

## Headnotes

to the Judgment of the First Senate of 25 March 2014

– 1 BvF 1/11 –

– 1 BvF 4/11 –

1. Pursuant to the second sentence of Article 5 section 1 of the Basic Law, the institutional set-up of the supervisory bodies of public broadcasting corporations is to be guided by the principle of ensuring diversity. This means, that persons with as wide a variety of perspectives and horizons of experience as possible, from all areas of the community, are to be included.
  - a. In the composition of the collegial bodies, the legislature must see to it that the widest possible variety of groups are represented and that, apart from major associations that govern public life, smaller groupings are included in an alternating manner, and perspectives which are not organised in a coherent structure are also presented.
  - b. In order to ensure diversity, the legislature may, apart from members who are nominated by specific groups in society, also include members of different levels of government.
2. As an expression of the principle of ensuring diversity, the organisation of public broadcasting must adhere to the principle of detachment from state authority (*Staatsferne*). Accordingly, the influence of the members who are part of state authority or close to it must be strictly limited.
  - c. The total share of members who are part of state authority or close to it may not exceed one-third of the statutory members of the respective body.
  - d. For the rest of the members, the composition of the supervisory bodies of public broadcasting corporations must be consistently structured in a way that is detached from state authority. Representatives of the executive may not have a controlling influence on the selection of the members who are detached from state authority; the legislature must create incompatibility rules that ensure that on the personal level, these persons are detached from state authority.

FEDERAL CONSTITUTIONAL COURT

– 1 BvF 1/11 –

– 1 BvF 4/11 –

Pronounced

on 25 March 2014

Sommer

*Amtsinspektorin*

as Registrar of the Court Registry



**IN THE NAME OF THE PEOPLE**

**In the proceedings**

**on the constitutional review of**

1. whether
  - a) Art. 1 § 1 of the Act on the Inter-state Treaty on Broadcasting in Unified Germany and on the Treaty on the European Culture Channel (*Gesetz zu dem Staatsvertrag über den Rundfunk im vereinten Deutschland und zu dem Vertrag zum Europäischen Fernsehkanal*) of 19 November 1991 (Law Gazette Baden-Wuerttemberg, *Gesetzblatt Baden-Württemberg* – GBl. BW p. 745),
  - b) the Resolution of Approval (*Zustimmungsbeschluss*) of the Bavarian *Landtag* on the Inter-state Treaty on Broadcasting in Unified Germany of 12 December 1991 (Bavarian *Landtag*, Printed Paper, *Bayerischer Landtag, Drucks 12/4324* p. 1),
  - c) § 1 of the Act on the Inter-state Treaty on Broadcasting in Unified Germany of 31 August 1991 and on Article 36 of the Unification Treaty (*Einigungsvertrag*) of 19 December 1991 (Law and Ordinance Gazette, *Gesetz und Verordnungsblatt* – GVBl p. 309) <Berlin> ,
  - d) § 1 of the Act on the Inter-state Treaty on Broadcasting in Unified Germany of 6 December 1991 (GVBl I p. 580) <Brandenburg> ,
  - e) Art. 1 § 1 sec. 1 of the Act on the Inter-state Treaty on Broadcasting in Unified Germany and on the Treaty on the European Culture Channel of 17 September 1991 (GBl p. 273) <Bremen> ,

- f) Art. 1 sec. 1 of the Act on the Inter-state Treaty on Broadcasting in Unified Germany of 16 December 1991 (GVBl p. 425) <Hamburg>,
- g) Art. 1 of the Act on the Inter-state Treaty on Broadcasting in Unified Germany of 13 December 1991 (GVBl p. 367) <Hesse>,
- h) § 1 sec. 1 of the Act on the Inter-state Treaty on Broadcasting in Unified Germany of 5 December 1991 (Law and Ordinance Gazette Mecklenburg-Western Pomerania, *Gesetz und Verordnungsblatt für Mecklenburg-Vorpommern* – GVOBl M-V p. 494),
- i) Art. 1 sec. 1 of the Act on the Inter-state Treaty on Broadcasting in Unified Germany of 26 November 1991 (GVBl p. 311) <Lower Saxony>,
- j) the Resolution of Approval by the *Landtag* of North Rhine-Westphalia of the Inter-state Treaty on Broadcasting in Unified Germany of 14 November 1991 (Law Gazette for the *Land* North Rhine-Westphalia, *Gesetz- und Verordnungsblatt für das Land Nordrhein-Westfalen* – GV. NW p. 408),
- k) § 1 of the *Land Act (Landesgesetz)* on the Inter-state Treaty on Broadcasting in Unified Germany of 10 December 1991 (GVBl p. 369) <Rhineland-Palatinate>,
- l) Art. 1 sec. 1 of Act No. 1279 on the Approval of the Inter-state Treaty on Broadcasting in Unified Germany of 29 October 1991 (Official Gazette of the Saarland, *Amtsblatt des Saarlandes* – ABI p. 1290) <Saarland>,
- m) Art. 1 of the Act on the Inter-state Treaty on Broadcasting in Unified Germany of 19 December 1991 (Law and Ordinance Gazette of Saxony, *Sächsisches Gesetz- und Verordnungsblatt* – SächsGVBl p. 425),
- n) Art. 1 sec. 1 of the Act on the Inter-state Treaty on Broadcasting in Unified Germany of 12 December 1991 (Law and Ordinance Gazette of the *Land* Saxony-Anhalt, *Gesetz und Verordnungsblatt für das Land Sachsen-Anhalt* – GVBl LSA p. 478),
- o) Art. 1 sec. 1 of the Act on the Inter-state Treaty on Broadcasting in Unified Germany and to Amend the *Land* Broadcasting Act (*Landesrundfunkgesetz*) of 12 December 1991 (Law and Ordinance Gazette of Schleswig-Holstein, *Gesetz und Verordnungsblatt für Schleswig-Holstein* – GVOBl Schl.-H. p. 596),
- p) § 1 sec. 1 of the Act on the Inter-state Treaty on Broadcasting in Unified Germany of 18 December 1991 (GVBl p. 635) <Thuringia>

are incompatible with the fundamental freedom of broadcasting (Art. 5 sec. 1 sentence 2 Basic Law, *Grundgesetz* – GG) to the extent that the aforementioned acts and resolutions approve and order the application of the following provisions:

§ 20, § 21 sec. 1 letters a) to c), g) to r), sec. 3 sentences 1 and 2, sec. 4, sec. 6, sec. 8 sentence 2, sec. 10 sentence 2, § 22 sec. 1, § 23 sec. 1 sentence 1, sec. 2, sec. 3, sec. 4, § 24 sec. 1, sec. 3 sentence 2 in conjunction with § 21 sec. 10 sentence 2 applied analogously, § 25 sec. 2, § 26 sec. 1 sentences 1 and 2, sec. 3 sentence 1, § 27 sec. 2, § 28 of the Inter-state Agreement on the Establishment of the Public Corporation *Zweites Deutsches Fernsehen (ZDF-Staatsvertrag, ZDF State Treaty)*, (promulgated as Art. 3 of the *Staatsvertrag über den Rundfunk im vereinten Deutschland, Inter-state Treaty on Broadcasting in Unified Germany* of 31 August 1991 <GVBl p. 369>),

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- Representatives: 1) Prof. Dr. Karl-E. Hain,  
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**– 1 BvF 1/11 –**

2. whether

- a) Art. 1 § 1 of the Act on the Inter-state Treaty on Broadcasting in Unified Germany and on the Treaty on the European Culture Channel of 19 November 1991 (GBl. BW p. 745),
- b) the Resolution of Approval of the Bavarian *Landtag* on the Inter-state Treaty on Broadcasting in Unified Germany of 12 December 1991 (*Bayerischer Landtag*, Drucks 12/4324, p. 1),
- c) § 1 of the Act on the Inter-state Treaty on Broadcasting in Unified Germany of 31 August 1991 and on Article 36 of the Unification Treaty of 19 December 1991 (GVBl <BE> p. 309),

- d) § 1 of the Act on the Inter-state Treaty on Broadcasting in Unified Germany of 6 December 1991 (GVBl I p. 580) <Brandenburg>,
- e) Art. 1 § 1 sec. 1 of the Act on the Inter-state Treaty on Broadcasting in Unified Germany and on the Treaty on the European Culture Channel of 17 September 1991 (GBl p. 273) <Bremen>,
- f) Art. 1 sec. 1 of the Act on the Inter-state Treaty on Broadcasting in Unified Germany of 16 December 1991 (GVBl p. 425) <Hamburg>,
- g) Art. 1 of the Act on the Inter-state Treaty on Broadcasting in Unified Germany of 13 December 1991 (GVBl p. 367) <Hesse>,
- h) § 1 sec. 1 of the Act on the Inter-state Treaty on Broadcasting in Unified Germany of 5 December, 1991 (GVOBl M-V p. 494),
- i) Art. 1 sec. 1 of the Act on the Inter-state Treaty on Broadcasting in Unified Germany of 26 November 1991 (GVBl p. 311) <Lower Saxony>,
- j) the Resolution of Approval by the North Rhine-Westfalia *Landtag* of the Inter-state Treaty on Broadcasting in Unified Germany of 14 November 1991 (GV. NW p. 408),
- k) § 1 of the *Land* Act on the Inter-state Treaty on Broadcasting in Unified Germany of 10 December 1991 (GVBl p. 369) <Rhineland-Palatinate>,
- l) Art. 1 sec. 1 of the Act No. 1279 on the Approval of the Inter-state Treaty on Broadcasting in Unified Germany of 29 October 1991 (ABl p. 1290) <Saarland>,
- m) Art. 1 of the Act on the Inter-state Treaty on Broadcasting in Unified Germany of 19 December 1991 (SächsGVBl p. 425),
- n) Art. 1 sec. 1 of the Act on the Inter-state Treaty on Broadcasting in Unified Germany of 12 December 1991 (GVBl LSA p. 478),
- o) Art. 1 sec. 1 of the Act on the Inter-state Treaty on Broadcasting in Unified Germany and to Amend the *Land* Broadcasting Act of 12 December 1991 (GVOBl Schl.-H. p. 596),
- p) § 1 sec. 1 of the Act on the Inter-state Treaty on Broadcasting in Unified Germany of 18 December 1991 (GVBl p. 635) <Thuringia>

are incompatible with the fundamental freedom of broadcasting (Art. 5 sec. 1 sentence 2 GG) insofar as the aforementioned acts and resolutions contain the approval and the order on the application of the provisions contained in

