[AT] KommAustria Criticises Lack of Variety in ORF Programmes

IRIS 2012-10:1/6

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On 4 October 2012, the Austrian communications authority KommAustria upheld a complaint by the Verband Österreichischer Privatsender (Association of Austrian private broadcasters) and ruled that Österreichische Rundfunk (the Austrian public service broadcaster - ORF) had failed to fulfil its public service remit over an 18-month period. KommAustria also ordered that the complaints be read out on the two main channels concerned, ORF eins and ORF 2.

Referring to their own evaluations of its programmes during the period concerned, the plaintiffs had argued that, contrary to Article 4(2) of the ORF-Gesetz (ORF Act), ORF had failed to offer a well-balanced overall programme by devoting an appropriate proportion of airtime to information, culture, entertainment and sport. By broadcasting too many entertainment programmes, ORF had failed to transmit two comprehensive channels in accordance with Article 3(1)(2) in conjunction with Article 4(2) of the ORF-Gesetz. Finally, through the content and presentation of its television channels, ORF had not met the requirement for public service broadcasting to be distinctive.

In its reply, ORF referred primarily to the period covered by the complaint, which it considered insignificant, as well as to its various special-interest channels and other categories (science/education/self-help and family), which the plaintiffs had not taken into account in their evaluation. It also argued that, when assessing whether an “appropriate proportion” of coverage had been given to different categories, these proportions should not be treated in mathematical isolation, with no account taken of the “variety of interests”.

Although, after detailed questioning of several experts, KommAustria rejected the last of the aforementioned complaints, it agreed with the rest of the plaintiffs’ arguments.

The communications authority began by ruling that, when calculating the proportions of airtime allocated to the various categories, apart from the two main channels ORF eins and ORF 2, ORF could only take into account the special-interest channel ORF SPORT+, which during the period covered by the complaint had been broadcast initially to mobile devices only and subsequently with limited airtime. Its other special-interest channels were either commercial (TW1) or had

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not been broadcast at all during the period concerned (ORF III and ORF SPORT+ in its current 24-hour format). Furthermore, only one of the nine regional windows broadcast on ORF 2 could be taken into account.

With regard to the number of categories, KommAustria referred to the wording of Article 4(2) of the ORF-Gesetz, which mentioned the four categories of information, culture, entertainment and sport. If the legislator had wanted to leave room for additional categories, it would have made this clear in the wording of the provision, such as by using the word “particularly”. When allocated to one of these categories, a “programme” was the smallest unit of a channel’s broadcast content and could only be allocated to one category. KommAustria therefore rejected ORF’s attempt to assign individual parts of a programme to different categories.

In order to differentiate it clearly from sport, information and entertainment, a narrow definition of culture should be adopted, essentially covering the fields of painting, art, music, theatre, opera, literature and philosophy, as well as modern art forms such as film and photography. A broad interpretation of culture would ultimately include all human performances and creations, and therefore cover all television content.

Finally, KommAustria explained that the ORF-Gesetz did not lay down any benchmarks from which concrete percentages could be derived to determine the “appropriate proportion” for each category. Moreover, rigid percentages would be problematic in view of the defendant’s freedom as a public service television broadcaster, as enshrined under Article 10 of the European Convention on Human Rights. Nevertheless, it was undoubtedly admissible to define a general framework within which appropriate proportions would lie. As a starting point, it should be assumed that each of the four categories was equal in size. However, in view of its freedom, which was also guaranteed under constitutional law, ORF could make individual categories larger or smaller. This freedom, however, was limited to the extent that there should be an appropriate balance between the categories. There would be no such balance if any one category accounted for more than 50% or less than 10% of the overall programme schedule. The evaluation of ORF’s programmes had demonstrated that these limits had been significantly exceeded, with the result that ORF had failed to ensure an appropriate balance between the four categories during the period concerned and had therefore failed to provide a varied overall programme.

Concerning the provision of two comprehensive channels, KommAustria ruled that it was not necessary for all four categories to be covered by both main channels. Three categories were sufficient, as long as each represented more than 10% and none more than two-thirds of overall airtime. However, each of the four categories should account for at least 10% on either ORF eins or ORF 2.

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ORF had failed to meet these requirements on ORF eins by exceeding the two-thirds limit for sport and allocating less than 10% of airtime to information and culture. On ORF 2, meanwhile, both culture and sport were below the minimum threshold. Since the culture category had not reached the 10% mark on either ORF eins or ORF 2, it had not been given sufficient coverage on either of ORF's two comprehensive channels.

Bescheid der KommAustria vom 4. Oktober 2012 (GZ: 12.005/12-023)

http://www.rtr.at/uploads/media/KOA_12.005-12-023_Beschwerde_V%C3%96P_gegen_ORF_anonymisiert.pdf

KommAustria decision of 4 October 2012 (GZ: 12.005/12-023)

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