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g) ECLI:AT:VFGH:2025:G168.2024 h) Codices (German)

Keywords of the Systematic Thesaurus

3.16 · General Principles - Proportionality

3.17 · General Principles - Weighing of interests

5.2 · Fundamental Rights - Equality

5.3.39 · Fundamental Rights - Civil and political rights - Right to property

Keywords of the alphabetical index

Housing, Rent / Brokerage fee, Obligation to pay

Headnotes

§ 17a of the Brokerage Act, according to which the tenant can only be charged a commission for the brokerage of a residential lease agreement if he or she has first contacted the real estate agent ("first-client principle"), aims to mitigate the effects on tenants of the actual balance of power in the housing market and strikes a fair balance between competing housing, social and urban development policy objectives.

Summary

1. § 17a of the Brokerage Act (*Maklergesetz*) provides for the "first-client principle" in commission agreements for the brokerage of residential leases. According to § 17a.1 and 2, the real estate agent can only agree on a commission with a person looking for a flat if the latter is the first client to approach the real estate agent with a request for mediation. If, on the other hand, the landlord is the first to contact the real estate agent, the agent cannot agree on a commission with the person looking for accommodation. § 17a.3 defines special situations in which the prohibition of commission agreements with the tenant also applies if the tenant is the first customer (e.g. in the case of a close economic relationship between the landlord and the real estate agent). In order to prevent circumvention of § 17a.1 to 3, agreements in which the tenant undertakes to pay a commission or other service in connection with the mediation or conclusion of a residential lease agreement to the real estate agent or landlord who is not entitled to a commission are invalid (§ 17a.5). § 17a.7 declares the agreement, demand or acceptance of services by the tenant to the landlord contrary to § 17a.5 an administrative offence. 2. The applicant rents out apartments in a house that he owns. He claims that § 17a of the Brokerage Act, as amended by the Act of 2023, violates both the principle of equality and the right to property. 3.1. The Constitutional Court observed that, when regulating tenancy law, the legislator must balance conflicting housing, social and urban development policy interests, whereby the legislator has a wide margin of discretion. Satisfying the housing needs of people with medium and low incomes is of particular importance. § 17a of the Brokerage Act pursues the legitimate objective of relieving tenants with low or moderate incomes in particular of

financial burdens and enabling them to meet their housing needs adequately, by declaring inadmissible agreements under which tenants pay commission for brokerage activities over which they have no influence and whose implementation and modalities they can hardly avoid due to the tight housing market. In this respect, the provision is intended to mitigate the effects on tenants of the real balance of power in the housing market. The measures provided for in § 17a are also suitable for achieving this objective. The Court also found that the legislature had not exceeded its wide margin of discretion. The provision is based on the actual conditions of the property market. As a rule, the landlord – unless he is looking for potential tenants himself – approaches an estate agent with a mandate to act as an intermediary for a specific rental property. The landlord can then choose the estate agent and agree the terms of the agency contract with him. Prior to the entry into force of the contested provision, when a tenant expressed an interest in a particular rental property, the estate agent usually made the arrangement of a viewing or the passing on of information conditional on the conclusion of a brokerage agreement which obliged the person seeking accommodation to pay a commission in the event of a rental agreement being concluded. Although the agent therefore usually acted as a double agent, in many cases tenants had to pay most of the agency costs or the entire commission on the basis of such agreements. In tight housing markets, tenants are unlikely to be able to influence such agreements, as they may fear that the tenancy agreement will be concluded with another tenant if they do not agree to pay the commission. Given the lack of *de facto* influence of the tenant on the brokerage agreement and the interest of the tenant in having his housing needs met at an affordable price, favouring the tenant appears to be objectively justified. In addition, in many cases the landlord benefits far more from the estate agent's agency activity than the person seeking accommodation. The Court agreed with the applicant that the brokerage activity is beneficial to both the landlord and the tenant, as the estate agent is obliged to protect the interests of both parties in the case of dual activity. In many cases, however, the landlord's savings – i.e. if the tenant only contacts the agent when he is interested in a particular property – are significantly higher than those of the tenant. While the landlord can essentially pass on all his costs (e.g. advertising the flat, contacting potential tenants, organising viewings) to the estate agent, it often makes little difference to the tenant whether he deals with an estate agent or the landlord himself. In such constellations, the time and effort required by the person looking for accommodation (in particular, searching for rental offers on various platforms, making contact, viewing the flat) is not reduced by the brokerage activity. Therefore, it is also objectively justified that the costs are borne by the person who primarily benefits from the estate agent's activity. While it must be admitted that § 17a of the Brokerage Act does not refer to the financial circumstances of the person seeking accommodation, this does not detract from the objectivity of the provision, especially since wealthy people seeking accommodation are also exposed to the power relations on tight housing markets – although perhaps not in the same way.

3.2. As far as the fundamental right to property is concerned, this right extends to every private right related to property, including private autonomy as such. The right to conclude or not to conclude a contract therefore also falls within the scope of this fundamental right. According to the case law of the Constitutional Court, the legislator may impose restrictions on property as long as this does not affect the essence of the fundamental right to the integrity of property or otherwise violate a constitutional principle that is also binding on the legislator, provided that the restriction on property is in the public interest and is not disproportionate. Referring to the case law of the European Court of Human Rights, the Constitutional Court found that § 17a of the Brokerage Act meets these requirements. The aim of the contested provision is – as stated above – to relieve tenants

financially, thereby enabling them to satisfy their housing needs and to protect them from the de facto balance of power on the market. 3.3. The Constitutional Court therefore dismissed the constitutional complaint against § 17a of the Brokerage Act as unfounded.

Cross-references

European Court of Human Rights:

- *Bittó and Others v. Slovakia*, no. 30255/09, 28.01.2014;
- *Edwards v. Malta*, no. 17647/04, 24.10.2006;
- *Hutten-Czapska v. Poland* (GC), no. 35014/97, 19.06.2006;
- *Mellacher and Others v. Austria*, no. 10522/83, 19.12.1989.