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The Constitutional Court of the Republic of Austria
Verfassungsgerichtshof der Republik Österreich

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The Cooperation of Constitutional Courts in Europe – Current Situation and Perspectives

Austrian National Report

Preliminary remark: Membership in the European Union and the ECHR in the rank of constitutional law: Union law and Convention law as the constitutional basis of Austria's position in the European legal system

The questions discussed in the following are determined by two constitutional developments of fundamental importance:

In Austria, the European Convention on Human Rights (ECHR), which Austria acceded to in 1958[1], has been granted the rank of constitutional law by explicit constitutional order[2]. Thus, the ECHR – equal in status to other genuinely national fundamental rights – is directly applicable constitutional law. At the national level, the fundamental rights enshrined in the ECHR have the same status and the same importance as other fundamental rights laid down in the Austrian Federal Constitution. This "unique form of incorporation of a treaty based on international law"[3] established a close link between the jurisprudence of the European Court of Human Rights (ECtHR) and the national application and interpretation of the ECHR.

Moreover, the referendum of 12 June 1994 provided the basis for a federal constitutional law on Austria's accession to the EU[4], which required a total revision of the Austrian Constitution[5] and authorized the relevant bodies responsible under constitutional law to conclude the state treaty on Austria's accession to the European Union. In brief, through this constitutional enabling and "opening" clause, Union law was put on a level equivalent to national law in Austria, which implies, in particular, the special significance of the jurisprudence of the Court of Justice of the European Union for the interpretation and application of Union law. Hence, the jurisprudence of the highest courts in Austria, including the Constitutional Court (CC), acknowledges the principle of primacy of Union law (over national constitutional law)[6].

[1] Federal Law Gazette 210/1958.
[2] Art. II of the amendment to the Federal Constitutional Law, Federal Law Gazette 59/1964.
[3] *Öhlinger/Eberhard*, Verfassungsrecht[10], 2014, para.681.
[4] Federal Law Gazette 744/1994.
[5] For details, see *Öhlinger/Eberhard*, Verfassungsrecht[10], para.134ff.
[6] Compilation of CC decisions 15.427/1999, 17.065/2003, 19.632/2012; for barriers to integration (remaining according to prevailing opinion) resulting from the fundamental principles of the Austrian Federal Constitution

I. Constitutional courts between constitutional law and European law

1. Is the constitutional court obliged by law to consider European law in the performance of its tasks?

The obligation of the Constitutional Court to apply the fundamental rights enshrined in the ECHR as constitutionally guaranteed rights in proceedings regarding a complaint for violation of fundamental rights (Art. 144 of the Federal Constitutional Law) and their use as a yardstick in the general review of legal norms (in particular pursuant to Art. 139 and 140 of the Federal Constitutional Law regarding the review of regulations and laws for their constitutionality) derives from the rank of the ECHR as constitutional law (see above). Generally speaking, the ECHR plays a crucial role in the jurisprudence of the Constitutional Court. In particular, in the case of "parallel rights", i.e. fundamental rights enshrined both in the national catalogue of fundamental rights, especially in the Basic Law of 1867, and in the ECHR, we observe a clear tendency of the CC to primarily refer to relevant Convention law as a standard of review in matters relating to fundamental rights[7].

Based on the situation outlined above, the CC is also obliged to apply Union law. However, given the specific constitutional jurisdiction of the CC, Union law only plays a limited role as a yardstick for the CC: As a matter of principle, Union law does not constitute a standard for judicial review by the CC[8]. Under Austrian constitutional law, violations of Union law are treated as violations of simple national law, which means that they are to be dealt with – depending on the classification of relevant provisions of Union law – by administrative tribunals or ordinary courts of law[9]. Nevertheless, the CC has to apply Union law (observing the primacy of Union law), which has an impact on the procedural prerequisites in proceedings of (concrete) judicial review[10]. If national legal standards, in particular fundamental rights granted subject to the reservation of legality or the prohibition of arbitrariness contained in the principle of equality, oblige the Constitutional Court to review acts by administrative tribunals pursuant to Art.144 of the Federal Constitutional Law for serious errors of enforcement (defined as arbitrary violations of the law or inconceivable

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(amended accordingly through accession to the European Union) with a view to future amendments to primary law requiring a total revision of the Austrian Constitution, see *Öhlinger/Potacs*, EU Recht und staatliches Recht[5], 2014, 52 ff; *Öhlinger/Eberhard*, Verfassungsrecht[10], para.158.

[7] In landmark cases, such as freedom of opinion pursuant to Art.10 ECHR, compared with Art.13 of the 1867 Basic Law, reference to Convention rights has made it possible for the CC to take guidance in its case law from that of the ECtHR and to further develop it on that basis; see also *Öhlinger/Eberhard*, Verfassungsrecht[10], para.685ff.

[8] Compendium of CC decisions 15.753/2000, 18.266/2007; in detail *Öhlinger/Potacs*, EU Recht und staatliches Recht[5], 168ff; *Öhlinger/Eberhard*, Verfassungsrecht[10], para.195ff.

