

CONSTITUTIONAL COURT
G 215/2022-26
5 October 2023

Translation in excerpts

IN THE NAME OF THE REPUBLIC

The Austrian Constitutional Court, chaired by President
Christoph GRABENWARTER,

in the presence of Vice-President
Verena MADNER

and the members

Markus ACHATZ,
Sieglinde GAHLEITNER,
Andreas HAUER,
Christoph HERBST,
Michael HOLOUBEK,
Helmut HÖRTENHUBER,
Claudia KAHR,
Georg LIENBACHER,
Michael MAYRHOFER,
Michael RAMI and
Ingrid SIESS-SCHERZ

as voting members, in the presence of the recording clerk
Franziska Sofie TILLIAN,

decided today – after a public oral hearing held on 26 September 2023, having heard the presentation by the Judge Rapporteur and the statements by the representative of the applicant *Land* Government Florian Philipitsch and representatives of the Federal Government Matthias Traimer und Michael Kogler – pursuant to Article 140 of the Constitution (*Bundes-Verfassungsgesetz, B-VG*) on the application filed by the *LAND GOVERNMENT OF BURGENLAND (BURGENLÄNDISCHE LANDESREGIERUNG)* to repeal as unconstitutional specific provisions of the ORF Act (*ORF-Gesetz*):

- I.
 1. Section 20 paragraph 1 first sentence subparagraphs 3 and 4 ORF Act, the words “and 2. have knowledge of the Austrian and international media markets or be held in high regard in the field of economics, science, arts or education by reason of their previous activities” in section 20 paragraph 1 last sentence ORF Act, section 20 paragraph 4 second sentence ORF Act, all of which as stipulated in Federal Law Gazette (*BGBI.*) 379/1984, as amended by Federal Law Gazette I 83/2001; section 28 paragraphs 4 and 5 ORF Act, Federal Law Gazette 379/1984, as amended by Federal Law Gazette I 83/2001; section 28 paragraph 6 first sentence ORF Act, Federal Law Gazette 379/1984, as amended by Federal Law Gazette I 115/2017; section 29 paragraph 6 second, third and fourth sentences ORF Act, Federal Law Gazette 379/1984, as amended by Federal Law Gazette I 23/2014; and section 30 paragraph 1 subparagraph 2 ORF Act, Federal Law Gazette 379/1984, as amended by Federal Law Gazette I 23/2014, are repealed as unconstitutional.
 2. The repeal shall take effect after 31 March 2025.
 3. Previous legal provisions shall not re-enter into force.
 4. The Federal Chancellor is obliged to publish these rulings without delay in Federal Law Gazette I.

II. [...]

III. [...]

IV. [...]

Reasoning

I. The Application

[...]

II. The Law

The relevant provisions of the Federal Act on the Austrian Broadcasting Corporation (*ORF-Gesetz, ORF-G*; hereinafter the ORF Act), Federal Law Gazette 379/1984 as amended by I 112/2023 read as follows [...]:

“Governing bodies and officers of the Austrian Broadcasting Corporation
Section 19 (1) The governing bodies and officers of the Austrian Broadcasting Corporation are

1. the Foundation Council (*Stiftungsrat*),
2. the Director General (*Generaldirektor*),
3. the Audience Council (*Publikumsrat*);

(2) In the exercise of their functions in the Austrian Broadcasting Corporation, the members of the bodies under paragraph 1 shall not be bound by instructions and orders; they shall be bound solely by statutory obligations and the duties provided by the rules of procedure.

(3) The role of member of the Foundation Council or the Audience Council is an honorary position. The members shall be entitled to reasonable compensation for costs incurred.

(4) Unless otherwise provided by law, all members of the governing bodies of the Foundation (*Stiftung*) shall be bound by a duty of confidentiality concerning all affairs of the Foundation and its affiliated businesses becoming known to them in the course of their duties. This duty of confidentiality shall continue after the end of their service as member of a governing body of the Foundation. Upon their departure, all written documents pertaining to affairs of the Foundation and its affiliated businesses shall be returned to the Foundation.

The Foundation Council

Section 20 (1) The members of the Foundation Council shall be appointed subject to the following provisions:

1. six members shall be appointed by the Federal Government in proportion to the number of seats held by the political parties in the National Council, due regard being paid to the proposals of those parties; each of the parties represented on the Main Committee of the National Council (*Hauptausschuss des Nationalrates*) shall be represented in the Foundation Council by at least one member;
2. nine members shall be appointed by the Austrian regions (*Länder*); each *Land* shall be entitled to appoint one member;
3. nine members shall be appointed by the Federal Government;

4. six members shall be appointed by the Audience Council;

5. five members shall be appointed by the Central Staff Council (*Zentralbetriebsrat*) in accordance with the Labour Constitution Act (*Arbeitsverfassungsgesetz, ArbVG*), Federal Law Gazette 22/1974.

It shall be ensured that members appointed pursuant to subparagraphs 1 to 4

1. possess the necessary personal and professional aptitude as a result of appropriate training or relevant vocational experience in the matters to be handled by the Foundation Council, and

2. have knowledge of the Austrian and international media markets or be held in high regard in the field of economics, science, arts or education by reason of their previous activities.

(2) The members of the Foundation Council shall have the same duty of care and the same responsibilities as members of the supervisory board of a stock corporation (*Aktiengesellschaft*). Claims against members of the Foundation Council shall be decided by the regular courts in accordance with the provisions of the Code of Civil Procedure (*Zivilprozessordnung, ZPO*).

(3) The following persons may not be appointed members of the Foundation Council:

1. persons who are employees of the Austrian Broadcasting Corporation; this ground for exclusion does not apply to members appointed pursuant to paragraph 1 subparagraph 5;

2. persons who are employees of a business affiliated with the Austrian Broadcasting Corporation within the meaning of section 228 paragraph 3 of the Business Code (*Unternehmensgesetzbuch, UGB*);

3. persons who are members of governing bodies of the Austrian Broadcasting Corporation; this ground for exclusion does not apply to members appointed pursuant to paragraph 1 subparagraph 4;

4. persons who are employees or shareholders of another media business (section 1 paragraph 1 subparagraph 6 of the Media Act [*Mediengesetz, MedienG*]);

5. members of the Federal Government, state secretaries, members of a *Land* government (*Landesregierung*), members of the National Council, the Federal Council (*Bundesrat*), another general representative body or the European Parliament; also persons who are employees of a political party or senior officials of an organization of a political party at federal or *Land* level, as well as members of the Austrian Ombudsman Board (*Volksanwaltschaft*), the President of the Austrian Court of Audit (*Rechnungshof*), and persons who have held one of the aforementioned offices within the previous four years;

6. persons who are employees of a party faction in a general representative body as well as parliamentary staff members within the meaning of the Parliamentary Staff Act (*Parlamentsmitarbeiterinnen- und Parlamentsmitarbeitergesetz, ParlMG*);

7. persons who have been assigned to service in a party faction in a general representative body;

8. employees of legal entities working in the field of civic education within the framework of the political parties (section 1 of the Journalism Subsidies Act (*Publizistikförderungsgesetz, PubFG*), Federal Law Gazette 396/1984);

9. staff members in the office of a federal minister or the office of a state secretary or another body at federal or *Land* level referred to in section 5, section 6 or section 8 paragraph 1 of the Emoluments Act (*Bezügegesetz, BezügeG*);

10. employees of the Austrian Communications Authority (*Kommunikationsbehörde Austria, KommAustria*) and members of the Federal Administrative Court (*Bundesverwaltungsgericht*) as well as employees of Regulatory Authority for Broadcasting and Telecommunications (*Rundfunk und Telekom Regulierungs-GmbH, RTR GmbH*).

(4) The term of office of the Foundation Council shall be four years from the day of its first meeting and in any case until the day on which a new Foundation Council convenes. The members appointed by the Federal Government may be removed from office prematurely during a term of office only if the Federal President has appointed a new Federal Government; a member appointed by a *Land* only if the *Land* parliament has elected a new *Land* government; and the members appointed by the Audience Council and the Central Staff Council only if the composition of these bodies changes. If a member departs prematurely, a new member shall be appointed without delay for the remaining term of office. If a member of the Foundation Council fails to comply with three consecutive meeting invitations without sufficient excuse or if a ground for exclusion pursuant to paragraph 3 arises following a member's appointment, the Foundation Council shall make a finding to that effect by resolution after hearing the member concerned. Such finding shall result in loss of membership, and a new member shall be appointed for the remaining term of office.

(5) If the governing bodies and officers authorized to appoint members of the Foundation Council pursuant to paragraph 1 do not avail themselves of this right and appoint no members, the vacancies shall be disregarded when establishing the presence of a quorum at meetings of the Foundation Council pursuant to paragraph 6.

(6) The Foundation Council shall draw up its own rules of procedure. It shall elect a chairperson and a deputy chairperson from among its members. The meetings of the Foundation Council shall be convened by the chairperson or, in the chairperson's absence, by the chairperson's deputy; the chairperson must convene the Foundation Council without delay if this is requested in writing by one third of the members of the Foundation Council or by the Director General; such written request must be accompanied by a draft agenda. The presence of no less than half of the members shall constitute a quorum. With the exception of resolutions pursuant to section 22 paragraph 5 and section 41 paragraph 1, the resolutions of the Foundation Council shall be passed by open vote and by a simple majority of the votes cast. The Chairperson shall participate in voting; in the event of a tie, the chairperson – or in the chairperson's absence, the deputy – shall have the casting vote. The members of the Foundation Council appointed by the Central Staff Council shall not be entitled to vote on resolutions pursuant to section 31 paragraphs 1 and 2 and shall not be counted when establishing the presence of a quorum at meetings of the Foundation Council.

(7) To prepare resolutions on specific issues and to supervise the Executive Board, the Foundation Council can set up committees drawn from its members. Each committee shall consist of at least five members.

(8) The Director General and the chairperson of the Audience Council or the chairperson's deputy shall have the right to attend the meetings of the Foundation Council in an advisory capacity. The members of the Audit Commission (Prüfungskommission) shall in any case attend those meetings of the Foundation Council and its committees which deal with approval of the annual financial statements and their preparation and with the auditing of the annual financial statements. The Foundation Council and its committees may also put questions to the members of the Audit Commission regarding planned auditing pursuant to section 40 paragraph 3 third sentence and the result of such audits. The members of the Audit Commission shall not be subject to a duty of confidentiality vis-à-vis the Foundation Council unless this would frustrate the purpose of the audit.

(9) In the event that a member of the Foundation Council is unable to attend a meeting, such member may arrange for another member to act as proxy in respect of all rights of the absent member for the duration of that meeting. The member unable to attend shall notify the chairperson of such proxy in writing. A member represented by such proxy shall not be taken into account when establishing the presence of a quorum. The right to hold the chair is not transferable.

(10) If the Foundation Council fails to appoint a Director General within three months following the invitation of applications for the office of Director General (section 27 paragraph 1), fails to entrust a suitable person with the provisional exercise of the responsibilities of Director General (section 22 paragraph 1) within one month of the office of the Director General falling prematurely vacant, or fails to arrive at a decision on one of the matters enumerated in section 21 paragraph 1 subparagraphs 3 to 6 and 7 to 15 and paragraph 2 within three months of dealing with the matter for the first time, the regulatory authority shall make a finding in respect of such fact without delay. If a matter has not been settled within four weeks of such finding, the regulatory authority shall declare the Foundation Council dissolved. In such case, the members of a new Foundation Council shall be appointed without delay.

