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Community law and Austrian constitutional law

This article focuses on the interplay between European Community law and Austrian constitutional law. It is essential, therefore, to examine in a first step the relationship between Community Law and national law in general. The non-existence of a written "supremacy clause" in European law leaves a wide margin for interpretation. The European Court of Justice (ECJ) characterizes European Community law as supreme, directly effective and autonomous. Behind these structural elements lurks the fundamental dogmatic question of the dependence of European Law on national law. As European law is founded on international treaties, the Member States' Supreme Courts tend to argue that treaty law can not be completely autonomous in their internal legal order. In their opinion and in opposition to the ECJ, the rule deciding whether national or European law should be supreme is located within the national constitutional order. Although the supremacy of European Community law is accepted by the national courts of all Member States as regards the relationship between European Community law and ordinary legislation, the mentioned dogmatic conflict between the ECJ and Member States' Supreme Courts matters when it comes to a conflict between European Community law and national constitutional law.

In Austria, the Constitutional Court and academia accept the primacy of European Community law even over Austrian constitutional provisions. Nevertheless, the technique chosen for opening the Austrian legal system to Community law also provides for an inherent limitation of supremacy as regards conflicts between Community law and the basic principles of the Austrian constitution, known as "*Integrationsschranke*". This is where the question on the ultimate aspects of the supremacy debate may come to the fore in a conflict between national and Community law.

COMMUNITY LAW AND NATIONAL LAW

Due to the lack of a written legal basis regarding the relationship between Community law and national law the clarification of this matter was left to the European courts. Thereby, the ECJ strengthened its self-image as "motor"¹ of European integration by establishing the doctrine of supremacy of European Community law. In its opinion supremacy and direct effect of Community law are

1 *Kirchhof*, Die rechtliche Struktur der Europäischen Union als Staatenverbund, in: *Bogdandy* (ed), *Europäisches Verfassungsrecht, Theoretische und dogmatische Grundzüge* (2003) 893 (923).

based on the "special and original nature"² of Community law itself, in particular on the fact that Community law forms an independent system of law flowing from an autonomous legal source.³ The idea of the EEC Treaty⁴ would be undetermined if a Member State could unilaterally nullify the effects of Community law. Subsequently, supremacy is essential to give full effect to Community law: the ECJ concludes that "the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question"⁵. As the only evidence in the treaties for this "supranational"⁶ characteristic of European Community law the ECJ refers to Article 249 of the EC Treaty.⁷

Today the supremacy of European Community law is indirectly – albeit not explicitly – incorporated in the treaties. Paragraph 2 of the Protocol (No 30) on the application of the principles of subsidiarity and proportionality refers to the "principles developed by the Court of Justice regarding the relationship between national and Community law", which arguably also includes the case-law of the ECJ regarding the interplay of Community law and Member States' law.⁸ The (rejected) Constitutional Treaty⁹ contains an explicit "supremacy clause" in Article I-6, stating that "[t]he Constitution and law adopted by the institutions of the Union in exercising competences conferred on it shall have primacy over the law of the Member States".¹⁰ This clause was not transferred into the Treaty of Lisbon¹¹. As a substitute, the Treaty of Lisbon includes a declaration¹² that recalls

2 Case 6/64 *Costa/ENEL* [1964] ECR 585.

3 The ECJ already emphasized the constitution of a "new legal order of international law for the benefit of which the States have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals" in case 26/62 *Van Gend & Loos* [1963] ECR 1.

4 Treaty establishing the European Economic Community; now Treaty establishing the European Community; see for the consolidated version of the treaty OJ C 321E of 29 December 2006.

5 Case 6/64 *Costa/ENEL* [1964] ECR 585.

6 See *Craig/de Burca*, EU Law⁴ (2007) 3.

7 Criticizing the focus on Article 249 of the EC Treaty see e.g. *Craig/de Burca*, EU Law⁴ (2007) 3.

8 See e.g. *Schäffer*, Gemeinschaftsrechtskonforme Interpretation und Anwendungsvorrang am Beispiel des Verfahrensrechts, in: *Holoubek/Lang* (eds), Abgabenverfahrensrecht und Gemeinschaftsrecht (2006) 34 (57).

