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Provisional text

JUDGMENT OF THE COURT (Third Chamber)

3 February 2021 (*)

(Reference for a preliminary ruling – Directive 2010/13/EU – Provision of audiovisual media services – Article 4(1) – Freedom to provide services – Equal treatment – Article 56 TFEU – Articles 11 and 20 of the Charter of Fundamental Rights of the European Union – Audiovisual commercial communication – National legislation prohibiting television broadcasters from inserting in their programmes broadcast throughout the national territory television advertisements whose broadcasting is limited to a regional level)

In Case C-555/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Landgericht Stuttgart (Regional Court, Stuttgart, Germany), made by decision of 12 July 2019, received at the Court on 19 July 2019, in the proceedings

Fussl Modestraße Mayr GmbH

v

SevenOne Media GmbH,

ProSiebenSat.1 TV Deutschland GmbH,

ProSiebenSat.1 Media SE,

THE COURT (Third Chamber),

composed of A. Prechal (Rapporteur), President of the Chamber, K. Lenaerts, President of the Court, acting as a Judge of the Third Chamber, N. Wahl, F. Biltgen, and L.S. Rossi, Judges,

Advocate General: M. Szpunar,

Registrar: M. Krausenböck, Administrator,

having regard to the written procedure and further to the hearing on 2 July 2020,

after considering the observations submitted on behalf of:

- Fussl Modestraße Mayr GmbH, by M. Koenig and K. Wilmes, Rechtsanwälte,
- ProSiebenSat.1 Media SE, ProSiebenSat.1 TV Deutschland GmbH and SevenOne Media GmbH, by C. Masch, W. Freiherr Raitz von Frenzt and I. Kätzlmeier, Rechtsanwälte,
- the German Government, by J. Möller and D. Klebs, acting as Agents,
- the European Commission, by M. Kellerbauer, L. Malferrari and G. Braun, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 15 October 2020,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 56 TFEU, Article 11 of the Charter of Fundamental Rights of the European Union (‘the Charter’), the general principle of equal treatment and 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) (OJ 2010 L 95, p. 1).

2 The request has been made in proceedings between Fussl Modestraße Mayr GmbH, a company incorporated under Austrian law (‘Fussl’), and SevenOne Media GmbH, ProSiebenSat.1 TV Deutschland GmbH and ProSiebenSat.1 Media SE, companies under German law, regarding the refusal of SevenOne Media to perform a contract concluded with Fussl for the broadcasting of television advertising for fashion products sold by Fussl within the territory of Freistaat Bayern (Land of Bavaria, Germany) on the ground that such advertising, if it is intended to be included in television programmes broadcast throughout Germany, is contrary to the applicable national law.

Legal context

EU law

3 Recitals 5, 8, 41 and 83 of Directive 2010/13 state:

‘(5) Audiovisual media services are as much cultural services as they are economic services. Their growing importance for societies, democracy – in particular by ensuring freedom of information, diversity of opinion and media pluralism – education and culture justifies the application of specific rules to these services.

...

(8) It is essential for the Member States to ensure the prevention of any acts which may prove detrimental to freedom of movement and trade in television programmes or which may promote the

creation of dominant positions which would lead to restrictions on pluralism and freedom of televised information and of the information sector as a whole.

...

(41) Member States should be able to apply more detailed or stricter rules in the fields coordinated by this Directive to media service providers under their jurisdiction, while ensuring that those rules are consistent with general principles of Union law. ...

...

(83) In order to ensure that the interests of consumers as television viewers are fully and properly protected, it is essential for television advertising to be subject to a certain number of minimum rules and standards and that the Member States must maintain the right to set more detailed or stricter rules and in certain circumstances to lay down different conditions for television broadcasters under their jurisdiction.'

4 Article 1 of that directive, included in Chapter I thereof, entitled 'Definitions', provides in paragraph 1 that:

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

(a) "audiovisual media service" means:

(i) a service as defined by Articles 56 and 57 [TFEU] which is under the editorial responsibility of a media service provider and the principal purpose of which is the provision of programmes, in order to inform, entertain or educate, to the general public by electronic communications networks within the meaning of point (a) of Article 2 of Directive 2002/21/EC [of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) (OJ 2002 L 108, p. 33)]. Such an audiovisual media service is either a television broadcast as defined in point (e) of this paragraph or an on-demand audiovisual media service as defined in point (g) of this paragraph;

(ii) audiovisual commercial communication;

(b) "programme" means a set of moving images with or without sound constituting an individual item within a schedule or a catalogue established by a media service provider and the form and content of which are comparable to the form and content of television broadcasting. Examples of programmes include feature-length films, sports events, situation comedies, documentaries, children's programmes and original drama;

...

(d) "media service provider" means the natural or legal person who has editorial responsibility for the choice of the audiovisual content of the audiovisual media service and determines the manner in which it is organised;

(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;

(f) “broadcaster” means a media service provider of television broadcasts;

(g) “on-demand audiovisual media service” (i.e. a non-linear audiovisual media service) means an audiovisual media service provided by a media service provider for the viewing of programmes at the moment chosen by the user and at his individual request on the basis of a catalogue of programmes selected by the media service provider;

(h) “audiovisual commercial communication” means images with or without sound which are designed to promote, directly or indirectly, the goods, services or image of a natural or legal entity pursuing an economic activity. Such images accompany or are included in a programme in return for payment or for similar consideration or for self-promotional purposes. Forms of audiovisual commercial communication include, inter alia, television advertising, sponsorship, teleshopping and product placement;

(i) “television advertising” means any form of announcement broadcast whether in return for payment or for similar consideration or broadcast for self-promotional purposes by a public or private undertaking or natural person in connection with a trade, business, craft or profession in order to promote the supply of goods or services, including immovable property, rights and obligations, in return for payment;

...’

