

■ CONSTITUTIONAL DEVELOPMENTS IN AUSTRIA

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Limits to Monitoring of Advertising – Transparency vs "Presumption of Innocence"

Austrian Constitutional Court
Judgement of March 15th, 2007 (G 138/06)

Relevant Austrian Law

Federal Constitutional Law (B-VG); Basic Law on the General Rights of Nationals (StGG)

Article 7 paragraph 1 B-VG and Art 2 StGG contain the equal treatment clause, guaranteeing equality before the law and excluding of privileges based upon birth, sex, estate, class or religion. The equal treatment clause plays an outstanding role in the jurisdiction of the Austrian Constitutional Court and implies the principle of objectivity.

Federal Act on the establishment of an Austrian Communications Authority ("KommAustria") and a Federal Communications Board (KommAustria Act – KommAustria Gesetz)

Section 2 determines the tasks and objectives of the Austrian Communications Authority (KommAustria), part of these tasks is the monthly monitoring of the compliance of all broadcasters with the advertising regulations codified in the Austrian Broadcasting Corporation Act (ORF Act), the Private Television Act and the Private Radio Broadcasting Act. For this purpose a sample of broadcasts of all broadcasters containing advertising are monitored and evaluated. The results of the monitoring activities have to be published conveniently within four weeks calculated from the date of broadcast. If KommAustria entertains suspicion, that an infringement of advertising regulations was committed, it has to communicate these results to the broadcaster concerned for comments. In case of justifiable suspicion (taking into account the broadcaster's comments), if the infringement was committed by the ORF the KommAustria has to report it to the Federal Communications Board or, if it was committed by a private broadcaster to prosecute it of its own motion.

Federal Act on the Austrian Broadcasting Corporation (ORF-Act – ORF-Gesetz)

Sections 13 to 17 regulate advertising and sponsoring within the framework of Austria's radio and television programmes under public law including the definition of advertising, advertising times, principles of advertising, product placement,

teleshopping, interrupting advertising, cut-in advertising for format programmes, advertising for medicines and alcoholic beverages, protection of minors and sponsored programmes (sponsoring).

Federal Act Stipulating Provisions for Private Television (Private Television Act – Privatfernsehgesetz, PrTV-G)

Sections 34 to 46 give the requirements for advertising and teleshopping in the private television domain such as advertising cutting into television broadcasts, ban on tobacco advertising, advertising and teleshopping for medicines, medical products and alcoholic beverages, protection of minors, advertising times and sponsored programmes. These requirements are very similar to those mentioned in the ORF Act.

Federal Act on Private Radio Broadcasting Act (Privatradiogesetz, PrR-G)

Section 19 and 20 stipulate rules on commercials being broadcasted by private radio stations and sponsoring also akin to the rules found in the ORF and Private Television Act.

The Circumstances of the case

While treating a complaint against a ruling of the Federal Communications Board the Austrian Constitutional Court found reservations against the constitutionality of a certain part of section 2 paragraph 1 subsection 7 of the KommAustria Act, reading as follows: "and the results of these [monitoring] evaluations have to be published conveniently within four weeks calculated from the point in time of the broadcast" and section 7 paragraph 1 requiring a convenient publication of the Austrian Communications Authority's and the Federal Communications Board's fundamental decisions. Therefore the Constitutional Court initiated ex officio proceedings for a concrete judicial review of the norms in questions prejudicing the complaint against the ruling the Federal Communications Board.

In the Constitutional Court's order to initiate the judicial review the following aspects are taken into consideration: The publication according to section 2 paragraph 1 subsection 7 of the KommAustria Act of the monitoring results constitutes the publication of a part of the preliminary proceedings, which lead in case of an infringement of section 19 and 20 Private Radio Broadcasting Act to an administrative penalty procedure before KommAustria and in every other case to an administrative procedure. Consequently the preliminary monitoring results are published before an infringement of the advertising regulations could be validly stated. Contrary to the obligation to publish the monitoring results there exists no such obligation to publish the outcome of possible proceedings, since only fundamental decisions have to be published. The Constitutional Court doubts whether it is objectively justified to publish only certain parts of the monitoring proceedings, as this might lead to an advance conviction of the broadcaster concerned. (The so-called "principle of objectivity" deriving from the equal treatment clause will be explained below). In the opinion of the Constitutional Court this problem is a fortiori to be tackled since the broadcaster has no right of appeal against the publication of the monitoring results at all.

