

THE IMPLEMENTATION OF EU LAW IN THE AUSTRIAN LEGAL SYSTEM\*

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**Abstract**

*The following paper analyses the implementation of EU law into Austrian law. I will in a first step define the term of “implementation”, as the further analysis varies depending on the scope of the definition. Opting for a rather broad definition allows to examine all three state powers, i.e. legislation, administration and judiciary. I will then present selected challenges the different state powers are facing when implementing EU law (e.g. challenges arising from the Austrian federal system, coordination, etc.).*

*In order to better understand these challenges, it is necessary to set out the constitutional framework for the implementation. This encompasses, amongst others, aspects of the constitutional distribution of competences and the role of the legality principle in the Austrian legal system which explains the fundamental role the legislator plays in implementing EU law.*

*Moreover, special consideration is given to the Constitutional Court, which after its 2012 land-mark judgement treats some guarantees of the Fundamental Rights Charter as a standard of scrutiny when assessing the constitutionality of infra-constitutional law (of laws and administrative and judicial decisions).*

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### 1. Introduction

Membership in the European Union has brought fundamental changes to the Austrian legal system.<sup>1 2</sup> This is not least due to the reliance of the EU legal system on different legal traditions<sup>3</sup>, which are not always completely compatible with the Austrian legal tradition. Since the EU legal system as a whole is a rather colorful *mélange* with elements of different legal traditions, it is not always compatible with the Austrian law either.

However, changes to the Austrian constitution do not begin and end with the country's entrance into EU membership. Rather, being a member requires the Austrian legal system to keep evolving in tandem with the EU legal system.<sup>4</sup>

In the following, after explaining the definition of implementation used for the analysis (2.), the Austrian (constitutional) parameters for the implementation (3., 4.) will be explained and current cases will be presented (5.). The aim of the analysis is to provide an explanation for recurring problems with and an overview on implementation of EU law in Austria, and allow for the comparison with the situation in other member states (see other contributions in this volume).

### 2. Implementation of EU Law

Implementation can be defined in a very narrow manner or more broadly, as is the case in this article. For the purpose of finding a definition of the term implementation I will in the following refer to the terms of execution and application of EU law, as those terms also appear in doctrine. For the analysis, the term implementation shall encompass those of execution and application, as I will show in this section.

<sup>1</sup> I would like to thank Dr. Teresa Sanader, MSc (LSE), BA for inspiring discussions.

<sup>2</sup> W. BERKA, *Verfassungsrecht*, Verlag Österreich, Wien, VI ed., 2016, p. 14. TH. ÖHLINGER, *Abschied von den UVS. Die UVS: Gestern - heute - morgen*, in ZUV, 2012, p. 51 (p. 56): „Das markanteste Ereignis der österreichischen Rechtsgeschichte der Zweiten Republik war wohl der Beitritt Österreichs zu EU.“

<sup>3</sup> See, e.g., F.G. NICOLA, *National Legal Traditions at Work in the Jurisprudence of the Court of Justice of the European Union*, in *The American Journal of Comparative Law*, 64, 2016, p. 865 (p. 865 ff). the different legal traditions are also reflected in the general principles of EU law, see A. KAHL, K. WEBER, *Allgemeines Verwaltungsrecht*, facultas, Wien, V ed., 2015, p. 76 f and CJEU, *Algera*, ECLI:EU:C:1957:7.

<sup>4</sup> G. LIENBACHER, *Der Verwaltungsrechtsschutz in Österreich und die europäische Dimension*, in A. GAMPER, P. BUßJÄGER, C. RANACHER, N. SONNTAG (eds.), *Die neuen Landesverwaltungsgerichte*, nap, Wien, 2013, p. 29 (p. 30) points out that the dynamic of the Luxembourg (and Strasbourg) court keeps things in a constant “flow”. He therefore explains, that the European dimension of legal protection in administrative law will keep Austria busy also in the future. The same is true for other fields.

Whether a definition is considered narrow or broad depends on which forms of execution of EU law are conceived as implementation; i.e. the choice of what should be covered by the term “implementation” depends on the aim of the analysis. It might make sense to only look at specific forms of implementation (e.g. implementation through the legislator). A broad definition can be useful when one wants to analyze the bigger picture (e.g. effects of implementation in general). Since this article aims to highlight different aspects of implementation in Austrian law and various Austrian peculiarities in relation to EU law, a broad definition is preferable, as will be shown by the different facets of implementation in this context, which will be covered in the following:

The law of the European Union<sup>5</sup> can be executed either directly through organs of the European Union or indirectly through organs of the member states.<sup>6</sup> There also exist mixed forms of implementation, but since they are not as common as the other forms, they will be excluded from this analysis.<sup>7</sup>

Regarding the distinction between direct and indirect execution, the existing literature shows that a considerable and important part of EU law is executed indirectly.<sup>8</sup> As the indirect execution of EU law only entails the adaptation of national institutions and procedures where necessary (though said adaptation is not uniformly laid out in an EU blueprint)<sup>9</sup>, a look at the different member states shows that the indirect execution varies depending on national legal culture and tradition.<sup>10</sup> An analysis of the implementation of EU law in the Austrian context requires an examination of the indirect execution of EU law. Austrian doctrine<sup>11</sup> distinguishes three forms of implementation: First, normative (legislative) implementation (“implementation in a narrow sense”), second, administrative implementation (through administrative regulations

<sup>5</sup> The Law of the European Union encompasses the treaties and other forms of law laid down in Art 288 TFEU. For the latter see M. RUFFERT, *Art. 288 AEUV*, in C. CALLIESS, M. RUFFERT (eds.), *EUV/AEUV*, V ed., Beck, München, 2016. However, questions of implementation show that the term goes beyond those treaties and other forms, and that it is more accurate to use “legal acts of the EU” instead. Also other norms, such as decisions of EU Courts are norms that have to be implemented; see C. RANACHER, *Bezüge zur Europäischen Union*, in E. PÜRKY (ed.), *Das Recht der Länder I*, Jan Sramek, Wien, 2012, p. 87 (p. 133 f).

<sup>6</sup> W. BERKA, *Verfassungsrecht*, cit., p. 105.

<sup>7</sup> A. KAHL, K. WEBER, *Allgemeines Verwaltungsrecht*, cit., p. 79 ff.

<sup>8</sup> W. BERKA, *Verfassungsrecht*, cit., p. 105, A. KAHL, K. WEBER, *Allgemeines Verwaltungsrecht*, cit., p. 73.

<sup>9</sup> See, A. KAHL, K. WEBER, *Allgemeines Verwaltungsrecht*, cit., p. 73 (argumentum a contrario).

<sup>10</sup> Directives are only binding with regard to their objectives, leaving therefore space for the way member states want to implement them, A. KAHL, K. WEBER, *Allgemeines Verwaltungsrecht*, cit., p. 213.

