

Independence and Pluralism of Public Service Broadcasting and its Governing Bodies in Austria?¹

On the decision of the Austrian Constitutional Court of 5 October 2023, G 215/2022

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Abstract: *The Austrian Constitutional Court has recently annulled provisions of the Federal Act on the Austrian Broadcasting Corporation (ORF Act) regarding the composition and appointment of members of the Austrian Broadcasting Corporation's (the ORF's) governing bodies as unconstitutional. The Court found that these provisions concerning the Foundation Council and the Audience Council of the ORF were inconsistent with the constitutional requirements as laid down in Art I para 2 Constitutional Broadcasting Act and Art 10 ECHR, namely the requirements of independence and pluralistic composition of these bodies. In particular, the Constitutional Court ruled on the question of the extent to which the bodies of the ORF must be independent from the state, state authorities and political parties. In this decision, unlike the German Federal Constitutional Court did in a case concerning the governing bodies of a German public broadcasting operator, the Austrian Constitutional Court in its decision does not refer to any constitutional guarantee that would require statutory law to ensure the ORF's bodies' sufficient "distance from the state" ("Staatsferne"). However, as will be shown in this text, there are no fundamental differences between the constitutional*

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requirements established by the German Federal Constitutional Court and the Austrian Constitutional Court in their respective case law.

Abstract: *Der VfGH hat mit Erkenntnis vom 05.10.2023, G 215/2022, Bestimmungen des ORF-G über die Zusammensetzung und Bestellung von Mitgliedern des Stiftungs- und des Publikumsrats des ORF als verfassungswidrig aufgehoben. Diese Vorschriften seien nicht mit den Anforderungen des Art I Abs 2 BVG Rundfunk und Art 10 EMRK vereinbar, nämlich mit den Geboten der Unabhängigkeit und der pluralistischen Zusammensetzung dieser Organe. Dabei hat sich der VfGH insb zur Frage geäußert, inwieweit die Organe des ORF vom Staat, seinen Organen und politischen Parteien unabhängig sein müssen. Der VfGH stellt in seiner Entscheidung begrifflich (anders als das deutsche BVerfG) nicht auf eine „Staatsferne“ der Organe des ORF ab. Wie zu zeigen ist, bestehen zwischen den vom BVerfG und vom VfGH in diesem Zusammenhang aufgestellten Maßstäben jedoch keine grundsätzlichen Unterschiede.*

Keywords: *independence and pluralism of public service broadcasting; depoliticization; distance from the state*

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I. Introduction

Public service broadcasting is operating in a potentially challenging field. The state bears a certain responsibility for public service broadcasting. At the same time, to adequately fulfill their tasks and responsibilities in a democratic society, public service broadcasting operators require independence, in particular from the state.² Along these lines, Art I para 3 of the Austrian Federal Constitutional Act Guaranteeing the Independence of Broadcasting (Constitutional Broadcasting Act)³ stipulates, that public service broadcasting is a "public responsibility". The Federal Constitution thus imposes functional and financial responsibilities on the state, especially an obligation to establish a public service broadcasting operator.⁴ At the same time, Art I para 2 Constitutional Broadcasting Act and Art 10 ECHR require that public service broadcasting operators and their governing bodies shall be independent from the state and state authorities.

The Austrian Constitutional Court has recently annulled provisions of the Federal Act on the Austrian Broadcasting Corporation (ORF Act)⁵ regarding the composition and appointment of members of the Austrian Broadcasting Corporation's (the ORF's)

² Walter Berka, *Zur Governance autonomer öffentlicher Institutionen: das Beispiel des öffentlich-rechtlichen Rundfunks*, in FS Raschauer 49, 50 f (2013).

³ Bundesverfassungsgesetz über die Sicherung der Unabhängigkeit des Rundfunks [BVG Rundfunk] [Constitutional Broadcasting Act] BGBl No. 396/1974.

⁴ Verfassungsgerichtshof [VfGH] [Constitutional Court], June 30, 2022, G 226/2021; VfGH, Oct. 5, 2023, G 215/2022. See also Ewald Wiederin, *Finanzierung des ORF – Programmentgelt – Ausnahme für Streaming-Nutzer der ORF-Programme*, 40 MR 290, 295 (2022); Hans Peter Lehofer, *VfGH: Bestandsgarantie für einen unabhängigen öffentlich-rechtlichen Rundfunk*, 78 ÖJZ 883, 883 (2023).

⁵ Bundesgesetz über den Österreichischen Rundfunk [ORF-Gesetz, ORF-G] [Federal Act on the Austrian Broadcasting Corporation, ORF Act] BGBl No. 379/1984, as amended by BGBl I No. 116/2023.

governing bodies as unconstitutional.⁶ The Court found that these provisions concerning the Foundation Council and the Audience Council of the ORF were inconsistent with the constitutional requirements as laid down in Art I para 2 Constitutional Broadcasting Act and Art 10 ECHR, namely the requirements of independence and pluralistic composition of these bodies. In particular, the Constitutional Court ruled on the question of the extent to which the bodies of the ORF must be independent from the state, state authorities and political parties.

In this decision, unlike the German Federal Constitutional Court did in a case concerning the governing bodies of a German public broadcasting operator (namely, the ZDF), the Austrian Constitutional Court in its decision does not refer to any constitutional guarantee that would require statutory law to ensure the ORF's bodies' sufficient "distance from the state" ("Staatsferne"). However, as will be shown in this text, there are no fundamental differences between the constitutional requirements established by the German Federal Constitutional Court and the Austrian Constitutional Court in their respective case law. The Austrian Constitutional Court in the present case was not required to comment on the question, whether the Austrian Constitution requires "distance from the state" in the sense of the German Federal Constitutional Court's case law. This question remains open.

According to the Austrian Constitutional Court's present decision, the Federal Constitution does not call for a complete depoliticization of public service broadcasting and the ORF's governing bodies. While political parties or state authorities may participate in the appointment of members of the ORF's governing bodies, it is essential that no party-political or otherwise defined group of persons, no state body or authority and not the state itself may be allowed to bear a predominant influence on public service broadcasting, i.e. the ORF and its governing bodies.

⁶ VfGH, Oct. 5, 2023, G 215/2022. An English translation of the decision can be found under: https://www.vfgh.gv.at/downloads/VfGH-Erkenntnis_G_215_2022_vom_5._Oktober_2023_EN.pdf. The references to paragraphs of the Constitutional Court's decision throughout this article refer to the German original language version. The English translation's paragraphs are unfortunately not numbered.

II. Organization of the ORF's Governing Bodies

Before discussing the key points of the Constitutional Court's decision, it is necessary to outline the (partially annulled) provisions of the ORF Act concerning the ORF's governing bodies, namely the Foundation Council and the Audience Council, that are essential to the decision.

