



Press and Information

Court of Justice of the European Union

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Advocate General's Opinion in Case C-492/17  
Südwestrundfunk v Rittinger and Others

**Advocate General Campos Sánchez-Bordona proposes that the Court of Justice declare that the amendment to the criterion used for charging the fee which finances public service broadcasters in Germany does not constitute unlawful State aid**

*In accordance with the new criterion, the event triggering the chargeability of the fee is the possession of a dwelling as owner or tenant*

Public service broadcasters in Germany are required to provide their services impartially and in such a way as to ensure the diversity, objectivity and balance of programme content. Given that the power to legislate in matters of public service broadcasting lies with the federal states (Länder), the formation and management of public service broadcasters and the provision of their services at federal level have been governed by a series of treaties between the federal states. Those treaties authorise public service broadcasters at national level (such as ARD and ZDF – the two main public television channels) and others at regional level (such as SWR, Südwestrundfunk, Anstalt des öffentlichen Rechts (South west broadcasting organisation); to be financed from revenue raised from three sources: a broadcasting fee (the main source of income), the sale of advertising space and other commercial activities.

In a decision of 2007,<sup>1</sup> adopted following an investigation opened following a number of complaints, the Commission declared that the method of financing the German public broadcasting services could be qualified as 'existing aid' within the meaning of EU law.<sup>2</sup> This means that the aid existed before the entry into force of the Treaty and, consequently, remained applicable after that date. The Commission does not need to be informed of the existence of such aid. None the less, at the Commission's request, the German Government ironed out a few issues to make the system compatible with the internal market. None of the measures adopted affected the broadcasting fee.

In 2013 changes were made to the criterion for calculating the fee: in short, whereas, previously, the fee became chargeable on the basis of possession of each broadcast-receiving device that was present within a dwelling, since then, mere possession of the dwelling as owner or tenant has been sufficient to trigger chargeability.

That new criterion has been challenged by a number of persons liable to the broadcasting fee before various German courts, including the Landgericht Tübingen (Regional Civil and Criminal Court of Tübingen, Germany), which made a reference for a preliminary ruling to the Court of Justice expressing its doubts regarding the compatibility of the fee with EU law. More specifically, that court considers that the legislative change to the event triggering the chargeability of the fee amounts to a substantial amendment which should have been notified to the Commission and, in any event, the aid resulting from that amendment is incompatible with the internal market. Furthermore, the German court also submits that, since the number of persons liable to it has been extended to include the entire adult population, it has generated a significant increase in revenue of approximately €700 million a year. Finally, the Landgericht Tübingen considers that the public

<sup>1</sup> Commission Decision of 24 April 2007, C(2007) 1761 final. State aid E 3/2005 (ex CP 2/2003, CP 232/2002, CP 43/2003, CP 243/2004 and CP 195/2004) — Financing of public service broadcasters in Germany.

<sup>2</sup> The regulation applicable at that time was Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty [now Article 108 TFEU] (OJ 1999 L 83, p. 1).

service broadcasters benefit from further State aid inasmuch as they are permitted to issue their own enforcement instruments to recover unpaid fees, given that the enforcement mechanism available under public law, which is more effective, expeditious and economical than the ordinary enforcement procedure, reduces the costs of execution.

In today's Opinion, Advocate General Manuel Campos Sánchez-Bordona considers, first of all, that **the German law which changes the event triggering the chargeability of the broadcasting fee does not constitute an alteration of existing aid and does not therefore create new aid which should have been notified to the Commission or approved by it.** The Advocate General considers that **the reform introduced is not caught by the concept of a substantial alteration to the previous scheme.** In that respect, he points out that the beneficiaries of the aid remain the public service broadcasters, and that the temporal effects of the aid remain unchanged, as well as its objectives (given that there has been no alteration to the purpose of the measure, namely to finance a public service, nor to the range of subsidised activities). He adds that, according to the data submitted to the Court of Justice and contrary to what the German court maintains, the income obtained from the charging of the fee appear to have remained stable from 2009 (before the legislative amendment) to 2016. In any event, the Advocate General notes that neither the increase in the number of persons liable to the fee nor the (alleged) increase in the revenue eventually raised in this way is of any relevance in determining whether the measure at issue is *new*, since, however much that revenue might be, the proportion of it that will go to the public service broadcasters (that is to say, the proportion that can genuinely be classified as State aid) is fixed, following the intervention of the KEF ('Kommission zur Überprüfung und Ermittlung des Finanzbedarfs der Rundfunkanstalten' – Committee for the review and determination of the financial needs of public service broadcasters) by the governments and parliaments of the federal states. Therefore, **there is no automatic link between the increase (if any) in the eventual revenue and the amount of the aid received by the public service broadcasters. A mere alteration of the basis for determining the obligation to pay incumbent on persons liable to the fee is not, in itself, such as to change the amount of the public aid received by public service broadcasters or, therefore, to have any bearing on the compatibility of that aid with the internal market.** The Advocate General adds that the change to the chargeable event is also explained, inter alia, by advances in technology, since, had the previous scheme ('one charge per device') been retained, the risk would have been run of multiplying revenue schemes, given the proliferation of new devices that provide access to broadcast programming. Furthermore, the reform serves the purpose of making it easier to manage the fee recovery process, which had been beset by an increase in late payments.

Second, as regards the use of the administrative enforcement procedure, the Advocate General concludes that **EU law does not preclude the German law which authorises public service broadcasters financed from a broadcasting fee to issue and execute their own enforcement instruments in order to recover that fee in the event of non-payment, without needing to apply to the ordinary courts.** Alongside other considerations, the Advocate General points out that **the Commission already took into account the existence of that prerogative in its 2007 decision.** Revenue obtained in this way remained under public control and was therefore in the nature of State resources. Since no changes have been made to the system of administrative enforcement examined by the Commission, it continues to benefit from the protection granted by the 2007 decision.

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**NOTE:** The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

**NOTE:** A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the

dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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The [full text](#) of the Opinion is published on the CURIA website on the day of delivery.

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