



Reports of Cases

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 15 October 2020¹

Case C-555/19

Fussl Modestraße Mayr GmbH
v
**SevenOne Media GmbH,
ProSiebenSat.1 TV Deutschland GmbH,
ProSiebenSat.1 Media SE**

(Request for a preliminary ruling from the Landgericht Stuttgart (Regional Court, Stuttgart, Germany))

(Reference for a preliminary ruling – Television broadcasting – Directive 2010/13/EU – Article 4(1) – National legislation that prohibits regional television advertising on programmes broadcast on national networks – Possibility for the Federal *Land* in which the advertising is broadcast to authorise the broadcast and to attach conditions to that authorisation – Equal treatment – Freedom to provide services – Article 11 of the Charter of Fundamental Rights of the European Union)

Introduction

1. Whilst the advent of the internet has not caused television to disappear, as some were predicting, it has certainly undermined its position, in particular from an economic and financial point of view. It is not just a question of the competition to television programmes from the material available on the internet, but also, if not primarily, the capacity of the internet to compete with ‘traditional’ media, in particular television broadcasters, on the advertising market, and the resulting loss of revenue for those broadcasters. Added to this is the general unfavourable economic climate and successive crises, in particular the financial crisis of 2008 and the current Covid-19 pandemic.

2. It is not therefore surprising that television broadcasters are looking for new sources of revenue, in particular by extending and increasing the flexibility of their advertising product, along the lines of internet advertising. It is in that context that the German television broadcaster ProSiebenSat.1 sought to offer advertisers the possibility of regional advertising (that is to say for one or more Federal *Länder*) on its national television network. However, that posed a threat to the economic interests of regional and local television networks for which advertising represents an important source of revenue. That attempt by ProSiebenSat.1 was therefore initially met with a

¹ Original language: French.

prohibition imposed by the Medienanstalt Berlin-Brandenburg (Media Authority for the Länder of Berlin and Brandenburg, Germany). That prohibition was, however, overturned by the judgment of the Bundesverwaltungsgericht (Federal Administrative Court, Germany) of 17 December 2014,² delivered on appeal against the judgment of the Verwaltungsgericht Berlin (Administrative Court, Berlin, Germany) of 26 September 2013.³ In its judgment, the Bundesverwaltungsgericht (Federal Administrative Court) held, inter alia, that in so far as advertising is not an integral part of the television programme, the licence for broadcasting on national networks does not preclude the broadcast of advertising on regional networks since that licence applies only to editorial content.⁴

3. Following that decision, the Federal *Länder*, competent in Germany in matters involving television broadcasting, adopted the Achtzehnter Rundfunkänderungsstaatsvertrag (Eighteenth Amending State Treaty on Broadcasting) of 21 December 2015, which introduced, in Paragraph 7(11) of the Staatsvertrag für Rundfunk und Telemedien (State Treaty on Radio and Television Broadcasting) of 31 August 1991 (the ‘RStV’), an explicit prohibition on regional advertising on national television networks.⁵

4. The Landgericht Stuttgart (Regional Court, Stuttgart, Germany), the referring court in the present case, is now seeking an assessment of the conformity of that prohibition with various provisions and principles of EU law.

Legal context

EU law

5. Under Article 1(1)(e) of 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)⁶:

‘For the purposes of this Directive, the following definitions shall apply:

...

(e) “television broadcasting” or “television broadcast” (i.e. a linear audiovisual media service) means an audiovisual media service provided by a media service provider for simultaneous viewing of programmes on the basis of a programme schedule;

...’

² 6 C 32.13.

³ 27 K 231.12.

⁴ Matzneller, P., ‘Le BVerwG autorise la régionalisation de la publicité par une chaîne nationale’, *IRIS: Legal Observations of the European Audiovisual Observatory*, 2015, No 3, p. 8; Trute, H.-H., ‘Zulässigkeit von Werbespots mit regional beschränktem Verbreitungsgebiet’, *Gewerblicher Rechtsschutz und Urheberrecht. Praxis im Immaterialgüterund Wettbewerbsrecht*, 2015, No 13, p. 284.

⁵ See, in that regard, in particular, Iacino, G., in: European Audiovisual Observatory, *IRIS Special*, ‘Regional and local television in Europe’, Strasbourg 2016, pp. 60 to 61.

⁶ OJ 2010 L 95, p. 1, and corrigendum OJ 2010 L 263, p. 15.

6. Article 4(1) of Directive 2010/13 provides:

‘Member States shall remain free to 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 Union law.’

German law

7. The RStV provides, in Paragraph 2(1) thereof:

‘Broadcasting is a linear information and communication service; it consists of the organisation and broadcasting of offers in the form of moving images or sounds intended for the community and to be received simultaneously, on the basis of a programme schedule and through the use of electromagnetic waves.’

