[AT] Austrian Constitutional Court mandates reform of ORF law to ensure independence and pluralism

IRIS 2024-8:1/14

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On 29 September 2024, the national parliamentary election in Austria will shape the course of the implementation of a ruling by the Constitutional Court (the VfGH), which declared certain provisions governing Austria's public service media (PSM) organisation, the Austrian Broadcasting Corporation (ORF), unconstitutional. The ruling issued on 5 October 2023 pursuant to Article 140 of the Federal Constitutional Law (B-VG), following a public oral hearing and a request for judicial review, will take effect on 31 March 2025, with the previous provisions not being reinstated. The legislature is required to enact new regulations by that date.

The decision of the VfGH essentially calls for more pluralism and greater independence of the ORF. The relevant provisions of the Federal Act on the Austrian Broadcasting Corporation (the ORF Act), Federal Law Gazette 379/1984 as amended by I 112/2023, pertain to the appointment and composition of the ORF's governing bodies – the Foundation Board (Stiftungsrat) and the Audience Council (Publikumsrat). While the Foundation Board oversees the management of Austria's PSM, the Audience Council represents public interests, mainly by advising on programming. Under the Federal Constitutional Act on the Independence of Broadcasting of 1974 (the Broadcasting Constitutional Act – Rundfunk-BVG), the legislature must ensure regulations that guarantee objectivity, impartiality, diversity, balanced programming, and the independence of individuals and governing bodies (Article I (2)). The VfGH concludes that the composition of the ORF's governing bodies must be such as to prevent unilateral state influence and ensure diverse representation in order to safeguard independence and pluralism. In its reasoning for the decision, the court identified the following violations of constitutional requirements concerning the Foundation Board:

- Government influence: The federal government currently appoints more members (9 out of 35) than the Audience Council (6) without being required to take recommendations into account (section 20 (1) ORF Act); this violates the principle of pluralism and independence. Constitutionally unobjectionable, however, are the appointments by the federal states (9), those proposed by parties represented in the parliament (6), and appointments by the ORF employee council (5). However, in practice, these provisions enable the government to

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appoint a simple majority of the 35 members of the Foundation Board, which is sufficient for most decisions, including the appointment of the director general and the directors.

- Early dismissal provisions: Members of the Foundation Board are appointed for a four-year term. However, pursuant to section 20 (4) of the ORF Act, the members appointed by the federal government and the Audience Council can be dismissed before the end of their term if a new government is formed or the Audience Council is reconstituted, which contradicts the principle of independence. There are no constitutional concerns regarding the early removal of the six party representatives and the five employee representatives on the Foundation Board.

- Insufficient pluralism: Members of the Foundation Board are required to meet high personal and professional standards. However, the ORF Act lacks provisions to ensure diversity in appointments. This broad discretion risks disregarding the constitutionally mandated pluralism, thereby violating Article I (1) (Broadcasting Constitutional Act).

Regarding the Audience Council, the primary concern is the influence of the chancellor (section 28 (3) ORF Act):

- The Audience Council includes members appointed by representative institutions (13 out of 30) and others appointed by the federal chancellor from nominees (17). Those appointed by the chancellor hold a disproportionate advantage, which violates the independence requirement.

- The federal chancellor appoints the members of the Audience Council based on proposals from organisations representing various societal groups. However, there are no specific guidelines on how organisations are selected or how members are distributed across the groups. This broad discretion allows undue influence by the chancellor. The constitutional provisions mandate that the legislature ensure equitable representation of members.

In summary, the court ruled that the current structure of the ORF’s governing bodies allows for overreaching government influence, violating the constitutional requirements of independence and pluralism. The legislature is now tasked with enacting reforms that address these issues. The possible courses of action are currently the subject of intense debate in the ongoing election campaign and range from minor adjustments to a genuine reform.

The Media Pluralism Monitor also identifies a significant risk to the ORF’s independence, with the appointment procedures, referenced by the Constitutional Court, playing a substantial role in this assessment. However, the risk pertains not only to the governing bodies discussed above, but also to the appointment of the director general and other management positions within the ORF. While the law

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(section 20 (3) 5 ORF Act) aims to provide objective and transparent appointment procedures for the management and board functions in the PSM, for example, by prescribing a variety of qualifications and incompatibility rules, or by requiring a two-thirds majority for the dismissal of the director general, the incompatibility of numerous political functions applies only to the four years prior to the appointment.

Meanwhile, on 5 July 2024, the VfGH dismissed a complaint against the constitutionality of the ORF household levy, ruling the application inadmissible. A total of 331 individuals, the majority of whom do not own a television, had filed an individual application for judicial review. The financing of the PSM was restructured in 2023 through the introduction of a household levy to replace the traditional fees. Nonetheless, the matter of the ORF's future financing remains a subject of considerable controversy, primarily driven by the Freedom Party of Austria, and is contingent upon the outcome of the election scheduled for 29 September. The possibility of state budget financing is being evaluated as a potential alternative.

The ORF is the only public service provider in Austria. It offers two full programmes and two special interest channels, twelve radio programmes, a news site, a video-on-demand service and an online platform for all radio offerings with high ratings in news usage, reach, market share, and still relatively strong trust levels (59.6%). Although trust in ORF news has been steadily declining – this is occurring at a significantly lower level than with other information providers in the country: according to the Reuters Digital News Report 2024, trust in news in Austria stands at 34.9%, which falls below the global average.

Decision G 215/2022: Provisions of the ORF Act (ORF-Gesetz) regarding the Foundation Council and the Audience Council are in part unconstitutional.

https://www.vfgh.gv.at/downloads/VfGH-Erkenntnis_G_215_2022_vom_5._Oktober_2023_EN.pdf

Bundesgesetz über den Österreichischen Rundfunk (ORF-Gesetz, ORF-G)

https://www.ris.bka.gv.at/Dokumente/Erv/ERV_1984_379/ERV_1984_379.html

Federal Act on the Austrian Broadcasting Corporation (ORF Act)

https://www.ris.bka.gv.at/Dokumente/Erv/ERV_1984_379/ERV_1984_379.html

Federal Constitutional Act of 10 July 1974 on Guaranteeing the Independence of Broadcasting

https://www.ris.bka.gv.at/Dokumente/Erv/ERV_1974_396/ERV_1974_396.html

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Federal Constitutional Law

https://www.ris.bka.gv.at/Dokumente/Erv/ERV_1930_1/ERV_1930_1.html

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