CONSTITUTIONAL COURT G
139/2021-11
June 27, 2023

DECISION

The Constitutional Court, chaired by President DDr. Christoph GRABENWARTER,

in the presence of the Vice President
Dr. Verena MADNER

and the members Dr.
Markus ACHATZ,
Dr. Sieglinde GAHLEITNER,
Dr. Andreas HAUER,
Dr. Christoph HERBST,
Dr. Michael HOLOUBEK,
Dr. Helmut HÖRTENHUBER,
Dr. Claudia KAHR,
Dr. Georg LIENBACHER,
Dr. Michael MAYRHOFER,
Dr. Michael RAMI and
Dr. Ingrid SIESS-SCHERZ

as voting leader, in the presence of the constitutional associate Matej SELEM, LL.M.
as secretary,

on the application of ***, represented by Niedermayr Rechtsanwälte GmbH, Stadtplatz 46, 4400 Steyr, to repeal Section 3 of the Climate Protection Act, Federal Law Gazette I 106/2011, as amended by Federal Law Gazette I 58/2017, as unconstitutional, decided in its closed session today:

The application is rejected.

Justification

I. Request

On the basis of Article 140 para. 1 subpara. c of the Federal Constitution, the applicant requests that the Constitution be 1

The Supreme Court may annul Section 3 of the Federal Act on Compliance with Maximum Quantities of Greenhouse Gas Emissions and the Development of Effective Measures for Climate Protection (Climate Protection Act - KSG), Federal Law Gazette I 106/2011, as amended by Federal Law Gazette I 58/2017, as unconstitutional.

II. Legal situation

The relevant provisions of the federal law on compliance with maximum 2
of greenhouse gas emissions and for the development of effective measures for climate protection (Climate Protection Act - KSG), Federal Law Gazette I 106/2011, as amended by Federal Law Gazette I 58/2017 read as follows (the contested provision is highlighted):

"Target

§ 1. The purpose of this federal law is to facilitate the coordinated implementation of effective measures to protect the climate.

Measures

§ Measures within the meaning of this Act are those that result in a measurable, reportable and verifiable reduction of greenhouse gas emissions or enhancement of carbon sinks, which are reflected in the Austrian greenhouse gas inventory in accordance with the applicable reporting obligations under international and European Union law. This includes sovereign and private-sector measures taken by the federal and state governments.

Allocation of established greenhouse gas emission ceilings; negotiations for the development of measures

§ (1) The greenhouse gas emission ceilings applicable to the Republic of Austria pursuant to obligations under international or Union law shall be determined in accordance with the Annexes. The ceilings may also be divided among sec- tors. The planning basis for the allocation of greenhouse gas emission ceilings to sectors for commitment periods from 2013 onwards shall be drawn up on the basis of a proposal by the Federal Minister of Agriculture, Forestry, Environment and Water Management on the basis of measures effective within Austria. This proposal shall also be submitted to the National Climate Protection Committee (§ 4). The final breakdown shall be recorded in an annex to this Act.

(2) Negotiations are to be held to develop measures to comply with the ceilings in the respective sectors. Negotiations shall in particular take into account possible measures in the following areas: increasing energy efficiency, increasing the share of renewable energy sources in final energy consumption, increasing overall energy efficiency in the building sector, integrating climate protection into spatial planning, mobility management, waste prevention, protecting and expanding natural carbon sinks, and economic incentives for climate protection. Measures can also be developed in the form of multi-year programs of measures and as joint measures by local authorities. The responsibility for conducting negotiations in the respective sectors lies with the federal ministries responsible in analogy to the Climate Strategies 2002 and 2007, and subsidiarily with the federal ministers responsible pursuant to the Federal Ministries Act 1986 (BMG), Federal Law Gazette No. 76, as amended. Negotiations shall commence one month after the submission of a proposal by the Federal Minister of Agriculture, Forestry, Environment and Water Management pursuant to subsection 1. Negotiations shall be concluded within nine months before the start of a commitment period, i.e. 31 March 2012 for the commitment period 2013 to 2020. If the greenhouse gas emission ceilings applicable to the Republic of Austria as of 2013 are exceeded in accordance with obligations under international or European Union law, further negotiations on the strengthening of existing measures or the introduction of additional measures shall be conducted without delay on the basis of an evaluation of the measures taken. These negotiations shall be concluded within six months.

