Court

Constitutional Court

Decision Date

12/01/2011

Case Identification Code:

G74/11, V63/11

Collection Number

19568

Guiding Principle

No unconstitutionality of the animal protection law normalizes prohibition of the keeping and use of wild animals in circuses; no violation against the freedom of enterprise with regard to the public interest in animal welfare; discrimination against the keeping of wild animals in zoos objectively justified; rejection of the individual application concerning a regulation in the keeping of animals in the absence of immediate intervention in the legal jurisdiction of the contesting circus company

Verdict

1. **The request for annulment of the word "Circuses", in paragraph 1 of § 27 of the Animal Welfare Act, BGBI. I No. 118/2004 in the version BGBI. I No. 80/2010, is rejected.**
2. **The request for annulment of the "'Z 9 big cats (Pantherinae), of all types;', 'Z 10 small cats (felinae) with the exception of the wildcat (Felis silvestris) and the lynx (Lynx lynx);', 'Z 12 bears (Ursidae), of all types with the exception of the brown bear (Ursidae arctos);', 'Z 21 hippos (Hippopotaminae), of all types;', 'Z 22 giraffes (Giraffidae), of all types;' in § 9 of the ordinance of the federal minister for health, family and youth over the keeping of vertebrates that do not fall under**

1. the regulation on the keeping of animals, for vertebrates, that have special demands in keep and the wild animal types, for which the keep is forbidden (2nd Animal Keep Ordinance), BGBI. II

No. 586/2004, in the version BGBI. II No. 384/2007, insofar to be repealed as illegal, as it pronounces a ban of the keeping of wild animals in circuses", is rejected.

Reason

Decision Basis:

1. Proposal and preliminary procedure
1. The applicant seeks, with their individual applications based on Art. 140 (1) and Art. 139 (1) B-VG, the support of the Constitutional Court

"1. in accordance with Art. 140 (1) B-VG in conjunction with § 64 (1) VfGG to abolish the wording of § 27 (1) Animal Welfare law 'circuses' as unconstitutional.

2. in accordance with Art. 139 (1) B-VG the word sequences of the the ordinance of the federal minister for health, family and youth over the keeping of vertebrates that do not fall under

1. the regulation on the keeping of animals, for vertebrates, that have special demands in keep and the wild animal types, for which the keep is forbidden (2nd Animal Keep Ordinance), BGBI. 486/2004 in § 9

'Z 9 big cats (Pantherinae), of all types;', 'Z 10 small cats (felinae) of all types with the exception of the wildcat (Felis silvestris) and the lynx (Lynx lynx);', 'Z 12 bears (Ursidae), of all types with the exception of the brown bear (Ursidae arctos);', 'Z 21 hippos (Hippopotaminae), of all types;',

'Z 22 giraffes (Giraffiedae), of all types;' insofar to be repealed as illegal, as it pronounces a ban of the keeping of wild animals in circuses."

2. To the application legalization:

2.1. To their application legitimacy regarding the word "circuses," in § 27 (1) of the Animal Protection Act (TScG), BGBI. I 118/2004, idF BGBI. I 80/010 the applicant brings forth especially:

The invasion of her legal sphere is immediate, distinctly determined and prevailing. As an operator of a circus, who regularly held performances in Austria and in which she brought wild animals and exhibited as part of the program, she is the norm addressee of the prohibition of §27 (1) TSchG to keep animals in circuses. She is not only economically but also legally affected by this legislative provision. The prohibition of the keeping and involvement of wild animals in circuses affects them namely in their constitutional rights by Art. 5, 6 and 7 StGG 1867. It actually and not only potentially hinders her in conducting circus performances in Austria on the basis of her program which relies substantially on animal numbers. The applicant has applied for guest performances in Austria in the past years repeatedly, but this has been refused to her by §27 (1) TSchG. The next tour through Austria is planned for 2014. The lead time for a concrete planning of these tours takes at least two years in the circus industry, which is why it is necessary to be ready to begin.

The applicant has no open reasonable alternative. If she were to go to the territory of the Republic of Austria with her current animal stock and disregard the wild animal use prohibition in accordance with §27 (1) TSchG, she would commit a regulatory offense under §38 Abs3 TSchG which would be punishable by a fine of up to €3750. Nor could she be referred to apply for a grant under §23 TSchG, since it is only to be granted if the proposed keeping of animals does not oppose any animal keep prohibition.

But §27 (1) TSchG justifies a ban of this type. A reasonable alternative for the request for the issue of an exemption can not be seen. The regions of upper Austria and Carinthia as well as the citiez Linz, Graz and Innsbruck, have already informed her that there stands no possibility of an exemption.

2.2 For the application legalization with regards to the word sequence in §9 of the ordinance by the federal minister for health, family and youth over the keeping of vertebrates, that do not fall under the 1. Animal Keeping Ordinance, that have particular demands in handling and over wild animal types, which prohibits their keep on grounds of animal welfare (2nd Animal Keep Ordinance), the applicant submits:

They rights will be directly infringed under §9 of the 2nd Animal Keep Ordinance. On the basis of §27 (2) TSchG, as a circus company, it falls under the enacted regulation of the federal minister for health, and

women on the keeping and use of animals in circuses, vaudevilles and similar facilities (Animal Welfare Circus Ordinance) BGBI. II 489/2004. These held regulations regarding the use, handling, feeding, care and training of the allowed animal types and in this respect refer to §2 (1) on the evaluation of the minimal requirements of the first Animal Keep Ordinance and the second Animal Keep Ordinance. Through this reprimand, the prohibition on the keeping of wild animals continued even after the abolishment of the word "circuses," as well as for circuses under another in §27 (1) TSchG based on §9 of the 2nd Animal Keep Ordinance. However, the word sequences in §9 of the 2nd Ordinance on Animal Keep, which are intended to prohibit the keeping of certain types of wild animals (used in their circus), are only applied to the extent that they are lawful "as these pronounce a prohibition of the keeping of wild animals in circuses."

2.3 The federal ruling opposes individual application under Art. 140 (1) final sentence B-VG:

"The application legalization of the applicant is not given by the Federal government. Contrary to what is stated in the application, the applicant is open to a reasonable alternative for constitutionally standardized inspection. [...]

The keep and use of animals in circuses requires a governmental authorization by §27 (3) TSchG; this applies regardless of the type of animal (domestic animals or wild animals). The license is to be granted according to §27 (4) TSchG among others in accordance with §23 TSchG. The authority grants authorization only for proposals. By §23 Z2 TSchG authorization is granted if the proposed keep and use does not violate a 'prohibition of animal keep', as standardized in §27 (1) TSchG.

The applicant can therefore present a proposal for authorization of the keep and use of (wild) animals. A decision must be taken on this proposal. This provides the applicant a reasonable alternative to bring forth her concerns against §27 (1) TSchG in another way than through individual application by Art. 140 B-VG to the Constitutional Court.

A present outlook already in advance of the extension of a grant for the keep and use of wild animals does not remove the possibility of an alternative. According to the legal discussion of the Constitutional Court, in the question of the reasonability of the alternative, it does not come down to whether the opposition to this alternative is futile in itself because of the existing simple legislation (ie. VfSlg. 15.163/1998 mwN)."

The scope of the proposal is too tight over this to view the unconstitutionality made necessary:

"§22 (1) TSchG would say to the proposed grant as following: 'In varying and similar facilities, no types of wild animals are allowed to be kept or put to use.' By the definition of the §4 Z11 and 12 TSchG, circuses as well as vaudevilles facilities, that solely differentiate from one another in the type of performance. A circus is a facility with performances, 'that lie in the territory of the skill or the training of animals and can include acrobatic performances, serious and funny acts, pantomimes like dance and musical acts'; facilities with performances is a variety, 'that essentially targets conversation and therein rotate performances in declamatory or musical performances, artistic demonstrations, performances, short antics, song pieces, burlesques or theatre'. The performances in circuses on one hand and vaudevilles on the other want to be differentiated from one another; but they are in any case 'similar'. In the repeal only of the word 'circuses', the applicant would be considered a 'similar facility' as a vaudevilles in the prohibition of §27 (1) TSchG.

