[DE] Federal Constitutional Court Finds Obligation to Keep and Preserve Records Constitutional

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

In a decision of 26 February 1997, the Federal Constitutional Court (Bundesverfassungsgericht - BVerfG) declared the obligation of private broadcasters to keep records of their broadcasts for the purpose of broadcasting supervision and under specific conditions to submit such records to the regional media authority (Landesmedienanstalt) as the supervisory body compatible with the guarantee of the freedom of broadcasting contained in Article 5, paragraph 1(2) of the Basic Law (Grundgesetz - GG).

The decision by the BVerfG was in response to an appeal on a point of constitutionality brought by a private broadcaster in Baden-Württemberg, who objected to complying with the obligation upheld by the administrative courts to submit recordings of broadcasts to the regional media authorities. According to Section 37 of the Baden-Württemberg Regional Media Act (Landesmediengesetz - LMedienG), the regional media authority (Landesanstalt für Kommunikation - LfK) is responsible for the supervision of operators of private broadcasting stations in Baden-Württemberg. As part of this supervision, operators may be required to supply information, recordings or other documents (Section 38, par. 1; LMedienG).

Under these provisions the LfK had demanded recordings of broadcasts allegedly encouraging participation in a prohibited demonstration.

In the appeal on a point of constitutionality the appellant claimed that this infringed the fundamental right of the freedom to broadcast since the LfK had the possibility of recording the broadcasts itself and this was in keeping with the principle of proportionality. It was also claimed that this infringed Art. 5, par. 1(2) of the GG as the presumed guarantee of the right to refuse to give evidence in connection with the disclosure of sources was not taken into account in the regulations of the Regional Media Act. Lastly, it was claimed that the obligation to supply recordings was also contrary to the right contained in Art. 2, par. 1 in connection with Art. 1, par. 1 of the GG of not being required to accuse oneself of a criminal offence.

The Court did not concur. It held that the fundamental right of freedom to broadcast, which above all was intended to ensure the freedom of the station, had been infringed, as had the obligation to supply recordings concerning

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programmes already broadcast, as this obligation was connected with the organisation of broadcasting and referred to this specifically. The Court held that the basic right under Art. 5, par. 1(2) of the GG had not been infringed, as the disputed provisions resulted from the broadcasting regulations within Art. 5, par. 2 of the GG, according to which restrictions on the freedom to broadcast were permitted.

The Court also held that although the main purpose of supervision was indeed to ensure the freedom to broadcast, it did not exclude a transfer to the regional media authorities of supervision of those provisions which restricted rather than promoted the freedom to broadcast. Concerning the right to refuse to give evidence, which the Constitutional Court extended to the protection of the freedom to broadcast, it was not obvious that the obligation to keep and supply records was unconstitutional. The media authorities were in fact only allowed such information in recordings as had already been made public in the broadcasts. The requirement to supply them should however require actual suspicion of an illegality.

Lastly, the Federal Constitutional Court found that the protection from pressure to accuse oneself of a criminal offence derived from Art. 2, par. 1 in connection with Art. 1, par. 1 of the GG was not infringed here as the broadcaster - as a legal entity - was not able to invoke such protection under basic law (Art. 19, par. 3; GG).

Bundesverfassungsgericht, Beschluß vom 26. Februar 1997, Geschäftsnummer 1 BvR 2171/96

Federal Constitutional Court, decision of 26 February 1997, Case No 1 BvR 2171/96

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