CONSTITUTIONAL COURT
G 297/2022-24
15 March 2023

# IN THE NAME OF THE REPUBLIC

The Constitutional Court, chaired by Vice-President
Verena MADNER

in the presence of the members

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

as well as the substitute member
Barbara LEITL-STAUDINGER

as voting members, in the presence of the recording clerk
Peter THALMANN,

decided today after private deliberations pursuant to Article 140 of the Constitution (*Bundes-Verfassungsgesetz, B-VG*) on the application filed by **********, represented by Maria Windhager, lawyer, Siebensterngasse 42-44, 1070 Vienna, to repeal as unconstitutional "section 17 paragraph 5 Media Act (*Mediengesetz – MedienG),* Federal Law Gazette *[BGBl.] 1993/20*", *in eventu* "section 17 paragraphs 4 and 5 Media Act (*MedienG)*, Federal Law Gazette *1993/20*", *in eventu* "section 16 paragraphs 2 and 3 Media Act (*MedienG*)*,* Federal Law Gazette *1993/20* […] and section 17 paragraphs 4 and 5 Media Act (*MedienG*), Federal Law Gazette *1993/20* […] and section 39 paragraph 1 Media Act (*MedienG*), Federal Law Gazette *I 2005/49*":

I. 1. Section 17 paragraph 5 of the Federal Act of 12 June 1981 on the Press and other Publication Media – Media Act (*Bundesgesetz vom 12. Juni 1981 über die Presse und andere publizistische Medien, Mediengesetz – MedienG)*, Federal Law Gazette *314/1981* as amended by *20/1993*, is repealed as unconstitutional.

2. The repeal shall take effect after 30 June 2024.

3. Previous legal provisions shall not re-enter into force.

II. The Federal Chancellor is obliged to publish these rulings without delay in Federal Law Gazette I.

## Reasoning

## I. The Application

Based on Article 140 paragraph 1 subparagraph 1 point d of the Constitution (*Bundes-Verfassungsgesetz, B-VG*), the applicant requests that the Constitutional Court repeal as unconstitutional "section 17 paragraph 5 Media Act (*MedienG*), Federal Law Gazette *1993/20*", *in eventu* "section 17 paragraphs 4 and 5 Media Act (*MedienG*), Federal Law Gazette *1993/20*", *in eventu* "section 16 paragraphs 2 and 3

Media Act (*MedienG*), Federal Law Gazette *1993/20* […] and section 17 paragraphs 4 and 5 Media Act (*MedienG*), Federal Law Gazette *1993/20* […] and section 39 paragraph 1 Media Act (*MedienG*), Federal Law Gazette *I 2005/49*".

## II. The Law

The relevant provisions of the Federal Act of 12 June 1981 on the Press and other Publication Media – Media Act (*Bundesgesetz vom 12. Juni 1981 über die Presse und andere publizistische Medien, Mediengesetz – MedienG)*, Federal Law Gazette *314/1981* as amended by *I 125/2022*, read as follows (the provision challenged in the main claim is in force as amended by Federal Law Gazette *20/1993* and is highlighted):

"Reply and subsequent notification on the outcome of criminal proceedings

Reply

Section 9 (1) Any natural or legal person (authority) not merely generally affected by facts presented ("presentation of facts") or published in a periodical medium is entitled to publication of a reply in that medium free of charge, unless such reply is untrue or cannot be published for other reasons.
(2) A presentation of facts qualified for a reply must be based on information which can be verified as to whether it is true and complete and the respective essential statement is not just a personal opinion, a value judgment or a warning against future conduct of another person.
(3) A reply shall state in a concise manner that the presentation of facts is incorrect or incomplete and describe how and why this is the case. The reply can be written as free text. The reply must either state the correct facts as opposed to the facts published or add essential information to them, or in some other way refer directly to the presentation of facts and its incorrectness or misleading incompleteness. The length of the reply must be proportionate to the length of the presentation of facts. It must be written in the same language as the publication it refers to.

[…]

Exceptions from the obligation to publish

Section 11 (1) There is no obligation to publish a reply or subsequent notification
1. if the reply or subsequent notification concerns a faithful report on a hearing in a public session of the National Council (*Nationalrat*), the Federal Council (*Bundesrat*), the Federal Assembly (*Bundesversammlung*), parliaments of the *Länder* or a committee of any of the aforementioned general bodies of representation;
2. if the reply concerns an advertisement for business purposes and is properly identified as such;
3. if the reply or subsequent notification refers to a presentation of facts the publishing of which is required by law;

4. if all or part of the content of the requested reply is not true;
5. if the presentation of facts is irrelevant for the person affected;
6. if the publication to which the reply relates also contains the assertion of the person affected and this can be deemed equivalent to the publication of a reply;
7. if the person affected has been offered adequate opportunity to give a statement in the same or another equivalent publication and has not made use thereof;
8. if an equivalent editorial correction or addition was published before receipt of the reply;
9. if, upon request of any party, a publication equivalent to a reply as required by law and with essentially the same content as the reply requested has already been effected, even if belatedly; or
10. if the reply has not been received by the media owner or the editorial office of the media company within two months of the date on which the presentation of facts was published or made available online or if the subsequent notification has not been received within two months of the date on which the person affected was informed that prosecution will not be continued or proceedings will be terminated. If a periodical medium contains the date of publication, the request shall be deemed to have been made in due time if it is received within two months of that date.

(2) Publication of the reply shall be refused if its dissemination would constitute an offence punishable by the courts or interference with the strictly personal sphere of any individual.

Request for publication

Section 12 (1) The request for publication shall be addressed in writing to the media owner or to the editorial office of the media company. If publication of a still or moving picture in a reply is requested, a suitable picture may be attached to the request.

(2) The request for publication may also be complied with by publication in the medium concerned of an equivalent editorial correction, addition or statement no later than at the time stipulated in section 13. The media owner or the editorial office must inform the person affected of such publication in writing.

