

CONSTITUTIONAL COURT E
2281/2020-15
December 10, 2020

IN THE NAME OF THE REPUBLIC!

The Constitutional Court, presided over by President DDr. Christoph GRABENWARTER,

in the presence of Vice President Dr. Verena MADNER

and members Dr. Markus ACHATZ,
Dr. Wolfgang BRANDSTETTER, Dr. Sieglinde GAHLEITNER,
Dr. Andreas HAUER, Dr. Christoph HERBST,
Dr. Michael HOLOUBEK,
Dr. Helmut HÖRTENHUBER,
Dr. Claudia KAHR,
Dr. Georg LIENBACHER,
Dr. Michael RAMI, and Dr. Johannes SCHNIZER

as voting representatives, in the presence of constitutional law expert Mag. Chiara SCHÖGGL
as secretary,

in the appeal case 1. of ÖSTERREICHISCHER RUNDFUNK and 2. of the Director General of Österreichischer Rundfunk ***, both ***, ***, both represented by Korn Rechtsanwälte OG, Argentinierstraße 20/1/3, 1040 Vienna, against the ruling of the Federal Administrative Court of May 29, 2020, ref. 1. W249 2153031-1/16E and 2. W249 2153031-2/15E, in its closed session today, in accordance with Art. 144 B-VG, has ruled as follows:

- I. The contested ruling violated the appellants' constitutionally guaranteed right to freedom of expression and broadcasting.

The ruling is overturned.

- II. The Federal Government (Federal Chancellor) is ordered to reimburse the complainants, through their legal representative, for the costs of the proceedings, amounting to €3,117.60, within 14 days, failing which enforcement proceedings will be instituted.

Reasons for the decision

I. Facts, complaint, and preliminary proceedings

1. On July 25, 2016, Austrian broadcaster ORF aired the program "Sommergespräch" (Summer Talk) on its channel ORF 2 ¹ television program ORF 2. In this program, the presenter *** discussed with the party leader of the "Team Stronach" party, which was represented in the National Council at the time. The content of the program focused mainly on a conversation with *** about the team and an outlook on his future political activities.

In the following program "ZIB 2," the presenter *** spoke with the political scientist *** to analyze the previous live discussion. As the Federal Administrative Court undisputedly established, this interview had the following content:

political scientist *** to analyze the previous live discussion. As the Federal Administrative Court found undisputed, this interview had the following content:

***: 'And now we're making a sharp cut to Austrian domestic politics and this year's first ORF summer interview. That took place just before ZIB 2. The founder and party leader of Team

Stronach, ***, was a guest on ***, and *** has joined us again this year to analyze the 'summer interviews'. Good evening.'

***: 'Good evening.'

***: 'Mr. ***, we haven't seen *** for a long time; he rarely appears in Austria anymore. The last time was in June, when he told us that he was planning to retire from politics at the end of this legislative period at the latest. Did we find out tonight what will become of Team Stronach?'

***: 'Yes, but we already knew that. Politically, it's a kind of living corpse. You only have to look at the party's name. Today, *** gave a kind of swan song, a review full of self-praise, and the part of the party's name that says 'Team' is pure mockery anyway, because this team was so stable that, in comparison, a house of cards is more stable and represents a concrete bunker, because there was so much coming and going that they almost had to line up every week so that you could count who was still on the team. They were political opportunists and defectors who changed parties up to four times, like other people change their underwear.'

***: 'The party has been around for four years, and for four years there has been a process of disintegration underway. Important colleagues such as *** have also left the party, some of them defecting to other parties. *** had also addressed ***'s mistakes, and we are now looking into that.'"

A short sequence of the conversation that took place earlier between *** and *** from the program "Sommergespräch" is played.

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***: 'The mistake was that I have a lot of activities in America, my family is still there, my grandchildren are there, and of course I couldn't be here that often. []'

***: 'So being party leader from afar, that model doesn't work?'

***: 'No, I don't think so, and then I wasn't here long enough to get to know people better. If I had lived here, we would have seen each other more often, and then I could have chosen better. Of course, I was a little disappointed that there were people here who were mainly only there for the money.'"

The conversation is then continued by *** and ***.

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***: 'My mistake was that I couldn't be here as often, *** said. Was that really his biggest mistake?'

***: 'No, with all due respect, ***'s biggest mistake was ***. Let me just summarize a few of today's statements: He believed we had 300 members of the National Council instead of 183; he didn't say whether he was more in favor of Hofer or Van der Bellen in the presidential election; instead, it was remarkable how uncertain he was as to whether the president would be directly elected at all, instead making vague statements that the president should do something with 20,000 signatures. And when asked whether he preferred Clinton or Trump, let's overlook the slip of the tongue about Thomas Trump, he replied that finance would push companies to Asia. This is in line with earlier statements, such as "we need neutrality if the Chinese invade," or when asked about the future of Europe, he once said, "Yes, the head teachers should choose their teachers." So it's really just confusing.

***: 'He said that so much could have been done and that he wanted to do so much. He said he had rattled the cage several times, and as a central mistake, which was briefly mentioned, he said again and again: People don't know me well enough, they should get to know me properly. Can that really be accepted? Which party leader, which politician do people really know that well?'

***: 'I'm really sorry to have to say this so bluntly, but that's nonsense too, because firstly, hardly any politician has ever had such a high profile as he did, and the more he appeared in public and the more famous he became through the media, the fewer voters he had.'

***: 'Team Stronach received 5.7 percent in the last National Council election, and for some time now it has been polling at around one percent. Is there even enough space in Austria for a party like the one Stronach conceived, i.e., one that is more economically liberal, but still a protest party?'

***: 'Not for Team Stronach. Let's briefly go through possible motives for voting. One is cost-benefit analysis, i.e., a party promises something from which I personally expect to benefit, such as pension increases, tax cuts, more social benefits, whatever. Team Stronach has little credibility in this regard, and besides, only dreamers believe that he can really implement this in the next government, because you have to become a coalition partner to do so. Party loyalty as a motive for voting is a contradiction in terms anyway with a chaotic group that has been around for four years. And the third thing you mentioned, a social model such as economic liberalism or security, is also advocated by others, with economic liberalism by the ÖVP, Neos, and also the FPÖ. and on the subject of security, it's always the case that when you invite a Team Stronach representative onto a TV show, you think you've accidentally invited them twice and now there are two of them sitting there, because they only repeat what the FPÖ has already said.

***: 'Finally, you once said that *** shatters any ability to analyze, but you have now successfully analyzed for several minutes. Do you still stand by this analysis?'

***: 'Yes, to be honest, I feel rather helpless, because on the one hand I would like to hook Team Stronach's own party members up to a lie detector to find out whether they think what some viewers might think, namely, in three words: He's crazy. Then again, I think that today's atmosphere for discussion was quite pleasant, even if the content was not assessable, and he just tried something at an advanced age that he should not have done.'

: ', you'll be back with us again next week, when *** will be joined by the leader of the Neos party, ***. Thank you very much for coming.'

