[DE] Cable operator's compensation claim for anti-competitive non-payment of fees upheld

IRIS 2021-10:1/13

Christina Etteldorf
Institute of European Media Law

In a ruling of 6 July 2021 (case no. KZR 11/18), the *Kartellsenat* (Cartel Division) of the *Bundesgerichtshof* (Federal Supreme Court – BGH) decided that a public service broadcaster's failure to pay feed-in fees to a cable network operator breached the anti-discrimination rules of the *Gesetz gegen Wettbewerbsbeschränkungen* (Act Against Restraints of Competition – GWB) and therefore created a compensation liability if (and because) payments were made to other cable network operators.

In a previous case, the BGH followed an action brought by a cable network operator to the *Landgericht Hamburg* (Hamburg regional court, case no. 315 O 625/11), demanding compensation totalling EUR 218 294.56 from the operator of Zweites Deutsches Fernsehen (ZDF) for unpaid feed-in fees covering the period between 2008 and 2012. ZDF's main channel, which was the main focus of the decision, is among the channels that must be carried free of charge under the so-called 'must-carry' obligation that German media law imposes on cable network operators that serve more than a certain percentage of connected households and therefore hold a dominant market position. Until the end of 2012, ZDF voluntarily paid a fee to four large cable network operators, which covered most of the cable network in Germany, for carrying its programmes. Since 2013, German public service broadcasters have no longer voluntarily paid feed-in fees to cable network operators. Although the defendant's programmes were carried in the Hamburg region via the plaintiff's network between 2008 and 2012 in accordance with the must-carry rules contained in the *Medienstaatsvertrag Hamburg-Schleswig-Holstein* (Hamburg-Schleswig-Holstein state media treaty) (in the version of the *Rundfunkstaatsvertrag* (state broadcasting treaty) valid at the time), it did not pay any fee for this service. The plaintiff therefore demanded payment of the unpaid fees plus interest, on the grounds that it had suffered a competitive disadvantage compared with the four major cable network operators that had received payments. Both the Hamburg regional court and the *Oberlandesgericht Hamburg* (Hamburg regional appeal court – OLG) (ruling of 29 March 2018, case no. 3 U 132/14) had rejected the plaintiff's request. The BGH, following a further appeal, then examined the case and found in favour of the cable network operator.

© European Audiovisual Observatory (Council of Europe) 2026

The compensation claim is based on Article 20(1)(2) in conjunction with Article 33(1)(3) GWB, on the grounds that, for no objective reason, the plaintiff had been treated unfairly compared with the large cable network operators. According to the BGH, these cable network operators and the plaintiff all operated in the same market, i.e. the market for the distribution of programme signals via broadband cables. The BGH considered that the existence of objective justification should be determined through a comprehensive weighing-up of the competitive situation. On this basis, it concluded that, contrary to the OLG's view, the plaintiff had been unlawfully discriminated against. The BGH explained that the non-payment of the feed-in fee had been highly detrimental to the plaintiff because it had not been remunerated for the feed-in service that it had provided. This in turn had a negative impact on its position vis-à-vis its competitors. On the one hand, it should be noted that its universal service remit, in principle, obliged the defendant to make use of the feed-in services of all cable network operators and entitled it to do so without paying a fee under the must-carry obligation. On the other hand, it should be borne in mind that, although the plaintiff held a dominant market position in the distribution area concerned and was therefore obliged to carry the defendant's programmes, it held very little market power compared with ZDF and its direct competitor in the relevant distribution area (Kabel Deutschland). On account of the need to build a broadband cable network, the plaintiff was also seriously hindered from entering the market for the provision of cable television to end customers. On the basis of this weighing-up process, the BGH concluded that the considerable disadvantage caused to the plaintiff by the defendant's failure to pay feed-in fees could not be justified under competition law. In particular, in view of the objectives of the GWB (protection of competition and open market access), such unequal treatment could not be justified by the argument that market-leading providers should, as the public service broadcasters had suggested, be given preferential treatment for a limited period on account of their longstanding (albeit voluntary) payment of feed-in fees.

The BGH concluded that the OLG's legal assumptions had been incorrect, annulled the ruling and referred the case back to the OLG for a new trial and a new decision.

Urteil des BGH (Az. KZR 11/18)

https://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=b0b0ab06373750b09ddd962568bc5253&nr=122215&pos=0&anz=1

Federal Supreme Court judgment (case no. KZR 11/18)

© European Audiovisual Observatory (Council of Europe) 2026

© European Audiovisual Observatory (Council of Europe) 2026