[DE] Sat.1 disputes third-party airtime

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Sat.1 SatellitenFernsehen GmbH has successfully submitted an urgent application to the Verwaltungsgericht Neustadt (Neustadt Administrative Court - VG Neustadt) against a licensing decision of the Rhineland-Palatinate regional media authority, the Landeszentrale für Medien und Kommunikation (LMK), which had been declared immediately enforceable. In a decision of 14 July 2017, the court reinstated the suspensive effect of the appeal against the LMK's decision.

The case concerned the question of whether Sat.1 was obliged to allocate airtime to independent third parties. On 13 February 2017, the LMK awarded licences to three television production companies for the production and distribution of national window programmes. Consequently, Sat.1 was obliged to allocate airtime to these TV companies at its own expense for a five-year period from 1 March 2017. In concrete terms, this meant that Sat.1's licence to produce and distribute its national general interest channel would be limited during the times when the third-party providers broadcast their window programmes.

Sat.1 filed an appeal against this decision, as well as an application for suspensive effect to be reinstated, given that the ruling had been declared immediately enforceable. In response to the latter application, the court decided that, prima facie, the LMK's decision appeared unlawful. The licences should not have been awarded to the three TV production companies and Sat.1's licence should not have been limited in this way because the procedure had not been conducted in accordance with the relevant provisions of the Rundfunkstaatsvertrag (Inter-State Broadcasting Agreement). The licensing procedure should not have been initiated and a call for tender should not have been issued while the licensing procedure for the 1 June 2013 to 31 May 2018 licensing period, concerning which the Oberverwaltungsgericht Rheinland-Pfalz (Rhineland-Palatinate Administrative Court of Appeal - OVG Rheinland-Pfalz) had yet to issue a decision, was still ongoing. The fact that the call for tender had contained certain caveats had not been sufficient to resolve the problem. The procedure should not have been initiated nor a new call for tender issued until after the conclusion of the appeal proceedings in February 2017. At that time, the applicant had not (or no longer) been obliged to allocate airtime to third parties because the audience share of the broadcasting group of which it was part had been below 19% during the relevant reference period of February 2016 to January 2017.

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In addition, regardless of the licensing period overlap, the audience share calculation carried out in accordance with the Rundfunkstaatsvertrag for the new licensing period had been based on the wrong reference period and the applicant had probably not been under any obligation to allocate third-party airtime at all. During the relevant reference period of February 2016 to January 2017, the audience share of the ProSiebenSat.1 broadcasting group had been less than 19%; however, the Rundfunkstaatsvertrag stated that the obligation to allocate third-party airtime only applied to broadcasting groups with an annual average market share of 20% or more, or to individual general interest channels with a share of at least 10%. Even the latter figure had not been reached in this case, since Sat.1 had only achieved an average market share of 7.3% in 2016.

After the court's decision, Sat.1 immediately removed the programmes of third-party providers Good Times and Tellvision from its schedule.

The court also ruled that the LMK should not have launched the new licensing procedure while another procedure remained the subject of appeal proceedings before the OVG Rheinland-Pfalz. An urgent procedure between the parties had been initiated in September 2014 and complaint proceedings in April 2015. In the latter, the VG Neustadt had decided that the LMK should issue a new call for tender for Sat.1 third-party airtime. The TV production companies summoned to the proceedings appealed against this decision and the matter was not concluded until February 2017, when the appeal was withdrawn. However, by issuing the new call for tender in January 2016 and then licences to third parties in February 2017, the LMK had committed a further procedural error.

An appeal against the decision may be lodged with the OVG Rheinland-Pfalz.

VG Neustadt, Pressemitteilung Nr. 28/17, 4. August 2017

https://vgnw.justiz.rlp.de/de/startseite/detail/news/detail/News/pressemitteilung-nr-2817/

Neustadt Administrative Court, press release no. 28/17, 4 August 2017

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