***: 'You're welcome.'

2. Subsequently, attorney *** filed a (popular) complaint with the Austrian Communications Authority ⁵

(KommAustria) (Popular) complaint pursuant to § 36 (1) Z 1 lit. b ORF-G and requested a ruling that the statement made by *** at the end of the interview reproduced above "Yes, to be honest, I feel rather helpless, because on the one hand I would like to hook up the Team Stronach party members to a lie detector[,] to find out whether they think what some viewers might think, namely, in three words: He's nuts." and by the program host's

*** failed to distance herself from this statement following this comment, in particular § 10 (1), (5), (6), and (7) ORF-G.

KommAustria upheld the complaint in its decision of March 1, 2017, and ⁶ that the above statement by ***, from which ORF did not distance itself, violated the provisions of Section 4(5)(3) in conjunction with Section 10(7) of the ORF Act.

3. The appeal lodged against this decision was dismissed by the Federal Administrative Court ⁷ Administrative Court dismissed the appeal against this decision in its ruling of May 29, 2020, on the following grounds (without emphasis in the original):

"[...] 'More extensive subject of analysis'

At the beginning of their complaints, the complainants suggest that the authority concerned had defined the subject of the factual analysis too narrowly in the contested decision, because the evaluation of a 50-minute political appearance took into account

not only isolates this, but also political developments in the past. The 'summer interview' was therefore also the starting point for further analysis of the political actions of *** to date, meaning that it was inadmissible to exclude this part of political action from the topic.

With regard to this argument, it should first be noted that the clarification of the subject of analysis is important insofar as, according to the established case law of the Administrative Court [...], the objectivity of an analysis – in addition to the comprehensibility of the assessment made in the analysis – is measured according to the specified topic. In this assessment, the overall context that determines the subject of the factual analysis must always be taken into account in the sense of the required overall view. This overall context and the impression gained from it by the average viewer form the basis for assessing whether the design of a program has complied with the requirement of objectivity.

In the opinion of the Federal Administrative Court, the topic of the present factual analysis, within the framework of which the comment made by *** about *** is to be assessed later [...], is revealed directly in the introduction to the analysis by the interviewing news anchor (***: 'The founder and party leader of Team Stronach, ***, was a guest on ***, and *** has joined us again this year to analyze the 'summer talks.')

and can be seen in the specific questions asked by the presenter during the interview (***: 'Have we learned tonight what will become of this Team Stronach?'; 'My mistake was that I couldn't be here as often, said ***. Was that really his biggest mistake?'; 'Is there even enough room in Austria for a party like the one Stronach conceived, i.e., more economically liberal, but still a protest party?') as well as the sequence that was played: The focus was on the 'summer interview' between *** and the presenter ***, broadcast before the news program 'ZIB 2', which focused on the future prospects of Team Stronach after the planned political retirement of *** and the party leader's 'complicity' in the 'crumbling process' of his party. The Federal Administrative Court cannot agree that the subject of the analysis was also the person *** as such and the dimension of his political work (and, as a result, his image values and general public perception). At no point was it conveyed to the average viewer that the interview was also intended to explore the political development of the Team Stronach chairman to date; viewers primarily expected an assessment of the previous television appearance, which also related to the political future and not to the political past.

As a result, the statements made by the authority concerned in the contested decision regarding the scope of the subject of analysis are to be upheld, and the complainants' arguments in this regard were unsuccessful.

[...] 'No polemical statement by ***'

In their complaints, the complainants further argue that the primary task of a political scientist is to incorporate public opinion into a political analysis. The incriminated statement by *** represents a summary of corresponding voter opinions, which he arrived at through data collected in advance and in preparation for the program. It would render motive analysis, especially election research, absurd if subjective assessments of voters (ranging from 'corrupt' to 'totally incompetent' and 'stupid' to 'crazy') were not allowed to be mentioned as evaluations. Although such voter opinions are not objective and are not facts, the fact that these opinions exist cannot be dismissed.

The Federal Administrative Court first notes in response to this argument that the Administrative Court has already ruled on the requirement of objectivity on several occasions [...], that although individual formulations may be justified in the overall context, this is always excluded in the case of polemical or inappropriate formulations. In the contested decision, the respondent authority recognized such a polemical formulation in the statement referring to ***, which, in its opinion, could not be justified by the overall context and was therefore incompatible with the requirement of objectivity.

The court also takes the view that *** was disparaged in his personality by the incriminating statement in response to the question of his 'analytical ability', because the average consumer, in the overall context of what was offered [...], undoubtedly perceived ***'s statement as exposing the party leader (the meaning of the word 'plemplem' according to the online Duden dictionary [available at <https://www.duden.de/rechtschreibung/plemplem>]: 'unreasonable-stupid', 'not quite right in the head'; synonyms are 'crazy', 'not in one's right mind'[,] [colloquial] 'foolish', 'not quite/right in the head', 'not quite/right in the head', 'not quite right in the head/in the brain', 'out of one's mind', [casual] 'crazy', 'stupid', 'gaga', 'meshugge', 'mad', [colloquial pejorative] 'not quite right in the head', 'stupid'). This remark did not contribute in any way to the specific political analysis, but served solely to discredit ***. Unlike his other conclusions, some of which were sharply worded, the studio guest's polemical conclusion was not supported by examples. The authority concerned is also not to be contradicted when it further assumed in the contested decision that the statement was reinforced in its effect by the fact that *** used a formulation that presented the opinion about the party leader as a supposedly public one. The comment complained about was therefore not an objective discussion.

The complainants argued that the wording used was merely a summary of the subjective assessment of a section of the electorate, which ***, in his capacity as a political scientist, had determined in preparation for the interview and merely reproduced in the analysis.

. Comments from the live ticker on derStandard.at were presented as evidence of the 'mood' among the average media consumer. The counterargument is that although opinion polling may be part of a political scientist's range of tasks, the use of contributions from a live ticker cannot be used to assess a violation of the requirement of objectivity – especially not in political analyses, where even higher standards of objectivity are required. Otherwise, the requirement for objectivity could in principle be circumvented by submitting suitable public, anonymous posts (it should be noted in this context that, in contrast to real-life interactions, virtual identities often pay less attention to good manners, which is why offensive comments are more common; In addition, website operators are often unable to keep up with the removal of inappropriate posts in 'news tickers' due to the high number of comments within a very short time; moreover, each of these operators also has a different value system). In any case, derogatory language must not be disguised as the 'opinion' of the population and declared legitimate by this detour.

Furthermore, even taking into account the assessments from the World Wide Web, it is not apparent to the Federal Administrative Court why the negative voter opinion expressed about *** by *** could not be reproduced in a different way, namely with a choice of words that is in line with the requirement of objectivity. For this reason, there is no need to further address the unspecified opinion polls presented in the administrative proceedings, on which *** could provide information, whereby it is also noted that the representative of the complainants denied the question of open requests for evidence in the appeal hearing.