Date and form of the publication

Section 13 (1) The reply or subsequent notification shall be published
1. no later than on the fifth working day if the periodical medium is published, broadcast or disseminated on a daily basis or at least five days per week, or if it is constantly available online (website),

2. in the next issue or broadcast if the periodical medium is published, broadcast or disseminated on a monthly basis or at intervals longer than that and if the reply is received at least fourteen days before the issue, the broadcast or the dissemination,
3. in all other cases at the latest in the second issue or broadcast after
the date it is received. The reply or subsequent notification shall be published at a later date if it is only in this way that the express request, made by the person affected, for publication in the same supplement, series of articles or broadcasts can be complied with.

(2) The release is to be marked ‘Reply’ or ‘Subsequent notification’. It must mention the name of the person affected and contain a reference to the issue or programme it concerns.
(3) The reply or the subsequent notification shall be given prominence equal to that of the original publication. If the periodical medium appears in more than one edition or is broadcast on more than one channel, the reply or subsequent notification shall be published in the same editions or on the same channels as the presentation of facts it concerns.
(3a) In case of publication on a website, the reply or subsequent notification shall be made available online for one month. In case the presentation of facts continues to be available online, the reply or subsequent notification shall remain available online until such time as the presentation of facts is deleted plus one further month.
(4) In the case of publication in a print periodical, the reply or subsequent notification shall be deemed to have been given equal prominence if it is printed in the same section and in the same font as the presentation of facts it relates to. In the case of a presentation of facts published on the front page of a print periodical or on the homepage of a website, a reference on the front page to the reply appearing inside the periodical or a link on the homepage to the reply is sufficient. The reference must make clear the subject-matter of the reply and the fact that it is a reply, and, if mentioned in the presentation of facts, the name of the person affected. If the presentation of facts appeared in a headline, the reply or reference shall be deemed to have been given equal prominence if the headline of the reply or the reference occupy the same amount of space as the headline they relate to. Where a reply relates to the presentation of facts published in a headline, on the front page of a print periodical or on the homepage of a website, the term ‘response’ (‘*Entgegnung*’) or, if the person affected is named, the expression ‘response made by ...’ (‘*... entgegnet*’) may be used instead of the word ‘reply’.
(5) If the reply is broadcast or published in other technologically similar media, the text shall be read by an announcer. If a presentation of facts has been disseminated on a broadcast channel repeatedly, it shall be sufficient to broadcast the reply or subsequent notification on a single occasion at such time as to give it maximum prominence.
(6) A reply shall be published in the form of a still or moving picture if the presentation of facts was also disseminated in the form of pictures or images and the legal protection sought by way of the reply can only be achieved by publication in this manner.
(7) Publication shall be made without insertions or omissions. Any addition shall be clearly identified as such.
(8) The media owner or the editorial office shall inform the person affected without delay of the publication of the reply or subsequent notification, specifying the issue or programme in which this will be done, or, if applicable, of the fact that publication has been refused.

Court proceedings

Section 14 (1) If the reply or subsequent notification is not published properly or at all, the person affected may file an application against the media owner as respondent within six weeks seeking a court order for publication of the reply or the subsequent notification. The six-week period starts at the time the person affected receives written notice that publication has been refused or at the time the reply or subsequent notification has not been properly published or by the time by which they should have been published.
(2) An application under paragraph 1 is to be submitted to the court specified in section 40, section 41 paragraph 2. A single judge at the regional court (*Landesgericht*) shall hear and rule on the case at first instance.
(3) In the proceedings upon application under paragraph 1, the applicant has the same rights as a private prosecutor (*Privatankläger*), the respondent those of the defendant. Section 455 paragraphs 2 and 3 of the Code of Criminal Procedure (*Strafprozessordnung, StPO*) shall be applied. In all other aspects and unless provided otherwise below, the provisions of the Code of Criminal Procedure (*StPO*) 1975 governing private prosecution proceedings shall apply to proceedings upon application under paragraph 1, subject to the proviso that delegation is admissible only in continued proceedings (section 16) and that obviously unsubstantiated applications may be dismissed only after a public oral hearing, unless the applicant has expressly waived such hearing.
(4) The court shall serve the application on the respondent without delay, asking the respondent to notify the court in writing within five working days of any objections (*Einwendungen*) and evidence, failing which the application will be granted. Any objections shall be served on the applicant for submission of counter-arguments (*Gegenäußerung*) and notification of evidence, to be submitted within five working days.

Section 15 (1) If no objections were raised within the statutory time limit, the court shall rule on the case by decision (*Beschluss*) within five working days of expiry of the time limit. The application shall be granted without conducting a hearing; however, if the application is obviously unsubstantiated, a decision shall be issued after a public oral hearing, unless the applicant has expressly waived such hearing.
(2) If the respondent, through no fault of their own or of their representative, was prevented by unavoidable circumstances from filing objections in due time, *restitutio in integrum* is to be granted upon the respondent's request; section 364 of the Code of Criminal Procedure (*StPO*) is to be applied accordingly, subject to the proviso that an application seeking *restitutio in integrum* is to be filed within five working days of service of the decision under paragraph 1 and that the court having made that decision shall decide on the *restitutio in integrum*.
(3) If objections are raised, the court shall rule on the application by judgment following a trial (*Hauptverhandlung*) within fourteen days of receipt of the counter-arguments or following expiry of the time limit for submission of counter-arguments. If facts concerning the applicant's strictly personal sphere are discussed, the public shall be excluded from the hearing upon the applicant's request.

(4) The respondent must prove that there was no duty of publication. An objection by the respondent that the contents of the reply are untrue shall not prevent a decision on partial or full publication of the reply if the evidence in support of such objection either cannot be taken within the period specified for a decision or is not sufficient to conclude that part or all of the reply is not true.
(5) An appeal (*Berufung*) against the judgment can only be brought if it does not challenge the decision on the objection stating that the reply is not true. Where the court ruled in its decision that the reply or subsequent notification must be published, the appeal does not have suspensive effect.

