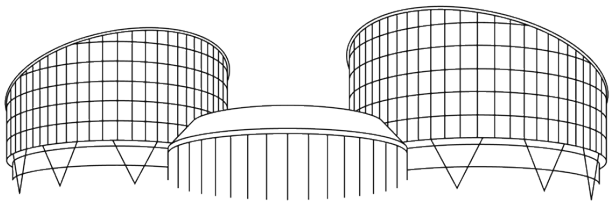

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF STEININGER v. AUSTRIA

(Application no. 21539/07)

JUDGMENT

STRASBOURG

17 April 2012

FINAL

17/07/2012

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Steininger v. Austria**,**

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Nina Vajić, *President,*
Anatoly Kovler,
Peer Lorenzen,
Elisabeth Steiner,
Khanlar Hajiyev,
Mirjana Lazarova Trajkovska,
Julia Laffranque, *judges,*

and André Wampach, *Deputy Section Registrar,*

Having deliberated in private on 27 March 2012,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 21539/07) against the Republic of Austria lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a business firm registered in Austria, company Franz Steininger ("the applicant company"), on 3 May 2007.

2. The applicant was represented by Mr J. Hofer and Mr T. Huemer, lawyers practising in Wels. The Austrian Government ("the Government") are represented by their Agent, Ambassador H. Tichy, Head of the International Law Department at the Federal Ministry for European and International Affairs.

3. The applicant alleged, in particular, that no tribunal within the meaning of Article 6 § 1 of the Convention had decided on the imposition of surcharges for unpaid contributions to the Austrian Agricultural Marketing Association.

4. On 23 October 2008 the application was communicated to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant company, which has its seat of business in Ernstbrunn (Austria), carries out cattle and pig slaughter, and is therefore liable to

agricultural marketing charges, calculated on the basis of the number of animals slaughtered, to be paid to Agrarmarkt Austria (AMA) under the Agricultural Market Act (*Agrarmarktgesetz*).

6. On 30 May 2006 the AMA issued a payment order against the applicant company, ordering it to pay outstanding contributions for the period of December 2005 and January 2006 in the amount of 11.730,05 euros (EUR) and, in addition, imposing a surcharge for failure to pay, amounting to 60% of the unpaid contributions. The applicant company appealed against the order. It argued in particular that the above system was contrary to the rules of the European Union on state aid. It also asked for oral hearings to be held on the appeal and also asked that the proceedings for enforcing the payment order be suspended.

7. The Federal Minister of Agriculture, Forestry, Environment and Water (*Bundesminister für Land- und Forstwirtschaft, Umwelt und Wasserwirtschaft*), acting as the appeal authority, dismissed the applicant company's appeal on 17 July 2006 without holding a hearing.

8. As regards the applicant's argument that the AMA contributions were levied for financing activities, the AMA quality programme, which was not in accordance with EU law, the Federal Minister found that after the decision of the European Commission of 30 June 2004 (C(2004)2037), the applicant company was in a position to know precisely which charges it had to pay. In that decision the European Commission had expressed that it had no objection to the AMA Quality programmes and quality mark registered as state aid NN 34A/2000 (*"Qualitätsprogramme und das AMA-Biozeichen und das AMA-Gütezeichen"*), because that state aid was in accordance with the Common Market provided for in the Treaty establishing the European Community. The Federal Minister referred further to the Administrative Court's decision of 20 March 2006, no. 2005/17/230, according to which also the levying of AMA contributions was in accordance with the relevant provisions of EU law (se §§ 24-27 below). The Federal Minister further held that it had not been necessary to hold a hearing because a hearing was only held if a decision was taken by a panel on an appeal against the decision of a tax office or a regional directorate of finance, which was not the case here.

