

Case C-555/19

Request for a preliminary ruling

Date lodged:

19 July 2019

Referring court:

Landgericht Stuttgart (Germany)

Date of the decision to refer:

12 July 2019

Applicant:

Fussl Modestraße Mayr GmbH

Defendant:

SevenOne Media GmbH

[...]

Landgericht Stuttgart (Regional Court, Stuttgart, Germany)

Order

In the case of

Fussl Modestraße Mayr GmbH, [...] Ort im Innkreis, Austria

[...]

v

SevenOne Media GmbH, [...] Unterföhring[, Germany]

[...]

concerning contractual performance in respect of television advertising

the Regional Court, Stuttgart [...] made the following order: **[Or. 2]**

[procedural matters] [...]

II.

The following questions on the interpretation of EU law are referred to the Court of Justice of the European Union pursuant to Article 267 TFEU:

1. Are
 - a) Article 4(1) of Directive 2010/13/EU,
 - b) the principle of equal treatment under EU law and
 - c) the rules under Article 56 TFEU on freedom to provide services

to be interpreted as meaning that they preclude a provision in national law that prohibits the regional broadcasting of advertising on broadcasting programmes authorised for the entire Member State?

2. Is Question 1 to be assessed differently if the national law allows statutory rules pursuant to which the regional broadcasting of advertising can be permitted by law and, in that case, is permitted with an — additionally required — official permit?

3. Is Question 1 to be assessed differently if no use is actually made of the possibility of permitting regional advertising as described in Question 2 and regional advertising is therefore prohibited in its entirety?

4. Having regard to Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and the case-law of the European Court of Human Rights, is Article 11 of the Charter of Fundamental Rights of the European Union, particularly the principle of pluralism of the media, to be interpreted as meaning that it precludes a national provision such as that described in Questions 1, 2 and 3? **[Or. 3]**

Grounds:

I. The Facts

The applicant requests that the defendant transmit an advertising spot on the television programme 'ProSieben' of ProSiebenSat.1 Television GmbH, this being restricted to the cable network of Vodafone Kabel Deutschland GmbH in Bavaria.

The applicant is a fashion company having its registered office in Ort im Innkreis (Austria) and operates numerous specialist fashion outlets from that location. These fashion stores are located

- (i) in Austria, and thus also in the ‘catchment area’ of potential customers from Germany, and
- (ii) in Germany, in the Federal Land of Bavaria, meaning that the applicant also addresses German customers in Bavaria directly.

The defendant is the marketing company of the ProSiebenSat.1 group. Its registered office is in Unterföhring (Germany).

In order to promote its commercial activities in Austria and Germany, locally restricted to Bavaria in that respect, the applicant entered into a contract [...] on the insertion of television advertising into the television programme ‘ProSieben’ with the defendant on 25 May 2018, this being restricted, however, to the territory of Bavaria, specifically the cable systems of Vodafone Kabel Deutschland GmbH in Bavaria. According to that contract, the advertising is to be inserted not into the programme ‘ProSieben’ that is transmitted throughout Germany, but rather only into the signal for cable retransmission on the cable networks of Vodafone Kabel Deutschland GmbH in Bavaria.

The reasoning behind the restriction to the broadcasting of the advertising is that, as a company operating locally in Austria and Bavaria, the applicant does not have an economic interest in broadcasting television advertising throughout Germany. On the contrary: advertising throughout Germany would be detrimental to the applicant because it could give the target group of the advertising the impression of a nationwide offering which the applicant, as a medium-sized company that must concentrate on specific regions with the resources available to it when opening up the German market, is unable to provide. This would create a risk of negative user reviews (inter alia on the internet).

In addition, the applicant has to pay the defendant lower remuneration on account of the territorial restriction. [Or. 4]

The defendant refuses to insert the advertising spot into the programme ‘ProSieben’ and broadcast it thereon. Although it is not disputed that it is technically capable of broadcasting regionalised advertising such as that in the present case, it claims that it is unable to perform the contract owing to requirements under broadcasting legislation.

II. Provisions of German law relevant to the decision

The provision of German law that is decisive for the purpose of ruling on the dispute reads as follows:

‘Staatsvertrag für Rundfunk und Telemedien (State Treaty for broadcasting and telemedia — RStV) in the version published on 21 December 2015

...

Paragraph 7 Advertising principles, Identification obligations

...

(11) The broadcasting on regional networks of advertising or other content on a programme commissioned or authorised for broadcasting on national networks is permissible only if, and only insofar as, the law of the Federal Land in which the broadcasting on regional networks takes place allows it. Advertising or other content of private commercial broadcasters broadcast on regional networks requires separate authorisation under state law; this can be made dependent upon content-related requirements to be determined by law.

...'

