[DE] Constitutional complaint about data reconciliation for licence fee collection unsuccessful

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In a ruling of 21 January 2022, the German *Bundesverfassungsgericht* (Federal Constitutional Court –BVerfG) rejected two constitutional complaints concerning the automatic, regular transfer of personal data from the German registration authorities to the *Landesrundfunkanstalten* (state broadcasting authorities) for the purpose of collecting the broadcasting licence fee. The complainants had claimed, *inter alia*, that their right to informational self-determination had been breached, but the BVerfG rejected the complaints on admissibility grounds.

The constitutional complaints had been lodged by two licence fee payers, who questioned the constitutionality of Article 11(5) of the *Rundfunkbeitragsstaatsvertrag* (state treaty on the broadcasting licence fee – RBStV) and the corresponding legislation implemented at state level in 2019 through the *23. Rundfunkänderungsstaatsvertrag* (23rd state treaty amending the state broadcasting treaty). The article states that, every four years, starting on a specific date in 2022, each German registration authority should automatically send to the relevant state media authority a series of data concerning all adults in standardised form (surname, first names and given name, previous names, doctorate, marital status, date of birth, addresses of current and previous main and secondary residences, including all available information about their location and the date they moved in). This requirement is designed to ensure the state broadcasting authorities have the latest information they need to collect the broadcasting licence fee. As soon as the data has been reconciled and the fee-payer's account settled, the state broadcasting authority must delete the data. In order to ensure proportionality between the fairness of the licence fee system and the protection of personal data, Article 11(5) RBStV also states that the data should not be transferred if the *Kommission zur Ermittlung des Finanzbedarfs der Rundfunkanstalten* (Commission for Determining the Financial Requirements of Broadcasters – KEF), in its two-yearly report on the financial situation of the state broadcasting authorities, finds that the existing database is sufficiently up to date.

The complainants argued that the article infringed their right to informational self-determination enshrined in Article 2(1) in conjunction with Article 1(1) of the *Grundgesetz* (Basic Law) (this fundamental right corresponds with the protection of privacy and personal data mentioned in other lists of fundamental rights, in a combination developed by the *Bundesverfassungsgericht*), firstly because it was

disproportionate, and secondly because it was inconsistent with the distribution of legislative powers. Indeed, it was a rule that should have been enshrined in registration law, for which the federal government was responsible, rather than media law, which fell under the remit of the *Bundesländer*. They also claimed that the principle of the clarity of legal rules had been breached because it was unclear what factors the KEF had to take into account when preparing its report.

However, the BVerfG rejected the constitutional complaints on the grounds that they were inadmissible and therefore had no chance of being upheld. Under the subsidiarity principle, before a constitutional complaint was lodged, all available procedural remedies must have been used in an effort to have the infringement corrected, or prevent a violation of fundamental rights. In the case at hand, the complainants should firstly have sought judicial protection from the administrative courts by applying for negative declaratory relief or an injunction. Such protection had already been available from the German administrative courts under the previous rules and, in the case at hand, applying for it did not seem either obviously pointless or without prospect of success. Clarification by a non-constitutional court would also – as a condition of the subsidiarity principle – have provided a more solid basis for a BVerfG decision: firstly, if such a court had established the facts (in principle, this is no longer the role of the BVerfG) concerning notification requirements and licence fee collection methods, it would have provided the basis for a decision on the alleged violation of a fundamental right, in particular with regard to proportionality. Secondly, a specialised court's interpretation of legal concepts that were open to interpretation, for example in relation to the KEF report, would have helped to establish whether the reconciliation of registration data was necessary and appropriate.

Under these circumstances, the BVerfG was not required to examine any further the formal and substantive complaints concerning Article 11(5) RBStV.

BVerfG, Beschluss der 2. Kammer des Ersten Senats - 1 BvR 1296/21

http://www.bverfg.de/e/rk20220121_1bvr129621.html

Federal Constitutional Court, decision of the 2nd chamber of the First Senate - 1 BvR 1296/21