9. On 25 July 2006 AMA dismissed the request for suspension of the enforcement.

10. Thereupon the applicant company lodged complaints with the Constitutional Court and the Administrative Court against the Federal Minister's decision. Before the Constitutional Court the applicant company complained, *inter alia*, that the surcharge imposed violated its constitutional right to property. Before the Administrative Court the applicant company complained that the appeal authority was not a court within the meaning of the case-law of the European Court of Justice which prevented it from having the lawfulness of the decision by the European Commission of

30 June 2004 reviewed by the European Court of Justice in proceedings under Article 234 of the Treaty of the European Union. As regards the imposition of the surcharge the applicant company complained that the findings of fact were insufficient. In particular the authority had failed to establish whether the objective and subjective elements of the offence (*objektiven und subjektiven Tatbildvoraussetzungen*) had been met. Relying on Article 6 of the Convention it complained further that no public hearing had been held and that no impartial tribunal established by law decided on the criminal charge against it (*"es ist kein unparteiisches, auf Gesetz beruhendes Gericht über den erhobenen strafrechtlichen Vorwurf eingeschritten"*). As the authorities imposing the surcharges had failed to hold an oral hearing, the applicant company asked the Administrative Court for a public hearing.

11. On 25 September 2006 the Constitutional Court declined to deal with the applicant company's complaint under Article 144 of the Federal Constitution for lack of prospect of success.

12. The Administrative Court dismissed the applicant company's complaint on 30 January 2007 and held as follows:

> "The present case does not differ in the questions of relevance to the decision from the one decided by the Administrative Court on 20 March 2006, no. 2005/17/230. Pursuant to Section 43(2) of the Administrative Court Act reference is made to it.
>
> For the reasons set out in that decision the breach of law complained of by the applicant company also does not exist in view of the present complaint, for which reason it can be dismissed without further proceedings *in camera*.
>
> For the reasons set out in the decision referred to also Article 6 of the Convention is of no relevance here."

II. RELEVANT DOMESTIC LAW

1. The AMA Act

13. The Federal Act Establishing the Market Regulation Institution "Agrarmarkt Austria", Federal Law Gazette 376/1992 (*Bundesgesetz über die Errichtung der Marktordnungsstelle "Agrarmarkt Austria"*, BGBl 276/1992 – "the AMA Act") defines "Agrarmarkt Austria ("AMA")" as a corporate body under public law (AMA Act section 2 paragraph 1). Its tasks comprise, *inter alia*, the promotion of agricultural marketing (AMA Act section 3 paragraph 1 (3)).

14. According to the AMA Act section 21a AMA collects agricultural marketing charges (*Agrarmarketingbeitrag*) for the following aims: (i) promoting and securing the distribution of domestic agricultural and forestry products and related processed goods, (ii) opening up and

maintaining markets for these products in Austria and abroad, (iii) improving the distribution of these products, (iv) promoting general measures for improving and maintaining the quality of these products (in particular agricultural products) and for providing relevant information to the consumer regarding the quality of the products and (v) promoting other marketing measures (in particular by means of offering its services and bearing personnel costs).

15. AMA finances its activities by levying charges. Under Section 21c in conjunction with sections 21e of the AMA Act, *inter alia*, individuals and companies operating establishments for slaughtering and butchery of cattle, calves, pigs, lambs and sheep are liable to AMA for agricultural marketing charges. The duty to pay these charges arises at the time the animals are slaughtered (AMA Act section 21f paragraph 1 (3)).

16. Section 21g of the AMA Act, in so far as relevant, reads as follows:

> "(1) A debtor in respect of the charge has to submit a declaration of the charge due within the time-limit set out in section 21f para. 2 or 3, making use of a standard form provided for this purposes by AMA, in which he himself has to calculate, ... the charge to be paid ...
>
> (2) If the debtor has not paid the charge at all, not paid in due time or not in the correct amount, AMA has to make an order for payment of the charge, issuing a formal written decision.
>
> (3) If AMA establishes that the charge was not paid at all or not paid in the correct amount, it may increase up to double the amount due. In fixing the increased amount, it must be taken into account to what extent the debtor could be expected to be aware of the debt and whether the non-payment or insufficient payment had occurred for the first time or repeatedly. In cases of late payment AMA may impose default interest exceeding the base interest rate *(Basiszinssatz)* by 3%, unless this would constitute unacceptable hardship in the individual case."

17. The collection of the charges is incumbent on the AMA. Appeals against its declaratory decisions can be made to the Federal Minister for Agriculture, Forestry, Environment and Water. The AMA and the Federal Minister are tax authorities within the meaning of section 49 para. 1 of the Federal Tax Code (*Bundesabgabenordnung*). The Federal Minister is also the superior supervisory authority (the AMA Act section 21i (1-3)).