(3) The result of the negotiations pursuant to para. 2 shall be recorded separately. The specified measures shall be implemented without delay.

(4) The Federal Minister for Agriculture, Forestry, Environment and Water Management shall report to the National Climate Protection Committee (§ 4) on the outcome of the negotiations pursuant to subsection 2 and the measures defined pursuant to subsection 3.

[…]

Entry into force

§ (1) Annex 2 as amended by Federal Law Gazette I No. 94/2013 shall enter into force at the end of the day on which it is promulgated.

(2) Article 1 of the Federal Act BGBl. I No. 128/2015 shall enter into force at the end of the day of promulgation.

(3) § Section 3 (1) and (2) and Section 4 (2) and (4) in the version of the Administrative Reform Act BMLFUW, Federal Law Gazette I No. 58/2017, shall enter into force at the end of the day of publication; at the same time, Section 4 (3) and Section 5 including the heading shall cease to be in force.

Attachment 1

Greenhouse gas emission ceilings by sector for the commitment period 2008 to 2012 in million metric tons of carbon dioxide equivalent (calculated according to the revised 1996 IPCC Guidelines for National Greenhouse Gas Inventories).

Sector	Greenhouse gas emission ceilings 2008 until 2012
Space heating CRF sectors 1A4a, 1A4b and 1A4c	59,5
Energy application CRF sector 1A1	Non-emissi-ontrade: 8.9
Waste management CRF sector 6	10,5
Traffic CRF sector 1A3	94,5
Industry and manufacturing CRF sectors 1A2 and 2A, 2B, 2C, 2D and 2G	Non-emissi-on trade: 18.4
'Fluorinated gases CRF sectors 2E and 2F	7,0
Other emissions CRF sectors 1A5, 1B and 3	4,5
Agriculture CRF sector 4	35,5

Annex 2 Annual

greenhouse gas emission ceilings by sector

for the commitment period 2013 to 2020 in
million metric tons of carbon dioxide equivalent
(calculated according to the 2006 IPCC Guidelines for National Greenhouse Gas Inventu- ries).

Sector	2013	2014	2015	2016	2017	2018	2019	2020
Waste management CRF sectors 1A1a - other fuels; and 6	3,1	3,0	3,0	2,9	2,9	2,8	2,8	2,7
Energy and Industry (non-emissi- on trade) CRF sectors 1A1 (less 1A1a - other fuels), 1A2, 1A3e, 1B, 2A, 2B, 2C, 2D, 2G and 3	7,0	6,9	6,9	6,8	6,7	6,6	6,6	6,5
Fluorinated gases CRF Sectors 2E and 2F	2,2	2,2	2,2	2,2	2,1	2,1	2,1	2,1
Building CRF sectors 1A4a and 1A4b	10,0	9,7	9,4	9,1	8,8	8,5	8,2	7,9
Agriculture CRF sectors 1A4c and 4	8,0	8,0	8,0	7,9	7,9	7,9	7,9	7,9
Traffic CRF-Sectors 1A3a (less CO_2), 1A3b, 1A3c, 1A3d and 1A5	22,3	22,3	22,2	22,1	22,0	21,9	21,8	21,7
Total-sum	52,6	52,1	51,5	51,0	50,4	49,9	49,4	48,8"

III. Application submission and preliminary proceedings

1. In support of its application, the applicant states in summary the 3
The following from: Austria is committed to comprehensive environmental protection. This is constitutionally regulated in the Federal Constitutional Act on Sustainability, Animal Protection, Comprehensive Environmental Protection, Securing Water and Food Supply and Research, Federal Law Gazette I 111/2013. The area of climate protection is regulated in the Climate Protection Act, which, according to § 1, is intended to enable the coordinated implementation of effective climate protection measures. After the expiry of the year 2020, the commitment periods under the Kyoto Protocol 2015 had been "cancelled", the requirement under the "Paris Agreement 2015" was now decisive. Austria has committed itself to a reduction of 16% by 2020, and a reduction of "at least 40/36%" by 2030. According to the official statistics of the Federal Environment Agency, Austria falls far short of the targets adopted on the basis of the Kyoto Agreement.