§ 20, § 21 sec. 1 letters a) to c), g) to r), sec. 3 sentences 1 and 2, sec. 4, sec. 6, sec. 8 sentence 2, sec. 10 sentence 2, § 22 sec. 1, § 23 sec. 1 sentence 1, sec. 2, sec. 3, sec. 4, § 24 sec. 1, sec. 3 sentence 2 in conjunction with § 21 sec. 10 sentence 2 analogue, § 25 sec. 2, § 26 sec. 1 sentences 1 and 2, sec. 3 sentence 1, § 27 sec. 2, § 28 of the ZDF State Treaty (promulgated as Art. 3 of the Inter-state Treaty on Broadcasting in Unified Germany of 31 August 1991 <GVBl p. 425>),

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**– 1 BvF 4/11 –**

the Federal Constitutional Court – First Senate –  
with the participation of Justices

Vice-president Kirchhof,  
Gaier,  
Eichberger,  
Schluckebier,  
Masing,  
Paulus,  
Baer,  
Britz

held on the basis of the oral hearing of 5 November 2013:

## JUDGMENT:

1. The acts and resolutions of the *Laender* (federal states) approving the Inter-state Broadcasting Treaty of 31 August 1991 are incompatible with Art. 5 sec. 1 sentence 2 of the Basic Law, insofar as they incorporate § 21 sec. 1, sec. 4, sec. 10 sentence 2, § 24 sec. 1, sec. 3 sentence 2 alternative 1 ZDF-State Treaty into *Land* law as Article 3 of the Inter-state Broadcasting Treaty of 21 August 1991 in the version of the 15th Amendment to the Inter-state Broadcasting Treaty of 15, 17, 21 December 2010.
2. They are compatible with the Basic Law insofar as they incorporate § 21 sec. 8 sentence 2, § 22 sec. 1, § 25 sec. 2, § 26 sec. 1 sentence 2, sec. 3 sentence 1 half-sentence 2 ZDF-State Treaty into *Land* law as Article 3 of the Inter-state Broadcasting Treaty of 31 August 1991 in the version of the 15th Amendment to the Inter-state Broadcasting Treaty of 15, 17, 21 December 2010.
3. They are compatible with the Basic Law in accordance with the reasons of this decision insofar as they incorporate § 21 sec. 3 sentences 1 and 2, sec. 6 ZDF-State Treaty into *Land* law as Article 3 of the Inter-state Broadcasting Treaty of 31 August 1991 in the version of the 15th Amendment to the State Broadcasting Treaty of 15, 17, 21 December 2010.
4. Insofar as the aforementioned acts and resolutions are incompatible with the Basic Law, the *Laender* are obligated to establish new constitutional legislation meeting the requirements of the Basic Law in accordance with the reasons presented here by 30 June 2015 at the latest. Until the new legislation is established, they may also still be used in this respect.

### Reasons :

#### A.

The applications for abstract judicial review concern the question of whether the regulations on the composition of and the passing of resolutions by the supervisory bodies of the *Zweites Deutsches Fernsehen* (ZDF) allow excessive state influence in the ZDF as a public broadcasting corporation (*öffentlich-rechtliche Rundfunkanstalt*).

1

#### I.

1. The ZDF broadcasting corporation is founded on the ZDF State Treaty (hereinafter: ZDF-StV), which [...] entered into force upon [...] Acts of Approval of the *Laender* [...].

2

2. Apart from the *Intendant* (Director General), who, as the central organ, manages

3

the business of the corporation and has the ultimate responsibility for the programming, the Treaty establishes two internal supervisory bodies with different tasks: the Television Council and the Administrative Council.

The tasks of the Television Council include primarily enacting guidelines for the programming – in general and in abstract terms –, monitoring compliance with these guidelines and the general programming principles regulated in the State Treaty, advising the *Intendant* with regard to programming matters as well as the final approval of the budget. The Television Council also elects the *Intendant* with a three-fifths majority of its statutory members.

Tasks of the Administrative Council include, in particular, the supervision of the business activity of the *Intendant*. It decides on the contract of employment with the *Intendant* as well as the budget set by the *Intendant*, and it adopts the financial regulation. [...] With the approval of the Television Council, the Administrative Council can also dismiss the *Intendant*, for which a three-fifths majority of the statutory members in both bodies is required.

3. The Television Council consists of one representative of each of the 16 *Laender*, three representatives of the Federation, twelve representatives of the political parties, distributed according to their relative strength in the *Bundestag*, five representatives of recognized religious communities, 25 representatives of associations that are individually determined by law – such as trade union federations, employers' associations, charitable associations, but also municipal umbrella organisations and self-governed bodies – as well as 16 representatives of various, only collectively and generally described areas of the community (§ 21 sec. 1 ZDF-StV). The *Laender*, the Federation, political parties and religious communities each appoint their own representatives to the Television Council. The representatives of the associations as well as the representatives of what is generally described as areas of the community are appointed to the Television Council by the Prime Ministers of the *Laender* – “unanimously wherever possible” (§ 21 secs. 3, 4 and 6 ZDF-StV). For this, the representatives of the associations are selected by the Prime Ministers from a list prepared by the associations consisting of three proposed candidates (§ 21 sec. 3 sentence 2 ZDF-StV). The representatives of the generally described areas of the community are appointed directly by the Prime Minister. More detailed requirements in this respect do not exist (§ 21 sec. 4 ZDF-StV). With the exception of the representatives delegated by the *Laender* and the Federation, the members of the Television Council may not at the same time be members of a Federal or *Land* government (§ 21 sec. 8 sentence 2 ZDF-StV).

The Administrative Council consists of five representatives of the *Laender*, one representative of the Federation as well as eight representatives that are elected by the members of the Television Council by a majority of three-fifths of the statutory members (§ 24 sec. 1 ZDF-StV). The members elected by the Television Council can neither be part of a government nor of a legislative body (§ 24 sec. 1 b second half-



sentence ZDF-StV).

[...] The members of neither body are bound by instructions in their activities (§ 21 sec. 9 sentence 1, § 24 sec. 5 ZDF-StV). The representatives of the Federation, the *Laender*, the political parties and the religious communities in the Television Council as well as the members of the Administrative Council can be dismissed at any time (§ 21 sec. 10 sentence 2, § 24 sec. 3 sentence 2 ZDF-StV). 8

4. [...] 9-10

5. [...] 11

6. [...] 12-17

## II.

With their application for judicial review, the applicants challenge what they regard as excessive state influence in the Television Council and the Administrative Council. If interpreted properly, their claim is that the acts and resolutions approved by the *Laender* incorporating the ZDF State Treaty as Article 3 of the Inter-state Broadcasting Treaty of 31 August 1991 into the law in each *Land* [...] are incompatible with the fundamental freedom of broadcasting enshrined in Art. 5 sec. 1 sentence 2 Basic Law (*Grundgesetz* – GG). 18

[...] 19-23

## III.

[...] 24-31

## B.

The applications are admissible and for the most part well-founded. 32

## I.

Art. 5 sec. 1 sentence 2 GG requires public broadcasting to be organised in a manner that ensures diversity and, as consequence thereof, maintains sufficient detachment from state authority (*Staatsferne* [independence from state influence, literally: distance to the state]). 33

1. The freedom of broadcasting serves the free formation of individual and public opinion. The mandate to guarantee the freedom of broadcasting, enshrined in Art. 5 sec. 1 sentence 2 GG, is aimed at establishing a system that ensures that the diversity of existing opinions is presented in broadcasting as broadly and comprehensively as possible. It is for the legislature to design this system, and the legislature has broad leeway for this (cf. Decisions of the Federal Constitutional Court, *Entscheidungen des Bundesverfassungsgerichts* –BVerfGE 12, 205 <262 and 263>; 119, 181 <214>; 121, 30 <50>; established case-law). The special responsibility of the state in 34

ensuring diversity in this area results from the pronounced significance that broadcasting, and especially television, have, owing to their wide-reaching effect, their currency and their power of influence, and especially to the fact that content can be transmitted quickly, even simultaneously, and sound, text and moving pictures can be combined with one another in the process. Their potential impact is all the more significant due to the fact that new technologies have increased the amount and variety of what is on offer and of the forms and ways of transmission as well as enabled innovative program-related services (BVerfGE 119, 181 <215>). The requirements related to the legislative design of the public broadcasting system for safeguarding the freedom of broadcasting within the meaning of Art. 5 sec. 1 sentence 2 GG are therefore not rendered obsolete by the development of communication technology and media markets (cf. BVerfGE 121, 30 <51>).

