

[DE] Sat.1 third-party transmission time: two urgent applications partially upheld

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In two decisions of 5 March 2014 (5 L 753/13.NW and 5 L 694/13.NW), which have not yet been published in full, the 5th Chamber of the *Verwaltungsgericht Neustadt an der Weinstraße* (Neustadt an der Weinstraße Administrative Court) partially granted the applications of Sat.1 SatellitenFernsehen GmbH and N24 Media GmbH for temporary legal protection against the allocation of transmission time for independent third parties (so-called third-party transmission time) on the main Sat.1 channel. Sat.1 remains obliged, at least temporarily, to broadcast the third-party programmes in full. According to the *Rundfunkstaatsvertrag* (Inter-State Broadcasting Agreement), the broadcaster must allocate a total of 180 minutes of transmission time per week towards the programmes of independent third parties.

Both Sat.1 and N24 had asked for the staying effect of their appeals against the licensing decision of the *Landeszentrale für Medien und Kommunikation Rheinland-Pfalz* (Rhineland-Palatinate Media and Communication Authority - LMK) of 23 July 2013 to be reinstated. In its decision, the LMK had renewed the licence of Mainz-based firm News and Pictures Fernsehen GmbH & Co. KG for the first and second blocks of transmission time, and that of DCTP Entwicklungsgesellschaft für TV-Programm mbH for the third and fourth blocks. Both companies have been broadcasting their programmes since the licensing period began on 1 June 2013.

The main broadcaster Sat.1's principal argument was that, since the period following January to December 2012, its audience share had been below the threshold laid down in the *Rundfunkstaatsvertrag*, above which transmission time had to be granted to third parties. It claimed that it was therefore no longer obliged to provide and fund any third-party transmission time. However, the VG Neustadt held that, when assessing the obligation to provide third-party transmission time, the audience share when the procedure opened was the decisive factor. At that time, Sat.1 had exceeded the market share threshold.

N24, as co-applicant, claimed that a procedural error had been committed and, in particular, that the LMK's decision had been unlawful. At the same time, it claimed that it should be awarded the licence for the first and second transmission blocks itself under a temporary court injunction until a decision had been taken in the main proceedings.

The administrative court, which had already lifted the first licensing decision in this case in its rulings of 23 August 2012 (promulgated on 5 September 2012), reinstated the staying effect of the actions in both procedures, as far as the licence applications of News and Pictures Fernsehen GmbH & Co. KG for the first and second transmission blocks were concerned.

Since it had not been selected with the agreement of main broadcaster Sat.1, under the Rundfunkstaatsvertrag the strict selection criterion of "greatest possible contribution to diversity" should be applied. There had been significant errors in the selection process followed by the LMK, in particular in the establishment of the selection criteria.

Therefore, the selection and licensing of News and Pictures Fernsehen GmbH & Co. KG would probably be ruled invalid in the main proceedings. However, based on the weighing up of the relevant interests, News and Pictures Fernsehen GmbH & Co. KG would initially be allowed to produce its Sat.1 programme window for a transitional period until the end of May 2014, after which the licence would become temporarily ineffective. After that, in the interests of equal opportunities, all applicants for the first and second transmission blocks would have to wait for the LMK to issue a new licensing decision.

The court refused to grant a temporary licence to the applicant N24 for the first and second transmission blocks.

The court ruled that the licensing decision for the third and fourth transmission blocks could remain in force for the time being, since the broadcaster in this case had been selected through an agreement between the Land media authority and the main broadcaster. The errors in the selection procedure would probably therefore have no effect; the rights of Sat.1 and N24 had not been breached.

The rulings expressly leave some of the legal questions discussed by the parties unresolved. However, concerning a question crucial to the whole licensing procedure, the court decided that Sat.1 was still obliged to provide third-party transmission time. According to the court's decisions, the Rundfunkstaatsvertrag laid down a specific moment in time when the audience share should be measured: the audience share when the licensing procedure started remained valid for the entire licensing period, even if - as in this case - it fell below the legal threshold later in the licensing procedure.

The LMK has announced plans to appeal to the OVG Rheinland-Pfalz (Rhineland-Palatinate Administrative Appeal Court) against the VG Neustadt's decision in order to request the reinstatement of the immediate enforceability of the full transmission time allocations. Sat.1's programming deficits had been established in an ALM study, while alleged errors in the laying down of criteria for the allocation of third-party transmission time could be clearly disproved. In view of the need to protect diversity of opinion, it was not acceptable that the

broadcaster should, contrary to its established obligation, make available only part of the required third-party transmission time.

