

## [DE] Discussion on the authorization of the first German tele-shopping channel (H.O.T.)

**IRIS 1996-1:1/10**

*Natali Helberger  
Institute for Information Law (IViR), University of Amsterdam*

IRIS 1995-9:13 included a report on the authorisation of HOT (Home Order Television) tele-shopping programmes by the Bavarian Central Office for New Media ( Bayerische Landeszentrale für Neue Medien BLM).

This authorisation in Bavaria was challenged by RTL+, and as a result of provisional legal protection proceedings before the Munich Administrative Court the BLM was obliged to provisionally prohibit inclusion in the Bavarian cable network. The claim was based on the opinion that the authorisation did not comply with Article 27-3 of the Agreement on Broadcasting between the Federal States in United Germany (RfStV) and moreover interfered with the basic economic conditions of the RTL+ radio and television organisation. In its ruling on 15.11.1995, although it upheld that tele-shopping programmes were illegal, the Bavarian Administrative Court nevertheless rejected RTL+'s claim as being out of order. RTL+'s application for an injunction in respect of the authorising body could not be retained as the State may not interfere with the freedom to broadcast either on the basis of fundamental rights (Article 5-1.2, Article 2-1 of the Basic Law), or on Article 11-1.1 of the Bavarian media law (BayMG), or Article 27 of the RfStV, which do not protect third parties.

In the legal assessment of the programmes the court disregarded clarification of the question of whether tele-shopping constituted broadcasting or not. At all event-s, the public law contract authorising HOT contravenes current law. If tele-shopping cannot be qualified as broadcasting, the BLM has acted beyond its terms of reference under Article 11 of the BayMG in concluding the contract, and is therefore not competent to conclude such a contract. If, on the other hand, the programme is deemed to constitute broadcasting, it should not be included in the scope of Article 25 of the RfStV and the BayMG, according to which advertising should basically only be used to finance broadcasting. According to Article 27-3.2 of the RfStV, any pure sales programmes should be prohibited, as established in the provision in Article 27 of the RfStV, to which there are no exceptions.

As the responsible supervisory authority in Bavaria, the BLM does not however share the Administrative Court's understanding of the law. On 17.12.1995 the Supervisory Council of the BLM agreed to the nation-wide broadcasting of HOT using Astra 1d, although the directors' conference of the regional media

authorities ( Direktorenkonferenz der Landesmedienanstalten ; recently renamed in : Arbeitsgemeinschaft der Landesmedienanstalten ) had repeated its refusal of the planned nation-wide broadcasting by satellite on 28.11.95.

According to the Bavarian authorisation authorities, pure tele-shopping channels are at present not covered by the scope of the provisions of the RfStV, as they do not constitute broadcasting in accordance with the classic definition. Nor is a decision at DLM level necessary in this case either, as it is only a matter of a test, with time and geographical limits. For a pilot test of this kind, the BayMG offers sufficient scope. In addition, the Munich Administrative Court's understanding of the law reached in summary proceedings, as an obiter dictum , should not be included as grounds for a decision and should not be taken as legally binding on the Central Office as party to the action.

***Beschluß des Verwaltungsgerichts München vom 15. November 1995, M 3 E 95. 4829, und Positionspapier der BLM zur bundesweiten Abstrahlung von H.O.T.***

*Ruling by the Munich Administrative Court on 15 November 1995, M 3 E 96. 4829, and explanatory paper by the BLM on nation-wide broadcasting of HOT.*