18. Section 21l of the AMA Act provides that non-compliance with the duty to submit a declaration of the charges due or non-payment of the charges caused by untrue or incomplete statements is an administrative offence for which the district administrative authority may impose a fine of up to EUR 3,630 or imprisonment in default, unless the act constitutes a criminal offence falling within the jurisdiction of the ordinary criminal courts or is subject to more severe penalties according to other provisions of the administrative criminal law. The district administrative authority has to inform the AMA about the outcome of any such administrative criminal proceedings pending before it.

2. The Administrative Court

19. Section 41(1) of the Administrative Court Act provides:

> "In so far as the Administrative Court does not find any unlawfulness deriving from the respondent authority's lack of jurisdiction or from breaches of procedural rules (section 42(2)(2) and (3)) ..., it must examine the impugned decision on the basis of the facts found by the respondent authority and with reference to the complaints put forward ... If it considers that reasons which have not yet been notified to one of the parties might be decisive for ruling on [one of these complaints] ..., it must hear the parties on this point and adjourn the proceedings if necessary."

20. Section 42(1) of the same Act states that, save as otherwise provided, the Administrative Court must either dismiss an application as ill-founded or quash the impugned decision.

21. Section 42(2) provides that

> "the Administrative Court shall quash the impugned decision if it is unlawful
>
> 1. by reason of its content, [or]
>
> 2. because the respondent authority lacked jurisdiction, [or]
>
> 3. on account of a breach of procedural rules, in that
>
> (a) the respondent authority has made findings of fact which are, in an important respect, contradicted by the case file, or
>
> (b) the facts require further investigation on an important point, or
>
> (c) procedural rules have been disregarded, compliance with which could have led to a different decision by the respondent authority."

22. Section 43(2) of the Administrative Court Act provides:

> "Every decision (*Erkenntnis*) must be reasoned. Insofar as questions of law have been clarified in the previous case-law, it is sufficient to refer to it."

23. If the Administrative Court quashes the impugned decision, "the administrative authorities [are] under a duty ... to take immediate steps, using the legal means available to them, to bring about in the specific case the legal situation which corresponds to the Administrative Court's view of the law (*Rechtsanschauung*)" (section 63(1)).

3. The Administrative Court's decision of 20 March 2006

24. In its decision of 20 March 2006, no. 2005/17/230 the Administrative Court decided on a complaint against a decision of the Federal Minister of Agriculture, Forestry, Environment and Water levying AMA contributions for July 2004 - that is for the period following the European Commission's approval of the AMA state aid programme on 30 June 2004.

25. The Administrative Court found that the Federal Minister had decided correctly when he had dismissed the appeal against the imposition of AMA charges for July 2004 and had interrupted proceedings on contributions in respect of periods before that date, pending the outcome of proceedings before the European Court of Justice concerning a similar question.

26. As regards the period after July 2004 AMA contributions were due because the European Commission had given its positive decision before that date. Insofar the appellant had argued that the decision of the European Commission was wrong and proceedings against that decision were pending before the Court of First Instance the Administrative Court found that, according to the case-law of the European Court of Justice, an alleged unlawfulness of a state aid affected the levying of contributions for financing that state aid only under specific circumstances, namely if there was a direct link between the amount of state aid granted and the amount levied as contribution. Since this was not the case as regards the AMA contributions, any alleged irregularity of the state aid had no relevance for its financing. For the same reason there was also no breach of Article 28 of the Treaty establishing the European Community (now Article 34 of the Treaty on the functioning of the European Union).

27. The Administrative Court also declined to hold an oral hearing in this case because the levying of parafiscal contributions, which was the subject mater of the proceedings at issue, did not involve the determination of a dispute on civil rights or obligations. Accordingly Article 6 of the Convention did not require an oral hearing.

4. The Constitutional Court's judgment of 14 October 1987

28. In a judgment of 14 October 1987 (G 181/86) the Constitutional Court held:

> "From the fact that it has been necessary to extend the reservation in respect of Article 5 of the Convention to cover the procedural safeguards of Article 6 of the Convention, because of the connection between those two provisions, it follows that, conversely, the limited review (*die (bloß) nachprüfende Kontrolle*) carried out by the Administrative Court or the Constitutional Court is insufficient in respect of criminal penalties within the meaning of the Convention that are not covered by the reservation."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION AS REGARDS THE LACK OF A TRIBUNAL DECIDING IN THE SURCHARGE PROCEEDINGS

29. The applicant company, which complained solely about the surcharges that it had to pay in excess of the charges due, complained that no tribunal decided in the proceedings on the surcharges. It relied on Article 6 § 1 of the Convention, which, in so far as relevant, reads as follows:

> "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing ... by an independent and impartial tribunal established by law. ..."