[…]

Publication ordered by the court

Section 17 (1) The court shall order publication of a reply or a subsequent notification if it was wrongfully not published properly or at all. If individual parts of the reply or the subsequent notification do not comply with the legal requirements, the court shall decide which parts of the reply or of the subsequent notification are to be published. If parts of the reply or the subsequent notification do not comply with the legal requirements, but can be improved to be compliant by changing their wording without modifying their substance, the court shall direct the applicant during the hearing to amend the reply or subsequent notification and subsequently order publication of the improved version. If the court does not order publication, the application seeking publication shall be dismissed.
(2) If the court has ordered publication of an improved version and doubts as to the wording of the publication might arise, the court shall, upon request, make the amended wording available to the respondent in writing.
(3) The publication ordered by the court shall be made applying by analogy section 13.
(4) If on the basis of a judgment at first instance a reply or subsequent notification was published and an appeal lodged against such judgment is granted in full or in part, the respondent shall, upon its request, be authorized to publish those parts of the judgment of the appellate court necessary to inform the public within an appropriate period and in a way compliant with the provisions of section 13. The judgment shall stipulate which parts of the judgment must be published. The court may, where it deems this necessary for the sake of comprehensibility of the substance of the judgment or for the sake of brevity of the publication, replace the wording of parts of the judgment with a concise summary.
(5) In addition, the court of appeal shall order the applicant to pay the costs of the wrongful publication of a reply or subsequent notification and of the publication of the judgment of the appellate court. The amount of these costs is to be determined, upon application, by decision of the court (*Beschluss*); a payment term of fourteen days shall be set. In cases of hardship, the court may reduce the publication costs at its discretion and set a longer payment term, which must not exceed one year. The decision constitutes an enforceable title as defined in section 1 of the Enforcement Code (*Exekutionsordnung, EO*).”

## III. Initial Proceedings, Application and Preliminary Proceedings

1.1. On 23 October 2019, the print periodical “***”, the media owner of which is the media group "***" GmbH, published an article on high staff costs caused by checks on compliance with the general ban on smoking in catering establishments (to be introduced as of 1 November 2019) that were to be carried out on the applicant’s instruction. On 22 October 2019, an article with the same content was published on the website www.***, the media owner of which is *** GmbH.

On 15 November 2019, referring to those articles, the applicant sent a written request in accordance with section 12 paragraph 1 Media Act (*MedienG*) to both media owners seeking publication of a reply to each of the articles with essentially the same content stating that the published assertions were untrue or misleadingly incomplete and that the actual costs were significantly lower.

As the media owners failed to publish the reply, the applicant submitted an application to the Vienna Criminal Court (*Landesgericht für Strafsachen Wien*) on 3 January 2020 requesting that the court order the media owners to publish the reply. The media owners filed objections within the statutory time limit but did not invoke the grounds specified in section 11 paragraph 1 subparagraph 4 of the Media Act (*MedienG*) that they had not published the reply because it was not true. The applicant’s request was granted by judgment of the Vienna Criminal Court dated 6 February 2020.

The media owners then brought an appeal against this judgment, which does not have suspensive effect (section 15 paragraph 5 Media Act) where the court had ordered publishing of the reply. The media owners therefore published the replies ordered by judgment of the Vienna Criminal Court dated 6 February 2020 within the statutory time limit.

In its judgment of 9 September 2020, the Vienna Higher Court of Appeal (*Oberlandesgericht Wien*) granted the media owners’ appeal and dismissed the applicant’s initial applications on the grounds that the replies did not meet the requirements as regards the presentation of counter-arguments. In addition, the judgment authorized the media owners to publish parts of the judgment of the

appellate court. Pursuant to section 17 paragraph 5 Media Act (*MedienG*), the applicant was ordered to pay the media owners the costs of the wrongful publication of the replies and the costs of publication of (parts of) the judgment of the appellate court.

On the applicant's suggestion, the Procurator General's Office lodged a plea of nullity (*Nichtigkeitsbeschwerde*) for the preservation of the law (section 14 paragraph 3 Media Act [*MedienG*] in conjunction with section 23 Code of Criminal Procedure [*Strafprozessordnung, StPO*]) against the judgment of the Vienna Higher Court of Appeal of 9 September 2020. The Supreme Court of Justice (*Oberster Gerichtshof*) found in its judgment dated 15 September 2021 that the judgment of the Vienna Higher Court of Appeal contravened both section 6 paragraph 2 of the Code of Criminal Procedure (right to be heard) and the obligation to state grounds.

1.2. By application of 16 November 2020, the media owners requested that the Vienna Criminal Court determine the costs of publication payable by the applicant in connection with the judgment of the Vienna Higher Court of Appeal dated 9 September 2020 for publication of the reply and (parts) of the judgment of the appellate court in accordance with section 17 paragraph 5 Media Act (*MedienG*).

1.3. By decision of 31 October 2022, the Vienna Criminal Court set the costs of publication payable by the applicant to the media owners at EUR 236,051.27 (EUR 26,471.27 for publication of the reply in the daily newspapers "***" and "***", and EUR 209,580 for publications on the website www.***). The applicant lodged a complaint (*Beschwerde*) against this decision and simultaneously instituted the present proceedings for review of the constitutionality of the above provisions of the Media Act. In its submission, the applicant raised the following concerns:

"[…] Article 10 in conjunction with Article 8 of the European Convention on Human Rights (ECHR)

In Austria, the right of reply is governed by sections 9 to 21 of the Media Act (*MedienG*). It is part of the fundamental right to freedom of expression (Article 10 ECHR), and for this reason a positive obligation may arise for the state to ensure that such an enforceable right is actually granted to the person affected, specifically where – as is the case here – that person's reputation, which is protected under Article 8 ECHR, may be compromised (cf. ECtHR, 5 July 2005, appl. 28743/03, *Melnychuk v. Ukraine* […]:

'However, there may be exceptional circumstances in which a newspaper may legitimately be required to publish, for example, a retraction, an apology or a judgment in a defamation case. Consequently, there will be situations when a positive obligation may arise for the State to ensure an individual's freedom of expression in such media […].'; cf. also the decision of the European Commission of Human Rights of 12 July 1989, no. 13010/87, *Ediciones Tiempo S.A. v. Spain*; on the protection of reputation under Article 8 ECHR see e.g. ECtHR, 4 May 2000 [GC], appl. no. 28341/95, *Rotaru v. Romania* [paragraph 44]; 15 November 2007, appl. no. 12556/03, *Pfeifer v. Austria* [paragraph 35 *et seq*.]; 10 October 2019, appl. no. 4782/18, *Lewit v. Austria* [paragraph 46]).