5 Article 4(1) of that directive is worded as follows:

‘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

6 On 31 August 1991, the *Länder* concluded the Staatsvertrag für Rundfunk und Telemedien (State Treaty on Radio and Television Broadcasting, GBl. 1991 – p. 745). The version of that treaty applicable to the main proceedings is that resulting from its amendment by the Achtzehnter Rundfunkänderungsstaatsvertrag (Eighteenth Amending State Treaty on Broadcasting) of 21 December 2015, which entered into force on 1 January 2016 (‘the RStV’).

7 Paragraph 2 of the RStV, entitled ‘Definitions’, provides in subparagraph 1:

‘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 of the RStV, entitled ‘Advertising principles, Identification obligations’, provides in subparagraphs 2 and 11:

‘(2) Advertising is an integral part of the programme. ...

...

(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 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.

...’

The dispute in the main proceedings and the questions referred for a preliminary ruling

9 Fussl, which has its registered office in Ort im Innkreis (Austria), operates a network of fashion shops in Austria and the Land of Bavaria.

10 SevenOne Media, which has its registered office in Unterföhring, (Germany), is the marketing company of the ProSiebenSat.1 Group, a private television broadcaster established in Germany.

11 On 25 May 2018, Fussl concluded a contract with SevenOne Media to broadcast television advertising, solely in the Land of Bavaria, for inclusion in the programmes of the national ProSieben channel using the Bavarian cable networks of Vodafone Kabel Deutschland GmbH.

12 Subsequently, SevenOne Media refused to perform that contract on the ground that it is prohibited by Paragraph 7(11) of the RStV from inserting, in programmes broadcast throughout Germany, television advertising whose transmission is restricted to a regional level.

13 Fussl then referred the matter to the referring court, the Landgericht Stuttgart (Regional Court, Stuttgart, Germany), to order SevenOne Media to comply with its obligations under the contract.

14 The referring court points out that it is common ground between the parties that, from a technical point of view, SevenOne Media, in the context of its national broadcasts, is in a position to limit the broadcasting of the television advertising at issue to the territory of the Land of Bavaria alone.

15 As regards the various arguments raised before it, that court questions, in the first place, whether the restriction on the freedom to provide services guaranteed by Article 56 TFEU resulting from the prohibition laid down in Paragraph 7(11) of the RStV can be justified in the light of the overriding reason of general interest pursued by that provision, namely the protection of media pluralism.

16 First, it considers that it is not certain that that objective is pursued in a consistent and systematic manner, since the prohibition does not apply to advertising disseminated solely at regional level on internet sites.

17 Secondly, the proportionality of the prohibition provided for in Paragraph 7(11) of the RStV could also be questioned, since regional television broadcasters benefit only to a lesser extent from that prohibition, while economic operators such as Fussl are significantly limited in their possibilities to promote their products.

18 The referring court considers, in the second place, that Paragraph 7(11) of the RStV may constitute an unlawful interference with the freedom to hold opinions and to receive or impart information, as guaranteed by Article 11 of the Charter and Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR').

19 In the third place, that court considers that Paragraph 7(11) of the RStV could be contrary to the principle of equal treatment, a general principle of Union law.

20 Under those circumstances, the Landgericht Stuttgart (Regional Court, Stuttgart) decided to stay its proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Are Article 4(1) of Directive 2010/13 ..., the principle of equal treatment under EU law and 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 [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, 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?'

The application for the oral part of the procedure to be reopened

21 Following delivery of the Opinion of the Advocate General, SevenOne Media, ProSiebenSat.1 TV Deutschland and ProSiebenSat.1 Media, by a document received at the Court Registry on 27 October 2020, applied for an order that the oral phase of the proceedings be reopened pursuant to Article 83 of the Rules of Procedure of the Court of Justice.

22 In support of their application, those companies submit that the Opinion delivered by the Advocate General contains a number of factual errors which should be corrected, since the judgment to be delivered cannot be based on erroneous information. In particular, they submit that the statement in point 57 of that Opinion that advertising on the internet is completely different from television advertising is incorrect in several respects.

23 It should be recalled that, under the second paragraph of Article 252 TFEU, it is the duty of the Advocate General, acting with complete impartiality and independence, to make, in open court, reasoned submissions on cases which, in accordance with the Statute of the Court of Justice of the European Union, require the Advocate General's involvement. The Court is not bound either by the Advocate General's Opinion or by the reasoning on which it is based (judgment of 25 July 2018, *Société des produits Nestlé and Others v Mondelez UK Holdings & Services*, C-84/17 P, C-85/17 P and C-95/17 P, EU:C:2018:596, paragraph 31).