8. Paragraph 7(11) of the RStV provides:

‘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 in so far 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 in only part of the national territory requires separate authorisation under state law; this can be made dependent upon content-related requirements to be determined by law.’

9. So far, not a single Federal *Land* has made use of the possibility, provided in Paragraph 7(11) of the RStV, of regionalised advertising authorisations under state law on programmes broadcast on national networks.

Facts, procedure and the questions referred

10. Fussl Modestraße Mayr GmbH, a company incorporated under Austrian law, operates numerous fashion outlets located in Austria and in the Federal Land of Bavaria (Germany).

11. SevenOne Media GmbH, a company incorporated under German law, is the marketing company of the ProSiebenSat.1 group, a private television broadcaster established in Germany.

12. On 25 May 2018, Fussl Modestraße Mayr entered into a contract with SevenOne Media relating to the broadcasting of television advertising on the national television network ProSieben, solely in the territory of Bavaria, using the cable systems of Vodafone Kabel Deutschland GmbH in Bavaria. SevenOne Media refused to perform the contract on the ground that the broadcasting on regional networks of television advertising on programmes transmitted throughout Germany is prohibited by Paragraph 7(11) of the RStV. Fussl Modestraße Mayr then applied to the referring court requesting that it order SevenOne Media to carry out its obligations arising under that contract.

13. The referring court notes that it is common ground between the parties that, from a technical point of view, SevenOne Media is able to broadcast, within the framework of its nationally broadcast television programmes, the television advertising in question in such a way that it may be viewed only in Bavaria. The only obstacle to the broadcasting of the television advertising in question is therefore legal.

14. It is in those circumstances that the Landgericht Stuttgart (Regional Court, Stuttgart) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Are

(a) Article 4(1) of Directive [2010/13],

(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[, signed in Rome on 4 November 1950; (‘the ECHR’)] and the case-law of the European Court of Human Rights, is Article 11 of the Charter of Fundamental Rights of the European Union [(‘the Charter’)], 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?’

15. Written observations were submitted by Fussl Modestraße Mayr, the German Government and the European Commission.⁷ The same parties, and SevenOne Media, were represented at the hearing on 2 July 2020.

Analysis

16. The first three questions asked by the referring court, that I propose to examine together, concern the assessment of the prohibition on regional advertising on national television networks, laid down in Paragraph 7(11) of the RStV, in the light of several provisions and principles of EU law. That assessment will require carrying out a proportionality test taking into account, inter alia, the possibility for Federal *Länder* to authorise the broadcast of such

⁷ The written observations of SevenOne Media were submitted out of time and were not therefore added to the file.

advertising and the fact that not a single Federal *Land* has made use of that possibility. The fourth question, as I understand it, concerns an assessment in principle of that prohibition in the light of fundamental rights, in particular the freedom of expression.

The first to third questions referred

17. By its first three questions referred for a preliminary ruling, the referring court asks whether Article 4(1) of Directive 2010/13, the principle of equal treatment and Article 56 TFEU must be interpreted as meaning that they preclude a prohibition on regional advertising on national television networks, as laid down in Paragraph 7(11) of the RStV. ‘Regional advertising’ should be understood as meaning the broadcast on a national television network of advertising segments or spots specific to one or more regions, different to the advertising broadcast at the same time in the rest of the national territory. In addition, the question raised thus relates to the importance of the possibility of lifting that prohibition in one or more regions.

18. I will approach the analysis of the prohibition in question in the light of the various rules of EU law in the order in which there are set out in the questions referred. I will also analyse the argument put forward by the German Government based on Article 1(1)(e) of Directive 2010/13.

The relevance (or not) of Directive 2010/13

19. The referring court refers, in the first place, to Article 4(1) of Directive 2010/13. The German Government puts forward, at the same time, an argument based on Article 1(1)(e) of that directive to defend the national measure at issue.

– Article 4(1) of Directive 2010/13

20. Directive 2010/13 establishes the freedom of movement of audiovisual media services, that is to say television programmes and on-demand audiovisual media services, prohibiting, in principle, Member States from restricting the reception and retransmissions on their territory of such services from other Member States (Article 3(1)). That freedom is accompanied by a harmonisation of the rules governing those services. That harmonisation covers, in particular, areas such as the protection of consumers or certain categories of consumers, the promotion of European works or even access by broadcasters to events of major importance for the public. So far as concerns a minimum harmonisation, Article 4(1) of Directive 2010/13 includes the possibility for Member States to require media service providers under their jurisdiction to comply with stricter rules in the fields covered by the harmonisation measures coordinated by that directive.

21. I do not see how that provision could preclude a prohibition on regional advertising such as that at issue in the main proceedings.

