



**The prohibition on broadcasting advertising only at regional level within the framework of German television programmes broadcast at national level could be contrary to European Union law**

*Firstly, that total prohibition may go beyond what is necessary to preserve the pluralistic nature of the supply of television programmes by reserving revenue from regional television advertising for regional and local channels and, secondly, it may create an unacceptable inequality between national television broadcasters and providers of advertising services on the Internet*

Fussl Modestraße Mayr GmbH, a company incorporated under Austrian law, operates a network of fashion shops in Austria and the *Land* of Bavaria (Germany). In 2018, it concluded a contract with SevenOne Media GmbH, the marketing company of the German television station ProSiebenSat.1. That contract concerned the broadcasting, solely in the *Land* of Bavaria, of advertising in the context of programmes of the national channel ProSieben.

However, SevenOne Media refused to perform that contract. Since 2016, a State Treaty concluded by the *Länder* has prohibited television broadcasters from inserting, in their national broadcasts, television advertisements whose broadcasting is limited to a regional level. That prohibition aims at reserving revenue from regional television advertising for regional and local television broadcasters, thus ensuring them a source of financing and thus their sustainability, in order to enable them to contribute to the pluralistic character of the offer of television programmes. The prohibition is accompanied by an ‘opening clause’, allowing the *Länder* to authorise regional advertising in the context of national broadcasts.

Under those circumstances, the Landgericht Stuttgart (Regional Court, Stuttgart, Germany), ruling on a dispute relating to the performance of the contract in question, questions the conformity of that prohibition with EU law.

That case invites the Court, in particular, to apply certain principles enshrined in its case-law on the freedom to provide services and to interpret the Charter of Fundamental Rights of the European Union (“the Charter”) in the particular context of a prohibition on regional advertising on national television channels. Such an analysis cannot disregard the existence of advertising services provided on Internet platforms which may constitute competition for traditional media.

#### Findings of the Court

In the first place, as regards the Audiovisual Media Services Directive <sup>1</sup>, the Court notes that Article 4(1) thereof, according to which Member States may, under certain conditions, provide for more detailed or stricter rules in the fields coordinated by that directive, for the purpose of ensuring the protection of the interests of viewers, does not apply in the present case. Although the prohibition at issue falls within a field covered by the directive, namely that of television advertising, it concerns however a specific matter which is not governed by any of the articles of that directive and does not, moreover, pursue the objective of protecting viewers. Therefore, it cannot be

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<sup>1</sup> Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) (OJ 2010 L 95, p. 1).

qualified as a 'more detailed' or 'stricter' rule within the meaning of Article 4(1) of that directive, so that that provision does not preclude such a prohibition.

In the second place, as regards the conformity of the prohibition at issue with the freedom to provide services guaranteed by Article 56 TFEU, the Court notes, first of all, that such a prohibition entails a restriction on that fundamental freedom to the detriment of both the providers of advertising services, namely, television broadcasters, and the recipients of those services, namely, advertisers, in particular those established in other Member States. Next, as regards the justification for that restriction, the Court notes that the preservation of the pluralistic nature of the offer of television programmes may constitute an overriding reason in the public interest. Finally, as regards the proportionality of the restriction, the Court notes that, admittedly, the objective of maintaining media pluralism, in so far as it is linked to the fundamental right to freedom of expression, gives the national authorities a wide discretion. However, the prohibition at issue must be such as to guarantee the attainment of that objective and may not go beyond what is necessary to attain it.

In that regard, the Court notes, firstly, that the prohibition at issue could be vitiated by an inconsistency, relating to the fact, to be verified by the national court, that it applies only to advertising services provided by national television broadcasters and not to advertising services, in particular linear advertising services, provided on the Internet. At issue could be two competing types of services on the German advertising market which are likely to present the same risk to the financial health and sustainability of regional and local television broadcasters and, hence, to the objective of protecting media pluralism<sup>2</sup>. Secondly, concerning the necessity for the prohibition, the Court considers that a less restrictive measure could result from the effective implementation of the authorisation system at the level of the *Länder* provided for by the 'opening clause'. However, it is for the national court to verify whether that a priori less restrictive measure can actually be adopted and implemented in such a way as to ensure that, in practice, the objective pursued can be achieved.

In the third place, as regards the freedom of expression and information guaranteed by Article 11 of the Charter, the Court notes that the latter does not preclude a prohibition of regional advertising on national television channels, such as that contained in the national measure at issue. That prohibition is essentially a balancing act between, on the one hand, the freedom of commercial expression of national television broadcasters and advertisers and, on the other hand, the protection of media pluralism at regional and local level. Therefore, the German legislature was entitled to consider, without exceeding the wide margin of appreciation which it is entitled to in that context, that safeguarding the public interest should prevail over the private interest of national television broadcasters and advertisers.

In the fourth place, the Court holds that the principle of equal treatment, enshrined in Article 20 of the Charter, also does not preclude the prohibition at issue, provided that it does not give rise to unequal treatment between national television broadcasters and providers of advertising, in particular linear advertising, on the Internet as regards the broadcasting of advertising at regional level. In that regard, it is for the national court to ascertain whether the situation of national television broadcasters and that of providers of advertising services, in particular linear advertising services, on the Internet, with respect to the provision of regional advertising services, is significantly different as regards the elements characterising their respective situations, namely, in particular, the usual ways in which advertising services are used, the manner in which they are provided or the legal framework within which they are provided.

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**NOTE:** A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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<sup>2</sup> The circumstances of the case in the main proceedings are, in that regard, substantially comparable to those which gave rise to the judgment of 17 July 2008, *Corporación Dermoestética* (C-500/06, see also Press Release No 56/08).

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The [full text](#) of the judgment is published on the CURIA website on the day of delivery.

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