9 Treaty establishing a Constitution for Europe; OJ C 310 of 16 December 2004.

10 See e.g. *Vedder*, Art I-6, in: *Vedder/Heintschel von Heinegg* (eds), Europäischer Verfassungsvertrag, Handkommentar (2007); *Haack*, Statut und Status im europäischen Verfassungsdis-kurs, ZÖR 61 (2006) 23 (33 f); *Ruffert*, Art I-6 VVE, in: *Calliess/Ruffert* (eds), Verfassung der Europäischen Union, Kommentar der Grundlagenbestimmungen (Teil 1), (2006) ref 18 ff; *Schneider*, Die neu verfasste Europäische Union: noch immer „das unbekannte Wesen"? in: *Jopp/Matl* (eds), Der Vertrag über eine Verfassung für Europa, Analyse und Konstitutionalisierung der EU (2005) 107 (115 f); *Dossi*, Der Entwurf für einen EU-Verfassungsvertrag – eine erste Analyse, JBl 2004, 97 (98); *Jacqué*, Der Vertrag über eine Verfassung für Europa: Konstitutionalisierung oder Vertragsrevision? EuGRZ 2004, 551 (553); *Obwexer*, Die neue Verfassung für Europa, eolex 2004, 674 (676); *Jaag*, Verfassungsvertrag für die Europäische Union, EuZ 2003, 104 (106).

11 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007; OJ C 306 of 17 December 2007.

that, "in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law". Furthermore, this declaration annexes an Opinion of the Council Legal Service¹³ emphasizing that "[t]he fact that the principle of primacy will not be included in the future treaty shall not in any way change the existence of the principle and the existing case-law of the Court of Justice". Bearing in mind the facts that primacy of Community law is still – indirectly – incorporated in the treaties and that declarations are not legally binding, the Treaty of Lisbon means no added value as regards the theoretical approach regarding the relationship between Community law and national law.

Even though the primacy of Community law over ordinary national legislation is to a large extent accepted by the Member States' courts, this does not hold true for the theoretical concept of the ECJ underlying its supremacy doctrine.¹⁴ The idea of an entire autonomy of the Community legal order is not shared by most of the Member States. On the contrary, national (constitutional) courts predominantly take the position that the special legal status of Community law derives from their national constitutional order. As regards the supremacy of Community law, this approach includes the necessity of a – written or unwritten – provision of the national constitutional law permitting primacy over national law. As a consequence, the Member States' constitutional orders may also provide for limitations of the supremacy of Community law, which is relevant for the relationship between Community law and national constitutional law.

The different approaches also lead to different conceptions regarding the competencies of the ECJ on the one hand and the national (constitutional) courts on the other hand. Following from the ECJ-doctrine, national courts are in no case allowed to review (secondary) Community law¹⁵ or to curtail the effect of supremacy. By contrast, the Member States' conception of supremacy by virtue of an authorization by the national constitutions inevitably leads to the competence of the national highest courts to examine possible violations of these national provisions. If the national constitutional order limits the transfer of power or the effects of supremacy, it is up to the national highest courts to assess whether these limitations are violated. This raises the question of who has "ultimate authority"¹⁶ and who is the "final arbiter"¹⁷ in the case of a conflict between national and Community law.

12 Declaration (No 17) concerning primacy, OJ C 306 of 17 December 2007, 256.

13 Opinion of the Council Legal Service on the primacy of EC law as set out in 11197/07 (JUR 260).

14 See *de Witte*, Direct Effects, Supremacy and the Nature of the Legal order, in *Craig/de Burca* (eds), *The Evolution of EU Law* (1999) 177 (201).

15 See Case 314/85 *Foto Frost* [1987] ECR 4199.

16 *Maduro*, Contrapunctual Law: Europe's Constitutional Pluralism in Action, in: *Walker* (ed), *Sovereignty in Transition* (2003) 501 (502 ff).

17 *Kumm*, Who is the Final Arbiter of Constitutionality in Europe? *CMLRev* 1999, 351.

Although the opening of the domestic legal order is seen as conditionality for supremacy by the Member States, from the Community point of view, this doctrine is seen as part of the "acquis communautaire".¹⁸

COMMUNITY LAW AND NATIONAL CONSTITUTIONAL LAW

As mentioned earlier, the primacy of European Community law is by and large accepted by the Member States' courts. This general assessment, however, can just be made as regards the relationship between Community law and national law, which is not in constitutional rank. As far as the interplay with national constitutional laws – and especially their basic principles – is concerned, different dogmatic derivation leads to different results.