[9] See relevant key decisions, Compendium of CC decisions 14.886/1997, 16.143/2001.

[10] In particular, the primacy of Union law applied by the CC affects the precedential value of national rules to be applied (the same holds for the primacy of application by courts filing with the CC), for details see *Öhlinger/Potacs*, EU Recht und staatliches Recht[5], 163ff.

application of the law), this also holds for seriously deficient application of Union law by administrative tribunals[11].

The rights guaranteed by the EU Charter of Fundamental Rights (CFR) constitute a special case. Based on the principle of equivalence of EU law, they fall within the jurisdiction of the national courts. According to the jurisprudence of the CC, this means that – based on national constitutional law – the rights guaranteed by the CFR can be invoked as constitutionally guaranteed rights in proceedings relating to a complaint for violation of fundamental rights (Art.144 Federal Constitutional Law) and constitute a yardstick for judicial review in proceedings pursuant to Art.139 and Art.140 of the Federal Constitutional Law[12]. Based on national constitutional law, the CC, bound by the principle of equivalence, has to consider rights granted by the CFR as constitutionally guaranteed rights and, therefore, use them as a yardstick in judicial review.

2. *Are there any examples of references to international sources of law, such as*

a. the European Convention on Human Rights

By virtue of explicit constitutional order, as mentioned above, the fundamental rights enshrined in the ECHR are deemed to be constitutionally guaranteed rights as defined in the Austrian Federal Constitution.

b. The Charter of Fundamental Rights of the European Union

In the landmark decision of 14 March 2012 (Compendium of CC decisions 19.632/2012) referred to earlier, the CC considered itself bound to classify the fundamental rights of the CFR as constitutionally guaranteed rights in light of the principle of equivalence for the following reasons: On the one hand, the CC refers to the model of the ECHR – enjoying the rank of constitutional law – and holds that the core of the CFR is determined by the Convention rights[13]. On the other hand, the CC points out that pursuant to Art.144 in conjunction with (now) Art.133(5) of the Federal Constitutional Law, it has exclusive jurisdiction to pronounce on a violation of constitutionally guaranteed rights[14]. Finally, as the Court's third argument, the system of guarantees provided for in the Federal Constitutional Law ensures that complaints for violations of constitutionally guaranteed rights (including the review of legal standards) are to be filed solely with the Constitutional Court[15].

By way of summary, the CC states in the aforementioned decision:

"The Constitutional Court has therefore come to the conclusion that, based on national law, the principle of equivalence means that the rights guaranteed by the EU Charter of Fundamental Rights can be invoked as constitutionally guaranteed rights before the Constitutional Court pursuant to Art.144 (…) of the Federal Constitutional Law and, within the scope of the Fundamental Rights Charter, constitute a yardstick for judicial

[11] See Compendium of CC decisions 16.401/2001; *Öhlinger/Eberhard*, Verfassungsrecht[10], para.105ff.
[12] Compendium of CC decisions 19.632/2012, additionally I/2/b.
[13] Compendium of CC decisions 14.03.2012, U 466/11 a.o. (19.632/2012), para.31.
[14] Compendium of CC decisions 14.03.2012, U 466/11 a.o. (19.632/2012), para.33.
[15] Compendium of CC decisions 14.03.2012, U 466/11 a.o. (19.632/2012), para.33.

review in proceedings relating to the review of general legal standards, in particular pursuant to Art.139 and Art.140 of the Federal Constitutional Law. This applies, at least, if the guarantee provided by the Fundamental Rights Charter, in its wording and specific meaning, is equivalent to the guarantee of rights under the Austrian Federal Constitution."

Elaborating on this aspect, the Constitutional Court continues:

"The individual guarantees contained in the Fundamental Rights Charter differ widely in their normative structure, some of them having the character of "principles" rather than constitutionally guaranteed rights, such as Art.22 or Art.37 EUCFR. Therefore, the decision as to which of the rights guaranteed by the Fundamental Rights Charter constitute a yardstick for judicial review before the Constitutional Court has to be taken on a case-by-case basis."

Thus, the CC reserves the right to decide, in each individual case, which provisions of the CFR are to be regarded as "rights" as defined in the Compendium of CC decisions 19.632/2012 and therefore have to be applied as constitutionally guaranteed rights pursuant to Art.144 of the Federal Constitutional Law. To date, the CC has explicitly pronounced on that basis with regard to Art.47 CFR[16], Art.8 CFR[17] and, most recently, Art.21 CFR[18].