22. First, I do not think that the prohibition in question falls within the scope of Directive 2010/13. Whilst that directive contains rules relating to television advertising, they nevertheless concern the content of such advertising, the time allocated to it and the clear distinction between the advertising and the editorial content. The main objective of those rules is the protection of viewers. By contrast, the measure at issue in the main proceedings concerns the division of the

advertising market between national and regional broadcasters and is intended to safeguard the position of regional broadcasters on that market. That objective does not fall within the field harmonised by Directive 2010/13.

23. Second, even assuming that the national measure at issue falls within the scope of Directive 2010/13, Article 4(1) of that directive merely provides for the possibility for Member States to adopt stricter rules than those established by that directive, without defining the content of those rules. Therefore, it would be difficult for that article to preclude such rules, once adopted by a Member State.

24. So far as concerns the reservation whereby those stricter rules must be in line with other provisions of EU law, it is a classic limitation intended to ensure that the possibility given to Member States to derogate from the provisions of an act of EU law cannot be interpreted as a general right for Member States to derogate from that law. However, the compliance of the rules adopted by a Member State with other provisions of EU law must be assessed not in the light of Article 4(1) of Directive 2010/13, but having regard to those other provisions.

25. For those reasons, I share the Commission's view that a provision such as Paragraph 7(11) of the RStV does not fall within the scope of Directive 2010/13 or, therefore, Article 4(1) thereof.

– *Article 1(1)(e) of Directive 2010/13*

26. The German Government submits in its written observations that the use, in the definition of 'television broadcasting' set out in Article 1(1)(e) of Directive 2010/13, of the words 'simultaneous viewing of programmes', reproduced in Paragraph 2(1) of the RStV, requires that the same content is simultaneously broadcast across the entire territory covered by the broadcast of a television network and thus precludes regional advertising on national networks.

27. It is my opinion that this point of view is incorrect.

28. Even assuming, contrary to the exact wording of the provision in question, that the words 'simultaneous viewing' apply not only to programmes (that is to say to editorial content), but also to advertising, those words in no way require the same content to be broadcast across the entire territory covered by the broadcast.

29. Directive 2010/13 is based on the distinction between so-called 'linear' services and on-demand services. Linear services are defined in Article 1(1)(e) of that directive. The essential characteristic of those services is that it is the broadcaster that decides what content is broadcast at any given time, regardless of any request, with the viewer's choice being limited to whether or not to receive the broadcast. Those services are therefore linear in time. The result is that all the viewers for whom the content is intended watch it simultaneously. However, there is no requirement that the same content should be intended for all viewers in the same broadcast coverage area of a television network. The fact that the broadcaster may vary the content on a territorial basis or by mode of transmission (terrestrial, cable, satellite, etc.), in no way detracts from the linear nature of its service.

30. Of course, the conditions for authorising the broadcast or even, as in the present case, national legislation may prohibit such differentiation but that is in no way required by Article 1(1)(e) of Directive 2010/13, or indeed by any other provision of that directive.

31. Article 1(1)(e) of Directive 2010/13 does not therefore require a prohibition on regional advertising such as that laid down in Paragraph 7(11) of the RStV.

The principle of equal treatment

32. The referring court refers, in the second place, in its questions referred for a preliminary ruling, to the principle of equal treatment as a benchmark for assessing the compliance with EU law of the prohibition on regional advertising on national television networks set out in Paragraph 7(11) of the RStV. Its concerns relate, on the one hand, to the unfavourable position of national linear audiovisual media service providers (namely television broadcasters), compared to that of non-linear audiovisual media service providers, in particular operating on the internet, with regard to the possibility of offering targeted advertising services. On the other, the referring court refers to the difference in treatment between prospective advertisers, that is to say purchasers of television advertising services on regional networks, such as the applicant in the main proceedings, and larger operators for which advertising on national networks is appropriate.

33. In that regard, it should be borne in mind that, according to the Court's settled case-law, the principle of equal treatment requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified.⁸

34. It does not seem to me that the situations of the operators discussed by the referring court are comparable.

35. First, so far as concerns national television network operators, I take the view, like the Commission, that their situation is not comparable, in terms of the principle of equal treatment, to that of non-linear audiovisual media service providers operating on the internet. Patterns of consumption of those services, the way advertising works on television and on the internet and, lastly, the regulatory framework at national and EU level,⁹ differ to such an extent that a comparison of their situations in the light of rules on regional advertising seems meaningless. That is due, in particular, to the fact that, on account of its interactive nature and the collection of a lot of information on users, internet advertising is not limited by the criterion of territory and can target users individually, depending on their supposed interests, which is not possible in the case of television. The possibility of offering regional television advertising would not eliminate such differences.

36. Second, with regard to the situation of prospective advertisers on regional networks compared to that of advertisers on national networks, I take the view, contrary this time to the position adopted by the Commission, that the different impact of the rules in question on those two categories of economic operators (purchasers of advertising services) may not be considered to amount to unequal treatment.

37. It is true that the prohibition on regional advertising on national television networks is likely to affect prospective advertisers on regional networks that could benefit from such advertising more than advertisers on national networks for which regional advertising serves little purpose.