2. Under constitutional law, the requirements placed on the institutional set-up of the public broadcasting corporations must be in line with the aim of ensuring diversity (cf. BVerfGE 57, 295 <320, 325>; 73, 118 <152 and 153>; 121, 30 <51>). These requirements are closely related to the legislature's fundamental decision in favour of a dual [public and private] broadcasting system and the tasks that are assigned to public broadcasting within this system (cf. BVerfGE 73, 118 <157 and 158>; 83, 238 <296 et seq.>; 114, 371 <387 and 388>; 119, 181 <217 and 218>; 121, 30 <51 and 52>).

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Within the framework of the dual broadcasting system, public broadcasting and its fulfilment of the classical functional mandate of broadcasting coverage are of particular importance. As a counterweight to private broadcasters, its task is to provide a range of services selected using a different rationale than market incentives, thus opening up different programming possibilities. It is to contribute to the diversity of content in a manner that cannot be provided by the free market alone (cf. BVerfGE 73, 118 <158 and 159>; 74, 297 <325>; 83, 238 <297 and 298>; 90, 60 <90>; 114, 371 <388 and 389>; 119, 181 <216>). Journalistic and economic competition does not automatically lead to broadcasting programming that depicts the full diversity of information, experience, values and behavioural patterns present in society. Furthermore, due to a considerable force of concentration in private broadcasting and the related risk of one-sided influence on the formation of public opinion, the Federal Constitutional Court has considered it necessary [for the legislature] to take precautions to protect journalistic diversity (BVerfGE 119, 181 <217> with further references).

36

One purpose of public broadcasting is to supplement and to balance private broadcasting's own specific rationale. Given that it is at least for the most part publicly financed, this enables it to act under different financial conditions. On this basis, it can and should contribute to the diversity of what is offered by means of its own impulses and perspectives, and offer programming that meets the constitutional requirements of content and opinion-related diversity, independent from audience ratings and advertising contracts (cf. BVerfGE 90, 60 <90>; 119, 181 <219>). In doing so, it must in particular also address issues that go beyond the standard formats of broadcasting for a mass audience, or it must give these its own touch. At the same time, the juxta-

37

position of the different rationales for decisions in private and public broadcasting can influence each other (cf. BVerfGE 114, 371 <387 and 388>; 119, 181 <217>). Given its significance, the mandate of public broadcasting is not restricted to providing a minimum supply or to filling gaps and niches that are not covered by private providers. Instead, it covers the breadth of the classical mandate of broadcasting in its entirety, which includes a cultural responsibility, in addition to its role of forming opinions and wills and in addition to providing entertainment and information (cf. BVerfGE 73, 118 <158>; 119, 181 <218>), and thereby addresses the entire public (cf. BVerfGE 83, 238 <298>). In the process, its programme offering must remain open toward new audience interests or new content and forms, and it may also not be limited to a certain level of technical development (cf. BVerfGE 74, 297 <324 and 325, 350 and 351>; 83, 238 <298, 299 and 300>; 119, 181 <218>).

3. Based upon this mandate of public broadcasting, the ZDF's set-up as a public broadcasting corporation - with an internally pluralistic structure in which the influence of the relevant currents is exercised internally within a framework of collegial bodies and substantively involving civil society - is not constitutionally objectionable (cf. BVerfGE 12, 205 <261 et seq.>; 83, 238 <333>; established case law). It does not leave the management of business to the *Intendant* alone but rather integrates him into the comprehensive supervision by pluralistically composed bodies and thereby subjects him to review. If such an internally pluralistic model is chosen to guarantee that public broadcasting ensures diversity, the detailed set-up of the organisation must also follow this functional mandate.

a) Here in particular, what is needed is a determination and balancing of those relevant currents within the decision-making bodies that must be both appropriate and bear in mind societal diversity, as well as the safeguarding of effective influence regarding the exercise of the mandate of broadcasting by those organs in which these are represented (cf. BVerfGE 12, 205 <261 and 262>; 57, 295 <325>; 83, 238 <334>). The composition of the collegial bodies must be aimed at bringing together persons from all areas of the community with perspectives and horizons of experience as diverse as possible. Here, the legislature must see to it in particular that not primarily official perspectives and other perspectives that are decisive for the formation of opinions in state and politics are presented, but that a full range of perspectives of diverse societal currents comes into play in a significant way (cf. on the contents of programming: BVerfGE 83, 238 <333 and 334>). In appointing the members of the collegial bodies, the legislature must see to it that the widest possible variety of groups are represented and that, in addition to major associations that govern public life, smaller groupings that do not *per se* have access to the media are included in an alternating manner, and perspectives that are not organised in a coherent structure are also presented. The organisation of public broadcasting with regard to the composition of the bodies therefore must be based on the mandate of ensuring programming diversity above and beyond what is offered by the private sector (cf. BVerfGE 60, 53 <66>; 83, 238 <334>). In this context, the legislature must also take into ac-

38

39

count the mandate of gender equality under Art. 3 sec. 2 sentence 2 GG (cf. BVerfGE 83, 238 <336>).

Constituting supervisory bodies from groups in society that are mainly organised in associations is not intended to transfer the task of creating programming to those groups or, even less, to attribute to them the fundamental right of broadcasting. Instead, the supervisory bodies are advocates of the interest of the general public. They should supervise the people and bodies responsible for programming to ensure that all important political, ideological, and societal currents, whose diversity – even if the composition is balanced – can never completely or representatively be reflected in a pluralistic body, are appropriately given a voice in the overall programming. The fact that members are nominated according to their affiliation to specific groups in society does not mean that they are appointed as representatives for their respective specific interests, but instead serves only as a means to obtain advocates for the general public who are independent from state organs, contribute their experiences from different areas of society, and therefore see to it that the programme does not unilaterally serve a single party, group, interest group, faith or ideology and that the programming takes into account the opinions of all affected persons, groups or agencies fairly and appropriately (BVerfGE 83, 238 <333>).

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b) To ensure that the bodies are composed in a way that combines various perspectives, the legislature may, in addition to members who are nominated by specific groups in society, set aside a contingent for representatives of the state (cf. BVerfGE 12, 205 <263>; 73, 118 <165>; 83, 238 <330>). In a democracy, it is precisely these actors who are particularly dependent on open, multifaceted and critical reporting, and are at the same time a defining element of a democratic community. In accordance with their overall political responsibility, they themselves can also introduce elements of public interest into the work of the public broadcasting corporations. Therefore, given the constitutional requirement of ensuring diversity, it is permissible for representatives of the *Laender* to also be appointed to the bodies of the public broadcasting corporations, particularly since they are also familiar with the functioning, challenges and problems of these institutions from an insider's point of view. This includes – to a strictly limited extent – the possibility of appointing representatives from the executive, even at the rank of a *Land* Prime Minister. Ensuring diversity in this context does not mean isolating a separate societal sphere in juxtaposition to the state, and protecting it as far as possible from the influence of state representatives – this would indeed be inconsistent with the participation of any state actors at all –, but rather means putting forward the different perspectives of the community as a whole. The legislature is not prevented from also appointing state representatives.

41

In view of the question regarding the levels of government from which representatives can be appointed to the broadcasting corporations, the element of ensuring diversity is also decisive. State representatives are not appointed in order to provide them with the option of unilaterally authoritatively enforcing decisions in the exercise of their own sovereign competence, but rather in view of including various perspec-

42

tives and creating diverse links within public broadcasting. Therefore, representatives of all levels of government – including for instance the Federation, the local authorities or certain self-governed bodies – can be appointed to become members in bodies of broadcasting corporations irrespective of specific powers related to broadcasting. In view of the overarching aim of ensuring diversity, perspectives as diverse as possible must be taken into account in the composition of group of representatives of the state.

4. The organisation of public broadcasting must, resulting from the requirement to ensure diversity, also adhere to the requirement of detachment from state authority (*Staatsferne*), which is a specific manifestation of the diversity requirement and provides it with more detailed contours (cf. BVerfGE 12, 205 <261 et seq.>; 57, 295 <320>; 83, 238 <296>). In accordance with it, public broadcasting – under the current broadcasting system – requires an institutional set-up in which the supervisory bodies responsible for the fundamental decisions regarding broadcasting policies and thus also for the programming guidelines are not subject to a controlling influence by those members who are part of state authority or close to it (cf. BVerfGE 83, 238 <330>; 121, 30 <61>).

43

a) The requirement of detachment from state authority does not, however, place public broadcasting beyond the sphere of the state's responsibilities. Rather, it ties in with the state's structural responsibility for broadcasting and presupposes its existence. Thus, within the framework of the dual broadcasting system, it is the duty of the legislature to shape public broadcasting. In particular for fulfilling its functional mandate, the legislature must ensure that the necessary technical, organisational, staffing and financial requirements are met (cf. BVerfGE 119, 181 <218>). Accordingly, the legislative bodies of the *Laender* regulate the organisation of the public broadcasting corporations, determine according to which principles which persons work together, and specify who is allowed to shape the content of the programming and in what way, which programming principles apply, and how plurality can be ensured in the process (cf. BVerfGE 12, 205 <261 et seq.>; 57, 295 <320 et seq.>; 83, 238 <332 et seq.>; 90, 60 <94>). This organises broadcasting in the form of a public broadcasting corporation, which is financed, in significant part, by the state (cf. BVerfGE 73, 118 <158>; 90, 60 <90 and 91>). Overall, the institution of public broadcasting, within the scope of the broadcasting system created by the legislature, does not present itself merely as a manifestation of a public-policy framework for exercising private freedom – as is in principle the case with private broadcasting (cf. BVerfGE 57, 295 <324 and 325>) – but instead as an organisation for broadcasting and reporting which is shaped by the state and for which the state takes responsibility. Here, the state has more than a mere supplementary responsibility to regulate, in contrast to economic areas, which are usually left to the private sector; it acts directly as a provider and organiser, which through its broadcasting corporations itself fulfils the functional mandate of public broadcasting (cf. BVerfGE 73, 118 <158>). Accordingly, the case-law of the Federal Constitutional Court on the composition of the broadcasting corporations never aimed

44

at shaping these, through a juxtaposition of state and society, as being entirely or even mostly free of the state, but always assumed the possibility of a certain and not merely marginal participation of state representatives within the broadcasting corporations (see above B. I. 3. b).

b) The requirement of detachment from state authority in particular touches upon the organisation and provision of services. It expresses a specific form of responsibility: the state must organise public broadcasting and fulfil the resulting mandate by means of its own broadcasting corporations; it must, however, see to it that the set-up of the programming and its specific content do not become part of the state's general exercise of its functions and are not set-up as part of these (cf. BVerfGE 12, 205 <262 and 263>; 73, 118 <182 and 183>; 83, 238 <322 and 323>; 90, 60 <89 and 90>). The aim is to create a broadcasting system that is bound by the principle of societal freedom and diversity but that is not shaped by the representatives and officials of the state machinery with regard to content (cf. BVerfGE 73, 118 <152 and 153>; 90, 60 <88>).

