[DE] Judgment by the Bavarian Administrative Court on illegal levying of a participation fee

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Mareike Stieghorst
Institute of European Media Law (EMR), Saarbrücken/Brussels

On 09.01.1997 the Bavarian Administrative Court delivered a second-court judgment against the the Bavarian Regional Office for New Media (Bayerische Landeszentrale für neue Medien - BLM) setting aside its judgment on the basis of the Bavarian Media Act (BayMG) on 26.05.1994 and the corresponding appeal judgment. This also amended the judgment of 16.10.1995 by the Administrative Court in Würzburg.

A private cable operator, the überlandwerk Unterfranken AG, had complained that it had been obliged by the BLM to conclude an agreement with the media operating company according to which the latter could demand a participation fee. The legal foundation for this is Article 38, paragraph 2 of the BayMG, according to which private cable installation operators must conclude an agreement with the appropriate media operating company for the purchase of specific programmes. On the basis of Article 38, paragraph 3(1) of the BayMG, a participation fee is then charged, which the installation operator in turn demands from its participants. The fee is intended as payment for the wider potential use of private broadcasting out of Bavaria and other private broadcasting channels compared with terrestrial reception. In its judgment the Administrative Court raised considerable doubts as to the constitutionality of the participation fee. This could be treated as a special form of licence fee, as fee-payers were owners of a cable connection and were charged regardless of actual use. According to the legal interpretation of the Federal Constitutional Court, licence fees are legally justified only for ensuring the maintenance and working order of public broadcasting in order to provide the population with a basic service.

In the opinion of the Administrative Court these provisions under constitutional law cannot be automatically applied to the participation fee.

Suspension of the decision in question was however upheld by a further consideration - infringement of the fundamental right of equality.

Article 38, paragraph 3 of the BayMG could be interpreted directly and restrictively according to the purpose and in view of the participation fee to mean that such a fee could only be charged to operators also able to re-broadcast regional or local programmes which can only be transmitted by cable or

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terrestrially (but not, however, by satellite). The participation fee imposes an additional public service duty on participants which can only be justified by an increased potential for use. Participants who are connected to the complainant cable installation company do not have any more potential than participants who have an individual reception installation, as regional and local broadcasts cannot be retransmitted via the complainant. Such programmes can only be retransmitted by installations which are connected to Deutsche Telekom's broad-band cable network.

The court held that the unequal treatment resulting from this situation of participants with an individual satellite reception installation and those connected to a private cable installation was in no way justified. It was also irrelevant that the participation fee was for the time being levied by the operators, as these were in the end required to refund their participants.

Urteil des Bayerischen Verwaltungsgerichtshofs vom 9. Januar 1997, Az. 7 B 95.4230.

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