⁸ See, in particular, with regard to television advertising, judgment of 18 July 2013, *Sky Italia* (C-234/12, EU:C:2013:496, paragraph 15).

⁹ Directive 2010/13 and Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') (OJ 2000 L 178, p. 1).

However, that prohibition is not intended to regulate the advertising opportunities of different categories of prospective advertisers but, by targeting broadcasters, to reserve the regional advertising market for regional and local television broadcasters. The impact of that prohibition on the different categories of prospective purchasers of advertising services does not result directly from that regulation, but from the situation in which the different operators find themselves due, in particular, to their economic size. The rules, by contrast, are the same for everyone. The principle of equal treatment cannot, in my opinion, be interpreted as requiring legal rules to accommodate the specific needs of each individual.

38. In summary, I therefore take the view that the principle of equal treatment does not preclude a prohibition on regional advertising on national television networks, such as that set out in Paragraph 7(11) of the RStV.

Article 56 TFEU

39. In the third place, the referring court asks whether Article 56 TFEU must be interpreted as meaning that it precludes a prohibition on regional advertising on national television networks, such as that set out in Paragraph 7(11) of the RStV.

40. That article prohibits any restriction on the freedom to provide services in cross-border situations, unless that restriction is justified by an overriding reason relating to the public interest.

– The existence of a restriction

41. It is settled case-law that the transmission of television signals, including the transmission of advertising, constitutes a supply of services covered by Article 56 TFEU.¹⁰ The freedom established in that article also covers the possibility for prospective advertisers to use services for broadcasting television advertisements.¹¹

42. Any measures which prohibit, impede or render less attractive the exercise of such freedoms must be considered to be restrictions on the freedom to provide services.¹² That is all the more true when prospective advertisers come from other Member States, in so far as restrictions on the possibility of using advertising services make it particularly difficult for them to access the market of the Member State which established those restrictions. Such restrictions may exist, in particular, when broadcasting of advertisements for the activities of the prospective advertiser is permitted only on local television networks, whilst it is prohibited on national television networks.¹³

43. A similar situation can be identified in the present case. The applicant in the main proceedings, a company incorporated under Austrian law, operates numerous fashion outlets located in Austria. It intends to expand its activity by establishing itself in Germany as well, but only in one region of Germany, namely Bavaria.

¹⁰ See, already, judgment of 30 April 1974, *Sacchi* (155/73, EU:C:1974:40, paragraph 6). For a recent application, see judgment of 11 December 2019, *TV Play Baltic* (C-87/19, EU:C:2019:1063, paragraph 34 and the case-law cited).

¹¹ See, to that effect, judgment of 17 July 2008, *Corporación Dermoestética* (C-500/06, EU:C:2008:421, paragraph 33 at the end).

¹² Judgment of 17 July 2008, *Corporación Dermoestética* (C-500/06, EU:C:2008:421, paragraph 32).

¹³ See, to that effect, judgment of 17 July 2008, *Corporación Dermoestética* (C-500/06, EU:C:2008:421, paragraph 33).

44. To that end, the applicant in the main proceedings intends to use television advertising services. However, pursuant to the prohibition set out in Paragraph 7(11) of the RStV, it cannot broadcast on a national television network advertising limited to the territory of Bavaria, as it had intended to do by entering into a contract to that effect with the defendant in the main proceedings. The only options available to it are either to purchase advertising space on a national television network, or to use regional and local television services. However, the applicant explains that neither of those options meets its needs.

45. Advertising on national networks would be too expensive and, to a large extent, unnecessary because it would cover primarily the territory in which the applicant does not wish to pursue activities. Such advertising would not therefore be profitable.¹⁴

46. As for advertising on regional and local television networks, it would not achieve the objectives pursued by the applicant. First, regional and local television networks attract only a minimal share of viewers (approximately 5% of the television audience according to the applicant). Second, the audience of regional and local television networks is not the public targeted by the applicant. The applicant's interest is in broadcasting the advertising either before or after television programmes likely to be of interest to its potential customers, that is to say fashion consumers. However, such programmes are broadcast on national television networks, whereas regional and local television networks focus on local news topics and attract a different audience.

47. The impossibility of using advertising broadcast on a national television network limited to the territory of Bavaria, resulting from the prohibition set out in Paragraph 7(11) of the RStV, even though such advertising is technically possible and the defendant in the main proceedings is prepared to provide such a service, makes it more difficult for the applicant to access the German market. This is due, in particular, to the fact that it would be competing with fashion retail chains operating at national level for which advertising on national television networks covering the whole territory is perfectly suited.

