

EC Law and the Austrian Constitutional Court

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I. Introduction

While some other constitutional courts – to put it simply – try to avoid issues of European law, the Austrian *Verfassungsgerichtshof* has intensively dealt with questions of European law for a long period of time. This certainly applies to the European Convention of Human Rights, as the Convention is part of constitutional law in Austria, but it is also true for EC law.

Since Austria's accession to the European Union in 1995 the Court decided several hundred cases raising questions of EC¹ law. It is not easy to summarize this jurisprudence,² and this short report cannot do more than just give an idea of it. In its

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1 So far, law of the second and third pillars of the EU has not played a role in the Court's practice.

2 For detailed analyses and special questions see L. K. Adamovich/B.-C. Funk/G. Holzinger *Österreichisches Staatsrecht* Bd. I, 1997, Rn. 17.084ff.; B. Bapuly/G. Kohlegger *Die Implementierung des Gemeinschaftsrechts in Österreich: Die Gerichtsbarkeit*, 2003, 4ff., 37ff.; Z. Chojnacka *ZÖR* 59 (2004), 415; S. L. Frank *Gemeinschaftsrecht und staatliche Verwaltung*, 2000, 213ff.; M. Frischhut/C. Ranacher *ÖJZ* 2005, 241; S. Griller in: Korinek/Rill (Hrsg.) *Österreichisches Wirtschaftsrecht und das Recht der EG*, 1990, 113 (129ff.); S. Griller in: Aicher/Holoubek/Korinek (Hrsg.) *Gemeinschaftsrecht und Wirtschaftsrecht*, 2000, 27 (127ff.); S. Griller *JRP* 2000, 273 (280f.); W.-D. Grussmann *ZfV* 1990, 427; G. Holzinger *JRP* 1996, 160 (179ff.); G. Holzinger *FS Winkler*, 1997, 351; G. Holzinger in: Hauer (Hrsg.) *Die Handhabung des Gemeinschaftsrechts in der österreichischen Verwaltung*, 2002, 31; G. Holzinger *FS Öhlinger*, 2004, 142; G. Kienast *RdW* 1999, 479; K. Korinek in: Holoubek/Lang (Hrsg.) *Das verfassungsgerichtliche Verfahren in Steuersachen*, 1998, 31; K. Korinek *FS Tomandl*, 1998, 465; K. Korinek *FS Öhlinger*, 2004, 131; R. Novak *FS Adamovich*, 2002, 539; R. Novak *JBl* 1998, 341; R. Novak *JBl* 2000, 137, 772; R. Novak *JBl* 2002, 11; R. Novak *JBl* 2003, 2, 894; R. Novak *JBl* 2005, 85, 227, 757; R. Novak *JBl* 2007, 220, 681; T. Öhlinger *FS Rill*, 1995, 359 (368 ff.); T. Öhlinger in: Hummer/Schweitzer (Hrsg.) *Österreich und das Recht der Europäischen Union*, 1996, 169 (178ff.); T. Öhlinger *Verfassungsfragen einer Mitgliedschaft zur Europäischen Union*, 1999, 200f., 217ff.; T. Öhlinger in: Karl (Hrsg.) *Internationale Gerichtshöfe und nationale Rechtsordnung*, 2005, 123 (129ff.); T. Öhlinger *Verfassungsrecht*, 7. Aufl. 2007, Rn. 190ff.; T. Öhlinger/M. Potacs *Gemeinschaftsrecht und staatliches Recht*, 3. Aufl. 2006, 116, 171ff., 192; D. Pauer *ZfV* 1997, 703; M. Potacs in: Griller/Rill (Hrsg.) *Verfassungsrechtliche Grundfragen der EU-Mitgliedschaft*, 1997, 127; M. Potacs *Die Europäische Union und die Gerichtsbarkeit des öffentlichen Rechts*, GA 14.ÖJT, 2000, 58ff., 95ff., 117ff.; M. Potacs *ZfV* 2001, 756; C. Ranacher *ZÖR* 58 (2003), 21 (82f.); Rodriguez Ig-

first part, it will present examples of where EC law comes into play in some of the standard procedures of the Court (constitutional complaints, review of statutes, and certain monetary claims under public law³); in its second part, it will categorize the examples in the light of the various functions of this jurisprudence.