1.1. The applicant considers his rights to have been violated by § 3 KSG. § 3 4
Paragraph 1 of the KSG stipulates that the Republic's obligations under international or European Union law with regard to the maximum quantities of greenhouse gas emissions shall be determined in accordance with the Annexes. According to para. 2, negotiations had to take place in order to implement these plans; subsequently, it was regulated in detail which bodies had to devote themselves to this procedure within which time horizon and which moments had to be taken into account. However, it is evident that measurable values to be reviewed at regular intervals and to be taken as a basis as a benchmark (§ 2) are not presented, as there is no description of which limit and/or threshold values may not be exceeded until which point in time. Rather, this is left to the outcome of the negotiations described in paragraph 2, so that it is ultimately left to the arbitrariness of the acting bodies whether and which requirements are initially stated, achieved or even exceeded in an unacceptable manner.

1.2. From the empirical data collected - reference is made to the enclosed evalua- 5
The report, which is based on the findings of the Federal Environment Agency, shows that the targets for the period up to 2020 have already been missed by a long way. It is notorious that the community of states did not agree in 2005 in the course of the consultations on Kyoto.

appropriate stance. The effectiveness of the [requirements] following the Paris Agreement on climate protection is also disputed. It is by no means beyond dispute that they are sufficient to serve the goal of limiting the rise in temperature. Many experts criticize that these targets are insufficient.

1.3. Austria has not even been able to "fulfill Kyoto" so far. 6
This is even less to be expected [in the future] if one considers the targets after Paris. It is evident that the provisions of the climate protection law are by no means sufficient to meet the requirements of international law and European Union law. On the contrary, its wording not only contains the seeds of failure, but also (possibly approvingly) accepts such a failure:

There is no sanction mechanism, he said, that would prevent an omitted or defective 7
cooperation of negotiating parties under Section 3(2) of the Act. A state of affairs consisting in a transgression of the external requirements would be without a sanction immanent in the law. Against this background alone, Section 3 KSG is completely ineffective and misguided. It does not permit the achievement of the climate protection targets and cannot ensure that even adequate efforts are made by the authorities concerned. Although climate protection is widely invoked as a state goal, the various actors have completely different assessments of its value and boycott such measures for environmental and climate protection. It should have been clear when the law was passed that it would not even begin to meet the goals pursued. In 2021, it was not even possible to update the law as required: While Annex 1 regulated the period 2008-2012 and Annex 2 that of 2013-2020, Annex 3, which would regulate the period from 2021 onwards, was obviously missing. This was a clear-eyed violation of international law and EU law.

1.4. As a result of this flawed statutory provision, the petitioner's 8
rights of freedom are violated: Necessary measures to be able to achieve the climate protection goals by 2030, at least to some extent, would be postponed to the future. In the next few years, it will be necessary to introduce increasingly stringent freedom

to provide for restrictive measures in order to achieve this. Practically every freedom is potentially affected by such cuts, because almost all areas of human life are connected with the emission of greenhouse gases. It is not foreseeable how the standard-compliant reduction could be achieved without massively restricting individual transport, travel and eating habits as well as industry, trade and commerce. Such a reduction would (have to) lead to "enormous restrictions of the freedom of acquisition, of freedoms in the sense of § 8 ECHR and other fundamental rights".

1.5. It is not misunderstood that the legislator has a legal policy shaping 9
The court held that the Federal Constitutional Court was entitled to discretionary powers. In the present case, however, a constellation existed which would suggest the assumption of an excessive regulation within the meaning of constitutional case law: This carries the seeds of complete ineffectiveness, since it is not ensured that external requirements with regard to climate protection can be implemented in a timely manner. The argument of the protection of legitimate expectations should be reversed in this respect. It may be required of the legislator that those subject to the norm and other addressees may trust that the legislator will comply precisely with the requirements. If this were not (or no longer) the case, the entire system of legislation and the rule of law would be disavowed. It could therefore be trusted that the requirements of international law and Union law would be implemented in a rule-conforming, comprehensible and effective manner. § Section 3 KSG does not permit this. The argument of the protection of legitimate expectations essentially refers to the fact that the person affected by a deterioration of the legal situation must be able to adjust to the new legal situation in good time. The expectations of someone who has to make long-term arrangements must be protected. In concrete terms, however, this is made impossible and turned into its opposite. It is already imperative to expect dramatic tightening. This risk is apparently not realized by fate, but is accepted by the legislator with a clear eye that its occurrence is certain.