For the ECJ the status of the conflicting national rule is without any relevance. As a consequence, Community law is supreme over any national provision, regardless of which status it has within the Member States' legal order. Not even fundamental principles of national constitutional law are able to challenge this concept of supremacy.¹⁹ The ECJ already stated in the *Costa/ENEL*-case that Community law could not "be overridden by domestic legal provisions, however framed"²⁰. Although this ruling was not based on a conflict between Community law and national constitutional law, the ECJ held that there could be no national provision – of whatever status – that could challenge the supremacy of Community law. This approach was confirmed by the ECJ in the case *Internationale Handelsgesellschaft*,²¹ which was based on a conflict between Community law and the German constitution. The ECJ explained that "recourse to the legal rules or concepts of national law in order to judge the validity of measures adopted by the institutions of the community would have an adverse effect on the uniformity and efficacy of Community law. The validity of such measures can only be judged in the light of Community law." The ECJ emphasized that Community law "cannot be overridden by rules of national law, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called in question. Therefore the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of a national constitutional structure." This doctrine was confirmed by the ECJ in the case *Dow Chemical*²²: "[R]eference either to infringements of fundamental rights as formulated in the Constitution of a Member State or to the principles of a national constitutional structure cannot affect the validity of a Community measure or its effect in the territory of that

18 See e.g. *Gialdino*, Some reflections on the *acquis communautaire*, CMLRev 1995, 1089 (1097 ff).

19 See e.g. *Craig/de Burca*, EU Law⁴ (2007) 346 – 348.

20 Case 6/64 *Costa/ENEL* [1964] ECR 585.

21 Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125.

22 Cases 97/87 to 99/87 *Dow Chemical* [1989] ECR 3165.

State." In more recent cases, such as *Kreil*²³ and *Connect Austria*²⁴, the ECJ does not even mention the constitutional status of the conflicting national provisions when it comes to the supremacy of Community law and thereby underlines that it attaches no importance to the legal status of an inconsistent national rule.

The national (constitutional) courts' positions on the primacy of Community law over national constitutional law are vastly different. Due to the fact that they locate the "opening clause" for Community law – and in particular for the supremacy of Community law – in the national legal order it is in their own authority to examine the compliance with this national provision. Nevertheless, the Member States' (constitutional) courts' positions vary. According to *Grabenwarter*²⁵, three groups of Member States' positions can be identified:

The first group – composed in particular of Austria, Luxembourg and the Netherlands – accepts the supremacy of Community law even over national constitutional law. The Netherlands even share the ECJ's theoretical foundation of supremacy of Community law.²⁶

The second – and biggest – group of Member States accepts supremacy of European Community law over national constitutional law in general, but not without reservations. The most prominent Member State within this group is Germany²⁷: The *Bundesverfassungsgericht* still emphasizes that it possesses jurisdiction where Community law violates fundamental rights of the *Bonner Grundgesetz*, although this jurisdiction will not be exercised *so long* as an effective protection of fundamental rights is generally ensured by the Community which is to be regarded as substantially similar to the protection of fundamental rights required by the *Bonner Grundgesetz*.²⁸ The *Bundesverfassungsgericht* also stated in the *Maastricht-case*²⁹ that it has the right to review whether Community acts fall within the scope of the Community competence. The Swedish position regarding the supremacy of Community law over national constitutional law is quite similar to the German approach.³⁰ Comparable concepts to the effect that there is no unlimited acceptance of primacy over national constitutional law can be found in Italy³¹, Denmark³², Spain³³, Ireland³⁴ and the United Kingdom³⁵.

23 Case C-285/98 *Kreil* [2000] ECR I-69 with regard to Article 12a of the *Bonner Grundgesetz*.

24 Case C-462/99 *Connect Austria* [2003] ECR I-5197 with regard to Article 133 para 4 B-VG.

25 *Grabenwarter*, Staatliches Unionsverfassungsrecht, in: *Bogdandy* (ed), Europäisches Verfassungsrecht (2003) 283.

26 See *Claes/de Witte*, Report on the Netherlands, in *Slaughter/Sweet/Weiler* (eds), The European Court and the National Courts – Doctrine and Jurisprudence (1998) 171.

27 See *Kokott*, Report on Germany, in *Slaughter/Sweet/Weiler* (eds), The European Court and the National Courts – Doctrine and Jurisprudence (1998) 77.