As regards Art.18 CFR, the CC consistently holds in its jurisprudence that the content of this provision does not go beyond that of the Geneva Convention on Refugees and that, therefore, the Court is under no obligation to refer to this provision in greater detail[19]. Regarding Art.7 and Art.8 CFR, the CC also stated that these provisions do not offer protection beyond the national fundamental right to data privacy and, consequently, references to them in the specific case would not have produced a different result[20]. In some cases, the CC refrains from a statement on the applicability of the CFR, pointing out that the relevant rights of the CFR – Art.15 and Art.16 CFR in the case in question – do not provide protection other than that guaranteed by a comparable national fundamental right, i.e. the freedom of employment pursuant to Art.6 of the Basic Law[21]. Finally, the Constitutional Court also refers to CFR rights in matters relating to a corresponding interpretation of EU law[22].

c. other instruments of international law at EU level

Summarizing very briefly, Austria has a Constitution that is open to international law and which, according to prevailing opinion, is based on a (moderately) monistic perception of the

[16] Compendium of CC decisions 19632/2012 and subsequently e.g. CC 13.03.2013, U 1175/12 a.o., CC 09.10.2012, G 64/10.
[17] Compendium of CC decisions 19.702/2012, p. 392, 395; see also Compendium of CC decisions 19.673/2012 (including mention of Art.7 EUCFR).
[18] CC 12.03.2014, B 166/2013.
[19] See, e.g. most recently CC 06.03.2013, U 1325/2012; earlier e.g. CC 07.06.2013, U 687/2013; 12.06.2013, U 732 to 738/2013; 12.12.2013, U 955 to 956/2013.
[20] Compendium of CC decisions 19.673/2012.
[21] CC 16.03.2013, G 82/12, para.33.
[22] See on Art.8(3) EUCFR in connection with organizational requirements to be met by the independent body monitoring compliance with data privacy provisions according to the Data Protection Directive, CC 14.03.2013, B 1326/12, para.20f; on Art.24 EUCFR in connection with the interpretation of the Dublin II Regulation 02.10.2013, U 2576/2012, para.16 and CC 29.06.2013, U 2465/2012, para.19 (with reference to relevant ECJ case law), and on Art.40 EUCFR in connection with the discussion on the right of EU citizens to vote in a referendum, CC 18.09.2013, W III 4/2013, para.31 (though only with an indication that Art.40 CFR does not grant any rights beyond those of Art.22 TFEU).

relationship between international law and national law[23]. Pursuant to Art.50 of the Federal Constitutional Law, state treaties under international law are transposed into national law by different procedures, depending on the type of state treaty. Customary international law as well as the generally recognized principles of international law apply, pursuant to Art.9(1) of the Federal Constitutional Act, without further transformation as part of federal law. Against this background, interpretation in conformity with international law is common practice of the Austrian courts, especially the Constitutional Court.

In the European context, treaties based on international law related to European Union law are of particular importance, such as the Convention Implementing the Schengen Agreement[24], the Association Agreements of the EU[25] or, as a special and most recent example, the ESM Treaty[26] or the so-called "Fiscal Compact"[27].

d. other instruments of international law at international level

As stated above, in Austria customary international law is deemed to be part of federal law pursuant to Art.9(1) Federal Constitutional Law. The Constitutional Court therefore regularly refers to customary international law, which sometimes aids in the interpretation of national law[28],[29].

Treaties based on international law (state treaties according to Austrian constitutional terminology) regularly play a role in the jurisprudence of the Constitutional Court. This holds for bilateral state treaties[30] as well as for multilateral conventions[31]. In the opinion of the CC, the UN Covenant on Civil and Political Rights[32] is a state treaty in the rank of a law; therefore, according to the Court, it cannot be regarded as a yardstick for the review of laws and its rights are not to be interpreted as constitutionally guaranteed rights pursuant to Art.144 Federal Constitutional Law.

The Vienna Convention on the Law of Treaties is of special importance for the case law of the Constitutional Court, as it is frequently referred to by the Court in its interpretation of treaties under international law, including the ECHR[33]. The Court also refers to the Vienna

[23] See, most recently, *Rill*, Internationales, supranationales und nationales Recht – eine Einheit, GS Walter, 2013, 679ff; *Grabenwarter/Holoubek*, Verfassungsrecht – Allgemeines Verwaltungsrecht[2], 2014, para.120.
[24] See Compendium of CC decisions 16.628/2002.
[25] Compendium of CC decisions 17.075/2003.
[26] CC 16.03.2013, SV 2/12.
[27] CC 03.10.2013, SV 1/2013.
[28] In Compendium 15.395/1998, the CC transfers the reasoning of customary international law in international tax law to the exercise of taxation rights by territorial authorities in the federal state: "International tax law acknowledges the principle of customary international law that states are only allowed to tax situations which they are sufficiently related to (…). In principle, this also applies to the exercise of taxation rights by the individual territorial authorities in the federal state (…)".
[29] See e.g. Compendium 17.415/2004, where the CC refers to the fact that "according to customary international law, international institutions generally enjoy immunity vis-à-vis national courts".
[30] See e.g. Compendium 11.073/1986 on a trade and navigation treaty between the Netherlands and Austria, or Compendium 12.281/1990 on the so-called "Accordino".
[31] Instead of many, Compendium 12.558/1990 – GATT Subsidies Code; 11.774/1988 – ILO Night Work (Women) Convention.
[32] Compendium 14.050/1995, 11.508/1987.
[33] Compendium of CC decisions 18.833/2009.