A. Admissibility

1. Applicability of Article 6 of the Convention

30. The Government argued that the complaint was incompatible *ratione materiae* with the provisions of the Convention because Article 6 did not apply to the proceedings at issue. The imposition of parafiscal charges, such as the marketing charges levied by AMA and surcharges in the event of non-payment, did not concern the determination of civil rights and obligations within the meaning of Article 6 § 1. The Government maintained that only under certain conditions proceedings on surcharges could be regarded as criminal proceedings within the meaning of Article 6 § 1, as the Court had found in the case of *Jussila v. Finland* [GC], no. 73053/01, ECHR 2006-XIII. According to this judgment the test for qualifying proceedings as criminal within the meaning of Article 6 was based on three elements, namely the qualification of the provision in domestic law as criminal, the character of the offence and the severity of the penalty the person concerned risked.

31. The Government maintained however, that the first condition was not met, because the imposition of a surcharge under domestic law was part of ordinary administrative law. Moreover, the AMA Act provided for a different and specific provision containing a criminal sanction, namely the AMA Act section 21l. As regards the nature of the surcharges, the relevant provisions of the AMA Act showed, in the Government's view, that this was primarily a lump-sum payment for additional work to be performed by the AMA, namely conducting formal administrative proceedings, and could not be regarded as a penalty. Also the third criterion was not met.

Considering that the amount imposed did not exceed 60% of the unpaid charges, the Government argued that the sanction could not be considered particularly severe.

32. The applicant company argued that Article 6 applied to the proceedings at issue because the proceedings on the surcharges imposed by the AMA under the AMA Act section 21g concerned the determination of a criminal charge, as the imposition of such charges clearly had a punitive element.

33. The Court observes that in the present proceedings the applicant company had been ordered by the AMA to pay surcharges, as they had failed to pay marketing charges, which are parafiscal contributions.

34. In the case of *Jussila,* (cited above), the Court found that Article 6 under its criminal head applied to proceedings on the imposition of surcharges for taxes. In doing so it examined whether the surcharge proceedings were "criminal" within the autonomous meaning of the Article, and to this end relied on three criteria, commonly known as the "*Engel* criteria" (see *Engel and Others v. the Netherlands*, 8 June 1976, § 82, Series A no. 22), to be considered in determining whether or not there was a "criminal charge". The first criterion is the legal classification of the offence under national law, the second is the very nature of the offence and the third is the degree of severity of the penalty that the person concerned risks incurring. The second and third criteria are alternative and not necessarily cumulative. This, however, does not exclude a cumulative approach where separate analysis of each criterion does not make it possible to reach a clear conclusion as to the existence of a criminal charge (see, as recent authority, *Sergey Zolotukhin v. Russia* [GC], no. 14939/03, § 53, ECHR 2009).

35. As regards the first criterion, it is apparent that the surcharges in the present cases were not classified as criminal but as part of the general framework of the AMA Act on the levying of marketing charges. This however is not decisive.

36. As to the second criterion, the nature of the offence, the Court observes that surcharges of the kind at issue in the present cases were not imposed by a general legal provision applying to taxpayers generally but to a more restricted group of persons – both physical and legal – who pursue a specific economic activity. Nevertheless the Court does not consider that section 21g of the AMA Act was aimed at singling out a specific group of the population and subjecting them to a particular regime, but rather at adapting a general obligation, that of the payment of taxes and other contributions due as a result of economic activities, to specific circumstances in order to make that obligation foreseeable. This does not therefore exclude the classification of section 21g of the AMA Act as "criminal" in the autonomous sense of the Convention.