According to Section 19 para 1 ORF Act, the Foundation Council and the Audience Council as collegial bodies and the Director General serve as the ORF's organs. Pursuant to Section 19 para 2 ORF Act, both collegial bodies and their members shall not be bound by instructions or orders. They shall exclusively fulfill the obligations arising from the laws and the rules of procedure.

A. Foundation Council

The Foundation Council has a role that is comparable to that of the Supervisory Board of a stock corporation. Its tasks are similar to those of a Supervisory Board in several respects.⁷ Besides monitoring management of the ORF and the appointment and dismissal of the Director General, the Foundation Council can exercise a certain influence on program design. The Foundation Council approves long-term planning of the ORF's program content (Section 21 para 1 subpara 6 ORF Act) as well as general guidelines for programming and program and service schedules for television and radio (Section 21 para 2 subpara 1 and 2 ORF Act).⁸

The Foundation Council consists of 35 members, which, pursuant to Section 20 para 1 first sentence ORF Act, are appointed as follows:

- six members shall be appointed by the Federal Government in proportion to the number of seats of the political parties in the National Council, due regard being paid to the proposals of these parties, each of these political parties shall be represented by at least one member (subpara 1);

⁷ Explanatory Remarks to the Government Bill, Nationalrat [NR] [National Council] Gesetzgebungsperiode [GP] 21 Beilage [Blg] No. 634.

⁸ Michael Kogler, Matthias Traimer & Michael Truppe, Österreichische Rundfunkgesetze, § 21 ORF-G (2018).

- nine members shall be appointed by the Austrian provinces, each of the provinces is entitled to appoint one member (subpara 2);
- nine members shall be appointed by the Federal Government (subpara 3);
- six members shall be appointed by the Audience Council (subpara 4);
- five members shall be appointed by the ORF's Central Staff Council (subpara 5).

These appointment rules were partially annulled by the Constitutional Court.⁹

When members of the Foundation Council are appointed in accordance with subpara 1 to 4 (i.e. all members except those to be appointed by the Central Staff Council), pursuant to Section 20 para 1 second sentence ORF Act, it is to be ensured that firstly the members are personally and professionally qualified in the matters to be carried out by the Foundation Board, through either appropriate previous education or professional experience. Secondly, the members are required to have sufficient knowledge of the Austrian and international media markets or to have acquired high esteem through previous professional activities in the fields of economics and business, science, arts or education. The members of the Foundation Council must combine a high degree of knowledge in the individual areas of the ORF's activities. Each member must have corresponding expertise in at least one of these areas.¹⁰

To ensure the Foundation Council's independence, Section 20 para 3 ORF Act contains rules on incompatibility. Amongst others, members of a general representative body (e.g. the National Council, provincial parliaments or municipal councils), members of the Federal or a Provincial Government and persons that hold a leading position in a political party may not be appointed as members of the Foundation Council.

The term of office of the Foundation Council is four years (Section 20 para 4 ORF Act). However, members may be replaced prematurely if the respective body, that appointed these members, has been newly constituted or elected. Thus, members appointed by the Federal Government may be recalled before the end of their four-year term when a new

⁹ See below section V.B.

¹⁰ Kogler, Traimer & Truppe, Österreichische Rundfunkgesetze, § 20 ORF-G (2018).

Federal Government has been constituted. As will be discussed below, this provision was annulled by the Constitutional Court.

B. Audience Council

According to Section 28 para 1 ORF Act, the ORF Audience Council's purpose is to represent and "safeguard" the interests of listeners and viewers of the ORF. The number of the Audience Council's members is not strictly defined by law, as the number of "entities who are responsible for civic political education within the political parties", who are to appoint one member each, varies with the number of political parties represented in the National Council.¹¹ The Audience Council currently consists of 30 members. 13 members are appointed directly by legal entities listed in Section 28 para 3 ORF Act, e.g. by the Austrian Federal Economic Chamber, the Roman Catholic Church, the Academy of Sciences or the aforementioned (currently five) entities for civic political education.

Pursuant to Section 28 para 4 ORF Act the Federal Chancellor appoints 17 further members on the basis of proposals that he receives from institutions or organizations that are representative of certain sectors or groups of society, namely academia, education, arts, sports, youth, students, the elderly, handicapped persons, parents and the family, ethnic groups, tourism, motorists, consumers and environmental protection. The Federal Chancellor decides which institutions or organizations he invites to submit proposals. Each proposal has to contain three candidates. The ORF Act does not contain more detailed provisions on the selection of members by the Federal Chancellor from these proposals. This point will also be of concern for the Constitutional Court in the ruling to be discussed.

Pursuant to Section 28 para 2 ORF Act, the members of the Audience Council are subject to incompatibility provisions that largely correspond to those for the Foundation Board described above. The term of office of the Audience Council is four years. Members may not be recalled before the end of their term of office.¹²

¹¹ Kogler, Traimer & Truppe, Österreichische Rundfunkgesetze, § 28 ORF-G (2018).

¹² Kogler, Traimer & Truppe, Österreichische Rundfunkgesetze, § 29 ORF-G (2018).

III. Objections of the Applicant Against the Constitutionality of the ORF Act.

The present decision of the Constitutional Court concerning the ORF Act arises from an application by a provincial government.¹³ The provincial government essentially submits that the ORF Act's rules on the composition and appointment of the Foundation Council and the Audience Council would not meet the constitutional requirements concerning independence and pluralism of the ORF and its governing bodies arising from Art 10 ECHR and Art I para 2 Constitutional Broadcasting Act.

Against the background of the German Federal Constitutional Court's decision on the composition of the governing bodies of the German ZDF¹⁴, the applicant claims that the relevant provisions on the ORF Foundation Council are insufficient to safeguard the Council's "distance from the state". While the applicant takes into account that the Austrian Constitutional Broadcasting Act did not impose the same constitutional requirements as Art 5 para 1 of the German Basic Law, it still holds that due to significant structural parallels between the constitutional provisions in question, a "reduced" requirement of "distance from the state" followed from Art I para 2 Constitutional Broadcasting Act. According to the applicant, 24 out of 35 members of the Foundation Council were not sufficiently "distant from the state", because they were to be appointed by the Federal Government, the provinces and the political parties. Due to the influence of these state or state-affiliated members of the Foundation Council, the independence of the ORF within the meaning of Art I para 2 Constitutional Broadcasting Act was not sufficiently guaranteed.

Alternatively, the applicant argues that the Foundation Council was to be considered as too close to the government. Too many members were to be appointed by the Federal Government itself and by the political parties forming the government. In addition to the nine members to be appointed by the Federal Government, in a coalition government of two parties, at least two of the members appointed by the political parties were to be

¹³ Namely, the Provincial Government of Burgenland.