Convention in its interpretation of treaties between the territorial authorities within the federal state concluded on the basis of the Constitution pursuant to Art.15a of the Federal Constitutional Law[34].

Finally, a special feature of the Austrian Federal Constitution should be mentioned in this context: The International Convention on the Elimination of all Forms of Racial Discrimination was transposed into national law through a federal constitutional law for the implementation of the Convention. This "Federal Constitutional Law against all Forms of Racial Discrimination" has been consistently interpreted by the CC to mean that the Constitution guarantees aliens the right to equal treatment among each other. Moreover, this is also interpreted to guarantee a general requirement of objectivity and a prohibition of arbitrariness for aliens – derived from the general principle of equality enshrined in Art.7(1) of the Federal Constitutional Law which, in principle, is only guaranteed for Austrian citizens and/or Union citizens[35].

3. *Are there any specific provisions of constitutional law imposing a legal obligation on the constitutional court to consider decisions by European courts of justice?*

The obligation to consider the case law of the ECJ, subject to the relevant provisions of Union law, derives from the applicability of Union law (by virtue of the "opening clause" in the Federal Constitutional Law on Austria's accession to the EU).

Although not explicitly required, it can be taken for granted that the Constitutional Court is also obliged to consider the case law of the ECtHR in the interpretation of Convention rights, given the fact that the ECHR enjoys the rank of constitutional law in Austria[36].

4. *Is the jurisprudence of the constitutional court influenced in practice by the jurisprudence of European courts of justice?*

The constitutional framework described above, which obliges the Court to consider the case law of the ECtHR and the ECJ, is reflected in the case law of the Constitutional Court.

In particular, the significance of the case law of the ECtHR for the decisions rendered by the CC in matters relating to fundamental rights cannot be overestimated. References to the case law of the ECtHR can be found in a large number of CC decisions, serving as a yardstick for its judicial review. In the literature, authors rightly maintain that the case law of the ECtHR has contributed to the fundamental rights jurisprudence of the Constitutional Court not only in individual cases, but generally in terms of fundamental rights doctrine[37]. Today, it can be taken for granted that the Constitutional Court, as a rule, follows the considerations of the

[34] e.g. Compendium of CC decisions 15.309/1998.
[35] Compendium of CC decisions 14.650/1996, 16.080/2001, 17.026/2003 a.o.
[36] On limits to such obligation, if any, see Compendium of CC decisions 11.500/1987 and below I/6.
[37] *Berka*, Verfassungrecht[5], 2014, para.1172ff.

ECtHR in its own jurisprudence[38]. The CC has referred to the case law of the ECtHR in its decisions on virtually all essential Convention rights[39]. The importance of ECtHR case law for the CC's interpretation of fundamental rights is also underlined by the fact that relevant Austrian legal textbooks dealing with the fundamental rights enshrined in the ECHR refer to both the case law of the ECtHR and that of the Constitutional Court, without qualifying one as more important than the other, when explaining the substance of the individual fundamental rights.

Given that violations of Union law do not fall within the jurisdiction of the Constitutional Court – except for rights under the CFR to be referred to later – the case law of the ECJ is less important for the CC than that of the ECtHR. Nevertheless, as stated above, the CC is obliged to apply Union law and to consider the case law of the ECJ. This is reflected in frequent references to the case law of the ECJ whenever issues of Union law play a role in connection with the law to be applied by the CC[40]. The CC's decisions on the national constitutional requirements of approval and transposition in the context of the ESM Treaty and the so-called Fiscal Compact, in which the CC determined the significance of the relevant legal acts from the viewpoint of Union law after the ECJ had rendered its decisions, is a particularly interesting example[41].

The situation differs with regard to the rights enshrined in the CFR which, as stated above, the CC has to apply within the scope of the CFR as constitutionally guaranteed rights and as a yardstick for judicial review[42]. In this context, the CC underlines that it is obliged to request preliminary rulings on issues relating to the CFR pursuant to Art.267(3) TFEU[43]. However, the CC also notes that the requirement to request a preliminary ruling from the ECJ does not apply if an issue of law is irrelevant to the decision. This holds for the CFR in cases in which "a constitutionally guaranteed right, especially a right enshrined in the ECHR, has the same scope as a right enshrined in the CFR. In such case, the CC takes its decision on the basis of

[38] See e.g. on prohibition of discrimination of Art.14 in conjunction with Art.8 ECHR regarding, in concreto, the provision on co-insurance coverage for same-sex partners, ECtHR case Karner, no. 40016/98 and Compendium 17.659/2005, or regarding the freedom of broadcasting and the admissibility of the monopoly position of a public service broadcaster, ECtHR case Informationsverein Lentia a.o., series A 276 and Compendium 14.453/1996.