[...]

The Federal Court points out the following: The applicant brings forth that §27 (1) TSchG goes against Art. 16 AEUV and Art. 16 of the protocol. By the verdicts of the Constitutional Court, unions rights are not

standardized testing according to Art. 140 B-VG (VfGH June 6th, 2000, G20/00; VfSlg. 16.771/2002). In such a proposal, it is more about the question of the reasonability of the request. By the verdict of the Constitutional Court ‘an individual application can only, by Art. 140 B-VG, be seen as permissible if it is determined that the utility of the challenged norm does not go against the directly used Community Law (VfSlg. 15.771/2000, 18.298/2007).

However, there is no such contradiction for immediate used Unions right **(**worker’s law). The prohibition of the keep and use of wild animals in circuses is consistent with Art. 56 AEUV, if it does not differentiate between domestic and international circuses in animal protection and therewith its purpose serves the pursuit of compelling reasons of the general interest and is appropriate and necessary to achieve [...] So the European Commission of the in accordance with Art. 226 (1) EUV (now Art. 258 AEUV) against the introduced infringement proceedings of the Austrian Republic No. 2005/4510 targeting the compatibility of the prohibition of the keep and use of wild animals in circuses with the freedom of service from a declaration of the Austrian Republic, BKA-VV.05/4510/0002-V/A/8/2005, is set with formal closure from June 12th, 2006. The federal ruling explains this opinion an integral as a part of this statement **(**supplement**).**

Nothing else applies with regard to the alleged violation against Art. 16 (1) of the services directive, since in accordance with Art. 16 (1) of the services directive, the measures taken by member states to restrict the freedom of service are reasonable if they are justified, proportionate and do not discriminate on the grounds of the public policy, public security public health or protection of the environment. Against the assertion of the applicant, a measure can also be justified by Art. 16 (1) of the protocol **(**services directive**)** by reasons of the animal protection**.** The recital no. 41 of the protocol (services directive) makes it clear that the animal protection falls under the concept of the ‘‘public policy’ regarding the protocol (services directive).”

2.4. The Federal Minister for health opposes the insufficiently prevailing effects on the applicant of the individual application by Art. 139 (1) last sentence B-VG:

“The application shows that the applicant does not intend to keep wild animals in Austria, but instead wants to perform much more with them on Austrian territory within the framework of a circus. §27 (1) Animal Welfare Act (TSchG), BGB1. I no. 118/2004, last altered through BGB1. I no. 80/2010, is hereby the lex specialis to the general provisions of the TSchG regarding the keep of wild animals in circuses. While §27 (1) TSchG forbids the keep and use of wild animals in circuses, in §25 (3) Z2 TSchG a regulation warrant is nominated for the prohibition of the keep of certain wild animals. [...]

First if §27 TSchG was meant to be lifted in parallel running proceedings, the applicant could actually and not only potentially be affected by the fought ordinance, but only bezogen to the keep of wild animals during any stay in Austria; the use of wild animals in a circus is not included in it.

In addition, it should be noted that the fact that it can be put down to mere factual, economic reflex effects does not allow any contestation. From proposals, the VfGH has to regard the claim and examine whether the effects brought about by the applicant be such, as she claims Art. 139 (1) last sentence B-VG as conditions for the proposal legitimation (see VfSlg. 8060/1977, 11.369/1987, 14.463/1996). In the concrete case, the applicant brings forth direct effects on her economic situation; the proposal legitimation would also be negated on these grounds.”

3. To the situation, the applicant essentially brings forth:

3.1. To the law:

The prohibition of keep and use of wild animals in circuses standardized by §27 (1) TSchG, violates the obligation to respect the federal as well as the provincial, which is inherent to the Federal Constitution, and violates the freedom of enterprise, the principle of equality and the right to property as against the regulation 2006/123/EG of the European parliament and of the counsel from December 12th, 2006 over services in the internal market (duty of service), ABI. L 376 from December 27th, 2006, and the Unions right guaranteed freedom of services:

"With the release of the §27 (1) Animal Welfare Act, the legislature violated the obligation to the opposing consideration between federal and states. [...] This principle was violated by the federal government in the release of the §27 (1) Animal Welfare Act. The provision of the §27 (1) Animal Welfare Act imposes an absolute ban for the carrying out of circus events with wild animals. This prohibition stands in the contradiction to the ruling of the right for the state to make decisions. These provisions, that were not affected by the altering of the legislative competence on the territory of the Animal Protection Act through BGB1. 118/2004 and the implementation of a federal Animal Protection Act, are in power as before.

For example, the Wiener proceedings, last altered by LGBI. 2006/64, that is here to be named as example for other provisions of federal state laws ensures through in §9 no. 3, that circus events need a license. This means, that circuses are allowed on principle as long as the operator is granted an official authorization. [...]

The fact that the Viennese provincial legislature is based on the permissibility of circus performances, including performances by wild animals, reveals conclusively, with also the announcement by the governor of Vienne affecting an agreement in accordance with Art. 15a B-VG, the intention for overall betterment of the Animal Welfare Act and especially in out-of-region sectors, given on April 16th, 1999, LGBI. 24/1999, (agreement in accordance with Art. 15a B-VG), which is referred to in the government legislation for the adoption of the Animal Protection Act. The states Burgenland, Carinthia, Lower Austria, Upper Austria, Salzburg, Styria, Vorarlberg and Vienna, represented through the state governor, have before the issuance of the (Federal)-Animal Protection Act made the commitment against animal cruelty within the scope of their existing responsibilities for the area of the animal protection. In Art. 1 (2) of the agreement in accordance with Art. 15a B-VG, the contracting parties undertook, especially for circuses, an official proceeding with the possibility of the prescriptions of restrictions, terms and conditions in the interest of animal welfare and, in the case, that through limitations, terms and conditions the interests of animal welfare cannot be protected, prohibiting the keep of wild animals. In Art. 4 (1) **litb** of the agreement, the minimum requirements for the keep of animals in circuses in accordance with annex 6 of this agreement are laid fast. To this, annex 6 includes a list of banned mammals (not lions, tigers, elephants). Only for trunked mammals, jaguars, leopards, tigers, lions, brown bears, monkeys, camels, zebras minimum standards were laid fast.

From this ruling it is made clear, that the state legislators - to be explained in more detail later - were aware of fundamental conflicts between the interests of the animal welfare one one hand and the freedom of enterprise affecting the circus company on the other hand and intend to balance these conflicting interests.The establishment of minimum standards corresponds in principle to a balanced viewpoint in consideration of these interests.

Over this, the applicant is violated through the regulation of the §27 (1) Animal Welfare Act in her constitutionally guaranteed right to freedom of occupation. [...]

Of course, the applicant of the operation of a circus company is not completely prohibited**.** It is for example possible for her to only show acrobatic and demonstrations with domestic animals. However, it would not take into account that the applicant's program is an artistic and conceptual unit from which the demonstrations with wild animals can not be removed. In addition, it must be noted that the applicant operates a classic circus company, where wild animal performances constitute the principal numbers and that the interest of the audience differs from that for vaudevilles**.** The applicant cannot exercise this employment on grounds of the prohibition of wild animal performances. It is therefore an interference in the freedom to work. [...]

However, a full prohibition of performing wild animal is neither offered nor suitable to the protection of the life and the well-being of the animal**.** A general performance ban for wild animals by grounds of animal protection is only given if it can be determined that the keep of these types of animals in circuses fundamentally tackles animal welfare problems. The ruling of the §27 (1) Animal Welfare Act can be objectively justified in the remaining. (However, the provisions of Section 27 (1) of the Animal Welfare Act are neither adequate nor can they be objectively justified.)

The general ban of the keep and use of wild animals in circuses is by no means the mildest means to ensure the protection of the animals. This objective can even so be reached effectively through less drastic provisions.

