

# Another brick in the wall: Constitutional Court reviews statutory rent regulations

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## Introduction

### Rent regulations

### Alleged unconstitutionality of rent regulations

### Alleged unconstitutionality of cut-off date

### Comment

## Introduction

In 2015 Austria introduced an act which allows individuals, under certain conditions, to challenge laws before the Constitutional Court as unconstitutional. This gave hope to many landlords, which saw this as a tool to challenge the existing rent control regulations.

The first attempt at challenging the regulations failed because the Constitutional Court ruled that the application was inadmissible.<sup>(1)</sup> However, the Constitutional Court recently handed down two new decisions on the same matter with surprising results.<sup>(2)</sup>

## Rent regulations

Austrian tenancy law contains a rather complex set of rules limiting the maximum rent that can be charged by a landlord.

The cases at hand concerned limits applicable to the rent for residential leases in buildings which were – broadly speaking – erected before May 8 1945 (ie, the end of World War II in Europe). The permissible rent for such apartments is determined by reference to a predefined base rent, which is increased by surcharges if the apartment features certain additional characteristics and decreased if it lacks certain characteristics.

### **Base rent**

'Base rent' is defined as the rent deemed adequate for a standard apartment. Under the Rent Act, the base rent is delineated by considering, among other things, the particular size, condition, configuration and location of the property. The base rent is different for each of the nine Austrian provinces.

The base rents were originally calculated in 1992 by considering the typical acquisition costs of the real estate and the typical construction cost of an apartment situated in a house with at least four apartments. The quality of the building and the apartment was defined by reviewing the characteristics of the property which landlords must prove in order to be eligible for public housing subsidies.

The base rate is increased biannually commensurate to the Consumer Price Index. Increases in the property market and the production cost – in particular, by reason of additional requirements prescribed by the building code – are not reflected.

The base rents range from €5.09 per square metre (in Burgenland) to €8.57 per square metre (in Vorarlberg). The base rent for Vienna is €5.58 per square metre.

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### ***Surcharges and discounts of base rent***

Any deviation from this standard type of apartment incurs surcharges or discounts on the base rent. The Rent Act contains a non-exhaustive list of characteristics which lead to surcharges or discounts.

This system of determining the permissible rent is intended to be flexible in order to adequately reflect factual differences in the apartments on the market. However, it is also opaque and creates a large degree of uncertainty on the maximum applicable rent for both landlords and tenants.

### **Alleged unconstitutionality of rent regulations**

In G 428/2016, V75/2016, the claimant asserted that the rent regulations are unconstitutional for the following reasons.

#### ***Principle of equality***

The claimant argued that the base rent in question was arbitrary. The property and construction costs in Vienna are significantly higher than in other provinces. Nevertheless, the base rent for Vienna is the second lowest in Austria. Moreover, the claimant contended that the reference to public subsidies was inappropriate. As the regulations apply only to buildings erected before May 1945, none of the buildings in question were actually subsidised by public funds.

In principle, the Constitutional Court agreed that rules may not be arbitrary. However, in spheres such as housing, the legislature necessarily enjoys a wide margin of appreciation, as set out in European Court of Human Rights case law.<sup>(3)</sup> One of the aims of the rent regulations is to ensure that lower-income individuals can afford housing. Further, the regulations aim to prevent rent prices from increasing.

An overriding interest can justify deviations from the principle of equality. In the proceedings, the government demonstrated that there were more low-income individuals in Vienna than in the other provinces. Moreover, the percentage of persons that rent rather than own property is higher in Vienna. According to the government, these factors justify the base rent in Vienna being different from that in other provinces. The principle of equality is not violated if the base rent is determined on different proportions of land and construction costs, provided that the burden imposed on the landowners is not disproportionate. This would be the case only if the landlord could not cover the cost of maintenance and repair of the house from its rental income. The court ultimately found that the claimant had not shown this to be the case.

#### ***Protection of property***

The claimant argued that the rent regulations violated the landlord's ownership right because the landlord could not freely agree on the rent for the apartment.

The Constitutional Court agreed that such restrictions can violate the principle of protection of property. However, it was clear that the restrictions in question were justified and in the public interest, and that the rules were appropriate, necessary and proportionate to reach the regulation's aim of providing affordable housing.

#### ***Professional freedom***

The claimant also argued that the rent regulations violated the landlord's right to choose an occupation. The Constitutional Court rejected this argument for the same reasons as the other two fundamental rights.

In summary, the Constitutional Court held that the rent regulations which establish different base rents for each province are constitutional not only on the basis of actual cost, but also on the basis of the need for affordable housing.

### **Alleged unconstitutionality of cut-off date**

As outlined above, the rent for apartments which were – broadly speaking – built before May 8 1945 is heavily regulated. By contrast, the rent for other apartments is only loosely regulated. This cut-off date is also relevant for other tenancy law provisions.

In G 34/2017, V26/2017, the claimant asserted, among other things, that this cut-off date is entirely arbitrary and therefore violates the principle of equality.

The Constitutional Court rejected this argument and stated that it is up to the legislature to choose a cut-off date. The claimant must show why a specific date is inappropriate. The chosen cut-off date was justified because it was intended to encourage the construction of new apartments at a time when many buildings had been destroyed.

### **Comment**

These judgments clearly show the Constitutional Court's unwillingness to address this hotly debated subject. The court interpreted the legislature's margin of appreciation in the field of tenancy law in the widest possible way, making it virtually impossible to challenge any rent provisions on constitutional grounds.

The Constitutional Court's reasoning in the second decision was – to say the least – cynical. Even if the cut-off date may have been justified in the aftermath of World War II, how can this still be true 70 years later? Would it not also make sense to encourage investment in older buildings in order to raise the standard of living?

As the Constitutional Court has shut this door, landlords' hopes rest on the civil courts and the legislature to eliminate the existing discrepancies.

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### **Endnotes**

- (1) October 12 2016 decision, G 673/2015.
- (2) June 28 2017 decisions, G 428/2016, V75/2016 and G 34/2017, V26/2017.
- (3) ECHR decision 0522/83; 11011/84; 11070/84 (Mellacher).

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