28 BVerfGE 73, 339.

29 BVerfGE 89, 155.

30 *Winkler*, Integrationsverfassungsrecht (2003) 115.

31 See *Laderchi*, Report on Italy, in *Slaughter/Sweet/Weiler* (eds), The European Court and the National Courts – Doctrine and Jurisprudence (1998) 147.

32 *Hofmann*, Der oberste Gerichtshof Dänemarks und die europäische Integration, EuGRZ 1999, 1 (3 f).

The third group of Member States does not accept the primacy of Community law over national constitutional law. In France,³⁶ Community law ranks between ordinary legislation and national constitutional law. In Greece, the supremacy over national constitutional law is also not accepted.³⁷ As regards the "new" Member States, Poland is a pertinent example: although Article 91 of the Polish constitution makes clear that Community Law has precedence over "statutes", the Polish constitutional court rejects supremacy of Community law over national constitutional law by stating that a collision between European Community law and Polish law "may in no event be resolved by assuming the supremacy of a Community norm over a constitutional norm"³⁸.

THE AUSTRIAN WAY OF OPENING THE LEGAL ORDER

As in other Member States, the position of Austrian academia and jurisprudence is that there is a need for a constitutional provision (sometimes called „*Verfassungshebel*“³⁹) opening the domestic legal order in order to transfer sovereignty to the European Union/European Community and to accept the main structural doctrines of the ECJ, namely direct effect and supremacy.

Under Austrian law, the constitutional provision opening the legal order for European Community law and its effects was not incorporated in the main text of the Austrian Constitution, the Federal Constitution Law (Bundes-Verfassungsgesetz – B-VG)⁴⁰. Instead, the legislator passed a separate constitutional act, the Federal Constitutional Act on the Accession of Austria to the European Union (EU-Beitritts-BVG)⁴¹. Section I of the EU-Beitritts-BVG authorizes the authorities competent pursuant to the Federal Constitution to conclude the Treaty regarding the Austrian accession to the European Union in accordance with the negotiation

33 See *García de Enterría/Alonso García*, Spanish report, in: *Schwarze* (ed), *Die Entstehung einer europäischen Verfassungsordnung, Das Ineinandergreifen von nationalem und europäischem Verfassungsrecht* (2000) 287.

34 See *Peters*, *Elemente einer Theorie der Verfassung Europas* (2001) 314 f.

35 See *Birkinshaw*, British report, in: *Schwarze* (ed), *Die Entstehung einer europäischen Verfassungsordnung, Das Ineinandergreifen von nationalem und europäischem Verfassungsrecht* (2000) 205.

36 See *Flauss*, *Rapport français*, in: *Schwarze* (ed), *Die Entstehung einer europäischen Verfassungsordnung, Das Ineinandergreifen von nationalem und europäischem Verfassungsrecht* (2000) 25.

37 *Mayer*, *Kompetenzüberschreitung und Letztentscheidung – Das Maastricht-Urteil des Bundesverfassungsgerichts und die Letztentscheidung über Ultra vires-Akte in Mehrebenensystemen – Eine rechtsvergleichende Betrachtung von Konflikten zwischen Gerichten am Beispiel der EU und der USA* (2000) 220 ff.

38 Judgment of the Polish constitutional court of 11 May 2005, K 18/04; see for the English translation http://www.trybunal.gov.pl/eng/summaries/documents/K_18_04_GB.pdf (15 July 2008).

39 *Ipsen*, *Europäisches Gemeinschaftsrecht* (1972) ref 10/51.

40 Federal Law Gazette No. 1/1930.

41 Bundesverfassungsgesetz über den Beitritt Österreichs zur Europäischen Union, Federal Law Gazette No. 744/1994.

results as set forth by the accession conference on April 12, 1994. Thus, the EU-Beitritts-BVG was the constitutional foundation for concluding the Accession Treaty^{42,43} According to Section II of the EU-Beitritts-BVG the Accession Treaty shall only enter into force upon ratification by the National Council and the approval of the Federal Council; each of the resolutions require the presence of at least half of the members and a majority of two thirds of the votes cast. As a *lex specialis* to Article 50 B-VG, Section II of the EU-Beitritts-BVG provided a legal basis for this approval-procedure within the Austrian parliament.⁴⁴ The aim of the EU-Beitritts-BVG was – according to the explanatory notes to the legislative proposal of the Federal Government – to open the Austrian legal order to Community law in a way resulting from the special claim of validity of the European Community's legal order, in particular supremacy and direct effect.⁴⁵

