[DE] Fixing of Licence Fees Unconstitutional

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Alexander Scheuer
Institute of European Media Law (EMR), Saarbrücken/Brussels

In a ruling of 11 September 2007, the *Bundesverfassungsgericht* (Federal Constitutional Court - BVerfG) decided that the fixing of broadcasting licence fees by the legislative bodies of the German *Bundesländer* had infringed the broadcasting freedom of the public service broadcasters under Art. 5.1.2 of the *Grundgesetz* (Basic Law - GG), and was therefore unconstitutional.

In their appeals to the Constitutional Court, the regional broadcasting authorities that make up the ARD, along with ZDF and Deutschlandradio , had argued that the fixing of the licence fees for the period from 2005 to 2008 breached their freedom to broadcast (see IRIS 2005-10: 10 and IRIS 2006-4: 11). The decision on the fees had been prepared by the Minister-Presidents in the *8. Rundfunkänderungsstaatsvertrag* (8th Amendment to the Inter-State Broadcasting Agreement) of October 2004 and adopted in the form of *Land* laws and resolutions. The dispute centred on the fact that the Minister-Presidents had decided not to follow the recommendation of the *Kommission zur Ermittlung des Finanzbedarfs der Rundfunkanstalten* (Committee for the establishment of the financial needs of the broadcasting authorities - KEF) when determining the future level of the fees, but to propose instead a smaller increase.

The BVerfG essentially granted the appeal. It accepted that most of the arguments submitted by the *Länder* to explain their deviation from the KEF's proposal did, in principle, justify the action taken by their legislative bodies. However, the grounds for these arguments given by the *Länder* were either insufficient or inaccurate. The BVerfG therefore declared the corresponding *Land* laws and resolutions to be incompatible with Art. 5 GG, but not invalid. The latter scenario would have nullified the legal basis for the (reduced) fee increase - a consequence that would have made the situation even more unconstitutional. The new fee period is likely to start on 1 January 2009 and the process for fixing the licence fee has already begun following the broadcasters' notification of their financial requirements. In view of the time it would take for the *Länder* to reach an agreement on the matter - in the form of a new Inter-State Agreement, which would also require the approval of the *Land* parliaments - the BVerfG did not consider that an immediate revision was necessary. This means that, for the current fee period, the part of the increase that was unlawfully rejected cannot be reclaimed. In the Court's opinion, compensation for the lost revenue can only be considered in areas other than programming, such as necessary investments. This

should be taken into account in the current process of establishing the broadcasters' financial requirements.

The Court used its decision to express a number of important opinions on fundamental media policy issues. Firstly, it clearly indicates that the development of communication technology and media markets does not affect in any way the requirements it has laid down for the legal structure of the broadcasting system and the need to protect the freedom to broadcast. The Court makes this clear in the context of its interpretation of Art. 5.1.2 GG, confirming its established precedents. Secondly, it highlights the potential dangers to the plurality of opinion in broadcasting. It begins by referring to the influence of advertising income on programming structure, which it says is strongly determined by programmes enjoying mass popularity and is becoming increasingly standardised. It also mentions the risks posed by unbalanced news reporting and the influence that this can have, as well as the dangers resulting from the development of media markets and the strong tendency towards concentration in private broadcasting. The Court mentions in general terms the activities of joint-stock companies in which international investors play a major role, the involvement of telecommunication companies as operators of platforms for broadcast programmes and the continuing trend towards horizontal and vertical integration. It says that this frequently creates the potential for mutual strengthening of editorial influence and economic success, and therefore for the use of economies of scale and scope, including through cross-media marketing (see also IRIS 2006-2: 9).

Thirdly, the BVerfG confirms its fundamental position on the dual broadcasting system. This particularly applies to the correlation between the fulfilment of the traditional remit of public service broadcasting and the reduced demands for plurality made by the legislator in relation to private broadcasting. The dual system, in its current form, is only compatible with the freedom to broadcast if the public broadcasters are able to meet the stricter requirements that apply to them. In this connection, the Court also considers the definition of a constantly changing remit of public service broadcasting in the digital age. Since programming must remain open to new content, formats and genres as well as new forms of dissemination, public broadcasters should not be restricted to the current phase of development from the programming, financial and technical points of view. This should be reflected in an appropriate funding structuring.

Fourthly, the BVerfG confirms its previously expressed view that the freedom of public broadcasters includes programming autonomy. The broadcasters themselves should be able to decide how to fulfil their remit. Nevertheless, legal restrictions on programme quantities are not necessarily unlawful; but neither should a broadcaster receive funding for every programming decision. Broadcasters are forbidden from extending the scope of their programming and

the indirectly linked financial requirements beyond what is necessary for the fulfilment of their remit. Elsewhere in its ruling, the BVerfG refers to the aforementioned relationship of tension between public and private broadcasting. It emphasises that the legislative body can define the function of public service broadcasting in an abstract way (and thus limit its financial requirements). However, the freedom to broadcast means that the State cannot lay down detailed provisions. In this context, the BVerfG refers to the voluntary self-obligation system (see IRIS 2003-1: 8). This represents a means of co-operation, basically compatible with the freedom to broadcast, which the broadcasters believe is necessary for the fulfilment of their remit. These obligations can help to guarantee the financing required while also protecting the broadcasters' programming autonomy.

Fifthly, the Court points out the advantages of licence fee-based funding. This type of funding should mean the broadcaster is largely independent of market forces and ensure that programmes are orientated towards editorial objectives, particularly plurality of opinion, rather than viewing figures and advertising contracts. The Constitution does not exclude the possibility of funding from other sources, such as advertising and sponsorship. However, it is necessary to check continuously whether it remains justified to assume that partial financing from these sources will increase the independence of public service broadcasting from the State. The BVerfG stresses the dangers, particularly the gearing of programmes to mass popularity and the erosion of the identifiable characteristics of public service channels.

Finally, the Court repeats that the licence fee should be fixed independently of any media policy objectives. This should be guaranteed by an appropriate procedure.

Urteil des Bundesverfassungsgericht vom 11. September 2007 (Az. 1 BvR 2270/05, 1 BvR 809/06 und 1 BvR 830/06)

http://www.bundesverfassungsgericht.de/entscheidungen/rs20070911_1bvr227005.html