



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

FIRST SECTION

DECISION

Application no. 36855/06
TAUERNFLEISCH VERTRIEBS GMBH AND OTHERS v. Austria
and 21 other applications
(see list appended)

The European Court of Human Rights (First Section), sitting on
12 March 2013 as a Chamber composed of:

Isabelle Berro-Lefèvre, *President*,
Elisabeth Steiner,
Khanlar Hajiyeu,
Mirjana Lazarova Trajkovska,
Julia Laffranque,
Linos-Alexandre Sicilianos,
Erik Møse, *judges*,

and Søren Nielsen, *Section Registrar*,

Having regard to the above applications lodged on 1, 4, 5 and
6 September 2006 and 11 January 2007 respectively,

Having regard to the observations submitted by the respondent
Government and the observations in reply submitted by the applicants,

Having deliberated, decides as follows:

THE FACTS

1. A list of the applicant companies is set out in the Appendix.
2. The applicant companies were represented before the Court by
Mr J. Hofer and Mr T. Humer, lawyers practising in Wels. The Austrian
Government (“the Government”) were represented by their Agent,

Ambassador H. Tichy, Head of the International Law Department at the Federal Ministry for European and International Affairs.

A. The circumstances of the case

3. The facts of the case, as submitted by the parties, may be summarised as follows.

4. The applicant companies carry out the slaughter of cattle and pigs, which makes them liable under the Agricultural Market Act (*Agrarmarktgesetz*) to pay agricultural marketing charges, calculated on the basis of the number of animals slaughtered, to Agrarmarkt Austria (“AMA”), the national agricultural marketing board.

5. Between 23 March 2005 and 9 June 2006 AMA issued payment orders against the applicant companies, ordering them to pay outstanding contributions and imposing surcharges for failure to pay, in amounts between 10 and 90% of the unpaid contributions (see Appendix). The applicant companies appealed against these orders. They argued that the above system was contrary to European Union rules on state aid. They asked for oral hearings to be held in their appeals.

6. The Federal Minister of Agriculture, Forestry, the Environment and Water (*Bundesminister für Land- und Forstwirtschaft, Umwelt und Wasserwirtschaft*), acting as the appeal authority, dismissed the appeals by decisions given between 21 July 2005 and 7 July 2006 (see Appendix) without holding a hearing. The Minister found that, following a decision of the European Commission of 30 June 2004 (C(2004)2037), the applicant companies had been in a position to know precisely which contributions they had to pay. In that decision, the European Commission had stated that it had no objection to AMA’s quality assurance scheme and quality mark, registered as state aid under notification number NN 34A/2000 (“*Qualitätsprogramme und das AMA-Biozeichen und das AMA-Gütesiegel*”), because that state aid was in accordance with the Common Market provided for in the Treaty establishing the European Community (“the EC Treaty”).

7. Thereupon, the applicant companies lodged complaints with the Constitutional Court and the Administrative Court against the Federal Minister’s decision. Before the Constitutional Court they complained extensively that the system of levying AMA contributions was unconstitutional. Before the Administrative Court they complained that they had not had the opportunity to have the European Commission’s decision of 30 June 2004 reviewed by the European Court of Justice in proceedings under Article 234 of the EC Treaty. They stated as follows:

[translation]

“Because the respondent authority was not a tribunal within the meaning of the case-law of the European Court of Justice, the validity of the decision of the European

Commission could not be examined. Such an examination by the European Court of Justice will lead to a declaration of invalidity [of the impugned decision]. Therefore, also the complaining party's right to have at its disposal a complete system of review, in the present case through the application of Article 234 of the EC Treaty, was violated."

[original]

"Dadurch, dass die belangte Behörde nicht als Tribunal im Sinne der Judikatur des Europäischen Gerichtshofes ausgestaltet ist, konnte die Gültigkeit der Kommissionsentscheidung nicht geprüft werden. Eine solche Überprüfung durch den Europäischen Gerichtshof führt zur Ungültigerklärung. Die Beschwerdeführerin ist daher auch in ihrem Recht auf Gewährung eines lückenlosen Rechtsschutzes, im vorliegenden Fall durch Anwendung von Artikel 234EG verletzt."

They also complained that the findings of fact made by the authorities in imposing the surcharges had been insufficient. In particular, the authorities had failed to establish whether the objective and subjective elements of the offence (*objektiven und subjektiven Tatbildvoraussetzungen*) had been met. As the authorities imposing the surcharges had failed to hold an oral hearing, the applicant companies asked the Administrative Court for a public hearing.

8. On 27 February and 25 September 2006, the Constitutional Court declined to deal with the applicant companies' cases for lack of prospects of success.

9. Without holding oral hearings, the Administrative Court dismissed the applicant companies' complaints on 20 March and 30 June 2006. Referring to previous decisions on the same subject, it held that the order to pay surcharges had been in accordance with the Agricultural Market Act and that no constitutional rights had been infringed. As regards the alleged lack of foreseeability of the contributions, the Administrative Court found that, as the contributions had to be self-assessed by the applicant companies, it was both possible and reasonable for them to request a refund of the contributions if they were found to be unjustified.

