[DE] Federal Constitutional Court rules on Saxony-Anhalt's blocking of the public broadcasting fee increase

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In a decision published on 20 July 2021, the First Senate of the *Bundesverfassungsgericht* (Federal Constitutional Court – BVerfG) decided that, by failing to approve the *Erster Medienänderungsstaatsvertrag* (first amended state media treaty), the *Land* of Saxony-Anhalt had violated the freedom of broadcasting enjoyed by public broadcasters under Article 5(1)(2) of the *Grundgesetz* (Basic Law – GG). The provisions of Article 1 of the first amended state treaty – including the plan to increase the public broadcasting fee by EUR 0.86 from EUR 17.50 to EUR 18.36 proposed by the *Kommission zur Ermittlung des Finanzbedarfs der Rundfunkanstalten* (Commission for Determining the Financial Requirements of Broadcasters – KEF) – will be applied provisionally with effect from 20 July 2021 until new state treaty provisions governing the adequate funding of broadcasters ARD, ZDF and Deutschlandradio have entered into force.

The decision concerns the three-stage process used to determine the public broadcasting fee, which is based on the BVerfG decision of 22 February 1994: in the first stage, ARD, ZDF and Deutschlandradio submit their funding requirements based on their programming decisions. In the second stage, the KEF examines whether the programming decisions fall within the scope of the broadcasting mandate and whether the ensuing funding requirements have been calculated in accordance with the principles of efficiency and economy. In the third stage, the *Länder* determine the fee. The governments and parliaments of the *Länder* base their decision on the fee proposed by the KEF.

The KEF's latest proposal to raise the broadcasting fee for the 2021 to 2024 funding period was incorporated into the first amended state media treaty, which was signed by the heads of all 16 *Land* governments in June 2020. The treaty provided for the amendments to enter into force on 1 January 2021. During 2020, the legislative bodies of 15 *Länder* granted approval for the first amended state media treaty to be transposed into *Land* law. Saxony-Anhalt was the only *Land* not to approve the amended treaty by 31 December 2020, preventing its entry into force.

In its decision, the BVerfG points out that the state has a duty to provide public broadcasters with adequate funding, corresponding to the broadcasters'

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constitutional right to receive such funding. The state's duty to provide funding under Article 5(1)(2) GG is incumbent upon the *Länder* as a federal sharing of responsibility, whereby each *Land* bears joint responsibility. One special feature of this federal sharing of responsibility is that, while the *Länder* are responsible for passing legislation on the funding of public broadcasting, the way in which public broadcasting is currently organised and financed means that only inter-*Land* (i.e. nationwide) legislation can give effect to the fundamental rights protection afforded under Article 5(1)(2) GG. In the absence of any other agreement, state treaty provisions concerning adjustments to the public broadcasting fee can only enter into force with the unanimous approval of all 16 *Länder*. Within the federal sharing of responsibility, the *Länder* have to ensure that public broadcasting is properly funded, so each *Land* has a specific constitutional duty to act.

Turning to recent developments in the media landscape, the BVerfG stresses the growing significance of the role of public broadcasters in providing genuine, thoroughly researched information that distinguishes between fact and opinion, avoids distorting reality and does not focus on the sensational but rather serves as a counterweight that safeguards diversity and provides guidance. This is particularly true in times of increasingly complex information, on the one hand, and partisan viewpoints, filter bubbles, fake news and deep fakes on the other.

If a *Land* does not fulfil its share of the collective responsibility and the constitutional right to funding becomes impossible to satisfy as a result, this in itself constitutes a violation of the freedom of broadcasting. This is because broadcasting cannot presently be funded at the inter-*Land* (i.e. nationwide) level without approval from all the *Länder*. It follows that any justification for not fulfilling the constitutional right to funding must likewise be supported by all the *Länder* in order to be constitutionally tenable. Under the current system agreed upon by the *Länder*, it is not sufficient for one single *Land* to refuse to increase the fee – especially not without tenable justification. Saxony-Anhalt's argument that it had for years been trying in vain to persuade the other *Länder* to agree to structural reforms of public broadcasting does not justify deviating from the evaluation of the funding requirements. The state media treaty's adoption was not tied to any plans to structurally reform the public broadcasting organisations or to reduce the scope of programming on offer, and it would be constitutionally impermissible to pursue such objectives via the determination of the public broadcasting fee. Insofar as Saxony-Anhalt was aiming to identify further pandemic-related conditions that might be relevant to determining the broadcasting fee, it did not sufficiently describe any factual circumstances that could justify a deviation, nor did it explain what conclusions it had drawn therefrom.

The BVerfG refrained from ordering an increase in the public broadcasting fee with retroactive effect from 1 January 2021. An assessment of how the failure to adjust the fee has affected the public broadcasting organisations can be carried

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out using the process agreed in the state treaty. It should however be noted that under the current system, this would require a statement by the KEF and a new amended state treaty adopted with the unanimous approval of the *Länder*. Compensation requirements arising from the failure to adjust the fee would have to be taken into account. The complainants are generally entitled to such additional compensatory funding. When the public broadcasting fee is next determined, the legislator must take the need for compensation into account. The additional funding required by the public broadcasters as a result of investments being postponed and essential reserves being used up will have to be taken into consideration. It will also be necessary to examine how the COVID-19 pandemic might have affected the public broadcasters' funding requirements and whether fee increases would be reasonable for the general public.

Beschluss des BVerfG

https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2021/07/rs20210720_1bvr275620.html

Pressemitteilung des BVerfG

https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/DE/2021/bvg21-069.html;jsessionid=B6C3C24A912D5EA00FC0328C72B71930.2_cid386

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