<sup>11</sup> TH. ÖHLINGER, M. POTACS, *EU-Recht und staatliches Recht*, LexisNexis, Wien, VI ed., 2017, p. 109 ff, A. KAHL, K. WEBER, *Allgemeines Verwaltungsrecht*, cit., p. 72.

and individual decisions; “execution”, “application”) and third, judiciary implementation (through the courts; “execution”; “application”).

With regard to the indirect execution, one can further distinguish between immediate indirect execution and mediated indirect execution, which has implications at the national level.<sup>12</sup> The implementation of EU law distinguishes between norms which have a direct effect<sup>13</sup> and norms which have to be genuinely implemented at the national level.<sup>14</sup> Norms with direct effect can affect national law if national law is not in line with EU law.<sup>15</sup> These norms enjoy primacy of application, meaning that national law which contradicts them cannot be applied (“Anwendungsvorrang”).<sup>16</sup> Primacy of application applies to any national norm that is against EU law, and therefore also extends to procedural or organizational questions.<sup>17</sup> In contrast, norms that are not vested with direct effect are (largely) directives. They have to be implemented by the member states in order to comply with European Union law.<sup>18</sup> As stated above, this article will rely on a broad understanding of implementation, which encompasses not only the implementation of directives, but also includes those effects of EU law that are sometimes classified as the application of EU law. In other words, all aspects of the indirect execution of EU law are covered, which allows for a more comprehensive understanding of the interfacing of EU law with the Austrian legal system. The emphasis of the analysis is put on the characteristics of this interface in order to highlight the most important changes brought to the Austrian legal system via accession to the EU. Instead of showing how Austria has implemented EU rules, the aim is to examine the questions which have arisen and, indeed, keep arising for the Austrian legal system in general from EU law.

### 3. Two systems, separate but intertwined

#### A. Leaving space for the member states

EU law does not determine every detail of its implementation by the member states. Rather, it acknowledges the autonomy of the member states and gives

<sup>12</sup> A. KAHL, K. WEBER, *Allgemeines Verwaltungsrecht*, cit., p. 73.

<sup>13</sup> Regulations are vested with direct effect (Art 288 TFEU); also primary law (the treaties) are vested with direct effect.

<sup>14</sup> Directives have to be implemented (Art 288 TFEU).

<sup>15</sup> A TH MÜLLER, *Effet direct. Die unmittelbare Wirkung des Unionsrechts*, 2017 (forthcoming).

<sup>16</sup> W. SCHROEDER, *Grundkurs Europarecht*, C.H. Beck, München, IV ed., 2015, p. 68 ff, A. KAHL, K. WEBER, *Allgemeines Verwaltungsrecht*, cit., p. 77 f. Doctrine suggests, that the primacy of application does not work towards the core principles (A. KAHL, K. WEBER, *Allgemeines Verwaltungsrecht*, cit., p. 78; on barriers to integration see also TH. ÖHLINGER, M. POTACS, *EU-Recht und staatliches Recht*, cit., p. 58 f).

<sup>17</sup> A. KAHL, K. WEBER, *Allgemeines Verwaltungsrecht*, cit., 77 f.

<sup>18</sup> A. KAHL, K. WEBER, *Allgemeines Verwaltungsrecht*, cit., 213.

them certain amounts of leeway.<sup>19</sup> Of course, what is left to the discretion of the member states is not the decision of whether or not to implement EU law in the first place, but rather the decision on *how* to do so, at least in a number of important respects.<sup>20</sup> EU law, especially the treaties and the Charter of Fundamental Rights, builds a framework which the member states have to respect.

This framework is characterized by the supranational nature of EU law and the relationship which it builds with the individual person (EU citizen). Since at least part of the EU law is vested with direct effect, it is (often) the individual person<sup>21</sup> that compels and/or forces the member states to respect and implement EU law.<sup>22</sup>

Hence, the implementation of EU law can differ considerably depending on the member state, especially on the procedural level.<sup>23</sup>

As a result, EU law and national law often merge<sup>24</sup>, which manifests in national legislators, administrations and judges being bound not only by EU law but also by their respective (constitutional) legal order.<sup>25</sup>

<sup>19</sup> A. WEBER, *Europäische Verfassungsvergleichung*, C.H. Beck, München, 2010, p. 411.

<sup>20</sup> A. KAHL, K. WEBER, *Allgemeines Verwaltungsrecht*, cit., 73 f.

<sup>21</sup> The EU citizenship is the strongest realisation of the relation between the EU and the individual person, see, CJEU, AG Jacobs, ECLI:EU:C:1992:504, n 46, W. SCHROEDER, *Grundkurs Europarecht*, cit., p. 205 ff and C. SCHÖNBERGER, *Unionsbürger: Europas föderales Bürgerrecht in vergleichender Sicht*, Mohr Siebeck, Tübingen, 2005, p. 47 f.

<sup>22</sup> In the case of directives, e.g., the individual can under certain circumstances bring the non-implementation to the CJEU, A. TH. MÜLLER, *Effet direct. Die unmittelbare Wirkung des Unionsrechts*, cit.

<sup>23</sup> Rules on how a law or an administrative ordinance is produced are at the discretion of the individual member states. The same is true for administrative proceedings in case of individual claims. Nonetheless, the CJEU is controlling those procedural rules to a considerable extent, especially in the light of the equivalence principle, general standards of EU law and with regard to effectiveness (see W. SCHROEDER, *Die Durchführung von Gemeinschaftsrecht*, in W. HUMMER (ed), *Paradigmenwechsel im Europarecht zur Jahrtausendwende*, Springer, Wien New York, 2004, p. 231 (p. 247 f)). Schroeder argues, that the term “procedural autonomy” is therefore misleading (p. 247). Literature is still using the term, see, e.g., A. KAHL, K. WEBER, *Allgemeines Verwaltungsrecht*, cit., p. 73 f, who are also pointing at the constraints highlighted by Schroeder. See also A. WEBER, *Verfassungsvergleichung*, cit., p. 411., W. SCHROEDER, *Grundkurs Europarecht*, cit., p. 134.

<sup>24</sup> This manifests, e.g., in the emerging common European administrative space (Europäischer Verwaltungsverbund), see the contributions in E. SCHMIDT-ASSMANN, B. SCHÖNDORF-HAUBOLD, *Der Europäische Verwaltungsverbund: Formen und Verfahren der Verwaltungszusammenarbeit in der EU*, Mohr Siebeck, Tübingen, 2005, and W. WEIß, *Der Europäische Verwaltungsverbund: Grundfragen, Kennzeichen, Herausforderungen*, Duncker & Humblot, Berlin, 2010.

<sup>25</sup> A. KAHL, K. WEBER, *Allgemeines Verwaltungsrecht*, cit., p. 114. This is also a demanding task for a state apparatus, especially in terms of building up a sufficiently large cadre of employees who possess the necessary in-depth knowledge of EU law.

