

## ARTISTIC FREEDOM

1.\* Since 1982, Art. 17a of the Austrian Basic Law of 1867 [*Staatsgrundgesetz 1867*] has guaranteed “the freedom of artistic creation and the publication and teaching of art [...]”. Therefore, artistic freedom has been established as an independent, unconditional basic right in the Austrian Constitution. Prior to that point in time, artistic freedom was already considered a part of protected freedom of speech under Art. 13 of the Austrian Basic Law of 1867.

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3.\* A separate division for the arts has been set up in the Federal Ministry for Education, Arts and Culture whose main responsibility is to support and promote contemporary art in Austria and to enhance the presence of Austrian artists abroad in the areas of the fine arts, architecture, fashion and design, music and the performing arts, photography, film and media art, literature and publishing, as well as regional cultural initiatives. There is a wide range of measures to support both individual artists and to aid structural development of the arts.

4.\* The term “artist” is defined in Section 2 (1) of the Artists’ Social Security Fund Act [*Künstler-Sozialversicherungsfondsgesetz*]:

“As defined by this federal law, an artist is a person who creates works of art based on her/his artistic capability within the scope of an artistic profession in the areas of the fine arts, the performing arts, music, literature, cinematic art or in one of the contemporary forms of the areas of art previously cited.”

Case law understands the term “contemporary forms” very broadly and is very work-oriented overall. An artist is a person who creates art. According to tax law, an artistic practice is “always deemed to be present if an individual creative activity is carried out in a comprehensive artistic category based on artistic talent.” The term “individually creative” is also extended to performing artists in the case of musicians, conductors, actors and directors. Furthermore, Section 2 (2) of the Artists’ Social Security Fund Act stipulates that a person who has successfully completed a university-level degree in one of the arts has the artistic capability of practising the artistic activities encompassed by that university-level degree. Therefore, persons with relevant professional artistic training and education fall under the scope of artistic activities, which specifically, but not exclusively include teaching.

In the relevant teachings, a broad, open, and typological concept of art is assumed that is determined primarily by the artist’s own self-image, however, that can depend on factors that can be objectively observed and assessed, for example, on the “honesty of the pursuit of artistic endeavours”.

5.\* The distinction between an artistic activity and crafts and decorative arts is fluid. The degree of originality of an artistic idea, a design, execution or presentation can be decisive in this regard.

6. and 7.\* ---

8.\* Since 2001, artists have been classified among the so-called “newly-self-employed” and are therefore covered by the compulsory health and pension insurance scheme of the Social Security Institution for Trade and Industry, as well as the accident insurance scheme of the Austrian Social Insurance for Occupational Risks (AUVA).

The Artists’ Social Security Fund Act (K-SVFG) provides for subsidies towards creative artists’ pension, health and accident insurance contributions under certain circumstances. Artists will only receive subsidies if they exercise an artistic activity as defined in the K-SVFG and if their earned annual income complies with maximum and minimum income limits. This means that a self-employed artist’s income must exceed a minimum income limit but must not go beyond a maximum income level.

The required annual minimum limit takes into account all self-employed artistic work and is the twelvefold amount of the marginal earnings threshold as defined in the General Social Security Act (ASVG) (€ 386,80 monthly for 2013). The annual maximum limit must not exceed the sixtyfold amount of the respective ASVG-marginal earnings threshold. The maximum income amount increases for every child for which there is the right to family allowance. As of 1 January 2013, the Artists’ Social Security Fund grants a maximum annual subsidy of € 1.722,00.

9.\* Artistic freedom cannot be restricted by any legal reservation, i.e. it is guaranteed absolutely and may not be restricted by law or by executive action. The holders of fundamental rights are, however, bound to the general limits of the legal system, for example, building law, the right of assembly, broadcasting law, etc. Artists must specifically, but not exclusively observe those legal norms that protect the rights of personality and protect against defamation, libel and slander and thus serve the orderly coexistence of people (e.g. Copyright Act: protection of images, Penal Code: defamation, Media Act: defamation, abusive language, mockery and libel and slander). According to case law of the Constitutional Court, restrictions specifically and intentionally targeting the limitation of this freedom are not permitted. Non-intentional encroachments on artistic freedom are permitted only if they are necessary and commensurate to protect another object of legal protection, whereby it is necessary that artistic freedom be weighed against the object of legal protection that is protected by said encroachment. In this context, sensitive conflict issues may arise

specifically, but not exclusively in the relationship of artistic freedom to other fundamental rights (e.g. freedom of religion) or the rights of personality of third parties.