II. The Role of EC Law in Standard Procedures of the Constitutional Court

1. Constitutional Complaint

Although the Court declines *ratione materiae* to decide on the conformity of Austrian legal acts with EC law, EC law plays an important role in constitutional complaint procedures for three reasons:

First, just like the *Bundesverfassungsgericht*, the Court qualifies the omission of a lower instance to refer a case to the ECJ as a violation of the (domestic) constitutional right of the parties to a decision by the judge provided by law.⁴ But unlike the *Bundesverfassungsgericht*, the Austrian Court uses a strict scrutiny test in this context and consequently has to interpret in detail all elements of article 234 TEC, e.g. the notion of a court, the relevance of the question for the case, and the *acte claire* doctrine under the CILFIT jurisprudence of the ECJ.

Secondly, the Court treats qualified violations of EC law as "arbitrariness" and thus as violations of the Austrian constitutional standards of equal protection under the law.⁵

Thirdly, the application of a domestic statute, which should not have been applied because of a contradiction to directly applicable EC law, is qualified as an infringe-

lesias *FS Adamovich*, 2002, 681 (685ff.); H. Schäffer *ZÖR* 60 (2005), 345 (370ff.); H. Schäffer in: Eilmansberger/Herzig (Hrsg.) *10 Jahre Anwendung des Gemeinschaftsrechts in Österreich*, 2006, 29 (50ff.); N. Schopf *Das Recht auf ein Verfahren vor dem gesetzlichen Richter*, 2000, 235f., 239ff.; C. Stix-Hackl *AnwBl* 1998, 558, 621; R. Thienel *ZfV* 2001, 342; P. Vcelouch *Gerichtskompetenz und EU*, 1996, 134ff., 205ff.; P. Vcelouch *ÖJZ* 1997, 721 (723ff.); R. Walter/H. Mayer/G. Kucsko-Stadlmayer *Bundesverfassungsrecht*, 10. Aufl. 2007, Rn. 246/21ff.; R. Winkler *Integrationsverfassungsrecht*, 2003, 134ff.; R. Winkler *JBl* 1998, 551.

3 For general information on the Court and the text of relevant constitutional and statutory provisions in English, see www.vfgh.gv.at/cms/vfgh-site/english/index.html. Decisions (in German) are accessible at www.ris2.bka.gv.at/Vfgh.

4 VfSlg (= Official Collection of the Decisions of the Constitutional Court) 14.390/1995; 14.607/1996; 14.889/1997; 15.507/1999; 15.657/1999; 15.766/2000; 16.988/2003; 17.411/2004; 17.500/2005; see also N. Schopf *Das Recht auf ein Verfahren vor dem gesetzlichen Richter*, 2000, 239ff.

5 VfSlg 14.886/1997; 15.450/2001; 16.771/2002.

ment of rights without a legal basis and therefore as a breach of the constitution, too.⁶

2. Constitutional Review of Statutes

The Court does not use EC law as a standard of review.⁷ Questions of EC law are important for the admissibility of motions for review, though, and they may alter the domestic standards of review:

In principle, a motion by another court or an individual party of a given procedure is inadmissible if the challenged statute is not in compliance with (directly applicable) EC law because then the statute must not be applied in the respective case and therefore there is no need to control it.⁸ This concerned, e.g., a promoting scheme for a public enterprise to the disadvantage of part-time employees in contradiction to article 141 TEC and pertaining secondary legislation.⁹ As a consequence, with the exception of abstract review situations,¹⁰ the Court has to deal to some extent with the compatibility of national law with EC law in each review procedure.

