

■ CONSTITUTIONAL DEVELOPMENTS

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Successive Authority and Separation of Powers

Austrian Constitutional Court,
Judgment of 12 June 2008, B 2184/06,
VfSlg 18.449/2008

The Austrian Constitutional Court rejected a complaint filed by a net-operator against a decision of the E-Control Commission in a dispute settlement procedure due to lacking legitimation resulting from the possibility of a request for review before an ordinary court. It came to this conclusion despite the fact that the decision remained effective until a final decision by the ordinary court.

I. Facts of the case

The applicant is a company which operates a network for the distribution of electricity. In addition to the system utilization charges, it also charged a community fee, which it had to pay according to the Viennese Act on Community Fees 1966 ("Wiener Gebrauchsabgabegesetz 1966"), to the authorized user. The user thought this additional charge was unlawful and took legal steps against it. The E-Commerce Commission, which was the competent authority, decided to a large extent in favor of the authorized user. According to § 16 para 3a of the Energy Regulatory Authorities Act ("Energie-Regulierungsbehördengesetz", hereinafter E-RBG), which was a constitutional law, the applicant had the possibility to bring the matter before the ordinary courts within four weeks. A decision of the E-Control Commission, however, remained effective until a judgment taken by the ordinary courts became final. The applicant did not only bring the matter before the ordinary courts, but also filed an application according to Article 144 of the Federal Constitutional Law ("B-VG") with the Austrian Constitutional Court. It alleged that § 16 para 3a was a violation of the principle of the separation of powers as enshrined in Article 94 B-VG, because it allowed for a decision of an administrative authority and a judgment of a court contradicting this decision to be in effect at the same time.

II. Relevant provisions

Article 44 B-VG

(3) Any total revision of the Federal Constitution shall upon conclusion of the procedure pursuant to Art. 42 above, but before its authentication by the Federal President be submitted to a referendum by the Federal people whereas any partial revision requires this only if one third of the members of the National Council or the Federal Council so demands.

Article 94 B-VG

Judicial and administrative powers shall be separate at all levels of proceedings.

Art 144 B-VG

(1) The Constitutional Court pronounces on rulings by administrative authorities including the independent administrative tribunals in so far as the appellant alleges an infringement by the ruling of a constitutionally guaranteed right or the infringement of personal rights on the score of an illegal ordinance, an illegal pronouncement on the republication of a law (state treaty), an unconstitutional law, or an unlawful treaty. The complaint can only be filed after all other stages of legal remedy have been exhausted.

§ 16 E-RBG

(1) (Constitutional Law) The following tasks are assigned to the E-Control Commission:

5. the arbitration of disputes between market players in those cases in which the one entitled to access to the net files a complaint against the net-operator (§21 EIWOG);

(3a) (Constitutional Law) The party, which is not content with decisions according to para 1 line 5, 6 and 20, can bring the proceedings before a court. As soon as the judgment of the court becomes final, the decision of the E-Control Commission will no longer be applicable. The decision about a request to restitutio in integrum is to be made by the court; the request is to be filed directly with the court.

III. Ruling of the Constitutional Court

According to the case law of the Constitutional Court, a complaint to the Constitutional Court pursuant to Article 144 para 1 B-VG is not admissible if there is a possibility to file a request for review of the decision before an ordinary court provided for by law, which could lead to the quashing of the decision, or any other possibility to assert the claim made.

The Constitutional Court emphasizes that § 16 para 3a E-RBG is a constitutional law. A comparison with its jurisprudence concerning successive authority provided for by ordinary law, in which the Court stressed that the decision of the administrative authority had to cease being effective as soon as a request for review was filed with a court, was therefore not possible. This is also true of any possible objection claiming that the preconditions of Article 20 para 2 B-VG would be questioned by this construction. The fact that the constitutional provision contravened Article 94 B-VG could not be seen as a total revision of the Federal constitution within the meaning of Article 44 para 3 B-VG.

Moreover, the Constitutional Court did not find a total revision of the Federal Constitution in the view of the principle of the rule of law. The claim that § 16 Abs 3a E-RBG could be considered to suspend the constitution, just as the Constitutional Court had found in its judgment VfSlg 16.327/2001 regarding

§ 126a of the Federal Public Procurement Law ("Bundesvergabegesetz"), was also not taken up by the Court. The reason for the annulment of this provision had been the fact that it generally suspended the Constitution for a part of the legal order by prescribing that the provisions in question should not be seen as unconstitutional. § 16 para 3a E-RBG, which regulates the legal protection in one particular area in contravention to Article 94 B-VG, was not comparable.

Therefore the Austrian Constitutional Court did not initiate proceedings to evaluate the constitutionality of § 16 para 3a E-RBG. Accordingly it dismissed the application.

