[DE] Federal Supreme Court quashes lower-instance rulings in dispute over feed-in fees

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Katrin Welker
Institute of European Media Law (EMR), Saarbrücken/Brussels

In the dispute over the cable feed-in fee between the public service broadcasters and a cable network operator, the BGH (Federal Supreme Court) referred two pending cases back to the appeal courts on 16 June 2015 (case nos. KZR 83/13 and KZR 3/14).

The public service channels are subject to the so-called must-carry rule of Article 52 of the Rundfunkstaatsvertrag (Inter-State Broadcasting Agreement - RStV), under which all cable network operators are obliged to carry the programme signals of the public service broadcasters. However, the RStV does not contain any rules on the fees that cable network operators can charge for carrying these signals.

Until now, the carrying of the programme signals was the subject of agreements between the public service broadcasters and the plaintiff, a cable network operator. A feed-in fee was payable to the cable network operator under these agreements. However, the public service broadcasters cancelled these agreements. They argued that, since the cable network operator was legally obliged to carry their programme signals, there was no need for either an agreement or for a fee to be paid to the cable network operator for carrying the signals.

The cable network operator claims that the public service broadcasters broke the law by cancelling the feed-in agreements. It therefore asked the courts to confirm the validity of the agreements or, in the alternative, to order the defendants to sign new cable feed-in agreements.

The lower-instance courts rejected the cable operator’s requests. In its decision, however, the BGH found that they had failed to sufficiently establish the facts of the case, and therefore referred the proceedings back to them. The lower-instance courts had not adequately explored whether the public service broadcasters had taken a joint decision to cancel the feed-in agreements. If the agreements had been cancelled on the basis of such an unlawful arrangement and not on the basis of independent business decisions, such cancellations would have been invalid under Article 1 of the Gesetz gegen Wettbewerbsbeschränkungen (Act on Restraints of Competition - GWB). In this

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case, the cable network operator's request would have to be upheld.

However, if each of the feed-in agreements had been cancelled on the grounds of an independent business decision, and had therefore been lawful, the appeal courts would have to decide what conditions for the feeding in and distribution of the must-carry programmes via the plaintiff's cable network would be reasonable. Depending on the answer to this question, either the cable network operator would be obliged to carry the programmes free of charge, or the public service broadcasters would be obliged to pay a fee, regardless of whether a feed-in agreement had been signed.

The BGH also ruled that the public service broadcasters were not obliged to sign a feed-in agreement with the cable network operator under broadcasting law, which merely required them to make their programme signals available in accordance with their universal service remit. In return, the cable network operator was obliged to feed in these signals under the must-carry rule of Article 52b RStV.

There were no provisions under EU or constitutional law to contradict this principle, since the BGH did not consider the must-carry obligation an unreasonable burden on the cable network operator. Rather, the programme signals made available free of charge by the public service broadcasters held considerable economic value in helping the plaintiff to market its cable TV services.

Furthermore, the decision to cancel the feed-in agreements did not constitute an abuse of a dominant market position by the public service broadcasters in the sense of Article 19(2) GWB. It was true that the public service broadcasters held a dominant market position because they did not directly compete with providers of programmes not covered by the must-carry rule. However, just because the cable network operator received a feed-in fee from private broadcasters did not mean that they were abusing this dominant market position. Neither did the fact that the public service broadcasters paid fees for other forms of transmission (satellite or terrestrial) constitute unlawful discrimination, since these fees were limited to the actual cost of transmission.

Urteil des Kartellsenats vom 16. Juni 2015 - KZR 3/14 -

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Decision of the BGH of 16 June 2015 - KZR 3/14 -

Urteil des Kartellsenats vom 16. Juni 2015 - KZR 83/13 -

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Decision of the BHG of 16 June 2015 - KZR 83/13 -

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