37. Further, given the amount which can be imposed under the AMA Act section 21g, namely up to double the amount due, such an amount is

substantial and cannot be intended merely as pecuniary compensation for additional work. Also the sum actually imposed on the applicant company, which was 60% of the original charge, shows that the amount was not unimportant. Having regard to this, the Court considers that the surcharges were imposed by a rule which purpose was deterrent and punitive. The Court considers that this establishes the criminal nature of the offence and hence that Article 6 applies under its criminal head.

38. Thus, the Government's objection of the incompatibility *ratione materiae* of the applicant companies' claims with the provisions of the Convention has to be dismissed.

2. Exhaustion of domestic remedies

39. The Government submitted that the applicant company had not exhausted domestic remedies as regards its complaint under Article 6 of the Convention, as it had failed, in particular, to argue in the domestic proceedings that no tribunal within the meaning of Article 6 had decided on its case,

40. This is disputed by the applicant company which claimed that it made use of all available domestic remedies.

41. The Court observes that the applicant company, in its complaint to the Administrative Court argued that no impartial tribunal established by law decided on the criminal charge against it and relied in this respect on Article 6 of the Convention. The Court considers therefore that this matter has been brought sufficiently to the attention of the domestic authorities and thus rejects the argument that the applicant failed to exhaust domestic remedies.

42. The Court further finds that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention and notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

43. The Government argued that even if Article 6 applied to the proceedings at issue, there was no breach of this provision. They submitted that, according to the constant case-law of the Court, the requirements for a tribunal under Article 6 § 1 of the Convention were fulfilled if that body had full jurisdiction to review all questions of law and fact relevant to the legal dispute at issue. In the present case it was the Administrative Court which made the decision in the surcharge proceedings. Since it considered the applicant company's complaints on the merits, point by point, without ever

having to decline jurisdiction when replying to them, that court qualified as a tribunal for the purposes of Article 6 § 1 (*Zumtobel v. Austria*, 21 September 1993, § 32, Series A no. 268-A).

44. The applicant company did not comment on this point.

2. The Court's assessment

45. The Court reiterates that Article 6 § 1 of the Convention guarantees a right to a public hearing by an independent and impartial tribunal established by law. According to the Court's case-law, a "tribunal" is characterised in the substantive sense of the term by its judicial function, that is to say determining matters within its competence on the basis of rules of law and after proceedings conducted in a prescribed manner. It must also satisfy a series of further requirements - independence, in particular of the executive; impartiality; duration of its members' terms of office; guarantees afforded by its procedure - several of which appear in the text of Article 6 § 1 itself (*Belilos v. Switzerland*, 29 April 1988, § 64, Series A no. 132). Where a penalty is criminal in nature there must be the possibility of review by a court which satisfies the requirements of Article 6 § 1, even though it is not inconsistent with the Convention for the prosecution and punishment of minor offences to be primarily a matter for the administrative authorities (*Baischer v. Austria*, no. 32381/96, § 23, 20 December 2001; *Malige v. France*, 23 September 1998, § 45, *Reports of Judgments and Decisions* 1998-VII).

46. The Court reiterates further that decisions taken by administrative authorities which do not themselves satisfy the requirements of Article 6 § 1 of the Convention must be subject to subsequent control by a "judicial body that has full jurisdiction" (see *Umlauft v. Austria*, 23 October 1995, § 37, Series A no. 328-B with further references).

47. In the present case the AMA ordered the applicant company to pay surcharges, and the Federal Minister of Agriculture, Forestry, Environment and Water Federal Ministry, acting as an appeal authority, decided on its appeal against that decision. While the former is a public law body in which some administrative powers are vested, the latter is an administrative and government authority. None of them qualify as tribunals and it remains to be seen whether the two courts which were seized in the present proceedings, the Administrative Court and the Constitutional Court, do so.

48. The Constitutional Court, which did not to entertain the applicant company's complaint for lack of prospect of success, cannot be considered a "judicial body that has full jurisdiction" for the purposes of the present proceedings, which are criminal in nature (see *Umlauft*, cited above, § 38), even though it has on occasions been considered a tribunal in relation to civil claims (see *Pauger v. Austria*, 28 May 1997, § 59, *Reports of Judgments and Decisions* 1997-III, and *Kugler v. Austria*, no. 65631/01, § 50, 14 October 2010).