Due to the fact that – according to the prevailing academic contributions⁴⁶ – the Austrian accession was considered to be a "total revision of the Federal Constitution" under the terms of Article 44 (3) B-VG the EU-Beitritts-BVG was submitted to a referendum by the Austrian population.⁴⁷ The parliamentary approval process regarding the accession treaty was initiated after the referendum. Thus, the procedure of Article 44 (3) B-VG, which states that any "total revision" of the Federal Constitution shall upon conclusion of the parliamentary approval process but before its authentication by the Federal President be submitted to a referendum, was turned upside down.⁴⁸

42 Treaty concerning the accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden to the European Union, Federal Law Gazette No. 45/1995; see also OJ C 241 of 29 August 1994 and OJ L 1 of 1 January 1995.

43 In addition to the opening mechanism of the EU-Beitritts-BVG the Austrian accession required amendments of the B-VG, see Federal Law Gazette No. 1013/1994; see also *Grabenwarter*, Änderungen der österreichischen Bundesverfassung aus Anlaß des Beitritts zur Europäischen Union, ZaöRV 1995, 166.

44 Following the Austrian accession in 1995 every treaty amendment was accompanied by a separate constitutional act, cloning the EU-Beitritts-BVG. Since the amendment of Article 50 B-VG in the year 2007 – Federal Law Gazette I No. 2/2008 – this procedure is not required anymore.

45 The original wording is: „Des weiteren sollte es die Bestimmung leisten, die österreichische Rechtsordnung gegenüber der Rechtsordnung der EU in der Weise zu öffnen, wie sich dies aus deren besonderem Geltungsanspruch – der vor allem vom Vorrang und von der Durchgriffswirkung des Gemeinschaftsrechts bestimmt ist – ergibt“; see 1546 BlgNR 18. GP, 4.

46 See e.g. *Öhlinger*, Die österreichische Verfassung und die europäische Integration, in: *Hummer* (ed), Paradigmenwechsel im Europarecht zur Jahrtausendwende, Ansichten österreichischer Integrationsexperten zu aktuellen Problemlagen (2004) 67 (67 ff); *Winkler*, Integrationsverfassungsrecht (2003) 14 ff; *Thun-Hohenstein*, Das Verhältnis zwischen österreichischem Recht und dem Recht der Europäischen Union (1995) 57 f; *Holzinger*, Die bevorstehende Öffnung Österreichs in den Europäischen Wirtschaftsraum und die Europäischen Gemeinschaften – Rechtsetzung unter besonderer Berücksichtigung auf den demokratischen und den rechtsstaatlichen Aspekt, Gutachten für den 12. Österreichischen Juristentag 1994, Band I/1 (1993) 86 ff, 124 ff, 146 ff.

47 See the announcement of the Federal Government of the result of the referendum of 12 June 1994, Federal Law Gazette No. 735/1994.

48 *Öhlinger*, EU-BeitrittsBVG, in: *Korinek/Holoubek* (eds), Österreichisches Bundesverfassungsrecht, Textsammlung und Kommentar (1999) ref 10.

The chosen procedure was justified by the dispute of whether Article 44 (3) B-VG is applicable to international treaties.⁴⁹ Its applicability was uncertain as according to Article 50 (3) solely Article 44 (1) and (2) – but not Article 44 (3) – shall be analogously applied to international treaties.⁵⁰ Another reason for the implementation of Section II of the EU-Beitritts-BVG – as *lex specialis* to Article 50 B-VG – was the intention to avoid the obligation to explicitly specify constitutional provisions within the accession treaty in accordance with Articles 44 (1) and 50 (3)⁵¹ which would have been indeed a very burdensome process.⁵²

The EU-Beitritts-BVG was – as mentioned – targeted towards opening the Austrian legal order in a way resulting from the special claim of validity of the European Community's legal order, in particular supremacy and direct effect.⁵³ The explanatory notes to the legislative proposal of the Federal Government of the EU-Beitritts-BVG explicitly stress that Community law should have supremacy also over Austrian constitutional law by emphasizing that any legislative or administrative organ shall desist applying conflicting national law, regardless of whether the national provision is of constitutional rank, an ordinary legislative act, or an ordinance.⁵⁴ Thus, as regards supremacy of European Community law the Austrian legislator did not distinguish between constitutional and non-constitutional provisions. This approach is also reflected in the jurisprudence of the Austrian Constitutional Court. In *Connect Austria*⁵⁵ – the first case regarding a conflict between a provision of the Austrian constitution⁵⁶ and a secondary Community act enjoying direct effect⁵⁷ – the Austrian Constitutional Court did not even mention the fact that the displaced Austrian rule was of constitutional rank.