### B. Twofold ties – “doppelte Bindung”

Since the structure of EU law differs from the structure of Austrian law, implementing European law into the Austrian system (via national Austrian law) requires the reconciliation and satisfaction of two systems at the same time. In order to fulfill this demand, Austrian doctrine has developed the concept of the so-called “*doppelte Bindung*”, the “twofold ties” for Austrian legal acts implementing EU law. This means that an Austrian law implementing a EU norm is not only bound to EU standards, but also to the Austrian constitutional provisions. However, the concept of the “twofold ties” is not limited to the implementation of EU law through laws. The Austrian system sometimes makes it necessary, e.g., to apply both, national fundamental rights and fundamental rights stipulated by the Charter of Fundamental Rights. This would be also a case of the “twofold ties”.<sup>26</sup>

For the legislator, the implementation of EU law entails<sup>27</sup> several questions, such as who is competent to implement it<sup>28</sup>, as well as issues regarding the form of the implementing act<sup>29</sup>, the requirements of determination of implementing acts, the publication and coming into force (*Kundmachung*) of implementing acts, possible sanctions, national human rights, and access to forms of legal protection, as well as the question whether tasks can be performed by “*Selbstverwaltungskörper*” (self-governing bodies) and issues with regard to specific forms of legislation (“framework legislation”). The administration is faced with, among other things, the requirement to respect the distribution of competences between the federation and the *Länder*. The administration is bound to the law and may have to choose the one solution that least affects national law out of several different possibilities that are in line with EU law. In addition, it has the duty to respect the principles of legality and national human rights.<sup>30</sup> Moreover, the administration has to exercise its “*Ermessen*”<sup>31</sup> (discretion), which emanates from a directly effective EU norm, in a way that does not affect the

<sup>26</sup> K. PABEL, *Zusammenwirken mitgliedstaatlicher und unionaler Grundrechte*, in S. GRILLER, A. KAHL, B. KNEIHS, W. OBWEXER (eds.), *20 Jahre EU-Mitgliedschaft Österreichs*, Verlag Österreich, Wien, 2016, p. 229 (p. 248) and E. VRANES, *Art. 53 GRC*, in G. LIENBACHER, M. HOLOUBEK (eds.), *GRC Kommentar*, cit., 2014.

<sup>27</sup> See C. RANACHER, M. FRISCHHUT, *Handbuch Anwendung des EU-Rechts*, Facultas, Wien, 2005, p. 281 f.

<sup>28</sup> See below (distribution of competence)

<sup>29</sup> See below (limited forms of legal acts in Austrian law).

<sup>30</sup> C. RANACHER, M. FRISCHHUT, *Handbuch Anwendung des EU-Rechts*, cit., p. 283.

<sup>31</sup> C. RANACHER, *Ermessen der Verwaltung und Ermessen der Verwaltungsgerichte*, in M. HOLOUBEK, M. LANG (eds.), *Grundfragen der Verwaltungs- und Finanzgerichtsbarkeit*, Linde Verlag, Wien, 2017, p. 189 ff and C. FUCHS, *Verwaltungsermessen und Verwaltungsgerichtsbarkeit: Rückblick und Ausblick*, in M. HOLOUBEK, M. LANG (eds.), *Das Verfahren vor dem Bundesverwaltungsgericht und dem Bundesfinanzgericht*, Linde, Wien, 2014, p. 231 ff.

national constitution and has to choose a constitution-friendly interpretation when applying and implementing EU law.<sup>32</sup> However, the exact scope of the principle of the “twofold ties” is still being debated in the literature.<sup>33</sup>

#### 4. The Austrian legal framework for the implementation

##### A. An opening of doors: The Constitutional Act on the Accession of Austria to the EU

The cornerstone of the accession of Austria to the European Union was the Constitutional Act on the Accession to the EU<sup>34</sup>. As this was considered a change to core principles of the Austrian constitution (especially the democracy principle and the rule of law principle)<sup>35</sup>, the special procedure of Art 44 para 3 AFC for major changes of the constitution (referendum) had to be applied.<sup>36</sup> This is due to the special nature of the core principles: They are more difficult to alter compared to the rest of Austrian constitutional law and their alteration requires the mentioned particular procedure (referendum).<sup>37</sup>

The content of the Constitutional Act on the Accession of Austria to the EU is very general; it limits itself to authorizing the accession of Austria to the EU from the constitutional point of view. Although the act seems unspectacular from a material point of view, it helped to achieve a very smooth (and undisputed) transition of Austria into the EU due to its procedural character.

<sup>32</sup> C. RANACHER, M. FRISCHHUT, *Handbuch Anwendung des EU-Rechts*, cit., p. 284.

<sup>33</sup> See, extensively, C. RANACHER, M. FRISCHHUT, *Handbuch Anwendung des EU-Rechts*, cit., p. 284 ff.

<sup>34</sup> Federal Law Gazette BGBl 744/1994. Almost all constitutions of the member states possess an opening clause, see A. WEBER, *Europäische Verfassungsvergleichung*, cit., p. 401.

<sup>35</sup> See the relevant legislative materials, RV 1546 XVIII GP 3 f. The core principles work as limits for the integration. A. WEBER, *Europäische Verfassungsvergleichung*, cit., 406 classifies Austria as rather open towards integration (compared to other member states); similarly also E. VRANES, *Art. 53 GRC*, in G. LIENBACHER, M. HOLOUBEK (eds.), *GRC Kommentar*, Manz, Wien, 2014, n 24. For the accession in general see TH. ÖHLINGER, *Bundesverfassungsgesetz über den Beitritt Österreichs zur Europäischen Union*, in K. KORINEK, M. HOLOUBEK, C. BEZEMEK, C. FUCHS, A. MARTIN, U. ZELLENBERG (eds.), *Österreichisches Bundesverfassungsrecht*, Verlag Österreich, Wien, 12th supplement, 2016. The core principles encompass the democratic principle, the rule of law principle, the republican, federal and liberal principle as well as the principle of the separation of powers (see, e.g. W. BERKA, *Verfassungsrecht*, cit., p. 35 f).

<sup>36</sup> Art 44 para 3 FCA requires a referendum. The referendum took place in 1994 and resulted in the accession. On Art 44 para 3 FCA in general, see Constitutional Court (recently) VfSlg 19.893/2014 and H.P. RILL, H. SCHÄFFER, H.P. RILL, *Art. 44 B-VG*, in B. KNEIHS, G. LIENBACHER, *Rill-Schäffer-Kommentar Bundesverfassungsrecht*, 14<sup>th</sup> supplement, 2014, n. 24 ff and 40 ff.

