[DE] NDR’s constitutional complaint concerning Tagesschau app rejected

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In a ruling issued on 23 February 2022 and published on 25 March 2022, the *Bundesverfassungsgericht* (Federal Constitutional Court – BVerfG) rejected a constitutional complaint lodged by Norddeutscher Rundfunk (NDR) regarding the admissibility of the Tagesschau app on the grounds that the complaint was inadmissible.

The dispute dates back to 2011, when eight newspaper publishers, in coordination with the *Bundesverband Digitalpublisher und Zeitungsverleger* (Federal Association of German Newspaper Publishers – BDZV), filed a complaint against ARD and NDR with the competition chamber of the *Landgericht Köln* (Cologne District Court). The complaint concerned the amount of written text contained in the Tagesschau app, i.e. its “press-like” character. The publishers argued that the free app, which was funded by the broadcasting licence fee, distorted competition. The *Medienstaatsvertrag* (state media treaty) and its predecessor, the *Rundfunkstaatsvertrag* (state broadcasting treaty), restricted the possibility for public-service broadcasters to provide press-like services on the Internet.

The courts upheld the complaint. In September 2016, the *Oberlandesgericht Köln* (Cologne Appeal Court – OLG) declared the Tagesschau app unlawful. In particular, the version of the app available on 15 June 2011 had been too press-like. In December 2017, the *Bundesgerichtshof* (Federal Supreme Court) confirmed this decision and ruled that it could not be the subject of any further appeal. In early 2018, NDR announced that it would file a constitutional complaint against the Cologne Appeal Court’s decision on the grounds that it had ignored essential aspects of broadcasting freedom.

The 2nd chamber of the First Senate of the BVerfG unanimously decided that the complaint was inadmissible because it did not meet the requirements contained in the *Gesetz über das Bundesverfassungsgericht* (Act on the Federal Constitutional Court) regarding the evidence that must be submitted following changes to the factual and legal situation after the complaint deadline. In particular, the NDR’s argument that the constitutional complaint was still admissible despite the amendment of telemedia law through the *22. Rundfunkänderungsstaatsvertrag* (22nd state treaty amending the state broadcasting treaty), which entered into force on 1 May 2019, was insufficient.

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The *22. Rundfunkänderungsstaatsvertrag* amended the public broadcasters' remit with regard to telemedia. For example, it relaxed the rules on the length of time for which telemedia content could be made available, and required the broadcasters to offer interactive communication and social media opportunities, as well as network the telemedia services they provided. The telemedia services provided by ARD, ZDF and Deutschlandradio must be primarily focused on moving images and sound, and text may not be in the foreground (they must not be press-like). A joint arbitration board was set up by public broadcasters and umbrella press organisations to deal with future disputes.

Since the BVerfG's decision cannot be appealed, the Federal Supreme Court's decision is now legally valid.

Beschluss des Bundesverfassungsgerichts

https://www.bundesverfassungsgericht.de/e/rk20220223_1bvr071718.html

Decision of the Federal Constitutional Court

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