Examples of equally effective but less constricting provisions are found primarily in the national law regulations**.** So the agreement sees, for example**,** in accordance with Art. 15 a B-VG in Art. 1 for the keep and use of wild animals in circuses, an official proceeding with the possibility of the regulation for restrictions**,** terms and conditions in the interests of animal welfare. Only for the case, where through the restrictions, terms or conditions of the interests of animal welfare cannot be respected, the keep and use of animals is to be prohibited**.** [...] Such a system of limitations, terms and conditions, in the form of a careful weighing of the interests was objective and presented a comparison between animal welfare interests and the interests of business operations in the practice of their economic activity through the performance of programs with wild animals, as well as display of wild animals. Through such rules, the appropriate and behaviorally correct accommodation of the animals is equally guaranteed and at the same time the commercial activity of the classic circus company is less limited. Even with these regulations where the circus companies are restricted in their freedom of enterprise, the operation of a classic circus is not made fully impossible. [...] On the other hand, a general prohibition of the keep and use of wild animals in circuses is disproportionate to the justified reasons. [...]

There is also an undoubted public interest in circus performances with wild animals. The Initiative of the European Parliament determined those circuses with animal performances to be specifically recognized as a part of Europe’s culture. These These efforts are clearly contrary to a wild animal ban. [...]

The prohibition of performance with wild animals also violates them through Art. & B-VG and Art. 2 StGG guaranteed equality principle**.** [...] An unequal treatment results from of the fact that the prohibition of the keep and use of wild animals only extends to circuses, vaudevilles and similar engagements, but not on other facilities such as zoos. These different keeping facilities are quite comparable with one another. With circuses as well as zoos of other commercial facilities it handles itself about business operations, in those wild animals held in human care and displayed for show. In this, the requirements of keep does not often distinguish animals in zoos and circuses from one another. Therefore, particularly the keep of animals in a stationary circus is comparably similar with that of the keep of animals in a zoo. This applies for the keep of animals in the film

industry. Even like in the mobile circus, animals are transported to different places in special modes of transportation.

Despite these public commonalities, the keep of wild animals in circuses is ruled by the legislator as different from the keep of these animals in other facilities**.** For example in §25 (1) Animal Welfare Act under the requirements of the fulfillment from minimum requirements, the possibility of the keep of wild animals for certain facilities**,** in accordance with para. 2 that are in the Animal Welfare Act, zoos, animal homes and the keep of animals in the context of commercial activity not requiring notice by para. 1. The Federal legislator allows the keep of wild animals in the context of commercial activity in accordance with §25 (2) no. 4 Animal Welfare Act on one hand, but on the other hand forbids circuses completely from keeping and using these animals. [...]

The opposed legal standard of the §27 (1) Animal Welfare Act is applicable to right of ownership protected through Art. 5 StGG and Art. 1 1. ZP EMRK. Through the prohibition of the keep and the performance of wild animals, the applicant is restricted in her rights of ownership**.** It is not possible for the applicant to enter the national territory of the Austrian Republic with wild animals in their possession, that have a worth over a million Euro, where the actual worth of the trained animals still exceeds this sum by about triple. [...]"

Finally, the applicant brings forth, that the prohibition to keep or use wild animals in circuses laid out in §27 (1) TSchG, infringes against Unions right**,** especially against Art. 16 of the services directive (directive 2006/123/EG of the European parliament and the counsel from December 12th, 2006 over services in the internal market) and against the guaranteed freedom to provide services of Art. 56 AEUV. The animal protection does not fall under within the concept of the public policy within the meaning of Art. 16 (1) of the services directive. Even if the protection of animals were to be covered by the protection of public policy, the prohibition would be contrary to the provisions of the Services Directive because the principle of proportionality is not respected. For this reason, the restriction of the freedom to provide services of Art. 56 AEUV, which is concomitant with the prohibition, could not be justified on grounds of general interest, the rules go beyond what is necessary to achieve the objective. The applicant is motivated with this context, to pose these questions to the European Court of Justice in the way of a preliminary ruling procedure.

3.2. For Regulation:

That in §9 iVm Annex 6 of the second Animal Keep Regulation ruled ban of the keep of wild animals is subject to the same constitutional and European legal concerns as §27 (1) TSchG. The regulation regards the prohibition of large cats, small cats, large bears, hippos and giraffes in no. 9, 10, 12, 21 and 22 of §9 of the second Animal Keep Ordinance, an infringement on the freedom of enterprise**,** the the right of ownership**,** the equality principle and the freedom to provide services**.** These infringements are not justified.

4. The Federal Government treads against the arguments of the applicant and essentially leads constitutionality of the §27 (1) TSchG:

"To the concerns regarding the allowance principles**:**

The applicant claims next a conflict against 'those of the Federal Constitution' and essentially leads to, is §27 (1) TSchG includes an absolute abn for the carrying out of of circus events with wild animals and therewith contradicts the ruling of the right of the state to make decisions**,** the legalization of circus events with wild animals. [...]

The Federal Government does not share this opinion**.** By the case law of the Constitutional Court 'it is [forbidden] to undermine the legal regulations and to negate the interests of the legislator of a local authority [...] ' (VfSlg. 15.281/1998 mwN). However, this so named 'consideration' grips established case-law of the Constitutional Court only in 'conflict of objectives' in the overlapping area through from federal and from state in the context of the legal competencies affected regulation (zB VfSlg. 15.552/1999 and 17.854/2006). Regulation is for the application of the 'consideration', as defined by the Constitutional Court, 'a [...] overlapping of common control areas and a resulting conflict of objectives' (VfGH 29.6.2011, F1/11, G7/11-17). That is not recognizable, in hindsight on the event-law of the states and §27 (1) TSchG:

With entry into force of the Competency Act of Art. 11 (2) Z8 B-VG, January 1st 2005, the legislative powers in the 'animal protection' is passed on to the Confederation, as long as it has been received by the states. The interpretation of the animal protection competency is essentially to be put aside of the *petrification* theory on the TSchG**,** that was also adopted with the competence and came in power **(**Irresberger/Obenaus/Eberhard, Animal Welfare Act, commentary, 2005, 6). The TSchG claims that in the embedded objective of §1 TSchG is 'to protect the life and the well-being of the animals out of the out of the special responsibility of humans for the animal as a fellow creature' and since its enactment in §27 (1) TSchG prohibits the keep and use of wild animals in circuses. In the ruling over the reasonability of the keep and use of wild animals in circuses it is about a matter of the animal protection in terms of Art. 11 (1) Z8 B-VG. National legislation, such as the right to decide, over the use of wild animals in circus events**,** that affect the animal protection aspect (see ie. §9 iVm. §18 (1) and (3) of the Viennese event law, LGBl. Nr. 12/1971, that provides the issue of a licence for a circus on 'animal rights considerations') are overruled in accordance with Art. 151 (30) B-VG, January 1st, 2005 (see RV 446 BIgNR 22. GP 4, from which the overruled regulations [...] are delimited in the same way as the newly created legislative power of the federation').

In contrast with the legal animal protection regulations, 'the object regulations [...] is settled typically in the field of administrative police security. It is about hazards and unreasonable impairments that step out from the proceeding itself from the therefore necessary equipment or from the necessary event venues, to avoid for the operator and event participant themselves or also for third keep' (Lienbacher, event-law, in: Holoubek/Potacs (ed.), Handbook of the public economic law I (2007) 274).

In accordance with the so-called viewpoint-theory, from which a life can be influenced by different factors, which can be attributed to different competences, circuses can be governed by federal legislation since January 1st 2005 from the point of view of animal protection (Art. 11 (1) Z8 B-VG) regulated by the legislation of the states under the aspect of the event management (Art. 15 (1) B-VG).