This conclusion is not affected by the complainants' objection that *** himself likes to "dish it out" and that politicians, as "public figures," must accept harsher attacks than private individuals in the interest of free public debate. In their supplementary statement of August 28, 2019, the complainants submitted the decision of the authority concerned dated October 3, 2018, KOA 12.051/18-006, which in their opinion was also indicative for the decision in question. In that decision, the respondent authority ruled that referring to members of the government as "bastards" in a talk show was consistent with the requirement of objectivity because politicians, in their public capacity, must show greater tolerance than private individuals and the incriminating statement was made in direct connection with the political debate.

However, in the opinion of the Federal Administrative Court, the two cases are not comparable: While the official decision of October 3, 2018 concerned a violation of Section 10 (6) ORF-G, the incriminating remark was made to a specific group of people in a pre-recorded talk show by an actor whom the average viewer did not associate with the initial complainant

and the presenter clearly distanced herself from this statement, the present decision concerns a violation of

Section 10(7) ORF-G on the basis of a statement made against an individual politician during a live analysis by a political scientist associated with the initial complainant, who is expected to be particularly objective due to his position. As can be inferred from the rulings of the highest courts, the initial complainant is subject to different requirements to comply with the principle of objectivity, depending on the specific nature of the program (VfSlg 13.843/1994, 17.082/2003; VwGH 15.09.2006, 2004/04/0074).

Furthermore, it is noted that the decision of October 3, 2018, has not yet become legally binding and for this reason alone cannot be used as a precedent.

In this context, the complainants pointed out in their supplementary statement of August 28, 2019, that there had also been a claim for compensation under media law for the designation as "bastards," which had already been dismissed with legal effect by a ruling of the Vienna Higher Regional Court. According to this, there is no claim for compensation under Section 6(2)(4) of the Media Act if the statement is a truthful reproduction of a third party's statement and there was an overriding public interest in knowing the quoted statement; these conditions are also met in the present case.

The Federal Administrative Court points out that this case law is also irrelevant to the present case: the judgment referred to concerns a so-called media content offense, which can only be decided by a criminal court. In contrast, the court hearing the case decides exclusively on violations of law under the ORF-G VfSlg 14.221/1995; 12.022/1989), which imposes requirements on the first complainant's broadcasts that are independent of the provisions of the Media Act, the General Civil Code, or the Criminal Code. Consequently, it cannot be automatically assumed that, in the absence of a violation of criminal law provisions, the ORF-G, specifically the requirement of objectivity, has not been violated.

Overall, all of the complainants' arguments justifying the comment made by *** were therefore fruitless, and the resulting exposure of *** could not be denied.

[...] 'No obligation on the part of the first complainant to distance himself'

In their complaints, the complainants also assert that the authority concerned wrongly assumes that the violation of the requirement of objectivity lies in the fact that the presenter did not distance herself from the statements made by ***. The text of the law already distinguishes between 'moderation' and 'factual analysis' (cf. Section 4 (5) (3) ORF-G); these are completely different parts of the program. Moderation cannot therefore be 'unobjective' on the basis of a factual analysis. Agreeing or distancing oneself in the moderation would also mean taking a

position, which would conflict with the requirement of objectivity. Even with this argument, the complainants fail to demonstrate the illegality of the contested decision: where the first complainant has influence over the design of a program, he has an obligation to maintain the balance of opinions represented in the program as far as possible [...]. Consequently, the first complainant is also prohibited from identifying with one-sided statements; however, identification is particularly evident if the first complainant does not maintain a clear distance when commenting on such one-sided statements. According to the case law of the Administrative Court, a violation of the requirement of objectivity following already broadcast, unobjective statements can only be avoided by distancing by the first complainant, who compensates for these statements and therefore, as far as possible, reaches the audience covered by the broadcast both in terms of time and in terms of the group of people (VwGH 15.09.2006, 2004/04/0074).

The complaint concerned an inappropriate comment made in a program produced by the first complainant [...]. The polemical statement made by ***, which the average television viewer would associate with the initial complainant [...], was not commented on by the initial complainant (in this case, the presenter ***, who could have immediately and comprehensively rectified the situation). By failing to respond immediately to the statement, which was not in accordance with the requirement of objectivity, the initial complainant violated § 4 (5) (3) in conjunction with § 10 (7) ORF-G.

Contrary to the complainants' assertions, it is possible to create balance even without taking a position (see, for example, the reaction of the presenter *** in the aforementioned decision of the authority concerned dated October 3, 2018, KOA 12.051/18-006: "No, ***, there are no politicians invited today who could respond to that," "Yes, I know, but I want to maintain the objectivity of the broadcast," etc.). The presenter *** was able to respond in the same way, regardless of the fact that this was an expert interview and not a talk show.

Furthermore, the Federal Administrative Court cannot understand the complainants' argument in their supplementary statement of August 28, 2019, that the political scientist himself provided sufficient relativization immediately afterwards, even if he did make isolated statements (***: 'Then again, I think that today's atmosphere for discussion was quite pleasant, even if it was not possible to evaluate the content, and he simply tried something at an advanced age that he should not have done.').

The argument that – as the complainants stated in their supplementary statement of August 28, 2019 – a duty to distance himself was ruled out simply because the political scientist was an external expert and the

first complainant should therefore not have been held responsible for his behavior is also unfounded. Although *** is not an employee of the first complainant due to the lack of an employment relationship, the fact that he is constantly invited to the studio as a guest for political analysis means that the average television viewer associates him to a greater extent with the first complainant and places him in a close relationship with him. The appearance of an employment relationship is intensified by the fact that the political scientist appears with the approval of the first complainant, who is free to choose his guests. In this situation, the first complainant is responsible for any violation of the requirement of objectivity by ***."

4. This decision is the subject of the present appeal, which is based on Art. 144 B-VG 8, in which the violation of the constitutionally guaranteed right to freedom of expression and broadcasting is alleged and the costly annulment of the contested decision, or alternatively the transfer of the appeal to the Administrative Court, is requested. The Federal Administrative Court alleges that the relevant provisions, in particular Section 4(5)(3) and Section 10(7) of the ORF-G, violate Article 10 of the ECHR (emphasis added):

"[...] Public interest in reporting

It should be noted at the outset that the analysis in question was expressed on a topic of public interest, namely the fate of the political party 'Team Stronach' and its steady 'disintegration', and in relation to a politician who is active in the public sphere, a 'public figure', namely the eponymous party founder ***.

In this sense, the Federal Administrative Court also assumes that the topic of the present factual analysis is directly reflected in the introduction to the analysis by the interviewing news anchor ***: 'The founder and party leader of Team Stronach, ***, was a guest on ***, and *** has joined us again this year to analyze the 'summer talks'. and, on the other hand, in the specific questions asked by the presenter during the interview: 'Have we learned tonight what will become of this Team Stronach?'; 'My mistake was that I couldn't be here as often, said ***. Was that really his biggest mistake?'; 'Is there even enough room in Austria for a party like the one Stronach had in mind, i.e., a party that is more economically liberal, but still a protest party?' as well as the recorded sequence: 'The focus was on the 'summer interview' between *** and presenter ***, broadcast before the news program 'ZIB 2', which focused on the future prospects of Team Stronach after the planned political retirement of *** and the party leader's 'complicity' in the 'disintegration process' of his party. [...]

