

Media & Entertainment - Switzerland

Television viewing figures drama ends

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Introduction

Facts

Decision

Introduction

The annual net television advertising turnover in Switzerland is Sfr700 million. Accordingly, viewing figures are of paramount importance to the television advertising industry, since they function as a benchmark for the allocation of advertising volumes to individual television channels. Thus, if a television channel's viewing figures have increased and it does not receive the most recent viewing data, it cannot exploit such an increase effectively.

Since March 2013 the publication of television viewing figures by Mediapulse, the official institution, was blocked by a court order and the entire Swiss television advertising industry was left in the dark regarding the efficacy of its advertising investments. In a recent decision the Federal Administrative Court⁽¹⁾ finally lifted the measures and viewing figures have been once again available to the industry and public since August 2 2013.

Facts

The Mediapulse Foundation is mandated by the Swiss Confederation to measure the official statistics on radio and television usage in Switzerland. The actual tasks are entrusted to its two operative subsidiaries, Mediapulse Ltd and Publica Data Ltd. Mediapulse plans, coordinates and carries out the measurement of radio and television consumption in Switzerland. It takes scientific standards as the basis for running the Mediapulse radio panel and Mediapulse television panel. Publica Data is a sales and marketing organisation for compiled data that acts on behalf of its customers. It markets the independently compiled research data for all radio and television programmes throughout Switzerland. Together with the two joint stock corporations under Swiss law, Mediapulse and Publica Data, the Mediapulse Foundation forms the Mediapulse Group.⁽²⁾

From 1985 until 2012 Swiss television viewing figures were measured by a system known as Telecontrol. From January 1 2013 a new system, 5000 Series PeopleMeter, was implemented and used. This new system works in an entirely different way, which results in different viewing figures and market shares than under the previous system.

Due to some technical difficulties the publication of the January viewing data was postponed. As a result some Mediapulse customers expressed their scepticism with regard to the plausibility and accuracy of the data obtained by the new system, and an expert report was commissioned.

In the meantime, private television channel 3 Plus filed a request for an *ex parte* injunction⁽³⁾ in March 2013, ordering the court to prohibit the publication of the new television viewing figures. It argued that its viewing figures and market share had decreased under the new system and it felt that it would suffer financial and reputational damage because its advertising customers would not book or would book fewer advertising slots due to 3 Plus's lower viewing figures.

In May 2013 the Federal Department of Environment, Transport, Energy and Communications analysed

the new viewing figure system and concluded that it was compliant with the applicable Swiss laws, but that there was room for improvement and optimisation. It therefore ordered that Mediapulse should, together with the television channels which were affected by the introduction of the new system, implement an action plan to optimise the system.

In June 2013 3 Plus filed an appeal⁽⁴⁾ against the authority order and requested, among other things, that parts of the order be abolished and that the injunction remain in place during the duration of the appeal proceedings. On July 16 2013 the Federal Administrative Court held that the injunctive measures should be lifted and viewing figures published.

Additionally, 3 Plus and Mediapulse concluded a settlement agreement, according to which the pending proceedings among the parties shall be withdrawn and Mediapulse shall implement the measures for the optimisation of its viewing rates system.

Decision

The court held in essence that 3 Plus could file the appeal legitimately, since the authority order affected its legal and factual interests.

Moreover, it held that disadvantages claimed by 3 Plus regarding the publication of the new viewing figures (since they were lower than under the previous system) did not outweigh the other television channels' disadvantages in not receiving the viewing figures, since this data is vital to the entire industry. If the advertising agencies and customers do not receive up-to-date viewing figures, the granting of new advertising mandates will be based on the old rates. Television channels whose viewing rates increased under the new system would not be able to exploit such increases and would sustain financial damage.

Finally, the court also held that the public interest in the accuracy of the viewing figures as claimed by 3 Plus does not outweigh the industry's interest in receiving up-to-date viewing data.

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Endnotes

⁽¹⁾ Decision A-3464/2013.

⁽²⁾ See www.mpgruppe.ch.

⁽³⁾ Based on infringement of the Act against Unfair Competition. Until the Federal Administrative Court's July 16 2013 decision, the injunctive measures were extended to various television channels, lifted and granted again.

⁽⁴⁾ 3 Plus initiated civil and administrative law proceedings in parallel. The Federal Administrative Court held that this was permissible.

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