49. As regards the Administrative Court the Court observes that where an adjudicatory body which determines disputes over "civil rights and obligations" does not comply with Article 6 § 1 in some respect, no violation of the Convention can be found if the proceedings before that body are "subject to subsequent control by a judicial body that has "full" jurisdiction and does provide the guarantees of Article 6 § 1. Both the former Commission and the Court have acknowledged in their case-law that the requirement that a court or tribunal should have "full jurisdiction" will be satisfied where it is found that the judicial body in question has exercised "sufficient jurisdiction" or provided "sufficient review" in the proceedings before it (see *Sigma Radio Television Ltd v. Cyprus*, nos. 32181/04 and 35122/05, §§ 151-152, 21 July 2011, with further references).

50. In the case of *Zumtobel*, on which the Government relied, the Court considered for the first time whether the limited review of the Administrative Court, which is essentially bound by the findings of fact of the administrative authorities, not empowered to take evidence itself or to establish the facts and not entitled to rule in the relevant authority's stead, but has always to remit the case to that authority, was sufficient for the purposes of Article 6 § 1. The Court found that the subject matter of the dispute was not a matter exclusively within the discretion of the administrative authorities and, as to the submissions relied on before the Administrative Court by the applicant, it considered these submissions on their merits, point by point, without ever having to decline jurisdiction when replying to them or ascertaining various facts. The Court concluded that, in the circumstances of the case, the scope of the competence of the Administrative Court satisfied the requirements of Article 6 § 1 (see *Zumtobel*, cited above, §§ 31-32). The subject matter of the dispute on which the Court had put much emphasis was land expropriation for the construction of a provincial highway, and thus concerned the determination of civil rights and obligations (ibid. § 31). In its subsequent judgments in the cases of *Fischer* and *Nowicky*, the Court confirmed this approach in respect of cases falling under the civil head of Article 6 § 1 (see *Fischer v. Austria*, 26 April 1995, § 34, Series A no. 312; *Nowicky v. Austria*, no. 34983/02, § 41, 24 February 2005).

51. In the subsequent case of *Bryan*, which concerned an order for demolition of buildings, the Court found that in assessing whether the limited review available to the applicant, an appeal on points of law against a decision by an administrative authority, was sufficient it was also necessary to have regard to matters such as the subject-matter of the decision appealed against, the manner in which that decision was arrived at, and the content of the dispute, including the desired and actual grounds of appeal (*Bryan v. the United Kingdom*, 22 November 1995, §§ 44-45, Series A no. 335-A; see also *Potocka and Others v. Poland*, no. 33776/96,

§ 52, ECHR 2001-X; and *Družstevní záložna Pria and Others v. the Czech Republic*, no. 72034/01, § 111, 31 July 2008).

52. In the present case, however, the criminal head of Article 6 § 1 applies to the proceedings at issue and in its case-law the Court followed a different approach as regards the scope of review of criminal sanctions imposed by administrative authorities.

53. In a series of cases decided in 1995 the Court had to consider whether the Austrian system of administrative criminal justice in force at the time, an administrative body intervening at the first and second levels of jurisdiction, followed by a judicial review essentially carried out by the Administrative Court, complied with the requirements of Article 6 § 1 (see *Schmautzer, Umlauft, Gradinger, Pramstaller, Palaoro and Pfarrmeier v. Austria*, judgments of 23 October 1995, Series A nos. 328 A-C and 329 A-C). The Court answered this question in the negative and, as regards the Administrative Court, held as follows:

> "39. The powers of the Administrative Court must be assessed in the light of the fact that the court in this case was sitting in proceedings that were of a criminal nature for the purposes of the Convention. It follows that when the compatibility of those powers with Article 6 § 1 is being gauged, regard must be had to the complaints raised in that court by the applicant as well as to the defining characteristics of a "judicial body that has full jurisdiction". These include the power to quash in all respects, on questions of fact and law, decisions of the body at the level below. As the Administrative Court lacks that power, it cannot be regarded as a "tribunal" within the meaning of the Convention. Moreover, in a judgment of 14 October 1987 the Constitutional Court held that in respect of criminal penalties not covered by the reservation in respect of Article 5 the limited review carried out by the Administrative Court or the Constitutional Court was insufficient (see *Schmautzer,* cited above, § 36; *Umlauft*, cited above, § 39; *Gradinger,* cited above, § 44; *Pramstaller*, cited above, § 41; *Palaoro*, cited above, § 43; and *Pfarrmauer,* cited above, § 40)".