A 'constant regulatory area', like by the case-law of the Constitutional Court for the utility of the 'considerations' required, is not given regarding the event-law on one hand and the prohibition of the keep and use of wild animals in circuses by §27 (1) TSchG on the other hand. It also cannot come to a 'conflict of objectives'' for both of these sets of rules, that serve on the one hand the security of human beings, on the other the protection of animals

The relevant legal situation is also not comparable with what the recognition VfSlg. 18.096/2007 is based on. The Constitutional Court saw a violation of the consideration through a federal prohibition of the exhibition from songbirds, that 'opposes the will of the regional legislator', because such events are no longer allowed to take place. The Constitutional Court considered, that the exception of such events from the scope of application of the (upper Austrian**)** regional legislation is based on the principle of admissibility. In contrast to this the Viennese Act of Conformity - applied by the applicant - provides a concession obligation for circuses (§9 leg. cit.). Such a license is only allowed in accordance with §18 (1) leg.cit among others to be awarded, if

no lawful impediments stand. A lawful impediment stands if the named interests in para. 3 cannot carry adequately fulfilled. §18 (3) leg.cit forsees such an ‘animal rights considerations’ interest. The Viennese Act governing the organization of events (respectively; see Art. 151 (30) B-VG) provides for the granting of an authorization for circus events, which must also take into account the provision of the animal protection, which also can lead the denial of a licence. It can therefore not be said that a prohibition of the keeping and the participation of wild animals in circuses, which has been the subject of federal legislation since January 1, 2005, 'diametrically opposes’ the will of the Viennese event organizer or the Viennese event law 'completely and without purpose power'.. [...]

To the concerns in hindsight upon the freedom of enterprise

The applicant claims that she is violated through §27 (1) TSchG also in her constitutionally guaranteed right to freedom of occupation in accordance with Art. 6 StGG. [...]

By opinion of the Federal Government it is by all means questionable, wether §27 (1) TSchG even poses a violation of the constitutionally guaranteed freedom of occupation in accordance with Art. 6 StGG. The Constitutional Court determines through settled case law, that only such provisions, that the occupation concerns directly, encroaches on the constitutionally guaranteed right. If an impairment of the occupation is merely a ‘factual restraint’ or a ‘side effect’ of a measure pursuing the other purposes, then there is no intervention at all in the absence of intentionality (zB VfSlg. 15.431/1999, 14.685/1996, 14.179/1995). §27 (1) TSchG does not prohibit circuses as such, but only out of reasons of the animal protection the keep and use of wild animals in such events. As long as the applicant achieves operation with her company in Austria through this prohibition is not possible for her, ‘because the program of the applicant is treated as a artistic and conceptual whole, out of which performance with wild animals cannot be removed’, the applicant merely stands on a factual hindering of her occupation on grounds of internal company organization. A fundamental rights violation therefore does not appear to exist at all.

Otherwise the fought provisions would qualify as restriction of professional practice, that would in any case be justified. By the jurisdiction of the constitutional court, ‘legal regulations, that the professional practice restricts, [...] are also to be examined on their consensus with the constitutionally guaranteed freedom of commercial activity and must be accordingly determined through a public interest and also be otherwise objectively justified. This means, that rules of practice must be proportional in a in an overall weighting between the weight of the infringement and that of their justification. In the ruling of the professional practice, a larger right-wing political design is open to the legislator as well as for the ruling that restricts access to an occupation (the acquisition of a company), because the exercise of employment regulations the violation is less severe against the constitutionally protected basic rights, as the impediment, due to the restrictions, of the access to the occupation (see ie. 18.150/2007 mwN).

The opposed provisions do not exceed this (comparatively) wide right-wing scope:

The the legislation generally applies with the TSchG and with the prohibition of the keep and use of wild animals in circuses in §27 (1) TSchG, especially the established objective in §1 TSchG, ‘to protect the life and the well-being of the animals out of the special responsibility of humans for the animal as a fellow creature’. With that the legislation follows an objective laid out in the public interest (VfSlg**.** 17.731/2005, 18.150/2007).

While domesticated animals over thousands of years became accustomed to the human household and have also evolved through systematic selective breeding in a physiological respect, wild animals have not undergone this process and therefore show an inferior adaptability and a lower suffering threshold. This is also referred to in § 13 TSchG, which regulates the principles of animal keep. [...]

Since the adaptability of wild animals is less than that of domestic animals, it appears appropriate and legitimate, to foresee restrictive protection conditions for wild animals as for other animals (*Hausetiere*).

The prohibition of the keep and use of wild animals in circuses to the protection of wild animals is suitable above all because of the (a) terms that are necessary for the type as well as lawful keep of wild animals, the (b) frequent change in location, that the animals are exposed to in circuses and the (c) training of the wild animals. [...]

The prohibition is also required to reach the objective. [...]

The animal protection legislator was able to assume on an average basis, that in circuses that [...] the requirements on the type and lawful keep of wild animals posed above cannot be guaranteed. This especially shows in the presented example requirements on the keep of elephants, lions and rhinos, with regard to the open-air enclosure, especially for circuses that are on tour regularly for a large part of the year (in the case of the applicant: eight months). Those stresses, that come with frequent change of locations and the training for circus animals can not be resolved through the prescription of restrictions, terms or conditions. Suitable alternatives to the general prohibition of §27 (1) TSchG are therefore not recognizable by the Federal Court.

In a similar manner, the Constitutional Court in the recognition VfSlg. 17.731/2005 has negated a violation of the freedom of labor through the prohibition of the keep and showing of dogs and cats in the context of commercial activity in specialty pet shops for the purpose of the sales, among others with the justification that in specialty pet shops and such facilities, 'an appropriate animal keep, by request of the legislator, could not be guaranteed'. In VfSlg. 18.150/2007 the constitutional court did not raise any objections to the necessity of a general prohibition on the use of electrical training equipment; the legislator is out of a constitutional point of view should not be opposed**,** if they allow such a contradiction of the public interest in the protection of animals.

The applicant doubted that the opposed measure is justified with reasonable proportion.

The TSchG foresees a graduated system of authorization and general prohibition regarding the keep and use of wild animals (see RV 446 BIgNR 22. GP 23): For (all) wild animals are through minimum requirements regulation adopted (§24 (1) Z2 TSchG). Wild animals, that pose particular needs on the keep, are only allowed to be kept by one reading; these wild animals are marked through regulation (§25 (1) and 3 Z1 TSchG). Except from the duty to give notice, the Animal Welfare Act subjected facilities**,** Zoos, animal shelters and keep of animals are in context of commercial activities (§25 Abs2 TSchG); their permissibility is subject to other legal regulations. Through regulation the keep of certain types wild animals is to be forbidden on grounds of the animal protection (§25 (3) Z2 TSchG). The legal materials shall be registered, 'with those animals whose needs in keep and care cannot be fulfilled by ordinary caretakers even in their best efforts' (RV 446 BIgNR 22. GP 23). Finally, §27 (1) TSchG sees a general ban on the keep and use of wild animals in circuses, vaudevilles and similar facilities.

For the background of the presented requirements on the type and rightful keep of wild animals and the particular stress caused by frequent change in location and training, it appears appropriate and not out of

proportion to the freedom of labor, if the animal protection legislator foresees a (general) prohibition of the keep and use of wild animals in circuses within this tiered system, especially through this prohibition, the operation of a circus is not forbidden and various performance possibilities stay open for circuses without use of wild animals.

The applicant tries her assertion of a violation of Art. 6 StGG through a comparison with regulation of the agreement - made between federal states - in accordance with Art. 15a B-VG to the betterment of the animal protection at large and especially in the out-of-country realm (zB Wiener LGBl. no. 24/1999) and to reinforce the affected keep bans of the Vienna Animal Protection - and Animal Keep Act, LGBl. Nr. 39/1987. It is to note in addition, that the named agreement dismissed through the contracting parties and on May 9th, 2006, was overruled, and the animal protection provisions were repealed in the referred law through the amendment LGBl. Nr. 4/2005 (since this amendment, the title of this law is 'Wiener Tierhaltegesetz'). [...]

To the concerns regarding equality (Art. 7 B-VG and Art. 2 StGG)

The applicant also claims a violation of the equality and essentially brings forth that the prohibition of the keep and use of wild animals extends only to circuses, vaudevilles and similar facilities, while the legislator allows the keep of these animals in other facilities in accordance with §25 (1) TSchG under the requirement to fulfill minimum requirements. [...]

Circuses differentiate themselves from all other forms of the keep of wild animals through two characteristics, that, as described above [...], are suitable in particular measure to affect the wellbeing of wild animals:

- first, they are non-stationary facilities that, due to their work, regularly move to different locations;

- second, the animals are presented in the context of specific performances that requires requires training which means an external influence on the animals with the goal of altering their natural behavior.

