

THE AUSTRIAN CLIMATE CASE- SUMMARY

On the 20th of February 2020, Greenpeace Austria and 8,063 petitioners filed a request with the Constitutional Court to invalidate tax exemptions that give credits to the aviation industry and not to less polluting public transportation forms like railways. The petitioners are represented by attorney Michaela Krömer and the filing was supported by Ökobüro, the alliance of the environmental movement in Austria. The request is based on Art. 2 and Art. 8 European Court of Human Rights (ECHR), Art. 2 and Art 7 of the EU Charter of Fundamental Rights (CFR), and the principle of equality of all under the law. The submission also contains a request for a preliminary ruling with the European Court of Justice (ECJ) regarding the legal nature of Art. 37 CFR.

Austria's constitution does not allow for generalized state inaction to be challenged in court. Hence, the plaintiffs challenge specific climate-damaging state action in the transport sector, which is still registers increasing greenhouse gas emissions. Value-added tax (VAT) exemptions on cross-border flights and kerosene exemptions on national flights make flying cheaper than taking the train in the country. This a big environmental problem considering that a train ride is 31 times more climate friendly than taking the plane. Both tax exemptions are ultimately borne by the customers, including the petitioners, who are all frequent users of the railway system. Some of the petitioners are particularly vulnerable to the consequences of the climate crisis due to their age, their socio-economic situation or health conditions.

The request for invalidation of the two tax exemptions is based on Art. 2 ECHR and Art. 2 CFR for all petitioners. Based on the case law of ECHR, the plaintiffs argue that the consequences of the climate crisis pose an imminent and foreseeable threat to the life of the petitioners. The state is fully aware of the consequences of the climate crisis. Austria is party to the Paris Agreement, several Austrian counties as well as the Austrian parliament have already declared climate emergency based on the reports by the IPCC (Intergovernmental Panel on Climate Change). Austria has a duty to protect its citizens from the known threats of the climate crisis but it is actively violating this duty, by granting tax exemptions to the aviation sector instead and thereby encouraging climate damaging behavior.

Some specific petitioners are more vulnerable than others to the impacts of climate change. Facing an additional burden imposed by the state's actions, they also request the aforementioned tax exemptions to be repealed on the basis of Art.8 ECHR and Art. 7 CFR.

The petition is also based on the constitutional principle of equality of all under the law. The present tax exemptions constitute a preferential treatment of the aviation sector over the railway system. Under Austrian law, unequal treatment of two comparable means of transportation has to be of public interest to be constitutional. In the present climate crisis, it is unacceptable to propose that cutting taxes on flight tickets can be of public interest. This is particularly true considering that Austria is not on track with its goals under the Paris Agreement, nor with the EU Effort Sharing Decision.

Lastly, the petition includes a request for a preliminary ruling with the ECJ. Both impugned tax exemptions are allowed for, yet not explicitly provided for, in the respective EU directives. Hence, they do not form part of the general taxation system. Given that Art. 37 CFR (which forms part of primary EU law) provides for a high level of environmental protection to be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development, the question arises whether Art. 37 CFR constitutes a binding right or a principle of EU law. If Art. 37 CFR constitutes a right, the question arises whether the tax exemptions granted by respective directives constitute a violation of this right. If Art. 37 CFR is not a right, but rather a principle of EU law, the ECJ should decide on its scope and legal relevance for EU secondary law, such as the respective directives. There is no ruling by the ECJ with regards to the legal nature of Art. 37 CFR, especially if individual rights can be conferred. The ECJ should therefore be requested to decide regarding this highly debated issue.

Currently, the case is pending with the Court which is yet to decide whether the petitioners have standing in the matter.