45

The organisation of the bodies relevant for fulfilling the functional mandate must be kept separate from the process of state-representative formation of opinions and must be shaped in a way that reflects the diversity of the community and societal plurality. The state only carries a structural responsibility and is limited to its fulfilment. Its responsibility is not part of or a preliminary stage of a full content-related responsibility. Rather, it is in opposition to state responsibility for specific programming. While the provision of public services generally serves to ensure content-related quality for which politically accountable officials are responsible, and thereby serves to select among a variety of possibilities the one specifically serving the public good, the issue here is to maintain a distance between broadcast coverage and the excessive shaping of content by the appointed officials who are usually called to action. In this respect, quality does not develop through aggregation of divergent interests by the state but by keeping open divergence and diversification. The requirement of detachment from state authority aims at presenting, processing and interpreting reality as it is reflected in the diverse views and numerous divergences in society.

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c) The requirement to set up public broadcasting in a manner detached from state authority is also and primarily intended to prevent the political instrumentalisation of broadcasting (cf. BVerfGE 90, 60 <88>; 121, 30 <53>). Unilateral political influence within the sphere of the state's exercise of power must be counteracted by appropriate institutional and procedural precautions (cf. BVerfGE 73, 118 <182 et seq.>; 83, 238 <322 and 323>; 90, 60 <88 et seq., 93 et seq.>). Consequently, the bodies of the public broadcasting corporations must be shaped in a way which prevents broadcast coverage from being influenced by actors from the political sphere or actors close to state authority who seek to promote their own interests or specific agendas, in particular those of political-parties. The composition of the bodies must already effectively prevent the possibility of having such actors instrumentalise broadcasting coverage. Such a prohibition of instrumentalisation has always been at the core of the Federal

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Constitutional Court's case-law on the freedom of broadcasting (cf. BVerfGE 12, 205 <262>; 31, 314 <325>; 90, 60 <88>; 121, 30 <53>).

d) In summary, the requirement of detachment from state authority thus requires a set-up of public broadcasting which – guided by the aim of ensuring diversity and at the same time of preventing the political instrumentalisation of broadcasting – allows members of the supervisory bodies who are detached from state authority to have a controlling influence and limits the possible participation of members who are part of state authority or close to it.

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5. These requirements meet the requirements of the European Convention on Human Rights (ECHR). According to the interpretation of the European Court of Human Rights (ECtHR), Art. 10 ECHR requires the member states to statutorily ensure diversity in broadcasting and to not undermine this obligation by allowing one significant economic or political group or the state to have a dominant position over a broadcasting corporation or within a broadcasting corporation and thereby exert pressure on the organisers (cf. ECtHR, *Manole and Others v. Moldova*, no. 13936/02, §§ 95 to 102; ECtHR (Grand Chamber), *Centro Europa 7 S.r.l. and Di Stefano v. Italy*, Judgment of 7 June 2012, no. 38433/09, *Neue Zeitschrift für Verwaltungsrecht*, *Rechtsprechungs-Report*, NVwZ-RR 2014, p. 48 <52 and 53>, §§ 129 et seq.; each referring to resolutions and recommendations of the Committee of Ministers of the Council of Europe).

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## II.

The detailed set-up of public broadcasting is principally a matter for the legislature. Within the current broadcasting system, however, the requirement to ensure diversity and the requirement of detachment from state authority impose constitutional limits on the set up of the supervisory bodies.

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1. The influence of members in the supervisory bodies of public broadcasting corporations who are part of state authority or close to it must be strictly limited. Their share may not exceed one-third of the statutory members of the respective body.

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a) According to the current usual legislative set-up, the supervision of the public broadcasting corporations – necessary to guarantee the fulfilment of the broadcasting mandate – is ensured by establishing an Administrative Council and a Television or Broadcasting Council. These supervisory bodies have far-reaching duties, both with regard to programming as well as the overall supervision of the management, that are of fundamental importance for the fulfilment of the functional mandate of the broadcasting corporations (cf. BVerfGE 60, 53 <65>). The scope of these powers, which also affect the content of broadcasting coverage, correlates with the strict requirements of their pluralistic composition (cf. BVerfGE 12, 205 <261 and 262>; 60, 53 <65 and 66>). Their set-up meets the requirements of ensuring diversity and satisfies the requirement of detachment from state authority only if these bodies reflect a broad diversity of social dynamics and if a controlling influence of members who are part of

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state authority or close to it is effectively ruled out (cf. BVerfGE 12, 205 <261 and 262>; 60, 53 <65>; 83, 238 <332 and 333>).

b) The regulations allowing members who are part of state authority or close to it to make decisions as a whole or to block them is incompatible with the requirement of detachment from state authority. Notwithstanding all the differences between the various interests, the possibility of such concerted action must be excluded from the outset.

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c) However, the requirements are not exhausted herein. The requirement of detachment from state authority aims not only to prevent the possibility of concerted action by members who are part of state authority or close to it; the likelihood of such action should already be limited as far as possible by the pluralistic composition of these members. In fact, it aims to already limit in principle the influence of members whose perspective is shaped in a particular way by competition for public office and mandates and therefore is closely linked to overall political programmes. Here, the influence of state communication structures, in particular those which are structured along party lines and currently manifest in the “circles of friends”, must also be taken into account. In order to ensure that the members of the supervisory bodies who are part of state authority or close to it cannot *de facto* gain excessive influence via such informal bodies whose work cannot be effectively regulated, their share must already be strictly limited (cf. BVerfGE 12, 205 <263>). In any case, it must be significantly lower than the share of members who are detached from state authority [...].

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A controlling influence of the members who are part of state authority or close to it is, in this sense, sufficiently ruled out only if there are at least two members who are detached from state authority for each member who is part of state authority or close to it, and therefore the share of members who are part of state authority or close to it does not exceed one-third of the statutory members of the respective body [...]. This applies in equal measure to both supervisory bodies, as each of them has far-reaching capabilities for influencing broadcasting coverage. The Television or Broadcasting Council has these capabilities as a result of its directly programming-related supervisory function, and the Administrative Council has these as a result of its participation rights in decisions regarding the composition of the programming-defining management and because of its budget competences [...].

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If these bodies split up into committees to prepare their work, the same must apply to the composition of these committees. The decisions of the Television Council and the Administrative Council are to a large extent pre-determined in the significantly smaller committees. Against this background, there is the risk that composition requirements directed only at the entire bodies would remain mostly without effect. Therefore, the composition of the committees on the basis of the by-laws must also ensure that the one-third limit applying to members of the bodies who are part of state authority or close to it is also reflected in these committees. From an overall perspective, the requirement of detachment from state authority must be honoured and a suf-

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ficient pluralistic composition must also be taken into consideration when determining the chairs of the bodies and committees, which under the current legal situation of the Television Council of the ZDF also form a substantial part of the extended executive board that has emergency competences.

2. Whether a member is deemed part of state authority or close to it for the purposes of limiting their share, is determined on the basis of a functional approach. 57

The requirement of detachment from state authority is not linked to the fundamental distinction between individual freedom and state obligations, which, pursuant to Art. 1 sec. 3 and Art. 20 sec. 2 GG is decisive for fundamental rights to be binding and for the democratic legitimation of state authority (cf. in this regard BVerfGE 128, 226 <244 et seq.>), but derives instead from Art. 5 sec. 1 sentence 2 GG; its aim is to ensure a broadcasting system that is oriented towards diversity and prevents the political instrumentalisation of broadcasting (see B. I. 4. above). Therefore, the determination of who is to be considered a member appointed by the state in view of the limited share allowed requires a separate, functional consideration. The decisive criterion is whether the person has political decision-making power, or competes for a public office or mandate that entails such power, and thus in this respect particularly depends on the approval of a broader public. 58

a) Belonging to this group, firstly, are those who carry political responsibility in a public office with a general mandate, insofar as they can have an interest in instrumentalising broadcasting for their purposes of gaining or maintaining power. These are members of a government (cf. BVerfGE 73, 118 <182>; 83, 238 <323>), members of Parliament (cf. BVerfGE loc.cit.) and political appointees [...]. Furthermore, this category includes elected officials in leadership functions, notably mayors or district administrators. They also hold political decision-making powers and are directly subject to various conflicting political forces which compete to achieve and maintain public office and mandate. The same is true for other persons appointed to the supervisory bodies as representatives of the municipalities. Considering the wide range of tasks entrusted to municipalities, the representation of a municipality at least comes close to a general mandate (cf. BVerfGE 73, 118 <191>; 83, 238 <330>). 59

b) In contrast, persons who are appointed to the supervisory bodies from universities, from the judiciary or from self-governed bodies, such as for instance the chambers of industry and commerce, are not deemed part of state authority or close to it. Although these are people in public office, they act within their specific limited duties and thereby in part even enjoy a specially protected legal status and are typically not involved in political decision-making that is characterised by the competition for public office and mandates [...]. 60

c) In contrast, the group of members who are part of state authority or close to it and whose share must be limited does include persons who are delegated to the supervisory bodies by political parties. Political parties and their representatives are in principle not considered part of organised statehood and do not exercise state power. 61

However, from a functional perspective, in the present context they must be qualified as close to the state and are therefore equated to members who are part of state authority. Pursuant to Art. 21 sec. 1 GG, the political parties participate in the formation of the political will of the people (cf. BVerfGE 107, 339 <358 and 359> with further references). They essentially aim to hold governmental office and have the task of preparing and presenting the state's decision-making process by aggregating various positions and placing them in competition with one another. Persons appointed as representatives of political parties are therefore inevitably involved in political decision-making, involved in the competition for public office and mandates. Therefore, they are actors from the political sphere who are close to state authority, and their participation in the supervisory bodies must be limited (cf. BVerfGE 60, 53 <67>; 121, 30 <54 and 55> [...]).