It is incomprehensible that the Federal Administrative Court simultaneously assumes that the person *** as such and the scope of his political activities (and, as a result, his image values and general public perception) were not the subject of the analysis and that it was not conveyed to the average viewer that the interview was also intended to explore the political development of the Team Stronach chairman to date.

This contradicts the topic defined by the Federal Administrative Court itself on the basis of broadcast statements. When, among other things, the question is raised: 'My mistake was that I couldn't be here as often, said ***. Was that really his biggest mistake? and it is emphasized that the focus of the 'summer interview' is not only on the future prospects of Team Stronach after the planned political retirement of ***, but also on the party chairman's 'complicity' in the 'crumbling process' of his party, then this inevitably includes an assessment of his political work and, as a result, his image values and general public perception.

The Federal Administrative Court disregards the overall context.

Right at the beginning of the interview, it is discussed that *** is hardly ever seen in Austria anymore: '***, we haven't seen *** for a long time, he rarely appears in Austria anymore, most recently in June, when he told us that he is planning to withdraw from politics, at the latest after the end of this legislative period. Did we find out tonight what will become of Team Stronach?' The presenter *** specifically addressed the 'crumbling process' of the party as follows: 'The party has been around for four years, [...] for four years a crumbling process has been underway, and important colleagues such as *** have left the party, some of them defecting to other parties. *** also addressed ***'s mistakes, and we will now take a look at that.' After a short sequence of the 'summer interview' in which *** comments on his stay in America, the presenter asks the following question: 'My mistake was that I couldn't be here as often, *** said. Was that really his biggest mistake?' [...].

In response, the expert ***—when asked about ***'s "biggest mistake"—not only describes various statements made by the politician in the summer interview (e.g., that he believed we had 300 instead of 183 members of the National Council), but also refers to earlier statements such as 'we need neutrality if the Chinese invade' or that, when asked about the future of Europe, he once said: 'Yes, the head teachers should choose their teachers. He summarises the examples he cites with the remark 'So it's really just confusing.' [...]. This also shows that the general focus was on *** and his behaviour. Incidentally, the incriminating statement is nothing more than a possible assessment of, among other things, the behaviour described [...].

The behavior of the politician *** was therefore the central focus of the analysis, which assessed, among other things, his influence on the 'crumbling' of the 'Team Stronach' party. This is clearly in the public interest.

When the interview addresses ***'s complicity and mistakes in this collapse, it is clear, based on the politician's repeated stays abroad and his earlier 'remarks' mentioned as examples, that it is not merely based on the summer interview.

Contrary to the opinion of the Federal Administrative Court, the subject of the analysis was (also) the person *** and his political activities, including any mistakes he may have made in the course of those activities, as well as the public perception of the politician in connection with this.

[...] On the admissibility of the statement

The Federal Administrative Court is of the opinion that *** was disparaged in his personality by the incriminated statement in response to the question of his 'analytical ability', because the average consumer perceived the party leader to be exposed in the overall context of what was offered. Reference is made to the meaning of the word 'plemplem'. The remark did not contribute to any concrete political analysis, but only served to discredit ***. Unlike his other conclusions, some of which were sharply worded, the studio guest's polemical conclusion was not supported by examples. Kom-mAustria is also followed insofar as the statement's effect was reinforced by the fact that *** used a formulation that presented the opinion about the party leader as a supposedly public one. It was therefore not a factual debate [...]. However, the Federal Administrative Court fails to recognize the following:

Here, too, the overall context is essential. The question of moderation aims to determine whether *** maintains that *** cannot be analyzed at all ('...shattered any ability to analyze'). He affirms this. Since a substantive analysis is not possible, possibilities are put forward as to how ***'s behavior could be evaluated. On the one hand, in the form of an objective statement that could be a mere possible brief summary by some viewers – 'which may also be the briefest analysis by some viewers'. This is followed by another possible brief summary, to which the studio guest even makes a personal reference: 'Then again, I think that today's atmosphere of discussion was, even if it was not possible to evaluate the content, quite pleasant, and he just tried something at an advanced age that he should not have done.'

This makes it clear that – because an analysis of the content is difficult or impossible – this is a purely evaluative summary from the perspective of the electorate, presenting both a negative and a positive interpretation. The latter relativizes the

previous statement, which is also formulated in a very restrictive manner ('perhaps', 'brief analysis', 'some viewers').

Evaluations are an essential part of an 'analytical commentary' [...]. It is therefore insufficient for the Federal Administrative Court to argue that the contested commentary is not in itself an objective discussion. If, in line with the Federal Administrative Court, one were to demand that each individual [...] component of an analysis constitute an objective discussion in itself, there would be no room for evaluations.

The essence of an assessment is precisely that it cannot be verified. The assessment in question merely summarized the behavior of *** discussed above, while also presenting a second interpretation.

At this point, therefore, there was no room for (further) examples, the absence of which the Federal Administrative Court criticizes. These had already been presented throughout the interview, for example by listing various statements made by *** and summarizing them with "So this is just confusing" [...]. Rather, this was a final assessment beyond the – impossible – analysis of content. In this respect, there was no need to list examples here. After all, the Federal Administrative Court itself refers to a (polemical) conclusion.

The Federal Administrative Court fails to recognize that this conclusion must be considered in the overall context. Its view disproportionately restricts freedom of the press because, in this case, every single statement would have to be substantiated on its own merits, regardless of the overall context. This would make concluding summaries impossible.

The BVwG's view that the statement was reinforced in its effect by the use of wording that presented the opinion about the party leader as a supposedly public one also fails to take the overall context into account.

The positive assessment presented immediately afterwards even contains a personal reference ("I think"). This has a much stronger effect, especially since this assessment – in contrast to the incriminated statement – is not relativized by restrictive additions ("perhaps," "brief analysis," "some viewers") as explained above.

The primary task of a political scientist is to incorporate (potential) public opinion leaders into a political analysis. It would disproportionately restrict expert analysis if it had to be limited from the outset to (potential) positive or defensive, cautious opinions. The essence of freedom of expression is precisely that it protects not only statements that are received positively or considered non-offensive or indifferent, but also those that hurt, shock, or disturb ([z]B ECtHR 2.5.2000, Bsw 26.132/95 – Bergens Tidende/Norway, Rn 48; ECHR 21.1.1999, Bsw 29.183/95 – Fressoz and

Roire/France, para. 45; ECtHR 7.12.1976, 5493/72 – Handyside/United Kingdom, para. 49).

An expert analysis must remain free to express interpretations of public opinion that may be perceived as offensive. The analysis of possible perceptions (in this case, those of viewers and voters) cannot and must not depend on whether a negative, critical assessment arises in a specific case. Otherwise, an expert analysis would not be able to fulfill its task of analyzing political events with the involvement of public opinion leaders, or would only be able to do so with massive restrictions on freedom of expression.