The right of reply is often construed in a very case-specific way, due to reasons including the great number of exceptions defined in section 11 Media Act (*MedienG*). As a result, judgments made by the courts at first instance (i.e. regional courts) are often reversed in appeal proceedings by courts of second and last instance (i.e. higher courts of appeal) – cf. e.g. *OGH 15 Os 37/16d*, *15 Os 124/17z* and *15 Os 140/18d.*

This means that persons affected by false media coverage and determined to have a reply published face enormous risks: If the court of first instance (i.e. a regional court) orders the media owner to publish a reply, there is the risk that such judgment may be reversed by courts of second and last instance (i.e. the superordinate higher court of appeal) and the initial application be dismissed. This is the risk borne by any party resorting to a court for redress and as such fully compliant with constitutional law.

However, a more critical risk arises for parties requesting a reply because an appeal by the media owner does not have suspensive effect and the reply must be published immediately (section 15 paragraph 5 Media Act) and, in the case reviewed here, where the court ordered the media owners to publish the reply and the media owner's appeal against this decision was allowed, the legal consequences defined in section 17 paragraphs 4 and 5 Media Act (*MedienG*) take effect, i.e. the media owner is authorized to publish parts of the judgment of the appellate court and the person affected must pay the media owner the costs of publication of the reply and of publication of the judgment of the appellate court.

The liability arising in connection with that risk (*Risikohaftung*) poses a number of problems (cf. Rami in: Höpfel/Ratz [eds.], *StGB² [2019] § 17 MedienG* point 26):

• The liability of the person affected is not connected to any fault of that person. This can be seen in the case under review here, where the exception provided for in section 11 paragraph 1 subparagraph 4 Media Act (*MedienG*), i.e. that the requested reply is not true, is not applicable.

• In contrast to similar liability rules in other legislation, such as the liability for a wrongfully imposed interim injunction defined in section 394 Enforcement Code (*Exekutionsordnung, EO*), the person affected has no choice and cannot prevent the implications a possibly wrongful judgment of the court at first instance may

have for the media owner. While, in the example of section 394 Enforcement Code (*EO*), the claimant can assert a claim in civil proceedings by merely filing an action without filing an application for an interim injunction (section 378 *et seq*. of the Enforcement Code), and in this way can *a priori* avoid the risk of a possibly wrongful court decision, an applicant in proceedings under section 14 *et seq.* Media Act (*MedienG*) does not have such choice because the provisions of section 15 paragraph 5 second sentence of the Media Act (respondent's appeal has no suspensive effect where the court has ordered publication of the reply) constitute mandatory law (*ius cogens*). The only way for the person affected to avoid this risk would be to refrain from enforcing the right to reply altogether.

• Particularly where larger media are concerned, the costs of publication as defined in section 17 paragraph 5 Media Act (*MedienG*) can be enormous: In the case reviewed here, the amount was EUR 236,051.27; cf. also *OGH 15 Os 45/10x*, where the person affected was ordered to pay the media owner more than EUR 100,000 for publication of a reply and a judgment (section 17 paragraphs 4 and 5 Media Act); cf. also *OGH 15 Os 22/11s*, where the amount was just below EUR 29,000).

• Although section 17 paragraph 5 Media Act provides that in cases of hardship the court may reduce the publication costs at its discretion and set a longer payment term, which must not exceed one year, this provision is vague in its most critical point ('at its discretion') and therefore does not provide for any constitutionally adequate protection from ruinous liability claims – and in particular for any foreseeable safeguards to avoid such claims.

In summary, the above means that any person who wishes to exercise their protected fundamental right of reply (Article 10 in conjunction with Article 8 ECHR) in order to retain their good reputation will be exposed to a risk of financially ruinous liability payments regardless of any fault on their part – as if that person requested a reply based on untrue information.

In practice, this means that in the majority of cases the person affected is *de facto* unable to make use of the right of reply. This is contrary to Article 10 in conjunction with Article 8 ECHR.

[…] Article 7 of the Constitution (*Bundes-Verfassungsgesetz, B-VG*), Art. 2 of the Basic State Law (*Staatsgrundgesetz, StGG*)

[…] Whether or not a person can make use of the right of reply *de facto* depends on that person's financial capacity:

The right of reply can in general only be enforced if the person affected has a sound financial background. If they are not at least very well off, they will in most cases be deterred from making use of the right of reply due to the legal consequences defined in section 17 paragraph 5 Media Act (= payment of the costs of publication). Only someone with very significant wealth can comfortably take the risk of having a reply published.

This situation, i.e. where making use of a right guaranteed by the law (sections 9 to 21 Media Act) and protected by constitutional rights (Article 10 in conjunction with Article 8 ECHR) *de facto* depends on the affected person's financial capacity, is in breach of the principle of equality (Article 7 of the Constitution [*B-VG*], Art. 2 of the Basic State Law [*StGG*]).

[…] Violation of the principle of proportionality:

The right of reply imposes a negligible burden on the media owner: Publishing of the reply does not imply any condemnation of the media owner (*Pierer, Grundfragen der Gegendarstellung – vom Preßgesetz bis zum digitalen Zeitalter* [part 1], *JBl 2022, 702 [707]* with further references) but only reflects and makes public the affected person's point of view. Aside from the money's worth of the small amount of working time spent by the employee who actually takes the action necessary to publish the reply, there is practically no financial burden on the media owner [...].