3. The requirements to ensure diversity following from Art. 5 sec. 1 sentence 2 GG also apply to the selection of the members who are part of state authority or close to it (see B. I. 3. B above). Consequently, it is not sufficient to limit the number of these persons to a certain share. Rather, the members belonging to this share must be determined in accordance with the requirements of ensuring diversity. This means in particular that the different political currents, also in the sense of divergences between political parties, are represented with as great a diversity as possible. The different impact of the various currents can thereby be taken into account. However, it is in accordance with the principle of ensuring diversity to especially include small political currents. At the same time, the legislature must see to it that other differences in perspective, due for instance to the federal structure of Germany or of a functional nature, are taken into account with as great a diversity as possible [...]. Finally, the legislature as well as the delegating executive is bound by the mandate of gender equality under Art. 3 sec. 2 sentence 2 GG.

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The legislature has a broad margin of appreciation in how it ensures such diversity. It decides which criteria and different perspectives it will use to ensure diversity and how they relate to one another. In this process, it is also its responsibility to determine the size of the bodies and thereby set limits – potentially different ones for each body – to the possibilities of ensuring diversity in order to guarantee functionality. The Constitution does not provide any further details on this. The Federal Constitutional Court merely reviews whether the set-up is guided by the standard of ensuring diversity and if it, from a realistic perspective, leads to a justifiable result (cf. BVerfGE 83, 238 <334 and 335>).

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4. Beyond the constitutionally allowed share of members who are part of state authority or close to it, the composition of the supervisory bodies of public broadcasting corporations must be consistently structured in a way that is detached from state authority; here also, the composition of the bodies must be based on the principle of ensuring diversity.

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a) Constitutional requirements in this respect are first placed upon the appointment

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of members who are detached from state authority.

aa) Government members and other representatives of the executive may not have a controlling influence on the selection and appointment of members who are detached from state authority. 66

Given that Art. 5 sec. 1 sentence 2 GG implies that the bodies of the public broadcasting corporations be filled primarily with members who are detached from state authority, and in particular with representatives of civil society, it also demands rules for the selection and appointment of these persons which ensure a distance to the actors from the political sphere who are part of state authority or close to it. If the selection of persons detached from state authority would be significantly under the control of the governments, there would be a high risk that the forces of competition for office and mandate would have spill-over effects on selection, and it could increase the appeal in strengthening official and political perspectives by means of the selection of respective group representatives [...]. It is therefore not compatible with Art. 5 sec. 1 sentence 2 GG to let them select freely, or guided only by general rules with respect to walks of life, those persons who participate in the bodies as members who are detached from state authority [...]. Similarly, it must be ruled out that members of the government or other representatives of the executive are given substantial freedom with regard to the selection members to be appointed on the basis of suggestions from groups in society [...]. Insofar as specific groups in society are entrusted with the selection of members, their proposal may, at most, be rejected in exceptional cases with specific legal reasons for it. 67

bb) The regulations concerning the selection and appointment of the members who are detached from state authority must be guided by the aim of ensuring diversity. At the same time, the dangers of a dominance of majority perspectives and a petrification of the composition of the bodies must be counteracted. 68

(1) The requirement of ensuring diversity obliges the legislature to institute rules that take into account the present diverse social currents and forces in Germany and that are aimed at reflecting a wide diversity in the decision regarding which persons are to be included in the bodies of the broadcasting corporations as members who are detached from state authority. The institutional set-up must have the aim of having the members introduce perspectives, experiences and interpretations of reality as diverse as possible into the broadcasting corporations and thereby provide a multifaceted image of the community (cf. BVerfGE 12, 205 <261 and 262>; 60, 63 <65 and 66>; 83, 238 <332 and 333>). 69

However, it is not possible for representatives of individual groups to constitute a realistic reflection of society as a whole. Social reality is fragmented in a disorganized manner, presents itself in non-simultaneous manifestations, and is only in part reflected in established structures that can be a point of departure for the participation in a broadcasting corporation. In particular, the interests of the public are not identical with the sum of the interests organised in associations. Rather, there are interests that 70

cannot or can hardly be organised in associations. For this reason, representation through associations is always only an imperfect means for ensuring the representation of public interests (BVerfGE 83, 238 <335>). Representatives of various groups thus cannot realistically represent the various layerings and overlays in a modern society (cf. BVerfGE 83, 238 <334> [...]). To a large extent the selection of such representatives can only have a fragmentary character and is only in part linked to values derived from equality criteria (cf. BVerfGE 83, 238 <334 et seq.>). The model of group plurality thus already fundamentally differs from the representative representation of the people on the basis of an equal vote.

In light of this, the legislature has broad leeway to design the detailed rules regarding the composition of the bodies. The only decisive factor is that the chosen composition must be recognizably set up to ensure diversity and thereby is suitable for ensuring the freedom of broadcasting, and ensuring that it takes place free of arbitrariness as well as in compliance with additional requirements of the Basic Law, such as those under Art. 3 sec. 2 GG (cf. BVerfGE 83, 238 <334 and 335>). In the process, the criteria chosen for selection must be applied equally and must not be abandoned without an objective reason (cf. BVerfGE 83, 238 <336 and 337>).

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(2) Among the requirements that must be laid down in order to ensure diversity when granting group-specific rights for appointing representatives is the duty to counteract a dominance of majority perspectives as well as a petrification of the composition of the bodies of the broadcasting corporation.

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In view of the practical necessity of keeping the number of seats in the bodies limited, only few representatives can be appointed for the respective areas of society. There is the danger that the right to appoint a member will usually be granted to the largest and best-established association. This structurally runs the risk that in the respective areas, only the conventional majority perspectives of the associations which can best assert their interests will be considered, while smaller associations with other perspectives will not be taken into account (cf. also BVerfGE 83, 238 <334>). If the groups entitled to appoint members are finally determined and set out by law – potentially, too, within the framework of a state treaty that can only be modified with difficulty – there is additionally the risk of petrification of the composition of the bodies. Given the merely fragmentary selection of groups entitled to appoint representatives, there is basically a relationship of tension with respect to the aim of ensuring diversity and it hinders the consideration of smaller groups. Moreover, there is a risk that newer increasingly important social developments are not included [...].

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In this respect, too, it is for the legislature to institute a functional set-up for the broadcasting corporations and thereby to balance, in particular, the tension between continuity and flexibility. In doing so, it has a broad array of possibilities for regulating which are not outlined in detail under constitutional law, as is apparent from the different approaches taken in the state treaties regarding the regional broadcasting corporations. Thus, the legislature may not only provide for a formalized recurring obliga-

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tion to evaluate how up-to-date the composition of the broadcasting council is, but it may also, for example, allow applications by interested associations for certain seats in the supervisory bodies and allow the parliaments – under condition, for example, of qualified voting quorums – to select from these every new legislative period. The legislature is also free to develop completely different solutions. The constitution does not provide specific rules in this respect. It is merely a requirement that the legislature provide for some form of dynamic impetus with regard to the selection of associations entitled to appoint persons or other representatives from civil society and that it counteract the petrification of the bodies to ensure diversity.

b) Furthermore, constitutional requirements also apply with regard to the personal requirements for the members who are detached from state authority. The legislature must create incompatibility rules which ensure that these persons are detached from the state on the personal level.

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The requirement of a set-up both detached from state authority and ensuring diversity requires that the members responsible for the supervision of the broadcasting corporations stem predominantly from outside political circles in which there is democratic competition for achieving and maintaining office and mandate (see B. II. 1. c above). Therefore, the legislature must ensure that persons appointed to the supervisory bodies as members detached from state authority are also personally sufficiently distant from political decision-making. The mere fact that people are appointed by a group in society does not sufficiently ensure that they do not otherwise act as political actors close to state authority because of other personal engagements. [...] It is even possible that groups entitled to appoint may hope to achieve some benefits through such connections. However, the requirement of a broadcasting set-up that is detached from state authority aims to limit such interconnections. The same is true for persons appointed by election from another broadcasting body – such as from the Broadcasting or Television Council to the Administrative Council. In this respect, it makes no difference to which of the bodies the members who are detached from state authority belong. The principle of detachment from state authority applies equally to all supervisory bodies (see B. II. 1. c above).

