[DE] BayVGH Rejects Competition Rules Injunction Request

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Meike Ridinger
Institute of European Media Law (EMR), Saarbrücken/Brussels

On 11 August 2009, the *Bayerische Verwaltungsgerichtshof* (Bavarian Administrative Court - BayVGH) (case no. 7 NE 09.1378) rejected an application by the game show broadcaster 9Live for an injunction against the competition rules adopted by the *Landesmedienanstalten* (state media authorities - LMA).

The broadcaster 9Live, which broadcasts phone-in quiz programmes, had asked the BayVGH to conduct a judicial review of the LMA's competition rules. In addition, 9Live had submitted an urgent application for all, or in the alternative, some of the rules to be withdrawn pending the outcome of the judicial review. Based on Art. 8a of the *Rundfunkstaatsvertrag* (Inter-State Broadcasting Agreement - RStV), the rules contain provisions on youth protection, a ban on manipulation and broadcasters' information obligations. Infringements can be punished with fines of up to EUR 500,000. 9Live based its application on the fact that participant numbers had fallen sharply since the competition rules had been introduced. The broadcaster had lost millions and was expecting to have to pay substantial sums in fines. The rules therefore jeopardised the whole business model of 9Live.

Since the BayVGH thought the chances of the judicial review application succeeding were unclear due to difficult legal questions which had not yet been resolved at appeal court level, the decision on the granting of the temporary injunction was based on the so-called " *Differenzhypothese* ", under which only the weighing up of each side's interests is decisive. The legislature had asked the LMA to adopt the rules in order clarify legal provisions on competitions. This official request to the LMA would remain unfulfilled indefinitely if the disputed rules were suspended under a temporary injunction. The fact that individual companies suffered financial harm could not justify the withdrawal of legal rules. Such a move would run counter to the purpose of the competition rules. Otherwise, the legislature would be prevented in many cases from immediately taking certain situations into account simply because they had financial implications.

The BayVGH thought that, in view of the importance of the protected interests and the large number of potentially concerned competition participants, in cases of doubt the specific protection of participants and minors, which the competition

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rules were meant to guarantee, should take precedence over the broadcaster's economic interest in having the rules withdrawn, unless the continued application of the rules until the main procedure was decided was highly likely to have particularly serious and irreversible consequences for the broadcasting operations of the company concerned. In this case, there were not sufficient grounds to suggest that the potentially unlawful competition rules would have an impending economic disadvantage for the broadcaster.

The competition rules remain in force pending the outcome of the main procedure.

Beschluss des Bayerischen Verwaltungsgerichtshofs (BayVGH) vom 11. August 2009 (Az.: 7 NE 09.1378)

http://www.telemedicus.info/urteile/Rundfunkrecht/Privater-Rundfunk/838-BayVGH-Az-7-NE-09.1378-Eilverfahren-gegen-die-Gewinnspielsatzung.html

Decision of the Bavarian Administrative Court (BayVGH) of 11 August 2009 (case no. 7 NE 09.1378)

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