In comparison, the affected person's liability defined in section 17 paragraph 5 Media Act (*MedienG*) of having to pay for a reply wrongfully published based on a judgment of the court of first instance is disproportionate. This is also in contravention of the principle of equality (Article 7 of the Constitution [*B-VG*], Article 2 of the Basic State Law [*StGG*]; cf. for example *Pöschl, Über Gleichheit und Verhältnismäßigkeit*, *JBl 1997, 413* with further references).

[…] Comparison with the publication of information on the proceedings (section 8a paragraph 5, section 37 Media Act):

In proceedings involving media content offences (section 1 paragraph 1 subparagraph 12, section 28 Media Act), the prosecution (applicant) may, immediately after instituting the proceedings, request publication of the information that proceedings have been initiated in connection with the incriminated media content (section 37 paragraph 1 Media Act). A similar approach is stipulated in section 8a paragraph 5 Media Act (*MedienG*) for separate proceedings for damages brought to enforce claims defined in sections 6, 7, 7b and 7c Media Act. In the above cases, as in the case under examination, a remedy (here: complaint) lodged to challenge the publication order does not have suspensive effect (section 37 paragraph 3 in conjunction with section 36 paragraph 4 Media Act).

In the case of publication under section 8a paragraph 5 or section 37 Media Act – and where either proceedings are terminated without a conviction; withdrawal of the incriminated media product or deletion of the incriminated website section or publication of the judgment is ordered in the separate proceedings (section 33 paragraph 2, section 34 paragraph 3 Media Act); or the applicant is awarded damages (sections 6 to 7c Media Act) – legal consequences similar to those defined in section 17 paragraph 4 Media Act apply pursuant to section 39 paragraph 1 Media Act: The media owner must be authorized, upon request, to publish a short statement in a way compliant with the provisions of section 13 Media Act.

The financial claim against the person affected, however, is different from that defined in section 17 paragraph 5 Media Act: While

• section 17 paragraph 5 Media Act entitles the media owner to the costs of publication […],

• section 39 paragraph 1 Media Act entitles the media owner to 'reimbursement of the costs of this publication as well as of the publication of information pursuant to section 8a paragraph 5 or pursuant to section 37 Media Act'. According to case law established over the course of decades, the latter does not mean the costs of publication as defined in section 17 paragraph 5, but only the costs actually incurred by the media owner, i.e. the specific expenses for materials and staff occasioned by the publication (Rami in *Höpfel/Ratz* [eds.], *StGB²* [2019] *§ 39 MedienG* point 4 with further references). As this will be a matter of a few working hours at most, the amount of the payment entitlement under section 39 will be only a fraction of the costs of publication provided for in section 17 paragraph 5.

The underlying provisions of the law are therefore highly inconsistent as regards compensation for the harm caused: It is absolutely incomprehensible why the media owner

• should in case of a reply (section 9 *et seq*. Media Act) be entitled to payment of the costs of publication, in most cases a very large sum [...], despite the fact that the publication of a reply in no way constitutes a condemnation of the incriminated media content but merely reflects and makes public the view of the person affected […],

• while in case of publication of information on proceedings (section 8a paragraph 5, section 37 Media Act), the media owner is entitled only to expenses for materials and staff actually incurred, despite the fact that proceedings on grounds of a media content offence (section 1 paragraph 1 subparagraph 12, section 28 Media Act) and separate proceedings for damages (section 8a Media Act) always involve an allegation by the prosecution (applicant) that the media owner has published some unlawful (and possibly even criminal) media content.

This adds to the conclusion that section 17 paragraph 5 violates the principle of equality (Article 7 of the Constitution [*B-VG*], Art. 2 of the Basic State Law [*StGG*]: cf. for example *VfSlg 12.566/1990*; *VfGH* 22.9.2022, *G 90/2022*; cf. also *VfSlg 10.365/1985*).

[…] Article 5 Basic State Law (*StGG)*, Article 1 of Protocol No. 1 to the ECHR

For the reasons given above (ruinous and thus disproportionate liability – which additionally is not related to any establishing of fault – on the part of the affected person for a wrongfully published reply, despite the fact that the entitlement to publication of a reply is a specifically protected fundamental right [Article 10 in conjunction with Article 8 ECHR]), section 17 paragraph 5 Media Act also violates

the fundamental right to property (Article 5 of the Basic State Law, Article 1 of Protocol No. 1 to the ECHR).

[…] Article 18 of the Constitution (*B-VG*)

• Section 17 paragraph 5 Media Act provides that in cases of hardship, the court may reduce the publication costs at its discretion and set a longer payment term, which must not exceed one year. This provision is so vague in its most critical point ('at its discretion') that it is in contravention of Article 18 of the Constitution (e.g. *VfSlg 4293/1962*) because it provides no guidance to the court on how to exercise said discretion."

2. The Austrian Government submitted written observations rejecting the application as inadmissible.

[...]

3. The respondents in the initial proceedings submitted written observations challenging the applicant's concerns in their capacity as parties to the proceedings.

## IV. Considerations

### A. As to the admissibility

[...]

### 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 provision challenged is 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. The second subchapter of the chapter on the legal protection of personal rights sets forth provisions on the right of reply and subsequent notification on the outcome of criminal proceedings (section 9 *et seq*. of the Media Act [*MedienG*]). Any natural or legal person not merely generally affected by presentation of facts published in a periodical medium is entitled to publication of a reply in that medium free of charge, unless such reply is untrue or cannot be published for other reasons (section 9 paragraph 1 Media Act). A reply shall state in a concise manner that the presentation of facts is incorrect or incomplete and describe how and why this is the case. The reply can be written as free text. The reply must either state the correct facts as opposed to the facts published or add essential information to them, or in some other way refer directly to the presentation of facts and its incorrectness or misleading incompleteness (section 9 paragraph 3 Media Act).