1.6. The present legal situation is disproportionate. It is not in the rudimentary 10
The Constitutional Court ruled that § 3 KSG was not suitable to comply with international law, European Union law and constitutional law. § Section 3 of the KSG is therefore contrary to equality (Article 2 of the Basic Law).

1.7. The petitioner was directly affected by this unconstitutionality in his 11

rights violated. The direct concern was already given, since

this unconstitutionality in the form of the law had become effective for the applicant without a court decision or without the issuance of a notice. The law directly interfered with the applicant's legal sphere, as the interference was clearly defined in terms of its nature and extent. It is evident that § 3 KSG accepts violations of the decision-making process provided for therein, since the provision does not clarify which emission targets are to be achieved by when and with what intensity (and it is therefore left to the arbitrariness of the actors to agree on such targets or not). This im- plicates that in the following years all the more dramatic interventions have to follow in order to comply with the external requirements. As a result, the applicant's legally protected interests in acquisition, property and Article 8 ECHR are impaired. Furthermore, there is a current impairment, as it is already clear that more dramatic measures will have to be taken in the following years in order to achieve the specified climate protection goals, which will massively impair the applicant's freedom of acquisition and his travel behavior, his rights to his choice of food (a large number of the foodstuffs currently consumed cause a huge amount of pollution during production) and his residential behavior (there will have to be restrictions with regard to heating in order to convert this to sustainability). There was no other reasonable way available to the applicant to defend against the alleged unlawful interference. There is no possibility to file a petition against the failure of legislative duties in order to reach the supreme court by way of special administrative jurisdiction. If the legislator had adequately implemented its mandate in due time with regard to the Climate Protection Act, only a moderate, gradual reduction of the emission load would have been necessary in order to meet the objectives of the requirements. Therefore, the excessive restriction would only be necessary because the implementation of Section 3 of the Climate Protection Act had failed.

2. The federal government has issued a statement rejecting, 12
in the alternative, the rejection of the application.

2.1. The Federal Government considers the application inadmissible for several reasons- 13
sig. Insofar as the applicant refers to "freedoms in the sense of [...] other fundamental rights", it is not apparent to which legal provisions he refers. The presentation of the concerns is ultimately limited to two arguments: § 3 KSG

does not ensure that obligations under international and European Union law are fulfilled, which is why the regulation is disproportionate and contrary to equality. In order to fulfill these obligations, even more serious climate protection measures would be necessary in the future, which would lead to restrictions of the freedom of acquisition, of property and of the right to respect for private and family life.

On the question of the relationship between international law and EU law 14
The Federal Government could not, however, find that the applicant's statements precisely described the concerns with regard to the proportionality of the contested regulation or that they conclusively and verifiably set out the concerns with regard to the proportionality of the regulation. However, the Federal Government could not find that the concerns with regard to the proportionality of the regulation had been precisely described or conclusively and verifiably presented.

On the question of violation of the freedom of acquisition, the right to property and to 15
Respect for private and family life, the argument is essentially limited to the assertion that future restrictions of these fundamental rights would be excessive as a consequence of the inadequate regulation in Sec. 3 KSG. As to the question of the nature of these interferences, only the references to "travel behavior", "food choice" and "residential behavior" were found. The applicant does not address the questions of public interest, proportionality, suitability, necessity and adequacy of the intervention. Thus, the applicant's concerns with regard to freedom of occupation, property and respect for private and family life are not precisely described and are not presented in a conclusive and verifiable manner. Moreover, it is not even sufficiently clear which of these measures, in the applicant's view, should interfere with which fundamental rights position.

2.2. The fact that the applicant does not succeed in
presenting the infringements of
fundamental rights alleged by him in a
sufficiently precise and comprehensible manner is not surprising. For these encroachments are by no means "clearly determined by the law itself in terms of their nature and extent". Rather, they are hypothetical encroachments which (at least in the opinion of the applicant) are to be found in a
and for this reason alone he was not able to say much more about their nature

and extent than that they would affect "almost all areas of human life" and that they would be "dramatic".

or "excessive". It is therefore out of the question that effects, which would normally only result from an individual legal act, could be derived directly from Sec. 3 KSG.