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Similar to the determination of which persons are to be considered members who are part of state authority (see B. II. 2. above), incompatibility rules will firstly exclude persons who are members of governments, members of Parliament, political appointees, or elected officials in leadership functions from the group of broadcasting corporation members detached from state authority [...]. Even if such persons are delegated by groups in society, they continue to be influenced by being part of state authority or close to it, and they are hardly any less at risk of having conflicts of interest or being guided by one-sided communication interests than persons who are directly appointed to the bodies as officials.

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Persons who bear responsibility in a leading position for a political party must, however, also fall under the incompatibility rules. Under the Basic Law, the political parties

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have the task of pre-forming the political formation of opinions, to aggregate the different positions supported in public into overall concepts, and on this basis contribute substantially to appointments to state office. In doing so, their political formation of opinions spans the different levels of government, leading also to a vertical linking of the political discourses and developing different political alternatives. In the political competition for public office and mandates, they confront one another and thereby provoke processes of solidarisation or distinction which can also – even to a substantial extent – cover up differences or similarities for the sake of overall cohesion (cf. BVerfGE 20, 56 <101>; 44, 125 <145 and 146>; 85, 264 <285 and 286>; 107, 339 <358 and 359>; 121, 30 <54 and 55>). Admittedly, not every person who is merely a member of a political party or actively contributes to them is already included in these circles. However, whoever takes responsibility in a prominent function within these parties is inevitably involved in political decision-making and the competition for public office or mandates. Pursuant to the requirement of detachment from state authority pursuant to Art. 5 sec. 1 sentence 2 GG, such connections being granted an excessive weight within the work of the broadcasting corporations – for example also within informal bodies like the circles of friends – should be prevented. Corresponding incompatibility rules must contribute toward this.

It is a matter for the legislature to define in greater detail what constitutes such participation with prominent responsibility within a political party. One possibility would be to focus on public positions above the district or county level. The set-up of the incompatibility rules is also a matter for the legislature in other respects. In order to strengthen these rules, the legislature could consider a statutory period applicable to political officials, only at the end of which these can be appointed to broadcasting corporations as members who are detached from state authority. Overall, the legislature has a considerable margin of appreciation and generalisation when laying down the incompatibility rules for the members who are detached from state authority.

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5. For all members of the supervisory bodies of the public broadcasting corporations – both the members who are part of state authority or close to it, as well as the members detached from state authority – a sufficient protection of their personal legal position is required to ensure their independence in the exercise of their functions.

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Ensuring freedom of reporting according to Art. 5 sec. 1 sentence 2 GG presupposes that the persons responsible have sufficient personal freedom and independence in the exercise of their functions. The legislature must therefore secure the personal legal position of the members of the supervisory bodies of the broadcasting corporations in such a manner as to prevent that they may be put under pressure in an intransparent way by outside forces or be subject to unobjective influences. For this it is necessary that the members not be bound by instructions with respect to the exercise of their functions within the broadcasting corporation (cf. also BVerfGE 60, 53 <66>; 83, 238 <332 and 333, 335> [...]) and that they may only be dismissed for important reasons. It is for the legislature to set out the details.

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6. The legislature must enact regulations which ensure at least a minimum of transparency with regard to the work of the supervisory bodies of public broadcasting. 82

The requirement of transparency firstly derives from the requirements to have public broadcasting set up so that, in practice too, it is effectively detached from state authority; these requirements also ensure that the formation of opinions in the supervisory bodies is not allowed to be significantly influenced by the sphere of political decision-making or the competition for public office and mandates. If members who are directly part of state authority and political actors who are close to it can nevertheless be appointed to the bodies, this creates a tension that must be counteracted by sufficient transparency in the formation of opinions. Insofar as they are functionally compatible with the tasks of the respective bodies, actions and influences of the members of the broadcasting corporations who are part of state authority or close to it must be recognizable for the public as well as for the legislature which is responsible for the structure of the broadcasting corporations. 83

The nature of the task also presupposes a minimum of transparency. The supervision of the broadcasting corporations – which are to a large extent publicly financed – by pluralistic supervisory bodies that reflect the diversity of society and whose members, as advocates of the general public, see to it that broadcasting coverage – which pursuant to Art. 5 sec. 1 sentence 2 GG must satisfy to the full extent the classical mandate of broadcasting and address the whole population – is ensured, is a task that requires, at least with regard to its fundamental decisions, the possibility of public awareness. In this context, transparency can have a beneficial preemptive effect against agreements and influences that are contrary to proper functioning, and it can help to counteract tendencies of abuse of power or appropriation by vested interests at an early stage. In this respect, the public has a substantial supervisory function, which supplements the internal institutional supervision [...]. 84

The Constitution does not outline in detail the degree of transparency that is expedient for a proper exercise of functions. It is a matter for the legislature to create a balance within the bodies of public broadcasting between the principle of transparency with regard to the supervision of broadcasting and the requirement of confidentiality to ensure the proper working of the bodies. In particular, it is for the legislature to determine whether the bodies' meetings should adhere to the principle of being open to the public. It is only necessary to have rules that guarantee a minimum of transparency. This includes, however, easy access to information on the organisational structures, the composition of the bodies and committees, as well as upcoming agendas, and that, at least in principle, the minutes of the meetings be made available in a timely manner, or that the public receive substantial information on the subject matter and the results of the deliberations. 85

It is a matter for the legislature itself to make the fundamental decisions, in a formal statute, on the scope of transparency, as these constitute substantial elements of the institutional set-up of public broadcasting. In contrast, detailed specification of these 86

rules may be left to secondary legislation.

7. In summary, Art. 5 sec. 1 sentence 2 GG requires that the institutional set-up of the public broadcasting corporations be guided throughout by the principle of ensuring diversity, and that the share of members in the supervisory bodies who are part of state authority or close to it be strictly limited. This also serves as a precaution to prevent members who are part of state authority or close to it from dominating the work in the bodies through informal agreements, as is common practice within the circles of friends. Even if the members of the supervisory bodies split into two groups representing different main currents to prepare for upcoming decisions, as is currently the case, if the composition of the bodies is in conformity with the Constitution, it will no longer be simply automatically predetermined that these groups simply mirror the forces that otherwise oppose each other along party lines and that personally and objectively they will be guided by or dependent on these parties. In any case, informal prior arrangements cannot reduce or cut back participation and information rights that belong equally to all members. In particular, the *Intendant* is equally accountable to all members of the bodies, regardless of their affiliation with the “circles of friends”.

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### III.

The provisions of § 21 sec. 1, sec. 4, sec. 10 sentence 2, § 24 sec. 1, sec. 3 sentence 2 alternative 1 ZDF-StV which are incorporated into *Land* law are – also in their interaction with the other challenged provisions – not compatible with the Constitution. In contrast, there are no constitutional objections with regard to the other challenged provisions; however, § 21 sec. 3 sentences 1 and 2, sec. 6 ZDF-StV insofar requires an interpretation in conformity with the Constitution.

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1. The regulations concerning the composition of the Television Council pursuant to § 21 ZDF-StV violate Art. 5 sec.1 sentence 2 GG in several respects.

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a) First, to the extent that the allowable share of members appointed directly to the Television Council who are part of state authority or close to it exceeds the constitutional limit of one-third, § 21 sec. 1 ZDF-StV is incompatible with Art. 5 sec. 1 sentence 2 GG. According to the standards that have been described, the 16 representatives of the *Laender*, the three representatives of the Federation, the twelve representatives of the political parties, and the three representatives of local government constitute such persons (cf. § 21 sec. 1 a, b, c, I ZDF-StV). Taken together, they constitute a share of approximately 44 % of the members of the Television Council. This is not compatible with the requirements that have been described for ensuring a set-up of public broadcasting that is detached from state authority.

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b) Furthermore, the composition of the Television Council is incompatible with the requirement of detachment from state authority according to Art. 21 sec. 1 a, b, c, I ZDF-StV in its interaction with § 26 sec. 1 sentence 2, sec. 3, § 24 sec. 1 b ZDF-StV. The members who are part of state authority or close to it could potentially, by means of concerted action, achieve a veto position with regard to questions that are subject

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to the voting quorums regulated therein.

c) The participation rights of the *Land* Prime Ministers with regard to the appointment of persons to the Television Council as members who are detached from state authority – in particular as representatives of civil society – are partly inconsistent with Art. 5 sec. 1 sentence 2 GG. 92

aa) Only if it is interpreted in conformity with the Constitution are there no objections under constitutional law to § 21 sec. 3, sec. 6 ZDF-StV, pursuant to which those members who are detached from state authority, who are to be appointed pursuant to § 21 sec. 1 g to q ZDF-StV, shall be appointed by the *Land* Prime Ministers, unanimously wherever possible, on the basis of a proposal consisting of three candidates from the groups and organisations specified in these provisions. According to current practice, these provisions can, and must, be interpreted to mean that the Prime Ministers are generally bound by the corresponding lists of proposals, and that a deviation from the lists is only possible in case of specific legal reasons. Such a reduced participation of the Prime Ministers, limited to narrow supervisory powers, does not negate the distance from state authority of the members concerned (see B. II. 4. a) aa) above). 93

bb) In contrast, the appointment of the members mentioned in § 21 sec. 1 r ZDF-StV, who are selected, without any further stipulation, unanimously wherever possible by the Prime Ministers pursuant to § 21 sec. 4, sec. 6 ZDF-StV does not satisfy the requirements for the appointment of members who are detached from state authority. The selection decision here lies not with civil society groups or organisations that are detached from state authority but directly with the state executive. This does not ensure, as constitutionally required, that such members are sufficiently distant from the state. 94

The current practice also demonstrates that this does not constitute a set-up of supervisory bodies of public broadcasting that is detached from state authority. [...] 95

d) § 21 sec. 1 ZDF-StV also does not satisfy the requirements constitutional law places on ensuring a set-up detached from state authority to the extent that no sufficient incompatibility rules are provided with regard to members who are detached from state authority (see B. II. 4. b above). [...] 96

e) § 21 ZDF-StV also does not satisfy the requirements of Art. 5 sec. 1 sentence 2 GG insofar as the independence of all members is not sufficiently ensured. 97

However, according to § 21 sec. 9 sentence 1 ZDF-StV, the members of the Television Council are not bound by instructions. Nevertheless, § 21 sec. 10 sentence 2 ZDF-StV stipulates that the representatives of the *Laender*, the Federation, the political parties and the religious communities can be dismissed without reason by the offices that sent them. This does not satisfy the constitutional requirements (see B. II. 5. above). [...] 98

f) The inclusion of representatives in the Television Council who are part of state authority or close to it, which is regulated in § 21 sec. 1 ZDF-StV, also violates Art. 5 sec. 1 sentence 2 GG to the extent that this is not underpinned with rules providing a minimum of transparency with regard to the work of the Television Council (see B. II. 6. above). At the level of legislation, rules concerning transparency are lacking altogether. [...]

