

ANNOTATIE

# **Fussl Modestraße Mayr GmbH (HvJ EU, zaak C-555/19) – Prohibition of regional advertising in country-wide broadcasting might violate EU law**

*J. Oster*

*Annotatie bij Hof van Justitie van de Europese Unie, 03-02-2021, ECLI:EU:C:2021:89 (EHRC-2021-0060)*

1. The initial proceedings that led to this preliminary ruling were remarkable: Fussl, an Austrian company which operates a network of fashion shops in Austria and the German Federal State (*Land*) of Bavaria, concluded a contract with SevenOne Media, the marketing company of the German private TV broadcaster ProSiebenSat.1, to broadcast television advertising solely in Bavaria. SevenOne Media subsequently refused to perform that contract: Paragraph 7(11) of the then-applicable German Interstate Broadcasting Treaty (RStV; now Paragraph 8(11) of the Interstate Media Treaty, MStV) prohibited the transmission of television advertising on a regional level in programmes broadcast throughout Germany, such as the ProSieben channel at issue. Therefore, one cannot but wonder why SevenOne Media concluded the contract in the first place. There is no indication as to a collusion between the parties to ‘provoke’ the judgment of the CJEU, which, it should be noted, would not be unprecedented.[1] At any rate, the CJEU faced the extraordinary constellation that both parties of the initial proceedings made the same claim, namely the incompatibility of Paragraph 7(11) of the RStV with EU law.

2. Having dealt with a procedural issue first,[2] the Court addressed the following questions: is Paragraph 7(11) of the RStV compatible with Article 4(1) of Directive 2010/13 (the Audiovisual Media Services Directive, AVMS Directive), the freedom to provide services (Article 56 TFEU),

freedom of expression as well as media freedom (Article 11 EUChFR), and Article 20 EUChFR (the principle of equal treatment)?[3]

3. According to Article 4 of Directive 2010/13, Member States may require media service providers under their jurisdiction to comply with more detailed or stricter rules in the fields coordinated by this Directive provided that such rules are in compliance with EU law. The applicability of Article 4 of Directive 2010/13 in the present case was thus subject to the condition that Paragraph 7(11) of the RStV constituted a ‘more detailed or stricter [rule] in the fields coordinated by this Directive’. This was questionable, for two reasons: first, the German Government—which, for reasons set out in the first paragraph of this review, was *de facto* the defendant in these proceedings—argued that the Directive applied only to audiovisual media services provided ‘for simultaneous viewing of programmes’ (Article 1(1)(e) of Directive 2010/13). That was supposedly not the case here, because the advertising was targeted at the Bavarian audience only. The Court rejected this argument, because the notion of ‘simultaneous viewing’ does not relate to geographical but to chronological simultaneity. The Court convincingly referred to the purpose of the concept of simultaneity in the Directive, namely to distinguish between linear audiovisual media services (particularly television) and non-linear audiovisual media services (on-demand services). Second, Paragraph 7(11) of the RStV would have to constitute a more detailed or stricter rule ‘in the fields coordinated by this Directive’. Although TV advertising is a field coordinated by the Directive, this coordination applies only with regard to the protection of viewers, particularly consumers. Therefore, the Court rightly concluded that Paragraph 7(11) of the RStV did not affect the fields coordinated by the Directive, and thus fell outside the scope of Article 4(1).[4]

4. Since the harmonising AVMS Directive was not applicable, the Court had to address Article 56 TFEU directly. The claims made by the litigating parties could not be in better harmony: SevenOne Media/ProSiebenSat.1 invoked its right to provide the broadcasting service, while Fussl claimed its right to receive that service. On the basis of its well-rehearsed principles, the Court confirmed that the freedom to provide and to receive services had been restricted in this case. The Court then identified ‘the preservation of the pluralistic nature of the offer of television programmes’—in short, media pluralism (Article 11(2) EUChFR)—as an overriding reason relating to the public interest capable of justifying the restriction: it has been the purpose of Paragraph 7(11) of the RStV to reserve revenue from regional television advertising for regional and local television broadcasters, thus enabling them to contribute to pluralism within the German broadcasting landscape.

5. In the justification analysis, the Court had to assess, first, whether Paragraph 7(11) of the RStV was capable of ensuring the maintenance of media pluralism. The Court reiterated that ‘national legislation is appropriate for ensuring the attainment of the objective sought only if it

genuinely meets the concern to attain that objective in a consistent and systematic manner'.[5] Concerning the question of consistency, the Court raised the problem that Paragraph 7(11) of the RStV did not apply to advertising via internet platforms. However, the Court did not address the question but asked the referring court, the *Landgericht Stuttgart*, 'to ascertain whether advertising services provided on internet platforms constitute genuine competition for regional and local television broadcasters on the regional advertising market and a threat to the revenue which they derive from that advertising'.[6] In particular, if German law permits national TV broadcasters to broadcast regional advertising as part of their online programmes, 'it would necessarily have to be concluded that the measure introduced by Paragraph 7(11) of the RStV is inconsistent'.[7] Yet this instruction is rather vague: the question 'if', that is, whether or not, German law permits regional advertising in online programmes, is not susceptible to an answer. Instead, permission of regionalised online advertising is a matter that has to be decided on a case-by-case basis depending on the service at hand.[8] For example, with regard to live streaming, the provisions on linear broadcasting apply, and this includes Paragraph 7(11) of the RStV. Yet this is different with regard to on-demand services.

