

COMMISSION DECISION

of 25 June 2007

on the compatibility with Community law of measures taken by Austria pursuant to Article 3a(1) of Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities

(2007/477/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, ⁽¹⁾ and in particular Article 3a(2) thereof,

Having regard to the opinion of the Committee established pursuant to Article 23a of Directive 89/552/EEC,

Whereas:

- (1) By letter of 12 March 2001, Austria notified to the Commission measures to be taken pursuant to Article 3a(1) of Directive 89/552/EEC.
- (2) The Commission verified, within three months from this notification, that such measures are compatible with Community law, in particular as regards the proportionality of the measures and the transparency of the national consultation procedure.
- (3) In its examination, the Commission took into consideration the available data on the Austrian media landscape.
- (4) The list of events of major importance for society included in the Austrian measures was drawn up in a clear and transparent manner and a far-reaching consultation had been launched in Austria.
- (5) The Commission was satisfied that the events listed in the Austrian measures met at least two of the following criteria considered to be reliable indicators of the importance of events for society: (i) a special general

resonance within the Member State, and not simply a significance to those who ordinarily follow the sport or activity concerned; (ii) a generally recognised, distinct cultural importance for the population in the Member State, in particular as a catalyst of cultural identity; (iii) involvement of the national team in the event concerned in the context of a competition or tournament of international importance; and (iv) the fact that the event has traditionally been broadcast on free television and has commanded large television audiences.

- (6) A number of the events listed in the Austrian measures, including the summer and winter Olympic games, the World Cup and the European Championship football matches involving the Austrian national team as well as the opening matches, the semi-finals and the finals of these tournaments (men), fall within the category of events traditionally considered to be of major importance for society, as referred to explicitly in recital 18 of Directive 97/36/EC. These events have a special general resonance in Austria, as they are particularly popular with the general public, not just with those who usually follow sport events.
- (7) The final of the Austrian Football Cup has a special general resonance in Austria, as football is the most popular sport in that Member State.
- (8) The FIS Alpine World Ski Championships and the FIS Nordic World Ski Championships have a special general resonance in Austria given that skiing is a very popular sport forming part of general school sports education in that Member State. Moreover, the distinct cultural importance of these events as catalysts of Austrian cultural identity is due to the success of the Austrian participants in those competitions and to the importance of skiing tourism in Austria.
- (9) The Vienna Philharmonic Orchestra's New Year's concert has a distinct cultural importance as a keystone of Austrian cultural identity in view of the extremely high quality of this cultural event and the fact that it commands a very considerable world-wide audience.

⁽¹⁾ OJ L 298, 17.10.1989, p. 23. Directive as amended by Directive 97/36/EC of the European Parliament and of the Council (OJ L 202, 30.7.1997, p. 60).

- (10) The Vienna Opera Ball has a special general resonance in Austria as a 'popular culture' event and as a symbol for the ball season with a specific importance in the Austrian cultural tradition. The important contribution of this event to the world-wide reputation of the Vienna State Opera House, as it usually involves world-famous opera singers, confirms its distinct cultural importance for Austria.
- (11) The listed events have traditionally been broadcast on free television and have commanded large television audiences.
- (12) The Austrian measures appear proportionate so as to justify a derogation from the fundamental EC Treaty freedom to provide services on the basis of an overriding reason of public interest, which is to ensure wide public access to broadcasts of events of major importance for society.
- (13) The Austrian measures are compatible with EC competition rules in that the definition of qualified broadcasters for the broadcasting of listed events is based on objective criteria that allow actual and potential competition for the acquisition of the rights to broadcast these events. In addition, the number of listed events is not disproportionate so as to distort competition on the downstream free television and pay television markets.
- (14) After communication by the Commission to the other Member States of the Austrian measures and consultation of the Committee established pursuant to Article 23a of Directive 89/552/EEC, the Director-General for Education and Culture informed Austria, by letter of 31 May 2001, that the European Commission did not intend to object to the measures notified.
- (15) The Austrian measures entered into force on 1 October 2001.
- (16) Those measures were published in the C Series of the *Official Journal of the European Communities* ⁽¹⁾ in accordance with Article 3a(2) of Directive 89/552/EEC.
- (17) It follows from the judgment of the Court of First Instance in Case T-33/01, *Infront WM v Commission*, that the declaration that measures taken pursuant to Article 3a(1) of Directive 89/552/EEC are compatible with Community law constitutes a decision within the meaning of Article 249 of the EC Treaty, which must therefore be adopted by the Commission. Accordingly, it is necessary to declare by this Decision that the measures notified by Austria are compatible with Community law. The measures, as finally taken by Austria and set out in the Annex to this Decision, should be published in the *Official Journal* in accordance with Article 3a(2) of Directive 89/552/EEC,

HAS DECIDED AS FOLLOWS:

Article 1

The measures pursuant to Article 3a(1) of Directive 89/552/EEC notified by Austria to the Commission on 12 March 2001, as published in the *Official Journal of the European Communities* C 16 of 19 January 2002, are compatible with Community law.