[39] More recent examples concern, for instance, the importance of Art.8 ECHR for measures terminating residence (see e.g. reference to ECtHR, case Boultif, RJD 2001 – IX and ECtHR case Jakopovic, no. 36 757/97 in CC 03.12.2012, G 74/12, or reasoning in Compendium 17.851/2006 following ECtHR case Radovanovic no. 42 703/98), or rulings on "Christian cross displayed in classrooms", first ECtHR 03.11.2009, case Lautsi, no. 30 814/06, then Compendium 19.349/2011 and at the same time ECtHR 18.03.2011 (Grand Chamber), case Lautsi, no. 30 814/06, in which the CC came to the same conclusion as the Grand Chamber (contrary to that of the Chamber of 03.11.2009).

[40] See more recent case law, e.g. CC 16.03.2013, G 82/12 a.o. (on gambling law) or CC 13.03.2013, B 1326/12 (on Data Protection Directive and the organizational requirements to be met by the "independent body" and its monitoring).

[41] CC 16.03.2013, SV 2/12 and CC 03.10.2013, SV 1/2013, each with reference to ECJ 27.11.2012, *Pringle*, case C-370/12.

[42] Compendium of CC decisions 19.632/2012 and I/2/b above.

[43] Compendium of CC decisions 19.632/2012

Austrian constitutional law without having to request a preliminary ruling pursuant to Art.267 TFEU."[44]

Moreover, the CC concludes from Art.52(4), Art.52(3) and Art.53 CFR "that fundamental rights derived from national constitutions, treaties under international law and the Charter of Fundamental Rights have to be interpreted as consistently as possible."[45]

As regards the well-known controversy over the scope of Art.51(1) of the Charter of Fundamental Rights, the CC has taken over the criteria[46] developed by the ECJ in its recent case law and, in applying them, has come to the conclusion that national matrimonial law and conflict-of-law provisions outside the jurisdiction of the European Union do not show a sufficient relation to Union law and, in particular, do not contain anything that would restrict the exercise of the freedom of movement[47]. In this context, the CC also stated – again following the criteria developed by the ECJ[48] - that, provided the action taken by a Member State is not governed by Union law, it is in the national court's discretion to apply national standards of protection of fundamental rights, if such application neither impairs the level of protection granted by the Charter not interferes with the primacy, unity and effectiveness of Union law[49].

5. *Does the constitutional court in its decisions regularly refer to the jurisprudence of the Court of Justice of the European Union and/or the European Court of Human Rights? Which are the most significant examples?*

For regular references by the CC to the jurisprudence of the ECtHR and the SCJ, see item I/3 and 4 above.

It is interesting to note that even before Austria's accession to the EU, the CC – albeit in rare cases – referred to ECJ jurisprudence for purposes of comparative law[50].

Significant examples of the influence of and references to the jurisprudence of the ECtHR in Austria are to be found, in particular, in Supreme Court decisions in civil and criminal law cases[51]. It is a particular feature of supreme court jurisdiction in Austria that there are three

[44] Compendium of CC decisions 19.632/2012
[45] Compendium of CC decisions 19.632/2012
[46] See, in particular, ECJ 26.02.2013, case C-617/10, Akkerberg/Franson, para.19 ff; 08.05.2013, case C-87/12, Ymeragaua, para.431; 06.03.2014, case C-206/13, Siragusa, para.25.
[47] CC 12.03.2014, B 166/2013.
[48] ECJ 26.02.2013, Akkerberg/Franson, case C-617/10, para.29.
[49] CC 12.03.2014, B 166/2013, para.28.
[50] As an outstanding example, see Compendium 13.038/1992 (see earlier Compendium 11.774/1988) of different interpretations of the principle of equality in the Austrian Federal Constitution and the requirement of equal treatment, a guideline regarding different retirement ages of men and women.
[51] This has been of special importance in the context of the protection of personal rights – see the case law of the Supreme Court, which derives a right to respect of privacy from Art.8 ECHR in conjunction with § 16 General Code of Civil Law (Supreme Court, JBl 1997, 641; Supreme Court, ÖJZ 2006, 376), or – presumably the most important development – the adaptation of the criteria applied in the assessment of potentially slanderous statements by the Supreme Court in the wake of jurisprudence initiated with ECtHR case Liniens, EuGRZ 1986, 424; see e.g. Supreme Court, JBl 2007, 574.

independent highest courts, with the Supreme Court being the highest court in civil and criminal matters, though without the possibility of filing a complaint for violations of fundamental rights with the CC. The legal instrument of "renewal of criminal proceedings" provided for in the Austrian Code of Criminal Procedure (§ 363a CCPr), which was created to provide legal remedy in criminal cases after an ECtHR judgment establishing a violation of a Convention right, has been interpreted by the Supreme Court as allowing such "renewal" also in cases in which an ECtHR judgment has not yet been passed, but a violation of the ECHR by a criminal court has been established by the Supreme Court itself in the renewal proceedings[52].