¹⁴ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] BVerfGE 136, 9. See Section IV.C.

named by the governing parties. Due to the Federal Chancellor's predominance in the appointment of the members of the Audience Council (see below), the six members of the Foundation Council to be appointed by the Audience Council were close to the Federal Government. The political parties forming the Federal Government would regularly also be involved in provincial governments. For all these reasons, more than half of the members of the Foundation Council were appointed under the influence of the Federal Government or the governing political parties. Thus, Art I para 2 Constitutional Broadcasting Act and Art 10 ECHR were violated.

As regards the Audience Council, the applicant's concerns are directed against the appointment of 17 Council members by the Federal Chancellor. The process of appointment of these 17 out of (currently) 30 members was not sufficiently determined by law, the applicant claims. The Federal Chancellor was thus free to choose one of the three candidates from each proposal according to party-political preference. This would contradict the requirement of sufficient "distance from the state". Moreover, the independence of these members, who make up the majority of the Audience Council, was not sufficiently guaranteed, as these members were especially too close to the Federal Government. Therefore, the appointment mode would contradict the requirements of Art I para 2 Constitutional Broadcasting Act and Art 10 ECHR.

IV. Relevant Constitutional Requirements

In Austria the ECHR holds the rank of a Federal Constitutional law. Art 10 ECHR as well as Art I para 2 Constitutional Broadcasting Act lay down constitutional requirements for the independence and pluralism of public service broadcasting and its governing bodies (see A. and B.). The applicant provincial government, in addition to that, argues that the Federal Constitution contained a "reduced" requirement of "distance from the state" (see C.).

A. Art 10 ECHR

Art 10 ECHR inter alia safeguards the freedom of the media and imposes certain obligations on the state.¹⁵ According to the case law of the ECtHR, the state must ensure a sufficient degree of pluralism in the audio-visual media.¹⁶ Television and radio play an important role in ensuring diversity of opinion within a democratic society because they are particularly effective forms of conveying opinions and information.¹⁷ Through the combination of words, sound and images, television has a more immediate and powerful influence on the democratic public communication process than print media.¹⁸

Pursuant to Art 10 ECHR, the state must ensure that the public through radio and television has access to impartial and accurate information and to a range of different opinions, that reflects the diversity of political outlook within the country.¹⁹ The state must – within a margin of appreciation – create a legislative and administrative framework that guarantees effective plurality in the audio-visual media sector.²⁰ This does not oblige the state to establish a public service broadcasting system, nor does it prohibit the state from establishing such broadcasters.²¹ If the state, however, decides to establish a public broadcasting service, it must ensure that the service reflects a pluralistic range of opinions and is independent.

¹⁵ Walter Berka & Hannes Tretter, *Public Service Media under Article 10 of the European Convention on Human Rights*, 10, 20 (2013) (available at <https://www.ebu.ch/publications/strategic/open/case-study/public-service-media-and-article>).

¹⁶ *Manole and Others v. Moldova*, ECtHR [European Court of Human Rights] No. 13936/02 para. 95 ff (2009); *Centro Europa 7 S.r.l. and Di Stefano v. Italy* (Grand Chamber, GC), ECtHR No. 38433/09 (2012) para. 129 ff; Christoph Hofstätter, *Art 10 EMRK, in Bundesverfassungsrecht* (Arno Kahl, Lamiss Khakzadeh & Sebastian Schmid eds., 2021) para. 19; Berka & Tretter, *Public Service Media under Article 10 of the European Convention on Human Rights* at 11; Karen Reid, *A Practitioner's Guide to the European Convention on Human Rights* 760 (7th ed. 2024).

¹⁷ *Manole v. Moldova*, para. 97; *Centro Europa v. Italy*, para. 132; *Animal Defenders International v. the United Kingdom* (GC), ECtHR No. 48876/08 (2013) para. 101. See also *Informationsverein Lentia and Others v. Austria*, ECtHR No. 13914/88 (1993) para. 38; *Murphy v. Ireland*, ECtHR No. 44179/98 (2003) para. 69; *Pedersen and Baadsgaard v. Denmark* (GC), ECtHR No. 49017/99 (2004) para. 79; Birgit Daiber, *Art 10 EMRK, in EMRK: Europäische Menschenrechtskonvention* para. 7 (Jens Meyer-Ladewig/Martin Nettesheim/Stefan von Raumer eds., 5th ed. 2023); Wolfgang Hoffmann-Riem, *Die Unabhängigkeit des Rundfunks, in Unabhängigkeit der Medien* 49, 52 ff (Walter Berka, Christoph Grabenwarter & Michael Holoubek eds., 2011).

¹⁸ *Manole v. Moldova*, para. 97. See also VfGH, 30 June 2022, G 226/2022.

¹⁹ *Manole v. Moldova*, para. 100, 107.

²⁰ *Centro Europa v. Italy*, para. 134; Daiber, *Art 10 EMRK* para. 69. See also *Manole v. Moldova*, para. 99.

²¹ *Manole v. Moldova*, para. 100; Hofstätter, *Art 10 EMRK* para. 41.

The state must thus firstly ensure “external pluralism”²² in the area of audio-visual media within the state as a whole. Pursuant to Art 10 ECHR, the state must sufficiently safeguard diversity of opinion across all broadcasters within the country.²³ In particular, it has to be ensured that no powerful economic or political group (including political parties) within a society or the state itself may gain a dominant influence on the audio-visual media within a country, as otherwise external pluralism would be at risk.²⁴

Secondly, these requirements of Art 10 ECHR also apply within a public service broadcaster, in the sense of “internal pluralism”.²⁵ If the state establishes a public service broadcasting system, it must ensure the programming of this public service provider complies with the aforementioned requirements and in particular reflects a pluralistic range of opinions.²⁶ The less pluralistic and the weaker the audio-visual media landscape outside of public service broadcasting is, the higher are the pluralistic requirements for public service broadcasting.²⁷ If the public broadcaster is the only or the dominant audio-visual media provider in a country, it is indispensable for the proper functioning of democracy and the formation of opinion in a democratic society that it transmits impartial, independent and balanced news and that its programmes reflect a broad spectrum of opinions and views.²⁸ The state must moreover take legislative and administrative precautions for the organization of a public service broadcaster, which guarantee the independence of such a broadcaster from political influence (in particular from dominant political parties) in order to safeguard pluralism.²⁹ This especially applies

²² BVerfGE 73, 118 at 153. See Berka & Tretter, *Public Service Media under Article 10 of the European Convention on Human Rights* at 11; Christoph Grabenwarter, *Meinungsvielfalt und Medienvielfalt als Verfassungsbegriffe*, in *Meinungsvielfalt im Rundfunk und in den Online-Medien* 33, 37 (Walter Berka, Christoph Grabenwarter & Michael Holoubek eds., 2014). See also Michael Holoubek, Klaus Kassai & Matthias Traimer, *Grundzüge des Rechts der Massenmedien* 76 f (5th ed. 2014).