Article 2

The measures, as finally taken by Austria and set out in the Annex to this Decision, shall be published in the *Official Journal* in accordance with Article 3a(2) of Directive 89/552/EEC.

Done at Brussels, 25 June 2007.

For the Commission

Viviane REDING

Member of the Commission

⁽¹⁾ OJ C 16, 19.1.2002, p. 8.

ANNEX

Publication in accordance with Article 3a(2) of Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities

The measures taken by Austria to be published pursuant to Article 3a(2) of Directive 89/552/EEC are set out in the following extracts from the Bundesgesetzblatt (Federal Law Gazette — I No 85/2001 and II No 305/2001):

85. Federal Act on the exercise of exclusive television broadcasting rights (Exclusive Television Rights Act (Fernseh-Exklusivrechtsgesetz — FERG))

The Nationalrat has decreed the following:

Article I*Scope*

§ 1. (1) This Act shall, with the exception of § 5, apply only to television broadcasters covered by the Austrian Broadcasting Act (Österreichischer Rundfunkgesetz — ORF-Gesetz), published in the Federal Law Gazette (BGBl.) No 379/1984, or the Private Television Act (Privatfernsehgesetz), BGBl. I No 84/2001.

(2) § 3 shall not apply to television broadcasting rights acquired prior to the entry into force of this Act, unless the underlying agreements were extended after this Act took effect.

Events of substantial social interest

§ 2. An “event of substantial social interest” shall for the purposes of this Act mean only those events referred to in an Ordinance issued under § 4 hereof.

Obligations of television broadcasters

§ 3. (1) Where a television broadcaster has acquired exclusive broadcasting rights for an event referred to in an Ordinance issued under § 4 hereof, it shall allow the event to be seen on a television channel freely accessible in Austria by at least 70 % of licence-payers and viewers exempted from the licence fee, whereby the arrangements set out in the Ordinance (whole or partial live or deferred coverage) shall be complied with. For the purposes of this subparagraph, coverage shall be deemed “deferred” where no more than 24 hours elapse between the beginning of the event and the beginning of the broadcast.

(2) For the purposes of this Act, “free-access television channels” shall mean channels which viewers are able to receive without any additional or regular payments for the use of technical equipment for decoding. “Additional payments” within the meaning of this subparagraph shall not include the licence fee (§ 2 of the Licence Fees Act (Rundfunkgebührengesetz — RGG)), the programme charge (§ 20 RFG), a cable network connection fee and the standing charge payable to a cable operator.

(3) The obligation referred to in subparagraph (1) shall be deemed to have been met if evidence is provided that the television broadcaster did all that could be reasonably expected under normal market conditions in an attempt to enable the event as referred to in subparagraph (1) to be viewed on free-access television channels. A television broadcaster may, in order to reach an amicable agreement about what constitutes such conditions, refer the matter to the Federal Communication Senate (Bundeskommunikationssenat). The latter shall involve all parties in efforts to reach a settlement and shall draw up a written record of the negotiations and their outcome.

(4) Where no agreement is reached, the Federal Communication Senate shall, at the request of one of the television broadcasters involved, decide whether the broadcaster concerned has adequately fulfilled its obligations under subparagraphs (1) and (3). In the event that the broadcaster has not adequately fulfilled these obligations, the Federal Communication Senate shall take the place of the broadcaster in determining what is meant by ‘normal market conditions’ as referred to in subparagraph (3). In particular, the Federal Communication Senate shall lay down an appropriate market price for the granting of broadcasting rights.

(5) A television broadcaster which has not adequately fulfilled its obligations under subparagraph (1) may be sued for damages in a civil action. The claim to damages shall also include compensation for loss of earnings.

- (6) Action for damages shall only be permissible once a decision has been given as referred to in subparagraph (4). Without prejudice to subparagraph (7), the court and the parties to the proceedings referred to in subparagraph (4) shall be bound by a non-appealable ruling.
- (7) Where, in proceedings referred to in subparagraph (6), the court considers that the decision is unlawful, it shall discontinue the proceedings and file a complaint with the Higher Administrative Court (Verwaltungsgerichtshof - VwGH) under Article 131 subparagraph (2) of the Federal Constitution (B-VG) requesting a declaratory ruling confirming the unlawfulness of the decision. When a ruling has been issued by the VwGH, the court shall continue its proceedings and rule on the dispute in keeping with the legal view of the VwGH.