<sup>37</sup> H.P. RILL, H. SCHÄFFER, H.P. RILL, *Art. 44 B-VG*, in B. KNEIHS, G. LIENBACHER (eds.), *Rill-Schäffer-Kommentar Bundesverfassungsrecht*, cit., n. 24 ff

In the context of interfaces, the importance of the act lies in its “door-opening function” for the implementation of EU law into Austrian law.<sup>38</sup>

### **B. Other (constitutional) changes**

After the accession, other constitutional changes followed. Through the years, different articles on EU-related topics have been introduced into the constitution (such as, e.g., Art 23a ff AFC [Austrian Federal Constitution]<sup>39</sup>). They are concerned with questions such as the elections to the European Parliament (Art 23a) or the information duties of the ministers towards the Austrian parliament (Art 23e and 23f) and include also changes due to the Lisbon Treaty (especially rules regarding the subsidiarity protocol in Art 23g and 23h).<sup>40</sup> Apart from that, several treaties between the *Länder*<sup>41</sup> and the federation were established regarding financial stability<sup>42</sup> or mechanisms of coordination.<sup>43</sup>

### **C. Other relevant constitutional provisions with regard to the implementation of EU law**

The focus of this analysis rests on the challenges which arise from the Austrian legal system as it is, rather than the constitutional or legal changes directly required by EU law. In order to provide an insight into some of these challenges, several problems will be explored in relation to specific principles of the Austrian constitution.

<sup>38</sup> A. ORATOR, P. THALMANN, E. VRANES, *Meilensteine in der rechtlichen Entwicklung der Integration*, in S. GRILLER, A. KAHL, B. KNEIHS, W. OBWEXER (eds.), *20 Jahre EU-Mitgliedschaft Österreichs*, Verlag Österreich, Wien, 2016, p. 3 (p. 6).

<sup>39</sup> Those changes include, e.g., norms on the subsidiarity protocol and the role of the *Land* parliaments. P. BUßJÄGER, P. GRASS, *Lissabon und die Folgen. Die Lissabon-Begleitnovelle zur Bundesverfassung und die parlamentarische Mitwirkung in EU-Angelegenheiten*, in ÖJZ, 2011, p. 60 ff.

<sup>40</sup> Such as changes due to the introduction of e.g. the subsidiarity protocol. P. BUßJÄGER, P. GRASS, *Lissabon und die Folgen. Die Lissabon-Begleitnovelle zur Bundesverfassung und die parlamentarische Mitwirkung in EU-Angelegenheiten*, cit., p. 60 ff.

<sup>41</sup> See Art 2 para 1 and 2 FCA: „(1) Austria is a federal state. (2) The federal state is formed by the autonomous provinces of Burgenland, Carinthia, Lower Austria, Upper Austria, Salzburg, Styria, Tirol, Vorarlberg, and Vienna.” For an overview on the Austrian Federal state, see P. PERNTHALER, *Österreichisches Bundesstaatsrecht*, Verlag Österreich, Wien, 2004.

<sup>42</sup> See recently, Vereinbarung zwischen dem Bund, den Ländern und den Gemeinden über einen Österreichischen Stabilitätspakt 2012, Federal Law Gazette BGBl I 30/2013.

<sup>43</sup> Vereinbarung zwischen dem Bund und den Ländern gemäß Art. 15a B-VG über die Mitwirkungsrechte der Länder und Gemeinden in Angelegenheiten der europäischen Integration, Federal Law Gazette BGBl 775/1992.



As mentioned above, the core principles of the Austrian constitution were affected by Austria joining the EU. Therefore, I will rely on the mentioned core principles of the Austrian constitution as a guideline for the analysis.<sup>44</sup>

## 5. Aspects of implementation

### A. Rule of law principle

The Austrian rule of law principle is laid down in Art 18 AFC and plays a most prominent role in the Austrian legal system.<sup>45</sup> In its appearance as legality principle, it ties the administration to the law but at the same time forces the legislator to write its laws in a way that the key features for administrative acting are clear.<sup>46</sup> But the principle also appears in other forms such as the *Rechtsstaatsprinzip*<sup>47</sup>, which guarantees individuals access to the courts whenever they feel violated in a constitutionally or legally guaranteed right.<sup>48</sup>

The legality principle of the Austrian constitution binds each act of the administration and judiciary to a law. Therefore, all acts of the European Union that require implementation or changes to the Austrian state organization or to a procedure have to be channeled into an Austrian law (in a formal and material sense). In other words, Austrian administrative and judiciary bodies can only act on the grounds of an Austrian law.<sup>49</sup> The Constitutional Court has already laid down that a EU directive or regulation cannot fulfill the function of an Austrian law with regard to Art 18 Federal constitution.<sup>50</sup>

<sup>44</sup> The notion of state powers shows the difference in the use of terminology. For example, English-language version of the treaties use the term "good governance" (Art 15 TFEU). The German translation, however, uses "verantwortungsvolle Verwaltungsführung" (responsible administrative management). The literature suggests that "governance" is broader than "Verwaltungsführung" and encompasses certain legislative functions as well. In the case of Austria, the German translation would suggest that the resultant principle of openness only applies to the administrative state power, whereas the EU principle of openness is intended to encompass more than that. Therefore, the rather strict distinction and allocation to one state power in the Austrian doctrine does not fit the unional approach.

<sup>45</sup> Already early, see H. Kelsen, G. Froehlich, A. Merkl, *Die Bundesverfassung vom 1. Oktober 1920*, reprint, Verlag Österreich, Wien, 2003, 85f.

<sup>46</sup> T. Öhlinger, H. Eberhard, *Verfassungsrecht*, cit., p. 267.

<sup>47</sup> W. Berka, *Verfassungsrecht*, cit., p. 58 is pointing at the duty to guarantee an effective legal remedy; see also recently Constitutional Court 30.11.2016, G 253/2016.

<sup>48</sup> H. Eberhard, *Verwaltungsaktelehre und Unionsrecht*, in S. Griller, A. Kahl, B. Kneihls, W. Obwexer (eds.), *20 Jahre EU-Mitgliedschaft Österreichs*, Verlag Österreich, Wien, 2016, p. 451 (p. 458 f).

<sup>49</sup> However, there are also exceptions: If, e.g., we are facing a directive, that has in that case direct effect, a individual ruling can be based exceptionally on a directive, see, H. Eberhard, *Verwaltungsaktelehre und Unionsrecht*, cit., p. 459.

<sup>50</sup> A. Kahl, K. Weber, *Allgemeines Verwaltungsrecht*, cit., p. 114.

Therefore, implementation (and not only application) through the courts and administrative authorities is in most cases based on national laws which implement the relevant EU law, except in case of directly effective regulations.

As mentioned, a precedence of the legislator in order to implement EU law is derived from Art 18 AFC; in some cases, pre-existing laws can fulfill the obligation of implementation through a law. This is the case when these laws can be interpreted in a way that enables the (Austrian) administration to issue a regulation (in order to implement EU law).

