[DE] Stuttgart regional court: state media treaty's regional TV advertising ban breaches EU law

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In a judgment of 23 December 2021 (case no. 20 O 43/19), the 20th civil chamber of the *Landgericht Stuttgart* (Stuttgart regional court – LG Stuttgart) ruled that the ban on regional TV advertising by national TV broadcasters, enshrined in Article 8(11) of the *Medienstaatsvertrag* (state media treaty – MStV), breached EU law because it was incompatible with the freedom to provide services (Article 56 of the Treaty on the Functioning of the European Union (TFEU)) and the principle of equal treatment laid down in Article 20 of the EU Charter of Fundamental Rights.

The plaintiff is a fashion company based in Austria. The defendant is the marketing company of a large German media company with its headquarters in Unterföhring, Bavaria. The parties signed a contract under which an advertisement for the plaintiff was to be broadcast on a television channel operated by the media company. The advertisement was only to be shown in Bavaria and was not meant to be broadcast nationwide.

The defendant refused to broadcast the plaintiff's advertisement with reference to Article 8(11) MStV. Under this rule, the regional transmission of advertising by a national TV provider (as opposed to a regional TV channel) is only allowed if special permission has been granted under state law, which was not the case here.

Both parties consider that Article 8(11) MStV violates European Union law and that the ban on regional advertising by national TV broadcasters therefore does not apply. The plaintiff therefore demanded that the contract on the regional transmission of the advertisement should be fulfilled.

The LG Stuttgart had stayed its proceedings and referred various questions to the European Court of Justice regarding the interpretation of EU law. These were answered by the Court in its ruling of 3 February 2021 (case C-555/19).

The LG Stuttgart has now ordered the defendant to broadcast the advertisement. It ruled that the defendant could not argue that it would be unlawful to broadcast it on the grounds that Article 8(11) MStV prohibited the regional transmission of advertising by national TV providers. The ban, which was aimed at protecting media pluralism, was not applicable because it was incompatible with the freedom to provide services and the principle of equal treatment enshrined in EU

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law. The interference with the freedom to provide services resulting from the ban on the regional transmission of advertising by national TV broadcasters was unjustified. The ban was unsuitable for ensuring the attainment of its objective of protecting regional TV broadcasters, who were allowed to broadcast regional advertising. The LG Stuttgart thought that advertising services provided via online platforms in the regional market also represented genuine competition for regional and local TV companies. Internet platforms posed as great a threat as national TV providers to the income that regional and local TV broadcasters could generate from such advertising. Internet platforms were therefore just as likely to harm the financial well-being and long-term survival of regional and local TV broadcasters. Banning the regional transmission of advertising by national TV broadcasters could therefore only protect media pluralism in a fragmented way. The restriction of the freedom to provide services that the ban created was therefore inconsistent. On account of this inconsistency, the ban was unsuitable for ensuring the attainment of its objective, i.e. protecting media pluralism.

The ban was incompatible with the equality principle enshrined in EU law because it meant national TV broadcasters were treated differently to providers of Internet-based advertising services, who were allowed to provide regional advertising. As a result, comparable situations were treated differently without any objective justification. The respective business models were comparable, since the advertising services of national TV broadcasters and Internet-based advertising were both designed to attract consumers' attention in order to generate advertising income. The target groups (consumers) of both forms of advertising were also similar. There was no justification for such unequal treatment.

The court had commissioned Prof. Dr Hinz, an expert from the Goethe University in Frankfurt am Main, to produce an economic report analysing the regional TV and Internet market and subsequently adopted his findings.

Although the ruling is not yet final, it seems highly unlikely that the defendant will appeal, since the parties in the proceedings were both clearly convinced that Article 8(11) MStV was incompatible with EU law. So far, the proceedings have exposed clear shortcomings in the cooperation between national courts and the ECJ in the context of requests for preliminary rulings when the referring court's establishment of the facts shows a tendency to be one-sided. This impression is further strengthened by the grounds for the decision, which is essentially based on a single economic report and appears to largely ignore the interests of regional media operators in the assessment of the proportionality of Article 8(11) MStV, as well as the risk that the decision could further exacerbate a lack of diversity at regional level.

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Pressemitteilung des LG Stuttgart

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Stuttgart regional court press release

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