24 Furthermore, neither the Statute of the Court of Justice of the European Union nor the Rules of Procedure provide for the possibility for the parties or interested parties referred to in Article 23 of the Statute of the Court of Justice of the European Union to submit observations in response to the Opinion delivered by the Advocate General (see, to that effect, judgment of 21 December 2016, *Commission v Aer Lingus and Ryanair Designated Activity*, C-164/15 P and C-165/15 P, EU:C:2016:990, paragraph 31 and the case-law cited).

25 Consequently, a party's disagreement with the Opinion of the Advocate General, irrespective of the questions that he examines in his Opinion, cannot in itself constitute grounds justifying the reopening of the oral part of the procedure (judgment of 28 February 2018, *mobile.de v EUIPO*, C-418/16 P, EU:C:2018:128, paragraph 30).

26 The Court may, however, at any time, after hearing the Advocate General, order the reopening of the oral phase of the proceedings, in accordance with Article 83 of its Rules of Procedure, in particular if it considers that there is insufficient information, or where a party has submitted an objection after the closure of that phase, where there is a new fact capable of exercising a decisive influence on the decision of the Court, or where the case is to be decided on the basis of an argument which has not been discussed between the parties or interested parties referred to in Article 23 of the Statute of the Court of Justice of the European Union.

27 That is not the case in this instance.

28 SevenOne Media, ProSiebenSat.1 TV Deutschland and ProSiebenSat.1 Media base their request to reopen the oral phase of the proceedings on a series of factual errors which vitiate the Opinion.

29 According to the Court's settled case-law, in proceedings under Article 267 TFEU, which are based on a clear separation of functions between the national courts and the Court, the national court alone has jurisdiction to find and assess the facts in the case before it and to interpret and apply national law (judgment of 18 February 2016, *Finanmadrid EFC*, C-49/14, EU:C:2016:98, paragraph 27 and the case-law cited).

30 In the present case, it is therefore for the referring court alone to assess the facts relied on by SevenOne Media, ProSiebenSat.1 TV Deutschland and ProSiebenSat.1 Media in support of their application to reopen the oral phase of the proceedings if that court were to find that such an assessment is necessary for the resolution of the dispute in the main proceedings, having regard, in particular, to the interpretation of EU law provided by the Court in the context of its reply to the present reference for a preliminary ruling.

31 Therefore, the Court considers, after hearing the Advocate General, that it is sufficiently informed by the various arguments which have been duly presented before it.

32 In the light of the foregoing, there is no need to order the reopening of the oral part of the procedure.

Consideration of the questions referred

33 By its four questions, which must be examined together, the referring court asks, in substance, whether Article 4(1) of Directive 2010/13, the principle of equal treatment, Article 56 TFEU and Article 11 of the Charter must be interpreted as precluding national legislation which

prohibits television broadcasters from inserting in their programmes broadcast throughout the national territory television advertisements whose transmission is limited to a regional level.

Conformity with Directive 2010/13

34 As regards, in the first place, the possible impact of Directive 2010/13 on the answer to be given to the questions referred for a preliminary ruling as reformulated in the previous paragraph of the present judgment, the German Government submits that Article 1(1)(e) of that directive, as transposed into German law by Paragraph 2(1) and Paragraph 7(2) and (11) of the RStV, enshrines the ‘principle of simultaneous viewing’, so that the RStV does not contain any ‘more detailed or stricter’ provisions, within the meaning of Article 4(1) of that directive, the conformity of which with Union law would be open to review.

35 However, such an interpretation of Article 1(1)(e) of Directive 2010/13 cannot be accepted.

36 The reference in Article 1(1)(e) of Directive 2010/13 to the notion of ‘simultaneous viewing of programmes’ cannot be understood in the sense that it implies an obligation for Member States to ensure that advertisements or other content in a television programme designated or authorised for broadcasting at national level are, in the absence of authorisation, systematically broadcast throughout their territory, as provided for in Paragraph 7(11) of the RStV in the present case.

37 Apart from the fact that Article 1(1)(e) of Directive 2010/13 confines itself to defining the concept of ‘television broadcasting’ or ‘television broadcast’ by expressly referring to the simultaneous viewing of ‘programmes’ and therefore does not, as such, impose any obligation with regard to television advertising, it follows from the scheme of that directive that the concept of ‘simultaneous viewing’ must be understood in the light of the distinction on which that directive is based between so-called ‘linear’ audiovisual media services, referred to in that provision, and the so-called ‘non-linear’ audiovisual media services which are ‘on-demand audiovisual media services’ as defined in Article 1(1)(g) of that directive with reference to the fact that, for these services, ‘viewing of programmes’ takes place ‘at the moment chosen by the user and at his individual request on the basis of a catalogue of programmes selected by the media service provider’.

38 The concept of ‘simultaneous viewing’, for the purposes of Article 1(1)(e) of Directive 2010/13, must therefore be understood in the light of the linear nature of the audiovisual media service constituted by television broadcasting, which implies that all viewers for whom a programme is intended view it simultaneously on the basis of a chronological programme schedule, independently of the choice and request of the user.

39 That concept does not, therefore, in itself imply that the broadcasting of television advertising cannot be differentiated, in particular by limiting such broadcasting to part of the territory of a Member State.

