

# AUT-2023-3-003

a) Austria b) Constitutional Court c) d) 05/10/2023 e) G 215/2022 f) g) ECLI:AT:VFGH:2023:G215.2022 h) Codices (German)

## Keywords of the Systematic Thesaurus

5.3.23 · Fundamental Rights - Civil and political rights - Rights in respect of the audiovisual media and other means of mass communication

## Keywords of the alphabetical index

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## Headnotes

The requirement of independence as laid down in the Federal Constitutional Law of 10 July 1974 on Safeguarding the Independence of Broadcasting is intended to ensure that neither the state nor private actors can influence public broadcasting for their own purposes by influencing the governing bodies of the Austrian Broadcasting Corporation (*Österreichischer Rundfunk* – hereinafter, "ORF").

The governing bodies of the ORF must therefore be legally organised in such a way that no state body has a preponderant influence on the composition of these bodies, which could jeopardise their independence as a whole.

In addition, public broadcasting is also subject to the principles of diversity of opinion and balance. This constitutional provision results in the requirement that the governing bodies of the ORF be composed in such a way that they cannot be unilaterally dominated by people forming a group.

## Summary

I. According to the Federal Act on the Austrian Broadcasting Corporation (hereinafter, the "ORF Law"), the Austrian Broadcasting Corporation (hereinafter, "ORF") is a foundation under public law. The governing organs are the Director General (*Generaldirektor*), the Foundation Council (*Stiftungsrat*) and the Audience Council (*Publikumsrat*).

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. 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, approves the Editorial Agreement, and its consent is required for certain business

decisions, including issuing the general guidelines in relation to programming, programme scheduling and service coordination of radio and television broadcasting and online services. Thus, by influencing the programming by way of the broadcasting guidelines and recommendations regarding programming, the Foundation Council also has powers relating to the content of programming.

The Foundation Council consists of 35 members who shall be appointed as follows:

- 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;
- nine members shall be appointed by the *Länder* with each Land being entitled to appoint one member;
- nine members shall be appointed by the Federal Government;
- six members shall be appointed by the Audience Council;
- five members shall be appointed by the Central Staff Council.

All members of the Foundation Council must have the necessary social and professional skills, have knowledge of the Austrian and international media markets or be held in high regard in the areas of economics, science, arts or education by reason of their previous activities.

The term of office of the Foundation Council is four years from the day of its first meeting. Before that time, the members appointed by the Federal Government may be removed from office, and new members shall be appointed for the remaining term of office, if a new Federal Government has been appointed. The same applies to the member appointed by a Land if a new Land Government has been elected and to the members appointed by the Audience Council and the Staff Council if the composition of these bodies has changed.

In principle, all resolutions of the Foundation Council shall be passed by open vote and by a simple majority of the votes cast.

The purpose of the Audience Council is to safeguard the interests of the listeners and viewers. The Audience Council shall appoint six members of the Foundation Council and make recommendations regarding broadcasting plans; it may also submit compliance issues to the regulatory authority.

The Audience Council consists of 30 members who shall be appointed as follows:

- 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;
- the chambers of freelance professionals shall together appoint one member;
- the Roman Catholic Church shall appoint one member;
- the Lutheran Church shall appoint one member;
- the educational organisations of the political parties shall each appoint one member;
- the Academy of Sciences (*Akademie der Wissenschaften*) shall appoint one member.

Another seventeen members of the Audience Council shall be appointed by the Federal Chancellor from shortlists of three persons submitted by organisations 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, with one member being appointed for each sector.

The Land Government of *Burgenland* filed a constitutional complaint with the Constitutional Court, claiming that the legal provisions regarding the appointment and composition the Foundation Council and the Audience Council violated the constitutional principles of independence and diversity as laid down in the Federal Constitutional Law of 10 July 1974 on Safeguarding the Independence of Broadcasting (*Bundesverfassungsgesetz über die Sicherung der Unabhängigkeit des Rundfunks* – hereinafter, the "Broadcasting Act").

