

[DE] Appeal court lifts public-service news app ban

IRIS 2023-8:1/25

*Christina Etteldorf
Institute of European Media Law*

Ruling in summary proceedings on 28 June 2023, the fourth civil chamber of the *Oberlandesgericht Stuttgart* (Stuttgart Appeal Court) set aside the lower court's decision to temporarily ban the distribution of the "Newszone" app by one of the German public broadcasting companies. However, the main reasons for its decision were formal rather than substantive, since, in accordance with the German *Medienstaatsvertrag* (State Media Treaty - MStV), the newspaper publishers that had complained about the app should have first initiated an arbitration procedure with the broadcaster concerned.

The case concerns an app provided by *Südwestrundfunk* (SWR), one of the nine German regional public broadcasters, and its youth radio station, *DasDing*. The Newszone app can be used to download customised news content (text, still and video images and audio content) from the SWR website onto smartphones and other connected mobile devices. According to the MStV, public-service broadcasters that offer telemedia (essentially online services that do not constitute broadcasting) have to meet certain content-related and procedural conditions. These include passing a verifiable "three-step test" to ensure that the proposed online offering is covered by the public broadcasting remit and the integration in a telemedia concept. Article 30(7) MStV also states that telemedia services must not be "press-like", i.e. the focus of their design must be placed on moving images or sound and, if they contain text, they must only provide content from a specific broadcast including background information. This is not the first German courtroom dispute between private and public-service media to be triggered by this rule, which is designed to protect media diversity by limiting the influence of subsidised public-service broadcasters for the benefit of the press in the online sector. In the present case, various newspaper publishers had complained that the app constituted a stand-alone telemedia service rather than being part of SWR's previously authorised telemedia offering, and therefore required a new, independent examination. They also claimed that the app was press-like because it offered content that was not programme-related and therefore intruded into a market reserved for the press in an anti-competitive way.

On 21 October 2022, the *Landgericht Stuttgart* (Stuttgart District Court), which was originally asked to issue the injunction, had upheld the publishers' request and temporarily prohibited SWR from distributing the app. Appealing against this decision, SWR insisted firstly that since the app was part of an existing (and

previously approved) online service, it did not require separate authorisation under the procedure outlined in the MStV and was also not press-like. Secondly, it argued that, before filing the complaint, the press companies should in any case have launched an arbitration procedure, which they had failed to do. The *Oberlandesgericht Stuttgart* agreed with the latter argument and therefore lifted the prohibition order issued by the lower-instance court. In order to enforce the rule that telemedia should not be press-like, Article 30(7) sentence 6 MStV requires public broadcasters and umbrella press organisations to set up an arbitration board. Such a board has been established and a corresponding arbitration agreement has been signed between the *Bundesverband Digitalpublisher und Zeitungsverleger* (Federal Association of German Newspaper Publishers - BDZV) and the *Arbeitsgemeinschaft der öffentlich-rechtlichen Rundfunkanstalten der Bundesrepublik Deutschland* (German Association of Public Service Broadcasters - ARD). In the opinion of the *Oberlandesgericht*, an arbitration procedure should therefore have been carried out in order to seek an amicable solution before the matter was brought before the courts. Unlike the *Landgericht*, the *Oberlandesgericht* held that the failure to conduct arbitration constituted a procedural impediment that meant the application for an injunction against the distribution of the Newszone app was inadmissible. Arbitration was compulsory. The arbitration agreement was applicable on account of both the facts of the case and the parties involved. All the publishing companies concerned were bound by the agreement either as BDZV members or through relationships with other companies, while the defendant was a public broadcaster belonging to the ARD.

Urteil vom 4. Zivilsenat des Oberlandesgerichts Stuttgart vom 28. Juni 2023 - 4 U 31/23

<https://openjur.de/u/2473267.html>

Ruling of the fourth civil chamber of the Stuttgart Appeal Court, 28 June 2023, 4 U 31/23