Responsibilities and duties of the Foundation Council

Section 21 (1) In addition to other duties imposed on it under this Federal Act, the Foundation Council shall:

1. supervise the Executive Board;
2. appoint and remove from office the Director General;
3. determine the number of Directors and the allocation of responsibilities under section 24 paragraph 2;
4. represent the Austrian Broadcasting Corporation vis-à-vis the Director General, particularly in the assertion of liability claims;
5. appoint and remove from office the Directors and Regional Directors on the recommendation of the Director General;
6. approve the long-term planning of the content in accordance with the criteria of the quality assurance system and the long-term planning of technical and financial affairs and staffing schedules;
- 6a. approve the quality assurance system (section 23 paragraph 1 subparagraph 1a);

- 6b. pass resolutions on the guidelines applicable to audio-visual commercial communications in particular in respect of audio-visual commercial communications aimed at minors;
 - 6c. pass resolutions on the plans presented by the Executive Board on the development of accessible services for people with a visual or hearing impairment;
 7. pass resolutions setting the broadcasting licence fee (section 23 paragraph 2 subparagraph 8 and section 31) and approve commercial communication rates (section 23 paragraph 2 subparagraph 8);
 8. approve the conclusion of collective agreements, contractual agreements with similar effect and the Editorial Agreement (*Redakteurstatut*);
 9. pass resolutions on the employment code (*Dienstordnung*) for the Austrian Broadcasting Corporation;
 10. pass resolutions on measures to be taken as a result of audit reports, including the publication of audit reports unless they have to be published under section 39;
 11. audit and approve the annual financial statements, audit the consolidated annual financial statements and approve the actions of the Director General;
 12. consulting on fundamental problems related to broadcasting and programming as well as to the introduction of quality assurance systems for channels in cooperation with the Executive Board, receive reports from the Director General and pass resolutions on recommendations related thereto;
 13. pass resolutions on restrictions on advertising and audio-visual commercial communication pursuant to section 13 paragraphs 8 and 9 and section 14 paragraph 3;
 14. pass resolutions on the annual report (section 7);
 15. determine, upon the proposal of the Director General, the scope and way of disseminating the radio channel pursuant to section 3 paragraph 6 and pass resolutions on commercial activities within the meaning of section 9 to section 9b.
- (2) In addition, the consent of the Foundation Council shall be required in the following cases:
1. for the implementation of the general guidelines to be issued by the Director General in relation to programming, programme scheduling and service coordination of radio and television broadcasting and online services (section 23 paragraph 2 subparagraph 1);
 2. for the broadcasting and service schedules for television and radio (annual broadcasting plans – *Jahressendeschemen*) and for the online services (annual content plans – *Jahresangebotsschemen*) in accordance with the criteria of the quality assurance system, to be drawn up by the Director General taking into account the long-term broadcasting plans and the broadcasting guidelines (subparagraph 1) and to be submitted to the Foundation Council no later than 15 November for the next calendar year, as well as for the operation of special-interest channels (section 9 paragraph 2), for determining the scope of advertising pursuant to section 18 and for the operation of mobile terrestrial television (section 9a);
 3. for the acquisition, sale or mortgaging of real property if the market value exceeds EUR 500,000;
 4. for the assumption of suretyship guarantees or other liabilities for the benefit of third parties;

5. for all transactions which entail a permanent encumbrance or an obligation over and above the ordinary course of business, unless such transactions were otherwise approved within the framework of the annual financial plans;
6. for the setting of the expenditure budgets and staffing schedules for the next calendar year, including how they are to be funded, which must be drawn up for each business year and submitted to the Foundation Council no later than 15 November (financial plan and staffing schedule);
7. for investment programmes and for the implementation of new construction as well as reconstruction works, acquisitions and other investments not covered by investment programmes already approved and in operation; this applies to expenditure that is not part of ongoing operating expenses and exceeds EUR 1 million in a particular case or a total of EUR 2 million in a business year;
8. for the introduction of long-term social measures;
9. for the rededication of the dedicated reserve (*Widmungsrücklage*) specified in section 39b paragraph 2;
10. for taking up bonds, loans and credits in excess of EUR 2 million;
11. for the acquisition and sale of patent rights and exploitation rights on copyrights the individual value of which exceeds EUR 1 million;
12. for granting loans and credits outside the ordinary course of business;
13. for the acquisition, sale and mortgaging of shareholdings in other businesses (section 228 Business Code [*UGB*]) as well as for the acquisition, sale and closure of businesses and enterprises;
14. for the establishment and closure of branch offices and for the establishment of subsidiaries;
15. for the establishment and disposal of business lines and modes of production;
16. for the conferral of general corporate power of attorney (*Prokura*) and power of attorney (*Handlungsvollmacht*) on Directors and executive staff;
17. for the definition of general principles of business policy;
18. for the exercise of the right to vote at shareholder meetings of affiliated businesses if the meeting is to pass a resolution which, by law or under the articles of association, must be passed by a majority of at least three quarters of votes cast or which deals with the appointment of managing directors or members of the management board or the supervisory board;
19. for the conclusion of contracts with media businesses (section 1 paragraph 1 subparagraph 6 of the Media Act [*MedienG*]) publishing periodicals, subject to the disclosure of the wording of such contracts.

(3) In addition, the Director General shall obtain the consent of the Foundation Council if the Director General participates in transactions as specified in paragraph 2 entered into by affiliated businesses by issuing instructions, giving consent or exercising a voting right.

(4) The Director General shall report to the Foundation Council as a management board member would report to the supervisory board of a stock corporation; in this respect, section 81 and section 95 paragraph 2 of the Stock Corporation Act (*Aktiengesetz, AktG*), Federal Law Gazette 98/1965, shall apply by analogy. In the course of the meetings of the Foundation Council, the members of the Foundation Council shall furthermore be entitled to put questions to the Director General, the Directors and the Regional Directors on all duties concerning their areas of responsibility within the Austrian Broadcasting Corporation and to request any relevant

information. Section 95 paragraph 3 of the Stock Corporation Act shall apply by analogy.

[...]

Audience Council

Section 28 (1) In order to safeguard the interests of listeners and viewers, an Audience Council shall be established in the registered office of the Austrian Broadcasting Corporation.

(2) Membership of the Audience Council shall not be open to:

1. persons who are employees of the Austrian Broadcasting Corporation or a business affiliated with the Austrian Broadcasting Corporation within the meaning of section 228 paragraph 3 of the Business Code (UGB);

2. persons who are members of other governing bodies of the Austrian Broadcasting Corporation; this ground for exclusion does not apply to the members of the Foundation Council who are appointed by the Audience Council;

3. persons who are employees or shareholders of another media business (section 1 paragraph 1 subparagraph 6 of the Media Act [Mediengesetz, MedienG]);

4. Members of the Federal Government, state secretaries, members of a Land government, members of the National Council, the Federal Council, another general representative body or the European Parliament; also persons who are employees of a political party or senior officials of an organization of a political party at federal or Land level, as well as members of the Austrian Ombudsman Board, the President of the Austrian Court of Audit, and persons who have held one of the aforementioned offices within the previous four years;

5. persons who are employees of a party faction in a general representative body as well as parliamentary staff members within the meaning of the Parliamentary Staff Act (Parlamentsmitarbeiterinnen- und Parlamentsmitarbeitergesetz, ParlMG);

6. persons who have been assigned to service in a party faction in a general representative body;

7. employees of legal entities working in the field of civic education within the framework of the political parties (section 1 of the Journalism Subsidies Act (Publizistikförderungsgesetz, PubFG), Federal Law Gazette 396/1984);

8. staff members in the office of a federal minister or the office of a state secretary or another body at federal or Land level referred to in section 5, section 6 or section 8 paragraph 1 of the Emoluments Act (BezügeG);

9. employees of the Austrian Communications Authority and members of the Federal Administrative Court, and managing directors and employees of RTR-GmbH.

(3) Members of the Audience Council shall be appointed as follows:

1. the Austrian Federal Economic Chamber (Wirtschaftskammer Österreich), the Conference of the Presidents of the Austrian Chambers of Agriculture (Landwirtschaftskammer Österreich), the Federal Chamber of Labour (Bundesarbeitskammer), and the Austrian Trade Union Federation (Österreichischer Gewerkschaftsbund) shall each appoint one member;

2. the chambers of freelance professionals shall together appoint one member;

3. the Roman Catholic Church shall appoint one member;

4. the Lutheran Church shall appoint one member;

5. the legal entities working in the field of civic education within the framework of the political parties (Federal Law Gazette 369/1984) shall each appoint one member;

6. the Academy of Sciences (*Akademie der Wissenschaften*) shall appoint one member.

(4) For the appointment of the other members, the Federal Chancellor shall solicit proposals from institutions or organizations which are representative of the following areas or groups: academia, education, arts, sports, youth, students, older persons, persons with disabilities, parents and families, ethnic groups, tourism, motorists, consumers, and environmental protection.

(5) The Federal Chancellor shall invite the representative institutions and organizations under paragraph 4 by way of a public announcement in the official gazette (*Amtsblatt zur Wiener Zeitung*) to propose three persons for appointment and to make the proposals submitted publicly known.

(6) The Federal Chancellor shall appoint another seventeen members from the proposals received in regard to the areas and groups given in paragraph 4, with one member being appointed for each area. For the purposes of Articles 29 and 30 of the Convention on the Rights of Persons with Disabilities, Federal Law Gazette III 155/2008, the interests of persons with disabilities shall be represented in the Audience Council by a person who has a disability.

Term of office, chairperson and passing of resolutions

Section 29 (1) The term of office of the Audience Council shall be four years, calculated from the day of its first meeting, and, at any rate, until the day on which a new Audience Council convenes.

(2) The Audience Council shall draw up its own rules of procedure. It shall elect a chairperson and a deputy chairperson from among its members.

(3) Meetings of the Audience Council shall be convened by the chairperson or, in the chairperson's absence, by the deputy chairperson, no less than three times per year and – upon request of no less than a quarter of its members or a quarter of the members of the Foundation Council – within 14 days.

(4) Resolutions of the Audience Council shall be passed when no less than half of its members are present and by a simple majority of votes cast. Resolutions pursuant to section 41 paragraph 1 require a two-thirds majority. The provisions governing the establishment of a presence quorum in case of non-appointment and the provisions on the appointment of a proxy to act for a member absent from a meeting which are applicable to the Foundation Council shall apply by analogy.

(5) If a member of the Audience Council fails to comply with three consecutive meeting invitations without sufficient excuse or if a ground for exclusion pursuant to section 28 paragraph 2 arises following a member's appointment, the Audience Council shall make a finding to that effect by resolution after hearing the member concerned. Such finding shall result in loss of membership, and a new member shall be appointed without delay for the remaining term of office.