Moreover, Art 18 AFC contains an obligation for the legislator to issue laws which have a certain degree of determination.<sup>51</sup> This means e.g. that the legislator is not allowed to delegate the implementation through a law, that would enable administration to implement a certain norm via an Austrian regulation.<sup>52</sup> On the contrary, the law itself already has to contain the cornerstones for administrative action.<sup>53</sup> The necessary degree of determination depends not least on the subject matter (“differentiated legality principle”)<sup>54</sup>.

Hence, it is above all the legality principle that makes the legislator a very important player in the process of implementation of EU law.

#### **B. The rule of law principle and the democracy principle: Restriction to existing legal forms (*Rechtsformenzwang/relative Geschlossenheit des Rechtsquellensystems*)**

The Austrian constitutional system provides a certain set of legal forms for acts (in sovereign administration) of the legislator, administration and judiciary.<sup>55</sup> It is not possible for the legislator to create new types of norms or act upon norms which are not already provided by the constitution.<sup>56</sup> As mentioned, Austria's accession to the EU did not bring any changes regarding these types of legal norms, hence, the implementation of EU law works the same for all three state powers as it does in a purely national context.<sup>57</sup> A

<sup>51</sup> This degree of determination can vary, however (see below).

<sup>52</sup> A. KAHL, K. WEBER, *Allgemeines Verwaltungsrecht*, cit., p. 108 f.

<sup>53</sup> A. KAHL, K. WEBER, *Allgemeines Verwaltungsrecht*, cit., p. 111.

<sup>54</sup> See, e.g., Constitutional Court, VfSlg 13.785/1994 and A. KAHL, K. WEBER, *Allgemeines Verwaltungsrecht*, cit., p. 111 and p. 113.

<sup>55</sup> M. HOLOUBEK, *Handlungsformen, Legalitätsprinzip und Verwaltungsgerichtsbarkeit*, in D. ENNÖCKL, N. RASCHAUER, E. SCHULEV-STEINDL, W. WESSELY (eds.), *FS Raschauer*, Jan Sramek, Wien, 2013, p. 181 (p.191 f).

<sup>56</sup> C. RANACHER, M. FRISCHHUT, *Handbuch Anwendung des EU-Rechts*, cit., p. 319 f, M. HOLOUBEK, *Die Verhaltensbeschwerde - Das Verfahren über Beschwerden wegen Rechtswidrigkeit sonstigen Verhaltens einer Verwaltungsbehörde*, in M. HOLOUBEK, M. LANG (eds.), *Das Verfahren vor dem Bundesverwaltungsgericht und dem Bundesfinanzgericht*, Linde Verlag, Wien, 2014, p. 113.

<sup>57</sup> Potential notification duties are excluded, as these duties arise from EU law. Notification duties arise from the directive EU 2015/1535 and the Austrian implementing law, the NotifikationsG 1999 (Federal Law Gazette BGBl I 183/1999).

formal requirement exists for implemented laws, mostly arising from EU directives: They have to be “labeled” as such, meaning that legislators have to preface paragraphs or articles which implement EU law with the headline “EU Law”.<sup>58</sup> In practice, those paragraphs or articles can be found mostly at the end of a law or the information is provided in a footnote.<sup>59</sup> The relevance of this formality lies in its signaling effect: It makes the EU law visible.

### C. The federal principle: Determination of the competent legislator(s)

#### a. Theory

The core of the federal principle lies in the existence of the *Länder* and in the fact that they possess competences. These are not only administrative competences, but also legislative and (since 2014) judicial competences.<sup>60</sup> The accession to the EU did not alter this principle, yet Austria's status as a federal state raises questions regarding who the competent legislator for the implementation of a given EU norm is.<sup>61</sup> EU law is completely neutral on the question of the competent level of governance.<sup>62</sup>

The Austrian Constitutional Court has already decided that the Austrian distribution of competences (which is laid down in Art 10 – 15 AFC) is relevant for determining the competent legislator for the implementation of EU law.<sup>63</sup> The constitutional anchor for the distribution of competences being the relevant parameter lies in Art 23d para 5 AFC.

With regard to the implementation of EU law, the provision is most important. Its relevance is fourfold: First, Art 23d para 5 AFC clarifies that the federal distribution of competences is applicable to the question of who the competent legislator for the implementation of EU law is.<sup>64</sup> Second, the provision provides a constitutional basis for the duty of the *Länder* to implement EU law. It is congruent with the duties arising from the principle of loyal co-

<sup>58</sup> Usually this results out of the directive itself, see C. RANACHER, M. FRISCHHUT, *Handbuch Anwendung des EU-Rechts*, cit., p. 315. For notification duties, see C. RANACHER, M. FRISCHHUT, *Handbuch Anwendung des EU-Rechts*, cit., p. 315 f.

<sup>59</sup> It mostly reads like this: „With this law the following directives are implemented: ...”; see, e.g. § 39 para 2 *Tiroler Bergsportführergesetz*, LGBl 7/1998, last amended through LGBl 26/2017, which reads: “Mit diesem Gesetz werden folgende Richtlinien umgesetzt ...”. See, C. KLEISER, *Die Umsetzung von Gemeinschaftsrecht aus legistischer Sicht: Der Umsetzungshinweis*, in JRP, 2001, 28 ff.

<sup>60</sup> For a comparative perspective, see A. GAMPER, *Die Regionen mit Gesetzgebungshoheit*, Peter Lang, Frankfurt, 2004, A. GAMPER, „Global Theory of Federalism”: *The Nature and Challenges of a Federal State*, in, *German Law Journal*, 2005, p. 129; P. PERNTHALER, *Österreichisches Bundesstaatsrecht*, cit., 2004.

<sup>61</sup> See Constitutional Court, VfSlg 17.022/2003.

<sup>62</sup> C. RANACHER, M. FRISCHHUT, *Handbuch Anwendung des EU-Rechts*, cit., p. 317.

<sup>63</sup> C. RANACHER, M. FRISCHHUT, *Handbuch Anwendung des EU-Rechts*, cit., p. 317 ff.

<sup>64</sup> C. RANACHER, *Bezüge zur Europäischen Union*, in E. PÜRKY (ed.), *Das Recht der Länder I*, cit., p. 134, citing the Constitutional Court VfSlg 17.022 / 2003 and VfSlg 17.936/2006.

operation, Art 4 para 3 TEU.<sup>65</sup> Third, and as a counterpart to the duty to implement, doctrine derives the autonomy of the *Länder* in the implementation within their competences. This manifests in the federation not having monitoring competences.<sup>66</sup> Moreover, in cases of non-compliance by a *Land*, the federation can only become active after a judgment of the CJEU and subsequently substitute the implementation by a federal law.<sup>67</sup> Fourth, this substitutive competence safeguards the loyalty principle of the EU<sup>68,69</sup>.

The collective responsibility for implementation, however, stays with the federation. It is the federation that is responsible in case of insufficient implementation by the *Länder*, at least in Austria's external relationship to the EU.<sup>70</sup> If the European Union levels sanctions against Austria because of not implementing a directive, Austrian law provides a means for making the relevant *Land* liable for recompense to the federal level (§ 3 FAG 2017).

