[AT] Austrian Federal Administrative Court confirms KommAustria's Champions League decision

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In Vienna on 23 January 2018, the Austrian Bundesverwaltungsgericht (Federal Administrative Court) ruled that Österreichische Rundfunk (Austrian Broadcasting Corporation - ORF) had not paid an inflated price for the rights to broadcast the UEFA Champions League and had therefore acted in accordance with the Bundesgesetz über den Österreichischen Rundfunk (Federal Act on the Austrian Broadcasting Corporation - ORF-Gesetz) (Case no. W120 2111451-1).

The legal dispute followed a disagreement between ORF and the Austrian private television broadcaster PULS 4 TV GmbH, which is owned by Munich-based ProSiebenSat.1 Media SE. The private broadcaster claimed that ORF had violated the ORF-Gesetz by paying too much for the football broadcasting rights. The ORF-Gesetz sets out the responsibilities and legal framework of public service broadcasters in Austria, requiring them to ensure that their programming is market-compliant. Under Article 31c(1)(1) of the ORF-Gesetz, ORF may not acquire broadcasting rights at excessive prices which cannot be justified by commercial principles. Funds accruing to the broadcaster out of the programme fee may not be used in a manner that distorts competition.

PULS 4 TV GmbH argued that this requirement had not been met when ORF acquired the UEFA Champions League broadcasting rights for the 2015/16, 2016/17 and 2017/18 seasons and lodged a complaint in the first instance with the Austrian regulator KommAustria. Founded in 2001, KommAustria regulates broadcasting and audiovisual media in Austria, as well as acting as the legal supervisory body for ORF (website: www.rtr.at).

To answer the complaint, KommAustria had to determine what would have been considered a reasonable price for the Champions League rights. Having conducted a confidential survey of bids for UEFA rights in the Austrian market, the media authority was able to prove that ORF had not acted in a manner that distorted competition by bidding for the rights. In a business simulation exercise, KommAustria treated ORF as a private broadcaster with no income from programme fees. It took into account the advertising income likely to be generated by Champions League coverage, as well as the value of strategic effects such as viewer loyalty and image enhancement. On the basis of this report, the media authority concluded that ORF would have been able to afford

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the price it had paid for the UEFA rights without its programme fee income, so the price was justified by commercial principles. Since competition had not been distorted, KommAustria rejected the complaint as unfounded (24 June 2015, KOA 10.300/15-028).

The Federal Administrative Court upheld this decision. It considered the business simulation and the calculation method used by KommAustria as necessary and conclusive. It dismissed the argument put forward by PULS 4 GmbH that ORF's purchase of the rights had not been 'necessary' to fulfil its public service remit - on the basis that the opposite had not been proven - and rejected alternative calculations designed to show that competition had been distorted.

However, the court allowed an appeal to the Verwaltungsgerichtshof (Higher Administrative Court) in Vienna. It said that, although Article 31c of the ORF-Gesetz was based on European law and European case law, there was no comparable situation anywhere in Europe to which KommAustria could refer and there was no supreme court case law concerning the matters in question.

The Federal Administrative Court rejected a complaint by ORF about KommAustria's investigation, in particular the extent of the documents that it had required the broadcaster to release and an alleged violation of ORF's trade secrets, as inadmissible.

Entscheidung des Bundesverwaltungsgerichts, Aktenzeichen W120 2111451-1, 23 Januar 2018

http://www.ris.bka.gv.at/Dokumente/Bvwg/BVWGT_20180123_W120_2111451_1_00/BVWGT_20180123_W120_2111451_1_00.html

Decision of the Federal Administrative Court, Case no. W120 2111451-1, 23 January 2018

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