(6) If a member of the Audience Council resigns before the end of the term of office, a new member shall be appointed for the remaining term of office. If a member appointed pursuant to section 28 paragraph 6 resigns before the end of the term of office, the Federal Chancellor shall invite the institutions or groups represented by the withdrawing member to submit new proposals. These proposals shall be submitted without delay. The Federal Chancellor shall appoint a member from the proposals submitted.

Responsibilities and duties of the Audience Council

Section 30 (1) The Audience Council shall:

1. make recommendations regarding programming as well as proposals for technical development;
2. appoint six members of the Foundation Council;
3. submit cases to the regulatory authority;
4. approve resolutions of the Foundation Council concerning the amount of the broadcasting licence fee (radio and television licence fees);
5. submit proposals as required for compliance with the statutory mandate in the cases laid down in this Act and comment on the allocation of shares of broadcasting time to ethnic groups. For that purpose, the Audience Council may hear representatives of the ethnic group advisory boards (*Volksgruppenbeiräte*);
6. make recommendations to the Foundation Council concerning annual broadcasting plans and annual content plans;
7. make reasoned recommendations regarding the quality assurance system;
8. make recommendations regarding the provision of programmes for the deaf and hearing-impaired.

For the purpose of performing the duties specified in paragraph 1, the Audience Council is authorized to put questions to the Director General, Directors and Regional Directors on all duties concerning their areas of responsibility within the Austrian Broadcasting Corporation and to request any relevant information. A party to whom such questions are put shall respond to them in writing or, if so requested, orally within two months. They may decline to respond only where this is in the overriding interest of the Austrian Broadcasting Corporation or in the public interest.

(3) If the Audience Council has made recommendations concerning programming, the Director General shall report to the Audience Council, within a reasonable period not exceeding three months, on whether and in what form the recommendation has been followed or why the recommendation was not implemented.

(4) The Director General or a representative nominated by the Director General shall attend meetings of the Audience Council in an advisory capacity. The Audience Council shall be entitled, by way of a request to the Director General, to request that a Managing Director or Regional Director be present. The Members of the Foundation Council shall be entitled to attend meetings of the Audience Council in an advisory capacity.

(5) Once per year, the Audience Council may request the Austrian Broadcasting Corporation to arrange for a representative survey of the audience to be carried out on topics laid down by the Audience Council; such survey shall be in addition to opinion polling conducted by the Austrian Broadcasting Corporation itself. The results of all opinion polls carried out by the Austrian Broadcasting Corporation shall be communicated to the Audience Council.”

III. Application and Preliminary Proceedings

1. The applicant *Land* Government submits that the Federal Constitutional Act of 10 July 1974 on Guaranteeing the Independence of Broadcasting (*Bundesverfassungsgesetz über die Sicherung der Unabhängigkeit des Rundfunks – BVG Rundfunk*, hereinafter the Constitutional Broadcasting Act) requires the independence of the employees, governing bodies and officers of the public service broadcaster to be guaranteed. In addition, Article 10 of the European Convention on Human Rights (ECHR) provides that public service broadcasting must not be dominated by any specific group, particularly not the (Federal) Government. The ORF Act does not fulfil these requirements, as the (Federal) Government has excessive influence over the appointment of the ORF's supervisory and controlling bodies, the applicant *Land* Government argues. The majority of the members of the Foundation Council (*Stiftungsrat*) and the Audience Council (*Publikumsrat*) are appointed by the (Federal) Government, specifically by the responsible Government member. The independence of the members of these bodies is not guaranteed, however.

The provisions of the ORF Act challenged by the applicant *Land* Government are thus in conflict with Article 10 ECHR and Article I paragraph 2 Constitutional Broadcasting Act [...].

2. The Federal Government submitted written observations. [...]

3. The Constitutional Court held a public oral hearing on 26 September 2023. At this hearing, the Constitutional Court and the parties discussed in particular the requirements relating to the appointment, composition, organization and functioning of the Foundation Council and Audience Council of the ORF set out in Article I paragraphs 2 and 3 of the Constitutional Broadcasting Act and the related provisions of the ORF Act.

IV. Considerations

A. As to the admissibility

1. In accordance with Article 140 paragraph 1 subparagraph 2 of the Constitution (*B-VG*), the Constitutional Court decides on the constitutionality of Federal Acts on applications, *inter alia*, by *Land* governments.

2.1. [...]

B. On the merits

1. In proceedings initiated upon an application filed to review the constitutionality of a law pursuant to Article 140 of the Constitution (*B-VG*), the Constitutional Court must limit itself to deliberations on the concerns raised (cf. *VfSlg. 12.691/1991, 13.471/1993, 14.895/1997, 16.824/2003*). It must therefore assess only whether the provisions challenged are unconstitutional on the grounds set out in the application (*VfSlg. 15.193/1998, 16.374/2001, 16.538/2002, 16.929/2003*).

2. The relevant law is as follows:

2.1. Part 5 of the ORF Act governs the organization of public service broadcasting, and section 19 paragraph 1 of the Act specifies the governing bodies and officers of the ORF, including the Foundation Council, the Director General and the Audience Council. Under section 19 paragraph 2 of the ORF Act, the members of these bodies are not bound by instructions and orders; they only have to fulfill the obligations provided by the law as well as the duties provided by the rules of procedure (referred to as “freedom from instruction” – *Weisungsfreistellung*; regarding the Director General see section 22 paragraph 3 ORF Act). The role of member of the ORF’s bodies, i.e. the Foundation Council or the Audience Council, is an honorary position. Notwithstanding the foregoing, the members are entitled to reasonable compensation for costs incurred (section 19 paragraph 3 ORF Act). In addition, all members of the governing bodies of the Foundation are – unless otherwise provided by law – bound by a duty of confidentiality concerning all affairs of the Foundation and its affiliated businesses becoming known to them in the course of their duties. This duty of confidentiality continues after the end of

their service as member of a governing body of the Foundation (section 19 paragraph 4 ORF Act).

2.2. The Foundation Council plays a key role in the governance structure of the ORF. It performs a combination of supervisory duties and strategic governance tasks (*Berka, Zur Governance autonomer öffentlicher Institutionen: das Beispiel des öffentlich-rechtlichen Rundfunks*, commemorative publication in honour of Bernhard Raschauer, 2013, 49 [52]). One especially important responsibility of the Foundation Council is the appointment and removal from office of the Director General. The Foundation Council is also responsible for other key staffing decisions. In addition, it sets the broadcasting licence fee and advertising rates, approves the long-term planning of content, technical and financial affairs and staffing schedules (section 21 paragraph 1 subparagraph 6 ORF Act), approves the Editorial Agreement (subparagraph 8), and its consent is required for certain business decisions (cf. section 21 Constitutional Broadcasting Act; *Holoubek/Kas-sai/Traimer, Grundzüge des Rechts der Massenmedien*⁵, 2014, 115 f.), including issuing the general guidelines in relation to programming, programme scheduling and service coordination of radio and television broadcasting and online services (section 21 paragraph 2 subparagraph 1 ORF Act). Thus by influencing programming by way of the broadcasting guidelines and recommendations regarding programming (section 21 paragraph 1 subparagraph 12 ORF Act), the Foundation Council also has powers relating to the content of programming.

2.3. The rules regarding the appointment of the 35 members of the Foundation Council are set out in section 20 paragraph 1 first sentence ORF Act: The Federal Government must appoint six members in proportion to the number of seats held by the political parties in the National Council, due regard being paid to the proposals of those parties; each of the parties represented on the Main Committee of the National Council must be represented in the Foundation Council by at least one member (subparagraph 1). The *Länder* shall appoint nine members, with each *Land* being entitled to appoint one member (subparagraph 2). The specific individual or group of people authorized to make these appointments, for example the *Land* government or the *Land* governor, is determined by the constitution of each *Land* or the relevant provisions of regional law (*Kogler/Traimer/Truppe, Österreichische Rundfunkgesetze*⁴, 2018, section 20 ORF Act, comments on para-

graph 1). The Federal Government also appoints (a further) nine members (subparagraph 3), the Audience Council six members (subparagraph 4; the requirement that members must be appointed from specific areas, as formerly provided for in section 16 paragraph 1 subparagraph 2 of the Broadcasting Act (*Rundfunkgesetz*) 1974, Federal Law Gazette 397/1974, no longer exists) and the Central Staff Council appoints five members (subparagraph 5); these latter members allow ORF personnel a certain degree of participation and co-determination (*Pöschl, Meinungsvielfalt im öffentlich-rechtlichen Rundfunk*, in: *Berka/Grabenwarter/Holoubek* [eds.], *Meinungsvielfalt im Rundfunk und in den Online-Medien*, 2014, 47 [61]).

Except as regards the members appointed by the Central Staff Council, it must be ensured during the appointment process that members of the Foundation Council possess the necessary personal and professional aptitude as a result of appropriate training or relevant vocational experience in the matters to be handled by the Foundation Council, and that they have knowledge of the media market or are held in high regard in the field of economics, science, arts or education. These general requirements regarding the professional and personal aptitude of the members of the Foundation Council stipulated in section 20 paragraph 1 final sentence ORF Act define the specific expertise that the members of the Foundation Council are required to possess; these requirements are also intended to ensure that “the Foundation Council as a whole possesses a high level of specialist knowledge concerning individual areas of the business” (*Kogler/Traimer/Truppe, op. cit.*, section 20 ORF Act, comments on paragraph 2, reference to *Kalss, Aktiengesellschaft*, in: *Kalss/Nowotny/Schauer* [eds.], *Gesellschaftsrecht*, 2008, point 3/474).

Section 20 paragraph 3 ORF Act sets out grounds for exclusion. Besides the members appointed by the Central Staff Council, persons who are employees of the Austria Broadcasting Corporation (subparagraph 1) may not be appointed to the Foundation Council. Additionally, the following are not eligible for appointment to the Foundation Council: members of the Federal Government, state secretaries, members of a *Land* government, members of the National Council, the Federal Council, members of another general representative body such as a *Land* parliament or municipal council (*Gemeinderat*) or the European Parliament; also persons who are employees of a political party or senior officials of an organization of

a political party at federal or *Land* level, as well as members of the Austrian Ombudsman Board, the President of the Austrian Court of Audit, and persons who have held one of the aforementioned offices within the previous four years (subparagraph 5). Senior officials are persons who “influence the decisions of a governing body of a federal or regional organization of a political party” by virtue of the party's by-laws, for instance voting members of the party executive committee (*Kogler/Traimer/Truppe, op. cit.*, section 20 ORF Act, comments on paragraph 3). The appointment of persons who are employees of a party faction in a general representative body as well as parliamentary staff members within the meaning of the Parliamentary Staff Act (*Parlamentsmitarbeiterinnen- und Parlamentsmitarbeitergesetz, ParlMG*) (subparagraph 6), persons who have been assigned to service to a party faction in a general representative body (subparagraph 7), employees of legal entities working in the field of civic education within the framework of the political parties (subparagraph 8), and staff members e.g. in the office of a federal minister or the office of a state secretary (subparagraph 9) is also precluded by the provisions relating to incompatibility (due to conflicts of interest). Thus under no circumstances are members of the Foundation Council permitted to perform any governmental or party functions (*Pöschl, op. cit.*, 59). If a ground for exclusion arises following a member's appointment, the Foundation Council must make a finding to that effect by resolution after hearing the member concerned; such finding entails loss of membership. A new member must be appointed for the remaining term of office (section 20 paragraph 4 final sentence ORF Act).