**g) [...]** 100

2. The regulations concerning the composition of the Administrative Council pursuant to § 24 ZDF-StV also violate Art. 5 sec.1 sentence 2 GG. 101

a) With a share of 6 out of 14 members overall, the share, pursuant to § 24 sec. 1 a, c ZDF-StV, of members of the Administrative Council who are part of state authority also exceeds the constitutional limit of one-third, and therefore does not comply with the requirements of a set-up detached from state authority. Moreover, in this composition, the members who are part of state authority achieve a blocking minority for decisions that require a quorum according to § 25 sec. 2 sentence 3 ZDF-StV, which is equally incompatible with the requirement of detachment from state authority. 102

b) § 24 sec. 1 ZDF-StV is also incompatible with Art. 5 sec. 1 sentence 2 GG insofar as the members appointed pursuant to § 24 sec. 1 b ZDF-StV are elected by a Television Council whose composition is not sufficiently detached from state authority, and in regard to which sufficient incompatibility rules also do not exist. The incompatibility rules that result from § 24 sec. 1 b half sentence 2 and § 24 sec. 5 in conjunction with § 21 sec. 9 ZDF-StV satisfy the constitutional requirements no more than the respective rules of the Television Council (see B. II. 4. b), III. 1. d) above). 103

Furthermore, practice has shown that these regulations do not sufficiently guarantee the required degree of detachment from state authority. [...]

c) As is the case for part of the Television Council members, the personal legal status of the members of the Administrative Council is not sufficiently ensured. Although the members of the Administrative Council are also not bound by instructions (cf. § 24 sec. 5 ZDF-StV), they can be dismissed without an important reason having to be provided (cf. § 24 sec. 3 sentence 2 in conjunction with § 21 sec. 10 sentence 2 ZDF-StV). This is not compatible with the standards developed above (see B. II. 5., III. 1. e) above). 105

d) With regard to the Administrative Council, a legislative provision containing, at least in principle, rules on the transparency of the work of the Administrative Council is lacking (see B. II. 6., III. 1. f) above). 106

e) In contrast, there are no constitutional objections to § 24 sec. 1 ZDF-StV with regard to its ensuring political diversity, both with respect to members who are part of state authority or detached from it. The fact that the members of the Administrative Council who are part of state authority are recruited only from a few political parties is 107

unavoidable given the small size of the body and considering the differences in perspective which are due to the federal structure of Germany that have an impact in this matter. In itself, the election of members who are detached from state authority by the Television Council according to § 24 sec. 1 b ZDF-StV is also constitutionally unobjectionable. As long as it is set up in a constitutionally unobjectionable way and sufficient incompatibility rules are created, the legislature can assume that the relevant requirement of a three-fifths majority for the election of members and the resulting compromises in voting do sufficiently ensure diversity.

3. Thus, as a result, the provisions of § 21 sec. 1, sec. 4, sec. 10 sentence 2, § 24 sec. 1, sec. 3 sentence 2 alternative 1 ZDF-StV – as incorporated into *Land* law – are incompatible with the Constitution. The [First] Senate [of the Federal Constitutional Court] hereby extends the declaration of unconstitutionality pursuant to § 78 sentence 2 of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz*, BVerfGG) to include § 21 sec. 1 ZDF-StV as a whole and as a result thereof also § 21 sec. 1 d to f ZDF-StV which was not challenged by the applicants. With regard to the lack of rules on incompatibilities, on personal security in the exercise of functions as well as on transparency, the provision, in this regard, has the same constitutional defect as § 21 sec. 1 ZDF-StV, and loses its purpose without the additional rules. 108

§ 21 sec. 3 sentences 1 and 2, sec. 6 ZDF-StV does not raise any constitutional objections if this provision – in accordance with current practice – is interpreted in conformity with the Basic Law (see B. III. 1 c) aa) above). § 21 sec. 8 sentence 2 ZDF-StV is also not objectionable under constitutional law; although it is insufficient as an incompatibility rule to ensure a set-up that is detached from state authority, taken on its own, however, it is not subject to constitutional concerns. Likewise, the procedural regulations of § 22 sec. 1, § 25 sec. 2, § 26 sec. 1 sentence 2, sec. 3 half-sentence 2 ZDF-StV, which are challenged by the applicants, are as such compatible with the Constitution. Given the unconstitutional composition of the supervisory bodies, veto positions of the members that are part of state authority can currently arise from these provisions, which is incompatible with the constitutional requirements; the constitutional objections as such, however, arise with regard to the composition of the bodies and not with regard to the procedural regulations and the quorums regulated therein. 109

#### IV.

1. To the extent that §§ 21 and 24 ZDF-StV are not compatible with the Constitution, they shall not be declared void. Instead, their incompatibility with the Basic Law shall be determined, together with the order that they may continue to be applicable on a transitional basis until new legislation is enacted. 110

A mere declaration of incompatibility, together with an order to temporarily continue the application of the unconstitutional provision, may be considered in cases where the immediate invalidity of the objectionable provision would eliminate the basis for the protection of paramount public interests and it would be more appropriate overall with regard to the affected fundamental rights to bear the unconstitutionality for a 111

transitional period than it would be to declare the rule void (cf. BVerfGE 33, 303 <347 and 348>; 109, 190 <235 and 236.>).

This is the case here. If the State Treaty were to be declared void, the supervisory bodies of the ZDF would lose the basis of their legitimacy and, consequently, they could not continue to act. A continuation of the ZDF's broadcasting without effective supervisory bodies would be even less acceptable under Art. 5 sec. 1 sentence 2 GG than supervision in the current constitutionally objectionable manner. In fact, the loss of the Administrative Council and the Television Council would call into question the broadcasting of the ZDF as such, particularly as the *Intendant*, who with respect to various decisions relies on the approval of the Administrative Council, would be hindered in continuing the broadcasting operation in a regular and planned out manner. The classical mandate of broadcasting that the ZDF must fulfil would, however, be hereby put at risk.

112

2. Until 30 June 2015 at the latest, the *Laender* are to enact new legislation that satisfies the constitutional requirements and that governs at the very least the next regular elections of the supervisory bodies. The Court shall abstain from enacting judicial orders during the transitional period; a subsequent *ex officio* enforcement order is hereby not ruled out, should it become necessary (cf. BVerfGE 6, 300 <304>; 100, 263 <265>).

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3. The decision was adopted with 7:1 votes in regard to the constitutional permissibility of the participation of representatives of the executive, 5:3 in regard to the constitutional obligation to create transparency rules, and 7:1 in regard to the instructions on the composition of the committees. For the rest, it was adopted unanimously.

114

Kirchhof	Gaier	Eichberger
Schluckebier	Masing	Paulus
Baer		Britz

## Separate Opinion of Justice Paulus

### Regarding the Judgment of the First Senate of 25 March 2014

– 1 BvF 1/11 – – 1 BvF 4/11 –

I cannot fully agree with the judgment to the extent that it declares the participation of representatives of the executive in the supervisory bodies of the *Zweites Deutsches Fernsehen* (ZDF) – a broadcasting corporation independent (*staatsfrei*) or at least detached from state authority (*staatsfern*) – to be permissible under constitutional law. 115

Since the first ZDF-Broadcasting judgment more than fifty years ago (BVerfGE 12, 205 <261 et seq.>), it is generally acknowledged that public broadcasting’s freedom (*Staatsfreiheit*) or at least detachment from state authority (*Staatsferne*) is a central requirement for its constitutionality. Public broadcasting does not serve to disseminate state information, but to provide broadcasts reflecting the diversity of opinions and the breadth of positions in society. The internal organisation of television must be measured against the standards imposed by this role, also in the Internet age. In line with the present judgment, I continue to consider this traditional approach in the case-law of the Federal Constitutional Court to be correct. 116

Today’s judgment, however, implements the Federal Constitutional Court’s own approach only in part, although it has become apparent since the Court’s first broadcasting judgment that the composition of the supervisory bodies of the ZDF does not satisfy the requirement of detachment from state intervention (below I.). Therefore, in my view, limiting the combined share of representatives of state authority and those “close to state authority” to one-third is not sufficient for ensuring diversity in the ZDF in order to meet the constitutional requirement of the detachment of broadcasting from state authority (below II.). Instead, I consider it necessary that the supervisory bodies be generally free of representatives of state authority (below III.) in order to emancipate them from state influence, as is the case with most broadcasting corporations operated by the *Laender*. This applies in any case to members of the executive, whereas members of parliaments and of political parties could indeed to a very limited extent be members of the Television and Administrative Councils, as they are constitutionally mandated representatives of the people and intermediaries between the state and its citizens (cf. Art. 38 sec. 1 sentence 2, Art. 21 sec. 1 sentence 1 GG). This does not rule out a consultative role for state representatives. However, the contribution of policy objectives by state decision-makers to the deliberations of the supervisory bodies must be separated from the decisions taken by these. 117

#### I.

According to the judgment, Art. 5 sec.1 sentence 2 GG requires the organisation of public broadcasting to ensure diversity, and in consequence, to ensure “sufficient” detachment from state intervention (B I of the judgment). Already this wording suggests that this decision diminishes the ideal of freedom from the state (cf. BVerfGE 118

31, 314 <329>; most recently, BVerfGE 121, 30 <52 and 53> with further references), which is found throughout the existing case-law of the Court. Back in 2008 the Court still concluded: “The principle of freedom from the state in broadcasting is not only related to the manifest danger of direct control or intervention in broadcasting; it must furthermore prevent any indirect or subtle influence by the state” (BVerfGE 121, 30 <53>).

