[DE] Administrative courts rule on access to public broadcasters' election debates

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Christina Etteldorf
Institute of European Media Law

On 5 February 2025, the *Verwaltungsgericht Köln* (Cologne Administrative Court) ruled in summary proceedings that the leading candidate of the party *Bündnis Sahra Wagenknecht* (Sahra Wagenknecht Alliance – BSW) for the 2025 Bundestag election did not have to be invited to appear on the pre-election debate programme *Wahlarena 2025 zur Bundestagswahl* broadcast by the *Arbeitsgemeinschaft der öffentlich-rechtlichen Rundfunkanstalten der Bundesrepublik Deutschland* (ARD). On the same day, the *Verwaltungsgerichtshof Baden-Württemberg* (Baden-Württemberg Administrative Court) ruled differently in relation to the same party's participation in the programmes *Wahlarena Baden-Württemberg* and *Wahlarena Rheinland-Pfalz* broadcast by *Südwestrundfunk* (SWR). Although both decisions were based on the same legal principles, in particular the principle of equal opportunities for political parties, the courts applied different weightings, primarily because the programme concepts were not the same.

In the run-up to the Bundestag elections held on 23 February 2025, the leading candidates of political parties were invited to present their manifestos and discuss them with each other in a large number of different television programme formats. As the political landscape in Germany is currently more diverse than ever before, with many parties already represented in the Bundestag or predicted to win seats, the leading candidates of some parties could not be invited to take part in such programmes, even though they had a chance of being elected. Parties excluded from the public service broadcasters' high-profile programmes in particular argued that this limited their election chances and turned to the courts in an attempt to be allowed to participate.

In the two cases at hand, the courts issued different decisions. Both adopted the same starting point, i.e. since the programmes had editorially designed formats and were protected under broadcasting freedom (Article 5(1) sentence 2 of the German Basic Law), the broadcasters had discretionary powers when deciding who should take part. However, broadcasting freedom was restricted, particularly during election campaigns, by the fundamental rights of political parties, especially the principle of equal opportunities. A claim against public broadcasters for the right to participate in an election programme could be justified if the programme in question carried high journalistic weight and if a party's chances of

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election success suffered lasting damage as the result of unjustified differentiation between parties. The line-up of guests must then be based on the principle of graduated equality of opportunity, where parties were represented "according to their importance". Both courts also assumed that, in order to determine a party's political importance, an overall view of the results of election polls conducted in recent months should also be taken into account, especially if there had been significant shifts in the political landscape. This was particularly relevant for the BSW because, based on the current balance of power in the Bundestag and the results of the previous election in 2021, it would not have had to be included at all. Even though it had only been founded in 2024 as a split from from the party *Die Linke* (The Left, a party represented in the Bundestag), the BSW was already registering 4 to 6% in the polls.

However, the main reason why the courts reached different verdicts was the different broadcasting concepts of the respective election programmes. In the case heard by the Cologne Administrative Court, the leading candidates of the four strongest parties in the Bundestag, each of which was expected to win well over 10% of the votes according to the latest polls, had been invited to take part. The court ruled that the BSW was not currently of comparable importance to the invited parties. According to the polls, the invited parties' current ratings gave their respective leaders a reasonable chance of becoming chancellor in the future, which was the basis for the programme concept. The BSW, together with two other parties with a similar standing in the polls, i.e. *Die Linke* and the *Freie Demokratische Partei* (Free Democratic Party – FDP), were primarily battling just to win any seat in the Bundestag. Since the BSW had been given sufficient airtime in numerous other editorial formats as part of ARD's overall election coverage concept, it had no automatic right to participate in this particular programme. The *Bundesverfassungsgericht* (Federal Constitutional Court) dismissed an appeal against this decision on 15 February 2025.

Meanwhile, in the case before the Baden-Württemberg Administrative Court, a representative of the FDP had been invited to take part in the two election programmes concerned alongside those of the four strongest parties. Although the FDP had achieved 11.4% of the vote in the previous Bundestag election, it was almost on a par with the BSW in the latest polls, with 4 to 6% of the vote. The court thought these projected figures, which had been confirmed by the 2024 European election results (5.2% for the FDP and 6.2% for the BSW), were more relevant than the current distribution of Bundestag seats. This unequal treatment was therefore considered a breach of equal opportunities. Since there was a risk that the BSW's chances of election success would suffer lasting damage, the court ordered the broadcaster to allow the party to participate.

Urteil des VGH Baden-Württemberg (ECLI:DE:VGHBW:2025:0205.1S164.25.00)

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Judgement of the Baden-Württemberg Administrative Court (ECLI:DE:VGHBW:2025:0205.1S164.25.00)

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https://nrwe.justiz.nrw.de/ovgs/vg_koeln/j2025/6_L_81_25_Beschluss_20250205.html

Judgement of the Cologne Administrative Court (ECLI:DE:VGK:2025:0205.6L81.25.00)

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Beschluss des Bundesverfassungsgerichts (2 BvR 230/25)

https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2025/02/rk20250215_2bvr23025.html?nn=68080

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https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2025/02/rk20250215_2bvr23025.html?nn=68080

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