48. Accordingly, it seems indisputable to me that the prohibition on regional advertising on national television networks, set out in Paragraph 7(11) of the RStV, constitutes a restriction on the freedom to provide services guaranteed under Article 56 TFEU. The fact that the RStV gives Federal *Länder* the possibility to authorise regionalised advertising on their territories has no bearing on that assessment because, on the one hand, it still requires authorisation from each Federal *Land* and, on the other, so far, not a single Federal *Land* has authorised such advertising, with it therefore remaining a mere theoretical possibility.

49. It is now necessary to examine whether that restriction may be justified by an overriding reason relating to the public interest.

¹⁴ The applicant in the main proceedings also argues that advertising on national networks could even be detrimental to it, in so far as it would create a demand that the applicant would not be able to meet. That argument seems to me to be purely hypothetical, however, since there is no guarantee that the applicant's offer associated with the television advertising would be so successful.

– *Justification for the restriction*

50. According to settled case-law, a restriction on the freedom to provide services guaranteed by Article 56 TFEU may be justified where it serves overriding requirements in the public interest, is suitable for securing the attainment of the objective which it pursues and does not go beyond what is necessary in order to attain it.¹⁵ It is for the Member State concerned to justify the measure it intends to adopt or maintain in force.

51. The German Government cites maintenance of the diversity of opinion at regional level, for which the existence of regional and local television networks is key, as justification. The German Government takes the view that reserving, by means of Paragraph 7(11) of the RStV, the regional advertising market for regional and local television broadcasters is necessary to ensure their economic survival.

52. The Court has already had the occasion to find that cultural policy reasons related to the maintenance of media pluralism may justify restrictions on the freedom to provide services. Such measures help to guarantee freedom of expression, as protected by Article 11 of the Charter.¹⁶

53. It seems that the same reasoning can be applied in the present case. Regional and local television broadcasters naturally tackle matters of local interest which are not, or very infrequently, addressed on national television networks. Such broadcasters thus contribute to public debate and therefore to the diversity of opinion on these matters. The importance of regional and local media in maintaining the diversity of opinion and participatory democracy has also been highlighted by various bodies of the Council of Europe.¹⁷ I take the view that a measure intended to ensure the operation of regional and local television broadcasters, by reserving the regional advertising market for them and by guaranteeing them a source of income, seems to be justified by an overriding cultural policy reason relating to the public interest.

54. However, that measure, to comply with Article 56 TFEU, must be suitable for securing the attainment of the objective which it pursues and proportional, to the extent that it does not go beyond what is necessary in order to attain it.

55. It is precisely with regard to those two points that the referring court and the parties to the main proceedings have doubts.

– *Suitability of the national measure at issue*

56. First, the referring court raises doubts as to the consistent and systematic nature of the measure in question, within the meaning of the Court's case-law,¹⁸ on account of the fact that advertising targeted to certain categories of users is permitted on the internet, in particular in connection with non-linear audiovisual media services provided on that network. The parties to the main proceedings and the Commission put forward similar arguments.

¹⁵ See, most recently, judgment of 11 December 2019, *TV Play Baltic* (C-87/19, EU:C:2019:1063, paragraph 37).

¹⁶ See, with regard to the free movement of goods, judgment of 26 June 1997, *Familiapress* (C-368/95, EU:C:1997:325, paragraph 18). See also, in particular, judgments of 13 December 2007, *United Pan-Europe Communications Belgium and Others* (C-250/06, EU:C:2007:783, paragraphs 40 to 42), and of 11 December 2019, *TV Play Baltic* (C-87/19, EU:C:2019:1063, paragraphs 38 to 40).

¹⁷ See McGonagle, T., and van Eijk, N., in: European Audiovisual Observatory, *IRIS Special*, 'Regional and local television in Europe', Strasbourg 2016, pp. 12 to 20 and the documents cited.

¹⁸ The referring court cites, in that regard, judgment of 12 July 2012, *HIT and HIT LARIX* (C-176/11, EU:C:2012:454, paragraph 22). See, also, judgment of 17 July 2008, *Corporación Dermoestética* (C-500/06, EU:C:2008:421, paragraph 39).

57. I am not persuaded by those arguments. As I have already stated with regard to the principle of equal treatment, internet advertising works completely differently to television advertising. On the one hand, internet advertising is technically independent of the content with which it is associated. Whilst the user is given the impression that the advertisements form an integral part of the content, they actually come from a different source. On the other, internet service providers, thanks to the information they collect on their users, are able to target the advertisements to each individual user in accordance with the particular interests attributed to them on the basis of the information collected. The geographical location of the user is only one of the elements taken into account. Consequently, by watching the same content on the internet, each user is likely to be shown their own selection of advertisements, different to those shown to other users. That mechanism is much more sophisticated than the geographic distribution of television advertising covered by the national measure at issue.

58. That the services provided on the internet constitute competition for regional and local television broadcasters on the advertising market and a threat to their revenue from that market is undoubtedly true, but this falls outside the legislative competence of the Federal *Länder*, not least because Directive 2000/31 severely limits the capacity of Member States to regulate those services.¹⁹ Moreover, the challenges of regulating the internet are quite different from those of regulating television. A Member State cannot be criticised, as the Commission did, for not having regulated an area outside its regulatory power.