²³ *Manole v. Moldova*, para. 100. See Berka & Tretter, *Public Service Media under Article 10 of the European Convention on Human Rights*.

²⁴ *Manole v. Moldova*, para. 98; Grabenwarter, *Art 5 Abs 1, 2 GG [Grundgesetz] [Basic Law]*, in 85 *Grundgesetz Kommentar* para. 812 (Günter Dürig, Roman Herzog & Rupert Scholz eds., 2018). See also *Centro Europa v. Italy*, para. 133; William Schabas, *The European Convention on Human Rights: A Commentary* 467 (2015).

²⁵ See Berka & Tretter, *Public Service Media under Article 10 of the European Convention on Human Rights*; Grabenwarter, *Meinungsvielfalt und Medienvielfalt als Verfassungsbegriffe* at 37. See also BVerfGE 73, 118 at 183.

²⁶ *Manole v. Moldova*, para. 101, 107; Reid, *A Practitioner’s Guide to the European Convention on Human Rights* at 760.

²⁷ See Grabenwarter, *Meinungsvielfalt und Medienvielfalt als Verfassungsbegriffe* at 38.

²⁸ *Manole v. Moldova*, para. 101, 107.

²⁹ *Manole v. Moldova*, para. 109.

to the management structure and the appointment and composition of the governing bodies.³⁰

Art 10 ECHR does not seem to play an overly important role in the Austrian Constitutional Court's recent decision on the independence and pluralism of the ORF's governing bodies. When generally summarizing and reiterating the relevant constitutional requirements, the Court does refer to Art 10 ECHR and the relevant case law of the ECtHR on the principle of pluralism.³¹ However, the Court subsequently does mention Art 10 ECHR in the reasons for its decision with regard to the provisions found to be unconstitutional. The Court there only refers to Art I para 2 Constitutional Broadcasting Act. The reason for this seems to be that Art I para 2 Constitutional Broadcasting Act contains more specific requirements for the independence and pluralism of the ORF and its bodies than Art 10 ECHR.³²

B. Art I para 2 Constitutional Broadcasting Act

The Constitutional Broadcasting Act contains constitutional requirements for the statutory rules on the organization of public service broadcasting in Austria. In general, Art I paras 2 and 3 Constitutional Broadcasting Act place an obligation on the federal legislator to establish public service broadcasting. Accordingly, the state bears functional and financial responsibility for public service broadcasting and is under the obligation to ensure that public service broadcasters have adequate resources to carry out their tasks.³³

Pursuant to Art I para 2 Constitutional Broadcasting Act, the federal legislator must enact provisions concerning the organization of public service broadcasting "ensuring the objectivity and impartiality of reporting, consideration to the diversity of opinion, the balance of programmes and the independence of the persons and executive bodies or officers who are entrusted with the tasks referred to in para 1." The Constitutional

³⁰ Manole v. Moldova, para. 109; Walter Berka, *Unabhängigkeit, Pluralität und Transparenz - Anforderungen an die Binnenorganisation der rundfunkrechtlichen Gremienaufsicht*, 33 MR 216, 217 (2015).

³¹ VfGH, Oct. 5, 2023, G 215/2022 at 61 ff. See also Hans Peter Lehofer, *Bestandsgarantie für den öffentlich-rechtlichen Rundfunk – zu den Folgen des VfGH-Erkenntnisses über die ORF-Gremien*, 2 ÖJA 122, 131 f (2024).

³² See also Markus Vasek, *Die Zusammensetzung von ORF-Stiftungs- und Publikumsrat vor dem Verfassungsgerichtshof*, 2 ÖJA 107, 114 f (2024)

³³ VfGH, Oct. 5, 2023, G 215/2022 at 62.

Broadcasting Act thus stipulates requirements for the diversity of opinion as well as for objectivity and impartiality of the program content. To this effect, Art I para 2 Constitutional Broadcasting Act also contains requirements for the independence and pluralism of the governing bodies of a public broadcaster. These rules for program content and the organization of broadcasting are interrelated. The independence of governing bodies guarantees pluralism. Vice versa, internal pluralism in the composition of governing bodies safeguards their independence by ensuring that neither any particular group nor the state or its authorities has a predominant influence on decision-making in the bodies and on programming.³⁴

In its decision under discussion, the Constitutional Court clarified the scope and extent of some of these constitutional requirements for the governing bodies of the ORF against the background of Art 10 ECHR.

C. “Distance from the State”?

In its application, the provincial government assumes that the Constitutional Broadcasting Act guarantees a further legal aspect. The applicant not only argues that the regulations on the appointment and composition of the Foundation Council and the Audience Council violate the requirements of independence and pluralism, but also that they violate a “reduced” guarantee of “distance from the state”, which according to the applicant should follow from Art I para 2 Constitutional Broadcasting Act. The applicant refers to a ruling by the German Federal Constitutional Court in which the Court declared the organization and appointment of members of the ZDF supervisory bodies to be incompatible with the freedom of broadcasting within the meaning of Art 5 para 1 of the German Basic Law (Grundgesetz, GG). The organization and the mode of appointment did not comply with the requirement of “distance from the state”.

According to the case law of the German Federal Constitutional Court, freedom of broadcasting under Art 5 GG places strict requirements on the independence of public service broadcasting from the state. Art 5 GG contains guarantees that largely run parallel

³⁴ Magdalena Pöschl, *Meinungsvielfalt im öffentlich-rechtlichen Rundfunk*, in *Meinungsvielfalt im Rundfunk und in den Online-Medien* 47, 58 (Berka, Grabenwarter & Holoubek eds., 2014); Herwig Mitter, *Freie und vielfältige Massenmedien* 178 (2023).

to those of Art 1 para 2 BVG Broadcasting and Art 10 ECHR: An internally pluralistic structure of public service broadcasters and their governing bodies must be guaranteed, so that no group within the country may have a decisive influence, and sufficient diversity of opinion in the program must be ensured.³⁵ In a strict sense, Art 5 GG requires independence from the state in the form of “freedom from the state” or sufficient “distance from the state”.³⁶ The state itself may not act as a broadcaster. State broadcasting is prohibited under Art 5 GG.³⁷

If representatives of the state sit on the management or supervisory bodies of a public service broadcaster, they may not have a dominant influence on the body.³⁸ The same applies to state-affiliated members of a body. The German Federal Constitutional Court defines body members who are considered to be state representatives or state-affiliated in a broad sense: This includes members of the government, members of parliament, civil servants, representatives of local authorities and members appointed by political parties. Judges or representatives of universities and professional chambers are not considered to be state representatives or state-affiliated.³⁹ According to the German Federal Constitutional Court, state representatives or state-affiliated members have a dominant influence if they make up more than one third of a governing body.⁴⁰

