

■ CONSTITUTIONAL DEVELOPMENTS IN AUSTRIA

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The Austrian Constitutional Court and the European Court of Justice

Austrian Constitutional Court
Judgement from December 13th, 2001 (VfSlg. 15.450)
Judgement from December 3rd, 2003 (VfSlg. 17.075)
Judgement from November 28th, 2003 (VfSlg. 17.065)

The Austrian Constitutional Court accepts the primacy of European Community Law over Austrian Law, even over Austrian constitutional law. Even though the primacy of European Community Law is accepted, the question of when the Austrian Constitutional Court will refer a case to the European Court of Justice (ECJ) is not easily answered. This short abstract demonstrates on the basis of three decisions of the Austrian Constitutional Court the circumstances in which the Austrian Constitutional Court will ask the ECJ for a preliminary ruling according to Art 234 of the EC Treaty.

Austrian Constitutional Court Judgement from December 13th 2001 VfSlg. 15.450

1) In the first case (VfSlg. 15.450/2001) a company doing business in the field of building and operating pipelines filed an application with the local tax authority according to the Energy-Tax-Reimbursement-Act (Energieabgabenvergütungsgesetz, BGBl. 201/1996, EAVG) for a refund of taxes paid for obtaining electric energy. The application was dismissed on the basis that only companies which produce tangible commodities are entitled to refunds. Other companies, which for example offer services, do not qualify for a tax refund under the EAVG.

In the constitutional complaint the applicant argued that the decision was based on an unconstitutional provision, because the provision differentiated on the basis of a non-objective reason between companies concerning tax refunds. It therefore violated the constitutional rights of the applicant.

Pursuant to Art 144 of the Austrian Constitution, the Austrian Constitutional Court had to decide if the administrative decision was based on a provision that violated the equal protection clause. However, before that question could be considered, the Court had to address the issue of whether the Austrian provision

of the EAVG was actually applicable in the pending case and was not overridden by a European Community Law provision. This issue was not easily solved: The EAVG could be qualified as a government aid under Art 88 (3) of the EC-Treaty. If the EAVG qualified as a government aid, the statute would have to have been notified to the European Commission to come into force. If the statute was not notified to the European Commission, it was not to be applied according to Art 87 of the EC-Treaty.

The Court asked the ECJ for a preliminary ruling on the question of whether the provision differentiating between companies that produced tangible commodities and those that did not had to be seen as a national measure that qualifies as a government aid in the meaning of Art 87 of the EC-Treaty. If so, would a national measure still qualify as a government aid if tax refunds were granted to companies regardless of their field of business?

The ECJ answered those questions by stating that a national measure that grants tax refunds to companies is not a government aid if it is applicable to all companies, regardless of their field of business. Therefore, a national measure that only grants tax refunds to companies that produce tangible commodities, qualifies as a government aid under Art 87 of the EC-Treaty.

The final ruling of the Austrian Constitutional Court was as follows: that provision of the EAVG, which differentiates regarding tax refunds on the basis of what field of business an entity is doing business in is a national measure that qualifies as a government aid and that has to be notified to the European Commission to be applicable. As it was not notified, that provision of the EAVG was not to be applied. Consequently the administrative decision in question was not based on a legal foundation; it was therefore issued arbitrarily and consequently was unconstitutional, violating the equal protection clause.

Austrian Constitutional Court
Judgement from December 3rd, 2003
VfSlg. 17.075

2) The second case (VfSlg. 17.075/2003) was filed according to Art 141 of the Austrian Constitution, under which the Constitutional Court rules on complaints against the lawfulness of elections. The facts of the case were that five Turkish citizens were excluded by the election commission from standing for election to the representative body of the chamber of labour, because they were not Austrian nationals. According to sec. 21 of the Austrian Chamber of Labour Act only Austrian nationals are eligible for election. The chamber of labor is an entity created by public law, with obligatory membership, and its duties are, inter alia, the advancement of workers' concerns, collective bargaining, inspections of work conditions, and providing advice to its members. It is organized democratically and its representative body is chosen by its members in free elections.

The applicant, the party for which those Turkish nationals ran, argued that those five Turkish nationals fell under Art 10 (1) of Decision No. 1/80 of the Association Council of September 1980 on the Development of the Association (Decision 1/80). This states that Member States of the Community shall, as

regards remuneration and other conditions of work, not discriminate against Turkish workers duly registered as belonging to their labour forces on the basis of nationality between them and Community workers. The claim was that they were illegally banned from the election and hence the election was unlawful.

