[AT] Administrative Court Confirms “Facebook Ban” for the ORF

IRIS 2013-1:1/6

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On 22 October 2012, the Verwaltungsgerichtshof (Administrative Court - VwGH), which has supreme administrative jurisdiction in Austria, confirmed the so-called “Facebook ban” in the case of the Österreichischer Rundfunk (Austrian Broadcasting Corporation - ORF) and dismissed an action brought by the ORF as unfounded.

In spring 2012, the Kommunikationsbehörde Austria (KommAustria), the authority responsible for regulating the ORF, established that the ORF’s provision of a Facebook page constituted an infringement of the ORF-Gesetz (ORF Act) (see IRIS 2012-3/9). The legal remedy lodged by the ORF with the Bundeskommunikationssenat (Federal Communications Board - BKS), the supreme broadcasting authority, was unsuccessful, whereupon the ORF filed an action in the Administrative Court and the Constitutional Court.

The Administrative Court gave as the reason for its decision the purpose of the rule that “(the provision of) such online services must, for reasons of competition, be the preserve of other media undertakings”. It went on to say that the wording of section 4f(2)(25) of the ORF Act (ban on co-operating with social networking sites) prohibited the ORF from engaging in “any form of co-operation [...] that has the same effect as the provision of a social networking service by the ORF itself”. By using Facebook, it said, the ORF was able to exploit an existing popular global network, which was precisely what the legislature regarded as only being covered to a limited extent by the ORF’s public service remit. Links to or co-operation with social networking sites were only allowed if there was a connection with its own “daily online news extracts”, so the complaint had to be dismissed as unfounded.

On 16 November 2012, the Verfassungsgerichtshof (Constitutional Court - VfGH) allowed the effect of the decision to be suspended pending the outcome of the ORF’s constitutional appeal. This enables the ORF to continue to operate the Facebook page for the time being. However, the VfGH stressed that its decision did not permit any conclusions to be drawn regarding the final ruling. If the constitutional appeal fails, the ORF’s Director-General will consider further steps at the European level. Furthermore, the legislature is to be urged to amend the ORF Act. It is pointed out that the broadcaster would be denied access to one of the world’s most important communications platforms, which would constitute an unparalleled restriction. It remains to be seen how the Constitutional Court will

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rule on the merits of the case.

Beschluss des Verwaltungsgerichtshofs vom 22. Oktober 2012 (Zl 2012/03/0070-12)

http://www.vwgh.gv.at/Content.Node/aktuelles/presse/2012/2012030070.pdf

Administrative Court decision of 22 October 2012 (Case Zl 2012/03/0070-12)

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