The Federal Administrative Court itself does not explain why the incriminated statement should not be considered a possible assessment from the perspective of some voters or viewers. On the contrary: the remaining statements in the interview were assessed by the court (as previously by KommAustria) as permissible, albeit harsh or sharp, and by no means polemical or unobjective, but rather as a critical analysis of the statements made by *** [...].

The summary was therefore also deemed admissible, various statements *** were 'just confusing', which was preceded by a list of various statements made by the politician [...]. However, the incriminated statement does not express anything else. The overall context shows that this possible concluding summary ties in with the content discussed previously. As explained, it severely restricts freedom of expression if a detailed justification and substantiation is required for a concluding summary that serves to briefly summarize what has been said previously.

Even if one were to disregard, as the Federal Administrative Court does, the opinions expressed live by voters (in the form of contributions to the live ticker), from which the incriminated interpretation can be derived without doubt [...], this interpretation can still be deduced from the overall context of the program.

If the Federal Administrative Court demands a 'different choice of words' for the negative voter opinion presented, it is once again massively interfering with freedom of expression. The expression 'plemplem' merely exaggerates what had previously been described as 'confused' in the interview. No other expression could sum this up as succinctly. Since this is a matter of interpreting a possible voter opinion, it would be misguided from the outset to demand an objective, scientific term for this. It is plausible and logical that voters could summarize the confused behavior described with the word "plemplem," especially since they would certainly not choose an "academic" term. To prescribe to expert analysis that the possible opinion of a section of the population must not be described casually violates Article 10 of the ECHR. Once again: it is not only defensive formulations that are protected by this.

According to the Federal Administrative Court, the decision of KommAustria of October 3, 2018, KOA 12.051/18-006, according to which the designation of members of the government as 'Drecks-

is not relevant. That case concerned a quote from an actor in a pre-recorded talk show, which the average viewer would not associate with the initial complainant. In this case, however, it concerned a live analysis by a political scientist associated with the first complainant, from whom particular objectivity was expected [...].

However, the BVwG did not take into account the fact that this was a live analysis. This circumstance should in any case have been taken into account in favor of the complainants.

If the legislature even provides for grounds for exclusion from live broadcasts in the relevant provisions of the Media Act (§§ 6ff MedienG) in the extremely sensitive area of reporting in connection with court proceedings [...], then this legislative assessment cannot and must not be disregarded in the present case either. After all, the provisions of media law give concrete form to the fundamental tension between freedom of expression and the protection of personality rights, which is why their assessments must be taken into account in the necessary weighing of interests [...].

As explained, this ground for exclusion is based on the consideration that liability on the part of the media owner for statements made in such broadcasts, which in some circumstances cannot be prevented and are no longer subject to editorial control, would be excessive and that in many cases the broadcast itself is covered by the public service remit of broadcasting (Berka in Berka/Heindl/Höhne/Koukal, MedienG⁴ § 6 Rz 34).

In light of this assessment, it must be taken into account that the incriminating statement was made during a live broadcast. Furthermore, no employee or representative of the broadcaster disregarded the required journalistic diligence within the meaning of the grounds for exclusion under media law. *** presented the statement as one of two possible evaluative summaries from the viewer's perspective. In any case, however, the presenter ***, as an employee of the initial complainant, exercised journalistic diligence [...].

[...] Regarding the accusation of a lack of distance

As explained above, the Federal Administrative Court considers that, on the one hand, the quotation of an actor in a pre-recorded talk show, which the average viewer does not associate with the initial complainant, cannot be compared with the statement in question in a live analysis [...].

At the same time, however, it imposes the same requirements on the presenter in the present case as were imposed in that case [...]: 'The presenter *** was able to react in the same way, regardless of the fact that the case in question was an expert interview and not a talk show.

Here, too, the Federal Administrative Court fails to recognize that the present case involved a live analysis.

The view that journalists must distance themselves from third-party statements in live analyses to the same extent as in a pre-recorded program massively exaggerates the requirements of due diligence imposed on them. This is all the more so given that the ECtHR rejects any general obligation on journalists to systematically and formally distance themselves from the content of a quotation [...].

Contrary to the opinion of the BVwG, this ruling does not apply only to journalists working for private media. This opinion constitutes an unjustifiable interference with freedom of expression and discriminates against journalists working for public service broadcasters. There is no objective basis for this. Furthermore, according to the case law of the VwGH, § 4 (5) ORF-G does not imply a 'duty to distance oneself' (VwSlg 16999 A/2006).

Particularly in the case of live broadcasts, statements cannot be prevented or edited; moreover, in many cases, the broadcast is covered by the public service remit of broadcasting. This is also the basis for the exclusion clause for live broadcasts under media law (Berka in Berka/Heindl/Höhne/Koukal, MedienG⁴ § 6 Rz 34).

IdS, journalistic diligence in connection with the media law exclusion clause for live broadcasts [...] is only violated if identification with the statement of a third party occurs or is provoked. However, identification cannot be inferred from the absence of an explicit distancing (Berka in Berka/Heindl/Höhne/Koukal, MedienG⁴ § 6 Rz 37 with reference to the materials RV MedienG-Novelle 1992, 10). In this context, too, it is emphasized that the requirements placed on media employees, such as counteracting offensive attacks during the broadcast by means of moderating the discussion, must not be exaggerated (Berka loc. cit. with further references).

Furthermore, the requirement that presenters themselves must 'relativize' the summary assessments of an independent political expert constitutes a massive encroachment on freedom of the press and freedom of expression. This would undermine the credibility of experts and their analytical work. At the same time, this would give the audience the impression that experts are not allowed to express their analyses freely, but must take 'ORF guidelines' into account. This would completely defeat the purpose of such an analysis. In addition, it would violate the requirement of objectivity, because the moderator would have to take a position.

In the present case in particular, distancing oneself was neither necessary nor expedient in terms of content, because the political expert had already relativized the incriminated statement – which was in any case only mentioned as one possible assessment

– had already relativized it himself. Immediately afterwards, he contrasted it with a second possible 'brief summary' as an assessment.

It therefore violates the constitutionally protected freedom of expression and broadcasting if, in addition to such a balanced analysis, further distancing or similar measures were to be required. According to the case law of the ECtHR, such an intervention is not necessary."

5. The Federal Administrative Court has submitted the court and administrative files , but refrained from submitting a counterstatement, as did the defendant authority. 9

6. The party involved has issued a statement in which it concurs with the legal opinion of the Federal Administrative Court. 10

Contrary to the statements in the complaint, the subject of the analysis was not "*** and his behavior" in general, but rather the "summer discussion" preceding the "ZIB 2" broadcast and the political future of "Team Stronach" discussed therein. The wording ("plemplem") rightly objected to by the Federal Administrative Court was not an objective discussion, but a polemical, inappropriate statement that lacked any objectivity as it degraded and exposed a person and thus violated the requirement of objectivity. Such a choice of words also violates the requirement of objectivity when it is disguised as "the opinion of the population." Contrary to the complaint, a specially trained and knowledgeable ORF presenter could create an objectively neutral balance within the scope of her duty of impartiality. Experts who are regularly invited to appear on the program enjoy a high degree of credibility among viewers, who therefore take their polemical personal assessments more seriously.