When appointing “non-state-affiliated” members, it must be ensured through legal provisions that the selection process safeguards that these members are sufficiently independent and “distant” from the state or state-affiliated players. The statutory rules on the appointment of governing body members may not leave the selection of “non-state-affiliated” representatives to the free discretion of the government or other state authorities. Art 5 GG requires the establishment of certain procedural rules and substantive criteria for the selection and appointment of governing body members. The determination of the selection procedure merely through a general focus on different

³⁵ BVerfGE 12, 205 at 261 f; BVerfGE 57, 295 at 320 ff; BVerfGE 73, 118 at 153; BVerfGE 121, 30 at 50; BVerfGE 136, 9 at 32 & 36; Grabenwarter, *Art 5 Abs 1, 2 GG* para. 808 f, 831.

³⁶ See, e.g., Witteman, *Constitutionalizing Communications: The German Constitutional Court's Jurisprudence of Communications Freedom*, in 33 *Hastings Int'l & Comp. L. Rev.* 95, 138 (2010).

³⁷ BVerfGE 121, 30 at 52.

³⁸ Grabenwarter, *Art 5 Abs 1, 2 GG* para. 830 f; Hans Jarass, *Art 5 GG, in Grundgesetz für die Bundesrepublik Deutschland* para. 103 f (Hans Jarass & Bodo Pieroth eds., 18th ed. 2024).

³⁹ BVerfGE 136, 9 at 39 f.

⁴⁰ BVerfGE 136, 9 at 38 f & 52.

areas of society does not meet the requirements of Art 5 GG.⁴¹ The selection criteria also have to consider the goal of ensuring pluralism within public service broadcasting.⁴²

Soon after the German Federal Constitutional Court's decision on the ZDF governing bodies, legal literature in Austria came to the conclusion that the composition and appointment of the ORF Foundation Council and Audience Council did not meet the requirements of Art 5 GG in the sense of sufficient "distance from the state".⁴³ Only six members of the Foundation Council, thus less than one fifth, are directly appointed by the political parties and are therefore to be considered as state or state-affiliated representatives in the sense described above. This is less than the threshold of one third defined by the German Federal Constitutional Court. However, the appointment of a further nine members by the Federal Government and the provinces, respectively, is not regulated in more detail by law. This does not meet the requirements formulated by the German Federal Constitutional Court under Art 5 GG. Moreover, the appointment of 17 members of the ORF Audience Council by the Federal Chancellor is not determined in detail with regards to the selection from the proposals. In this respect, too, the appointment of the governing bodies of the ORF does not meet the requirements of "distance from the state" within the meaning of Art 5 GG. This "proximity to the state" of the Audience Council also affects the appointment of members of the Foundation Council by the Audience Council. This appointment procedure does not sufficiently safeguard the member's "distance for the state".⁴⁴ As will be shown, these concerns voiced in legal literature largely correspond to those that lead the Austrian Constitutional Court to repeal provisions of the ORF Act in the present decision under discussion.

Prior to the Austrian Constitutional Court's decision, however, Austrian legal literature seemed to be widely in agreement that neither Art 10 ECHR nor Art I para 2 Constitutional Broadcasting Act require public service broadcasting and its governing bodies to be "distant from the state" in the strict sense that as follows from Art 5 GG and the case law

⁴¹ BVerfGE 136, 9 at 43; Grabenwarter, *Art 5 Abs 1, 2 GG* para. 811.

⁴² BVerfGE 136, 9 at 43 ff; Grabenwarter, *Art 5 Abs 1, 2 GG* para. 809 ff.

⁴³ For the following, see Hans Peter Lehofer, *ORF-Gremien im "Staatsferne"-Schnelltest* (Mar. 30, 2014), <https://blog.lehofer.at/2014/03/Staatsferne.html>; Wolfgang Buchner, *14. Rundfunkurteil des Bundesverfassungsgerichts*, *ecolex* 917, 918 (2014).

⁴⁴ Lehofer, *ORF-Gremien im "Staatsferne"-Schnelltest*. See also Buchner, *14. Rundfunkurteil des Bundesverfassungsgerichts* at 918.

of the German Federal Constitutional Court.⁴⁵ The requirement of “independence” of public service broadcasting under Austrian constitutional law was deemed to be different from the requirement of “distance from the state”.⁴⁶ As will be shown below (see section VI.B), against the background of the Constitutional Court’s decision under discussion, this conclusion must be questioned. While the Austrian Constitutional Court in its decision does not explicitly refer to the concept of “distance from the state” as a constitutional requirement, the constitutional standards applied by the German Federal Constitutional Court and the Austrian Constitutional Court under the terms of “distance from the state” and “independence” respectively correspond to a large extent.

V. Decision of the Constitutional Court

The main points of the Austrian Constitutional Court’s reasoning in its decision of 5 October 2023, G 215/2022, that lead to the annulment of several provisions of the ORF Act, are as follows:

A. On the Relevant Constitutional Framework

Concerning the relevant Federal Constitutional framework for the statutory organization of the ORF and its governing bodies that follow from Art I para 2 Constitutional Broadcasting Act and Art 10 ECHR, the Constitutional Court emphasizes two essential requirements already discussed above: Firstly, the requirement of independence of the ORF and its governing bodies, and secondly, the requirement of pluralistic composition of these organs.⁴⁷

The requirement of independence for the ORF’s governing bodies within the meaning of Art I para 2 Constitutional Broadcasting Act is of particular importance. It protects the ORF and its bodies against any state or private interference or dependencies, which could impair their functioning. If the legislator, in order to establish democratic legitimacy,

⁴⁵ See especially Berka, *Unabhängigkeit, Pluralität und Transparenz* at 217.

⁴⁶ Berka, *Unabhängigkeit, Pluralität und Transparenz* at 217. See also Lehofer, *Staatsferne light - das VfGH-Erkenntnis zu den ORF-Gremien* (Oct. 11, 2023), <https://blog.lehofer.at/2023/10/ORF-Gremien.html>.