B. Relevant domestic law

10. The relevant provisions of 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"), the Administrative Court Act (*Verwaltungsgerichtshofgesetz*) and a summary of the Administrative Court's decision no. 2005/17/230 of 20 March 2006, to which reference is made in the present decision, are reproduced in the Court's judgment in the case of *Steininger v. Austria* (no. 21539/07, §§ 13-28, 17 April 2012).

11. Article 234 of the Treaty establishing the European Community, at the relevant time, read as follows:

“The Court of Justice shall have jurisdiction to give preliminary rulings concerning:

- (a) the interpretation of the Treaty;
- (b) the validity and interpretation of acts of the institutions of the Community and ECB;
- (c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decision there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.”

COMPLAINTS

12. The applicant companies complained solely about the proceedings concerning the surcharges that they had been required to pay in excess of the contributions due.

13. Under Article 6 of the Convention, they complained that those proceedings had not been decided by a tribunal and that there had not been oral hearings before a tribunal in their cases. The applicant companies further complained under Article 6 § 3 (a) that they had not been informed in detail about their duty to pay contributions.

14. Moreover, the applicant companies complained that the relevant provision of the AMA Act had lacked legal certainty. Despite the decision of the European Commission, the extent to which contributions had to be paid had not been clear and the payment orders had thus violated Article 7 of the Convention.

15. They also invoked Article 13 of the Convention, claiming that they could only have avoided paying the surcharges by paying the allegedly illegal contributions.

16. The applicant companies also complained under Article 1 of Protocol No. 1 that the surcharges had not been proportionate to the aim sought. They also relied on Article 14 of the Convention in this respect, arguing that the same surcharges could apply irrespective of the amount of contributions that had gone unpaid.

THE LAW

A. Joinder of the applications

17. Given that these twenty-two applications concern similar facts and raise essentially identical issues under the Convention, the Court shall consider them together and render a single decision, in accordance with Rule 42 § 1 of the Rules of Court.

B. Complaint under Article 6 as regards the lack of a tribunal and lack of a hearing

18. The applicant companies, which complained solely about the proceedings concerning the surcharges that they had been required to pay in excess of the contributions due, submitted that those proceedings had not been decided by a tribunal and that there had not been oral hearings before a tribunal in their cases. They 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. ...”

19. The Government submitted that the applicant companies had not exhausted domestic remedies as regards their complaint under Article 6 of the Convention, as they had failed to argue during the domestic proceedings that those proceedings were not being decided by a tribunal within the meaning of Article 6.

20. This was disputed by the applicant companies, which claimed that they had made use of all available domestic remedies.

21. The Court considers that it must examine whether the applicant companies exhausted all available domestic remedies in respect of their complaint that no tribunal within the meaning of Article 6 § 1 decided in the surcharge proceedings, because only a hearing before such a body would have served a meaningful purpose (see *Alge v. Austria*, no. 38185/97, § 29, 22 January 2004). Therefore the Court will examine in the first place whether the applicant companies have complied with the requirement of exhaustion of domestic remedies as regards the question whether a tribunal within the meaning of Article 6 § 1 decided in their cases and, only if this question is answered in the affirmative, the issue of an oral hearing.

22. The Court reiterates that the rule of exhaustion of domestic remedies under Article 35 § 1 of the Convention obliges applicants to first use the remedies which are available and sufficient in the domestic legal system to enable them to obtain redress for the breaches alleged. The existence of the

remedies must be sufficiently certain both in theory and in practice, failing which they will lack the requisite accessibility and effectiveness. Article 35 § 1 also requires that complaints intended to be brought subsequently before the Court should have been made to the appropriate domestic body, at least within the limits laid down in domestic law, and further that any procedural means that might prevent a breach of the Convention should have been used (see *Aksoy v. Turkey*, 18 December 1996, *Reports of Judgments and Decisions* 1996-VI, pp. 2275-76, §§ 51-52; *Akdivar and Others v. Turkey*, 16 September 1996, *Reports* 1996-IV, p. 1210, §§ 65-67; and *Cennet Ayhan and Mehmet Salih Ayhan v. Turkey*, no. 41964/98, § 64, 27 June 2006).

23. The Court observes that, whereas the applicant companies complained before the Court of a breach of Article 6 of the Convention because a criminal charge against them had not been determined by a tribunal within the meaning of that provision, they had complained in the domestic proceedings, and in particular before the Administrative Court, that they had not had the opportunity to have a decision of the European Commission reviewed by the European Court of Justice in proceedings under Article 234 of the EC Treaty, because the appeal authority had not been a court within the meaning of the case-law of the European Court of Justice. Even allowing for some flexibility in the application of the rule of exhaustion, the Court cannot find that the applicant companies raised in substance before the domestic authorities the complaint they now make before the Court. The Court therefore considers that the applicant companies have failed to exhaust domestic remedies, as required by Article 35 § 1 of the Convention.

24. It follows that this complaint must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

C. Complaint under Article 1 of Protocol No. 1 to the Convention

25. The applicant companies also complained under Article 1 of Protocol No. 1 to the Convention that the surcharges had not been proportionate to the aim sought. Article 1 of Protocol No.1 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.”