II. Legal situation

The relevant provisions of the Federal Act on Austrian Broadcasting (ORF Act, ORF-G), Federal Law Gazette 379/1984 (WV), as amended by Federal Law Gazette I 24/2020, are as follows: 11

"Core public service mandate

§ 4. [...]

(5) In designing its programs and offerings, Austrian Broadcasting Corporation shall also ensure

1. objective selection and communication of information in the form of news and reports, including coverage of the activities of legislative bodies and, where appropriate, the broadcasting of their proceedings;
 2. the reproduction and communication of comments, viewpoints, and critical opinions that are essential to the general public, taking appropriate account of the diversity of opinions represented in public life;
 3. its own commentaries, factual analyses, and moderation, while observing the principle of objectivity
- . [...]

Content principles

§ 10. (1) All programs broadcast by Austrian Broadcasting Corporation must respect human dignity and the fundamental rights of others in terms of their presentation and content.

[...]

(4) Comprehensive information should contribute to the free formation of individual and public opinion in the service of responsible citizens and thus to democratic discourse among the general public.

(5) The information must be comprehensive, independent, impartial, and objective. All news and reports must be carefully checked for accuracy and origin, and news and commentary must be clearly separated.

(6) The diversity of opinions represented in public life must be given appropriate consideration, and the human dignity, personal rights, and privacy of individuals must be respected.

(7) Comments, analyses, and moderation must be factual and based on verifiable facts.

[...]"

III. Considerations

The appeal is admissible and well-founded:

12

1. The contested decision interferes with the right to respect for private and family life protected by Article 10 of the ECHR.

13

freedom of expression and broadcasting of the complainant ORF (VfSlg. 12.086/1989, 19.742/2013, 19.854/2014).

The Federal Administrative Court justifies its decision confirming the KommAustria decision

¹⁴

with requirements for the ORF under Section 4(5) and

§ 10 (7) ORF-G. These legal provisions are based on Art. 10 (1) sentence 3 ECHR for the implementation of the requirements of Art. I (2) BVG Broadcasting (cf. on the differentiation between Art. 10 (1) sentence 3 ECHR and Art. 10 (2) ECHR

as a restriction on the fundamental right to freedom guaranteed by Art. 10(1) ECHR, VfSlg. 17.082/2003).

In view of the – also not disputed by the complainant ORF – 15

Given the fundamental soundness of the legal basis applied by the Federal Administrative Court, which subjects ORF as a public broadcaster to specific regulations, it remains to be examined below whether the Federal Administrative Court applied these provisions in a manner that is inconceivable because it erroneously assumed that the law contained content that violated the specific restrictions of Article 10 of the European Convention on Human Rights by interpreting Section 4(5) in conjunction with Section 10(7) of the ORF Act as imposing a restriction on the freedom of expression of opinion. In this case, the special restrictions of Art. 10 ECHR, by deriving from § 4 (5) in conjunction with § 10 (7) ORF-G a restriction of the ORF's freedom of expression and broadcasting that is not necessary in a democratic society in the interests of the objectives associated with Art. 10 (1) sentence 3 ECHR and Art. 1 para. 2 BVG Rundfunk (VfSlg. 12.086/1989, 16.468/2002).

2. The Federal Administrative Court first accuses the ORF of disparaging ***'s personality in the statement complained of by 16

the statement by *** ("plemplem") *** in its personality and therefore violated the requirement of objectivity under § 4 (5) Z 3 in conjunction with § 10 (7) ORF-G. The Federal Administrative Court assumes that the ORF was not prevented from critically examining the previously broadcast "Sommergespräch" in the subsequent news program with the help of a political scientist of its own choosing within the scope of its journalistic freedom, and that the specific review of the broadcast interview with *** was a factual analysis that had to meet the requirements of § 4 (5) Z 3 in conjunction with § 10 (7) ORF-G. The decisive factor for the violation of these provisions assumed by the Federal Administrative Court was that the subject of the analysis in "ZIB 2" following the "Sommergespräch" was not the person *** as such and the scope of his political activities and thus also his political development to date as Team Stronach chairman, but that viewers had primarily expected an assessment of the previous television appearance, which had related to the political future and not to the political past. The objectionable statement was made against an individual politician in the context of a live analysis by a political scientist affiliated with ORF, who is expected to be particularly objective due to his position. Therefore, the suggestion that ***, as a

a politician had to accept harsher attacks than private individuals in the interests of free public debate were unfounded. The negative opinion about *** had *** also be able to reproduce it in a different way and using wording that is consistent with the requirement for objectivity.

2.1. According to Section 4 (5) ORF-G, the ORF must, in the design of its programs and offerings, the ORF must, among other things, ensure the reproduction and communication of comments, viewpoints, and critical opinions that are essential to the general public, taking appropriate account of the diversity of opinions represented in public life (Z 2), and provide its own comments, factual analyses, and moderation in accordance with the principle of objectivity (Z 3). According to § 10 (7) ORF-G, comments, analyses, and moderation must be objective and based on verifiable facts. 17

These legal specifications of the requirement of objectivity, which are in the interest of objectivity and impartiality in reporting 18

and the consideration of diversity of opinion within the meaning of Art. I (2) BVG Rundfunk, take into account the ORF's position as a public broadcaster as well as its special function as a "public watchdog" in a democratic society, as guaranteed by Art. 10 ECHR. Therefore, the ORF's core mission includes not only the provision of comprehensive information, but also the reproduction and communication of comments, viewpoints, and critical opinions of third parties that are essential to the general public, as well as its own comments and factual analyses. While Section 4(5)(2) ORF-G requires that the reproduction and communication of comments and opinions of third parties take appropriate account of the diversity of opinions represented in public life (VwSlg. 16.999 A/2006, 18.545 A/2012), § 4 (5) Z 3 ORF-G subjects the ORF's own comments and factual analyses to a special requirement of objectivity.

The general requirement of objectivity in Section 4(5) of the ORF Act must therefore be viewed in a differentiated manner 19

, depending on the position of the person making comments or statements and factual analyses in relation to the ORF (see already VfSlg. 17.082/2003). If a comment, statement, or factual analysis is made by a person who is invited by those responsible for the program to make such an assessment in the program, but who is not involved in editorial responsibility, i.e., in this sense, is independent of

, , ORF, , , , , , , ORF's (selection) responsibility pursuant to Section 4 (5) (2) ORF-G, particularly from the perspective of diversity. If, on the other hand, the statements are directly attributable to the ORF because the persons responsible for them are editors, the ORF is particularly responsible for the content pursuant to Section 4 (5) (3) ORF-G. This depends on the assessment of the statements in question in their overall context with regard to the nature and content of the program concerned and the topic on which specific commentary and factual analysis are made, whereby the journalistic freedom of expression and freedom of opinion protected by Art. 10 ECHR must always be taken into account (see VfSlg. 12.086/1989).