⁴⁷ VfGH, Oct. 5, 2023, G 215/2022 at 64 f & 66 ff.

assigns the appointment of members of the ORF's governing bodies to (supreme) state authorities (e.g. the Federal Government), the independence of the ORF and its governing bodies must also be guaranteed vis-à-vis these appointing authorities and the political forces that they represent.⁴⁸ The statutory provisions on the appointment and composition of the ORF's bodies must ensure that no state authority has any unilateral or predominant influence on the appointment and composition of the ORF's governing bodies, that could compromise the independence of the ORF as a whole.⁴⁹

The requirement of pluralistic composition of the ORF's governing bodies aims to ensure that these bodies are not unilaterally dominated by members factually or legally associated with a group. In this respect, there is a close interdependency between the requirements of independence and pluralism.⁵⁰

Moreover, it follows from these two requirements that no state authority may exert excessive influence on the appointment of members. The selection of a member may not be left to the free discretion of a state body, but must be sufficiently determined by law, e.g. through qualification requirements or by assigning rights to nominate candidates to non-state institutions.⁵¹

The legislator has a margin of appreciation in how he chooses to ensure pluralism within the ORF's governing bodies. Pluralism may, for example, be safeguarded through proportional representation of significant social groups in the governing bodies, through various qualification requirements with regard to the range of tasks of the governing bodies or through the involvement of different state authorities or other bodies and institutions in the appointment procedures.⁵²

B. On the Foundation Council

With regard to the Foundation Council, the Constitutional Court emphasizes that the appointment of members of governing bodies by state authorities does not in itself violate

⁴⁸ VfGH, Oct. 5, 2023, G 215/2022 at 64.

⁴⁹ VfGH, Oct. 5, 2023, G 215/2022 at 65.

⁵⁰ VfGH, Oct. 5, 2023, G 215/2022 at 66.

⁵¹ VfGH, Oct. 5, 2023, G 215/2022 at 67.

⁵² VfGH, Oct. 5, 2023, G 215/2022 at 68.

the aforementioned constitutional requirements of independence and pluralism. Rather, the democratic legitimacy of supreme authorities can foster the representation of different social groups in the country and thus contributes to pluralism.⁵³ The decisive factor is how the appointment by state authorities is organized.

1. Authorities and Bodies Assigned with the Appointment of Council Members

The Constitutional Court then examines whether the various appointment procedures for members of the Foundation Council provided for in Section 20 para 1 ORF Act are in compliance with Art I para 2 Constitutional Broadcasting Act against the background of Art 10 ECHR.

According to the Constitutional Court, the appointment of six members based on proposals from the political parties represented in the National Council is compatible with the constitutional requirements, since it is directly connected with the principle of representation of the general public in a democratic parliamentary system and is thus guided by pluralistic considerations.⁵⁴ The appointment of nine members by the nine provinces, where each province names one member, promotes “federal diversity”. This method of appointment is compatible with the requirements of Federal Constitutional Law.⁵⁵ The appointment of six members by the Audience Council as an independent and non-governmental body is also supposed to promote aspects of pluralism, because the Audience Council itself should be pluralistically composed.⁵⁶ At a later point, however, the Constitutional Court again deals with the appointment by the Audience Council and declares it unconstitutional for other reasons, see below.

2. Predominance of the Federal Government

In contrast, in the view of the Constitutional Court, the appointment of nine members by the Federal Government is problematic for two reasons. Firstly, the Federal Government in deciding on candidates to appoint is not legally bound by any specific parameters

⁵³ VfGH, Oct. 5, 2023, G 215/2022 at 70.

⁵⁴ VfGH, Oct. 5, 2023, G 215/2022 at 72.

⁵⁵ VfGH, Oct. 5, 2023, G 215/2022 at 73.

⁵⁶ VfGH, Oct. 5, 2023, G 215/2022 at 74.

beyond the general personal and professional requirements for Foundation Council members pursuant to Section 20 para 1 second sentence ORF Act (the Constitutional Court comes back to this issue later on, see below V.B.4.).

Secondly, the Federal Government, with nine members to be appointed, has a clear predominance in comparison to the Audience Council with only six members to be appointed. The number of members to be appointed by the provinces and the political parties, respectively, is determined with an evident view to the aspects of diversity and pluralism to be considered in each case. The numerical predominance of the Federal Government over the Audience Council, however, cannot be justified against the background of Art I para 2 Constitutional Broadcasting Act. The legislator must ensure that the Audience Council does not appoint fewer members than the Federal Government.⁵⁷ The provisions of Section 20 para 1 ORF Act on the appointment of members of the Foundation Council by the Federal Government (item 3) and the Audience Council (item 4) thus proved to be unconstitutional.

3. Premature Dismissal of Council Members

The Constitutional Court then addresses the possibility of dismissing members of the Foundation Council before the end of their term of office as provided for in Section 20 para 4 ORF Act. The fixed term of office of Council members safeguards their independence. The possibility of premature dismissal could undermine this function.⁵⁸

The Constitutional Court identifies a field of tension between premature dismissal, requirements of independence and other aspects to be considered in this context. The Court undertakes to resolve these tensions for each of the appointing bodies and the respective options for premature dismissal. For members appointed on proposal of political parties represented in the National Council, the aspect of democratic diversity and representation prevails over other considerations. Thus, early replacement of these

⁵⁷ VfGH, Oct. 5, 2023, G 215/2022 at 75 ff.

⁵⁸ VfGH, Oct. 5, 2023, G 215/2022 at 82.

members is constitutionally permissible, in particular to enable newly elected parties in the National Council to be represented in the Foundation Council accordingly.⁵⁹

In contrast, according to the Constitutional Court, such considerations do not apply to the members appointed by the provinces, the Federal Government and the Audience Council, respectively. Unlike the situation in the National Council, these authorities' and bodies' composition is not a direct result of democratic elections. Therefore, matters of democratic representation do not play a role in the appointment of Council members by these authorities and bodies. The federal representation provided through appointment by the provinces, the social representation through appointment by the Audience Council and the appointment by the Federal Government, which is determined solely by general professional and personal qualifications, cannot justify any premature dismissal.⁶⁰

For the appointment of Council members by the ORF's Central Staff Council, the situation is different again according to the Constitutional Court. The Central Staff Council is elected by the ORF's employees. The representation of employee interests justifies premature dismissal when a new Central Staff Council has been elected.⁶¹

For these reasons, the Court finds Section 20 para 4 ORF Act to be unconstitutional as a whole, because this provision does not differentiate between members for whom premature dismissal is justified and for whom such a justification cannot be found.

4. Lack of Sufficient Guidelines for Appointment by the Federal Government and the Audience Council

The Constitutional Court then turns its attention to the already mentioned lack of sufficient legal guidelines for the appointment of nine Council members by the Federal Government. Since the Constitutional Court in its decision subsequently finds that the Federal Chancellor may exert excessive influence on the composition of the Audience

⁵⁹ VfGH, Oct. 5, 2023, G 215/2022 at 83.

⁶⁰ VfGH, Oct. 5, 2023, G 215/2022 at 87.

⁶¹ VfGH, Oct. 5, 2023, G 215/2022 at 88.

Council,⁶² these concerns also apply to the six members appointed by the Audience Council.