IV. Assessment

In March § 16 para 3a became ineffective. However, the Austrian Constitutional Court's judgment raises some issues of general interest. Especially the Court's jurisprudence concerning successive authority and Article 94 B-VG and its approach to unconstitutional constitutional law are worth taking a closer look.

According to Article 94 B-VG judicial and administrative powers shall be separate at all levels of proceedings. This principle of the separation of judicial and administrative powers can be seen as an important part of the organizational side of the principle of the separation of powers,¹ which is one of the fundamental principles of the Austrian Constitution.² This principle of the separation of the administration and the judiciary implies an exclusion of interdependent levels of appeal, but successive authority seems to be an exception.³ In these cases the law provides for the opportunity to file a complaint against the decision of an administrative authority with a court. A successive authority of the ordinary courts is not compatible with Article 94 B-VG, if the administrative authority's decision does not cease to be effective as soon as a request for review is filed with a court.⁴ The court has to decide in the case, without revising the administrative authority's decision.⁵ If the administrative authority's decision remained effective and the court was entitled to revise it, the courts would be situated above the administrative bodies. The two would be merged into a single system of instances of appeal. Since they ought to be separated at all levels, this would be unconstitutional.⁶

However, there is one distinctive difference between the cases for which these principles have been established and the case at hand. As the Constitutional Court pointed out correctly, § 16 para 3a E-RBG is a constitutional provision just like

1 Ewald Wiederin 'Zur materiellen Gewaltentrennung zwischen Justiz und Verwaltung – im Besonderen: Zum Funktionsvorbehalt zugunsten der Verwaltung' (2009) *Juristische Blätter* 351, 351 et seq.

2 Theo Öhlinger, *Verfassungsrecht* (8th edn. facultas.wuv, Vienna 2009), 75 et seq.

3 Theo Öhlinger, *Verfassungsrecht* (8th edn. facultas.wuv, Vienna 2009), 606.

4 Christoph Grabenwarter, Michael Holoubek, *Verfassungsrecht – allgemeines Verwaltungsrecht* (facultas.wuv, Vienna 2009), 780.

5 Robert Walter, Heinz Mayer, Gabriele Kucsko-Stadlmayer, *Bundesverfassungsrecht* (10th edn., Manz, Vienna 2007), 558;

6 Instead of many Constitutional Court VfSlg 10452/1985.

Article 94 B-VG. The Austrian Constitutional Court therefore had to measure constitutional law against constitutional law.

In Austrian legal doctrine the fundamental principles of constitutional law stand above common constitutional law. An alteration of one of these principles has to be seen as a total revision of the constitution. According to Article 44 para 3, a referendum by the Federal people has to be held in case of such a total revision of the constitution. A constitutional law that contravenes one of these principles therefore is unconstitutional.⁷ *Christoph Grabenwarter*, however, points out that the relationship between the fundamental principles and ordinary constitutional law is not one of hierarchy but one of equality.⁸ According to him, the requirements of Article 44 para 3 B-VG are to be seen as procedural requirements. Such requirements can also be found in other provisions of the B-VG.⁹ Irrespective of the approach to this relationship, the result remains the same: A constitutional provision that contravenes one of the fundamental principles is either unconstitutional due to its rank in the hierarchy in the legal system or it is unconstitutional since it does not comply with the procedural requirements, as a referendum would be required according to Article 44 para 3 B-VG. In 2001, for the very first time, the Constitutional Court came to the conclusion that a constitutional law was unconstitutional. In this case, the provision in question generally suspended the Constitution for part of the legal order by prescribing that the provisions in question should not be seen as unconstitutional. This constituted a violation of the principle of the rule of law and the provision was therefore qualified as unconstitutional by the Constitutional Court.¹⁰

In the case at hand, however, the Constitutional Court did not go this far. Due to the very limited scope of application, namely the legal protection in one particular area, § 16 para 3a E-RBG did not constitute a violation of the principle of the separation of the administration and the judiciary laid down in Article 94 B-VG. Therefore, it cannot be seen as unconstitutional. Consequently, the Constitutional Court dismissed the application.

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7 Christoph Grabenwarter, Michael Holoubek, *Verfassungsrecht – allgemeines Verwaltungsrecht* (facultas.wuv, Vienna 2009), 58 et seq., 63; Theo Öhlinger, *Verfassungsrecht* (8th edn. facultas.wuv, Vienna 2009), 62; Robert Walter, Heinz Mayer, Gabriele Kucsko-Stadlmayer, *Bundesverfassungsrecht* (10th edn., Manz, Vienna 2007), 146.

8 Otto Depenheuer/Christoph Grabenwarter, *Verfassungstheorie* (Mohr Siebeck, Cologne/Vienna 2010), 402 et seq.

9 Otto Depenheuer/Christoph Grabenwarter, *Verfassungstheorie* (Mohr Siebeck, Cologne/Vienna 2010), 402 et seq.

10 Constitutional Court VfSlg 16327/2001.