For the most part, the Foundation Council takes decisions by open vote and by simple majority (regarding the exception of decisions to remove the Director General from office pursuant to section 22 paragraph 5 ORF Act and special audits pursuant to section 41 paragraph 1 ORF Act, see section 20 paragraph 6 ORF Act). The chairperson must participate in voting. In the event of a tie, the chairperson – or in the chairperson's absence, the deputy – has the casting vote. If the bodies authorized to appoint members fail to do so, the resulting vacancies are disregarded when establishing the presence of a quorum (i.e. the presence of no less than half of the members, section 20 paragraph 6 ORF Act) at meetings of the Foundation Council (section 20 paragraph 5 ORF Act; the provisions regarding establishment of a quorum at meetings of the Foundation Council in the event of non-appointment apply by analogy for the Audience Council [section 29 paragraph 4 ORF Act]),

meaning that the functioning of the Foundation Council is assured if bodies authorized to appoint members do not avail themselves of that right (*Kogler/Traimer/Truppe, op. cit.*, section 20 ORF Act, comments on paragraph. 4).

2.4. The term of office of the Foundation Council is four years. The members appointed by the Federal Government may be removed from office prematurely during a term of office only if the Federal President has appointed a new Federal Government; a member appointed by a *Land* only if the *Land* parliament has elected a new *Land* government; and the members appointed by the Audience Council and the Central Staff Council only if the composition of these bodies changes (see section 20 paragraph 4 second sentence ORF Act). The ORF Act also expressly provides for loss of membership in the event that a member of the Foundation Council fails to comply with three consecutive meeting invitations without sufficient excuse or (as previously mentioned) if a ground for exclusion within the meaning of section 20 paragraph 3 ORF Act arises following a member's appointment. Members may also resign before the end of their term of office, i.e. depart prematurely (for a detailed discussion see *Kogler/Traimer/Truppe, op. cit.*, section 20 ORF Act, comments on paragraph 4).

2.5. The members of the Foundation Council are subject to the same duty of care and have the same responsibilities as members of the supervisory board of a stock corporation (section 20 paragraph 2 ORF Act). Accordingly, they must exercise the due care of a prudent and conscientious manager. If members of the Foundation Council breach these requirements, they are jointly and severally liable to the Foundation to make good any loss or damage caused (*Holoubek/Kassai/Traimer, op. cit.*, 115 f.). To prepare resolutions on specific issues and to supervise the Executive Board, the Foundation Council can set up committees comprising as a minimum five of its members (section 20 paragraph 7 ORF Act).

2.6. The purpose of the Audience Council is to safeguard the interests of listeners and viewers (section 28 paragraph 1 ORF Act).

2.6.1. Its term of office is four years (section 29 paragraph 1 ORF Act). Resolutions of the Audience Council are passed by a quorum of no less than half of its members and by a simple majority of votes cast (see section 29 paragraph 4 ORF Act regarding the exception for the special audit pursuant to section 41 paragraph 1 ORF

Act). Its responsibilities include the making of recommendations regarding programming and the approval of resolutions of the Foundation Council setting the amount of the broadcasting licence fee (see section 30 ORF Act; *Holoubek/Kassai/Traimer, op. cit.*, 116 f.). The Audience Council also appoints six members of the Foundation Council (section 30 paragraph 1 subparagraph 2 ORF Act). The Audience Council is free to select persons suitable to join the Foundation Council by simple majority; such persons are not required to be members of the Audience Council (*Kogler/Traimer/Truppe, op. cit.*, section 30 ORF Act, comments on paragraph 1). If the Audience Council appoints persons drawn from its members to the Foundation Council, those members may also continue to serve on the Audience Council, meaning that they may belong to two governing bodies of the ORF simultaneously (section 20 paragraph 3 subparagraph 3 ORF Act and section 28 paragraph 2 subparagraph 2 ORF Act).

2.6.2. The Audience Council is composed of representatives of key areas of society and groups. The Austrian Federal Economic Chamber, the Conference of the Presidents of the Austrian Chambers of Agriculture, the Federal Chamber of Labour, and the Austrian Trade Union Federation each appoint one member (section 28 paragraph 3 subparagraph 1 ORF Act). In addition, the chambers of freelance professionals together appoint one member (subparagraph 2), the Roman Catholic Church and the Lutheran Church each appoint one member (subparagraphs 3 and 4), the legal entities working in the field of civic education within the framework of the political parties each appoint one member (subparagraph 5; the number of these appointees varies) and the Academy of Sciences appoints one member (subparagraph 6).

2.6.3. Alongside this system of direct appointments, which largely grew up over time (*Kogler/Traimer/Truppe, op. cit.*, section 28 ORF Act, comments on paragraph 3), 17 members are appointed by the Federal Chancellor (currently by the Federal Minister for Women, Family, Integration and Media in the Federal Chancellery, see Federal Law Gazette II 3/2022) on the basis of proposals from various representative institutions and organizations; there is no statutory entitlement to representation (*Kogler/Traimer/Truppe, op. cit.*, section 28 ORF Act, comments on paragraph 6). For the appointment of these 17 members, the Federal Chancellor must solicit proposals from institutions or organizations which are representative

of areas such as education, the arts, families, consumers and environmental protection (section 28 paragraph 4 ORF Act). The Federal Chancellor must invite the representative institutions and organizations by way of a public announcement in the Austrian official gazette to propose three persons for appointment and to make the proposals submitted publicly known (section 28 paragraph 5 ORF Act). The Federal Chancellor must then appoint the members from the proposals received, with (at least) one member being appointed for each area. Since 17 members are to be drawn from 14 areas, certain areas or groups will have greater representation as more than one person is appointed from those areas or groups. In addition, one person who has a disability must be appointed to represent the interests of persons with disabilities (section 28 paragraph 6 second sentence ORF Act).

If a member appointed in the manner resigns before the end of the term of office, the Federal Chancellor must invite the relevant institutions or groups to submit new proposals without delay; the Federal Chancellor must appoint a member from among the proposals received (section 29 paragraph 6 ORF Act). No provision is made for departing members to be succeeded by persons originally proposed but not appointed (*Kogler/Traimer/Truppe, op. cit.*, section 29 ORF Act, comments on paragraph 6). It is for the Federal Chancellor to determine whether an institution is representative and therefore eligible to make proposals. Section 28 ORF Act – except in paragraph 6 second sentence – does not specify what criteria the Federal Chancellor must apply when making the selection (*Kogler/Traimer/Truppe, op. cit.*, section 28 ORF Act, comments on paragraph 6).

2.7. Members of the Audience Council are also subject to grounds for exclusion, which are largely the same as those for members of the Foundation Council. Thus members of the Federal Government, state secretaries, members of a *Land* government, the National Council or Federal Council, another general representative body or the European Parliament may not be appointed to the Audience Council; in addition, persons who are employees of a political party or senior officials of an organization of a political party at federal or *Land* level, as well as members of the Austrian Ombudsman Board and the President of the Austrian Court of Audit are not eligible. Additionally, members are not allowed to have held any of the aforementioned offices within the previous four years (section 28 paragraph 2 subparagraph 4 ORF Act). Also ineligible for appointment to the Audience Council are

persons who are employees of a party faction in a general representative body as well as parliamentary staff members within the meaning of the Parliamentary Staff Act (subparagraph 5); persons who have been assigned to service to a party faction in a general representative body (subparagraph 6); employees of legal entities working in the field of civic education within the framework of the political parties (subparagraph 7) and employees e.g. in the office of a federal minister or the office of a state secretary (subparagraph 8).

If such ground for exclusion arises following a member's appointment or if a member fails to comply with three consecutive meeting invitations without sufficient excuse, that member will lose membership of the Audience Council and a new member must be appointed for the remaining term of office (see section 29 paragraph 5 ORF Act). If a member resigns before the end of the term of office, this results in premature departure. There are no provisions regarding premature removal of members of the Audience Council analogous to those applicable to the Foundation Council in section 20 paragraph 4 second sentence ORF Act (*Kogler/Traimer/Truppe, op. cit.*, section 29 ORF Act, comments on paragraphs 5 and 6).

3. In essence, the applicant *Land* Government raises the following concerns regarding the composition of the Foundation Council:

3.1. The Foundation Council is the controlling and supervisory body of the ORF and holds wide-ranging powers. However, especially the Federal Government has excessive influence over the appointment of its members (and thus also the committees drawn from among those members).

The Constitutional Broadcasting Act lays down the principles governing the editorial and organizational independence of the ORF. It is motivated, *inter alia*, by a desire to place broadcasting beyond the influence of political forces. Diversity of opinion and independence need to be guaranteed in law, specifically by defining requirements applicable to the supervisory and governing bodies, but this is not sufficiently achieved, the applicant *Land* Government argues. The ORF as public broadcaster has to fulfil specific programme responsibilities defined by law (see section 4 of the ORF Act). The organization of its governing bodies is based on the idea of this core public service remit. As a result, these bodies must, on the one

hand, be pluralistic in composition and, on the other hand, be solely accountable to and dependent on the “general public”.

Having regard to the decision of the German Federal Constitutional Court (*Bundesverfassungsgericht*) of 25 March 2014 concerning the supervisory body of the German public service broadcaster *Zweites Deutsches Fernsehen* (ZDF), the governing bodies of the ORF do not meet the requirements for sufficient distance from the state (*Staatsferne*), firstly, due to the fact that the majority of members are appointed without sufficient distance from the state, and secondly, due to a lack of statutory safeguards to ensure diversity of membership in the governing bodies and adequate transparency. In light of the constitutional requirement that the governing bodies and officers of the ORF be independent, the principle of independence from the state, within the meaning of the Constitutional Broadcasting Act, also applies to the ORF. As the state is a reflection of a pluralistic society, it is in principle particularly suited to the task of appointing the governing bodies and officers of a public service media business. However, any dominance by the Federal Government over the supervisory and controlling bodies of public broadcasters is incompatible with the provisions of constitutional law guaranteeing independence. The identity of the appointer is more important than the personal aptitude and ideological – or party-political – orientation of an appointee, the applicant *Land* Government argues. Since, pursuant to section 20 paragraph 6 ORF Act, the Foundation Council takes decisions by simple majority (and by open vote), that body cannot be regarded as independent if more than half of its members are appointed by a single group (the Federal Government). The incompatibility provisions set out in section 20 paragraph 3 ORF Act are not sufficient to guarantee the required independence, as they relate solely to the individual concerned. Even the appearance of political dependence, which is created by the fact that appointments are made by the Federal Government, is of significance and may call that independence into question.