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11.\* Censorship is prohibited. The Youth Media Commission [JMK] is a service and information centre of the Federal Ministry for Education, Arts and Culture. This Commission concerns itself with the audio-visual media as defined by the UN Convention on the Rights of the Child and acts in accordance with the recommendation put forth by the Council of the European Union with regard to the protection of minors. The objective is compliance with national standards and active participation in the development of international standards for the classification of media products, as well as the promotion of a positive media culture for children and young people. The Youth Media Commission is the official information centre for the Austrian federal states with regard to the age ratings of films. Assessments for the film industry (cinema operators, producers, distributors, etc.) are carried out upon request. The Commission provides assistance and guidance for parents and guardians regarding media education and protection of minors. Additionally, it provides information about films for children and young people whose content and form are worthy of particular attention. Furthermore, there is an understanding between ORF and the Ministry for Education relative to the protection of minors in the media. Upon request, films are reviewed for ORF with regard to their suitability for minors.

12.\* The procedure is described using the federal state "Vienna" as an example. In many public places, the presentation/performance of street art requires a space reservation. Street art presentations/performances are presentations/performances that are shown free of charge for short periods of time in public places without using any equipment, structures or podiums that have been specifically erected for this purpose. This includes musical performances, lectures, dance and vaudeville performances, pantomimes without theatrical equipment, performance of magic tricks, puppet shows and portrait artists. These space reservations are issued on the last Monday of the month for the following month. One space reservation contains dates for the entire month, whereby there are no performances on some days of the month. From a certain quota on, space reservations are issued only for individual days. They cost EUR 6.54 per space reservation.

13.\* The Ministry of Finance's sponsorship decree from May 1987 and the Federal Art Grants Act 1988 [*Bundes-Kunstförderungsgesetz*] explicitly emphasise the necessity of subsidies of the arts by private persons. On one hand, the sponsorship decree makes it clear under what conditions funding by sponsors for cultural events creates a sufficient advertising effect to make it tax-deductible as a business expense; on the other hand, the sponsorship

contribution is tax-deductible for the company only if the sponsorship is reported in mass media or if a large segment of the public is informed of it by way of commercial advertising (print adverts, posters). A mention in the programme of the event is not enough. Sponsoring of artists by individuals based on the personal inclination of the entrepreneur is not tax-deductible. Expenditure for cultural sponsoring is estimated to be about EUR 40 million per year. KulturKontakt Austria provides advice regarding cultural sponsoring and establishes contacts between business and industry and the cultural sector at no charge.

14.\* Of note is the Professional Association of Austrian Fine Artists [*Berufsvereinigung der bildenden Künstler Österreichs*] that has been looking after the interests of Austria's artists since 1912. Its responsibilities include representing artists vis-à-vis public and private entities, as well as the following activities: To unify artists working in all the fine arts and to represent and promote their artistic, business, legal, social interests and other interests specific to their profession as a professional association, specifically, but not exclusively by way of organising and promoting art exhibits and art events in Austria, supporting social facilities for its members, representing the interests of its members vis-à-vis government authorities, public agencies and institutions, as well as representing its members within the scope of the association under public law of copyright owners in Austria, Collecting Society for the Fine Arts, Photography, and Choreography [*Verwertungsgesellschaft Bildende Kunst, Fotografie und Choreografie GmbH*]. Another important aspect is the exchange of both art and information, as well as networking with artists' associations in other countries. There are also numerous, other, loosely structured organisations and societies for various art forms and genres.

15.\* There are various collecting societies that have been set up based on the Collecting Societies Act [*Verwertungsgesellschaftengesetz*] (e.g. Collecting Society for Radio Broadcasters [*Verwertungsgesellschaft Rundfunk GmbH*], Austrian Collecting Society for Authors, Composers, and Music Publishers [*Österreichische Verwertungsgesellschaft für Autoren, Komponisten und Musikverleger*], Collecting Society for the Fine Arts, Photography, and Choreography [*Verwertungsgesellschaft Bildende Kunst Fotografie und Choreografie GmbH*]) that handle the exploitation of copyright or associated intellectual property rights as a trustee for a large number of copyright owners or owners of associated intellectual property rights.

Walter/Mayer/Kucsko-Stadlmayer, *Grundriss des österreichischen Bundesverfassungsrechts* [Compendium of Austrian Federal Constitutional Law]<sup>10</sup>, 2007

Hengstschläger/Leeb, *Grundrechte* [Fundamental rights], 2012