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# Austria

## Constitutional Court

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### Important decisions

*Identification:* AUT-2017-1-001

**a)** Austria / **b)** Constitutional Court / **c)** / **d)** 14.03.2017 / **e)** G 405/2016 / **f)** / **g)** / **h)** CODICES (German).

*Keywords of the systematic thesaurus:*

3.16 General Principles – **Proportionality**.  
3.19 General Principles – **Margin of appreciation**.  
5.2 Fundamental Rights – **Equality**.  
5.3.13 Fundamental Rights – Civil and political rights – **Procedural safeguards, rights of the defence and fair trial**.

*Keywords of the alphabetical index:*

Criminal proceedings, fairness / Costs, criminal trial.

*Headnotes:*

If criminal proceedings have been discontinued, the legislator enjoys a margin of discretion in determining any reimbursement of costs to be awarded to the person accused.

*Summary:*

I. The applicant had been charged with breach of trust. After the trial, the public prosecutor withdrew the indictment, and the competent regional court (sitting as a panel of professional and lay judges) discontinued the criminal proceedings.

After the pronouncement of discontinuation of the proceedings the applicant claimed a contribution to the necessary legal costs in the amount of EUR 248,756, including EUR 146,544 for necessary legal defence throughout the trial which had lasted 33 days. The regional court partly allowed the applicant's claim and awarded a contribution to the costs of the legal defence in the amount of EUR 5,000 as well as reimbursement of cash expenses in the amount of EUR 10,524.



The applicant appealed against this decision; at the same time, he filed a normative constitutional complaint (*Parteiantrag auf Normenkontrolle*) with the Constitutional Court, claiming that Article 393a of the Code of Criminal Procedure (*Strafprozessordnung* – hereinafter, “StPO”) infringed the constitutional principle of equality as well as his right to a fair trial.

Article 393a StPO provides that if an accused person has been acquitted of the alleged offence or if the criminal proceedings have been discontinued after the trial, he or she is entitled to receive a contribution to the costs of his or her legal defence. This contribution includes all necessary cash expenses as well as a lump-sum allowance for the costs of the defence counsel (except in cases where the accused person had been granted legal aid). This lump-sum allowance shall be determined by the criminal court, taking into account the extent and complexity of the legal defence as well as the extent to which the involvement of a defence counsel has been necessary or appropriate. However, the maximum amount of the allowance is EUR 10,000 in jury proceedings, EUR 5,000 in proceedings before a regional court sitting as a panel of professional and lay judges, EUR 3,000 in proceedings before a regional court sitting as a single judge, and EUR 1,000 in proceedings before a district court.

II. The Constitutional Court pointed out that criminal proceedings aim to enforce criminal law by investigating criminal offences, prosecuting suspects and punishing persons sentenced. As for the public prosecutor’s office, it is not authorised to bring prosecutions unless the facts of the matter have been clarified sufficiently and a conviction appears to be probable. Any indictment may be appealed by the person accused on the grounds of illegality. After the indictment has become final, the public prosecutor’s office becomes a party to the (main) criminal proceedings directed by the competent criminal court. Nevertheless, throughout the entire proceedings the public prosecutor’s office is committed to the principle of objectivity. As a consequence, it must consider any evidence, whether incriminating or exculpatory, in the same way and lodge a complaint also for the benefit of the person accused if necessary.

With regard to the various specifics of criminal proceedings, such proceedings cannot be compared with (contentious) civil proceedings where the unsuccessful party is liable for the costs of the opposing party. Apart from that, if prosecutions have been brought unlawfully and culpably, the person accused may claim damages arising from public liability; such a claim may also extend to the costs of legal defence.

The Constitutional Court therefore found that the question whether a person charged with a criminal offence shall be granted full reimbursement of legal costs where proceedings taken against him or her have been discontinued falls within the margin of appreciation given to the legislator.

As for the system of maximum amounts of reimbursement of legal costs set out in Article 393a StPO, the Court observed that it is based on the type of criminal court having jurisdiction, i.e., implicitly, on the type of criminal offence to be prosecuted, which may be considered an objective aspect under the general principle of equality.

The Court was also satisfied that the lump-sum allowance for legal costs is quite proportionate to the necessary and appropriate costs of legal defence. The fact that in a manageable number of cases the legal costs incurred by the person accused (far) exceed the statutory maximum lump-sum allowance could not affect this finding.

Finally, referring to the case-law of the European Court of Human Rights, the Constitutional Court held that neither Article 6.2 ECHR (concerning the presumption of innocence) nor any other provision of the European Convention on Human Rights gives a person charged with a criminal offence a right to reimbursement of his or her costs.

#### *Cross-references:*

European Court of Human Rights:

- *Reinmüller v. Austria*, no. 69169/01, 18.11.2004;
- *Hibbert v. The Netherlands*, no. 30087/97, 26.01.1999;
- *Englert v. Germany*, no. 10282/83, 25.08.1987, Series A, no. 123.

#### *Languages:*

German.

