[AT] ORF Breaches Public Service Remit by Exceeding Entertainment Limit

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In a decision of 18 April 2013, the *Bundeskommunikationssenat* (Federal Communications Senate - BKS) ruled that *Österreichische Rundfunk* (the Austrian public service broadcaster - ORF) had broadcast too much entertainment in its overall programme between January and August 2011. ORF had therefore infringed its public service remit.

The *Kommunikationsbehörde Austria* (the Austrian communications authority - KommAustria) had, as the first-instance body, already upheld a complaint by several private television broadcasters that ORF had failed to fulfil its public service remit under Article 4(2) of the *Bundesgesetz über den Österreichischen Rundfunk* (ORF Act - ORF-G) (see IRIS 2012-10/6).

ORF is obliged by law to “provide a varied overall programme comprising information, culture, entertainment and sports for everyone”. According to Article 4(2)(3) ORF-G, there should be an “appropriate” balance between these different categories. Furthermore, in KommAustria’s opinion, Article 3(1)(2) ORF-G requires ORF to provide two “comprehensive channels” that must also devote an appropriate proportion of airtime to these categories. KommAustria ruled that ORF had breached this obligation.

ORF appealed to the BKS against this decision. It essentially argued that a well-balanced programme was merely an objective, but by no means a binding requirement that could be enforced before a court by quoting the proportions of airtime devoted to each category. It also claimed that the rigidity of the categories defined by KommAustria was untenable. The concept of culture was too narrowly defined and Article 3(1)(2) ORF-G made no provision for the differentiation of content within individual programmes broadcast on the national channels.

The appeal was rejected in so far as it contested the finding that ORF had, between January and August 2011, failed to provide an appropriate balance in its overall programme between information, culture, entertainment and sport by broadcasting an excessive amount of entertainment.

The BKS agreed with KommAustria’s view that the list of categories required for a well-balanced overall programme under Article 4(2) ORF-G was exhaustive. In this

connection, there were no grounds, when assessing this balance, for objecting to the practice of allocating each ORF programme to one of the four categories.

In its decision, however, the BKS paid particular attention to the concept of culture. It considered the "narrow definition of culture" on which KommAustria based its decision too restrictive and advocated a broader, although "not too liberal definition of the concept" ("broader definition of culture"). "Culture" should therefore not be interpreted as elitist, sophisticated culture that only met the highest intellectual standards. Rather, the concept of culture in the ORF-G reflected the principle of "culture for all". If there were narrow, medium and broad definitions of culture, the ORF-G would use the medium one.

When considering the overall programme, radio, television and online services must be assessed separately. In the present case, the proportion of airtime dedicated to each category is, in principle, calculated on the basis of all ORF television channels. The BKS ruled that the "varied overall programme" was not merely an objective, as ORF had suggested. However, the definition of rigid percentages appeared problematic in view of Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). The BKS also distanced itself from the definition of certain upper and lower limits, as KommAustria had advocated. Rather than rigid lower limits for each category, it was essentially a case of checking whether any one category had been allocated an "excessive" share of the overall programme. As part of this process, it should be noted that Article 4(2) ORF-G reflected the legislator's desire to prevent the broadcast of too many entertainment programmes. The BKS confirmed that such an excess had occurred during the period from January to August 2011 and therefore rejected this part of the appeal.

However, the appeal was partly successful in so far as KommAustria had also ruled that Article 4(2) ORF-G had been breached during another period, i.e. January to December 2010. Between 1 January 2010 and 30 September 2010, the current wording of Article 4(2) ORF-G, requiring an "appropriate" balance between the different categories of content in the overall programme, had not yet been in force. Although this rule had been added to Article 4(2) ORF-G through the ORF-G amendment, valid from 1 October 2010, the BKS thought that the observation period of 1 October to 31 December 2010 was too short.

The BKS also disagreed with KommAustria's interpretation regarding channels. It did not dispute that ORF had failed to provide two comprehensive channels meeting the criteria of information, culture, entertainment and sport. However, the ORF-G did not require a balance between the channels. The wording of the law did not require ORF to provide so-called comprehensive channels.

Alongside the central issue of the excessive proportion of entertainment programmes, numerous formal and procedural questions were raised during the

appeal procedure (such as the need for oral proceedings). However, they had little ultimate impact on the key aspect of the legal dispute, i.e. the question of excessive entertainment.

Bescheid des Bundeskommunikationssenats vom 18. April 2013 (Az. GZ 611.941/0004-BKS/2013)

http://www.bundeskanzleramt.at/DocView.axd?CobId=51094

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