Summarizing the most important examples of influence of the ECtHR on the jurisprudence of the CC, this selection – which is bound to be a subjective one, given the large number of examples – can be based on the following lines? of judicial action: recognition of the obligation to guarantee Convention rights, especially in the context of Art.8 ECHR and Art.11 ECHR, the development of an elaborate proportionality review within the framework of the legality proviso of Art.10(2) ECHR and, in particular, the enforcement of comprehensive checks of the administration of justice in the wake of ECtHR jurisprudence on Art.6 ECHR. In the latter context, in particular, the influence of Art.6 ECHR and the related jurisprudence of the ECtHR ultimately contributed towards a structural reform of the Austrian Federal Constitution and the introduction of two-tier administrative jurisdiction.

6. *Are there any examples of divergences in decisions taken by the constitutional court and the European courts of justice?*

The jurisprudence on Art.6 ECHR mentioned above has led to the only openly conflicting jurisprudence between the ECtHR and the CC to date. However, in line with the characteristic tendency of both courts to avoid such conflicts as far as possible, or at least not to allow them to develop beyond the individual case, the jurisprudence of both the ECtHR and the CC has found a way of dealing with and, ultimately, settling the conflict. In fact, the ECtHR finally prevailed, as the legislator solved the problem by reforming the system of protection in administrative law matters in Austria and by introducing comprehensive first-instance administrative jurisdiction (taking the course which the CC had demanded in its opposing decision).

In brief, the broad interpretation of the term "civil rights" by the ECtHR caused problems for the Austrian system of protection in administrative law matters, which had for a long time been based on a system of protection internal to the public administration, but largely in line with judicial standards applied under the rule of law, especially because the original, one-tier system of control by the Administrative Court was limited in its authority to establish the facts of a case. In the Compendium of CC decisions 11.500/1987, the CC implied that it would no longer be able to follow the broad interpretation of the ECtHR in all issues:

[52] See Supreme Court 01.08.2007, 13 OS 135/06m.

"However, the CC wishes to point out that the infringement of the Convention by the Austrian legal order thus implied, based on the Court's current considerations, could only be the result of an open further development of the law by the Convention bodies; consequently, the question would arise – not to be answered here – if the transfer of the task of further developing constitutional law to an international body and the resulting exclusion of the constitutional legislator would constitute a total revision of the Federal Constitution as defined in Art.44(3) of the Federal Constitutional Law and, therefore, would have required a vote to be taken by the people of the Federal Republic."[53]

In its decision on the merits of the case, the CC pointed out that "certain interpretation results may be in conflict with constitutional law regarding the organization of the state", which means that the Court "cannot use this interpretation as a basis for its decision". "Even if the European Court (of Human Rights) were to assume a conflict between the Convention and the Austrian legal system in this matter, this infringement could only be corrected by the constitutional legislator itself."[54]

Even though the problem was ultimately solved by the constitutional legislator, it was due to the development of the case law of the CC and the ECtHR over the years that a decision to resolve the open issue in this conflict was never required. Through its interpretation of Art.6 ECHR[55], the CC showed that there is a way to overcome the problem. The ECtHR, for its part, strictly limited itself to a judicial review of the individual case – without referring to the CC's approach – and, in so doing, accepted the post-implementation review by the CC as sufficient. There were a few individual cases in which this did not apply, but then the CC itself took over the decision of and assessment by the ECtHR.

There are, however, individual aspects in Art.6 ECHR which still give rise to differences in jurisprudence, especially regarding the question as to when an oral hearing is to be held[56]. Differences in nuances can also be found in the jurisprudence on double jeopardy[57].

Given the specific jurisdiction of the CC with regard to Union law, comparable zones of conflict with the jurisprudence of the ECJ have not been identified to date. As regards the rights enshrined in the CFR, the CC in Compendium 19.632/2012 explicitly acknowledged the ECJ's jurisdiction pursuant to Art.267 TFEU.

7. *Do other national courts also consider the jurisprudence of European courts of justice as a result of the constitutional court taking it into consideration in its decisions?*

[53] Compendium of CC decisions 11.500/1987, p. 365f.
[54] All citations Compendium of CC decisions 11.500/1987; the point at issue was whether the CC can be "forced" through Art.6 ECHR to establish the facts of the case.
[55] According to the "core-and-periphery" model of jurisprudence, post-implementation review by the CC is sufficient in cases peripheral to Art.6 ECHR, see Compendium 11.500/1987 and subsequently, e.g. Compendium 15.149/1998 or Compendium 17.644/2005.
[56] For CC jurisdiction to review zoning plans, which in Austria are equivalent to ordinances, see ECtHR case Kugler, no. 65631/01 und VfSlg 19.587/2011.
[57] See outline of jurisdiction in Compendium …/2009.

Consideration of the jurisprudence of the ECtHR and the ECJ derives from the constitutional situation described above. Thus, the question can be answered in the affirmative, as Austrian courts consider the jurisprudence of the ECtHR as well as that of the ECJ, subject to the provisions of Convention rights and Union law. The CC doing the same may be taken as confirmation and affirmation, but the real reason is to be found in constitutional law.

8. *Are there any examples of decisions by European courts of justice influenced by the jurisprudence of national constitutional courts?*

Examples of explicit references[58] can be found in the jurisprudence of the ECtHR, especially in the context of Art.6 ECHR, with an intensive dialogue taking place between the two highest courts (see I/6 above).