The harm to the well-being of wild animals in circuses is therefore substantially larger than in the §25 TSchG and §28 TSchG (use of animals in other events and use for film and TV shows), for which reason, the difference between §25 and §28 TSchG on one hand and that of §27 (1) TSchG nominated prohibition for circuses on the other hand is objectively justified.

This especially targets the keep of wild animals in zoos, that differentiate themselves majorly from that in circuses. The right to keep lions, elephants, rhinos, and Zebras, with which the applicant want to go on tour, is reserved for zoos in category A. In accordance with §4 (2) of the Zoo regulation, BGBl. II no. 491/2004 idF BGBl. II no. 30/2006, the responsible director of such a zoo must be able to show an complete study of the zoology of biology or veterinary medicine in conjunction with a multi-year practical work experience for the veterinary biological field. The number of keepers (caretaker who complete final apprenticeship examination in the profession of animal keeper) has to be in relation to the animal stock (§4 (2) of the Zoo-regulation). Para. 4 leg.cit puts forth, that zoos in category A contribute at least to research on the species conservation, participate in the exchange of information over species conservation and raising in human care and in the education in behaviorally specific knowledge and skills. The objective of a circus is not comparable with that of a zoo since in the circus it is about the entertainment of the spectators through the actions of the animals and therefore about demanded, non species-specific behaviors.

In zoos it is possible for the law to design the enclosure with 'environmental enrichments', so that they comply with the natural needs as much as possible, to allow the animals their typical behaviors and to fulfill

their biological needs (ie. daily bath of the elephant, sand baths, structuring of the installations, the survival of food-eating behaviors, the prey simulator in the feeding of feline predators etc.). In zoos the social/family structure can also be better formed in zoos (ie. through single housed loner animals). In circuses the switch of social partners between life in isolation or in small groups can pose a excessive demand on the adaptability. This can have negative consequences for the behavior, the well-being and the reproduction. In the literature it is pointed out that circuses frequently switch animals with other institutions and this has an extremely negative effect on the social behavior, since many strong social group bonds are disrupted (Iossa et. al., Are wild animals suited to travelling circus life? Animal Welfare 2009, 18: 129-140). With elephants it can be detected, that this intervention in the social structures can have hefty effects on the well-being and the reproduction. The switch between social partners and the life in isolation of small groups can pose an excessive demand of the adaptability for circuses. [...]

In the case made by the applicant where the keep of animals in a stationary circus is comparable with the keep of animals in a zoo, it is to be noted that the change in venues counts to the atypical aspect of a circus; the applicant is, according to her own data, on tour eight months of the year on tour. The keep of animals named in §9 of the second Animal Keep Ordinance would, in any case, only be allowable if it concerns a zoo iSd of the Zoo-regulation.

The following counters the case made by the applicant that the use of wild animals in film and TV recordings is comparable with that in circuses,:

Unlike the use of wild animals in circuses, where long month lasting tours undertake frequent change in location, the operations in film recordings take place in less shooting locations in one given timeframe. The use of wild animals for film recordings in accordance with §28 (1) TSchG is allowed authorization by §23 TSchG. The distribution of the authorization is tied to the regulation of restrictions regarding the duration of the operation, the accommodations of the animals, the care etc. If by an inspection, the keep no longer meet the requirements with the authorization conditions, it may lead to the withdrawal of authorization. The risk of overtaxing the adaptability in film recording is low since, typically, frequent change in location is not associated with this. Apart from the short appearances during shooting, in which acts can be demanded of the animals, these animals can basically be kept in a proper animal care, which is not the case in circuses. […]"

The Federal Court essentially considers the concerns regarding the property law (Art. 5 StGG, Art. 1 1. ZPMRK) out of those that already do not meet laid out grounds for the freedom of enterprise.

4. The Federal Minister for Health rejected the concerns of the applicant against the stated provisions of the second Animal Keep Ordinance with fundamentally equal arguments as those from the Federal Court to the legal prohibition.

II. To the legal situation

1. The challenged provision of the Animal Welfare Act, BGBl. I 118/2004, idF BGBl. I 80/2010, and its essential environment (the opposed provision is brought forth) reads:

*Objective

§1. The ultimate goal of this federal law is the protection of the life and the well-being of animals out of the special responsibility of humans for the animal as a fellow creature.

Extension of the animal protection

§ 2. Federal, state and local are obliged, to awaken and deepen the understanding of the public and especially the youth for the animal protection and have to promote animal-friendly farming systems, scientific animal welfare research as well as concerns of animal welfare according to budgetary possibilities.

[...]

Definitions

§4. The terms below mean the following in this federal law:

1. [...]

2. *Haustiere*: domesticated animals of the genera cattle, pig, sheep, goat and horse, while with exception of exotic types, such as large camels, small camels, water buffalos, guinea pigs, dogs, cats, caged birds and domestic fish;

3. *Heimtiere*: animals, that are kept in a household out of companion interests for the animal, as long as they are *Haus* animals or domesticated animals in the order of the carnivore, rodents, parrot birds, finches, dove and the fish class;

4. Wild animals: all animals outside of the *Haus* and *Heimtieren*;

[…]

10. Zoos: permanent facilities apart from circuses and pet shops; with the public display of wild animals kept in a timeframe of at least seven days of the year;

11. Circus: a facility with performances, that under others rest on the area of the skill or the training of the animal and can involve acrobatic performances, serious and funny performances, pantomimes like dance and musical pieces;

12. Vaudeville: a facility with performances, that essentially targets entertainment and are organized in the alternating program sequence, declamatory or musical performances, artistic performances, show numbers, short antics, musical dramas, Burleske or scenes;

[…]

Authorizations

§23. Authorization requires, unless determined otherwise, the following requirements:

1. The authorities only distribute authorization on application. The authorities are in charge of the authorizations where the keep, participation or use of wild animals take place in their territory.

2. The authorization is to be granted if the proposed keep of animals comply with the requirements of this federal law and regulation adopted on these grounds like the recognized stance of the scientific knowledge and opposes no animal keep prohibition.

3. Authorizations may, if necessary, be issued for a limited period or be subject to terms and conditions.

4. A temporary authorization is to be extended upon request of the owner if the application is brought forth before expiration of the term and the regulation allows for the distribution of the authorization.

The requirements or restrictions (Z3) are to be changed if necessary.

5. If the authority determines that the keep of animals no longer complies with the authorization conditions or do not hold up to the prescribed restrictions or requirements, the competent authority must, by means of a decision, prescribe the measures necessary to achieve the legally required condition and impose a withdrawal of the authorization. If the holder does not comply with the requirements within the time limit set in the decision, the authority will revoke the authorization. The affected animals are to be taken away and handed over to such associations, institutions or persons which provide a guarantee for an attitude corresponding to this Federal Law.

[...]

Wild Animals

§25. (1) Wild animals, that pose – regarding Climate, nutrition, need for exercise or social behavior – unique needs in keep, in the fulfillment of the prescribed regulation, are only allowed on the basis of a two week display of the wild animal keep with the authorities. Keep of enclosures where hoofed game is held exclusively for meat production, when fulfilling the prescribed regulation, is only allowed by the authority to be held when a notification of wild animal keep is presented. The notification shall include the name and address of the keeper, the type and maximum number of animals kept, the place of keeping and other details necessary for the assessment by the authority; the details shall be governed by the ordinance of the Federal Minister of Health, in respect of enclosures in which hoofed game is kept exclusively for meat production, in agreement with the Federal Minister for Agriculture, Forestry, Environment and Water Management.

(2) A notification by para. 1. does not apply to:

1. facilities that succumb the Animal Experimentation Law, BGBl. Nr. 501/1989;

2. zoos;

3. animal shelters;

4. the keep of animals in the context of commercial activity.

(3) Through the regulation taking into account the objective and the other provisions of this federal law like the recognized stance of scientific knowledge, the Federal Minister for health has

1. To denote those wild animals, that pose unique requirements and

2. forbidden the keep of certain types of wild animals on grounds of the animal protection. Such a prohibition does not apply for zoos, that have ordered an authorization in accordance with §26, life for scientific facilities, that their wild animal keep indicates in accordance with para. 1.

