[DE] Private Television Stations Object to Sub-programmes on Public Channels

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Alexander Scheuer
Institute of European Media Law (EMR), Saarbrücken/Brussels

On 27 May 1997, the Association of Private Broadcasting and Telecommunications Operators (VPRT) submitted a complaint to the European Commission in Brussels, alleging "serious breaches of European Community law". The VPRT sees these breaches in the fact that the sub-programmes, "Kinderkanal" and "Phoenix", organised by the public channels, ARD and ZDF , are financed from licence fees, although they cannot be regarded as forming part of basic programme provision.

Among other things, the association claims that funding these programmes from licence fees violates the regulations on competition contained in Articles 85 to 94 of the EC Treaty, Article 92 (1) of which declares that state subsidies are, in certain conditions, incompatible with the Common Market. It further argues that co-operation between the public programme providers violates the prohibition on agreements which restrict competition contained in Article 85 of the EC Treaty.

For years, there has been disagreement on two things: firstly, as to whether the use of public funds or mandatory levies or fees paid by users to finance public broadcasting bodies (not only in Germany) constitutes state aid within the meaning of Article 92, par. 1 of the EC Treaty; secondly, as to whether the rule on state aid can in fact be applied, even when the formal conditions for doing so are present, to public broadcasting bodies in Europe. Under Article 90, par. 2 of the EC Treaty, its provisions, and particularly those on competition, apply to undertakings entrusted with the operation of services of general economic interest only in so far as such application does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The complaint falls within this context since the public broadcasting bodies consider that the organisation of these sub-programmes is covered by the maintenance and development guarantee which applies to them.

In several judgements (BVerfge 73, 118, 154 ff.; 74, 297, 325 f.; 87, 181, 199), the Constitutional Court has recognised that the public broadcasting bodies enjoy this guarantee as basic programme providers, thus indicating the scope and nature of their responsibilities.

The VPRT also complains of the practice followed by some of the Land media authorities, which regard sub-programmes as "determined by law" within the

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meaning of Article 19 (2) of the National Broadcasting Agreement, the result being that these programmes are given priority access to the cable networks.

In response to the complaint, the Commission launched an informal examination procedure, and asked the German Government to comment on a number of relevant questions. Having first consulted the federal Länder with broadcasting responsibilities, the Government replied on 4 June, referring to the Constitutional Court rulings mentioned above.

However, at the European Council's summit in Amsterdam on 17 June, the Heads of State and Government adopted a protocol in which they decided that application of the subsidy rule contained in Article 92 of the EC Treaty to public broadcasting bodies would be governed by the following principle: In general, Member States may stipulate that public broadcasting bodies are to be funded from licence fees, provided that such funding serves fulfilment of the tasks entrusted to them by those states. Funding from licence fees must not, however, create a situation in which trade and competition within the Community are adversely affected to an extent which harms the general interest.

Karel van Miert, the EU Commissioner for competition questions, commented on the complaint in an interview given in mid-September. Although the complaint was still being examined, he did not think that the rules on competition were automatically violated in cases where there were good reasons for having a children's programme free of advertising and violence.

We shall keep our readers informed of the future course of the proceedings and of the effects on them of the declaration contained in the Amsterdam Protocol.

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