The Federal Government argued, that the norms to be judicially reviewed are not prejudicing the complaint, which triggered the considerations on the constitutionality, for the broadcaster's request to oblige the KommAustria to publish the decision on the discontinuance of proceedings was dismissed on procedural grounds (non-competence) only. (The prejudicing character of the norms in question is a precondition for the concrete judicial review). The Austrian government also revealed the two main objectives of the transparency obligations: On the one hand KommAustria's procedural method should be made transparent, on the other hand the so-called "dual broadcasting" (i.e. the existence of both private broadcasters and broadcasters under public law) should be encouraged, as the publication of monitoring results allows timely legal complaints by competitors (§ 36 ORF-Act, § 61 Private Television Act and actions based on the Federal Act Against Unfair Competition). These objectives can only be achieved, if KommAustria publishes the monitoring results, i.e. naming the program and the broadcaster, on its homepage. Not to name the broadcaster, would make the advertising monitoring senseless. The government denies that the publication of the monitoring results is a part of preliminary proceedings; it is only to be seen as a transparency measure, so there is no danger of an advance conviction and no need for a right to appeal.

The Court's Assessment

As far as the prejudicing character of the norms in question is concerned, the Austrian Constitutional Court refers to its invariable practice in ex officio initiated judicial reviews: Every rule the authority could conceivably apply has prejudicing character for the relevant case, regardless whether it is a substantive or a procedural rule (see VfSlg 10.617/1985, 11.752/1988).

Furthermore, the Constitutional Court adheres to its premise, that the monitoring is part of preliminary proceedings possibly leading to an administrative penalty procedure or to an administrative procedure.

Note to the Austrian Constitutional System: The Constitutional Court focuses on the examination of whether or not the monitoring results' publication is a breach of the principle of objectivity. The principle of objectivity derives – as mentioned above – from the equal treatment clause. The quintessence of the principle of objectivity is that unless discrimination is based on reasonable grounds, it is not consistent with the Federal Constitution. When applying the equal treatment clause, the Constitutional Court compares two rules and their different legal consequences. This comparison ceases to apply, if the Court refers to the principle of objectivity, in this case the Constitutional Court checks the rationality, the plausibility and sometimes even only the necessity of the relevant act of legislation. Academic scholars criticise this very vague criterion, since it is utmost flexible, allowing nearly every decision – not based on law, but only on the judges' opinion – to be taken (Öhlinger, *Verfassungsrecht ["Constitutional Law"]*, 2005, 338s).

The Constitutional Court holds that the publication of monitoring results naming and so to say "pillorying" the broadcasters and possibly containing

"suspicious factors" could lead to a conviction in advance. This contradicts – with regard to the Constitutional Court – the principle of objectivity all the more for the broadcasters neither have a right to appeal against the publication of the results, nor can they demand publication of a justification or a decision on the discontinuance of proceedings. Under these circumstances the objectives of the advertising regulations cannot legitimate the publications of the monitoring results. Thus, the relevant part of section 2 paragraph 1 subsection 7 of the KommAustria Act ("and the results of these [monitoring] evaluations have to be published conveniently within four weeks calculated from the point in time of the broadcast") contradicts the equal treatment clause and is declared unconstitutional and void.

Opinion

The Constitutional Court basically had to balance the need for transparency against the need for "presumption of innocence" in the advertisement of monitoring systems. Bearing in mind that the publication of monitoring results should encourage broadcasters to comply with the advertising regulations, the Constitutional Court's judgement fulfils the broadcasters' need for legal protection more than generously. The harm caused by the publishing monitoring results on KommAustria's website can certainly not be compared with the situation of an innocent person being accused of having committed a crime, but still the question remains, to what extent such a publication is disadvantageous to a broadcaster. As the relevant regulations show, the most probable consequences are legal complaints or actions by competitors. But this kind of self-monitoring is exactly, what the legal advertising framework wants to encourage.

The Constitutional Court's argument based upon the principle of objectivity seems rather weak, as it evades an in-depth analysis of the function of advertising regulations. General concerns about a too extensive use of the principle of objectivity were already mentioned above.

In my opinion it would have been much more elegant to repeal the phrase "of fundamental significance" in section 7 paragraph 1 KommAustria Act, so that it would read: "Decisions by KommAustria and the Federal Communications Board (Section 11) and instructions under Section 6 paragraph. 1 shall be publicized in an appropriate manner, due account being taken of the provisions of the Data Protection Act." If all decisions by KommAustria and the Federal Communications Board were published, decisions on the discontinuance of proceedings would be available open to the public on KommAustria's website. This approach would have met the need for transparency more effectively without neglecting the broadcaster's legitimate demand not only to be "pilloried" in every case but also to be exculpated, when not having violated the advertising regulations.

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