

■ CONSTITUTIONAL DEVELOPMENTS IN AUSTRIA

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Reverse discrimination – an example

Austrian Constitutional Court
Judgement from October 1st, 2007
G 237/06

In the judgement of October 1st 2007, the Austrian Constitutional Court ruled that parts of § 21 Abs 2 Salzburg Land Transfer Law 1997 ("Salzburger Grundverkehrsgesetz – Sbg GVG 1997") were unconstitutional. By reason of opposition to EC-Law, a discrimination of purely domestic cases ("*rein innerstaatliche Sachverhalte*") took place as a result of the supremacy of European Community law. The Court found no reasonable grounds for the violation of the equal protection clause.

Facts of the case

The Administrative Court had to decide on a complaint against the ruling of the Independent Administrative Tribunal ("UVS") Salzburg from Sept.12th 2005.

The claimant's application for authorization of his property transaction was rejected as inadmissible by the Independent Administrative Tribunal (UVS) on the grounds that there was no more effective legal transaction with regard to § 21 Abs 2 Salzburg Land Transfer Law 1997.

During the pendent procedure, the Administrative Court filed the application so that the Constitutional Court might declare that parts of § 21 Abs 2 Salzburg Land Transfer Law 1993, LGBl 152, proclaimed again as Land Transfer Law 1997 – GVG 1997, LGBl 11, were unconstitutional.

Relevant provisions

Section 7 Abs 1 Salzburg Land Transfer Law regulates certain transactions concerning agricultural or forestry plots that need to be approved by the competent administrative authority to get their full validity.

Section 21 regulates the invalidity of the transaction: as long as the necessary authorization is not issued, the contracting parties are not allowed to execute the transaction. Particularly, the entry of the acquisition in the land register is not admissible, whereas the parties stay tied on to the contractual obligations. If

the approval is rejected by the authority, the transaction becomes retroactively invalid.

Section 21 para 2 says that the transaction becomes retroactively invalid if the application for approval is not made within a certain period of time.

Art 7 para 1 Federal Constitutional Law (B-VG) reads:

"All nationals (Austrian citizens) are equal before the law. Privileges based upon birth, sex, estate, class or religion are excluded. No one shall be discriminated against because of his disability. The Republic (Federation, Laender and municipalities) commits itself to ensuring the equal treatment of disabled and non-disabled persons in all spheres of every-day life."

Art 56 para 1 EC-treaty provides:

"Within the framework of the provisions set out in this chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited."

Ruling of the Constitutional Court

According to § 7 Abs 1 Sbg GVG 1997, certain property transactions relating to built-on land require the consent of the authority to get their full validity. If the purchaser does not apply for authorisation by the competent land transfer authority within two years of the expiration of the three-month period, § 21 Abs 2 Sbg. GVG 1997 orders the transaction to become retroactively invalid.

In this judgement, the Constitutional Court assumed that this provision (now section 16 Salzburger Land Transfer Law 2001 as amended on LGBl Nr 99/2007 is regulating the invalidity of a transaction in exactly the same way) was in conflict with the freedom of capital transactions according to Art 56 EC for the same reasons as the European Court of Justice has mentioned in the case of *Burtscher vs Stauderer* Rs C-213/04 concerning a similar provision of the Vorarlberg Land Transfer Law ("Vorarlberger Grundverkehrsgesetz"-VGVG, LGBl. 61/1993).

The case of *Burtscher vs Stauderer* was about an acquisition of built-on land. According to Vorarlberg Land Transfer Law, the purchaser had to execute a declaration in respect to the acquisition of built-on land within three months afterwards. If the declaration had not been provided within two years of the expiration of the three-month period, the transaction would become retroactively invalid.

In this case, the European Court of Justice stated that such a penalty is not proportionate to the objectives pursued by the Vorarlberg Land Transfer Law. First, the Court criticized the fact that the sanction is automatic following the mere passing of the time-limit for submitting the requisite declaration and irrespective of the reasons for the delay. Furthermore, in the view of the ECJ for no reason deriving from infringement of the applicable substantive rules, such a penalty radically calls into question an agreement expressing the intentions of the parties and therefore cannot reflect the requirements of legal certainty, which are particularly important in relation to property acquisitions. Moreover, the ECJ argued that other measures with less wide-ranging effects, such as fines, could

penalise late submission of declaration. Under certain circumstances, a system of prior declaration (and even a prior authorization procedure) could be compatible with the free movement of capital, if it is necessary to achieve certain town and country planning objectives. However, the Court judged that a penalty such as the one at issue in the main proceedings cannot be regarded as absolutely necessary to ensure that the obligation to make a declaration of acquisition is complied with and to attain the objective of the public interest pursued by the VGVG. The answer of the ECJ to the national court's question was that Art 56 (1) EC precludes the application of national legislation, such as the VGVG, under which the mere fact that the requisite declaration of acquisition is submitted after the due date in the retroactive invalidity of the property transaction concerned.

In the case at hand, the Austrian Constitutional Court assumed that the ECJ's arguments can be transferred to those property transactions that are not only subject to a system of prior declaration, but also to a prior authorization procedure. The Constitutional Court argued that there cannot be a difference between these two systems with regard to the ECJ's in *Burtscher vs Stauderer*.

As a consequence, in the view of the Austrian Constitutional Court the provision of § 21 Abs 2 Sbg GVG 1997 to the extent of the appealed word orders stood in conflict with Art 56 (1) EC for the same reasons, which the ECJ took account of in the above mentioned case.

Whereas in cases relating to the European Community law ("*Gemeinschaftsrechtsbezug*"), a national provision is ousted in the event it violates a direct applicable EC-Law; in purely domestic cases, the national norm remains applicable.

Thus, primacy of application ("*Anwendungsvorrang*") of EC-law can lead to a discrimination against the country's own nationals ("*Inländerdiskriminierung*").

Moreover, the Constitutional Court held that rules and regulations that are in effect that put nationals in a worse position than foreigners need to be assessed on the basis of the equal protection clause (Article 7 para.1 of the Federal Constitution) which forces the legislator to treat equal issues in an equal manner. Thus, a discrimination against nationals is only constitutional if it is based on reasonable grounds ("*Sachlichkeitsgebot*"). Due to the fact that the Constitutional Court found no severe reasons in the instant case which could justify the violation of the equal protection clause, it asserted that the rescinded words of § 21 Abs 2 Sbg GVG 1997 (which, at the time, were already expired) were unconstitutional.

Assessment

Generally speaking, if the Constitutional Court has to deal with cases of discrimination against the country's own nationals, it should proceed in the following way: First, the Constitutional Court states whether it must judge on a case relating to European Community law. If that's the case, a provision which stands in conflict to EC-law would not be applicable. In the second step, if the Court has to deal with a purely domestic case, a discrimination against Austrian citizens in comparison with foreigners has to be measured against the equal protection clause with regard to the "double binding" ("*doppelte Bindung*") of the legislator within the implementation of EC-law.

In this judgement, the argument is in accord with the Court's preceding jurisdiction concerning the subject of discrimination against the country's own nationals ("*Inländerdiskriminierung*") (cf VfSlg. 14.863/1997, 14.963/1997, 15.683/1999).

Admittedly, there is one aspect that has to be pointed out: "Classical" cases of discrimination against nationals typically develop if, in a member states' legal order, there exists severe barriers to market access or very strict provisions concerning the approval of products (in particular, food law is concerned).

However, in this judgement, the Constitutional Court declared a provision (that caused a discrimination against nationals) as unconstitutional, which had a legal effect on a civil legal relationship.

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