(4) For the keep of wild animals that pose no unique requirements in keep and care, applies in para. 1 respectively in commercially operated facilities.

(5) The keep of pelted animals for the fur production is forbidden.

Keep of animals in zoos

§26. (1) The keep of animals in zoos is authorized according to §23.

(2) More detailed provisions on the minimum requirements for zoos in terms of the facilities, care for animals, management, on the training to be carried out by the persons employed in animal upkeep, with the exception of facilities in which no significant animals or species are put on display and are not important for the protection of wild animals or the conservation of biological diversity, which are to be determined by the Federal Minister of Health based on regulation, taking into account the objectives and the other provisions of this Federal Law as well as the recognized state of scientific knowledge and the demands of the held animal species.

[...]

Keep of animals in circuses, vaudevilles and similar facilities

§27. (1) In circuses, vaudevilles and similar facilities, no type of wild animals are allowed to the kept or utilized.

(2) The Federal Minister for Health, with consideration of the objectives and other provisions of this Federal legislation as well as the acknowledged state of scientific knowledge, shall govern through regulation the requirements and minimum premises for the keep and use of animals in circuses and similar institutions as well as the necessary knowledge of the caregivers.

(3) The keep and use of animals in circuses, vaudevilles and similar facilities, particularly the increase in the number of animals or the keep of animals that are not approved, needs an official authorization. The authorization takes effect for the entire Federal territory. The jurisdiction for provisions by §23 Z5 depends on the location.

(4) The Authorization is in accordance with §23 and only then to be granted if it is ensured that

1. the keep of animals complies with the requirements of this Federal legislature and the regulations based thereon,

2. adequate veterinary care is ensured and

3. the approved applicant has a suitable winter location which meets the requirements of animal keep in accordance with this legislation. Foreign players have to provide a similar confirmation of their home country.

(5) The change in location shall be notified to authorities in timely fashion, in any case before the new location is assumed. The notification shall indicate, in addition to the new location, the type and time of the production as well as the animals kept. The the original or a copy of the authorization must be attached.

(6) [...]

Penalty Regulations

§38. (1) Anyone who

1. inflicts pain, suffering or heavy anxiety upon an animal [...]

commits a regulatory offense and is to be punished by the authority with a fine up to 7, 500 Euros, in the case of repeated offense up to 15,000 Euros.

(2) In severe cases of animal cruelty, a fine of at least 2,000 Euros must be imposed.

(3) Anyone who in the cases of Para. 1 and 2 violates against §§5, 8a, 9, 11 to 32, 36 Para. 2 or 39 or against these regulation determined administrative acts, commits an offense and is penalized with a fine up to 3,750 Euros and, in the event of repetition, up to 7,500 Euros.

(4) [...]

(5) The attempt is penalizable.

(6) [...]"

2. The relevant provisions of the Ordinance of the Federal Minister for Health and Women over the protection, keep and use of animals in circuses, vaudevilles and similar facilities (Animal Protection Circus Ordinance) BGBl. II 489/2004, read:

"Scope, Definitions

§1. (1) These regulations determine the conditions for the keep and use of animals in circuses, vaudevilles and similar facilities as well as the necessary expertise of the caregivers.

(2) For the purposes of this regulation

1. 'Similar facilities' establishments that present similar entertainment to circuses or vaudevilles, ie. such as music and performing arts;

2. 'Dressage' the working with an animal in which the animal responds to the incensed key stimuli with a specific behavior.

Minimum requirements for keep

§2. (1) For the keep of animals in circuses, vaudevilles and similar facilities the minimal requirements apply from

1. Animal Keep Ordinance, BGBl. II no. 485/2004 and

2. Animal Keep Ordinance, BGBl. II no. 486/2004.

(2) The animals are to be accommodated and provided in such a way that

1. their safety and health as well as the safety and health of the caregivers and the patrons is guaranteed and

2. no environmental-related diseases or behavioral disorders occur.

(3) Every animals is provided with proper indoor installation built for the needs of the species and, where this is provided in the 1st or 2nd Animal Keep Ordinance, also an outdoor installment. If an outdoor installment is required, the animals must be given free movement in the outdoor area daily.

(4) With all animals that are used in circuses, vaudevilles, and similar facilities, the type of performance must be regularly labored.

(5) The days on which the animals are worked, they have, for at least six hours, the option to be in the outdoor area. On other days they should have at least eight hours."

3. The relevant provisions for the regulation of the Federal Minister for Health, Family and Youth over the keep of vertebrates, that do not fall under the 1st Animal Keep Ordinance, over the wild animals that pose particular needs for their keep and over the keep of wild animal species whose keep is forbidden on grounds of the animal protection (2nd Animal Keep Ordinance), BGB1. II 486/2006, idF BGB1. II 384/2007, together with a crucial setting (the challenged regulations are highlighted) read:

* Scope and Objective

§1. (1) In the presented regulation, minimum requirements for the wild animals, that are suitable to keep in human care, are laid down as well as such wild animals that pose particular requirements in keep and such wild animal species whose keep is prohibited on grounds of animal protection.

(2) This regulation applies for the keep of animals of vertebrates, that do not fall under the 1st Animal Keep Ordinance, BGBl. II no. 485/2004.

(3) The fundamental objective is not only to enable animals under human care to a maximize species specific behavior, but to also promote a maximum species specific behaviours.

[…]

Prohibition of the keep of certain wild animals

§9. Keep of the following animals is prohibited, outside of zoos, which have authorization in accordance with §26 (1) of the Animal Protection, as well as scientific institutions that can keep wild animals in accordance with §25 (1) of the Animal Protection Act:

1. Monotremes (Monotremata), of all types;

2. Colugos (Dermoptera), of all types;

3. Great apes (Ponigdae), of all types;

4. Xenathras (Xenathra), of all types;

5. Pangolins (Pholidota), of all types;

6. Viverrids (Viverridae), of all types;

7. Hyenas (Hyaenidae), of all types;

8. Dog predators (Canidae), of all types except for wolf (Canis lupus), fox (Vulpes vulpes), raccoon dog (Nyctereutes procyonoides) and golden jackal (Canis aureus);

9. Big cats (Pantherinae), of all types;

10. Small cats (felinae) of all types with the exception of the wildcat (Felis silvestris) and the lynx (Lynx lynx);

11. Cheetah (Acinonyx jubatus), of all types;

12. Big bears (Ursidae), of all types with the exception of the brown bear (Ursidae arctos);

13. Red cat bear (Ailurus fulgens), of all types;

14. Giant panda (Ailuropoda melanoleuca), of all types;

15. Seals (Pinnipedia), of all types;

16. Whale (Cetacea), of all types;

17. Orycteropodidae (Tubulidentata), of all types;

18. Sea cow (Sirenia), of all types;

19. Rhinoceros (Rhinocerotidae), of all types;

20. Tapir (Tapiridae), of all types;

21. Hippopotamus (Hippopotamidae), of all types;

22. Giraffes (Giraffidae), of all types;

23. Trunked mammals (Proboscidea), of all types."

III. Considerations

1. Process Requirements:

1.1. In accordance with Art. 139 and Art 140 B-VG, the Constitutional Court recognizes over illegality of regulations and the unconstitutionality of legislation at the request of a person, that is violated directly through the unconstitutionality or illegality, provided that the legislation or the regulation is made effective for this person without a court decision or without issuing a decision. In the way that the Constitutional Court

carried out their settled case-law beginning with VfSlg. 8009/1977 and 8058/1977, therefore fundamental conditions for the applicant are that the legislation or the regulation directly encroaches and – in the case of its unconstitutionality or their illegality -violate the rights of the affected person. Here**,** the Constitutional Court has to assume from the proposal and to identify whether the impacting effect on the applicant is as they claim Art. 140 (1) and Art. 139 (1) last Satz B-VG as conditions for the application legitimation. (see ie VfSlg. 10.353/1985, 15.306/1998, 16.890/2003).