II. The Broadcasting Act provides that broadcasting is a public responsibility and subject to federal legislation. In particular, federal legislation shall include provisions ensuring the objectivity and impartiality of reporting, the diversity of opinion, the balance of programmes and the independence of the persons and bodies in charge of broadcasting (Article I.2 of the Broadcasting Act).

The Constitutional Court observed that the Broadcasting Act and [Article 10 ECHR](#) impose a functional responsibility on the legislator as regards the organisation 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 and is intended to comprehensively guarantee freedom of public discourse via broadcasting.

As for the constitutional principle of independence provided for in Article I of the Broadcasting Act, it relates expressly to the governing bodies of the ORF. 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. 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", 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.

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 jeopardise its independence as a whole.

A further requirement regarding the organisation of the governing bodies of the ORF is that the governing 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 principle of pluralism and the principle of independence thus interact with one another.

The constitutional principle 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 detached from state authority.

The fact that the governing bodies of the ORF are appointed by state bodies, especially by the Federal Government, not only does not conflict with the constitutional requirements of the Broadcasting Act regarding pluralism and independence, but also contributes to compliance with those requirements due to the democratic legitimacy of those bodies.

The same holds true for the provision that every political party represented in the National Council be represented by at least one member of the Foundation Council. As for the appointment of an additional member by each Land, this provision once again reflects an aspect of federal diversity. The appointment of six additional members by the Audience Council, which itself is composed according to the principles of social representation, also corresponds to the aim of ensuring a pluralistic composition of the Foundation Council.

In contrast, the Federal Government is not subject to any ties that go beyond the general personal and professional requirements of the nine additional members of the Foundation Council that it appoints, which are intended to bring about diversity on that body. These members form a relatively large group that clearly outweighs the six members appointed by the Audience Council. This violates the constitutional guarantees of independence and pluralism in the appointment and composition of the ORF's governing bodies.

The ORF law does provide for sufficient regulations safeguarding the personal independence of the members of the Foundation Council when carrying out their work. While the members of the Foundation Council are not bound by any instructions or orders when exercising their functions, early dismissal is possible if the appointing institutions have themselves been reappointed or have been reconstituted. This contradicts the constitutional requirement of independence.

The members of the Foundation Council appointed by the Federal Government and the Audience Council must meet high personal and professional standards that they have acquired in various areas. However, the law 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 in the personal and professional qualifications of the members to be appointed is achieved. As a result, the Federal Government and the Audience Council have too much leeway in selecting members of the Foundation Council, and may even ignore the aspect of pluralism in the composition of the Foundation Council. This deficiency is particularly significant with a view to the responsibilities of the Foundation Council and means that the regulation of the appointment of the members of the Foundation Council also violates Article 1.2 of the Broadcasting Act on this point.

The Audience Council consists of 30 members, thirteen of whom shall be appointed directly by the organisations named in the ORF law. For the remaining seventeen members, the Federal Chancellor shall solicit three proposals from institutions or organisations representative of fourteen areas (groups) such as universities, the arts or the elderly. These (seventeen) members appointed by the Federal Chancellor therefore have a clear

preponderance over the remaining (thirteen) members sent by representative institutions. This contradicts the principle of independence.

The Constitutional Court observed that the Federal Chancellor can freely determine how many institutions or organisations he invites to make proposals for the areas (groups) specified in the law and how many members are appointed for each area (each group). However, given that these determinations are at the complete discretion of the Federal Chancellor, the members of the Audience Council are no longer sufficiently linked to those areas and groups that are legally defined as socially relevant, as the representativeness can be undermined through multiple nominations. This provision therefore also violates the constitutional requirement of pluralism and the independence of the Audience Council.

### **Cross-references**

European Court of Human Rights:

- *Manole and Others v. Moldova*, no. 13936/02, 17.09.2009.