The appointment of six members of the Foundation Council by the parties represented in the National Council as well as the appointment of nine members by the *Land* governments and nine members by the Federal Government are to be deemed close to the state (*staatsnah*), i.e. closeness to the state applies to a total of 24 Foundation Council members (disregarding the members delegated by the Audience Council), which constitutes the two-thirds majority required in some

matters. Eighteen of the 35 members of the Foundation Council must be categorized as close to the Government (*regierungsnah*). Furthermore, many members of the Foundation Council are organized in interest groups aligned along party-political lines, referred to as “circles of friends” (*Freundeskreise*), which regularly coordinate their votes. The communication structure organized along party-political lines which is manifest here must (within the meaning of the case law of the German Federal Constitutional Court) be limited in order to ensure that state members and close-to-state-authority members do not obtain excessive influence via such bodies.

3.2. Moreover, Article 10 ECHR requires states to guarantee that broadcasting is organized in such a way as to ensure pluralism and independence. In the case of *Manole and Others v. Moldova*, the European Court of Human Rights established principles for the organization of the controlling and supervisory bodies of public service broadcasters that focus on appointment modalities rather than the qualifications or political orientation of appointees. Although the facts and circumstances differ in the Manole case, Article 10 ECHR imposes a general obligation to ensure diversity in broadcasting by enacting corresponding legislation and avoid undermining that obligation by permitting a powerful economic or political group or the state to obtain a position of dominance over or within a broadcasting organization and thereby exercise pressure. According to the applicant *Land* Government, the existing incompatibility provisions do not provide adequate safeguards; the sole relevant criterion when determining whether political bias within the meaning of the case law of the European Court of Human Rights is present is allocation to a dominant group. The applicant *Land* Government also alleges a lack of guarantees against political interference. Such guarantees can be provided either by stipulating substantive requirements (e.g. by defining minimum requirements relating to the potential appointees or criteria for delegation to governing bodies) or by specifying procedural requirements (e.g. by defining a public application or selection procedure). Due to the absence of adequate safeguards against political bias, the applicant *Land* Government argues, the rules relating to the appointment of Foundation Council members set out in section 20 ORF Act conflict with Article 10 ECHR. The prohibition on secret ballots provided for in section 20 paragraph 6 ORF Act is also problematic from a constitutional point of view in this connection.

4. In summary, the Federal Government responds to the submissions of the applicant *Land* Government regarding the Foundation Council as follows:

4.1. The applicant *Land* Government expresses the view that the mere fact of a member's appointment by the Federal Government or a *Land* establishes a situation of political dependence which conflicts with the requirement for members to perform their duties independently and on their own responsibility. According to the applicant *Land* Government, the candidate's personal qualifications are not relevant. However, the power of state bodies to appoint individual members of a governing body of a public service broadcaster does not automatically affect the independence of either the individual member appointed, the body concerned or public service broadcasting itself. Independence is not directly connected to distance from the state. Rather, appointment by a democratically legitimated body establishes a framework of democratic legitimation. In addition, the ORF Act provides for safeguards to ensure that the rights of the state to participate in decision-making regarding the composition of the governing bodies of broadcasters cannot be misused for political purposes. For instance, those safeguards include the incompatibility provisions of section 20 paragraph 3 ORF Act. Furthermore, the ORF Act stipulates requirements regarding the personal and professional aptitude of the individual Foundation Council members (section 20 paragraph 1 final sentence ORF Act). These particular requirements are connected, on the one hand, to the duty of care (i.e. the duty to exercise care) and the responsibilities of the Foundation Council members. If a nominated Foundation Council member does not possess the required minimum qualifications, that candidate must decline the appointment so as to avoid any risk of liability. On the other hand, these stringent qualification requirements help avoid political bias: By appointing high-qualified persons, the aim of ensuring objective decision-making in line with the interests of the general public, unaffected by various relationships of dependency, can be achieved.

The central provision concerning the independence of the members of the Foundation Council is section 19 paragraph 2 ORF Act, pursuant to which (*inter alia*) the members of the Foundation Council are not bound by instructions and orders but solely by statutory obligations and the duties provided by the rules of procedure. The applicant *Land* Government does not take adequate account of this stipula-

tion, which is also contained in other legislation governing comparable legal settings to ensure independence. In parallel to their freedom from instruction, the members of the Foundation Council have the same duty of care and the same responsibilities as members of the supervisory board of stock corporations, who are liable for damage resulting from non-compliance (section 20 paragraph 2 ORF Act). Independence and individual liability for breaches of the duty of care ensure that the members of the Foundation Council, which supervises the Executive Board, act on their own responsibility.

According to the Federal Government, the organization of Foundation Council members into “circles of friends” is not problematic either because discussions and efforts to achieve as broad a majority as possible on an issue subject to a forthcoming vote in the Foundation Council do not appear to entail any breach of independence. In addition, Foundation Council members need not fear premature removal from office as a result of their (public) voting record, as members may only be removed during a term of office on specific, precisely defined grounds (section 20 paragraph 4 ORF Act).

Also, the applicant *Land* Government wrongly assumes that the facts which resulted in the decision of the German Federal Constitutional Court of 25 March 2014 are comparable with the facts in the present case. The responsibilities and duties of the Foundation Council, which are set out in section 21 ORF Act, are less extensive than those of the Television Council (*Fernsehrat*) of the ZDF. Firstly, the Foundation Council has no influence over on-going programming. Its powers are limited to involvement in long-term planning of programming. Secondly, the Foundation Council, unlike the Television Council, has no regulatory control function besides supervision of the Executive Board pursuant to section 21 paragraph 1 subparagraph 1 ORF Act. Legal supervision over public broadcasting is exercised by the regulatory authority Austrian Communications Authority (*Kommunikationsbehörde Austria, KommAustria*). In addition, and above all, the provisions relating to incompatibility differ significantly between the two organizations.

Moreover, account must be taken of the independence and individual responsibility of all programming staff and the free exercise of the journalistic profession (cf. section 32 ORF Act). Section 33 ORF Act provides for an Editorial Agreement to be

concluded for this purpose. Any breach can be referred to the independent regulatory authority. A breach of the ORF Act by a governing body or officer of the ORF may result, in addition to establishing a finding of such breach, in the dissolution of the body or removal of the officer concerned (section 37 paragraph 2 ORF Act). External and independent legal supervision is a central element of the system of guarantees ensuring objectivity and independence of content as well as independence of the staff of a public service media provider in line with the interests of the general public.

4.2. With regard to the submissions concerning Article 10 ECHR, it must firstly be noted that the circumstances of the present case are not comparable to those in *Manole and Others*. Alongside clear legal requirements guaranteeing editorial independence and freedom from instruction of the governing bodies of the ORF, several democratically legitimated bodies participate in the appointment of those bodies in Austria. This means that the members of the governing bodies appointed by the Federal Government and the *Länder* are indirectly democratically legitimated. In addition, incompatibility provisions are in place for both the Foundation Council and the Audience Council.

5. As regards the requirements concerning independence and plurality in public service broadcasting laid down in Article I paragraph 2 Constitutional Broadcasting Act, the Constitutional Court takes the following view:

5.1. The Constitutional Broadcasting Act and Article 10 ECHR – in conjunction with Article 10 paragraph 1 third sentence ECHR (*VfSlg. 20.500/2021*) – impose a functional responsibility on the legislator as regards the organization of the broadcasting system. It is based on the freedom to broadcast, an individual right guaranteed by Article 10 ECHR, and on the institutional requirements of the Constitutional Broadcasting Act (*cf. VfSlg. 12.822/1991* with further references) and is intended to comprehensively guarantee freedom of public discourse via broadcasting. It is upon the federal legislator to stipulate in more detail the legal framework for broadcasting and its organization (Article I paragraph 2 first sentence Constitutional Broadcasting Act), encompassing provisions guaranteeing the objectivity and impartiality of reporting, diversity of opinion, balanced programming and independence of the individuals and governing bodies entrusted with the provision

of broadcasting (within the meaning of Article I paragraph 1 Constitutional Broadcasting Act). Broadcasting in this sense is a public function (Article I paragraph 3 Constitutional Broadcasting Act). The institutional guarantees provided for in Article I paragraphs 2 and 3 Constitutional Broadcasting Act – in conjunction with Article 10 ECHR, which also protects broadcasting of this nature (*VfGH 30.6.2022, G 226/2021*) – apply to broadcasting as defined in Article I paragraph 1 Constitutional Broadcasting Act.

It is within the scope of this constitutional framework provided for broadcasting that public service broadcasting must be given a status adequate to its function as required by the Constitutional Broadcasting Act and Article 10 ECHR. The specifications laid down in Article I paragraphs 2 and 3 of the Constitutional Broadcasting Act aim to accentuate the democratic and cultural significance of public service broadcasting within overall broadcasting. It is this democratic and cultural purpose of public service broadcasting that is central to the legislator's responsibility for the functioning and financing of public service broadcasting (*VfGH 30.6.2022, G 226/2021*). This responsibility for the functioning and financing of public service broadcasting encompasses an obligation to provide a legal framework that guarantees that public service broadcasting complies with the principles defined in Article I paragraph 2 second sentence Constitutional Broadcasting Act, as well as an institutional obligation – inseparable from the former under the scheme of the Constitutional Broadcasting Act – to organize the provision of such broadcasting by a public service broadcaster.

The organization and internal structures of that public service broadcaster must comply with the criteria laid down in Article I paragraph 2 second sentence Constitutional Broadcasting Act. The form of public service broadcasting must therefore be aligned with its function and comply with the provisions of Article I paragraph 2 second sentence Constitutional Broadcasting Act (on the significance of the constitutional broadcasting requirements regarding content and structure of the ORF, see *Pöschl, op. cit.*, 58; *Berka, Unabhängigkeit, Pluralität und Transparenz, Medien und Recht 2015*, 216). The Constitutional Court emphasized this institutional aspect of the ORF's freedom to broadcast when it found this freedom to be guaranteed only "if the news or ideas can actually be broadcast by the ORF in view of the objectivity and impartiality of reporting, consideration to the diversity

of opinion and balanced programming” (*VfSlg. 10.948/1986*; see *Berka, Rundfunkmonopol auf dem Prüfstand. Die Freiheit und öffentliche Verantwortung des Rundfunks in Österreich, 1988, 24*).

5.2. The constitutional requirement which is of particular importance in the above sense as regards the organization of the governing bodies of the ORF at issue in these proceedings, i.e. the Foundation Council and the Audience Council, is the principle of independence provided for in Article I paragraph 2 second sentence Constitutional Broadcasting Act, which relates expressly to these bodies. This constitutional provision guaranteeing broadcasting independence protects the ORF and its governing bodies and officers against any state or private interference or dependencies affecting their functioning (*VfGH 30.6.2022, G 226/2021*). Thus the independence of the governing bodies and officers of the ORF is also intended to ensure that no state or private forces are able to influence the activities of the ORF’s programming staff for their own purposes by interfering with the activities of the governing bodies and officers. In light of the ORF’s function as a “public watchdog” (see *VfSlg. 20.427/2020*), this is particularly important in relation to those political forces which, because they are represented in the relevant democratic institutions, are involved in appointing members of the ORF’s governing bodies. If, for reasons of representation of the general public and corresponding democratic legitimation, responsibility for the appointment of members of the Foundation Council and the Audience Council is conferred on supreme state bodies, the independence of the ongoing activities of the ORF’s governing bodies must be guaranteed specifically with regard to the state bodies which appoint their members and the political forces that they represent, in the interests of the general public (which the public service broadcaster and its activities are intended to serve). It is this challenging situation in particular that the guarantee of independence provided for in Article I paragraph 2 Constitutional Broadcasting Act is intended to address with regard to public service broadcasting (and which in the past resulted in the enshrinement in constitutional broadcasting law [specifically in Article I paragraph 2 Constitutional Broadcasting Act] of the “independence of the individuals and governing bodies” entrusted with public broadcasting responsibilities [*cf. stenographic protocols of the National Council, 13th legislative period, 111th meeting, pp. 10870, and the preparatory documents relating to the 1974 Amendment to the Broadcasting Act, Explanatory Notes on the Government Bill*

933 supplements to the stenographic protocols of the National Council, 13th legislative period, p. 10, in the course of which the Constitutional Broadcasting Act was enacted as a separate Federal Constitutional Act]).

