Identification: AUT-2015-1-002

a) Austria / **b)** Constitutional Court / **c)** / **d)** 03.07.2015 / **e)** G 239/2014 / **f)** / **g)** / **h)** www.icl-journal.com; CODICES (German).

Keywords of the systematic thesaurus:

2.1.1.4.4 Sources – Categories – Written rules – International instruments – **European Convention on Human Rights of 1950**.
2.1.1.4.18 Sources – Categories – Written rules – International instruments – **Charter of Fundamental Rights of the European Union of 2000**.
3.16 General Principles – **Proportionality**.
3.19 General Principles – **Margin of appreciation**.
5.2.1 Fundamental Rights – Equality – **Scope of application**.
5.3.39 Fundamental Rights – Civil and political rights – **Right to property**.

Keywords of the alphabetical index:

Property, deprivation / Property, right, scope / Creditor, banks, insolvency.

Headnotes:

In principle, the State can legitimately take measures to save a *Land* (regional body) responsible for bank liabilities from experiencing a situation similar to that of insolvency. However, measures affecting only a small group of investors are neither justified nor proportionate if they are obviously insufficient to prevent the bank from failing.

Summary:

I. The applicants (members of Parliament and the regional court of Klagenfurt) requested the Court to review parts of the Hypo Reorganisation Act *(Hypo-Sanierungsgesetz)*. Subdivided into four different laws, the Hypo Reorganisation Act provides for the restructuring and controlled winding-down of the Hypo Alpe-Adria – Bank International AG (hereinafter, "Hypo"), an Austrian credit institution in financial trouble, which had been nationalised in 2009. The two laws brought before the Court are the "HaaSanG" and "GSA". The HaaSanG foresees the expiry of certain subordinate claims as well as guarantees thereon and the deferral of certain disputed claims. The "GSA" establishes a wind-down unit, which determines the conditions to wind-down the portfolios by Hypo (hereinafter, "HETA").

Section 3 of the HaaSanG stipulates that, with the publication of a corresponding ordinance by the Financial Markets Supervisory Authority (hereinafter, "FMA"), all subordinate claims and shareholders' claims substituting equity maturing before the 30 June 2019 ("cut-off date") shall expire. Section 6 of the HaaSanG provides that creditors, whose claims fall under Section 3 of the HaaSanG, may gain a new claim against HETA if, after completion of the wind-down, assets remain. Disputed claims (claims whose status as subordinate or as shareholder's claim is unsure) are deferred at least until this date or until the proceedings are completed. According to the explanatory remarks to the government bill, a period of around five years (cut-off date on 30 June 2019) was deemed to ensure an orderly wind-down of the portfolios at the best possible conditions, while allowing the remaining subordinated claims to be honoured.

The applicants, however, submitted that the expiry of claims violated the fundamental right to the protection of property. They saw it as an expropriation or restriction of property rights. The *pari passu* principle was not respected because only claims of certain subordinate creditors were affected while other (equally subordinate) creditors as well as the Austrian federation as the owner of HETA could keep their claims. Even if a public interest were to be granted, the restriction of the right to property would be disproportional, violating the right to equal treatment. An ordinary insolvency procedure could have avoided this discrimination.

II. The Court considered the concerns. The creditors' claims were deemed to fall under the right to property as protected under constitutional law (Article 1 Protocol 1 ECHR and Article 5 Basic Law on the General Rights of Nationals) and European law

(Article 17 of the European Charter of Fundamental Rights). However, the Court found that the expiry of claims according to the HaaSanG was not an expropriation *stricto sensu* since the claims were chosen solely for their value. Moreover, the restructuring of Hypo was in the public interest. Since the legislator had discretion to make economic prognoses, he could choose a wind-down over ordinary insolvency proceedings. Also, a "hair-cut" may be necessary for the resolution of a bank in crisis. The differentiation between different groups of creditors ("normal" and "subordinate") was legitimate since subordinate creditors would also be left empty-handed in insolvency proceedings. Regarding the differentiation between subordinate creditors and the Austrian federation as the owner of HETA, it had to be taken into account that the Austrian federation had already put in more than € 5 billion to mitigate damages in the interest of other creditors.

However, the Court found that the right to property was nonetheless violated because the HaaSanG differentiated within the group of subordinate creditors by declaring only those claims that mature before 30 June 2019 as expired. Subordinate creditors with such claims were discriminated further as the securities and guarantees on their claims expired together with the claim. Meanwhile, the other equally subordinate creditors were not affected at all and even kept their interest claims. Since it turned out that the cut-off date could not prevent HETA from failing before the end of restructuring period (measures under the Bank Restructuring and Resolution Act had been taken with regard to the remaining creditors after the entry into force of the Hypo Reorganisation Act), it could not ensure an orderly restructuring and resolution.

The Court also agreed with the applicants regarding the expiry of all securities together with the claims foreseen in Section 3 HaaSanG (and Section 1356 of the Civil Code). This particularly affected guarantees by the *Land* of Carinthia according to the Holding Act of the *Land* of Carinthia ("K-LHG"). The Court emphasised that claims resulting from such statutory guarantees (rendering the claims quilt-edged and equipping them with qualified protection) constituted a severe restriction on the right to property. While the government claimed the protection of credit-worthiness of Austrian *Länder* as well as the prevention of an insolvency of the *Land* of Carinthia, the Court saw no reason solely for the specific group of subordinate creditors to be drawn on. The expiry of guarantees, which exclusively applies to those subordinate creditors whose claims expire while guarantees for other creditors remain unaffected, was found to be neither factually justified nor proportionate. Guarantees issued by a *Land* must not be rendered invalid retroactively, even when the *Land* is evidently incapable of bearing the risk (at the time of the judgment, the guarantees still amounted to around € 10.2 billion).

Regarding the GSA, the applicants submitted *inter alia* that it was unclear which assets may be transferred to other entities in the course of the winding-down of Hypo and that the minister of finance's discretion to decide how this transfer was affected (by way of ordinance or ruling) was too great. However, the Court found that owing to the legislator's margin of appreciation and the flexibility needed for the resolution of Hypo, the GSA is constitutional. Thus, certain rights (e.g. cancellation or approval) may legitimately be limited when deciding on restructuring measures and specific insolvency rules foreseen for a wind-down unit.

The Court thus concluded that the HaaSanG is unconstitutional and repealed it in its entirety. Hence, the FMA ordinance based on it was repealed as well. A deadline for correction was not set; thus, the HaaSanG is no longer applicable. As far as the applications concerned the GSA, they were dismissed as unfounded.

Cross-references:

European Court of Human Rights:

- *Olczak v. Poland*, no. 30417/96, 07.11.2002, *Reports of Judgments and Decisions* 2002-X;
- *Capital Bank AD v. Bulgaria*, no. 49429/99, 24.11.2005, *Reports of Judgments and Decisions* 2005-XII;
- *Grainger and others v. United Kingdom*, no. 34940/10, 10.07.2012.

Languages:

German.