54. The same approach was followed in the case of Mauer (no. 2) (*Mauer v. Austria (no. 2)*, no. 35401/97, § 15, 20 June 2000).

55. In two further cases, *Janosevic v. Sweden* and *Västberga Taxi Aktienbolag and Vulic v. Sweden*, which concerned the imposition of tax surcharges qualified as criminal sanctions within the autonomous meaning of Article 6 § 1, the Court found that Contracting States must be free to empower tax authorities to impose sanctions like tax surcharges even if they come to large amounts. Such a system was not incompatible with Article 6 § 1 so long as the taxpayer can bring any such decision affecting him before a judicial body that has full jurisdiction, including the power to quash in all respects, on questions of fact and law, the challenged decision (*Janosevic v. Sweden*, no. 34619/97, § 81, ECHR 2002-VII; *Västberga Taxi Aktiebolag and Vulic v. Sweden*, no. 36985/97, § 93, 23 July 2002). It observed that the Swedish administrative courts had jurisdiction to examine all aspects of the matters before them and was not restricted to points of law but could also extend to factual issues, including the assessment of evidence. If they

disagreed with the findings of the Tax Authority, they had the power to quash the decisions appealed against. For these reasons, the Court found that the review had been conducted by courts that afforded the safeguards required by Article 6 § 1 (*Janosevic*, cited above, § 82; *Västberga Taxi Aktienbolag and Vulic*, cited above, § 94).

56. In the present case, however, the power of review of the Administrative Court is limited (see § 50 above) and has already been found by the Court insufficient for regarding it a tribunal within the meaning of the Convention in respect of proceedings that were of a criminal nature for the purposes of the Convention. In this respect the Court cannot overlook that the Austrian Constitutional Court itself has considered that the limited review (*die (bloß) nachprüfende Kontrolle*) carried out by the Administrative Court was insufficient in respect of criminal penalties within the meaning of the Convention (see § 28 above).

57. Moreover, turning to the decision taken by the Administrative Court in the present proceedings on the complaint brought by the applicant before it, the Court observes that this was a summary decision which merely related to questions of law (see § 12 above) consisting in a simple reference to a previous decision on a similar matter and containing no answer to the applicant company's complaint relating to the facts and cannot therefore be qualified as adequate "full review" of the applicant company's criminal conviction passed by an administrative authority.

58. In sum, the Court considers that in the proceedings at issue, which were criminal in nature, the applicant company did not have access to a tribunal within the meaning of Article 6 § 1.

59. There has accordingly been a violation of Article 6 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION AS REGARDS THE LACK OF A HEARING IN THE SURCHARGE PROCEEDINGS

60. The applicant company complained further under Article 6 § 1 of the Convention that no public hearing has been held in the surcharge proceedings.

61. The Government contested that argument.

62. The Court notes that this complaint is linked to the one examined above and must therefore likewise be declared admissible.

63. Having regard to the conclusions above, namely that the surcharge proceedings have not been conducted before a tribunal within the meaning of Article 6 § 1 of the Convention, the Court considers that it is not necessary to examine whether there has been a violation of Article 6 on account of the lack of a public hearing, because only a hearing before a

body which qualifies as a tribunal would have served a meaningful purpose (see *Alge v. Austria*, no. 38185/97, § 29, 22 January 2004).

III. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1

Admissibility

64. The applicant company also complained under Article 1 of Protocol No. 1 that the surcharges were not proportionate to the aim sought. It relied on Article 1 of Protocol No.1 to the Convention, which reads as follows:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

65. The Government argued that the applicant company had not exhausted domestic remedies, as it had merely mentioned in the proceedings before Constitutional Court that their "fundamental right to protection of possession" had been violated without, however, giving any substantive arguments in this respect. In any event there was no breach of Article 1 Protocol No. 1 as the contracting states had a wide margin of appreciation as regards the levying of taxes and other contributions and the interference with the applicant company's rights, if any, had been proportionate, as no excessive burden had been imposed on it.

66. This is disputed by the applicant company, which maintained that it properly exhausted domestic remedies. It also argued that the surcharges imposed on it were excessive, because, given their amount, they could not be considered as merely covering additional administrative costs incurred as a result of the non-payment of the contributions.