26. The Government argued that the applicant companies had not exhausted domestic remedies, as they had not invoked Article 1 of

Protocol No. 1 at all before the domestic courts or other domestic authorities.

27. This was disputed by the applicant companies.

28. The Court observes that the applicant companies did not raise the issue they are complaining about before the Court in the domestic proceedings and therefore finds that they have failed to exhaust domestic remedies. It follows that this part of the application must be rejected in accordance with Article 35 §§ 1 and 4 of the Convention.

D. Other alleged violations of the Convention

29. Lastly, the applicant companies complained under Article 6 § 3(a) of the Convention that they had not been informed in detail of the duty to pay contributions. Under Article 7 of the Convention they complained that, despite the decision of the European Commission of 30 June 2004, the extent to which contributions had to be paid had remained unclear, and the relevant provision of the AMA Act and the payment orders based on it had therefore lacked legal certainty. Under Article 13 they complained that they could only have avoided paying the surcharges by paying the allegedly illegal contributions and therefore that they had not had an effective remedy at their disposal. Under Article 14 read in conjunction with Article 1 of Protocol No. 1 they complained of discrimination because the same surcharges could apply irrespective of the amount of contributions that had gone unpaid.

30. 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 these complaints do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols.

31. 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.

For these reasons, the Court unanimously

Decides to join the applications;

Declares the applications inadmissible.

Søren Nielsen
Registrar

Isabelle Berro-Lefèvre
President

APPENDIX

Application No.	Case Name	Date of application	Surcharge	Date of AMA payment order	Date of Federal Ministry appeal decision	Date of Constitutional Court judgment	Date of Administrative Court judgment
36855/06	Tauernfleisch Vertriebs GmbH	01/09/06	40%	23/03/05	21/07/05	27/02/06	20/03/06
37567/06	Scheucher-Fleisch GmbH	05/09/06	30%	23/03/05	21/07/05	27/02/06	20/03/06
37580/06	Strasser Schlächtereie GmbH	05/09/06	30%	25/03/05	21/07/05	27/02/06	20/03/06
37588/06	Fa. Franz Steininger	05/09/06	40%	23/03/05	21/07/05	27/02/06	20/03/06
37591/06	Herbert Handlbauer GmbH	05/09/06	40%	03/05/05	21/07/05	27/02/06	20/03/06
37602/06	Julius Kloiber Schlachthof GmbH	04/09/06	40%	08/07/05	01/08/05	27/02/06	20/03/06
37619/06	Josef Gruber Vieh-Fleisch GmbH	04/09/06	40%	25/03/05	21/07/05	27/02/06	20/03/06
37637/06	Fa. Franz Holzner	04/09/06	30%	25/03/05	21/07/05	27/02/06	20/03/06
37647/06	Schlachthof Artmayr GmbH	04/09/06	30%	25/03/05	21/07/05	27/02/06	20/03/06
38217/06	Schweinespezialbetrieb Innviertel GmbH	06/09/06	40%	25/03/05	21/07/05	27/02/06	20/03/06
3762/07	Fa. Johann Zsifkovics	11/01/07	20%	16/09/05	14/04/06	25/09/06	30/06/06
3764/07	Dachsberger & Söhne GmbH	11/01/07	40%	05/08/05	14/04/06	25/09/06	30/06/06

Application No.	Case Name	Date of application	Surcharge	Date of AMA payment order	Date of Federal Ministry appeal decision	Date of Constitutional Court judgment	Date of Administrative Court judgment
3765/07	Kälberschlächtere Huber GmbH	11/01/07	40%	02/09/05	14/04/06	25/09/06	30/06/06
6496/07	Fa. Franz Steininger	11/01/07	50%	05/08/05	14/04/06	25/09/06	30/06/06
6779/07	Julius Kloiber Schlachthof GmbH	11/01/07	50%	02/09/05	14/04/06	25/09/06	30/06/06
6780/07	Strasser Schlächtere GmbH	11/01/07	40% 50%	02/09/05 30/12/05	14/04/06	25/09/06	30/06/06
6781/07	Herbert Handlbauer GmbH	11/01/07	50% 60% 80% 90%	22/07/05 30/12/05 12/04/06 09/06/06	14/04/06 14/04/06 28/06/06 07/07/06	25/09/06	30/06/06 26/09/06
6782/07	Scheucher-Fleisch GmbH	11/01/07	40% 50%	16/09/05 30/12/05	14/04/06	25/09/06	30/06/06
6783/07	Schweinespezialbetrieb Innviertel GmbH	11/01/07	50%	22/07/05	14/04/06	25/09/06	30/06/06
6784/07	Josef Gruber Vieh- Fleisch GmbH	11/01/07	50% 60%	16/09/05 30/12/05	14/04/06	25/09/06	30/06/06
9664/07	Zeilinger GmbH & Co. KG	11/01/07	10%	12/10/05	14/04/06	25/09/06	30/06/06
9673/07	Schlachthof Artmayr GmbH	11/01/07	40% 50%	14/04/06 30/12/05	25/09/06	30/06/06	