The current distribution of competences cannot be changed through interpretation for the purpose of changing the competent legislator; this does not inhibit formal changes of the constitutionally entrenched distribution of competences, however. Changes through interpretation were tempting in the past, especially when these changes seemed relatively small. As a result, cases were brought before the Constitutional Court where competences were interpreted in order to “round off” or to “complement” a certain competence, making only one legislator competent.<sup>71</sup> The Austrian Constitutional Court ruled that “rounding off” competences was not a viable method.<sup>72</sup>

Yet, the distribution of competences can be changed within the Austrian constitutional system. This can be done changing Art 10 – 15 AFC or outside

<sup>65</sup> C. RANACHER, *Bezüge zur Europäischen Union*, in E. PÜRKY (ed.), *Das Recht der Länder I*, cit., p. 134.

<sup>66</sup> C. RANACHER, *Bezüge zur Europäischen Union*, in E. PÜRKY (ed.), *Das Recht der Länder I*, cit., p. 135.

<sup>67</sup> C. RANACHER, *Bezüge zur Europäischen Union*, in E. PÜRKY (ed.), *Das Recht der Länder I*, cit., p. 135. This was only necessary in one single case, CJEU, *Commission of the European Communities v Republic of Austria*, ECLI:EU:C:2001:336 and W. OKRESEK, *Die Durchsetzung von Verpflichtungen aus EMRK und Gemeinschaftsrecht vor europäischen Gerichten - dargestellt anhand von zwei Beispielen*, in A. ROSNER, P. BUßJÄGER (eds.), *FS 60 Jahre Verbindungsstelle der Bundesländer*, nap, Wien, 2011, p. 511 (p. 517 ff).

<sup>68</sup> For the loyalty principle see W. OBWEXER, *EUV Artikel 4*, in H. VON DER GROEBEN, J. SCHWARZE, A. HATJE, *Europäisches Unionsrecht*, VII ed, Nomos Verlag, Baden-Baden, 2015, n. 88 ff.

<sup>69</sup> C. RANACHER, *Bezüge zur Europäischen Union*, in E. PÜRKY (ed.), *Das Recht der Länder I*, cit., p. 135.

<sup>70</sup> C. RANACHER, *Bezüge zur Europäischen Union*, in E. PÜRKY (ed.), *Das Recht der Länder I*, cit., p. 135.

<sup>71</sup> C. RANACHER, M. FRISCHHUT, *Handbuch Anwendung des EU-Rechts*, cit., p. 318.

<sup>72</sup> Constitutional Court VfSlg 17.022/2003 and C. RANACHER, M. FRISCHHUT, *Handbuch Anwendung des EU-Rechts*, cit., p. 318.

these Articles. This second way, though rarely used, creates so-called “*Kompetenzdeckungsklauseln*“ (competence coverage clauses) by virtue of special constitutional provisions.<sup>73</sup> These are clauses which create a new constitutional basis for a certain competence outside the distribution of competences laid down in Art 10 – 15 AFC. In the context of the implementation of EU norms, this pertains to the creation of a new competence on the federal level. The *Länder* are not in favor of such clauses and there even exists an informal decision by the *Länder* not to agree to such clauses.<sup>74</sup> Therefore, Austria often faces the problem that a directive needs to be implemented by ten legislators (the nine Land legislators plus the federal one).<sup>75</sup>

On rare occasions, systemic deficiencies of the Austrian system regarding the distribution of competences can lead to a situation where neither the federation nor the *Länder* are competent to regulate a certain matter (“neither-nor competence”).<sup>76</sup> The consequence of the applicability of the regular distribution of competences for the implementation of EU law is that the competence to implement remains open.

### b. Practice

An inefficient system of implementation?

The Austrian federal system is often said to be inefficient because of the so-called “Factor 10”. Factor 10 means that there are ten legislators, i.e. the nine *Land* legislators and the federal level, which may be competent to implement a EU law. Sometimes this leads to the paradoxical situation of all ten legislators choosing to implement e.g. a directive using the same wording. An example is the public service directive.<sup>77</sup>

<sup>73</sup> For *Kompetenzdeckungsklauseln* in general see S. NEUDORFER, *Kompetenzdeckungsklauseln außerhalb des B-VG Österreichische Provisorienkultur oder sinnvoller Pragmatismus?*, in S. SCHMID, V. TIEFENTHALER, K. WALLNÖFER, A.W. WIMMER, *Auf dem Weg zum hypermodernen Rechtsstaat?*, Jan Sramek, Wien, 2011, p. 111 ff.

<sup>74</sup> S. BÖRGER, *Die Durchführung von Unionsrecht durch die Verwaltung eines föderal organisierten Mitgliedstaats*, in *ALJ*, 2015, p. 143 (p. 147).

<sup>75</sup> See below.

<sup>76</sup> See, generally, TH. ÖHLINGER, H. EBERHARD, *Verfassungsrecht*, cit., p. 139.

<sup>77</sup> Burgenländisches Landesdienstleistungsgesetz LGBl 81/2011, Kärntner Dienstleistungsgesetz LGBl 23/2012, Gesetz über den Einheitlichen Ansprechpartner im Land Niederösterreich LGBl 0025-0, (Oberösterreich) Landesgesetz über den Einheitlichen Ansprechpartner LGBl 83/2011, Salzburger Allgemeines Landesdienstleistungsgesetz LGBl 95/2011, Steiermärkisches Dienstleistungsgesetz 2011 LGBl 101/2011, Tiroler Dienstleistungsgesetz LGBl 124/2011, (Vorarlberg) Gesetz zur Umsetzung allgemeiner Bestimmungen der Dienstleistungsrichtlinie und der Richtlinie über die Anerkennung von Berufsqualifikationen LGBl 1/2012, Wiener Dienstleistungsgesetz LGBl 19/2012 and Dienstleistungsgesetz, Federal Law Gazette BGBl I 100/2011.

This suggests that it would be more efficient to make the federal legislator competent for the implementation of EU law.<sup>78</sup> An argument against is that the system in its current form bundles competences. Moreover, it is doubtful whether it would be more efficient if only the federal level were competent in all cases of implementation. As long as Austria continues to be a federal state, implementation of EU law could always require changes of Land legislation. Therefore, in many cases the Land legislator has to act anyways. Additionally, a competence of the federal legislator would lead to (further<sup>79</sup>) fragmented competences.

#### Coordination

Obviously, ten legislators make mechanisms of coordination indispensable not only with regard to EU law<sup>80</sup>. In practice, it is the “*Bundeskanzleramt*” (the Federal Chancellery of the Republic of Austria) which informs the other ministries and the *Länder* about new directives. Each ministry and each *Land* has a so-called “implementation commissioner” (*Umsetzungsbeauftragter*). Ministries and *Länder* then check whether they themselves qualify as competent and have to submit their planned measures of implementation (law, regulation, amendment), including an itinerary, to the Federal Chancellery. For this purpose, the Chancellery has created a database. Moreover, the implementation commissioners of the different *Länder* and a representative of the Federal Chancellery hold regular meetings and form an “implementation commission”.