59. For that reason, I see no similarity between the present case and the case which gave rise to the *Corporación Dermoestética* judgment.²⁰ That case concerned a prohibition on advertising medical and surgical treatments. However, that prohibition applied only to national television networks, excluding regional television networks on which such advertising was allowed. The Court considered such rules to be inconsistent and, as a result, contrary to Article 56 TFEU.²¹ By contrast, the objective of the national measure at issue in the present case is not to prohibit or restrict advertising targeted to a category of viewers, but to reserve a specific market – the regional television advertising market – as it exists, for regional and local television broadcasters. The existence of targeted advertising on other communication channels, in particular the internet, does not therefore call into question the consistency of that measure.

60. In addition, it does not seem to me that ‘media convergence’, in particular the convergence of television and internet, relied on by the defendant in the main proceedings, can call that finding into question. That convergence is merely a process which, as long as those two types of media are subject to different regulations,²² is far from being completed. Therefore, I do not share the view of the Commission with regard to the alleged ‘anachronistic’ nature of the national measure at issue. In any event, that measure is no more anachronistic than EU legislation concerning different types of media.

61. Second, the applicant in the main proceedings, supported on that point, as moreover on the others, by the defendant in the main proceedings, disputes the premiss on which the national measure at issue is based, that is to say that the opening of the regional advertising market to national television networks seriously undermines the funding of regional and local television broadcasters. That argument is based, in particular, on a study carried out at the request of the

¹⁹ So far as concerns audiovisual media services provided on the internet, Directive 2010/13 provides for a limited number of advertising restrictions. Those restrictions do not concern, however, the geographic scope of that advertising.

²⁰ Judgment of 17 July 2008, (C-500/06, EU:C:2008:421).

²¹ Judgment of 17 July 2008, *Corporación Dermoestética* (C-500/06, EU:C:2008:421, paragraphs 39 and 40).

²² At EU law level, Directive 2010/13, with specific provisions concerning television, and Directive 2000/31.

defendant in the main proceedings.²³ According to that study, the advertisers which are likely to use regional advertising on national television networks, like the applicant in the main proceedings, are not the same as those which use the advertising services of regional and local networks. Accordingly, the opening of that market to national networks would not result in a significant loss of revenue for regional and local networks. By contrast, it is internet advertising which is, according to that study, detrimental to the revenue streams of those networks.

62. However, whilst I do not wish to get into the argument on assessments of fact, it is difficult to predict with certainty the future behaviour of market players in a changed legal environment, in particular because they are likely to adapt their behaviour to such changes. Moreover, once the principle of regional advertising is accepted, there is nothing to prevent national television networks from also offering advertising services at sub-regional and local level, that is to say at the level currently occupied, according to the aforementioned study, by regional and local television broadcasters.

63. Thus, the idea that the entry on the regional advertising market of market players as powerful as national television networks risks seriously encroaching on the market share currently held by regional and local television broadcasters does not appear to me to be manifestly unfounded. I therefore consider that the German legislature, in the context of its margin of discretion, was entitled to base itself on that premiss by introducing the prohibition on regional advertising on national television networks. With regard to a measure intended to protect the freedom of expression guaranteed by Article 11 of the Charter, the national legislature has a wide margin of discretion.²⁴

64. To conclude this section, I take the view that the German legislature, in the context of its margin of discretion, was entitled to consider that the market entry of national television networks on the regional advertising market risked undermining the funding of regional and local television broadcasters, thus threatening the diversity of opinion at regional level to which those broadcasters contribute. The national measure at issue is, to my mind, therefore, appropriate for achieving the aim of preserving that diversity. In addition, the existence of advertising targeted to individual internet users does not call into question the consistency of that measure.

– *The proportionality of the national measure at issue*

65. For a restriction on the freedom to provide services to be justified by an overriding reason relating to the public interest, it must be suitable for securing the attainment of the objective which it pursues and it must also be proportionate, that is to say it does not go beyond what is necessary in order to attain that objective. The question therefore arises whether other measures could achieve the same objective, whilst at the same time placing fewer restrictions on the freedom to provide services.

66. Both the parties to the main proceedings and the Commission dispute the proportionality of the national measure at issue, claiming that it is seriously detrimental to the applicant's promotional opportunities, whilst providing only a very limited benefit to regional and local television broadcasters.

²³ Dewenter, R., 'Führt das Verbot regionaler Fernsehwerbung auf bundesweiten Programmen zu einer Förderung von lokalen/regionalen Programmen?' (https://www.hsu-hh.de/ioek/wp-content/uploads/sites/520/2020/01/Gutachten_P7S1_Dewenter_final.pdf).