The Constitutional Court has consistently held their position in the settled case-law since the decision VfSlg. 8009/1977 and 8058/1977, before the application legitimation by Art. 139 and Art. 140 (1) last sentence B-VG setze, that, through the opposed provisions, the (lawfully protected) interests of the applicant must not only potentially but actually be affected and that individual relief is granted through Art. 139 (1) and Art. 140 (1) B-VG, legal protection against unlawful general standards only to this extent**,** since a reasonable alternative is not available (ie VfSlg. 16.332/2001).

1.2. The applicant operates a circus company. For the purpose of the programs performed by this circus, wild animals play an essential role in performances, inside of §27 (1) TSchG. The applicant planned a tour through Austria, in which her circus program performs in various locations in Austria including the performances with wild animals. These conditions remained undisputed in proceedings and the Constitutional Court also has no reason to raise these in doubt.

§27 Para. 1 TSchG puts forth a prohibition – through §38 para. 3 TSchG administrative criminal prosecution – of the keep or use wild animals in circuses in Austria. This prohibition inhibits the applicant in her circus program – permitted in Germany – in full extent, Including the numbers with wild animals, and to transport the wild animals as part of their circus company during the tour through Austria. This prohibition affect the applicant in her legal rights directly and currently (see ie. VfSlg. 11.853/1988, 12.379/1990, 18.096/2007).

The applicant also has no other reasonable alternative to performance to address the issue of the constitutionality of the provision to the Constitutional Court. The Constitutional Court takes the view, in settled case-law, that it is not reasonable for an applicant to be subject to a norm and, consequently, also to the applicant, to oppose administrative criminal proceedings and to contest the illegality of the prohibition standard (see ie. VfSlg. 14.260/1995, 18.096/2007). §27 (3) TSchG subjects the keep and use of “animals” in circuses where §27 (1) TSchG prohibits the keep and use of “wild animals” which does not offer a reasonable path for the applicant. Ultimately, in the prohibition of the keep and use of “wild animals” in circuses by the Constitutional Court in §27 (1) TSchG, the authorization procedure of §27 (3) TSchG refers to – which the Federal Court does as well – only animals that are not wild. The authorization of the use and keep of “wild animals” can therefore not be the subject of a authorization proceeding by §27 (3) TSchG, where even the directly acting prohibition of §27 (1) TSchG cannot be carried out by the authority in proceedings by §27 (3) TSchG. In this configuration, where the conditions for a proceeding in accordance with §27 (3) TSchG does not give at all regarding wild animals (see VfSlg. 8396/1978), the proceedings provide no way to challenge the prohibitions of §27 (1) TSchG .

The unions rights of the applicant for the annulment requested provisions is also not too narrow**,** in the case of the repeal to eliminate the asserted unconstitutionality. In view of the distinction between the "circus" and "vaudeville" (§4 Z11 and 12 TSchG), it would be excluded from the background of the findings of the Constitutional Court, which remove the word "circuses" in §27 Abs1 TSchG, that the keeping and use of wild

animals in circuses is therefore prohibited by virtue of this legal situation because circuses are "similar establishments" as varieties.

The proposal is also unacceptable with regards to the utility priority unions rights to be perceived by the Constitutional Court. This would then be the case, if the opposed standard stands against directly applicable unions right, because in this case it would have to be excluded that the applicant could be violated in their rights by the opposed standard iSd Art. 140 (1) B-VG (see VfSlg. 15.771/2000, 18.298/2007). In light of of the 41st recital to the services directive and regarding that set forth by the Federal Court, the Constitutional Court has no concerns in proceedings by (now) Art. 258 AEUV written record of the European Commission concerning the consistency of the prohibition of the keep and use of wild animals in circuses with the freedom of service, that the represented prohibition from §27 (1) TSchG opposes the directly applicable Unions right.

The Antrag, to repeal the word “circuses“ as unconstitutional, in §27 (1) TSchG, therefore proves to be permissible.

1.3. The request to abolish the provisions of the 2nd Animal Keep Ordinance, is already inadmissible on the following grounds:

In accordance with Art. 139 B-VG, the Constitutional Court recognizes the illegality of regulations called forth by a person, that is directly violated in their rights through the illegalities, as long as the regulation is effective without a judicial judgement or without issuing a notification for this person. Since the Constitutional Court has implemented in their established law case beginning with VfSlg. 8058/1977, there are basic conditions for the application legitimization, that the regulation directly engages and violates – in the case of their illegality – the rights of the affected person. Here, the Constitutional Court only has to examine whether there are such effects on the applicant as raised through Art. 139 (1) last sentence B-VG as conditions for the application legitimation (see ie VfSlg. 8594/1979, 15.527/1999, 16.425/2002 and 16.426/2002).

As a circus enterprise, the Animal Protection Ordinance enacted by §27 (2) TSchG applies for the applicant. On the other hand, those opposed to §§24 (1) Z2 and § 25 (3) TSchG, the 2nd Animal Keep Regulation stipulates in general the species of wild animals which are prohibited- outside zoos and certain scientific institutions - for animal welfare reasons. In the regulation system of the TSchG and the ordinances based on this law, a special prohibition for keep and use, which includes all wild animals, applies to circuses in §27 (1) TSchG, while the general keep in §9 of the 2. Animal Keep Ordinance of described species (ie. large cats, trunked mammals etc.) is prohibited and, on the other hand, the wild animals (ie. birds, reptiles) included in §8 of the mentioned ordinance may only be kept after prior notice.

For the circuses, and therefore for the applicant, the 2nd Animal Keep Ordinance comes into play only to the extent that §2 (1) of the Animal Protection Circus Ordinance refers to the minimum minimum requirements of the 2nd Animal Keep Ordinance. In the current system of animal protection, this reference covers, in particular, the minimum requirements, also laid down in the 2nd Animal Keep Ordinance, for vertebrates that are suited to be kept in human care.

Because of the applicable, special but incomprehensive prohibition of the keep of wild animals in circuses according to §27 (1) TSchG, the reference of §2 (1) of the Animal Protection Circus Ordinance does not include the prohibition of keeping certain wild animals in §9 of the 2nd Animal Keep Ordinance. This does not count among the minimum requirements for the keep of animals in circuses, which regulates the §2 (1) of the Animal Protection Circus Ordinance.

It is therefore precluded that the prohibition of certain wild animals of §9 of the 2nd Animal Keep Ordinance encroaches on the legal rights of the applicant. The appeal is already to rejected as unaccpetable on these grounds.

2. In the case that:

The Constitutional Court first notes that it is limited to discussing the issues raised on the examination of the application process in accordance with Art. 140 B-VG (see VfSlg. 12.691/1991, 13.471/1993, 14.895/1997, 16.824/2003) and has to assess whether the opposed settlement is unconstitutional on the grounds of the application (VfSlg. 15.193/1998, 16.374/2001, 16.538/2002, 16.929/2003).

2.1.1. The applicant sees foremost a violation of her basic rights in freedom of enterprise given by Art. 6 StGG in the prohibition issued by §27 (1) TSchG on the keep and use of wild animals in circuses. The prohibition is still necessary, whether required. In the context of an individual authorization proceeding, the interests of the animal protection can, when governed by local laws before the entry into force of the comprehensive federal law prohibition, be shown to be equally effective, but the employment exercise of the applicant less restricted. Also, an total prohibition of the keep and use of wild animals in circuses stands overall in no relation to the fully justified basis of such a prohibition, but does pass an undoubted public interest in circus performances with wild animals.

2.1.2. Since the nationality of Art. 6 StGG, like that of the equality principle from Art. 7 (1) B-VG, finds no utility in the scope of application of the Unions right, the applicant can draw upon the constitutionally guaranteed freedom to enterprise in Art. 6 StGG because the protection also extends to non-citizens with non-Austrian Nationality or legal persons established in EU countries (see, concerning the procedure under Art. 144 B-VG, VfSlg. 19.077/2010, 19.118/2010; nothing else applies to proceedings under Art. 140 (1) B-VG).