67. The Court observes first that the applicant company merely mentioned in the proceedings before Constitutional Court that its "fundamental right to protection of possession" had been violated, without giving any further details. However, it need not examine whether this constituted proper exhaustion of domestic remedies, as this complaint is in any event inadmissible for the following reasons.

68. The Court reiterates that as regards the right of States to enact such laws as they deem necessary for the purpose of "securing the payment of taxes, provided for in Article 1 of Protocol No.1, the legislature must be allowed a wide margin of appreciation (Gasus Dosier- und Fördertechnik

GmbH v. the Netherlands, 23 February 1995, § 60, Series A no. 306-B). According to the Court's well-established case-law, the second paragraph of Article 1 of Protocol No. must be construed in the light of the principle laid down in the Article's first sentence. Consequently, an interference must achieve a "fair balance" between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. The concern to achieve this balance is reflected in the structure of Article 1 as a whole, including the second paragraph: there must therefore be a reasonable relationship of proportionality between the means employed and the aim pursued (ibid, § 62). That balance will be lacking where the person concerned has to bear an individual and excessive burden (see Wieczorek v. Poland, no. 18176/05, §§ 59, 8 December 2009).

69. In the present case, the applicant company had to pay surcharges in the amount of 60 % of the unpaid contribution. Considering the wide margin afforded to the Contracting States and the amounts involved, the Court cannot find that this amount constituted an individual and excessive burden imposed on the applicant company.

70. It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

IV. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

71. Lastly, the applicant company complained under Article 6 § 3 (a) that in the surcharge proceedings it had not been informed in detail of the duty to pay these charges. Under Article 7 of the Convention it complained that despite the decision of the European Commission of 30 June 2004 the question to what extent charges had to be paid was not clear, and the relevant provision therefore lacked legal certainty. Under Article 13 it complained that it could only avoid the penalty by paying the allegedly illegal charges and therefore did not have an effective remedy at its disposal. Under Article 14 read in conjunction with Article 1 of Protocol No. 1 it complained of discrimination because the same penalty could apply, irrespective of the amount of charges not paid.

72. However, in the light of all the material in its possession, and in so far as the matters complained of are within its competence, the Court finds that they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols.

73. It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

74. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

75. The applicant company claimed compensation for pecuniary damage, consisting in the amount of the surcharge it had had to pay.

76. The Government commented that there was no causal link between the violation alleged and the pecuniary damage claimed by the applicant. It was by no means certain that the applicant company would not have had to pay the charges, had the procedural guarantees considered to have been violated been complied with.

77. The Court agrees with the Government that there is no causal link between the violation of the Convention and the pecuniary damage claimed by the applicant. Consequently, it makes no award under this head.

B. Costs and expenses

78. The applicant companies also claimed 2,673.44 euros (EUR) for costs and expenses incurred before the domestic authorities and courts and EUR 1,006 for costs incurred in the proceedings before the Court.

79. The Government argued that the costs claimed for the domestic proceedings were excessive.

80. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum.

81. The Court considers that the costs claimed both in respect of the domestic proceedings and the proceedings before the Court were necessary and reasonable as to quantum and awards them in full. It therefore awards the applicant company EUR 3,679.44 for costs and expenses, plus any tax that may be chargeable to the applicant company on this amount.

C. Default interest

82. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaint concerning the lack of a tribunal deciding in the surcharge proceedings and lack of a public hearing admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 6 § 1 of the Convention as regards the complaint concerning the lack of a tribunal deciding in the surcharge proceedings;

3. *Holds* that there is no need to examine the complaint under Article 6 § 1 of the Convention as regards the complaint concerning the lack of a public hearing in the surcharge proceedings;

4. *Holds*
   (a) that the respondent State is to pay to the applicant company, within three months of the date on which the judgment becomes final, in accordance with Article 44 § 2 of the Convention, EUR 3,679.44 (three thousand six hundred seventy nine euros and forty four cents), plus any tax that may be chargeable to the applicant company, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. *Dismisses* the remainder of the applicant company's claim for just satisfaction.

Done in English, and notified in writing on 17 April 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

André Wampach	Nina Vajić
Deputy Registrar	President