EC law may not be the standard of review but it may alter this standard – be it by an interpretation of Austrian constitutional law in conformity with EC law or be it because a certain provision of the Constitution must not be applied due to a contradiction to EC law. The Constitutional Court has accepted, in principle and in most of its practice, the supremacy of directly applicable EC law over constitutional law, too.¹¹ For instance, it held inapplicable a constitutional rule that inhibited the access to the Administrative Court in certain telecommunication issues because this rule was superseded by a provision of the respective directive on effective remedies.¹²

3. Monetary Claims under Public Law

Unlike other constitutional courts, the Austrian *Verfassungsgerichtshof* has jurisdiction over cases of monetary claims against the state under public law. This jurisdiction is of a subsidiary nature and does not include regular state liability cases; they fall within the competence of the ordinary courts. State liability claims based on qualified violations of EC law by legislative acts or highest Courts decisions are not regular cases, though; they cannot be brought before the ordinary courts under the

relevant statute. The Constitutional Court, using its subsidiary jurisdiction, happily acts as a substitute here.¹³ In this specific role, it has to use European law as the standard of legality.

4. References to the ECJ

As the Constitutional Court deals with EC law in all those situations (and some others, too), it finds itself also in the position to refer questions to the ECJ. The Court has expressly accepted its own duty to ask for preliminary rulings,¹⁴ and it has done so on several occasions and faithfully drawn the consequences of the respective decisions of the ECJ.¹⁵

III. Functional Analysis of the Court's Practice

1. The Court as a Community Court

From a functional perspective, it is evident that the Constitutional Court acts to a large degree as a Community Court, i.e. a court that supports and enhances the correct application and implementation of EC law in Austria. Its jurisprudence on violations of the duty to refer questions to the ECJ as violations of Austrian constitutional law compensates a weakness of the EC system of legal protection, which is important also under ECHR standards. The doctrine of the inadmissibility of the constitutional review of superseded statutes is particularly important in obvious cases where there is no duty to refer the question to the ECJ under the *acte claire* doctrine: The complaining party will technically lose the case but it will be nevertheless satisfied because it gets a statement of non-applicability of the disputed statute by the Constitutional Court. Finally, the described conversion of violations of EC law into violations of the Constitution, like in the mentioned cases of arbitrariness or lawlessness, increases the chances of a correct application of EC law in Austria.

2. The Court as Defender of the Constitution against EC Law

But obviously this is not the primary task of the Constitution Court. Its main function is to protect the constitution, and that is what the Court does, in purely internal cases as well as in cases involving EC law. In particular, the Court sees the Austrian authorities implementing EC directives under a double commitment to EC law and

6 VfSlg 15.448/1999; 15.910/2000; 17.614/2005.

7 VfSlg 14.886/1997; 14.948/1997; 15.753/2000; 16.627/2002.

8 VfSlg 15.368/1998; 16.995/2003; concerning a motion by an individual VfSlg 15.771/2000.

9 VfSlg 15.368/1998; 15.448/1999; see *G. Kienast* RdW 1999, 479.

10 VfSlg 15.753/2000.

11 VfSlg 15.215/1998; 16.050/2000; 17.065/2003; 17.075/2003.

12 VfSlg 15.427/1999; see also *G. Holzinger* in: Hauer (Hrsg.) *Die Handhabung des Gemeinschaftsrechts in der österreichischen Verwaltung*, 2002, 31 (37ff.).

13 VfSlg 16.107/2001; 17.002/2003; 17.019/2003; 17.095/2003; 17.214/2004; 17.576/2005; see *M. Frischhut/C. Ranacher* ÖJZ 2005, 241.