40 Next, as regards the possible impact of Article 4(1) of Directive 2010/13 on the answer to be given to the questions referred for a preliminary ruling as reformulated in paragraph 33 of the present judgment, it should be recalled that it follows from that provision, as well as from recitals 41 and 83 of that directive, that, for the purposes of ensuring full and adequate protection of the interests of consumers, who are viewers, Member States have the option, with regard to media service providers under their jurisdiction, of laying down more detailed or stricter rules and, in certain cases, different conditions, in the fields covered by that directive, provided that such rules

comply with Union law and, in particular, with its general principles (judgment of 18 July 2013, *Sky Italia*, C-234/12, EU:C:2013:496, paragraph 13).

41 As also noted, in substance, by the Advocate General in point 22 of his Opinion, the rule deriving from Paragraph 7(11) of the RStV, although it falls within a field covered by Directive 2010/13, namely that of television advertising, which is regulated by Articles 19 to 26 thereof, which are intended to protect consumers, namely viewers, from excessive advertising (judgment of 18 July 2013, *Sky Italia*, C-234/12, EU:C:2013:496, paragraph 17), concerns a specific matter which is not governed by one of those articles and does not, moreover, pursue the objective of protecting viewers.

42 It follows that the measure established by Paragraph 7(11) of the RStV cannot be qualified as a ‘more detailed’ or ‘stricter’ rule within the meaning of Article 4(1) of Directive 2010/13 and does not fall within the scope of that directive.

Conformity with the freedom to provide services guaranteed by Article 56 TFEU

The existence of a restriction on the freedom to provide services

43 As regards, in the second place, the examination of the conformity of a national measure such as that at issue in the main proceedings with regard to the fundamental freedom to provide services guaranteed by Article 56 TFEU, it should be recalled that all measures which prohibit, impede or render less attractive the exercise of that freedom must be regarded as restrictions on that freedom (see, to that effect, judgment of 4 May 2017, *Vanderborght*, C-339/15, EU:C:2017:335, paragraph 61 and the case-law cited).

44 The concept of ‘restriction’ covers, in particular, measures taken by a Member State which, although applicable without distinction, affect the free movement of services in other Member States (judgment of 4 May 2017, *Vanderborght*, C-339/15, EU:C:2017:335, paragraph 62 and the case-law cited).

45 In that context, Fussl argues that the prohibition laid down in Paragraph 7(11) of the RStV precludes the special advertising needs of a medium-sized non-resident economic operator, such as that company, which seeks to penetrate the German market by initially focusing on a single catchment area, in this case the Land of Bavaria.

46 First, the broadcasting of television advertising in the context of national programmes throughout Germany is too costly and could give rise to too great a demand, which might not be met.

47 Secondly, the broadcasting of television advertising by regional television broadcasters has a very limited advertising impact. That is mainly due to the fact that the programmes broadcast by those regional channels reach only a particularly small number of viewers, namely approximately 5% of the total number of German television viewers.

48 In that regard, a national measure such as that at issue in the main proceedings, in so far as it prohibits television broadcasters from broadcasting regional television advertising in the context of their national programmes for the benefit, in particular, of advertisers established in other Member States such as, in the present case, Fussl, entails a restriction on the freedom to provide services to the detriment of both the providers of advertising services which are those television broadcasters and the recipients of those services which are those advertisers wishing to promote their products or

services in another Member State, while at the same time limiting that promotion to a regional level (see, to that effect, judgments of 28 October 1999, *ARD*, C-6/98, EU:C:1999:532, paragraph 49, and of 17 July 2008, *Corporación Dermoestética*, C-500/06, EU:C:2008:421, paragraph 33).

49 In the present case, Paragraph 7(11) of the RStV, in so far as it prevents non-resident economic operators, such as Fussl, from benefiting from the provision of television advertising broadcasting services on German territory, is liable to hinder their access to the market of that Member State.

50 The existence of that obstacle to the freedom to provide services cannot, moreover, be called into question by the fact, to which the referring court refers in its second and third questions, that each *Land* may, by virtue of the ‘opening clause’ contained in Paragraph 7(11) of the RStV, provide in its legislation for a system of authorisation permitting, where appropriate under certain conditions, such television advertising to be broadcast at regional level.

51 It is sufficient in that respect to note that it is clear from the reference for a preliminary ruling that that is a mere option which has not yet been used by any *Land*, so that it must be held that, *de lege lata*, the prohibition on television broadcasters, to include in their programmes transmitted throughout the national territory television advertising whose broadcasting is limited to a regional level, as provided for in Paragraph 7(11) of the RStV, and the restriction of the freedom to provide services resulting therefrom is established.

Possible justification for the restriction on the freedom to provide services

52 As regards, next, the possible justification for such a restriction, it is settled case-law of the Court that a restriction on a fundamental freedom guaranteed by the FEU Treaty may be permitted only if the national measure in question meets an overriding reason relating to the public interest, that it is appropriate to ensure that the objective it pursues is achieved and that it does not go beyond what is necessary to achieve it (see, to that effect, in particular, judgments of 4 May 2017, *Vanderborght*, C-339/15, EU:C:2017:335, paragraph 65, and of 11 December 2019, *TV Play Baltic*, C-87/19, EU:C:2019:1063, paragraph 37 and the case-law cited).