2.3. It should also be noted that the Climate Protection Act is a
self-17 binding law. It lays down responsibilities and processes for the development of measures to comply with the maximum quantities of greenhouse gas emissions prescribed by EU law and allocates these maximum quantities to sectors by the year 2020. The Climate Protection Act thus obliges government bodies to take certain actions; it does not, however, create any rights or obligations for individual persons. This precludes from the outset the possibility that the climate protection act Act - and thus also its § 3 - affects the applicant in his legal sphere.

2.4. This result would not change even if the qua- 18
The applicant disputes the classification of the Climate Protection Act as a purely self-binding law. The purpose of an application under Article 140(1)(1)(c) of the Federal Constitution is to eliminate the alleged violation of law by repealing the challenged provision. If, on the other hand, the legal position of the applicant would not change in spite of the repeal of this provision, there would be no legitimation of the application (cf. e.g. VfSlg. 17.217/2004 and 18.512/2008). Exactly this case is evidently present here: The repeal of Section 3 KSG would not change anything about the inadequate implementation of requirements under international and EU law criticized by the applicant, nor would it change anything about the alleged violations of law derived from this by the applicant.

2.5. With regard to the substance of the comments, the Federal Government considers itself to be in a position to 19
on the legal situation in Germany and under international and European Union law on the subject of climate protection prompted the following corrections:

2.6. The Climate Protection Act only regulates greenhouse gas emissions in the so-called 20
Effort sharing (i.e., greenhouse gas emissions outside the EU emissions trading system). Greenhouse gas emissions covered by the EU emissions trading system, on the other hand, are not included. emissions, are
Subject of regulation of the Emission Allowance Act 2011, Federal Law Gazette I 118/2011.

2.7. The assertion that Austria has not fulfilled the obligations arising from the Kyoto agreement 21

The Commission is of the opinion that the European Union and the Member States have by far failed to meet the targets adopted. The European Union and the Member States jointly meet the reduction targets from the Kyoto Protocol to the United Nations Framework Convention on Climate Change (targets up to 2020) and from the Paris Agreement (targets from 2021). The achievement of these targets is ensured on the one hand by EU emissions trading, and on the other hand by the effort-sharing targets imposed on the member states under EU law. For the area of effort sharing - i.e. the area to which the Climate Protection Act refers - binding national climate protection targets (specifically: maximum greenhouse gas emissions) are already specified by EU legal acts.

2.8. It was true that Austria had not complied with the objectives of Union law pursuant to the Decree of 22

Decision No. 406/2009/EC in the years 2017, 2018 and 2019. However, Austria had fallen short of the targets in the years 2013 to 2016, in some cases significantly. For the year 2020, no inventory data are available yet; however, a significant decrease in greenhouse gas emissions is to be expected. As EU law allows for a balance between over- and underachievement within the years 2013 to 2020, it can be assumed from today's perspective that Austria will meet its effort-sharing targets in total over the years 2013 to 2020.

2.9. The assumption of the applicant that in the Climate Protection Act "concrete [...] 23

values are not presented, in that there is no representation as to which limit and/or threshold values may not be exceeded by which point in time", is misguided. In Annexes 1 and 2, the Climate Protection Act does indeed specify concrete annual sectoral targets for 2020 quantified in tons of carbon dioxide equivalent. With regard to the claim that Annex 3 is missing in the Climate Protection Act, which would regulate the period from 2021, it is noted that a new codification of the Climate Protection Act is currently being worked on on the basis of requirements from the government program 2020-2024, the resolution of the National Council 160/E 27th GP of 26 March 2021 and the Austrian Reconstruction and Resilience Plan 2020-2026. This law will also contain concrete values for maximum greenhouse gas emissions from the year 2021.

The applicant's conclusion, based on this, that it is the will- 24
It is wrong that it is left to the discretion of the acting bodies whether and which targets are met, achieved or exceeded. It is not important whether the specific values missed by the applicant are presented in the annexes to the Climate Protection Act or not. The maximum amounts of greenhouse gas emissions are prescribed by directly applicable Union law. Even if the Climate Protection Act did not contain any concrete values for maximum amounts of greenhouse gas emissions, there would therefore be no room for the arbitrariness alleged by the applicant.

