[DE] Constitutional Court denies public service broadcasters emergency legal protection in dispute over licence fee increase

IRIS 2021-2:1/28

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In a decision issued on 22 December 2020 in the dispute over a proposed increase in the broadcasting licence fee used to fund public service broadcasting in Germany, the *Bundesverfassungsgericht* (Federal Constitutional Court – BVerfG) rejected urgent applications submitted by the broadcasters forming the ARD, ZDF and Deutschlandradio contesting the block that one of the German *Bundesländer* had placed on the proposed increase. The broadcasters therefore failed in their attempt to ensure that the increase took effect on 1 January 2021 despite opposition to it, which was partly political in nature.

German households and businesses are (with some exceptions) currently obliged to pay a monthly licence fee of EUR 17.50, which is used to fund public service broadcasters. The fee is set in accordance with the broadcasters' requirements. The process for establishing their financial requirements and adjusting the fee accordingly is clearly set out in the *Rundfunkfinanzierungstaatsvertrag* (State Treaty on the financing of broadcasting – RFinStV). The complex rules governing this process include the obligation for the broadcasters to present their requirements to the independent Kommission zur Ermittlung des Finanzbedarfs der Rundfunkanstalten (Commission for Determining the Financial Requirements of Broadcasters - KEF), which must examine them according to the principles of economy and efficiency. Every two years, the KEF submits a report on its evaluations to the governments of the German *Bundesländer*, who are responsible for media regulation, and includes a recommended licence fee in its report. This recommendation can only be disregarded under specific, strict conditions. In its most recent report, published in 2020, the KEF proposed that the fee should be increased by EUR 0.86 to EUR 18.36 from 1 January 2021. However, in order for an increase to take effect, all the parliaments of the German *Länder* must approve an amendment to the RFinStV. After the Saxony-Anhalt Parliament rejected the proposal, its Minister-President withdrew the bill on 8 December 2020, thereby blocking the licence fee increase.

The urgent proceedings initiated with the BVerfG by the broadcasters (along with a main procedure running in parallel) concerned (and still do concern) the question of whether the Saxony-Anhalt Parliament was actually allowed to reject the fee increase. According to the RFinStV, the state parliaments can only reject

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the KEF's proposal if the fee increase is likely to impede free access to information or if the cost to the licence-holder is no longer reasonable. In either scenario, verifiable justification must be presented. However, in the broadcasters' view, such justification had not been provided.

The BVerfG rejected the urgent application to impose the fee increase at least temporarily pending the outcome of the main procedure. However, it was not required to decide whether the Saxony-Anhalt Parliament's refusal to approve the increase had been lawful, since the urgent proceedings only required it to weigh the consequences of not imposing an interim order and the main application being successful against the disadvantages that would result if the interim order was granted and the main application was later dismissed. In the court's view, the broadcasters had failed to provide sufficient evidence that infringing the constitution by delaying the fee increase would be irreversibly and seriously detrimental. They would have had to show that the funds generated from the existing licence fee were insufficient to provide the programme portfolio examined by the KEF and that the broadcasters' freedom of broadcasting would therefore have been irreparably infringed. However, the BVerfG did not believe that this had been plausibly substantiated because, under its own case law, retrospective financial compensation would become due if it was later found that the licence fee had been set in breach of the constitution. The ARD members should be able to continue providing their programmes for a limited period of time.

However, the BVerfG did not rule on the legality of the Saxony-Anhalt Parliament's rejection of the proposal or the fixing of the licence fee. These questions will be dealt with in the pending Constitutional Court proceedings. Nevertheless, in its decision, the BVerfG stressed that the Saxony-Anhalt Parliament's decision may well have infringed broadcasting freedoms.

BVerfG, Beschluss des Ersten Senats vom 22. Dezember 2020 (1 BvR 2756/20 - 1 BvR 2775/20 - 1 BvR 2777/20)

http://www.bverfg.de/e/rs20201222_1bvr275620.html

Federal Constitutional Court, ruling of the First Senate of 22 December 2020 (1 BvR 2756/20 - 1 BvR 2775/20 - 1 BvR 2777/20)

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