2.2. The claim must be asserted by submitting a written request for publication. This request for publication of a reply must be addressed to the media owner or to the editorial office of the media company together with the text of the requested publication (see section 12 Media Act). If the reply has not been received by the media owner or the editorial office of the media company within two months of the date on which the facts were published or made available online, there is no duty of publication. Generally, the media owner must comply with any request submitted in the required form and in due time. If the periodical medium is published on at least five days per week, the reply must be published no later than on the fifth working day following its receipt (section 13 paragraph 1 subparagraph 1 Media Act). In case of publication on a website, the reply must be made available online for one month (section 13 paragraph 3a Media Act). If the reply is not published properly or not at all, an application may be filed against the media owner within six weeks seeking a court order for publication of the reply (section 14 paragraph 1 Media Act). The proceedings are of a *sui generis* nature (see *Weis*, *Handbuch der Gegendarstellung, 1994, 93*) and the provisions of the Code of Criminal Procedure (*Strafprozessordnung, StPO*) 1975 governing private prosecution proceedings are generally applicable to them (section 14 paragraph 3 Media Act).

The court must serve the application on the respondent without delay, requesting the respondent to notify the court in writing within five working days of any objections and evidence. Any objections must be served on the applicant for submission of counter-arguments and notification of evidence, again to be submitted within five working days (proceedings according to section 14 paragraph 4 Media Act). If no objections were raised within the statutory time limit, the court must rule on the case by decision within five working days (proceedings according to section 15 paragraph 1 Media Act). If objections are raised, however, the court must rule on the application by judgment within fourteen days of receipt of the counter-arguments or following expiry of the prescribed time limit. In general, an appeal can be brought against the judgment. However, such an appeal does not have suspensive effect where the court ruled in its decision that the reply must be published (proceedings with statutory time limit according to section 15 paragraphs 3 to 5 Media Act; section 21 Press Act [*Preßgesetz, PreßG*] 1862 did not accord suspensive effect to such remedies either, see in more detail *Kirchmayer*, *Österreichisches Entgegnungsrecht – von den Anfängen bis zur Gegenwart*, point 1983, 258 [260]; on the proceedings *Höhne*, *§ 14 MedienG*, in: *Berka/Heindl/Höhne/Koukal* [eds.], *Mediengesetz Praxiskommentar*[4]*, 2019,* point 1). This means that the reply must be published irrespective of the outcome of the appeal proceedings; the intention is to make the response accessible to the media audience promptly (see Weis, loc. cit., 129).

If the court orders publication of the reply in proceedings with statutory time limit (section 14 *et seq*. Media Act), section 15 paragraph 5 Media Act provides that an appeal against the judgment can only be brought if it does not challenge the decision on the objection stating that the reply is not true (section 11 paragraph 1 subparagraph 4 Media Act). If the media owner argued that all or part of the content of the requested reply is not true (section 11 paragraph 1 subparagraph 4 Media Act), the proceedings at the court (of first instance) must be continued upon the applicant's or respondent's request pursuant to section 16 Media Act (see *Höhne*, *§ 16 MedienG*, in: *Berka/Heindl/Höhne/Koukal* [eds.], *Mediengesetz Praxiskommentar*[4], 2019, point 1). In these continued proceedings, the court may issue a decision, similar to the decision of the court of appeal pursuant to section 17 paragraph 4 Media Act, authorizing publication of those parts of the judgment necessary to inform the public (section 16 paragraph 2 Media Act) and ordering the applicant to pay the "appropriate costs of publication" for this publication of the

judgment and for the publication resulting from the previous judgment; again similarly to section 17 paragraph 5 Media Act, the amount of these costs is to be determined, upon the respondent's application, by decision of the court (and, again, the publication costs may be reduced by the court in cases of hardship). In this respect, the continued proceedings are comparable to the proceedings under section 17 paragraphs 4 and 5 Media Act (*MedienG*). These provisions are not the subject of the present proceedings for review of constitutionality, however.

2.3. The court must make a decision ordering publication of a reply where it was wrongfully not published or not published properly (voluntarily) (section 17 paragraph 1 Media Act; *Röggla*, *§ 17 MedienG*, in: *Röggla/Wittmann/Zöchbauer [eds.], Medienrecht,* 2012, point 1). If the request for publication turns out to be (partially) unsubstantiated, section 17 paragraphs 4 and 5 provide for a liability of the applicant in connection with the claim to the publication of the judgment and the obligation to pay the costs of that publication as well as of the publication of the wrongfully granted reply (*Rami*, *§ 17 MedienG*, in: *Höpfel/Ratz* [eds.], *WK*$^2$, as of 1 September 2019, rdb.at, point 26).

If a reply was published on the basis of a judgment of the court of first instance and an appeal lodged against such judgment is granted in full or in part, the respondent must, upon its request, be authorized to publish those parts of the judgment of the appellate court necessary to inform the public within an appropriate period (section 17 paragraph 4 Media Act). The respondent is granted the right to publication of the relevant parts of the judgment of the appellate court to compensate for the fact that the appeal does not have a suspensive effect and that the reply must be published within the statutory time limits provided for in section 13 paragraph 1, e.g. for periodical media published on a daily basis the reply must be published no later than on the fifth working day following the date of receipt according to section 13 paragraph 1 subparagraph 1 Media Act (*Höhne*, *§ 17 MedienG*, in: *Berka/Heindl/Höhne/Koukal* [eds.], *Mediengesetz Praxiskommentar*$^4$, 2019, point 8). Through publication of the judgment of the appellate court the "media user will understand (clearly) [...] that the reply was wrongfully published in the first place" (*Weis*, loc. cit., 129, on the "remediation" effected this way). It is deemed an act of "journalistic redress" (*Pierer*, *Grundfragen der Gegendarstellung I, JBl 2022, 702 [703]*).

In addition, the court of appeal must order the applicant to pay the costs of the wrongful publication of a reply and of the publication of the judgment of the appellate court, if they were actually published (*Rami*, *§ 17 MedienG*, points 36, 44). Payment of the costs of publication both of the wrongful publication of the reply and the publication of the judgment of the appellate court must be ordered *ex officio* (see *Höhne*, *§ 17 MedienG*, point 10).