The ORF Act lays down various personal and professional requirements for the members of the Foundation Council and further prerequisites to ensure the Council member's independence. This concerns the freedom from instructions and orders pursuant to Section 19 para 2 ORF Act, the incompatibility provisions in Section 20 para 3 ORF Act, the confidentiality according to Section 19 para 4 ORF Act and the due diligence obligation in Section 20 para 2 ORF Act.⁶³ These rules are supplemented by the requirements stipulated in Section 20 para 1 last sentence ORF Act regarding the high personal and technical qualification that members of the Council should possess in the matters to be carried out by the Foundation Council.⁶⁴ From the facts that the Foundation Council serves a function similar to that of a stock corporation's supervisory board and that its members are subject to the same duties of care as supervisory board members (Section 20 para 2 ORF Act) as well as from the prerequisites concerning the Council member's particular professional and personal qualification (Section 20 para 1 last sentence ORF Act) the Court concludes that the appointing authorities and bodies must take into account aspects of pluralism with regard to the members' qualifications in the appointment process. Members must be selected in a pluralistic manner according to their respective personal and professional qualification so that the Foundation Council as a whole possesses the necessary knowledge to properly carry out its duties.⁶⁵

However, for the members to be appointed by the Federal Government and the Audience Council, the law does not sufficiently specify how these aspects of pluralism should be taken into account in the appointment process and especially how the abovementioned personal and professional requirements are to be distributed among the members to be appointed. Thus, the margin of appreciation granted to the Federal Government in deciding which individuals to appoint is too broad. It is not ensured that the requirements of pluralism pursuant to Art I para 2 Constitutional Broadcasting Act are adequately taken into account in the selection decision. This is of particular importance with regard to the

⁶² See section V.C. below.

⁶³ VfGH, Oct. 5, 2023, G 215/2022 at 80.

⁶⁴ VfGH, Oct. 5, 2023, G 215/2022 at 90 f.

⁶⁵ VfGH, Oct. 5, 2023, G 215/2022 at 93.

Federal Government, because the Federal Government in appointing nine Council members is not bound by proposals from any other body, but may choose freely the individuals to be appointed. The appointment of nine Council members by the Federal Government therefore does not meet the requirements of independence and pluralism of the Foundation Council pursuant to Art I para 2 Constitutional Broadcasting Act.⁶⁶

These considerations concerning the lack of sufficient legal guidelines correspondingly apply to the appointment of six Foundation Council members by the Audience Council. Since the Federal Chancellor possesses an unconstitutional preponderance in the appointment of members of the Audience Council,⁶⁷ the insufficient legal determination also affects the appointment of Foundation Council members by the Audience Council. These appointment procedures do not meet the requirements of Art I para 2 Constitutional Broadcasting Act.⁶⁸

C. On the Audience Council

With regard to the Audience Council, the Constitutional Court first emphasizes that the rules on the appointment of the Audience Council's members and on its composition follow the principle of pluralistic representation of various areas and groups of society as defined by the ORF Act, by giving consideration to as broad a spectrum of representative institutions and organizations as possible. The ORF Act in this respect pursues the idea of social representation.⁶⁹

Against the background of the Constitutional Broadcasting Act, the Constitutional Court voices no fundamental constitutional objections against the fact that Section 28 para 4 ORF Act leaves it to the Federal Chancellor to decide which institutions or organizations are to be considered representative of the sectors or groups enumerated in Section 28 para 4 ORF Act, in order to obtain proposals for the appointment of Council members from these institutions or organizations. However, in order to guarantee the independence of the Audience Council, the law has to provide for sufficient transparency

⁶⁶ VfGH, Oct. 5, 2023, G 215/2022 at 95 f & 98.

⁶⁷ See section V.C.

⁶⁸ VfGH, Oct. 5, 2023, G 215/2022 at 97 f.

⁶⁹ VfGH, Oct. 5, 2023, G 215/2022 at 102.

of the appointment procedures. Moreover, the appointment procedures shall be aimed at ensuring social representation.⁷⁰

The Court concludes that the ORF Act in the first step of appointment procedures provides for sufficient transparency by requiring the Federal Chancellor to invite the selected institutions and organizations to submit proposals by means of announcement in the official gazette. In addition, the Federal Chancellor is under the obligation to publicly announce all proposals received from the selected institutions and organizations. However, the law does not sufficiently determine the subsequent selection process by the Federal Chancellor. Altogether, the Federal Chancellor is to obtain 14 proposals from institutions and organizations, where each proposal shall contain three candidates, for the appointment of 17 Council members. The Federal Chancellor is not required by law to in advance announce from which proposals he will appoint which number of members. Thus, already at a time, when the names of the proposed candidates are known to the Chancellor, he is free to choose from these candidates as long as he appoints at least one member from each proposal. The Federal Chancellor is therefore free to select three members at his discretion from the pool of all candidates proposed. This regime does not sufficiently guarantee social representation. The Federal Chancellor may undermine this principle by appointing several members proposed by the same institution or organization. This violates the constitutional requirements of plurality and independence within the meaning of Art I para 2 Constitutional Broadcasting Act.⁷¹

Moreover, in appointing 17 members, the Federal Chancellor bears a predominant influence on the composition of the Audience Council when compared to (currently) 13 members appointed directly by legal entities listed in Section 28 para 3 ORF Act. Although the Constitutional Court agrees with the argument put forward by the Federal Government, that the appointment of members by the Federal Chancellor should, in principle, ensure flexibility in the representation of various sectors and social groups, this does not justify the preponderance of members appointed by a supreme state authority with a considerable leeway. Against the background of the requirement of independence pursuant to Art I para 2 Constitutional Broadcasting Act, the legislator must balance the

⁷⁰ VfGH, Oct. 5, 2023, G 215/2022 at 106.

⁷¹ VfGH, Oct. 5, 2023, G 215/2022 at 108 f.

proportion of members of the Audience Council in such a way “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 proposals submitted by representative institutions and organizations”.⁷² Section 28 para 6 first sentence ORF Act therefore does not meet the requirements of Art I para 2 Constitutional Broadcasting Act.

VI. What Follows from the Constitutional Court's Decision?

A. Independence and Pluralism Pursuant to Art I para 2 Constitutional Broadcasting Act

In its present decision, the Constitutional Court clarifies the requirements Art I para 2 Constitutional Broadcasting Act in conjunction with Art 10 ECHR set out for statutory regulations concerning the appointment and composition of the ORF's governing bodies in terms of independence and pluralism.

The provisions on the appointment and composition of the ORF's governing bodies must ensure that these bodies are pluralistically composed and that the bodies and their members are independent, both from the state and its authorities as well as from social groups and political parties. The constitutional requirement of pluralistic composition of the ORF's governing bodies, by preventing these bodies from being dominated by persons who de facto or legally form a group, aims at safeguarding the bodies' independence. The law must balance the influences of the state, its authorities, political parties and social groups, so that none of the aforementioned may exert a predominant influence.