14 VfGH B 2251/97 of 10. 3. 1999; VfSlg 16.627/2002.

15 VfSlg 15.450/2001; 17.065/2003; 17.075/2003.

constitutional law.¹⁶ As a consequence, it regularly reviews implementing acts for their constitutionality, e.g. whether they should have been enacted by federal authorities or by authorities of the *Länder*, whether an act of parliament is necessary or an ordinance of a minister is sufficient, whether an implementing statute is detailed enough, whether the implementing act covers all relevant situations and not only those in the ambit of the respective directive and so on.¹⁷

The double commitment doctrine is a perfectly sound concept as long as EC law gives room to the fulfilment of constitutional requirements. It does not work, though, if EC requirements and constitutional requirements cannot be fulfilled simultaneously because they contradict each other. In such situations, the Court has to choose between the double commitment theory and the supremacy of EC law over the constitution. In this respect the practice has not been consistent: In the conflict between EC rules on effective legal remedies and various constitutional limitations of access to independent tribunals the Court found the Constitution superseded in one (already cited) case¹⁸ and insisted on the need to change the constitution before implementing the directive in another case.¹⁹ The reasons for that are not clear; some argue the Court just wanted to keep all options for the future.²⁰

3. The Court as a Player with EC Law

That leads us to the third and most interesting function: the creative use of EC law by the Constitutional Court for a policy of its own. Let me give you just one example. A few years ago, the Court had to assess the constitutionality of a statute that required the publication of the income of the top managers of Austria's public broadcasting company.²¹ It was a tough case because the statute had been enacted as a special constitutional act so there was a conflict between the *constitutional* duty of publication on one hand and the *constitutional* right to private life under article 8 ECHR on the other hand. The Court could have resolved the conflict, resorting to the *lex posterior* or the *lex specialis* rule, in favour of the publication duty, but obviously it did not like this outcome so it found another solution. Although it was hard to see an EC context, the Court asked the ECJ whether the EC data protection rules were to be understood to prohibit publications like the one provided for in the Austrian statute. The ECJ did as requested: With a reference to the practice of the Stras-

16 VfSlg 15.106/1998; 15.321/1998; 15.683/1999; 16.260/2001; 17.001/2003; 17.022/2003; 17.347/2004; 17.554/2005; VfGH G 138/05 ua, V 97/05 ua of 11. 10. 2006; see K. Korinek FS Öhlinger, 2004, 131.

17 VfSlg 15.189/1998; 15.354/1998; 16.921/2003; 17.022/2003; VfGH G 138/05 ua, V 97/05 ua of 11. 10. 2006.

18 VfSlg 15.427/1999.

19 VfSlg 17.001/2003.

20 R. Novak JBI 2005, 757.

21 VfSlg 16.050/2000.

bourg Court of Human Rights, the ECJ held that the publication was inadmissible under the data protection directive unless there was a prevailing public interest for it; whether there was such an interest in the given case, the ECJ left for the Constitutional Court to decide.²² The Constitutional Court could now do what it had wanted to do to start with:²³ It denied the prevalence of the public interest, and based on the supremacy of the data protection directive over the constitutional statute on the publication it could decline to apply the publication rule. So privacy prevailed in the end because the Constitutional Court had used the ECJ to promote article 8 of the ECHR to a supra-constitutional rank.

On the surface the case is on the supremacy of EC law over Austrian constitutional law. But more than that: it is a case on the possibilities of a creative constitutional court to use EC law for its own purposes.

IV. Conclusion

The constitutional courts of the old Member States do not handle EC law in a uniform way. Also beyond technicalities, there are remarkable differences, and it is hard to generalize.

The Austrian example shows that European law need not be a threat for the special role of Constitutional Courts; on the contrary, constitutional courts which choose an active and creative approach to it can only benefit from it.

22 ECJ, Joined Cases C-465/00, C-138/01 and C-139/01, *Österreichischer Rundfunk and others.*, ECR 2003, I-4989.

23 VfSlg 17.065/2003; see also Z. Chojnacka ZÖR 59 (2004), 415; R. Novak JBI 2005, 757; T. Öhlinger in: Karl (Hrsg.) Internationale Gerichtshöfe und nationale Rechtsordnung, 2005, 123 (129ff.).

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