From the constitutional guarantee of broadcasting independence applicable to the governing bodies of the ORF under discussion here it can be derived that the ability of the members of those bodies to perform their duties independently and free of influence must be provided for by law. The guarantee of independence also relates to the governing body as a whole, however. The provisions governing the appointment and composition of its members must guarantee that no state body is able, when appointing the members of a governing body of the ORF, to exert a unilateral influence over the composition of that body which may jeopardize its independence as a whole.

5.3 A further requirement regarding the organization of the governing bodies of the ORF arising from the other principles of constitutional broadcasting law set out in Article I paragraph 2 second sentence Constitutional Broadcasting Act, particularly the provisions requiring diversity of opinion and balanced programming, is that those bodies' composition must allow for a certain pluralism so that they cannot be unilaterally dominated by persons factually or legally associated with a group (the European Court of Human Rights also derives this fundamental principle from Article 10 ECHR; see ECtHR 17 September 2009, appl. no. 13.936/02, *Manole and Others*, point 98; cf. also *Grabenwarter*, Article 5 GG, in: *Dürig/Herzog/Scholz* [eds.], *Grundgesetz Kommentar*, volume I, 85. Lfg., 2018, point 812). The principle of pluralism and the principle of independence thus interact with one another.

The constitutional principle in broadcasting law which requires the governing bodies of the ORF to be pluralistic in composition and the principle which requires those bodies to be independent in the performance of their duties are intended to ensure that no state body which appoints members to those bodies has excessive influence over their composition. Additionally, those principles are intended to guarantee that appointment decisions by state bodies are – to the extent constitutionally permissible – governed by statutory provisions, for example through requirements regarding the qualifications of members or through granting rights of proposal to institutions that are independent of the state, and that appointment

decisions are not, except for grounds for exclusion, left to the discretion of that state body.

5.4. The legislator has a margin of appreciation in this regard. Ensuring representation of key areas of society and groups in a manner which reflects the spectrum of users of public service broadcasting is one approach (traditionally taken in the development of public service broadcasting in Europe) to ensure pluralism; another approach to ensure pluralism is defining various professional requirements for members to cover the responsibilities and duties of the governing body and achieve professional decision-making. The purpose of ensuring pluralism by imposing professional requirements for individual members is – along with ensuring diversity by involving multiple state bodies in appointing members and allocating the number of members to be appointed among them – to make sure that a variety of interests and perspectives are taken into account in the body's decision-making and to prevent that interests which are unrelated dominate the body's decision-making.

6. With regard to the concerns of the applicant *Land* Government in relation to the Foundation Council of the ORF:

6.1 The applicant *Land* Government regards the appointment of members of the Foundation Council by state bodies, particularly the Federal Government, in itself to constitute a breach of the constitutional principle of broadcasting independence: This is a fundamental misconception of the importance and function of democratic legitimation as enshrined in the Constitution (*Bundes-Verfassungsgesetz, B-VG*), which specifies the democratic principle in more detail. Democratically legitimated (supreme) state bodies represent the community which makes up that state. The fact that the governing bodies of the ORF are appointed by those state bodies not only does not conflict with the constitutional requirements of broadcasting law regarding pluralism and independence, but also contributes to compliance with those requirements due to the democratic legitimacy of those bodies. The existence of political parties and the potential for changes of political majorities are an expression of the democratic principle underlying the Constitution (B-VG) (see *VfSlg. 7593/1975* and the constitutional provision set out in section 1 paragraph 1 of the Political Parties Act [*Parteiengesetz, PartG*] 2012).

6.2 With a view to the independence of the Foundation Council members appointed by state bodies, and the question of whether its composition satisfies the pluralism requirements of Article I paragraph 2 Constitutional Broadcasting Act, the specific legal provisions for the appointment of its members and the requirements the state body appointing them must comply with are crucial.

6.2.1. Section 20 paragraph 1 first sentence ORF Act divides responsibility for appointment of the members of the Foundation Council among various (state and non-state) bodies; this is constitutionally important as regards the requirements for independence and pluralism in broadcasting laid down in Article I paragraph 2 Constitutional Broadcasting Act. Specifically, the appointment of six members by the Federal Government – pursuant to section 20 paragraph 1 first sentence subparagraph 1 ORF Act in conjunction with the provision requiring each party represented in the Main Committee of the National Council to be represented in the Foundation Council by at least one member – is directly connected with the representation of the general public in a democratic parliamentary system. Apart from the fact that the Federal Government must have regard to the general personal and professional requirements when appointing these six members to the Foundation Council, the selection of those six members is guided by considerations of democratic representation.

6.2.2. Constitutional broadcasting law provides for public service broadcasting to ensure participation of the general public in public discourse; the general public is represented by the democratically legitimated state bodies when appointing the governing bodies of the public broadcaster. In principle, no constitutional objection can be raised on the fact that the legislator allocates responsibility for the representation of the general public, except for the six members of the Foundation Council to be appointed in accordance with section 20 paragraph 1 first sentence subparagraph 1 ORF Act, to the Federal Government (section 20 paragraph 1 first sentence subparagraph 3 ORF Act) and in the federal system laid down in the Constitution (*B-VG*) to supreme bodies of the *Länder* (section 20 paragraph 1 first sentence subparagraph 2 ORF Act) (cf. IV.B.6.1. above on the democratic legitimation of appointments by supreme bodies of the Federation or the *Länder*). Regarding the members of the Foundation Council appointed by the individual *Länder* in accordance with section 20 paragraph 1 first sentence subparagraph 2 ORF Act, it is also significant, from the perspective of Article I paragraph 2

Constitutional Broadcasting Act, that the selection of these nine members of the Foundation Council, each by a different *Land* (beyond the requirements regarding general personal and professional qualifications) gives expression to the aspect of federal diversity.

Pluralism of the Foundation Council is to be generally achieved by the appointment of members to the Foundation Council by the Audience Council, which is, firstly, itself constituted in accordance with principles of social representation and, secondly, furnished with constitutional guarantees of broadcasting independence; thirdly – unlike the Federal Government or the *Länder* – the Audience Council is subject to regulatory control by KommAustria when making its appointments to the Foundation Council (cf. *Kogler/Traimer/Truppe, op. cit.*, section 35 ORF Act, comments on paragraph 1 and section 37 ORF Act, comments on paragraph 2). Further, the appointment of members of the Foundation Council by the Audience Council, which is not a state body, is an expression of the notion of distance from the state.

6.2.3. By contrast, in relation to the nine members of the Foundation Council appointed by the Federal Government in accordance with section 20 paragraph 1 first sentence subparagraph 3 ORF Act, the Federal Government is not subject to obligations intended to ensure diversity in the Foundation Council exceeding those relating to the general personal and professional requirements (see IV.B.6.4.3.1. below). Bearing in mind that, particularly in light of the requirement defined in section 20 paragraph 1 first sentence subparagraph 1 final clause ORF Act, six members are appointed on the proposal of political parties in the National Council within the margin of appreciation of the legislator, and that the number of members to be appointed by the individual *Länder* is necessarily nine, the nine members to be appointed by the Federal Government in accordance with section 20 paragraph 1 first sentence subparagraph 3 ORF Act constitute a relatively large group. This is of special significance because the Foundation Council (unlike the previous Board of Trustees [*Kuratorium*] pursuant to section 9 paragraph 1 Broadcasting Act [*Rundfunkgesetz*] 1974) makes fundamental decisions for the ORF on matters such as the appointment of the Director General by simple majority of votes cast (section 20 paragraph 6 ORF Act).

6.2.4. As a result, the Federal Government clearly predominates in comparison with the group of members of the Foundation Council appointed by the Audience Council (which, as mentioned in the foregoing, is particularly relevant for ensuring diversity within the Foundation Council).

For this reason, the size of these two groups of members of the Foundation Council relative to one another, as stipulated in section 20 paragraph 1 first sentence subparagraphs 3 and 4 ORF Act, fails to adequately fulfil the requirements provided for in Article I paragraph 2 Constitutional Broadcasting Act. In view of the number (derived to ensure diversity or given) of members appointed pursuant to section 20 paragraph 1 first sentence subparagraphs 1 and 2 ORF Act by state bodies, including in particular the Federal Government, the fact that the additional members appointed by the Federal Government pursuant to section 20 paragraph 1 first sentence subparagraph 3 ORF Act outnumber those to be appointed by the Audience Council cannot be justified. As regards the ratio between the members appointed by the Federal Government, as a state body, and those appointed by the Audience Council, as an independent non-state body, it must be ensured as a minimum that the number of members appointed by the Audience Council is not smaller than the number of members appointed by the Federal Government pursuant to section 20 paragraph 1 first sentence subparagraph 3 ORF Act.

6.2.5. Therefore, the provisions of section 20 paragraph 1 first sentence subparagraph 3 ORF Act and section 20 paragraph 1 first sentence subparagraph 4 ORF Act are found to be unconstitutional for breach of Article I paragraph 2 Constitutional Broadcasting Act.

6.3. The appointment of members of the Foundation Council is additionally characterized by the stipulation that those members must satisfy general personal and professional requirements. These requirements are just as important, in terms of the personal independence of the members of the Foundation Council, as the statutory rules regarding their activities.

6.3.1. The ORF Act lays down a number of rules intended to guarantee the personal independence of the members of the Foundation Council in the performance of their duties, particularly vis-à-vis the state bodies which appoint them

or the political parties entitled to make proposals for their appointment. The first of these is the central provision in section 19 paragraph 2 ORF Act, which stipulates *inter alia* that members of the Foundation Council are not bound by instructions and orders in the exercise of their functions, but have to solely fulfill statutory obligations as well as duties provided by the rules of procedure. The independence of the members of the Foundation Council from (state) influence, particularly of the state bodies which appoint them and the political parties entitled to make proposals for those appointments, is further ensured by the incompatibility provisions in section 20 paragraph 3 ORF Act, which – in addition to stipulating that other duties for the ORF under a contract of employment or similar work relationship are incompatible with membership of the Foundation Council – focus above all on excluding from appointment to the Foundation Council persons who have a close relationship to the political parties entitled to make proposals or to the Federal Government which makes the appointments (regarding the grounds for exclusion to ensure independence in the Constitutional Broadcasting Act, see *Kogler/Traimer/Truppe, op. cit.*, section 20 ORF Act, comments on paragraph 3). These independence rules are supplemented by the duty of confidentiality (particularly vis-à-vis the bodies or institutions which appoint or propose the members) to which members of the Foundation Council are subject pursuant to section 19 paragraph 4 ORF Act, and by the duty of care and the resulting personal responsibility which members of the Foundation Council have pursuant to section 20 paragraph 2 ORF Act.

