not be enough to judge whether a company was a programme organiser. Much more consideration had to be given to the material criterion of responsibility for programme making. It was not possible, at least where radio programmes which were the result of joint activities were concerned, to establish exactly where this responsibility lay without some further investigation. The organiser should at any rate be in charge of programme-making itself. In one of the decisive cases (2 B 11374/03.OVG), the DCTP had not actively made programmes itself but left this to Spiegel TV GmbH (its co-operation partner), giving it complete editorial independence. Actual programmes seemed to the Administrative Court of Appeal to raise doubts about the DCTP's status as a programme organiser. However, it was prepared to accept that the co-operation agreement between the DCTP and Spiegel TV GmbH might have conferred the requisite organising role on the DCTP if it had reserved final decisions on programming for the DCTP according to the so-called editor's principle. This was, however, yet to be decided in the main proceedings.

In the other case (2 B 11372/03.OVG), the DCTP had pieced together its third-party broadcasting time from various cultural contributions, which it itself had not made. In this case however, unlike that of the co-operation with Spiegel TV, the OVG allowed the benefit of the doubt as to the actual responsibility for programme content to play in favour of the DCTP. This would apply so long as no more precise proof arose concerning the internal decision-making processes between the DCTP and its co-operation partners, making it clear that the DCTP was no more than a "clearing house".

As a result, the Rhineland-Palatinate LPR's licensing decisions still stood. The Administrative Court of Appeal said that in the main proceedings, there could be scope to look into the questions raised by Focus TV concerning the DCTP's independence. It was argued that under concentration law, there was a dependent relationship between the licence holder and the holder of a licence for the broadcast of nationwide television, RTL Television GmbH.