²⁴ Judgment of 13 December 2007, *United Pan-Europe Communications Belgium and Others* (C-250/06, EU:C:2007:783, paragraph 44).

67. That argument is, however, based on the finding, by those parties, that the measure is not appropriate for achieving the objective which it pursues. However, as I have explained, the inappropriate nature of that measure in comparison to the objective which it pursues has not been established. Accordingly, if it is accepted that the measure at issue is suitable for securing the attainment of its objective, balancing the interests at stake – those of undertakings wishing to promote themselves by means of regional advertising on national television networks and those of regional and local television broadcasters – must be viewed in a different light. In my opinion, the German legislature could legitimately consider that the public interest in the existence of those broadcasters and their contribution to public debate at regional and local level outweighs the private interest of undertakings to promote themselves through a given channel of communication.

68. The question thus remains whether there are other less restrictive measures which could achieve that objective of protecting media pluralism at regional and local level.

69. The applicant in the main proceedings invokes, in that regard, the solution currently adopted in Austria, its Member State of origin. That solution consists in ensuring the funding of public television networks through a licence fee, with a ban on advertising, and giving freedom as regards advertising (including regional advertising) to private networks.

70. However, in accordance with settled case-law, the fact that one Member State imposes less strict rules than another Member State does not mean that the latter's rules are disproportionate and hence incompatible with EU law.²⁵ Consequently, the existence of less strict rules in Austria cannot be considered proof that the German measure at issue is disproportionate.

71. Furthermore, whilst the funding of the media using public funds may be a solution to certain problems, it may also raise questions with regard to the actual independence of the media. From that point of view, having one's own resources, for example in the form of advertising revenue, is an additional gauge of the independence of the media and, therefore, the diversity of opinion.

72. By contrast, the very existence of the clause provided for in Paragraph 7(11) of the RStV, which allows Federal *Länder* to authorise – possibly subject to conditions – regional advertising on national television networks on their respective territories, suggests that the relaxation of the prohibition under Paragraph 7 of the RStV could be possible without undermining the objective which it pursues. The fact that that possibility has never been applied in the past does not change the fact that the German legislature, by introducing that clause, recognised the compatibility of such authorisation with the objectives pursued by the measure at issue.

73. Other measures which are less restrictive than a total prohibition on regional advertising on national television networks could be envisaged such as a revenue-sharing mechanism whereby regional and local television broadcasters share the revenue of national television broadcasters generated by regionalised advertising. Such a mechanism would make it possible to balance the interests of prospective advertisers, such as the applicant in the main proceedings, with those of regional and local television broadcasters.

²⁵ See, in particular, judgments of 10 May 1995, *Alpine Investments* (C-384/93, EU:C:1995:126, paragraph 51); of 13 July 2004, *Commission v France* (C-262/02, EU:C:2004:431, paragraph 37); as well as, lastly, of 18 September 2019, *VIPA* (C-222/18, EU:C:2019:751, paragraph 71).

74. It is ultimately for the referring court to assess, in the light of the specific legal and factual circumstances in Germany, the proportionality of the measure at issue and, in particular, the possible existence of less restrictive measures. For that assessment to be realistic, the referring court must only take account of those measures likely to be applied by the national legislature. It would be pointless to criticise the existing measure in the name of measures which are less restrictive but purely hypothetical.

Proposed answer

75. In the light of the foregoing, I propose that the answer to the first three questions referred for a preliminary ruling is that Article 4(1) of Directive 2010/13 and the principle of equal treatment must be interpreted as meaning that they do not preclude a prohibition on regional advertising on national television networks, such as that set out in Paragraph 7(11) of the RStV. Article 56 TFEU must be interpreted as meaning that it does not preclude such a prohibition, provided that there are no less restrictive measures that the national legislature is actually able to introduce, in order to attain the objective of protecting the diversity of opinion at regional and local level, which it is for the referring court to determine.

The fourth question referred

76. By its fourth question referred, the referring court asks whether Article 11 of the Charter must be interpreted as meaning that it precludes a prohibition on regional advertising on national television networks, such as that set out in Paragraph 7(11) RStV.

77. The referring court does not explain the basis for its doubts relating to the conformity of the national measure at issue with Article 11 of the Charter. The same is true for the applicant in the main proceedings and the Commission, in so far as they merely assert that that measure infringes the provision of the Charter in question. It is, however, necessary to analyse that question in order to give the referring court an answer to it.

78. As the Commission rightly observes, the Charter is applicable in the present case. It is applicable, *inter alia*, in situations where the national legislation constitutes a restriction of one of the fundamental freedoms of the internal market and the Member State concerned relies on overriding reasons in the public interest to justify that restriction.²⁶

79. Pursuant to Article 52(3) of the Charter, in so far as it contains rights which correspond to rights guaranteed by the ECHR, the meaning and scope of those rights are the same as those laid down by that convention. The freedom of expression is guaranteed by Article 10 ECHR. The meaning and scope of the rights guaranteed by that convention are set out in the case-law of the European Court of Human Rights.

