CJEU rules on regional advertising ban on national television in Germany

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On 3 February 2021, the Court of Justice of the European Union (CJEU) ruled, in Case C-555/19 (Fussl Modestraße Mayr), that the provisions of the German *Rundfunkstaatsvertrag* (State Broadcasting Treaty – RStV), which was recently replaced by the *Medienstaatsvertrag* (State Media Treaty – MStV), prohibiting television broadcasters from showing advertising at regional level in programmes broadcast throughout the country could be contrary to EU law, in particular the freedom to provide services. The court cast particular doubt on the proportionality of Article 7(11) RStV (now Article 8(11) MStV), which prohibits regional advertising but allows certain exceptions at individual Bundesland level, although it noted that none of the German Bundesländer had so far used this option. The rule was introduced by the Land legislators mainly to protect media pluralism, on the grounds that income from regional advertising should be reserved for regional and local broadcasters. According to the CJEU, the blanket ban could go beyond what was necessary to preserve the pluralistic character of the offer of television programmes and could lead to unlawful unequal treatment between national television broadcasters and providers of advertising services on the Internet.

The proceedings before the CJEU concern a case heard by the Landgericht Stuttgart (Stuttgart regional court). The Austrian company Fussl Modestraße Mayr GmbH (Fussl) operates a network of fashion shops in Austria and the Land of Bavaria. In May 2018, Fussl concluded a contract with the German company SevenOne Media GmbH, the marketing company of the German ProSiebenSat.1 Group, to broadcast television advertising solely in the Land of Bavaria in the national programmes of ProSieben using the Bavarian cable networks of Vodafone Kabel Deutschland GmbH. SevenOne Media refused to perform the contract on the grounds that it was prohibited under Article 7(11) RStV from inserting regional television advertising in programmes broadcast throughout Germany. Fussl then referred the matter to the Landgericht Stuttgart with the request that SevenOne Media be ordered to comply with its obligations under the contract. The regional court then submitted a series of questions to the CJEU concerning the rule’s compatibility with Union law.

In its legal assessment, the CJEU emphasised four key points in particular. Firstly, it noted that the German ban on regional advertising was not more detailed or stricter within the meaning of Article 4(1) of the Audiovisual Media Services

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Directive (AVMSD), since although the rule fell within the field covered by the Directive, it did not concern a specific matter governed by it because the advertising rules of the AVMSD were mainly intended to protect viewers rather than deal with other aspects such as financing or plurality. In the absence of relevant secondary law provisions, the CJEU therefore examined the rule from the perspective of the freedom to provide services guaranteed by Article 56 of the Treaty on the Functioning of the European Union (TFEU) and found that it restricted this fundamental freedom to the detriment of both providers of advertising services (television broadcasters) and the recipients of those services (advertisers). With regard to whether such a restriction could be justified by an overriding reason in the public interest, it was true that the preservation of the pluralistic character of the offer of television programmes could be a suitable objective and the member states were free to legislate further in this area. However, the CJEU doubted whether the rule was suitable to attain its objective and whether it was proportionate. It thought there could be an inconsistency, in particular in the fact – which should be verified by the national court – that the prohibition only applied to advertising services provided by television broadcasters and not to advertising services, in particular linear advertising services, provided on the Internet. It should be remembered that advertising services provided on Internet platforms could constitute competition for traditional (including local and regional) media. Less restrictive measures for national broadcasters could be introduced by the Bundesländer through an exemption clause. However, according to the CJEU, the national court would need to verify whether, in practice, this was suitable for securing the attainment of the objective. Nevertheless, the court did not believe that the freedom of expression and information guaranteed by Article 11 of the EU Charter of Fundamental Rights or the principle of equal treatment enshrined in Article 20 of the Charter had been violated, provided, in relation to Article 20, that the legislation did not give rise to unequal treatment between television broadcasters and the aforementioned Internet advertising providers.

EuGH, Urteil vom 3.2.21, C-555/19, Fussl Modestraße Mayr

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CJEU, judgment of 3 February 2021, C-555/19, Fussl Modestraße Mayr

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