– *The existence of an overriding reason in the public interest capable of justifying the restriction*

53 It is apparent from the file submitted to the Court, from the reference for a preliminary ruling and from the written observations of the German Government, as confirmed, moreover, by the explanatory memorandum to the Eighteenth Amending State Treaty on Broadcasting, that Paragraph 7(11) of the RStV 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 by providing content of a regional and local nature.

54 According to the Court’s settled case-law, the preservation of the pluralistic nature of the offer of television programmes, which is intended to guarantee a cultural policy may constitute an overriding reason in the public interest capable of justifying the restriction of the freedom to provide services (see, to that effect, judgments of 13 December 2007, *United Pan-Europe Communications Belgium and Others*, C-250/06, EU:C:2007:783, paragraphs 41 and 42, and of 22 December 2008, *Kabel Deutschland Vertrieb und Service*, C-336/07, EU:C:2008:765, paragraphs 37 and 38).

55 Likewise, the Court has held that the safeguarding of the freedoms protected under Article 11 of the Charter, which in paragraph 2 thereof refers to the freedom and pluralism of the media, unquestionably constitutes a legitimate aim in the general interest, the importance of which in a democratic and pluralistic society must be stressed in particular, capable of justifying a restriction on freedom of establishment (judgment of 3 September 2020, *Vivendi*, C-719/18, EU:C:2020:627, paragraph 57 and the case-law cited).

– *The proportionality of the restriction*

56 While the objective of maintaining media pluralism pursued by Paragraph 7(11) of the RStV is capable of constituting an overriding reason relating to the public interest, it is also necessary, as already recalled in paragraph 52 of the present judgment, for the restriction on the freedom to provide services contained in that national provision to be justified, that it must be capable of ensuring the attainment of the objective which it pursues and must not go beyond what is necessary to attain it.

57 In that context, it should be recalled that, while that objective, in so far as it is linked to the fundamental right to freedom of expression, gives the national authorities a wide discretion, the fact remains that the requirements deriving from the measures designed to achieve that objective must in no circumstances be inappropriate or disproportionate to ensure the attainment of the objective which they pursue (see, to that effect, judgment of 13 December 2007, *United Pan-Europe Communications Belgium and Others*, C-250/06, EU:C:2007:783, paragraph 44).

58 It is therefore necessary to verify, in the first place, whether that prohibition is appropriate to ensure the achievement of the general interest objective of guaranteeing media pluralism pursued by that measure.

59 In that regard, it should be recalled that, in accordance with the Court's settled case-law, 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 (judgments of 10 March 2009, *Hartlauer*, C-169/07, EU:C:2009:141, paragraph 55, and of 11 July 2019, *A*, C-716/17, EU:C:2019:598, paragraph 24 and the case-law cited).

60 Like the referring court, the parties to the main proceedings and the European Commission question whether Paragraph 7(11) of the RStV satisfies that requirement of consistency, principally in so far as the prohibition imposed by that national provision does not apply to advertising provided solely at regional level by means of various internet platforms.

61 In that regard, it will be for the referring court 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.

62 In that context, the referring court also held that Paragraph 7(11) of the RStV puts broadcasters and resident and non-resident advertisers wishing to engage in television advertising at regional level in a less favourable position than other media service providers on internet platforms, since the latter are entitled to differentiate their advertising offer by region in the same way as national press organisations.

63 Moreover, subject to verification by the referring court, it appears that regional television broadcasters compete on the market for regional advertising with providers of advertising services,

in particular linear advertising, on the internet, so that advertisers are likely to shift their demand for regional advertising from those broadcasters to those providers.

64 Subject also to verification by the referring court, it does not appear that the risk of loss of revenue which regional and local television broadcasters are thus liable to suffer as a result of that shift in demand and revenue from advertising services to providers of advertising services, in particular linear advertising services, on the internet would be less significant than that connected with the same shift in demand and revenue to national television broadcasters if a prohibition such as that laid down in Paragraph 7(11) of the RStV did not apply.

65 Furthermore, it should be noted that, while it is apparent from the file before the Court that, according to the explanatory memorandum to the Eighteenth Amending State Treaty on Broadcasting, the German legislature based the prohibition laid down in Paragraph 7(11) of the RStV on the risk of such a shift in demand and a loss of income from advertising revenue to the detriment of regional television broadcasters whose importance would be such that the continued existence of those broadcasters would be likely to be compromised, the existence of such a risk is questioned by the parties to the main proceedings.

66 It is for the referring court alone to ascertain, on the basis of current, sufficiently detailed and substantiated data, whether there is a real or actually foreseeable risk of a shift, to the detriment of regional television broadcasters, in the demand for regional advertising services and in the revenue derived therefrom, the importance of which would be such that the funding and, therefore, the sustainability of those broadcasters would be liable to be jeopardised if national television broadcasters were authorised to broadcast regional advertising as part of their programmes broadcast throughout the national territory.

67 Consequently, it follows from the foregoing that the possible inconsistency of Paragraph 7(11) of the RStV could be due to the fact, to be verified by the referring court, that the prohibition contained in that provision applies only to advertising services provided by national television broadcasters and not to advertising services, in particular linear advertising services, provided on the internet, whereas at issue could be two competing types of services on the German advertising market which, subject to verification by the referring court, are likely to present the same risk to the financial health and sustainability of regional and local television broadcasters and hence to the objective to which that provision is directed, namely to promote media pluralism at regional and local level.