These requirements of the ORF Act intended to ensure personal independence are additionally supplemented by the four-year term of office and the stipulation in section 20 paragraph 4 ORF Act that members may be removed from office prematurely only on specific grounds. A member of the Foundation Council can be removed from office prematurely only if certain grounds for exclusion apply (incompatibility arising following appointment or material breach of the requirement to perform the duties of a Foundation Council member; in both cases, a resolution to that effect by the Foundation Council is required; section 20 paragraph 4 penultimate sentence ORF Act). However, premature removal from office is also possible if the state bodies which appointed the Foundation Council are themselves replaced or if the composition of the governing body or entity of the ORF entitled to delegate members to the Foundation Council changes (section 20 paragraph 4 second sentence ORF Act).

6.3.2. This last rule is inconsistent with the fixed term of office of the members of the Foundation Council. One of the arrangements intended to ensure that members exercise their functions independently is the fact that they are appointed for a reasonable period of time, and during that term of office (four years pursuant to section 20 paragraph 4 first sentence ORF Act) can be removed prematurely only for specific reasons (see section 20 paragraph 4 ORF Act).

In *VfSlg. 7593/1975*, the Constitutional Court found that there are no reservations with regard to Article I paragraph 2 Constitutional Broadcasting Act in relation to a provision of the Broadcasting Act in force at that time that was comparable with section 20 paragraph 4 second sentence ORF Act. While such a provision produced some uncertainty, enabled by the legislator, regarding the duration of a member's participation in the Board of Trustees of the ORF (the predecessor body of the Foundation Council), this did not create a basis for affecting their independence during that participation, the Constitutional Court ruled back then. The Court upholds that view with regard to the members to be appointed pursuant to section 20 paragraph 1 first sentence subparagraph 1 ORF Act on the proposal of the political parties represented in the National Council. The aspect of democratic diversity, particularly as regards the guarantee that each party represented in the Main Committee of the National Council must be represented by at least one member in the Foundation Council, is crucial in this regard and justifies the restriction on the otherwise fixed term of office of the (smaller) number of members of the Foundation Council appointed in this manner.

6.3.3. The Constitutional Court does not uphold, however, its view as regards the members of the Foundation Council to be appointed in accordance with section 20 paragraph 1 first sentence subparagraphs 2, 3 and 4 ORF Act.

Due to its supervisory, content-related and financial responsibilities, the Foundation Council has significant influence over the ORF's core mission of participating actively in public discourse with its programming as a public service broadcaster via the medium of broadcasting as defined in Article I paragraph 1 Constitutional Broadcasting Act (see *VfGH 30.6.2022, G 226/2021* on participation in public discourse via the medium of broadcasting, which is the basis of the comprehensive freedom to broadcast envisaged by the Constitutional Broadcasting Act and for

the sake of which this Federal Constitutional Act provides for corresponding guarantees for public service broadcasting). For this reason it is even more important for the independence of ORF's broadcasting that the Foundation Council and its members actually are independent as envisaged by the ORF's (institutional) freedom to broadcast (*cf. VfSlg. 10.948/1986*).

The responsibilities of the Foundation Council, specifically those set out in section 21 paragraphs 1 and 2 ORF Act, comprise the appointment and supervision of the ORF's Executive Board, including decision-making and approval obligations as usually applicable to comparable supervisory bodies of a company (see e.g. section 21 paragraph 1 subparagraphs 1 to 5, 8 to 11 ORF Act or section 21 paragraph 2 subparagraphs 3 to 18 ORF Act). In addition to the foregoing, the Foundation Council has key strategic responsibilities concerning both the content of ORF's broadcasting (see section 21 paragraph 1 subparagraphs 6 to 6c and subparagraphs 12 to 15 ORF Act and section 21 paragraph 2 subparagraphs 1 and 2 ORF Act) and its financial foundations within the financing system for public service broadcasting (under both the current licence fee system and the new system introduced by Federal Law Gazette I 112/2023, which in accordance with section 49 paragraph 22 ORF Act will enter into force on 1 January 2024, see section 21 paragraph 1 subparagraph 7 ORF Act).

As opposed to appointing the members of the Foundation Council in accordance with section 20 paragraph 1 first sentence subparagraph 1 ORF Act, in the case of the members appointed by the *Länder* in accordance with section 20 paragraph 1 first sentence subparagraph 2 ORF Act, by the Federal Government in accordance with section 20 paragraph 1 first sentence subparagraph 3 ORF Act and by the Audience Council in accordance with section 20 paragraph 1 first sentence subparagraph 4 ORF Act, the impact of democratic elections of general representative bodies does not play a relevant role. With regard to the members appointed by the *Länder*, considerations related to Austria's federalist system are key; for the members appointed by the Audience Council in accordance with subparagraph 4, social representation is decisive (which is not affected by social change in a manner comparable to the effect of democratic elections on a general representative body). By contrast, in the case of the members appointed by the Federal Government in accordance with section 20 paragraph 1 first sentence subparagraph 3

ORF Act the general requirements relating to personal and professional qualifications are of exclusive importance. Therefore, for the members appointed in accordance with section 20 paragraph 1 first sentence subparagraphs 2, 3 and 4 ORF Act, the aspect of ensuring the independence of their activities by way of a fixed term of office must be accorded overriding importance.

6.3.4. The situation regarding the appointment of members by the Central Staff Council of the ORF in accordance with section 20 paragraph 1 first sentence subparagraph 5 ORF Act is different from the above because the aim here is direct representation of the interests of the employees represented by the Central Staff Council.

6.3.5. Section 20 paragraph 4 second sentence ORF Act is therefore found to be unconstitutional as it is contrary to Article I paragraph 2 Constitutional Broadcasting Act. This applies to the entire provision because it does not distinguish between Foundation Council members appointed in accordance with section 20 paragraph 1 first sentence subparagraphs 1 or 5 ORF Act and those appointed in other ways.

6.4.1. The set of provisions intended to ensure the personal independence of the members of the Foundation Council – as is made clear in the preparatory documents for the relevant statutory amendment (see the Explanatory Notes on the Government Bill 634, supplements to the stenographic protocols of the National Council, 21st legislative period, p. 38) and specifically highlighted in the literature (cf. *Kogler/Traimer/Truppe, op. cit.*, section 20 ORF Act, comments on paragraph 2) – is supplemented by certain general requirements stipulating that members must possess (a high level of) personal and professional aptitude. Those members have the same duty of care and the same responsibilities as members of the supervisory board of a stock corporation (section 20 paragraph 2 ORF Act), which entails requirements relating to various types of specialist knowledge that is important for the activities of the ORF as a whole (see *Kogler/Traimer/Truppe, op. cit.*, section 20 ORF Act, comments on paragraph 2). This is supplemented by the stipulation in section 20 paragraph 6 ORF Act that the Foundation Council takes decisions by open vote (regarding secret ballots by roll call, see *Kogler/Traimer/Truppe, op. cit.*, section 20 ORF Act, comments on paragraph 6;

regarding the legitimacy of “non-anonymous” secret ballots, where voting behaviour can be verified subsequently if necessary, under section 92 of the Stock Corporation Act [AktG], cf. *Kalss*, section 92, in: *Doralt/Nowotny/Kalss* [eds.], AktG³ [version dated 1 June 2021, rdb.at] point 82).

Therefore, members of the Foundation Council must, firstly, possess the required personal and professional aptitude acquired through appropriate training or relevant vocational experience in the matters to be handled by the Foundation Council. Besides this, they must, secondly, have knowledge of the Austrian and international media markets or be held in high regard in the field of economics, science, arts or education by reason of their previous activities (section 20 paragraph 1 final sentence subparagraphs 1 and 2 ORF Act).

The duty of care and responsibility under section 20 paragraph 2 ORF Act and the resulting requirements applicable to members of the Foundation Council are based to a large extent on the fact that the responsibilities and duties of the Foundation Council have been defined in the ORF Act on the basis of the role of the supervisory board of a stock corporation (see the explicit statement to this effect in the Explanatory Notes to Government Bill 634, supplement to the stenographic protocols of the National Council, 21st legislative period, p. 38).

6.4.2. Thus the Federal Government, like the *Länder* and the Audience Council, must appoint individuals possessing a correspondingly high level of personal and professional aptitude, which they must have acquired in various fields of activity (section 20 paragraph 1 final sentence ORF Act). Accordingly, the Foundation Council as a whole should accordingly possess “a high level of specialist knowledge concerning individual areas of the business” (*Kogler/Traimer/Truppe, op. cit.*, section 20 ORF Act, comments on paragraph 2). The objective of the requirements regarding the aptitude of the members of the Foundation Council provided for in section 20 paragraph 1 second sentence and paragraph 2 ORF Act is (similarly to comparable supervisory bodies) to ensure through the specialist knowledge acquired in various fields and the resulting personal and professional qualifications that the Foundation Council is pluralistic in composition and that decision-making of the Foundation Council is independent and takes into account all relevant aspects.

6.4.3. However, as regards the six members of the Foundation Council to be appointed by the Audience Council in accordance with section 20 paragraph 1 first sentence subparagraph 4 ORF Act and, in particular, the nine members to be appointed by the Federal Government in accordance with section 20 paragraph 1 first sentence subparagraph 3 ORF Act, the law does not provide for any further requirements as to how plurality aspects should be considered in conjunction with the qualification requirements pursuant to section 20 paragraph 1 last sentence ORF Act when appointing the members in accordance with section 20 paragraph 1 first sentence subparagraphs 3 and 4 ORF Act.

6.4.3.1. In particular, the Federal Government, when appointing nine members in accordance with section 20 paragraph 1 first sentence subparagraph 3 ORF, is not subject to any specific provisions governing whether and how the various general personal and professional requirements to which section 20 paragraph 1 final sentence ORF Act refers should be distributed among the members to be appointed on this statutory basis. Section 20 paragraph 1 first sentence subparagraph 3 ORF Act does not define at all the various types of knowledge and the high regard acquired in various fields (referred to in section 20 paragraph 1 final sentence ORF Act) to be distributed among the nine members and how that should be done. The law therefore contains no safeguards to guarantee that those appointing the members of the Foundation Council ensure, or as a minimum seek to ensure, that a certain degree of diversity – as expressed in section 20 paragraph 1 final sentence ORF Act, taking account of pluralistic aspects – in the personal and professional qualifications of the members to be appointed is achieved. It is highlighted in the literature that the Federal Government has a particular responsibility as regards the nine members to be appointed in accordance with section 20 paragraph 1 first sentence subparagraph 3 ORF Act to ensure that the requirements of section 20 paragraphs 1 and 2 ORF Act governing the composition of the Foundation Council are fulfilled (see *Kogler/Traimer/Truppe, op. cit.*, section 20 ORF Act, comments on paragraph 2).