Once the planned measure is implemented by the *Land*, it has to report that to the Federal Chancellery via the database. The Federal Chancellery then undertakes the necessary steps to notify the implementation to the Commission.

#### **D. The rule of law principle and the liberal principle: The right to the legally competent judge (*Recht auf den gesetzlichen Richter*)**

The right to the legally competent judge is constitutionally guaranteed. It ensures that the competent authority (i.e. not only a judge, but also the compe-

<sup>78</sup> Interestingly, in environmental matters there were calls for a federal competence, see, P. BUßJÄGER, G. HEISL, *Probleme von EU-Naturschutzrecht in Österreich*, in *Natur und Recht*, 2008, p. 382 (p. 383).

<sup>79</sup> Critically with regard to the claimed fragmentation of the Austrian Constitution, E. WIEDERIN, *Verfassungsinterpretation in Österreich*, in G. LIENBACHER (ed.), *Verfassungsinterpretation in Europa*, Jan Sramek, Wien, 2011, p. 81 (p. 103).

<sup>80</sup> See, A. GAMPER, *Koordination im Bundesstaat - ein „ungeschriebenes“ Verfassungsprinzip?*, in A. ROSNER, P. BUßJÄGER (eds.), *FS 60 Jahre Verbindungsstelle der Bundesländer*, nap, Wien, 2011, cit., 257 ff.

tent administrative authority<sup>81</sup>) decides on a case, which adheres to the liberal principle of the Austrian Constitution. In its function of guaranteeing a decision by the legally competent judge, it also serves the rule of law principle. In several cases, the Constitutional Court ruled that the CJEU is included in the right of the “legal judge” as well.<sup>82</sup> If an authority which has to initiate a procedure for a preliminary decision (Art 2687 para 3 TFEU) fails to do so, the Constitutional Court will recognize a violation of the right to the legally competent judge.<sup>83</sup> This example illustrates how legal protection extends from the national context to the EU context and shows that the obstruction/denial of access to an EU court (even if this violation only occurs indirectly) can result in the violation of a national fundamental right.

#### **E. The liberal principle<sup>84</sup>: The role of the Fundamental Rights Charter in Austria<sup>85</sup>**

The liberal principle of the Austrian constitution protects the range of constitutionally guaranteed rights as a whole.<sup>86</sup>

Aspects of judicial and administrative implementation encompass the way administrative authorities and courts apply EU law. The following decision of the Austrian Constitutional Court was surprising to Austrian scholars at the time of ruling for its consideration of EU law, not least because violations of EU law are usually treated as if a violation of an ordinary law had taken place.<sup>87</sup>

In March 2012, the Constitutional Court ruled that it would, under certain circumstances, use not only Austrian constitutional law as a yardstick for the examination of decisions by an administrative court, an administrative regulation, or a law, but moreover take into consideration some of the guarantees laid out in the Fundamental Rights Charter. As a result, since March 2012, the Constitutional Court has treated certain guarantees of the Fundamental Rights Charter as if they were guarantees resulting from Austrian constitutional law. In its reasoning, the Constitutional Court stated that the

<sup>81</sup> TH. ÖHLINGER, H. EBERHARD, *Verfassungsrecht*, cit., p. 449.

<sup>82</sup> Constitutional Court VfSlg 14.390/1995, 14.607/1996.

<sup>83</sup> W. BERKA, *Verfassungsrecht*, cit., p. 550.

<sup>84</sup> TH. ÖHLINGER, H. EBERHARD, *Verfassungsrecht*, cit., p. 61. The liberal principle is sometimes called into question since it can be seen as a part of the rule of law principle (see W. BERKA, *Verfassungsrecht*, cit., p. 36).

<sup>85</sup> See, e.g., A TH MÜLLER, *An Austrian „Ménage à Trois“. The Convention, the Charter and the Constitution*, in K. ZIEGLER, E. WICKS, L. HODSON (eds.), *The UK and European Human Rights: A Strained Relationship?*, Hart, Oxford, 2015, p. 299 ff, A. GAMPER, *Wie viel Kosmopolitismus verträgt eine Verfassung?*, in JBl 2012, p. 763.

<sup>86</sup> TH. ÖHLINGER, H. EBERHARD, *Verfassungsrecht*, cit., p. 61.

<sup>87</sup> TH. ÖHLINGER, H. EBERHARD, *Verfassungsrecht*, cit., p. 113.

equivalence principle requires the Court to recognize said Fundamental Rights Charter guarantees, which are similar to Austrian constitutional guarantees with regard to their form and content. This is of course only true for cases that fall within the scope of application of EU law.

This landmark judgment by the Constitutional Court means that ever since, the Court has regularly examined the constitutionality of norms with regard to their compliance with a Fundamental Rights Charter guarantee. Doctrine assumes that not all, but at least some guarantees of the Charter would be recognized as a yardstick by the Constitutional Court.<sup>88</sup>

The decision by the Constitutional Court sparked a lot of discussion, in particular between the Supreme Court and the Constitutional Court. The discussions were grounded in a constitutional provision (Art 89 AFC) which obliges the Supreme Court to present the norms applied in a specific case to the Constitutional Court, should the Supreme Court have any doubts as to their constitutionality. This provision was cause for concern for the Supreme Court<sup>89</sup>, which went so far as to refer the question to the CJEU (preliminary reference). The question was, if in case of doubts of the compatibility of a norm with the Fundamental Rights Charter, an ordinary court had to refer to the Constitutional Court first or if it could still refer the question to the CJEU. In response, the CJEU made it clear that the preliminary reference is admissible in any stage of national proceedings. Conversely, national norms which provide for a reference to a national court (as in Austria Art 89 FCA, which provides for an access to the Constitutional Court) were deemed unproblematic as long as they do not inhibit a preliminary reference to the CJEU.<sup>90</sup>

In the end, the landmark judgment made one thing clear: Even constitutional courts are nowadays guardians of EU law.

#### **F. Separation of powers: Fines which exceed a certain limit**

EU directives often include fairly high penal provisions. This brings challenges with regard to the principle of the separation of powers of the Austrian Constitution. This principle is also linked to Art 18 AFC.<sup>91</sup> For the separation of administration and courts, it is deduced from Art 94 AFC.<sup>92</sup> It is worth noting that the constitution itself mostly mentions “legislation” and “execution” (*Vollziehung*), and often treats the administration and the judiciary as one and the same.<sup>93</sup> Apart from criminal law (which falls within

<sup>88</sup> TH. ÖHLINGER, H. EBERHARD, *Verfassungsrecht*, cit., p. 449.

<sup>89</sup> CJEU, *A v B and Others*, ECLI:EU:C:2014:2195.