2.10. Insofar as the applicant assumes that necessary measures will be limited to 25
The Commission notes that, if the necessary measures are postponed to the future in order to achieve the climate protection targets by 2030, at least to some extent, it must be noted that Austria is expected to meet its targets in effort sharing over the years 2013 to 2020 and that there can therefore be no question of postponing the necessary measures to the future.

2.11. As for the "enormous restrictions on the freedom to earn a living, on freedoms in the 26
The Federal Government was not in a position to comment on this for lack of any concretization of this argument. However, it appears highly questionable that possible restrictions on individual traffic, travel possibilities and eating habits are covered by the scope of protection of Art. 8 ECHR.

2.12. The arguments concerning the protection of legitimate expectations and the disproportionate nature of 27
is based on the incorrect assumption that it is not ensured that the external requirements can be implemented in a timely manner. Therefore, it is not necessary to elaborate on the alleged disproportionality and lack of equality of the contested regulation (and would not be possible in view of the fact that the concerns in this regard are neither precisely described nor presented in a conclusive and verifiable manner).

2.13. As far as the alleged infringement of the right of ownership is concerned, the 28
The Federal Government is also not required to comment on the content of this statement due to a lack of specifics.

IV. Admissibility

1. The application is not admissible. 29

2. Pursuant to Art. 140 para. 1 subpara. c B-VG, the Constitutional Court shall rule on 30
Unconstitutionality of laws at the request of a person who claims to have his rights directly violated by unconstitutionality, if the law has become effective for that person without rendering a judicial decision or issuing a notice.

A prerequisite for the right to file an application pursuant to Art. 140 par. 1 fig. 1 lit. c B-VG is a- 31
On the one hand, the applicant must claim that his or her rights have been directly infringed by the contested law - with regard to its unconstitutionality - and, on the other hand, that the law has actually become effective for the applicant without a court decision being rendered or without an official notice being issued. The basic prerequisite for the legality of the application is therefore that the law adversely affects the applicant's legal sphere and - in the case of its unconstitutionality - violates it.

It is necessary, moreover, that the law itself be actually enacted into law 32
sphere of the applicant is directly interfered with. Such an encroachment can only be assumed if the nature and extent of the encroachment is clearly defined by the law itself, if it not only potentially but actually impairs the (legally protected) interests of the applicant and if the applicant has no other reasonable means of defending against the - allegedly - unlawful encroachment (VfSlg. 11.868/1988, 15.632/1999, 16.616/2002, 16.891/2003).

In this respect, the Constitutional Court shall proceed on the basis of the submission of the application and le- 33
It is essential to examine whether the effects referred to by the applicant are such as required by Article 140 para. 1 subpara. 1 lit. c B-VG as a prerequisite for the legi- tation of the application (cf. e.g. VfSlg. 11,730/1988, 15,863/2000, 16,088/2001, 16,120/2001).

Pursuant to Section 62 (1) of the Constitutional Court Act (VfGG), the application to set aside a law as unconstitutional shall 34
to set out in detail the concerns raised against the law. The

Reasons for the alleged unconstitutionality must be described precisely, and the concerns must be presented in a conclusive and verifiable manner (VfSlg. 11.888/1988, 12.223/1989, 20.213/2017). The application must state with sufficient clarity to which legal provision the norm requested to be repealed is supposed to contradict and which reasons speak in favor of this thesis (VfSlg. 14.802/1997, 17.752/2006). It is not the task of the Constitutional Court to assign concerns raised in a general manner to individual provisions and - as it were by proxy - to specify the arguments for the applicant (VfSlg. 17.099/2003, 17.102/2004, 19.825/2013, 20.213/2017).

3. From the submission - as also pointed out by the Federal Government - it is not 35
It is not apparent which of the future measures mentioned by the applicant would interfere with which fundamental rights position. Thus, there is no presentation of the unconstitutionality "in detail", as required by Sec. 62 (1) VfGG.

4. The absence of an appropriate presentation within the meaning of Sec. 62 (1) second sentence VfGG is not a 36

The application is not a remediable formal defect but a procedural impediment.
The application therefore proves to be inadmissible.

V. Result

1. The application is rejected. 37

2. Pursuant to Section 19 (4) of the Constitutional Court Act, this decision could be taken in closed session. 38

be grasped.

Vienna, June 27, 2023
The President:
DDr. GRABENWARTER

Secretary: SELEM,
LL.M.