6. Second, the Court examined whether the restriction imposed by Paragraph 7(11) of the RStV was necessary for attaining its objective. The Court highlighted that Paragraph 7(11) of the RStV provided for a so-called 'opening clause', enabling the German Federal States to introduce a specific authorisation scheme. The implementation of such an authorisation theme, the Court found, could constitute a less restrictive but equally effective measure to minimise the financial impact on regional broadcasters while at the same time allowing the broadcasting of regional advertising by national television broadcasters.[9] However, the Court also left this question to be decided by the domestic court.[10]

7. The Court then addressed the conformity of Paragraph 7(11) of the RStV with Article 11 EUChFR. Fussl invoked its right to broadcast its advertising—that is, its own content—in Bavaria. This is freedom of expression, protected by Article 11(1) EUChFR, which also includes the right to disseminate commercial speech.[11] SevenOne Media/ProSiebenSat.1 could not only invoke freedom of expression, which, according to Article 11(1), includes the right to impart (third-party) information. As a media company, SevenOne Media/ProSiebenSat.1 could also invoke media freedom according to Article 11(2) EUChFR. Yet freedom of expression and media freedom operate under different parameters.[12] The Court rightly highlighted that commercial speech receives weaker protection under freedom of expression doctrine,[13] whereas commercial speech as a source of income for media companies is protected under the media freedom principle.[14] However, the Court emphasised that regional advertising is 'only one method of broadcasting advertising and, therefore, only one

source of income among others for those operators’.[15] As a consequence, the Court found that Article 11 EUChFR had not been violated. Yet the Court’s reasoning is based on a mistaken perception of the situation of private broadcasters in Germany. The fact that regional advertising is ‘only one source of income’ does not change the fact that advertising in general is the main source of revenue for private broadcasters. In Germany, these broadcasters have to compete with publicly financed broadcasters for both audience and advertising. In such competition, every source of income matters.

8. Paragraph 7(11) of the RStV might violate the principle of equal treatment (Article 20 EUChFR), because the provision placed national TV broadcasters and advertisers in a less favourable position than providers of internet advertising services. While the Court furnished the domestic court ‘with any information which may be useful for the purposes of that examination’, the Luxembourg Court ultimately left it to the Landgericht Stuttgart ‘to ascertain whether the national legislation at issue in the main proceedings complies with the principle of equal treatment’.[16]

9. The Court’s decision neither is particularly helpful for the domestic court nor does it fully convince in its reasoning. First, it is barely helpful, because the Court left the critical issues to be decided by the *Landgericht* Stuttgart while providing very little guidance that goes beyond the reiteration of general and well-known principles. To be sure, the Court’s decision is informative to the extent that it does *not exclude the possibility* that Paragraph 7(11) of the RStV (now Paragraph 8(11) of the MStV) might violate EU law, but it did not go further. Second, it fails to fully convince in substantive terms. The conclusion that a less restrictive measure ‘could’ result from an effective implementation of a specific authorisation scheme avoided the question at issue. Moreover, the Luxembourg Court once again[17] missed the opportunity to properly conceptualise media freedom as a fundamental right. With its terse and misconceived reasoning on the significance of regional advertising for broadcasters, the Court did not even begin to grasp the complexity of the institutional protection of the media.[18] The exercise of media freedom presupposes the self-sufficient, state-independent financing of media companies. Depriving the media of potential sources of revenue, such as regional advertising, creates an impediment for media activities, including journalistic investigations and reporting on matters of public concern. In the current European media landscape, in which the freedom of the ‘public watchdog’[19] is under increasing threat even in EU Member States, decisive and detailed guidance by the Court on the protection of media freedom is more necessary than it has ever been.

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[1] See, for example, *Mangold v Helm*, ECJ 22 November 2005, Case C-144/04, ECLI:EU:C:2005:709.

[2] *Fussl*, Par. 21-31.

[3] The Court did of course approach this question from a different perspective, namely with regard to the interpretation of EU law. For the sake of simplicity, the questions are rephrased for the purposes of this review.

[4] *Fussl*, par. 42.

[5] *Fussl*, par. 59.

[6] *Fussl*, par. 61.

[7] *Fussl*, par. 68.

[8] K.-H. Ladeur, '§ 7 RStV', in: Binder/Vesting (eds.), *Beck'scher Kommentar zum Rundfunkrecht*, 4th ed. 2016, par. 16.

[9] *Fussl*, par. 77.

[10] *Fussl*, par. 79.

[11] See, e.g., *Murphy v Ireland*, ECtHR (3<sup>rd</sup> Section) 10 July 2003, no. 44179/98, ECLI:CE:ECHR:2003:0710JUD004417998, par. 61.

[12] See J. Oster, 'Media Freedom as a Fundamental Right', 2015, p. 48-54.

[13] *Fussl*, par. 91; see J. Oster, 'Media Freedom as a Fundamental Right', 2015, p. 249-255.

[14] *Fussl*, par. 87 ; see J. Oster, 'European and International Media Law', 2017, p. 179, 446-447.

[15] *Fussl*, par. 87.

[16] *Fussl*, par. 97.

[17] See also, for example, *Google Spain SL v Costeja González*, CJEU (GC) 13 May 2014, Case C|131/12, ECLI:EU:C:2014:317, «EHRC» 2014/186 case comment Van Hoboken; *Spiegel Online GmbH v Beck*, CJEU (GC) 29 July 2019, Case C|516/17, ECLI:EU:C:2019:625, «EHRC» 2019/221.

[18] See J. Oster, 'Media Freedom as a Fundamental Right', 2015, p. 84-101.

[19] See, e.g., *Jersild v Denmark*, ECtHR (GC) 23 September 1994, no. 15890/89, ECLI:CE:ECHR:1994:0923JUD001589089, par. 35.