68 In that context, the referring court will in particular have to ascertain whether German law permits national television broadcasters to broadcast regional advertising as part of their streaming programmes on the internet. If so, it would necessarily have to be concluded that the measure introduced by Paragraph 7(11) of the RStV is inconsistent.

69 The circumstances of the case in the main proceedings are moreover, in that regard, substantially comparable to those which gave rise to the judgment of 17 July 2008, *Corporación Dermoestética* (C-500/06, EU:C:2008:421).

70 Although, in paragraph 39 of that judgment, the Court concluded that the advertising scheme at issue in that case was inconsistent and therefore unsuitable for ensuring the attainment of its objective relating to the protection of public health, on the ground that it included a prohibition on advertising for medical and surgical treatments on national television channels, while offering the possibility of broadcasting such advertising on local television channels, such a conclusion is clearly explained by the fact that, as far as advertising for such treatments is concerned, that

objective of protecting public health was equally relevant whether such advertising was broadcast on national or local television channels.

71 Finally, it should be recalled, as already stated in paragraph 57 of the present judgment, that the wide discretion enjoyed by the national authorities when they intend to protect media pluralism must be taken into account by the national court when assessing the consistency of the restriction.

72 In the second place, as is clear from the case-law of the Court recalled in paragraph 52 of this judgment, in order for a restriction on a fundamental freedom guaranteed by the TFEU to be justified, the national measure giving rise to it must not only satisfy an overriding reason in the public interest and be suitable for securing the attainment of the objective which it pursues, but must also not go beyond what is necessary to attain that objective.

73 It must therefore be examined whether, in the present case, other measures less detrimental to the freedom to provide services could have made it possible to achieve the objective of protecting media pluralism at regional and local level, as intended by the German legislature, by means of the measure laid down in Paragraph 7(11) of the RStV.

74 In that regard, it should be noted, as the Advocate General also observed, in substance, in points 69 and 70 of his Opinion, that the mere fact that other Member States finance public service television broadcasters by means of licence fees and allow private broadcasters to broadcast national and regional advertising freely does not, as such, constitute sufficient proof of the lack of proportionality of the prohibition laid down in Paragraph 7(11) of the RStV.

75 Having regard, in particular, to the fact that, as is apparent from paragraph 57 of the present judgment, Member States should be accorded a certain margin of appreciation with regard to the implementation of the objective of respect for media pluralism, the fact that one Member State imposes less strict rules than another Member State does not mean that the latter's rules are disproportionate (see, to that effect, judgment of 18 September 2019, *VIPA*, C-222/18, EU:C:2019:751, paragraph 71).

76 That being the case, it should be noted that Paragraph 7(11) of the RStV itself provides for a so-called 'opening clause', enabling the *Länder* to introduce a measure that is less restrictive than the outright prohibition, namely a specific authorisation scheme, provided that the law of the *Land* concerned so provides.

77 Consequently, a less restrictive measure could result from the effective implementation of that authorisation system at the level of the *Länder*, allowing the broadcasting of regional advertising by national television broadcasters within certain limits and under certain conditions to be determined in the light of the specific features of each *Land* in order, in particular, to minimise any financial impact on regional and local television broadcasters and thus to preserve the pluralistic nature of the television offer, particularly at regional and local level.

78 As the Advocate General also noted in point 69 of his Opinion, the fact that that possibility has so far not been applied does not alter the fact that the German legislature, in introducing that clause, recognised the compatibility of such an authorisation scheme with the objectives of the measure in question.

79 Moreover, the existence of an a priori less restrictive measure cannot affect the proportionality of Paragraph 7(11) of the RStV unless, which it is for the referring court to verify, it can actually be adopted and implemented in such a way as to ensure that, in practice, the objective

of that provision to preserve media pluralism at regional and local level through the protection of the funding and sustainability of regional and local television broadcasters can be achieved.

Conformity with Articles 11 and 20 of the Charter

80 As regards, in the third and last place, the question whether the prohibition established by Paragraph 7(11) of the RStV may be regarded as undermining the freedom to broadcast as guaranteed by Article 11 of the Charter, or as being contrary to the principle of equal treatment, it should be noted, as a preliminary point, that, having regard to the Court's settled case-law, once it has been established in the context of the examination under Article 56 TFEU that such regulation is liable to impede the freedom to provide services which the Member State concerned considers to be justified by an overriding reason in the public interest, in this case the objective of preserving media pluralism, the said legislation must be regarded as implementing Union law within the meaning of Article 51(1) of the Charter, so that it must comply with the fundamental rights guaranteed by the Charter (see, to that effect, judgment of 21 May 2019, *Commission v Hungary (Usufruct over agricultural land)*, C-235/17, EU:C:2019:432, paragraphs 63 to 65).

The freedom of expression and information guaranteed by Article 11 of the Charter.

81 With regard to freedom of expression and information, enshrined in Article 11 of the Charter, it should be recalled that that freedom is also protected under Article 10 ECHR, which applies, in particular, as is clear from the case-law of the European Court of Human Rights, to the dissemination by a business of commercial information, including in the form of advertising (judgment of 17 December 2015, *Neptune Distribution*, C-157/14, EU:C:2015:823, paragraph 64 and the case-law cited).

