

# Austria

## Constitutional Court

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### Important decisions

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5.3.21 Fundamental Rights – Civil and political rights – **Freedom of expression.**  
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:*

Broadcasting, restriction.

*Headnotes:*

The Austrian Broadcasting Corporation must be allowed to act within existing social networks. Activities of the Austrian Broadcasting Corporation on the social platform ‘Facebook’ do not fall under the legal provision banning it from providing ‘forums’. Any other interpretation of the provision would result in a violation of the freedom of expression.

*Summary:*

I. The Austrian Broadcasting Corporation (*Österreichischer Rundfunk*, hereinafter, “ORF”) acted on the social platform ‘Facebook’ by providing several services within the network. Specifically, the ORF supplied 39 sites on Facebook. After the Federal Communications Board ruled that these activities constituted a violation of Section 4f.2.25 Act on the Austrian Broadcasting Corporation (hereinafter, “ORF Act”), prohibiting the ORF from providing links to or cooperate with social networks unless this was related to the ORF’s own daily online news overviews, the ORF filed a complaint against this decision with the Constitutional Court and the Supreme Administrative Court. The Supreme Administrative Court dismissed the complaint, ruling that the activities of the ORF on Facebook were

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prohibited under Section 4f.2.25 ORF Act (*VwGH* 22 October 2012, 2012/01/007). The Constitutional Court, however, quashed parts of Section 4f.2.25 of the ORF Act on the basis that they violated the freedom of expression of the ORF (Judgment of 27 June 2013, G 34/2013). As a consequence, the remaining part of the provision prohibited the ORF from providing a social network of its own, whereas the prohibition of cooperation with social networks was held unconstitutional by the Court.

As a reaction to the ORF's continuing activities on Facebook, the Federal Communications Board altered its decision and declared the ORF to have violated Section 4f.2.23 ORF Act, prohibiting the ORF from running forums, chats and other services for the publication of content by users. The Federal Communications Board defined a 'forum' as a virtual place for the exchange and storage of thoughts, opinions and experiences. As the sites provided by the ORF on Facebook contained a 'wall' allowing registered users to state their opinions *vis-à-vis* the ORF and other users, the activities of the ORF on Facebook, according to the Federal Communications Board, fell within the prohibition of running 'forums'. Hence, as the sites were attributable to the ORF, the ORF's activity constituted a breach of Section 4f.2.23 ORF Act. This view was, according to the Federal Communications Board, compatible with the Constitutional Court's previous ruling on the interaction of the ORF on Facebook as the prohibition of providing forums did not ban the ORF from acting on Facebook altogether but only concerned a specific part of its activities on Facebook.

II. Following a public hearing, the Constitutional Court quashed the decision of the Federal Communications Board, stating that the Federal Communications Board's decision constituted interference with the freedom of expression of the ORF under Article 10 ECHR.

The Court reiterated that the definition of a 'forum' used by the Federal Communications Board corresponds to the respective definition of the term established by the Supreme Administrative Court in proceedings concerning a webpage run by the ORF (*debatte.orf.at*; see *VwGH* 24 July 2012, 2011/03/0232). According to the Constitutional Court, however, the Supreme Administrative Court based its decision on an interpretation of Section 4f.2.23 ORF Act that would render the provision unconstitutional. The Federal Communications Board was, in the Constitutional Court's view, right to assume that most of the Facebook-sites run by the ORF including their 'walls' and the possibility to publish postings, comments on postings and comments on already existing comments have to be considered as a virtual

space for the exchange of thoughts, opinions and experiences. Hence, from an isolated perspective, these activities of the ORF on Facebook fall within the meaning of 'forums, chats and other services for the publication of content by users' as prohibited by the provision mentioned above.

However, the Constitutional Court observed that a complete lack of differentiation between forums provided for on online platforms which are run by the ORF itself and the ORF's activities on other platforms is not compatible with Article 10 ECHR. The prohibition of providing forums according to Section 4f.2.23 has to be read in the systematic context of Section 4f.2.25, i.e. the prohibition of providing for social networks. Once the Constitutional Court had overturned those parts of the latter provision which had banned the ORF from interacting with existing social networks (Judgment of 27 June 2013, G 34/2013), the remaining part of the provision only prohibits the ORF from providing a social network of its own. This, however, does not affect links to or cooperation with existing social networks. In this context, Section 4f.2.25 constitutes a *lex specialis* with regard to Section 4f.2.23 (i.e. the prohibition of providing forums). Hence, the ORF is, according to the provisions of the ORF Act, allowed to appear on social networks, e.g. in the shape of business pages on Facebook, posts on individual Facebook profiles or automatically generated Facebook pages.

The Constitutional Court also pointed out that the removal of one provision from the legal order by the Constitutional Court must not result in the same activities of the ORF on Facebook falling within another ban provided by the ORF Act. It could not be assumed that it was the intention of the legislator to regulate the same activities of communication with two different legal provisions.

The permissibility of the pursuance by ORF of the activities outlined above on Facebook does not depend on the feasibility of the relevant Facebook pages being designed so as to exclude the feature of leaving posts, comments on posts or comments on comments. If the ORF Act only allowed ORF to appear on Facebook on condition that these features were disabled, this would constitute a disproportional infringement of the freedom of expression. Such a condition would keep the formal possibility of ORF to appear on Facebook, but would deprive the use of Facebook of its purpose, namely reciprocal communication between broadcaster and audience.

The Constitutional Court found that the Federal Communications Board had incorrectly interpreted the provision at hand as having an unconstitutional content. It therefore overturned the decision.

*Languages:*

German.