2.4. Pursuant to section 17 paragraph 5 Media Act, the amount of these costs is to be determined, upon application, by decision of the court. This decision on the amount of the costs of publication is made separately and independently of the judgment because in many cases the court of appeal cannot determine the amount and include it in the judgment as the media owner will usually not have notified the court of the amount by that point (*Weis*, loc. cit., 130 *f*). According to the prevailing view and established case law of the Austrian Supreme Court of Justice, the costs of publication provided for in section 17 paragraph 5 are defined as the amount derived from the rate for advertisements customary for the specific medium at the time of the specific publication (see *Höhne*, *§ 17 MedienG*, point 12, reference to *Weis*, loc. cit., 130). “The costs of publication do not only comprise the costs incurred by the media owner through the publication; rather, payment of the costs of publication is intended to fully indemnify the media owner, or, in other words, provide an effective compensation for having been, as it turned out later on, wrongfully required to publish the reply in the first place” (*OGH 15.9.2010, 15 Os 45/10x* and others).

In cases of hardship, i.e. if the applicant’s economic existence is at risk (*Höhne*, *§ 17 MedienG*, point 12, with further references; *OLG Wien 29.11.1995, 18 Bs 270/95*), the court may reduce the publication costs at its discretion (carefully weighing the applicant’s economic situation against the media owner’s interests, rather than “taking into account only the applicant’s economic situation”, *AB 743 BlgNR* 15th legislation period, 9) and set a longer payment term, which must not exceed one year.

3. The concerns raised by the applicant are justified:

3.1. The basic intention of the right of reply under the Media Act is to grant persons who have become the subject of public debate in the media and are affected

by an incorrect or misleadingly incomplete presentation of facts the right, deriving from their personal rights, to have their own corrective or additional account published promptly in the same place and, where possible, at the same level of publicity directed at the same public audience (right to hear the other side – "*audiatur et altera pars*"; *OGH 28.6.1995, 13 Os 53/95 and others*; *19.7.2017, 15 Os 49/17w).* The right of reply is also intended to ensure that the media audience is given correct and complete information (see *VfSlg. 20.217/2017*). With this in mind, the reply must be published in such a way as to adequately ensure that the same media audience at which the – in the affected person's view – incorrect or misleading assertion was directed is informed of the reply. Accordingly, the reply must be given prominence equal to that of the original publication (section 13 paragraph 3 Media Act) and be published at a time close enough to the original publication for the connection to it to be apparent (cf. section 13 paragraph 1 Media Act).

There are a number of criteria deriving from various fundamental rights that provide the general framework and constraints for the right of reply in the law. First and foremost, the statutory right of reply curtails the media owner's freedom of the media and communication, which in light of the significance of the freedom of the media in a democratic society (cf. only *ECtHR, 8 July 1986 [GC]*, appl. no. 9815/82, *Lingens v. Austria*, and *VfGH 14.12.2022, G 287/2022* and others) must meet the requirements of Article 10 paragraph 2 ECHR (cf. European Commission of Human Rights of 12 July 1989, no. 13010/87, *Ediciones Tiempo S.A. v. Spain*; paragraph 1; ECtHR, 24 October 2017, appl. no. 24016/05, *Eker v. Turkey*, paragraph 43). For persons individually affected by a presentation of facts in the media, the right of reply protects their private and personal sphere as provided in Article 8 ECHR (cf. ECtHR, 17 January 2023, appl. no. 8964/18, *Axel Springer SE v. Germany*, paragraph 34); it also protects their right, covered by Article 10 paragraph 1 ECHR, to be able to respond to incorrect or misleading media coverage on facts related to them and for such response be given comparable prominence in the public debate in the media (cf. ECtHR, 5 July 2005, appl. 28743/03, *Melnychuk v. Ukraine*); in this way, it also provides for provision of correct and complete information to the media audience to ensure a functioning public debate as intended by Article 10 paragraph 1 ECHR (*VfSlg. 20.217/2017*).

3.2. The provisions governing the (modalities of the) obligation to publish a reply, subsequent authorization of the media owner (who was initially obliged to publish the reply) to publish the judgment of the appellate court and the obligation on the person affected (who requested and was granted an order for publication of the reply which ultimately turned out to have been unlawful) to pay the costs of publication are thus intended to provide for a balance of interests in the law and, at the same time, (also) specify in more detail the requirements of Articles 10 and 8 ECHR.

On the one hand, this balancing of interests is achieved by provisions requiring that persons affected by, in their view, untrue or misleading presentations of facts in a periodical medium retain an effective right to publication of a reply. Section 15 paragraph 5 of the Media Act (*MedienG*) ensures the necessary temporal connection between the publication of the presentation of facts and the reply by stipulating that an appeal brought against the publication of a reply by the media owner (ordered by judgment in proceedings with a statutory time limit) does not have suspensive effect. With a view to appropriately informing the target audience, section 13 paragraph 3 and 3a Media Act in particular provide for prominence of the reply equal to that of the original publication. On the other hand, the law intends to protect media owners against an inappropriate or unreasonable obligation to publish replies by connecting this obligation to conditions such as content and time (see section 11 paragraph 1 Media Act), subjecting publication to judicial review and prescribing balancing mechanisms in favour of the media owner to provide compensation for replies that were published but ultimately turned out to have been published wrongfully. The last of these balancing mechanisms in favour of the media owner are stipulated in section 17 paragraphs 4 and 5 Media Act: Firstly, the media owner may request publication of the judgment of the appellate court to demonstrate that the media owner had been wrongfully required to publish the reply; secondly, the person initiating the reply must pay the costs of the wrongful publication of the reply and the costs of publication of (parts of) the judgment of the appellate court.

According to case law established by the Austrian Supreme Court of Justice, the costs of publication (section 17 paragraph 5 Media Act) comprise not only the actual publication costs incurred by the media owner but also includes the price (rates) set by the media owner for advertisements published solely on the basis of

an autonomous agreement between the media owner and an advertiser and serving exclusively the private interests of the advertiser (cf. *OGH 15.9.2010, 15 Os 45/10x* and others; and *Höhne*, *§ 17 MedienG*, point 12).