82 Since freedom of expression and information, enshrined in Article 11 of the Charter and Article 10 ECHR, have the same meaning and scope in each of those two instruments, as is apparent from Article 52(3) of the Charter and the explanations relating thereto in respect of Article 11 thereof, it must be held that the national measure at issue in the main proceedings, in so far as it limits the possibilities for national television broadcasters to broadcast regional television advertising for the benefit of the advertisers concerned, constitutes an infringement, on the part of those operators, of that fundamental freedom (see, to that effect, judgments of 26 June 1997, *Familiapress*, C-368/95, EU:C:1997:325, paragraph 26; of 23 October 2003, *RTL Television*, C-245/01, EU:C:2003:580, paragraph 68, and of 17 December 2015, *Neptune Distribution*, C-157/14, EU:C:2015:823, paragraphs 64 and 65).

83 With regard to national broadcasters, interference with freedom of expression and information takes the particular form of interference with freedom of the media or freedom of broadcasting, specifically protected by Article 11(2) of the Charter.

84 While the freedoms guaranteed by the Charter may be limited, any limitation on their exercise must, in accordance with Article 52(1) of the Charter, be provided for by law and respect the essential content of those freedoms. Moreover, as is clear from that provision, in accordance with the principle of proportionality, limitations may be made only if they are necessary and actually meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others (judgment of 17 December 2015, *Neptune Distribution*, C-157/14, EU:C:2015:823, paragraph 68).

85 In that regard, it should be noted, in the present case, first, that the limitation resulting from the prohibition on regional advertising under Paragraph 7(11) of the RStV must be regarded as laid down by law in so far as it is contained in a treaty concluded between all the German *Länder*.

86 Secondly, the essential content of the freedom of expression and information of the operators concerned is not affected, since, on the one hand, as the Advocate General also stated in point 81 of his Opinion, that national legislation restricts only the ability of advertisers to use a particular channel of communication, namely national television channels, while leaving them free to use other promotional channels to reach their regional target, such as advertising on the internet, the effectiveness of which, including at regional level, is not disputed.

87 On the other hand, as regards private and non-subsidised national television broadcasters, although the freedom of the media from which they benefit is limited in that they are prohibited from broadcasting regional advertising in the context of the broadcasting of programmes with a national scope, that is only one method of broadcasting advertising and, therefore, only one source of income among others for those operators.

88 Thirdly, the interference referred to in paragraph 85 of the present judgment responds to an objective of general interest recognised by the Union.

89 As is clear from paragraph 53 of the present judgment, the national legislation at issue in the main proceedings is intended to reserve revenue from regional television advertising for regional and local television broadcasters with a view to ensuring their financing and, therefore, their sustainability, in order to enable them to contribute to the pluralist nature of the offer of television programmes through the provision of regional and local content.

90 That objective, in so far as it concerns the protection of media pluralism at regional and local level, constitutes an objective of general interest, as already noted in paragraph 55 of the present judgment, expressly recognised in Article 11(2) of the Charter.

91 Fourthly, as regards the proportionality of the interference found, it is important to stress that it follows from the case-law of the European Court of Human Rights concerning Article 10(2) ECHR that national authorities enjoy a certain margin of appreciation in determining whether there is a pressing social need which may justify a restriction on freedom of expression. According to that case-law, that is particularly important in commercial matters and especially in an area as complex and fluctuating as advertising (judgment of 23 October 2003, *RTL Television*, C-245/01, EU:C:2003:580, paragraph 73 and the case-law cited).

92 The prohibition of regional advertising under Paragraph 7(11) of the RStV is essentially a balancing act between, on the one hand, the freedom of commercial expression of national television broadcasters and advertisers to broadcast regional television advertising in the context of programmes intended for all national television viewers and, on the other hand, the protection of media pluralism at regional and local level, to which regional and local television broadcasters can contribute only if their funding and hence their sustainability is ensured by reserving sufficient income from regional advertising.

93 In that regard, as also noted, in substance, by the Advocate General in point 83 of his Opinion, by adopting Paragraph 7(11) of the RStV, the German legislature was entitled to consider, without exceeding the wide margin of appreciation which it is entitled to in the particular context of such an exercise of balancing possibly conflicting interests, that safeguarding the public interest in ensuring that regional and local television broadcasters are able to contribute to the public debate at

those levels should prevail over the private interest of national television broadcasters and advertisers in broadcasting regional television advertising in the context of programmes intended for all national viewers.

94 It follows from the foregoing considerations that Article 11 of the Charter must be interpreted as not precluding a measure prohibiting regional advertising on national television channels, such as that contained in Paragraph 7(11) of the RStV.

The principle of equal treatment guaranteed by Article 20 of the Charter

95 As regards the conformity of national legislation, such as Paragraph 7(11) of the RStV, with the principle of equal treatment, it should be recalled that that general principle of Union law is enshrined in Article 20 of the Charter. According to the Court's settled case-law, that general principle 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. A difference in treatment is justified if it is based on an objective and reasonable criterion, that is, if the difference relates to a legally permitted aim pursued by the legislation in question, and it is proportionate to the aim pursued by the treatment concerned (judgment of 22 May 2014, *Glatzel*, C-356/12, EU:C:2014:350, paragraph 43 and the case-law cited).