The appointment of members of the Foundation Council and the Audience Council by (supreme) state authorities is constitutionally permissible, because and insofar as this provides for democratic legitimacy. However, statutory law has to provide for legal precautions to safeguard the independence of these governing bodies and their members

⁷² VfGH, Oct. 5, 2023, G 215/2022 at 111 f.

from the appointing state authorities. The selection and appointment of members may not be left to the free discretion of state authorities, because otherwise these authorities or the state could exert excessive influence on the composition of the governing bodies. The legislator has to enact sufficiently detailed regulations on the selection and appointment of members by state authorities. For this purpose, statutory law may provide for rights of nomination, which, for example, promote social representation. Alternatively, the law may define personal and professional requirements for Council members. The law then also has to specify how these requirements are to be incorporated into the appointment process. Moreover, the requirements of pluralistic composition and social representation must be observed.

Besides restricting state authorities' margin of discretion in selecting members, statutory law also has to ensure that state authorities may not exert a predominant influence on the composition of the Foundation Council and the Audience Council. In this way too, the state and its authorities could otherwise gain excessive influence over the ORF and its governing bodies. The appointment of more than a quarter of the members of the Foundation Council by the Federal Government and more than half of the members of the Audience Council by the Federal Chancellor were too dominant a position.

Only in exceptional cases may the law allow premature dismissal of members of the governing bodies before the end of their term of office. The fixed term of office safeguards the independence of the members of the governing bodies. A deviation from the fixed term of office is justified if, for example, aspects of representation need to be taken into account. This is the case when the political majorities in the National Council or the Central Staff Council of the ORF change. In contrast, the appointment of a new Federal Government does not justify premature dismissal.

B. "Distance from the State" and the Influence of Political Parties

The term "distance from the state" ("Staatsferne") only appears in two places in the Constitutional Court's reasoning. The Court does not use this term in the sense of a

constitutional requirement for the statutory organization of the ORF's governing bodies.⁷³ However, it should not be concluded that the Constitutional Court applies a more generous standard for the independence of the ORF's governing bodies within the meaning of Art 1 para 2 Constitutional Broadcasting Act than the German Federal Constitutional Court does under Art 5 of the German Basic Law in its abovementioned decision.⁷⁴ The requirements set by the Austrian Constitutional Court largely correspond to those formulated by the German Federal Constitutional Court in its case law. As will be discussed in more detail below, the Austrian Constitutional Court had to decide a case that was to some extent different from the case before the German Court. As a result, the Austrian Constitutional Court was not under any obligation to comment on certain aspects in this context. The question of whether the Austrian Constitutional Court and the German Federal Constitutional Court apply the same constitutional standard to the rules on the composition and appointment of governing bodies of public broadcasters under the concepts of "independence" and "distance from the state" remains open.

Firstly, this concerns the role of political parties in the appointment of the members of the Foundation Council. In its decision, the Austrian Constitutional Court does not raise concerns against the selection of six members by the political parties, as it serves the purpose of democratic representation.⁷⁵ In this respect, there is a significant difference to the decision of the German Federal Constitutional Court. The German Federal Constitutional Court holds that representatives selected by political parties from a functional perspective are to be considered "state-affiliated" or "state" members, as if a member of the government itself were a member of the governing body.⁷⁶ At first glance, the Austrian Constitutional Court's standard regarding the influence of political parties appears more generous. However, the selection of six out of 35 members of the ORF's Foundation Council by political parties, as provided for in the ORF Act, would also be unproblematic under the German Federal Constitutional Court's standard.⁷⁷ According to

⁷³ See also Vasek, *Die Zusammensetzung von ORF-Stiftungs- und Publikumsrat vor dem Verfassungsgerichtshof* 113, who comprehensively establishes that historical factors are also relevant for the Austrian Constitutional Court not referring to the concept of "distance from the state".

⁷⁴ See section IV.C.

⁷⁵ VfGH, Oct. 5, 2023, G 215/2022 at 74.

⁷⁶ BVerfGE 136, 9 at 41.

⁷⁷ Lehofer, *ORF-Gremien im "Staatsferne"-Schnelltest*.

the German Federal Constitutional Court, the number of state or state-affiliated members must be limited to one third.⁷⁸ For the ORF's Foundation Council, the political parties select less than one fifth of members. Also, under the requirements formulated by the Austrian Constitutional Court in its decision that, in particular, political parties should not have a predominant or decisive influence on the governing bodies, this proportion does not appear to be problematic, especially as this fifth is divided between several political parties.

Another reason why the Austrian Constitutional Court did not address the issue of "distance from the state" within the meaning of the German Federal Constitutional Court's case law is that German law did not provide for incompatibility provisions comparable to those of the ORF Act. In Germany, it was permissible for members of a government or members of parliament to be appointed as members of public broadcasting governing bodies. This is not permissible under Section 20 para 3 and Section 28 para 2 ORF Act. The ORF Act thus already safeguards relevant aspects of independence from the state within the meaning of the case law of the German Federal Constitutional Court.⁷⁹ The Austrian Constitutional Court did not have to comment on this issue.

Other than that, there are extensive parallels between the standards applied by the Austrian Constitutional Court and the German Federal Constitutional Court. The independence of the governing bodies must be ensured, in particular from the state and its authorities, appointment of members may not be left to the free discretion of state authorities, statutory law must in sufficient detail regulate the selection and appointment of members, no state authority may have a predominant position in the appointment of members and, in all this, pluralistic aspects must be taken into account.⁸⁰

Although the Austrian Constitutional Court does not explicitly discuss the question of the influence of political parties in detail, it does address issues that concern the political influence on the composition of the ORF's governing bodies. In general, the legislator must ensure the independence of the ORF's governing bodies from political forces and

⁷⁸ BVerfGE 136, 9 at 39 ff.

⁷⁹ See also Vasek, *Die Zusammensetzung von ORF-Stiftungs- und Publikumsrat vor dem Verfassungsgerichtshof* 113.

⁸⁰ See BVerfGE 136, 9 at 43 ff.

parties.⁸¹ The Constitutional Court demands sufficient statutory rules for and transparency of the selection of members of the Audience Council by the Federal Chancellor. This indirectly aims at limiting the influence of the governing parties through restricting the possibility of selection at political discretion. The Constitutional Court in its decision does not call for a complete depoliticization of the ORF and its governing bodies, for as long as the influence of political parties conveys democratic representation. However, there is no room for a dominant influence of any political force or party.

⁸¹ VfGH, Oct. 5, 2023, G 215/2022 at 64.