2.1.3. By the permanent jurisdiction to the constitutionally issued right to freedom of commercial activity in accordance with Art. 6 StGG (s. ie. VfSlg. 10.179/1984, 12.921/1991, 15.038/1997, 15.700/1999, 16.120/2001, 16.734/2002 and 17.932/2006), the rule, restrictions on freedom of enterprise on the basis of the reservation of rights attached to this fundamental right are only permissible, if they are suited, adequate and otherwise are justified through the achievement of objective through the imperative public interest. Also the legal regulation, which restricts the professional practice, is to be examined for its consensus with the constitutionally guaranteed freedom of employment and must therefore be determined through a public interest and otherwise to be objectively justified. This means that the regulations of practice must be proportionate in an overall assessment of the importance of the operation and its justified grounds. However, the legislature is more open to the right of political regulation than to the overall regulation of professional practice which restricts the access to an occupation (the acquisition of a company), because of the execution of occupation regulations which may interfere is less heavy in the constitutionally protected rights than through regulation, that hinders access to the profession at all (see ie. VfSlg. 13.704/1994 and the previous rulings cited therein; further VfSlg. 16.024/2000 and 16.734/2002).

§27 (1) TSchG orders, that in circuses, no type of animals are allowed to be kept or used. By “wild animals”, the TSchG covers the decisions in §4 of this legislation “all animals not included in *Haus* and *Heim* animals” (§4 Z4 TSchG), where “*Haustiere*” (domesticated animals) (§4 Z2 TSchG) and “*Heimtiere*” (domestic pets) (§4 Z3 TSchG) are to be defined in more detail by law. The prohibition standardizes in §27 (1) TSchG that a circus like that of the applicant exhibits wild animals such as elephants, lions, a rhinoceros, llamas and zebras in its program, is prevented, to show this program in Austria in the provided way. With that, the applicant’s circus work will simply not be prohibited, because a series of performances in the program that manage without

wild animals, can be shown in this regard without restriction. But certain provisions were made for the applicant, how she may carry out circus work for profit, only without the use of wild animals. §27 (1) TSchG provides for a regulation of the occupational activities of the applicant and applies its constitutionally guaranteed right to freedom of employment.

2.1.4. The prohibition, to keep and to use wild animals in circuses and the resulting interference with the applicant's freedom of action serves the public interest, namely the "protection of the life and well-being of the animals out of the special responsibility of humans for the animal as a fellow creature"(§1 TSchG). This has already been stated multiple times by the constitutional court (VfSlg. 15.394/1998, 17.731/2005, 18.150/2007). The applicant does not question this, but deems an absolute prohibition on the keep and participation of wild animals in circuses not necessary to achieve the objective of the regulation, especially against a system which provides prohibition with a reservation of authorization along with individual approval for keep and use of wild animals in a particular circus.

The legislators considers, as the Federal Government states, the absolute prohibition of the keep and participation of wild animals in circuses necessary for the following reasons:

Circuses could not typically ensure adequate animal care as defined in the 2nd Animal Keep Ordinance due to their special conditions of activity (in particular frequent travel and associated requirements for the accommodating facilities available to the animals). Therefore, for a lion, in addition to a specially designed interior, year-round access to an outcrop must be allowed, which must have at least 500 m^2 (plus 10% additional area for every adult animal) where lions are kept in packs. Rhinos must be kept at least in pairs and, in addition to an indoor system, have access to an outcrop of at least 1000 m^2, elephants have at least 3000 m^2 for three adult cows and 700 m^2 for a grown bull. Furthermore, frequent change in location, typical for the circuses as well as the applicant, puts the animals in a strongly detrimental situation to them because of the accommodation in the transport vehicles and the need to get used to new surroundings. Finally, in context of circus performances, animals are not only restricted to specific movements and positions, but also especially those that do not correspond to the natural behavior of wild animals, such as the elephant's head posture.

Professional rules of practice such as the prohibition of the keeping and the participation of wild animals in circuses to be assessed here must be proportionate to the severity of the intervention and the weight of the justifications. The legislator is open to a larger right-wing political scope because a regulation governing the exercise of employment is less affected by the freedom to work than be rules which completely ban the access to the profession.

As the constitutional court has already noted, a change in values has occurred in the last decades and, according to today's view, animal welfare is widely recognized and important to public interest (VfSlg. 15.394/1998). Even though the Constitutional Court does not misjudge the fact that the long tradition of the working and living form of the circus (including performances historically always connected with wild animals). However, in the greater scope of this legislature, the Constitutional Court can not object to it from a constitutional viewpoint if it no longer accepts the use of wild animals in circuses and the impairments and burdens forced upon these animals for the purpose of amusement and entertainment, which was once regarded as irrelevant.

The applicants claim to exercise freedom of action is therefore not a matter of constitutional importance , if the legislator particularly regards the regulations governed by the care needs laid down for wild animals and the burdens, which they endure in the high mobility of a circus, demands a prohibition on the keeping and participation of wild animals in circuses. Like a prohibition of the keep or display of dogs and cats

in pet shops for the purpose of sale (VfSlg. 17.731/2005) or a general ban of the use of electric disciplining devices (VfSlg. 18.150/2007), the prohibition in §27 (1) TSchG also proves to be proportionate in the overall balancing the freedom of enterprise.

2.2.1. The applicant also considers that the principle of equality laid down in Art. 7 (1) B-VG, which also applies to citizens of non-Austrian nationality and legal persons domiciled outside the union (see also point 2.1.2. above), because the prohibition of §27 (1) TSchG extends only to circuses, vaudevilles etc. but not to other establishments such as zoos, even though these establishments are quite comparable with regard to the keep of wild animals. The principle of equality sets the legislator's limits in terms of content, insofar as it prohibits the adoption of objectively unjustifiable rules (see ie. VfSlg. 14.039/1995, 16.407/2001). Within these limits, however, the legislator is not denied constitutional reason through the principle of equality, to pursue their political aims in a manner which seem appropriate to them (see for example VfSlg. 16.176/2001, 16.504/2002). These limits are not exceeded in the present case:

As the Federal Government expresses convincingly in its statement, the keep of wild animals in zoos differs significantly from that in circuses. Thus, zoos can meet requirements of wild animals with regard to the care needs posed by animals and can be enforced. Furthermore, the use of wild animals in a circus, which involves the participation of the animals in trained acts, differs considerably from that in a zoo with regard to the objective of the TSchG. There is therefore no unjustified unequal treatment and no violation of the principle of equality.

2.3 Out of the reasons stated in point 2.1. and 2.2., the constitutional court also finds that the Prohibition of §27 (1) TSchG does not violate public interest or pose a disproportionate restriction on the property of the applicant (to the effect that Art. 5 StGG or Art. 1 1.ZP EMRK does not preclude restrictions on property rights provided by the legislator insofar as this property restriction is in the public interest and no disproportionate, see, for example, VfSlg 15.367/1998, 15.577/1999, 15.753/2000 or 17.071/2003).

2.4.1. Finally, the applicant sees a violation of the constitutional duty to mutual consideration between the federal government and the Ländern through §27 (1) TSchG, because the Federal Legislator did not take into account the regional legislators in the ruling of the absolute prohibition of the keep and use of wild animals in circuses.

2.4.2. As the Constitutional Court already states in the verdict VfSlg. 8831/1980, the Federal Constitution is subject to a mutual obligation of consideration. This forbids the legislature of one political body from negating the interests of the legislature of the other political body and undermining its legal regulations (VfSlg. 10.292/1984). The Constitutional Court cannot recognize recognize with the Federal Government that the Federal Legislator is guilty of a violation against this because of the jurisdiction of §27 (1) TSchG under Art. 11 (1) Z8 B-VG. The federal law prohibiting the keep and use of wild animals in circuses does not prevent the state legislator from regulating the activities of circuses under the rules of the courts. Moreover, the Federal legislature does not underlie (unlike in the case VfSlg. 18.096/2007) the opposing regulatory intention of the provincial legislator.

IV Result and related remarks

The application for the annulment of the word "circuses," in para. 1 of §27 TSchG is therefore unfounded and must be rejected.

According to §19 para. 4, first sentence VfGG, this decision could be made without a hearing in a non-public session.