2.2. Against this background, it must first be determined what position the political scientist *** invited by ORF to appear on the program "ZIB 2" as an interview partner of the "ZIB 2" presenter: 20

It is undisputed (also in administrative and administrative court proceedings 21 proceedings) that *** is not a journalist employed by ORF who is involved in the editorial team of the news program "ZIB 2" and has editorial responsibility for this program or for the related program "Sommergespräche" (Summer Talks). In this context, ORF stated the following in the proceedings before KommAustria:

"When analyzing the annual Sommergespräche or following discussions with candidates before the elections, the editorial team of 'Zeit im Bild 2' relies on *** for one very simple reason: he guarantees ORF contractually that he may not accept any consulting assignments from political parties or politicians, among others. *** is not in any kind of employment relationship with ORF."

Nevertheless, the Federal Administrative Court apparently assigns *** to the ORF (and assesses his statements accordingly – as KommAustria has already done – exclusively in accordance with § 4 (5) Z 3 ORF-G and not in accordance with § 4 (5) Z 2 leg.cit.), because he is regularly called upon by ORF as an expert in connection with (pre-)election reporting or domestic political programs such as the "Sommergespräche" (summer talks). 22

The decisive factor in determining whether the statements made by *** are to be measured against the standard set out in 23

Z 2 or Z 3 of § 4 (5) ORF-G is initially determined solely by the fact that he is not involved in the editorial context of the relevant programs and does not participate in the editorial design of the programs. He is a guest on the program and an interview partner of the "ZIB 2" presenter. Furthermore, although it can be assumed, in line with the Federal Administrative Court, that viewers perceive *** as an expert who is asked to provide analysis and assessment on the basis of his scientific expertise, this does not make him part of the ORF editorial team responsible for the news program "ZIB 2" from the viewers' perspective, as his role as a "studio guest" is also made clear in the overall context of the relevant ORF news programs.

Contrary to the assumption of the Federal Administrative Court, 24

The statements made by *** in the program in question are not "own" comments or factual analyses by ORF (Section 4 (5) (3) ORF-G), but rather, by inviting *** to the program, ORF is fulfilling its duty to convey comments, viewpoints, and critical statements that are essential to the general public within the meaning of Section 4 (5) (2) ORF-G. viewpoints, and critical statements within the meaning of § 4 (5) (2) ORF-G. The role of *** as a "studio guest" and interview partner of the "ZIB 2" presenter thus also differs from situations in which, in the course of a comparable news program, ORF journalists are available to the presenter of the news program as discussion partners, or in which members of an ORF editorial team are called upon in this capacity to provide their own comments or factual analyses.

The statements and assessments made by *** in the relevant context here 25

in the news program are therefore not attributable to the ORF in terms of content, but to him personally. In the present proceedings, the Constitutional Court therefore has to assess exclusively the violation of provisions of the ORF-G by the ORF as assumed by the Federal Administrative Court. In the opinion of the Federal Administrative Court, this violation by the ORF lies in the fact that the statement made by *** in the program did not comply with the objective form required by § 10 (7) ORF-G and did not maintain the necessary factual connection to the topic of the program (see point 3 below) and that the presenter had failed to comply with her duty of distancing herself pursuant to Section 4 (5) (3) ORF-G (see point 4 below).

3. With regard to Section 4(5)(2) ORF-G, the ORF is responsible for the statements made by ***
26

in the program in question, as explained above, has a (selective) responsibility with regard to the appropriate consideration of the diversity of opinions represented in public life, if it grants and entrusts him with a qualified, though not exclusive, authority to interpret events from a political science perspective. Contractual obligations to ensure the impartiality of the expert may also play a role here, as may the overall context of the relevant ORF programs as a whole.

A certain degree of content, from the point of view of general objectivity... 27

However, the ORF is responsible for comments and statements made by third parties within the meaning of Section 4(5)(2) ORF-G in accordance with the duty of care under Section 4(5) ORF-G insofar as pursuant to Section 10(1) ORF-G, all broadcasts, including comments and statements pursuant to Section 4(5)(2) ORF-G, must respect human dignity and the fundamental rights of others (see also Section 10(6) ORF-G). Furthermore, Section 10(7) ORF-G imposes certain requirements on comments and analyses, and thus also on corresponding expert opinions within the meaning of Section 4(5)(2) ORF-G, as in the present context by ***, with regard to objectivity and comprehensible factual basis.

By qualifying the contested statement by *** as 28

a violation of the requirement of objectivity and impartiality for which the ORF would be responsible, it attributes to the relevant provisions of the ORF-G a content that is incompatible with the limits of Art. 10 ECHR, which are decisive for the interpretation of these provisions. Contrary to the Federal Administrative Court, the contested expression of opinion finds in the overall context of the topic of the interview and in the preceding "summer discussion" that helped determine the topic, a basis that provides the expert's assessment with a comprehensible factual substrate, and the wording used complies with the limits of Section 10 (1) and (6) ORF-G in conjunction with Article 10 (2) ECHR:

3.1. The interview in question begins with an assessment of the future prospects of Team Stronach and its party leader at the time. Subsequently, *** refers in particular to errors in the sense of factual inaccuracies, political uncertainties, and incomprehensible statements.

future prospects of Team Stronach and its party leader at the time. *** then goes on to address in particular errors in the sense of factual inaccuracies, political uncertainties, and incomprehensible

statements made by the party leader *** in the preceding "summer interview" or elsewhere in this capacity, and describes some of them as "confused." *** describes the assessment expressed by *** in the "summer interview" that people do not know him well enough as inaccurate, pointing out that hardly any politician has as high a profile as ***. The political scientist then analyzes the chances for a more economically liberal protest party in the Austrian party landscape.

Contrary to the assumption of the Federal Administrative Court, the topic covered by the program " " 30

in the program "Sommergespräche" for the subsequent analysis by the political scientist in the program "ZIB 2" not only the specific interview conducted by an ORF journalist with *** in the course of the "Sommergespräche," but also includes the overall context of the political activities of the political party represented in the National Council by *** , represented in the National Council, its political development to date, and its future concept. When a leading politician, such as the chairman of a party represented in parliament (at the time), engages in a political discussion that is not related to a specific event, such as in the "Sommergespräche," then the overall context of the political activities of the political party he leads, its political development to date, and the future concept of this party become just as much a topic of discussion as the political significance of the party chairman and the public perception of his function.

In view of the party leader's statements, some of which were difficult to understand, as discussed several times in the course of his assessment of ***, the term "plemplem" clearly refers to the impression of a certain "confusion" on the part of the party leader, which is the subject of the analysis in 31.

