# [DE] Judicial review applications against ZDF Inter-State Agreement largely successful

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In a ruling of 25 March 2014, the *Bundesverfassungsgericht* (Federal Constitutional Court - BVerfG) decided that the provisions of the *Staatsvertrag über das Zweite Deutsche Fernsehen* (Inter-State Agreement on Zweites Deutsches Fernsehen - ZDF-StV) on the composition of the supervisory bodies breached Article 5(1)(2)(2) of the *Grundgesetz* (Basic Law - GG) in several respects and were therefore unconstitutional. The ruling explained that the basic right of broadcasting freedom (Article 5(1)(2)(2) GG) required that a system should be established that ensured that the diversity of opinions was presented in broadcasting as broadly and comprehensively as possible. Under constitutional law, the requirements placed on the legislature for the institutional structure of the broadcasting corporations must follow the aim of ensuring diversity. The organisation of public broadcasting must satisfy the need for independence from State intervention, which was given concrete shape by the principle of ensuring diversity. The composition of the collegiate bodies must be aimed at including people with as wide a variety of perspectives and horizons of experience as possible, from all areas of the community. The legislature was not prevented from allowing representatives of the State to become members of the supervisory bodies. Ensuring diversity did not, per se, mean shielding a social sphere that was juxtaposed with the State. However, the share of members who were part of State authority or close to it should not exceed one-third of the statutory members of each body. According to the BVerfG, the influence of communication structures that were established by the State and structured along party lines should also be taken into account, as was currently apparent in the so-called “circles of friends”. Whether a member was deemed part of State authority or close to it for the purposes of this threshold should depend on their function. The decisive criterion was whether the person had decision-making powers at State political level. Among these members, it was also necessary to ensure that the broadest possible variety of perspectives was represented.

According to the court, the ZDF-StV met these requirements only in part. According to Article 21 ZDF-StV, the share of Television Council members directly appointed as persons who were part of State authority or close to it was around 44%, while the corresponding figure for the Administrative Council, according to Article 24 ZDF-StV, was approximately 43%. In both cases, therefore, the proportion of members who were part of State authority or close to it exceeded

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the constitutional threshold of one-third. This meant that these members could form a blocking minority with regard to decisions that required a three-fifths majority of the statutory members. This infringed the principle of independence from State intervention in the broadcasting sector.

The court also stated that representatives of the executive could not have a controlling influence on the selection of the members who were separate from State authority. Article 21(3) in conjunction with Article 21(6) ZDF-StV, according to which the members detached from State authority appointed under Article 21(1)(g) to (q) ZDF-StV should be selected by the Minister-Presidents on the basis of a proposal consisting of three candidates, therefore only conformed with the Constitution if it was interpreted in this way. As was the current practice, the Minister-Presidents were therefore, in principle, bound by the lists of proposals submitted by the associations and organisations entitled to appoint members, and it was only possible to deviate from the lists if there were special legal reasons. In contrast, Article 21(1)(r) ZDF-StV did not meet the requirements for the appointment of members who were detached from State authority. These decisions were taken directly by the State executive. With regard to the Administrative Council, the BVerfG found that the members appointed pursuant to Article 24(1)(b) ZDF-StV were elected by a Television Council that was not sufficiently detached from State authority.

Furthermore, there were no sufficient incompatibility regulations for the members of either body who were detached from State authority. In addition, the independence of at least some of the Television Council and Administrative Council members was not sufficiently safeguarded.

Moreover, the BVerfG thought there were no legislative provisions governing the transparency of the supervisory bodies' work.

Therefore, for the above reasons, the BVerfG ruled that Articles 21 and 24 ZDF-StV were incompatible with the Basic Law. They could be applied until new legislation was enacted. However, the Länder were obliged to enact such new legislation as has satisfied constitutional law by 30 June 2015 at the latest.

### *Urteil des Bundesverfassungsgerichts vom 25.03.2014 (Az. 1 BvF 1/11, 1 BvF 4/11)*

https://www.bundesverfassungsgericht.de/entscheidungen/fs20140325_1bvf000111.html

*Ruling of the Federal Constitutional Court of 25 March 2014 (case no. 1 BvF 1/11, 1 BvF 4/11)*

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