Advocate General: Public Broadcasters Considered as "Public Contracting Authorities"

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If a broadcaster is financed indirectly through licence fees that have to be paid by the owners of receiving devices, it is considered to be "financed by the State" within the meaning of Art. 1(b) para. 2 of Council Directive 92/50/EC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (identical to Art. 1 para. 9 of the follow-up Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts). This opinion was expressed by the Advocate General in his conclusions submitted on 6 September 2007 following the request for a preliminary ruling filed by the *Oberlandesgericht Düsseldorf* (Düsseldorf Court of Appeal - OLG).

The key question was whether public broadcasters in Germany should be considered as "public contracting authorities" within the meaning of the EC public procurement directives and whether they are therefore obliged to carry out tendering procedures when awarding contracts.

The appellants in the original proceedings before the OLG were the regional broadcasting authorities represented by the *Arbeitsgemeinschaft der Rundfunkanstalten Deutschlands* (association of German broadcasting authorities - ARD), *Zweites Deutsches Fernsehen* (ZDF) and Deutschlandradio. Following an application by a cleaning company, the public procurement office of the Cologne regional government had decided that the joint *Gebühreneinzugszentrale* (fee collection office - GEZ) of the regional broadcasting authorities was a "public contracting authority" within the meaning of Art. 98 no. 2 of the *Gesetz gegen Wettbewerbsbeschränkungen* (Restraints of Trade Act - GWB). The public procurement office had, therefore, urged the GEZ to comply with the provisions of public procurement law (particularly by organising a Europe wide tendering procedure). The GEZ, which does not have its own legal personality, is a joint institution of the regional broadcasting authorities, Deutschlandradio and ZDF. It acts on the broadcasters' behalf as the official collector of licence fees.

The Advocate General decided that the public broadcasters were "financed, for the most part, by the State" within the meaning of Art. 1(b) para. 2 of Directive 92/50/EC. In response to the first and second questions referred, he stated that

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the fee had been introduced through public law instruments - the *Staatsvertrag über die Regelung des Rundfunkgebührenwesens* (Inter-State Agreement on Broadcasting Fees) and the *Rundfunkfinanzierungsstaatsvertrag* (Inter-State Agreement on the Financing of Broadcasting) - and anyone who owned a receiving device was obliged to pay. The fee was therefore tantamount to a tax; the funds levied by the GEZ were of a public law nature. Furthermore, the Advocate General explained that, in order to be categorised under Art. 1(b) para. 2, broadcasters did not need to meet any other criteria, such as a direct State influence on the awarding of contracts. No such requirement was laid down in the Directive. In addition, it made no difference whether the State collected the fees directly and then passed them on or whether it authorised another body to do so. Finally, the Court had already recognised the possibility of indirect State control in relation to another alternative to Art. 1(b) para. 2. The Advocate General rejected the broadcasters' argument that public funding only occurred when no specific service was provided in return (in this case, the right to receive programmes). The income was not of a private law nature and there was no normal business relationship. He added that the public aspect of the subsidy was heightened by the fact that the generation of the funds did not depend on market conditions and therefore gave the broadcasters a degree of protection. Since income from licence fees represented the vast majority of the broadcasters' revenue, they were deemed to be "financed, for the most part, by the State".

Finally, responding to the third question referred, the Advocate General concluded that only the services listed in Art. 1(a) of the Directive (such as the acquisition, development, production or co-production of programme material by broadcasters and the broadcasting of programmes) were excluded from the scope of the Directive.

Schlussanträge in der Rechtssache C-337/06 vom 6. September 2007

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Conclusions in the case C-337/06 of 6 September 2007

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