, the statement "plemplem" clearly refers to the impression of a certain "confusion" on the part of the party leader that is discussed in the analysis. It is thus made in the context of the subject of the interview and refers to the political function and its perception by the politician, and not, for example, to the immediate private or personal sphere of ***. If the politician's behavior and statements give cause for this, it must also be possible, in the interest of the free public discourse guaranteed by Article 10 of the ECHR, to point out "that the emperor has no clothes."

3.2. In view of the standards that a prominent politician must meet in public debate and must accept criticism against himself, even when presented in a sharp, polemical, and aggressive form (see established case law of the ECtHR, July 8, 2004, 32

must accept criticism against himself in public debate, even when expressed in a sharp, polemical, and aggressive manner (see established case law of the ECtHR 8.7.1988, *Lingens* case, Appl. 9815/82, EuGRZ 1986, 424 [Z 42]; May 23, 1991, *Oberschlick* case [No. 1], Appl. 11.662/85, EuGRZ

1991, 216 [Z 59]; 26.2.2002, case *Unabhängige Initiative Informationsvielfalt*, Appl. 28.525/95, MR 2002, 149 [Z 36] and VfSlg. 12.086/1989), the pointed and polemical choice of words remains, in the overall context, within the bounds of what is permissible under Article 10 of the ECHR in a statement such as that made by *** in the present case to a politician.

3.3. A statement such as the one made here by the interviewee *** in 33 in the specific broadcast situation as violating § 4 (5) in conjunction with § 10 (7) ORF-G is therefore not necessary in a democratic society in the interests of the objectives pursued by the aforementioned provisions in the light of Art. 10 (2) ECHR. By failing to recognize this, the Federal Administrative Court has attributed a meaning to the aforementioned provisions of the ORF-G that is incompatible with Art. 10 ECHR.

4. The Federal Administrative Court further considers § 4 (5) Z 3 in conjunction with § 10 (7) 34

ORF-G by the ORF because the presenter of the program "ZIB 2" did not react directly to the objectionable statement by *** and did not distance herself from this polemical statement, contrary to an obligation arising from these provisions, in the opinion of the Federal Administrative Court. In doing so, the Federal Administrative Court also misjudges the significance of Art. 10 ECHR:

4.1. In principle, as the European Court of Human Rights has already held on several occasions (35

(see ECtHR 14.12.2006, case *Verlagsgruppe News GmbH*, Appl. 76.918/01, NL 2006, 311 [Z 33]; 14.2.2008, case *July and Sarl Libération*, Appl. 20.893/03 [Z 71]; 4.12.2018, case *Magyar Jeti Zrt*, Appl. 11.257/16, NLMR 2018, 539 [Z 80]), no obligation on the part of a journalist to "distance" themselves from the content of a statement made by a third party, which they reproduce in the form of a comment or quotation or which they receive as a response in an interview situation, in the sense that the journalist would have to relativize the statements made by the third party or their counterpart because they "offend, shock or disturb." Even according to the objectivity requirement of § 4 (5) Z 3 ORF-G, which applies specifically to the ORF, a journalist, such as a news program presenter as in the present context, is not required to continuously distance themselves from statements made by their interview partner about third parties

, a journalist, such as a news program presenter as in the present context, is not required to continuously evaluate and, if necessary, relativize statements made by their interview partner about third parties. This does not, of course, preclude an interviewing presenter from asking critical questions in the performance of their journalistic function and countering a pointed opinion of the interviewee with other opinions or even their own. However, they are not fundamentally obliged to do so by the requirement of objectivity.

A need to respond may arise from the requirement of objectivity in Section 4 (5) of the German Broadcasting Act () 36

ORF-G only applies in specific circumstances. This is the case, for example, with regard to the requirement to give appropriate consideration to the diversity of opinions represented in public life within the meaning of Section 4(5)(2) ORF-G, if, in view of the composition of, for example, a panel discussion in a program or an individual interview, it must be pointed out that third parties about whom evaluative statements are made are not present and therefore cannot respond. Of course, such a response is only necessary if, in the overall context of the program and in view of the opportunities available to the persons concerned to make their voices heard in the public debate, it cannot be assumed that the persons concerned will be able to present their views in a comparable manner and thus respond publicly in any case. This can be assumed from the outset in the case of a leading politician who is in the public media spotlight and regularly seeks it, unless the statements in question clearly violate human dignity or fundamental personal rights within the meaning of Section 10 (1) or (6) ORF-G or otherwise violate comparable constitutional principles. In special circumstances, in order to preserve diversity and balance, the requirement of objectivity for public service broadcasting during election campaigns may also require that a specific voting recommendation made by the presenter at the end of an entertainment program be relativized after the program as not representing the views of the ORF (VfSlg. 17.082/2003).

4.2. Even if one were to consider the statement in question by *** to be a violation of Section 37 of the ORF Act ()

ORF against § 4 (5) in conjunction with § 10 (7) ORF-G because the requirements for fact-based traceability or the limits of even critical wording in a factual analysis were not met, the case at hand here

In any case, the statements in question do not constitute a case that would justify interference with the journalistic freedom of the ORF and its presenter in the light of Article 10(2) of the ECHR, which imposes a corresponding duty to respond. In any case, there is no serious disregard for the immediate personal and private sphere of *** outside his political function (performance), which could require a response from the presenter in view of Art. 10 (1) and (6) ORF-G. The assumption of a "duty to distance oneself" to the effect that the presenter should immediately "diversity of opinion" towards her interview partner would be incompatible with the freedom of broadcasting companies and their journalistic activities guaranteed by Art. 10 ECHR, both for broadcasting companies in general and for public broadcasting companies in particular, as it would fundamentally misinterpret the (externally pluralistic) concept of Art. 10 ECHR of a competition of free expressions of opinion.

4.3. The Federal Administrative Court () misjudged these relevant contexts in light of Article 10 of the ECHR when it assumed that the presenter had a duty to respond immediately to statements made by her interview partner that, in her opinion, were not in accordance with the requirement of diversity of opinion.

Federal Administrative Court misjudged these contexts, which are relevant in light of Art. 10 ECHR, when it assumed that the presenter had a duty to react immediately to statements made by her interview partner which, in her opinion, were not in accordance with the requirement of § 10 (7) ORF-G. In this respect, it applied § 4 (5) Z 3 in conjunction with

§ 10 (7) ORF-G, which is incompatible with the freedom of broadcasting protected by Art. 10 ECHR, in particular the ORF's journalistic freedom of design.

IV. Result

1. The complainants are therefore not affected by the contested decision in constitutionally guaranteed right to freedom of expression and broadcasting under Art. 10 ECHR. 39
2. The ruling must therefore be overturned. 40
3. This decision was made in accordance with § 19 (4) VfGG without oral in a closed session. 41

4. The decision on costs is based on Section 88 of the VfGG. The costs awarded include value added tax in the amount of €479.60 and a filing fee pursuant to § 17a VfGG in the amount of €240. 42

Vienna, December 10, 2020 The

President:

DDr. GRABENWARTER

Secretary: Mag.
SCHÖGGL