To decide this case, the Austrian Constitutional Court first had to answer the question of whether Art 10 (1) of the Decision 1/80 was directly applicable as a European Community Law provision and therefore overrode sec. 21 of the Austrian Chamber of Labour Act, which states that only Austrian nationals are eligible for election. The Court asked the ECJ for a preliminary ruling on the question of whether Art 10 (1) of the Decision had to be interpreted in a way that conflicted with the national provision which stated that Turkish workers were not eligible to stand for election to the representative body of the Chamber of Labour. If so, was Art 10 (1) of the Decision 1/80 directly applicable?

The ECJ ruled that Art 10(1) of the Decision 1/80 was directly applicable and that it conflicts with a national provision that provides that Turkish Workers duly registered as belonging to the labour force of a Member State are ineligible for election to the representative body of an institution defending and fostering workers' concerns.

In its final ruling, the Austrian Constitutional Court held that the five Turkish employees were illegally excluded from the election and annulled the election.

Austrian Constitutional Court
Judgement from November 28th, 2003
VfSlg. 17.065

3) The background of the last case to be analysed (VfSlg. 17.065/2003) is as follows: the general mission of the Austrian Court of Audit is to inspect governmental departments and legal entities that are owned, controlled or run by the government. According to an Austrian Constitutional Law Provision, persons who draw a salary or a retirement pension above a certain amount from one or more entities under the jurisdiction of the Austrian Court of Audit must inform the respective legal entities. Then, the entity has to report to the Court of Audit, which prepares a public report listing all persons and their salaries and retirement pensions. If a legal entity does not report, the Court of Audit has to gather the necessary information directly by inspecting those entities.

Some entities that were obliged to inform the Court of Audit about the salaries of their employees refused to provide the information or to be checked by the Court of Audit, arguing that disclosing the information would infringe upon the affected employees' right to respect for private and family life. The Court of Audit filed a claim under Art 126a of the Austrian Constitution before the Austrian Constitutional Court arguing that the Austrian Court had jurisdiction over the entities in question and that those entities had to provide the Court of Audit with the necessary information so that this information could be published.

The entities in question argued that the aforementioned Austrian Constitutional Law Provision was ousted by a European Directive and so was not applicable. The Austrian Constitutional Court asked the ECJ for a preliminary ruling on the question

of whether European Law provisions concerning data protection conflicted with a national provision that obliged national authorities to collect and forward information concerning salaries in circumstances where the collection of this information leads to publication of names and salaries of employees. If so, are private persons, who are affected by the national provisions, able to directly invoke the relevant European Law provisions?

The ECJ ruled that the provisions on the protection of individuals with regard to the processing of personal data and on the free movement of such data do not preclude national legislation such as that at issue, provided that it is shown that the wide disclosure not merely of the amounts of the annual income above a certain threshold of persons employed by the bodies subject to control by the Austrian Court of Audit but also of the names of the recipients of that income is necessary for and appropriate to the objective of proper management of public funds pursued by the legislature, that being for the national courts to ascertain. Further, the EC Directive in question is directly applicable, in that it may be relied on by an individual before the national courts to oust the application of rules of national law which are contrary to those provisions.

The final ruling of the Constitutional Court was that the Court of Audit has the competence to inspect all documents (including those that are private and confidential) concerning salaries and retirement pensions. But – to ensure an effective supervision over public funds – it is not necessary and appropriate within the meaning of Art 8 ECHR, which forms part of the legal principles of the European Union to publish names in connection with salaries and retirement pensions. Therefore the directly applicable European Law provisions concerning data protection trumped the Austrian Constitutional provision in question. Consequently, the Court of Audit did not have the competence to publish the collected data.

Outlook

Given the wide range of competences the Austrian Constitutional Court has, this abstract gives just a short overview on the basis of three cases of the circumstances in which the Court asks the ECJ for a preliminary ruling pursuant to Art 234 of the EC Treaty. The topic is complex and highly sophisticated, but generally it can be said that, if the Court has jurisdiction in a certain case under the Austrian Constitution – in other words, in a case where a question of constitutionality has to be answered – and has reason to believe that the Austrian provision in question conflicts with a European Law Provision, the Court will move for a preliminary ruling.

However, the Court has come in some cases to the conclusion that it is obvious that an Austrian provision conflicts with a European Law Provision and is therefore not applicable and cannot be the subject-matter of a constitutional proceeding. On other occasions, an inferior court has failed to ask the ECJ for a preliminary ruling, even though it was bound to do so. In such cases, the constitutional right to a lawful judge has been violated; the case was reversed and remanded by the Constitutional Court without referring it to the ECJ.

For an in-depth analysis of this topic the author suggests reading *Öhlinger/Potacs, Gemeinschaftsrecht und staatliches Recht, Die Anwendung des Europarechts im innerstaatlichen Bereich*, 3rd edition 2006, LexisNexis ARD Orac.

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