96 In particular, the referring court questions whether a measure prohibiting regional advertising on national television channels, such as that contained in Paragraph 7(11) of the RStV, could be contrary to the principle of equal treatment, since that provision places national television broadcasters, as well as resident and non-resident advertisers, in a less favourable position than providers of internet advertising services, such as video-on-demand or streaming services, since the latter are entitled to differentiate their advertising by region in the same way as national print media.

97 While it is for the referring court to ascertain whether the national legislation at issue in the main proceedings complies with the principle of equal treatment, the Court may nevertheless provide it with any information which may be useful for the purposes of that examination (see, to that effect, judgment of 30 January 2020, *Autoservizi Giordano*, C-513/18, EU:C:2020:59, paragraph 36).

98 In that regard, it is necessary to examine, first, whether the various operators referred to in paragraph 96 of the present judgment are in a comparable situation.

99 According to the Court's settled case-law, the comparable nature of different situations is assessed in the light of all the elements that characterise them. Those elements must, in particular, be determined and assessed in the light of the subject matter and purpose of the act making the distinction in question. In addition, the principles and objectives of the field to which the act relates must also be taken into consideration (see, to that effect, judgments of 18 July 2013, *Sky Italia*, C-234/12, EU:C:2013:496, paragraph 16, and of 30 January 2019, *Planta Tabak*, C-220/17, EU:C:2019:76, paragraph 37 and the case-law cited).

100 It is therefore for the referring 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.

101 It is also for the referring court to ascertain whether, having regard to the object and purpose of Paragraph 7(11) of the RStV, which is aimed in particular at safeguarding the funding of regional and local television broadcasters, the situation of non-subsidised national television broadcasters providing advertising is comparable to that of providers of advertising services, in particular linear advertising services, on the internet, taking into account the fact that those two categories of operators are equally dependent on that advertising revenue for their funding.

102 In that context, an important indication that the two categories of operators are in a comparable situation would be the circumstance, if found by the referring court, that they provide similar services which are in competition with each other (see, to that effect, judgment of 30 January 2020, *Autoservizi Giordano*, C-513/18, EU:C:2020:59, paragraph 38).

103 Secondly, if, following those checks, the referring court were to conclude that the situation of national television broadcasters and that of providers of advertising services, in particular linear advertising services, on the internet are comparable having regard to the factors which characterise them, the object and purpose of Paragraph 7(11) of the RStV and the principles and objectives of the area of national law to which that provision belongs, it would still be for that court to ascertain whether the inequality of treatment between those two categories of operator can be objectively justified.

104 In that regard, as is clear from paragraph 95 of the present judgment, a difference of treatment is justified where it is based on an objective and reasonable criterion, that is to say, where it relates to a legally permissible aim pursued by the legislation in question, and where that difference is proportionate to the aim pursued by the treatment concerned.

105 While it is for the referring court alone to determine whether any inequality of treatment resulting from the application of the rule laid down in Paragraph 7(11) of the RStV can be objectively justified in the light of the criteria referred to in the previous paragraph, it should be noted that such an examination corresponds, in substance, to that relating to the justification of the restriction on the freedom to provide services, carried out in paragraphs 52 to 79 of the present judgment, so that the two examinations must be carried out in the same way.

106 Finally, as regards the question whether the rule laid down in Paragraph 7(11) of the RStV leads to unequal treatment between, on the one hand, advertisers who engage the services of national television broadcasters in order to advertise at the regional level and, on the other hand, advertisers who make use of providers of advertising services, in particular linear advertising services, on the internet at the same level, it is important to note that the examination of that question is closely linked to the examination of the situation of those broadcasters and providers. Therefore, the explanations set out in paragraphs 98 to 105 of the present judgment also apply in relation to such advertisers.

107 In the light of all the foregoing considerations, the answer to the questions referred is as follows:

- Article 4(1) of Directive 2010/13 and Article 11 of the Charter must be interpreted as not precluding national legislation which prohibits television broadcasters from inserting in their programmes broadcast throughout the national territory television advertising whose broadcasting is limited to a regional level;
- Article 56 TFEU must be interpreted as not precluding such national legislation, provided that it is suitable for securing the attainment of the objective of protecting media pluralism at regional

and local level which it pursues and does not go beyond what is necessary to attain that objective, which it is for the referring court to ascertain, and

– Article 20 of the Charter must be interpreted as not precluding such national legislation, provided that it does not give rise to unequal treatment between national television broadcasters and internet advertising providers as regards the broadcasting of advertising at regional level, which it is for the referring court to ascertain.

Costs

108 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

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 ('the Audiovisual Media Services Directive') and Article 11 of the Charter of Fundamental Rights of the European Union must be interpreted as not precluding national legislation which prohibits television broadcasters from inserting in their programmes broadcast throughout the national territory television advertising whose broadcasting is limited to a regional level;

Article 56 TFEU must be interpreted as not precluding such national legislation, provided that it is suitable for securing the attainment of the objective of protecting media pluralism at regional and local level which it pursues and does not go beyond what is necessary to attain that objective, which it is for the referring court to ascertain;

Article 20 of the Charter of Fundamental Rights must be interpreted as not precluding such national legislation, provided that it does not give rise to unequal treatment between national television broadcasters and internet advertising providers as regards the broadcasting of advertising at regional level, which it is for the referring court to ascertain.

[Signatures]

* Language of the case: German.