Ordinance on events of substantial social interest

- § 4. (1) The Federal Government shall determine, by means of an Ordinance, what events referred to in § 2 are of substantial social interest in Austria. The Ordinance shall include only events which meet at least two of the following criteria:
1. the event already commands widespread attention in Austria, particularly as a result of reports in the media;
 2. the event is an expression of Austria's cultural, artistic or social identity;
 3. the event is — particularly because of the involvement of top-level Austrian sportsmen/women — a sporting event of special national significance or commands widespread attention among viewers in Austria owing to its international importance;
 4. the event has previously been broadcast on free-access television.
- (2) The Ordinance shall stipulate whether an event shown on free-access television is to have live or deferred coverage, and whether the whole event or only parts of it are to be broadcast. An event shall be covered live and in full unless there are objective reasons (e.g. different time zones, various events/parts of the same event being organised simultaneously) why it is necessary and appropriate not to provide such coverage.
- (3) Before the Ordinance is issued or amended, a cross-section of television broadcasters, holders of rights, the business sector, consumers, employees and persons from the fields of culture and sport shall be consulted. The draft Ordinance shall be published in the official gazette supplement (Amtsblatt) to the Wiener Zeitung, and provision shall be made for any person to comment on it within a period of eight weeks. The draft shall then be submitted to the European Commission. The Ordinance may only be issued if, within a period of three months following submission to the European Commission, the latter has not raised any objections to its being issued.

[...]

Federal Communication Senate

- § 6. Responsibility for the supervision of the provisions of this Act on points of law shall lie with the Federal Communication Senate in so far as such provisions relate to television broadcasters (§ 11 of the KommAustria Act (KOG), BGBl. I No 32/2001).

Penalties and procedures

- § 7. (1) Any person who infringes obligations under:

1. § 3 subparagraph (1); or

[...]

shall be deemed to have committed an administrative offence and be subject to a fine of EUR 36 000 to EUR 58 000 from the Federal Communication Senate.

- (2) In the procedure provided for in subparagraph (1), the Federal Communication Senate shall conduct a public oral hearing.
- (3) The Federal Communication Senate shall apply the 1991 General Administrative Procedures Act (Allgemeine Verwaltungsverfahrensgesetz 1991) (BGBl. No 51) and, in cases provided for in subparagraph (1), the 1991 Administrative Penalties Act (Verwaltungsstrafgesetz 1991) (BGBl. No 52).
- (4) In the event of repeated and serious infringements of this Act by a television broadcaster (§ 2 subparagraph (1) of the Private Television Act, BGBl. I No 84/2001), the Federal Communication Senate shall initiate the procedure for withdrawing licences or prohibiting cable broadcasts as provided for in § 63 of the Private Television Act.

[...]

Enforcement

- § 9. (1) Enforcement of this Act shall be entrusted to the Federal Government with respect to § 4 subparagraphs (1), (2) and (3), final sentence, to the Minister for Justice with respect to § 3 subparagraphs (5)-(7), and to the Federal Chancellor with respect to all other provisions.
- (2) The requirements of the first and second sentences of § 4 subparagraph (3) may be disregarded when an Ordinance is issued for the first time after this Federal Act comes into force, if, as part of the preparation of the notification procedure pursuant to Article 3(a)(1) and (2) of Directive 89/552/EEC as amended by Directive 97/36/EC, the parties concerned have already been consulted and the content of the Ordinance to be issued has been made known in an appropriate manner as part of this consultation.

Note on transposition

- § 10. The provisions of §§ 1-4, §§ 6-9 and § 11 of this Act transpose Article 3(a)(1) of Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (OJ L 298, 17.10.1989, p. 23), as amended by Directive 97/36/EC (OJ L 202, 30.7.1997, p. 60).

[...]

Entry into force

- § 11. This Act shall enter into force on 1 August 2001.

KLESTIL
SCHÜSSEL'

'305. Ordinance on events of substantial social interest

The following Order is made pursuant to § 4 subparagraph (1) of the Federal Act on the exercise of exclusive television broadcasting rights (Exclusive Television Rights Act (Fernseh-Exklusivrechtgesetz - FERG)), BGBl. I No 85/2001:

§ 1. Events of substantial social interest are:

1. The Summer or Winter Olympic Games;
2. FIFA World Cup football matches (for men) if the Austrian national team is involved, as well as the opening match, the semi-finals and the final of the football World Cup (for men);
3. European Championship football matches (for men) if the Austrian national team is involved, as well as the opening match, the semi-finals and the final of the football European Championship (for men);

4. The final of the Austrian Football Cup;
5. FIS World Alpine skiing championships;
6. World Nordic skiing championships;
7. The Vienna Philharmonic Orchestra's New Year Concert;
8. The Vienna Opera Ball.

§ 2.

- (1) Television broadcasters who have obtained exclusive broadcasting rights for the events mentioned in § 1 must ensure that these events can be viewed live and in their entirety on free-access television.
- (2) A recorded or partial version of the events in § 1 subparagraphs (1), (5), (6) and (8) may be broadcast if:
 1. parts of one of the events under § 1 or more than one of the events mentioned in § 1 take place at the same time; or
 2. the event has, in the past, not been broadcast in its entirety because of its length.

§ 3. This Ordinance shall enter into force on 1 October 2001.

SCHÜSSEL — RIESS-PASSER — FERRERO-WALDNER — GEHRER — GRASSER — STRASSER —
BÖHMDORFER — MOLTERER — HAUPT — FORSTINGER — BARTENSTEIN.