<sup>90</sup> CJEU, *A v B and Others*, ECLI:EU:C:2014:2195 and *Melki and Abdeli*, ECLI:EU:C:2010:363.

<sup>91</sup> W. BERKA, *Verfassungsrecht*, cit., 54.

<sup>92</sup> TH. ÖHLINGER, H. EBERHARD, *Verfassungsrecht*, cit., p. 277.

<sup>93</sup> W. BERKA, *Verfassungsrecht*, cit., p. 117, 119 ff.



the competence of ordinary courts), there also exists the so-called administrative criminal law. In the past, the Constitutional Court decided that very high fines<sup>94</sup> had to be regulated using the means of ordinary criminal law instead of administrative criminal law.<sup>95</sup>

One of the landmark cases was a judgment<sup>96</sup> in which the Constitutional Court decided that the Vienna *Land* legislation which had classified the removal of trees under certain circumstances as an administrative offense punishable with fines between (then) 10,000 and 2,000,000 Austrian Schillings<sup>97</sup> was unconstitutional. The Constitutional Court argued that the prescription of a fine of two million Schillings could not be justified because of Art 91 AFC, which allows for the participation of the people (i.e. a jury) in severe cases of criminal law. From the core principles of Art 91 AFC, the Constitutional Court furthermore derived that very harmful social behavior sentenced with exceedingly high fines (such as the fine for the removal of trees) would fall into the core of criminal law.<sup>98</sup> The Vienna *Land* legislator argued that the newly introduced independent administrative commissions (“UVS”) fulfilled the requirements of Art 6 ECHR because they were on par with tribunals (even though they were, from an organizational point of view, still considered administrative commissions). However, the Constitutional Court remained unconvinced. Its main argument consisted in the assumption that judges serving in criminal courts are better qualified to decide because of their greater degree of independence. This ruling is seen as the result of the material separation of powers.<sup>99</sup>

The situation of the independent commissions changed with the introduction of administrative courts in 2014<sup>100</sup>, to which the tasks and competences of said commissions were then transferred.<sup>101</sup> The quality of the new administrative courts as genuine courts cannot be questioned anymore.<sup>102</sup> Therefore,

<sup>94</sup> The Court does not however provide a definition of “high fine”. It would be interesting to know, which amount of money is considered a high fine.

<sup>95</sup> Constitutional Court, VfSlg 14.361/1995.

<sup>96</sup> Constitutional Court, VfSlg. 14.361/1995.

<sup>97</sup> In Euro (then) approximately 726,73 to 145345,67 Euro.

<sup>98</sup> See, for an overview on the topic, e.g., P. KNOBL, *Konzessionspflichtiges Depotgeschäft ohne Grenzen? Anmerkungen zu den VwGH-Erkenntnissen 2012/17/0135 bis 0138, zur Vollzugspraxis in Verwaltungsstrafverfahren und zu zukünftigem Reformbedarf*, in ÖBA, 2013, p. 110 (p. 116 f).

<sup>99</sup> TH. ÖHLINGER, H. EBERHARD, *Verfassungsrecht*, cit., p. 279.

<sup>100</sup> For the introduction of administrative courts see (out of the very vast literature) J. FISCHER, K. PABEL, N. RASCHAUER (eds.), *Handbuch der Verwaltungsgerichtsbarkeit*, Jan Sramek, Wien, 2014, M. HOLOUBEK, M. LANG (eds.), *Die Schaffung einer Verwaltungsgerichtsbarkeit erster Instanz*, Linde, Wien, 2008, B. BUßJÄGER, A. GAMPER, C. RANACHER, N. SONNTAG (eds.), *Die neuen Landesverwaltungsgerichte. Grundlagen - Organisation - Verfahren*, nap, Wien, 2014.

<sup>101</sup> TH. ÖHLINGER, *Abschied von den UVS. Die UVS: Gestern - heute - morgen*, cit., p. 51 (p. 54 f).

<sup>102</sup> See, e.g., W. BERKA, *Verfassungsrecht*, cit., p. 301.

the argument that criminal courts are better qualified is devoid of purpose. Again, one could question, if the case law should be changed.

Should the Constitutional Court not change its case law, the question arises if the *Länder* are competent to stipulate the respective penal provision when they implement a directive. The problem is that nowadays, many directives include fairly high penal provisions.<sup>103</sup> Normally, provisions of criminal law do not fall into the competence of the *Land* legislator<sup>104</sup>, although the *Land* legislator can stipulate penalties for administrative offenses.<sup>105</sup> However, in Art 15 para 9 AFC, the Austrian constitution provides a solution for matters subject to *Land* competence, for which it is deemed necessary to regulate aspects of civil law or criminal law. The question now is whether the implementation of EU law can be considered such a case. As the literature has thus far not discussed this question in any amount of detail<sup>106</sup> and the Constitutional Court also has yet to address the problem, a proper answer is still pending.

## 6. Conclusion

At first glance, the implementation of EU law seems to be a rather dated topic – after all, Austria has been a member state since 1995. During the early days of Austria’s membership, the Constitutional Court handled several important cases on questions which arose in national constitutional law due to the implementation of EU law.<sup>107</sup> However, this does not mean that nowadays changes in EU law no longer have consequences for national law.<sup>108</sup> Therefore, it is both advisable and necessary to take a closer look at the interfaces between EU law and the national legal order at regular intervals. The problems discussed in this article have shown as much: Issues related to the legality principle and linked to the distribution of competences are bound to arise again and again as e.g. new techniques are introduced which might present new legal questions (not only in terms of EU law and its implementation, but of law in general). Moreover, certain problems only develop or become press-

<sup>103</sup> See, e.g., Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC (Art 59 para 2 lit e).

<sup>104</sup> W. BERKA, *Verfassungsrecht*, cit., p. 130.

<sup>105</sup> W. BERKA, *Verfassungsrecht*, cit., p. 130 f.

<sup>106</sup> C. RANACHER, *Die Funktion des Bundes bei der Umsetzung des EU-Rechts durch die Länder*, Brauneder, Wien, 2002.

<sup>107</sup> See the list in C. RANACHER, M. FRISCHHUT, *Handbuch Anwendung des EU-Rechts*, cit., p. 554 ff.

<sup>108</sup> For issues linked to individual (subjective) rights see G. LIENBACHER, *Der Verwaltungsschutz in Österreich und die europäische Dimension*, cit., p. 30.

ing over a length of time, such as the problem of high fines (at least in its EU dimension). Lastly, changes in the jurisprudence of courts, such as those affected by the landmark ruling of March 2012 by the Austrian Constitutional Court, can bring fundamental changes to the national legal system. Above all, this analysis has demonstrated that the implementation of EU law adds a dynamic element to the Austrian legal system – not only because EU law itself brings about changes, but also because the legislator, the administration and the courts are constantly re-evaluating, reshaping and evolving the national system alongside the EU standards.