4.1. In light of Articles 8 and 10 ECHR, which provide the general framework for the right to reply of persons affected by untrue or misleading presentations of facts, the costs of publication under section 17 paragraph 5 Media Act must not reach an amount that is capable of "producing a chilling effect" (cf. ECtHR, 3 December 2013, appl. no. 64520/10, *Ungváry and Irodalom Kft. v. Hungary*, paragraph 68), i.e. that deters a person affected by a presentation of facts in the media *a priori* from making use of their right of reply.

4.2. The amount of the costs of publication is based on a number of criteria: These include in particular the standard rates charged by the media owner for advertisements in a specific media product; this means the costs depend mainly on the media product's market position. Furthermore, the costs of publication in the case of a reply published on a website for the statutory minimum period of one month, pursuant to section 13 paragraph 3a Media Act, may reach a considerable amount, as can be seen in the initial proceedings in the case under review here.

The party entitled to publication of a reply cannot influence those criteria. Persons considering publication of a reply have to resolve whether or not they actually want to seek such publication in the form and scope prescribed by law at a time when the court proceedings to establish if the reply is lawful are still pending. The provisions governing the time of publication, combined with section 15 paragraph 5 providing that an appeal does not have suspensive effect, as well as the provisions ensuring equal prominence aim at informing the public in a comprehensive manner. At the same time, persons affected have a general right of reply but there is no way for them to limit their risk of having to pay the costs of publication in case the reply is ruled to be wrongful in the appeal proceedings. The party entitled to publication of a reply is bound by a number of requirements predetermined by the media owner based on the type, place and scope of the reporting to which the reply responds; this also directly impacts on the pricing of the costs of publication as provided in case law on section 17 paragraph 5 Media Act (see *OGH 15.9.2010, 15 Os 45/10x* and others). The person affected does not have any influence either on the timing of the publication (and cannot wait for the judgment of

the appellate court, if an appeal was filed) or on the duration the reply is available on the website. By contrast, the media owner is obliged to publish the reply based on a court order (and thus the lawfulness of the publication is subject to review by a court). Furthermore, it has to be taken into account that if the costs of publication are high because the periodic medium has a strong market position and the media owner a good economic standing, the periodic medium (i.e. the initiator of the entire communication process) will in many cases have an edge over the "opposing party".

Considering the aforesaid, the amount of the costs of publication as defined in section 17 paragraph 5 to be paid by the person requesting a reply that ultimately turns out to be wrongful is found to be disproportionate: The costs of publication pose an economic risk for the persons affected (or compels them to refrain from requesting a reply altogether) that may be unbearable for them. In this way, section 17 paragraph 5 of the Media Act *(MedienG)* may *a priori* deter persons affected from making use of their right of reply and, consequently, curtail the general information purpose of the right of reply. Yet the media owner's protection from being wrongfully forced to publish third-party content, which is as well an essential right covered by Article 10 ECHR, can also be safeguarded in right-of-reply proceedings in case that the amount of the costs of publication – payable by the affected person if the publication of the reply is ultimately found to be wrongful – do not *a priori* deter that party from making use of their right to reply. Having regard to the foregoing considerations, the Court takes the view that section 17 paragraph 5 Media Act governing the costs of publication in connection with the right of reply does not strike a fair balance between the fundamental rights requirements specified in Article 8 and Article 10 ECHR as regards, on the hand, the person affected by presentation of facts considered untrue or misleading and, on the other hand, the media owner who makes use of the freedom of the media and communication (cf. ECtHR, 17 December 2004, appl. no. 33348/96, *Cumpănă and Mazăre v. Romania*, paragraph 91: failure to strike "a fair balance" between the rights of the media owner and the person entitled to publish a reply).

5.1. This view is held despite the judicial discretion provided for cases of hardship in section 17 paragraph 5, third sentence, according to which the court may reduce the publication costs at its discretion and set a longer payment term, which

must not exceed one year. “Cases of hardship” within the meaning of said provision are such cases where the economic existence of the person affected is put at risk (see *Rami*, *§ 17 MedienG*, point 51; *OLG Wien 31.12.2008, 17 Bs 233/07z; 17.4.2015, 17 Bs 106/15k*; as regards avoiding ruinous costs see *OLG Wien 29.11.1995, 18 Bs 270/95*), which applies only in exceptional cases and the assessment of which depends on the discretion of the court; consequently, this provision does not substantially mitigate the risk that the person wishing to publish a reply is deterred from making use of that right.

5.2. As regards section 13 paragraph 3a, it has to be noted that, while in *VfSlg. 20.217/2017* the Constitutional Court confirmed this provision with regard to establishing equal prominence, it also emphasized that this form of reply is not the only possible way of safeguarding the right of reply in electronic media. In a time of constantly changing conditions for communication in electronic media (cf. in this context *Zöchbauer*, *Gegendarstellungsrecht unter "postfaktischen" Bedingungen,* in: Berka/Holoubek/Leitl-Staudinger [eds.], *Elektronische Medien im "postfaktischen" Zeitalter*, 2019, 73 [74 *f*]) amended legislation may be needed to, especially in view of the implications for the amount of the costs of publication, provide for an appropriate duration of publication of the reply.

6. The concerns of the applicant are therefore considered justified. Section 17 paragraph 5 Media Act is to be repealed (in its entirety because its individual sentences are inseparably linked) as unconstitutional as it violates the rights guaranteed in Articles 10 and 8 ECHR.

## V. Result

Section 17 paragraph 5 of the Media Act (*Mediengesetz*, Federal Law Gazette *314/1981*, as amended by Federal Law Gazette *20/1993* is repealed as unconstitutional for violation of the right to freedom of expression (Article 10 ECHR) and the right to private life (Article 8 ECHR).

[...]

Vienna, 15 March 2023
The Vice-President:
MADNER

Recording clerk:
THALMANN