One may see a newfound realism in this relativisation. The desire to prevent “all indirect or subtle influence by the state” by means of a Television Council, of which currently almost one-half, and following this decision, still up to one-third will be made up of state representatives, and which – most probably – will, in practice, continue to be controlled outside of the formal structure by circles of friends composed according to political criteria, appears to be a doomed effort. In reality, as also demonstrated in the oral hearing, the broadcasting and television bodies are a playing field for media politicians from the *Laender*, who – as is to be expected – aim to realize their media policies within the Television and Administrative Councils. They thus seem unsuited for supervising the broadcasting corporations to ensure the freedom of broadcasting and the diversity of opinions.

119

With one exception, the members of the Television Council belong to one of the two circles made of political friends. The non-political members of the Television Council are thus politically “brought into line”. The official sessions of the Television Council largely adhere to the prior arrangements between the circles of friends. Whoever does not submit to the dualist political structure, thereby gives up any influence. This may accomplish that television coverage is not politically one-sided. However, beyond this, no societal nor cultural diversity is ensured; instead, the promotion of political interests – which is, as such, not illegitimate – is made possible. The representatives of groups in society are far too dependent on politics for promoting their associations’ interests to counterbalance them face-to-face, as equals. Television is thereby turned into a field of political contention and not into an experimental laboratory of diversity. Politics does not adapt to the obligations of the supervisory bodies; rather, the supervisory bodies, and, along with them, the broadcasting corporations, adapt to politics.

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[...]

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In reality, in the Administrative Council the *Intendant* negotiates directly with representatives of the executive of the *Laender*, who come either from among the ranks of Prime Ministers or their State Chancelleries. [...]. It should be recalled that one reason for the application for judicial review was the – ultimately successful – attempt by a *Land* Prime Minister who was member of the Administrative Council to directly influence the re-appointment of the ZDF’s editor-in-chief [...]. This judgment contributes little to prevent such direct influence of politics on the broadcasting corporations.

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## II.

Contrary to the reasoning in the judgment (1. below), the reinforcement or rather re-establishment of the ZDF's freedom from the state, by freeing the television bodies to a large extent from state influence, appears to be constitutionally required (2. below). 123

1. According to the established case-law of the Federal Constitutional Court, which the Senate confirms in this judgment, the freedom of broadcasting serves the free, individual and public formation of opinion. The constitutional requirements for the institutional set-up of the broadcasting corporations must follow the aim of ensuring diversity (cf. BVerfGE 57, 295 <320, 325>; 73, 118 <152 and 153>; 121, 30 <51>; B I 2 of the judgment). Accordingly, the *Intendant*, who manages the business of a broadcasting corporation, should be subject to supervision and review by bodies, which, as custodians of the general interest, reflect the diversity of society. The legislature must ensure in particular that it is not primarily the official perspectives and views relevant for the political formation of opinions that are reflected, but rather that a broad span of perspectives from diverse groups in society will be voiced (cf. BVerfGE 83, 238 <333 and 334>; B I 3 a). All this is correct as far as it goes. 124

However, after this, the judgment thwarts this goal itself: "Therefore, given the constitutional requirement of ensuring diversity, it is permissible for representatives of the *Laender* to also be appointed to the bodies of the public broadcasting corporations [...]. This includes – to a strictly limited extent – the possibility of appointing representatives from the executive, even at the rank of a Prime Minister" (B I 3 b). Thereby, the judgment re-defines state authority as an element of the realization of diversity, rather than a threat to it, thus taking on the "overall political responsibility" for the operation of the broadcasting corporations. [...] 125

One of the most important tasks of television and radio in a democratic state with separation of powers is to enable the citizens to form their own opinion by providing information as diverse, in-depth and balanced as possible. Radio and television hereby take on a central monitoring role. If the bodies that supervise radio and television are controlled by those they are supposed to control, this impairs their function. In other words, the state organs, in particular the executive, are not on the side of or in the camp of the subjects of fundamental rights and the freedom of broadcasting that "serves" them, but rather on the side of the state, which does not hold any fundamental rights (cf. BVerfGE 128, 226 <244 and 245>); they are precisely the ones broadcasting needs to stay away from, if the detachment from state intervention is to have any meaning. In the words of the last broadcasting decision: "Fundamental communication rights were originally aimed against the tight control of the media by the state, and they still continue today to have significant application in the defence against state control of broadcasting" (BVerfGE 121, 30 <52> with further references). Consequently, the "possibilities of influence must be eliminated insofar as they do not serve the establishment and preservation of the freedom of broadcasting and are not covered by the limits of the fundamental right" (BVerfGE 121, 30 <53>). It is not clear to me why the presence of the executive in the Television and Administrative Coun- 126

cils should serve the establishment and preservation of the freedom of broadcasting.

2. It is not convincing that the judgment lumps the representatives of the executive and the so-called representatives that are “close to state authority” together in a quite inhomogeneous group and only subjects them in total to a quota of one-third of the members of both councils. 127

The composition of the councils must be guided by the aim of excluding the possibility of political instrumentalisation as far as possible. The inclusion of representatives who are part of state authority or close to it is only admissible to the extent that it is absolutely necessary for ensuring the diverse composition of these organs. Representatives with a low risk of being politically instrumentalised are to be preferred. Against this background, the inclusion of representatives of the executive does not seem necessary, because the participation of representatives from parliaments and political parties, who are not directly involved in decisions at the governmental level, but themselves fulfil a constitutional mandate independent of the executive branch, is less prone to political instrumentalization [...]. 128

The Senate refers to three Federal Constitutional Court decisions in justifying the admissibility of the presence of representatives of the executive (B I 3 b). In the first broadcasting decision, however, the remark concerning the possible composition of bodies (cf. BVerfGE 12, 205 <263>) was only *obiter dictum*, and was therefore not the reason upon which the decision rested. The decision concerning the *Land* Broadcasting Act of Lower Saxony dealt with [...] private broadcasting, not public broadcasting corporations (cf. BVerfGE 73, 118 <164 et seq.>). The decision on the Act on the *Westdeutschen Rundfunk* Broadcasting Corporation (BVerfGE 83, 238 <330>) [...] dealt with local representatives, not representatives from the executive. After the developments of the last fifty years, the present decision should have distanced itself from this *dictum* rather than turning it into newly-established case-law. 129

### III.

Representatives of the executive branches of the Federation and the *Laender* are either to be excluded completely – as in most of the broadcasting corporations operated by the *Laender* – or at least to be limited to a minimal presence in the Television Council (1. below). While the solution supported here has proven to be practical for broadcasting corporations operated by the *Laender*, the majority decision is, in contrast, mostly without effect with regard to the composition of the Administrative Council (2. below). 130

1. The supervisory bodies must be kept completely free of representatives of the executive [...]; the more decision-making power the bodies have, the less they may be filled with state representatives. 131

At most, it might be acceptable to permit the participation of a small share of members of the executive in the Television Council – at maximum one-sixth, that is to say half of the group developed by the Senate consisting of representatives that are 132



“close to state authority” – so that in the interest of federal “differences in perspectives” the interests of the *Laender* which have established the broadcasting corporation will be considered. However, the representation of the interests of the *Laender* by representatives who are not part of the executive would here again be preferable. The membership of representatives of the *Laender* executives in the Administrative Council, however, must be ruled out altogether. It is for the legislature to determine the details.

2. The vague requirements that the decision imposes hardly bring about effective change, especially with regard to the Administrative Council where the core task of supervising the *Intendant*, the managing staff and the budget of the corporation is concentrated (§ 23 sec. 2, § 27 sec. 2 ZDF-StV, § 19 sec. 2 lit. a ZDF-bylaws) (cf. B III 2 a of the judgment): [...]

One cannot claim that the strict freedom from state intervention of the Television and Administrative Councils advocated here is impractical. [...] As far as one can tell, no other corporation within the ARD (the consortium of German regional public broadcasters) with the exception of the broadcasting corporation of the Saarland has a representative of the *Laender* executive in its Administrative Council.

#### IV.

The convergence of media in the Internet age poses new challenges for public radio and television as a whole (cf. BVerfGE 119, 181 <214>; 121, 30 <51>). It therefore seems all the more important that public radio and television strengthen their diversity and political independence, as diversity and independence are fundamental prerequisites for their existence. The judgment does at least take a small – in my opinion far too small – step towards guaranteeing these prerequisites. Nevertheless, the promise of radio and television stations that are detached from state intervention will, even after this now 14th broadcasting decision by the Federal Constitutional Court, likely remain unfulfilled.

Paulus

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