So far, not a single Federal Land has made use of the possibility, provided in that provision, of regionalised advertising authorisations under state law. [Or. 5]

III. Legal situation

1. Freedom to provide services

It is possible that Paragraph 7(11) RStV infringes Article 56 TFEU, pursuant to which restrictions on freedom to provide services within the European Union are in principle prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended. In this respect, advertising broadcast by a television broadcaster established in one Member State for an advertiser established in another Member State for remuneration is a service within the meaning of Article 57 TFEU (CJEU, judgment of 17 July 2008 — C-500/06, paragraph 33). In the present case, Paragraph 7(11) RStV prevents the applicant from using such a service and prevents the defendant from providing such a service.

Although measures which impede or render less attractive the freedom to provide services conferred under Article 56 TFEU are permissible in exceptional cases, the latter exist only under specific conditions: the measures must be applied in a non-discriminatory manner; they must be justified by overriding reasons based on the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain that objective (CJEU, judgment of 17 July 2008 — C-500/06, paragraph 35). Furthermore, the measures must be appropriate in the narrow sense of the word (CJEU, judgment of 13 December 2007 — C-250/06, paragraph 44).

There are doubts as to whether these conditions are fulfilled in the case of Paragraph 7(11) RStV.

a) Although it can be assumed that regional media operators benefit economically from this provision, purely economic benefits for one or more

competitors cannot constitute an overriding reason in the public interest justifying a restriction of a fundamental freedom guaranteed by the Treaty (CJEU, judgment of 22 December 2010 — C-338/09, paragraph 51).

b) It can indeed also be assumed that Paragraph 7(11) RStV may contribute to preserving or even increasing pluralism of the media. Pursuant to the case-law of the Court of Justice of the European Union, however, this objective justifies the restriction of a fundamental freedom such as that referred to in the present case only if it is pursued in a consistent and systematic manner (cf. CJEU, judgment of 12 July 2012 — C-176/11, paragraph 22). The latter appears to be doubtful given that internet advertising giants such as Google and Facebook are able to offer internet-based [Or. 6] regional advertising.

c) Furthermore, it is questionable whether the provision is suitable for pursuing the objective and — if this is found to be the case — appropriate in the narrow sense of the word. The unresolved issue in the present case is whether regional media outlets do not benefit from Paragraph 7(11) RStV, or benefit from it only very slightly, while traders such as the applicant are significantly restricted in their advertising possibilities. The applicant thus argues, without challenge, that regional programmes targeted viewers with specific, local interests. From the perspective of the viewers, they were a long way behind the television programmes broadcast on national networks in terms of the quality of their content and composition. Together with the local characteristics of those programmes, this meant that, even when taken together, the regional programmes accounted for less than 5% of the total television audience. The applicant could not therefore derive any relevant advertising value from advertising on so-called regional programmes. Even if it were to place advertising on all the regional programmes, the applicant would still be excluded from over 95% of the television advertising market. Nor would there be a relevant image transfer, as would be the case when advertising on nationally broadcast television programmes, which are of a high quality from the perspective of the viewers. It was this very image transfer that was crucial for the success of its television advertising in establishing the brand ‘Fussl Modestraße’, however.

2. Freedom of broadcasting and freedom of expression

Paragraph 7(11) RStV could also constitute an impermissible encroachment on the freedom of broadcasting protected under Article 11 of the Charter of Fundamental Rights of the European Union and pursuant to Article 10 ECHR and on the freedom of expression protected under Article 11 of the Charter of Fundamental Rights of the European Union.

3. Principle of equal treatment under EU law

Finally, the principle of equal treatment under EU law could be infringed by Paragraph 7(11) RStV. Paragraph 7(11) RStV places broadcasters as well as national and foreign traders seeking to carry out linear television advertising on

national broadcasting networks at a disadvantage compared with other media service providers, particularly compared with non-linear audiovisual media services such as video-on-demand services or streaming services such as YouTube or Spotify, for example. They are just as able to regionally differentiate their advertising as print media offered on a nationwide basis. In addition, individual traders are placed at a disadvantage vis-à-vis each other. In practice, the prohibition on regional advertising leads to preferential treatment for large providers that operate on a nationwide basis, for which such broadcasting of advertising is worthwhile. [Or. 7]

IV. Relevance of the questions of interpretation

The outcome of the present dispute is dependent on the answer to the questions referred — which have not yet been interpreted by the Court of Justice of the European Union. In the event that Paragraph 7(11) RStV is impermissible under EU law, the applicant would be able to demand contractual performance from the defendant, that is to say the contractually agreed broadcasting of regionalised advertising in the Federal Land of Bavaria. In the event that Paragraph 7(11) RStV is permissible under EU law, however, the defendant would be released from its performance obligation pursuant to Paragraph 275(1) of the Bürgerliches Gesetzbuch (German Civil Code; ‘the BGB’).

[Signatures]

[...]