²⁶ See, most recently, judgment of 21 May 2019, *Commission v Hungary (Usufruct over agricultural land)* (C-235/17, EU:C:2019:432, paragraphs 63 to 65).

80. According to that case-law, as pointed out by the Commission, the freedom of expression is applicable to advertising and commercial speech.²⁷ It follows that the national measure at issue in the present case, which limits the advertising opportunities of the applicant in the main proceedings, must be analysed as a restriction of the freedom of expression guaranteed by Article 10 ECHR and Article 11 of the Charter.

81. However, in accordance with Article 52(1) of the Charter, any limitation on the exercise of the rights and freedoms recognised by the Charter must be provided for by law, respect the essence of those rights and freedoms and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others. A similar reservation is set out, with regard to the freedom of expression, in Article 10(2) ECHR.

82. The national measure at issue in the present case pursues the objective of protecting media pluralism, a value expressly recognised in Article 11(2) of the Charter. According to the settled case-law of the European Court of Human Rights relating to the application of Article 10(2) ECHR, ‘the breadth of the margin of appreciation available to the Contracting States in that regard varies depending on a number of factors, among which the type of speech or information at issue is of particular importance. Whilst there is little scope under [Article 10(2) ECHR] for restrictions on political speech, for example, Contracting States have a broad margin of appreciation when regulating freedom of expression in commercial matters’.²⁸ That principle has already been recognised by the Court with regard to the applicability of fundamental rights in Union law.²⁹ In addition, according to the European Court of Human Rights, ‘where the aim pursued is the “protection of the rights and freedoms of others” and where these “rights and freedoms” are themselves among those guaranteed by the [ECHR] or its Protocols, it must be accepted that the need to protect them may lead States to restrict other rights or freedoms likewise set forth in the [ECHR]. The balancing of individual interests that may well be contradictory is a difficult matter, and Contracting States must have a broad margin of appreciation in this respect’.³⁰

83. I take the view that, by adopting the national measure at issue, the German legislature did not exceed the limits of its discretion in balancing, on the one hand, the freedom of expression in commercial matters and, on the other, the interest of protecting the diversity of opinion and pluralism of the media.

84. In that regard, it is particularly important to observe that the measure at issue does not contain any prohibition on advertising in respect of the goods or trade mark of the applicant in the main proceedings. It merely restricts the possibility for the applicant to promote itself through a single channel of communication, that is to say by means of regional advertising on national television networks. Even though it is the most profitable means of advertising according to the applicant, the fact remains that there are other promotional channels available to it, in particular internet advertising which is regarded by the applicant as being nearly equivalent to television advertising. Accordingly, so far as concerns the applicant’s freedom of expression, it must be found that the national measure at issue has no bearing on the essence of its rights.³¹ At most, it affects its business opportunities.

²⁷ See ECtHR, 16 July 2013, *Remuszko v. Poland* (CE:ECHR:2013:0716JUD000156210, § 59).

²⁸ ECtHR, 10 January 2013, *Ashby Donald and Others v. France* (CE:ECHR:2013:0110JUD003676908, § 39).

²⁹ See judgment of 23 October 2003, *RTL Television* (C-245/01, EU:C:2003:580, paragraph 73).

³⁰ ECtHR, 10 January 2013, *Ashby Donald and Others v. France* (CE:ECHR:2013:0110JUD003676908, § 40).

³¹ See, by analogy, judgment of 4 May 2016, *Philip Morris Brands and Others* (C-547/14, EU:C:2016:325, paragraph 151).

85. I therefore propose that the answer to the fourth question referred for a preliminary ruling is that Article 11 of the Charter must be interpreted as meaning that it does not preclude a prohibition on regional advertising on national television networks, such as that set out in Paragraph 7(11) of the RStV.

Conclusion

86. In the light of the foregoing, I propose that the answer to the questions referred for a preliminary ruling by the Landgericht Stuttgart (Regional Court, Stuttgart, Germany), is as follows:

Article 4(1) of 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'), the principle of equal treatment, and Article 11 of the Charter of Fundamental Rights of the European Union must be interpreted as meaning that they do not preclude a prohibition on regional advertising on national television networks, such as that set out in Paragraph 7(11) of the Staatsvertrag für Rundfunk und Telemedien (State Treaty on Radio and Television Broadcasting) of 31 August 1991, amended by the Achtzehnter Rundfunkänderungsstaatsvertrag (Eighteenth Amending State Treaty on Broadcasting) of 21 December 2015.

Article 56 TFEU must be interpreted as meaning that it does not preclude such a prohibition, provided that there are no less restrictive measures that the national legislature is actually able to introduce, in order to attain the objective of protecting the diversity of opinion at regional and local level, which it is for the referring court to determine.