

AUT-2023-1-001

a) Austria / b) [Constitutional Court](#) / c) / d) 15-03-2023 / e) G 297/2022 / f) / g) ECLI:AT:VFGH:2023:G297.2022 / h) CODICES ([German](#)).

Keywords of the systematic thesaurus:

[05.03.21](#) Fundamental Rights - Civil and political rights - **Freedom of expression.**

[05.03.32](#) Fundamental Rights - Civil and political rights - **Right to private life.**

[05.03.32.01](#) Fundamental Rights - Civil and political rights - Right to private life
- **Protection of personal data.**

Keywords of the alphabetical index:

[International organisation, staff, protection of fundamental rights / Privileges and immunities / Media, statement, incorrect or misleading / Right of reply.](#)

Headnotes:

The right to reply to allegations that have been made in the media is protected by Article 8 and [Article 10 ECHR](#). Under [Article 10 ECHR](#), the State is also required to adopt measures that protect media owners against undue publication requirements, including the obligation to compensate the media owner for costs incurred if the publication obtained has not been justified. However, such a payment obligation is disproportionate if it may deter individuals from exercising their right of reply.

Summary:

I. The applicant was member of the Vienna city council and, inter alia, responsible for enforcing the ban on smoking in bars and restaurants which had been introduced as of 1 November 2019. On 22 and 23 October 2019, a media company published an article, both in a newspaper and online, denouncing "excessive staff costs" caused by the necessary control measures.

On 15 November 2019, the applicant requested the media owner to publish a reply stating that the allegations published in that article had been incorrect, incomplete and misleading. In fact, the costs incurred had been much lower.

When the media company refused to publish the reply, the applicant lodged an application with the Vienna Criminal Court (*Landesgericht für Strafsachen Wien*) on 3 January 2020. On 6 February 2020, the Vienna Criminal Court allowed that application and ordered the media owner to publish the rectification requested.

The media owner appealed against that decision; as by law the appeal did not have suspensory effect (Article 15.5 of the Media Act), the company published the reply ordered by the Vienna Criminal Court.

On 9 September 2020, the Vienna High Court (*Oberlandesgericht Wien*) granted the appeal and dismissed the applicant's initial application. The Vienna High Court also ruled that the media company was entitled to publish parts of that appellate decision, and that under Article 17.5 of the Media Act the applicant was obliged to pay to the media company the costs for publishing the reply and the relevant parts of the appellate decision.

On 31 October 2022, the Vienna Criminal Court fixed the definitive costs to be paid by the applicant at about EUR 240.000.

The applicant lodged a constitutional complaint with the Constitutional Court. She argued that Article 17.5 of the Media Act violated various constitutional principles including the right to freedom of expression ([Article 10 ECHR](#)), the right to respect for private life ([Article 8 ECHR](#)) and the principle of objectivity inherent in the principle of equality ([Article 7 of the Federal Constitutional Law](#)).

II. Pursuant to the Media Act, the court shall order publication of a reply if it has wrongly not been duly published or if it has not been published at all (Article 17.1). If on the basis of a judgment of first instance a counterstatement has been published and an appeal lodged against such judgment is granted in full or in part, the media owner shall, upon request, be authorized to publish within an adequate term these parts of the decision on the appeal in such a form that is required for the information of the public. In addition, the court of appeal shall sentence the applicant to pay the cost for such publication of the reply obtained in an unjustified way and of the publication of the judgment on the appeal. Upon request, a decision is to be rendered on the amount of the costs to be paid within a term of fourteen days. In exceptional cases the court may reduce the amount of the costs to be paid for the publication at its discretion and fix a longer payment term (Article 17.5).

The Supreme Court (*Oberster Gerichtshof*) has established that the costs to be imposed on the applicant under Article 17.5 of the Media Act amount to the standard advertising rates of the media owner concerned.

The Constitutional Court observed that the obligation imposed on a media company to publish a reply is an interference with its freedom of expression; as a consequence, such interference will infringe the Convention if it does not meet the requirements of [Article 10.2 ECHR](#).

As for the individual concerned, the aim of the right to reply is to afford him or her the possibility of protecting him or herself against certain statements or opinions disseminated by the mass media that are likely to be injurious to his or her private life, honour or dignity. The right to make a counterstatement therefore falls within the ambit of [Article 8 ECHR](#). In addition, the right of reply also serves the purpose of ensuring that the public is provided with information that is both correct and complete. From that point of view, the right of reply, as an important element of freedom of expression, also falls within the scope of [Article 10 ECHR](#).

As a result, when determining the right of reply, the State is required to strike a fair balance between the right to respect for private life and the right to freedom of expression in conformity with the criteria laid down in [Articles 8.2 and 10.2 ECHR](#).

The Constitutional Court found that, as a matter of principle, the Media Act includes various provisions that seek to live up to this balancing task. On the one hand, there are provisions ensuring that the right to reply can be exercised effectively, as replies shall be published at very short notice (because appeals do not have suspensory effect) and in a way ensuring the same public impact as the statement impugned. On the other hand, the Media Act also affords certain safeguards for media owners as claims for publication of a counterstatement are subject to conditions, time-limits, and judicial review; moreover, media owners are entitled to compensation for the costs incurred if the publication of a reply has been unjustified.

However, the Constitutional Court also pointed out that these safeguards which aim to protect media owners against undue publication duties must not be of such nature as to produce a "chilling effect" on exercising the right of reply.

In this respect, the Constitutional Court noted that the costs to be paid to the media owner depend on the advertising rates of the media, which in turn reflect the market position of the media concerned. Moreover, if a counterstatement has to be published on a website, the minimum time of this publication is one month by law (Article 13.3a of the Media Act). Against this background, the Constitutional Court considered that the provision at issue may expose the applicant to a disproportionate financial risk or even inhibit individuals from exercising his or her right to reply at all.

Admittedly, Article 17.5 of the Media Act also provides that the court may reduce the amount to be paid. However, such reduction is at the discretion of the court and may only be granted in case of hardship, i.e., if the economic existence of the applicant would otherwise be at threat.

The Constitutional Court therefore concluded that Article 17.5 of the Media Act violated both [Articles 8 and 10 ECHR](#) as it failed to strike a fair balance between the right to respect for private life and the right to freedom of expression.

Cross-references:

European Court of Human Rights:

- *Axel Springer SE v. Germany*, no. 8964/18, 17.01.2023;
- *Cumpana and Mazare v. Romania* [GC], no. 33348/96, 17.12.2004;
- *Ediciones Tiempo S.A. v. Spain*, no. 13010/87, 12.07.1989;
- *Eker v. Türkiye*, no. 24016/05, 24.10.2017;
- *Lingens v. Austria*, no. 9815/82, 08.07.1986 [[ECH-1986-S-003](#)];
- *Melnychuk v. Ukraine*, no. 28743/03, 05.07.2005;
- *Ungváry and Irodalom Kft. v. Hungary*, no. 64520/10, 03.12.2013.

Languages:

German.