The margin of appreciation granted to the Federal Government in its decisions regarding which individuals (who need to be personally and professionally suitable as a general requirement) it appoints to the Foundation Council in accordance with section 20 paragraph 1 first sentence subparagraph 3 ORF Act is thus too broad because the important aspect with regard to Article I paragraph 2 Constitutional

Broadcasting Act is a pluralism afforded by a variety of personal and professional qualifications can be devoid of substance. However, detailed binding obligations are especially important, particularly as regards members to be appointed by the Federal Government without being further tied to proposals (see IV.B.5.3. above).

6.4.3.2. Similar considerations apply in principle with regard to the appointment of six members of the Foundation Council by the Audience Council in accordance with section 20 paragraph 1 first sentence subparagraph 4 ORF Act. As already mentioned in the foregoing (see IV.B.6.2.2.), the guarantee of independence is stipulated in constitutional broadcasting law and the appointments made by the Audience Council – unlike appointments by the Federal Government – are subject to regulatory control by KommAustria. However, because supreme state bodies currently have an influence over the selection of members of the Audience Council incompatible with the constitutional requirements of broadcasting law (see IV.B.7.4.), this – in conjunction with the lack of detailed provisions specifying the scope of the Audience Council’s discretion to make selections in accordance with section 20 paragraph 1 first sentence subparagraph 4 ORF Act – has an effect on the constitutional assessment of this provision.

6.4.4. For these reasons too, subparagraphs 3 and 4 of section 20 paragraph 1 first sentence ORF Act conflict with the requirements regarding independence and pluralism defined in Article I paragraph 2 Constitutional Broadcasting Act. These provisions do not adequately ensure that the Federal Government and the Audience Council, in making appointment decisions regarding nine and six Foundation Council members respectively, take account of the pluralism aspects enshrined in section 20 paragraph 1 final sentence ORF Act, and instead leave the selection decisions in this regard entirely to the discretion of the appointing bodies. This means that section 20 paragraph 1 final sentence ORF Act – which in general or in itself is unobjectionable as regards Article I paragraph 2 Constitutional Broadcasting Act – fails to achieve the specific effect of ensuring pluralism and thus independence, which is crucial in relation to Article I paragraph 2 Constitutional Broadcasting Act, because there is no legal obligation to ensure that the various personal and professional requirements are taken into account when appointing individual members. This is very important in light of the Foundation Council’s function as a supervisory body and its significant decision-making powers with regard to the content of the ORF’s programming and leads to the conclusion that, in this respect

too, the provisions governing the appointment of members of the Foundation Council (section 20 paragraph 1 first sentence subparagraphs 3 and 4 ORF Act) fail to satisfy the requirements of Article I paragraph 2 Constitutional Broadcasting Act with regard to plurality and independence of that governing body.

7. Regarding the concerns of the applicant *Land* Government in relation to the Audience Council of the ORF:

7.1. The applicant *Land* Government considers the Federal Chancellor's responsibility of appointing members to the Audience Council to be in conflict with the guarantee of independence under constitutional broadcasting law because the law does not specify which institutions and organizations are to be regarded as "representative" pursuant to section 28 paragraph 4 ORF Act for the areas and groups specified therein. In addition, the Federal Chancellor is entirely at liberty to decide how the further 17 members to be appointed in accordance with section 28 paragraph 6 ORF Act should be distributed across the individual areas and groups. This dominance by the Federal Chancellor in relation to the appointment of the majority of the members of the Audience Council without concrete specifications regarding the relevant selection criteria undermines the concept of social representation provided for in section 28 paragraph 4 ORF Act, the applicant *Land* Government argues. The Federal Chancellor's decision-making freedom, in conjunction with the absence of selection criteria, has the result that there are no adequate statutory safeguards to ensure the independence of the members of the Audience Council.

7.2. In response, the Federal Government submits that it is left to the assessment of the Federal Chancellor to select the institutions and organizations to be regarded as representative within the meaning of section 28 paragraph 4 ORF Act with the explicit aim to be able to take account of the dynamics of and changes in the relevant areas of society. The representative institutions and organizations were formerly defined in a regulation (*Verordnung*), which proved to be too static, resulting in the petrification of the composition of the Foundation Council. The German Federal Constitutional Court also noted that there is a risk of petrification of the composition of the governing bodies of public service broadcasters if the groups entitled to appoint members are conclusively determined by law (*BVerfG 25.3.2014, 1 BvF 1/11 and others, point 73*).

7.3.1. The purpose of the Audience Council is to safeguard the interests of listeners and viewers (section 28 paragraph 1 ORF Act). The fundamental aim of the rules relating to the appointment of its members and its composition is to ensure representation of specified areas of society and groups by giving consideration to as broad a spectrum of representative institutions and organizations as possible. Thus, the fundamental aim pursued by the ORF Act with regard to the Audience Council is social representation.

The members of the Audience Council are not bound by instructions and orders in the exercise of their functions (see section 19 paragraph 2 ORF Act, which applies to both the Foundation Council and the Audience Council). They are also subject to a duty of confidentiality and bound by incompatibility provisions in the same way as the Foundation Council members (section 19 paragraph 4 ORF Act and section 28 paragraph 2 ORF Act).

The responsibilities and duties of the Audience Council essentially aim at representation of the interests of “listeners and viewers” in the relevant decision-making processes within the ORF. The Audience Council is accorded essential rights to make recommendations and proposals, particularly as regards programming (section 30 paragraph 1 subparagraph 1 and subparagraphs 5 to 8 ORF Act). The appointment of six members of the Foundation Council by the Audience Council also serves this fundamental aim. Within the scope of its duties and responsibilities, the Audience Council is additionally required to ensure compliance with the statutory requirements by submitting cases of suspected non-compliance to the regulatory authority KommAustria. Finally, the Audience Council has a key role in establishing the financial foundations of the ORF (see section 30 paragraph 1 subparagraph 4 ORF Act under both the current licence fee system and the new system which will enter into force on 1 January 2024 in accordance with section 49 paragraph 22 ORF Act as amended by Federal Law Gazette I 112/2023).

7.3.2. In view of the statutory responsibilities and duties of the Audience Council, there are in principle no constitutional objections to a social representation model of this kind for the composition of the Audience Council (see IV.B.6.2. above). However, questions regarding how exactly this fundamental aim is put into practice, as raised in the concerns of the applicant *Land* Government, are to be assessed in these proceedings only to the extent that they are related to the powers

of the Federal Chancellor to appoint 17 further members of the Audience Council in accordance with section 28 paragraphs 4 to 6 ORF Act.

In *VfSlg. 7593/1975*, the Constitutional Court ruled that there was no conflict with the requirements of Article 18 paragraph 1 of the Constitution (*B-VG*) when the law provided only a general framework and used only vague legal terms regarding the issue of how the Federal Chancellor distributes the 20 members of the former “Listeners’ and Viewers’ Representatives” body (*Hörer- und Sehervertretung*) to be appointed by him across similar representative institutions and organizations. The Constitutional Court finds that it is (still) constitutional, in light of the independence requirements provided for in constitutional broadcasting law, for the legislator to leave to the supreme Federal administrative function the question of which institutions and organizations are representative of certain areas and groups defined in law for appointing Audience Council members, as long as the law ensures transparency and alignment of the appointment procedure with the general objectives.

7.4. The provisions of section 28 paragraphs 4 to 6 ORF Act do not take this into account in a manner that is adequate from a constitutional point of view, however:

7.4.1. The Federal Chancellor must invite the institutions and organizations considered by him or her to be eligible to represent the areas and groups specified in section 28 paragraph 4 ORF Act, and thus authorized to make proposals, by making a public announcement in the official gazette (*Amtsblatt zur Wiener Zeitung*) and asking those institutions and organizations to propose three persons; the Federal Chancellor is also required to make all such proposals publicly known. However, the Federal Chancellor is not required by law to commit to one representative institution or organization for each of the areas specified in section 28 paragraph 4 ORF Act, or – in connection with an advance disclosure as to how the 17 further members to be appointed in accordance with section 28 paragraph 6 ORF Act will be allocated – to the appointment of a specific number of members per area or group. As a result, the Federal Chancellor can freely select from among the sets of three proposals submitted by multiple institutions or organizations – and it has to be noted that the Federal Chancellor at this point already knows the names of the persons proposed – for each area of society or group to be represented (and can also allocate the number of members to the individual areas,

again with knowledge of the persons proposed), under the sole conditions that, firstly, one member is appointed for each area and, secondly, the requirement of section 28 paragraph 6 second sentence ORF Act is met. Consequently, the Chancellor not only has a choice between different sets of three proposals for each socially relevant area or group, but can also freely select three members from among all proposals received.

As a result, however, the immediate connection established by tying the appointment of Audience Council members from areas and groups that have been defined in both law and society as relevant for that purpose to representative institutions and organizations, which is key to the fundamental aim of social representation, is guaranteed only inadequately because the Federal Chancellor is able to undermine this representativeness by appointing multiple members from the same institutions and organizations when freely choosing whether and which proposals to accept. A provision of the law that permits the appointment of the members of the Audience Council in the way described in the foregoing is in contravention of Article I paragraph 2 Constitutional Broadcasting Act as regards the required plurality and the independence of the Audience Council thus ensured.

7.4.2. Pursuant to section 28 paragraph 3 ORF Act, the institutions mentioned in that provision appoint a total of 13 members of the Audience Council (current number; subject to change in light of section 28 paragraph 3 subparagraph 5 ORF Act). The Federal Chancellor appoints a total of 17 members on the basis of proposals from various institutions and organizations which are representative of the areas and groups specified in section 28 paragraph 4 ORF Act. Thus, in the Audience Council (the fundamental objective of which is social representation) the members appointed by the Federal Chancellor, on the basis of proposals but with considerable leeway, in accordance with section 28 paragraph 6 first sentence ORF Act significantly outweigh the members appointed directly by representative institutions in accordance with section 28 paragraph 3 ORF Act.

The Federal Government justifies this distinction between fixed statutory rights of appointment by representative institutions and by a state body on the proposal of representative institutions or organizations from a variety of socially relevant areas and groups, by stating, correctly, that the flexibility achieved in this way helps

ensure that social groups and areas of society are adequately and in an up-to-date-manner reflected.

However, this fundamental aim does not justify allowing the members appointed with considerable leeway by supreme state functions to predominate in the composition of the Audience Council. In view of the independence requirements stipulated in Article I paragraph 2 Constitutional Broadcasting Act, the legislator must strike a balance in such a way as to ensure that the direct influence of representative institutions set out in law is reflected in the composition of the Audience Council to at least the same extent as that of a supreme state body which (though bound by constitutional requirements) has a certain amount of leeway to choose from among proposals submitted by representative institutions and organizations when appointing members to that body. Section 28 paragraph 6 first sentence ORF Act is – for this reason, too – in conflict with the requirements defined in Article I paragraph 2 Constitutional Broadcasting Act.

7.5. For the reasons outlined above, section 28 paragraphs 4 and 5 and paragraph 6 first sentence ORF Act violate Article I paragraph 2 Constitutional Broadcasting Act.

[...]

Vienna, 5 October 2023

The President:
GRABENWARTER

Recording clerk:
TILLIAN