II. Interactions between constitutional courts

1. *Does the constitutional court in its decisions refer to the jurisprudence of other European or non-European constitutional courts?*

As statistics show, the CC tends to be (very) reserved when it comes to references to the jurisprudence of other constitutional courts. Relevant studies[59] have come more or less to the same conclusions: if the CC refers to decisions by other constitutional courts, the decisions cited most frequently are those taken by the German Federal Constitutional Court, the Swiss Federal Supreme Court, and – in matters related to tax law – the German Federal Fiscal Court. Moreover, a distinction has to be made between (more frequent) cases in which the parties to the proceedings cite the jurisprudence of foreign courts, especially that of the aforementioned highest courts, to support their own arguments, and cases in which the CC itself refers to the jurisprudence of foreign highest courts in its reasoning. (Here again, it makes a difference if the reference is essential for the CC's own arguments, or if the CC's intention is merely to demonstrate to the parties that the position taken by the foreign court is irrelevant to the Austrian constitutional situation[60]).

[58] See Compendium of CC decisions 14.295/1995 and ECtHR 31.07.2008, APL 40825/98.

[59] See *Holoubek*, Wechselwirkungen zwischen österreichischer und deutscher Verfassungsrechtsprechung, in: *Merten* (Publ.), Verfassungsgerichtsbarkeit in Deutschland und Österreich, 2008, 85ff; *Fuchs*, Verfassungsvergleichung durch den Verfassungsgerichtshof, JRP 2010, 176ff; *Gamper*, Austria: Non-cosmopolitan, but Europe-friendly – The Constitutional Court's comparative approach, in: *Groppi/Ponthoreau* (eds), The use of foreign precedents by constitutional judges, 2013, 213ff; *Eberhard*, Funktionalität und Bedeutung der Rechtsvergleichung in der Judikatur der VfGH, in: *Gamper/Verschraegen* (Publ.), Rechtsvergleichung als juristische Auslegungsmethode, 2013, 141 ff.

[60] For such example, see Compendium of CC decisions 18.541/2008 containing a statement that the reasoning of the German Federal Constitutional Court in its decision on contingency fees for lawyers cannot be transferred to the Austrian situation.

In the majority of cases, reference is made, in particular, to the German Federal Constitutional Court (but also to the Swiss Federal Supreme Court[61]), the intention being to confirm certain trends in the interpretation of fundamental rights[62]. At the same time, references to foreign jurisprudence tend to be more frequent in questions relating to fundamental issues[63]. One area of greater prominence in references to foreign jurisprudence is tax law[64], which is probably due to the arguments put forth by the parties.

A clear majority of cases with references to foreign jurisprudence concerns the interpretation of fundamental rights. In other contexts, foreign courts are cited far less frequently[65]. In rare cases, such as the CC's landmark decision on Art.6 ECHR mentioned in Item I/6 above, the CC also engages in extensive comparative studies[66].

Altogether, based on a survey of literature published since 1980[67], we find 60 to 70 references to foreign decisions in the jurisprudence of the Constitutional Court, about half of them in constellations in which such references are cited in the reasoning of the decisions.

2. *If so, does the constitutional court tend to refer primarily to jurisprudence from the same language area?*

As stated above, the CC primarily refers to decisions taken by the highest courts of Germany and Switzerland. Presumably, this is not exclusively (though to a certain extent) due to the common language, but mainly to the fact that the legal systems of these three states – especially with regard to their federal structure and their fundamental rights tradition – lend themselves most readily to comparisons.

[61] See e.g. Compendium of CC decisions 12.104/1989 or 11.297/1987, or the reference to a decision by the Swiss Court of Cassation in Compendium 16.385/2001.

[62] See, e.g. Compendium of CC decisions 18.893/2009 referring to BVerfG 15.09.2008/1 BvR 1565/05 on the "need for special protection of those criticizing the powers that be" in respect of freedom of expression Art.10 ECHR or Compendium 17.600/2005 and a reference to BVerfGE 104, 92 [sit-ins] on forms of communication to be protected under the freedom of assembly; confirming the CC's interpretation, e.g. in Compendium 16.958/2003 or 15.094/1998.

[63] See, most recently, Compendium of CC decisions 19.592/2011 on "e-voting" and the reference to the German constitutional situation in BVerfG E 123, 39 (voting computers), or Compendium 14.390/1995, where the jurisprudence of the German Federal Constitutional Court regarding the classification of the ECJ as a "lawful judge" was explicitly referred by the CC to as a model for the interpretation of Art.83(2) Federal Constitutional Law.

[64] See, e.g. Compendium of CC decisions 16.587/2002, 10.029/1984, 11.260/1987 (all referring to the German Federal Constitutional Court) as well as Compendium 15.987/2000, 9138/1982 (all referring to decisions by the German Federal Fiscal Court).

[65] See, however, CC 29.06.2012, SV 2/12 on the interpretation of the ESM Treaty by the German Federal Constitutional Court or the reference to the "comparable law on state-church relations" in Germany in Compendium 18.965/2009 referring to BVerfGE 102, 370.

