[AT] Administrative Court Rules Out Notification Obligation for One-Off Violation of Time-Limit for Authorised Satellite Window Programme

IRIS 2012-4:1/8

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On 15 December 2011, the Austrian Verwaltungsgerichtshof (Administrative Court - VwGH) upheld a broadcaster's appeal against a decision of the Kommunikationsbehörde Austria (Austrian communications authority - KommAustria) and held, inter alia, that a one-off violation of the time limit applicable to an authorised satellite window programme did not breach the notification requirement laid down in Article 6 of the Privatfernsehgesetz (Private Television Act - PrTV-G).

In its decision of 26 May 2008, KommAustria had ruled that, by broadcasting the entertainment programme "Amadeus Award 2008" as a window programme between 8.15 p.m. and 10.42 p.m. on 19 April 2008, the TV broadcaster had substantially exceeded the 60-minute limit for this period without prior notification. KommAustria based its ruling on several licensing decisions taken between 2003 and 2005, which had authorised the broadcaster to transmit a total of two daily programme windows of up to 60 minutes plus a weekday morning programme lasting up to 210 minutes and another window of up to 120 minutes per day for a quiz-based programme broadcast during the night. Since the entertainment programme was broadcast in so-called "prime time" (8.00 p.m. - 10.00 p.m.), it should not have exceeded 60 minutes. However, it lasted 147 minutes, substantially exceeding the limit.

In its appeal, the broadcaster argued that KommAustria had ruled, for no apparent reason, that the individual licences had specifically restricted the window programme to a particular time of day and that an amendment should therefore have been notified in accordance with Article 6 PrTV-G. However, it claimed that the wording of Article 5(3) PrTV-G indicated that it was not necessary to define the programme window according to a precise time or time of day. Rather, the description in the licences ("during the morning programme" and "during the night") should be interpreted in connection with the respective description of the intended programme content. The broadcaster therefore assumed that, at the time of the disputed broadcast, it had been allowed to broadcast the programme window for a total of up to 180 minutes (60+120 minutes). This limit had not been exceeded.

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The VwGH began by pointing out that the broadcaster had correctly noted that Article 5(3) PrTV-G did not, in principle, stipulate at what time of day an authorised window programme should be broadcast. However, such rules could be derived indirectly from the type of programme that had been authorised, so it was in fact true that the “morning programme” specified in the licence could not simply be broadcast at any time of the evening or night. However, no specific time had been laid down for the programme window that, according to the licence, should be broadcast during the night. KommAustria’s interpretation that a daily window programme lasting up to 120 minutes starting after 10 p.m. had been approved was incorrect. The broadcaster had therefore not exceeded the limit of 180 minutes in this particular case.

However, the VwGH went even further and explained that, regardless of the above findings, the programme’s time slot could not be considered to have been significantly changed just because the broadcaster had exceeded the time limit for the authorised window programmes on a single occasion. Even if the maximum prime-time window was actually only 60 minutes long, the broadcast of the programme from 8.15 p.m. until the end of prime time would have constituted an excess of 45 minutes. It was unlikely that the legislator would consider such one-off changes to a window programme’s time slot as significant and therefore want to make it subject to notification and approval requirements.

Entscheidung des VwGH vom 15. Dezember 2011 (Az. 2011/03/0053)

http://www.ris.bka.gv.at/Dokumente/Vwgh/JWT_2011030053_20111215X00/JWT_2011030053_20111215X00.pdf

VwGH decision of 15 December 2011 (case no. 2011/03/0053)

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