[66] See Compendium of CC decisions 11.500/1987 citing Swedish and Dutch jurisprudence; see also Compendium 15.632/1999 in questions relating to in-vitro fertilization or Compendium 10.291/1984 in which the CC surveys the standards of Contracting Parties to the ECHR in the context of the prohibition of seizure of documents of professional party representatives in fiscal criminal law, or Compendium 13.629/1993, where the CC compared the provisions regarding relations between elective children and their families of origin under family law with the legal situation in certain Contracting Parties to the ECHR.

[67] Date from which electronic records of CC decisions are available.

3. *In which fields of law (civil law, criminal law, public law) does the constitutional court refer to the jurisprudence of other European or non-European constitutional courts?*

As already stated, references to other courts mostly concern the field of fundamental rights. This is probably due to the fact that a comparative approach appears to be more meaningful in matters relating to fundamental rights – given the umbrella function of the ECHR – than in fields characterized by national specificities, such as issues relating to the organization of the state.

The prevalence of references to other courts in specific fields of law is also due to the system of jurisdiction of the highest Austrian courts, given the fact that issues of civil and criminal law are put before the Constitutional Court far less frequently than issues of public law or tax law.

4. *Have decisions of the Austrian Constitutional Court noticeably influenced the jurisprudence of foreign constitutional courts?*

Without any doubt, the primary influence of constitutional jurisdiction in Austria on foreign systems of constitutional law derives from the "Austrian model" of constitutional jurisdiction.

References to individual decisions of the CC can be found in the jurisprudence of the German Federal Constitutional Court[68]. Apart from that, isolated citations of CC decisions exist in the jurisprudence of foreign constitutional courts[69].

5. *Are there any forms of cooperation going beyond the mutual acknowledgement of court decisions?*

Contacts are being maintained between the CC and other European and non-European constitutional courts through regular mutual visits[70]. Moreover, informal meetings and research projects provide a platform for members of European and international constitutional courts to engage in an informal exchange of ideas.

[68] Description of jurisprudence in *Martini*, Lifting the constitutional curtain? The use of foreign precedent by the German Federal Constitutional Court, in: *Groppi/Ponthoreau*, 248 (examples: BVerfG E 26, 327/ Compendium 5116/1965; BVerfG E 94, 315/Compendiumg 13.130/1992; BVerfG E 104, 337/Compendium 15.394/1998).

[69] In the jurisprudence of the South African Constitutional Court (*Rautenbach*, South Africa, in: *Groppi/Ponthoreau*, 197), the constitutional courts of Romania (*Tanasescu/Daconu*, Romania, in: *Groppi/Ponthoreau*, 331, Poland (*Wendel*, in: *Grabenwarter/Vranes* (Hrsg), Kooperation der Gerichte im europäischen Verfassungsverbund, 2013, 138) or Taiwans (Chang/Yeh, in: *Groppi/Ponthoreau*, 385).

[70] Listed in the publicly accessible activity reports of the CC.

III. Interactions between European courts in the jurisprudence of constitutional courts

1. *Do references to European Union law or to decisions by the Court of Justice of the European Union in the jurisprudence of the European Court of Human Rights have an impact on the jurisprudence of the constitutional court?*

Given that the CC regularly considers the jurisprudence of the ECtHR and the ECJ and that it has to apply European Union law, mutual references between the ECJ and the ECtHR are reflected in the jurisprudence of the CC when cases of that nature are put before the Constitutional Court[71].

The CC also takes up such issues when requesting a preliminary ruling from the ECJ, e.g. in the context of questions arising under the Dublin II Regulation, with a reference to relevant jurisprudence of the ECtHR[72].

2. *How does the jurisprudence of constitutional courts influence the relationship between the European Court of Human Rights and the Court of Justice of the European Union?*

Influence of this nature may derive, in particular from the CC's requests for preliminary rulings addressed to the ECJ. The CC has already asked the ECJ for preliminary rulings pursuant to Art.267 TFEU on several occasions, mostly regarding issues of fundamental rights[73].

3. *Do differences between the jurisprudence of the European Court of Human Rights, one the one hand, and the Court of Justice of the European Union, on the other hand, have an impact on the jurisprudence of the constitutional court?*

To date, no such impact has been observed in the jurisprudence of the Constitutional Court.

[71] See, e.g. ECJ, case C-149/79, Commission/Belgium, Compendium 1980, 03881, and reference thereto in ECtHR case of Pellegrin, RJD 1999-VIII and subsequently CC 30.09.2005, B 1741/03.
[72] See Compendium of CC decisions 19.652/2012 with reference to ECtHR, case of M.S.S., APPL 30.696/09.
[73] See, in particular, Compendium 16.050/2000 and most recently CC 28.11.2012, G 47/12 a.o. on "Data Retention", with the CC querying the relationship between the ECHR and specifically Art.7 CFR with regard to Art.52(3) of the Fundamental Rights Charter.