49 See the explanatory notes to the legislative proposal of the Federal Government, 1546 BlgNR 18. GP, 4.

50 Some academic opinions assume that international treaties, categorized as "total revision" of the Federal Constitution, do not have to be submitted to a referendum; see *Walter/Mayer/Kucsko-Stadlmayer*, Grundriss des österreichischen Bundesverfassungsrechts¹⁰ (2007) ref 230. Furthermore, it is argued that "total revisions" of the Federal Constitution cannot be implemented by international treaties, but merely by constitutional acts; see e.g. *Grabenwarter*, Die Verteilung völkerrechtsbezogener Zuständigkeiten nach der österreichischen Bundesverfassung, ZÖR 48 (1995) 79 (114); this opinion is shared by the Legal Service of the Austrian Federal Chancellery, see e.g. 789 BlgNR 22. GP, 2, ref 3.1. Another – from my point of view accurate – opinion states that international treaties are subsumed under Article 44 (3) B-VG due to the fact that Article 44 (3) B-VG refers to "any total revision"; see *Gamper*, Die verfassungsrechtliche Grundordnung als Rechtsproblem (2000) 80 f; *Öhlinger*, Verfassungsfragen einer Mitgliedschaft zur Europäischen Union (1999) 53 ff.

51 1546 BlgNR 18. GP, 4 f.

52 See *Griller*, Verfassungsfragen der österreichischen EU-Mitgliedschaft, ZfRV 1995, 89 (94).

53 1546 BlgNR 18. GP, 4.

54 The original wording is: „Der dargelegte Anwendungsvorrang unmittelbar wirksamen Gemeinschaftsrechts in der österreichischen Rechtsordnung hat zur Konsequenz, dass alle innerstaatlichen Organe der Gesetzgebung und Vollziehung innerstaatliche Rechtsvorschriften – gleichviel, ob es sich um Verfassungsrecht, einfachgesetzliche Regelungen oder Verordnungen handelt – außer acht zu lassen haben, sofern sie mit unmittelbar anwendbaren Rechtsakten des Gemeinschaftsrechts in Widerspruch stehen"; see 1546 BlgNR 18. GP, 7.

55 VfSlg 15.427/1999.

56 Article 133 para 4 B-VG.

57 Which was confirmed by the ECJ in the case C-462/99 *Connect Austria* [2003] ECR I-5197.

Although this understanding of supremacy is not explicitly laid down in the EU-Beitritts-BVG it has to be pointed out that the chosen legal technique at any rate implies a link to the ECJ's concept of "unlimited" supremacy. According to Article 1 (2) of the accession treaty, the provisions of the accession act⁵⁸ shall form an integral part of the accession treaty. Pursuant to Article 2 of the accession act "the provisions of the original Treaties and the acts adopted by the institutions before accession shall be binding on the new Member States and shall apply in those States under the conditions laid down in those Treaties and in this Act". As the ECJ's supremacy doctrine has to be subsumed under the "acts adopted by the institutions before accession" it is also part of the "accession acquis".⁵⁹ From the Community point of view, the obligation to accept the ECJ's theoretical concept of supremacy could also be drawn from the indirect incorporation of the supremacy doctrine in paragraph 2 of the Protocol (No 30) on the application of the principles of subsidiarity and proportionality. All this leads back to the very fundamental question of the dependence of European Law on national law and the question of whether primacy of Community law derives from the autonomy of Community law or from the national constitutional orders. If the Member States are – as it is the opinion of the author of this article – allowed to set limits when authorizing the transfer of sovereignty to the European Union/European Community by locating a (written or unwritten) "supremacy clause" in their national legal orders, even a European "supremacy clause" incorporated in the treaties would still have limited effects in cases in which these very effects are limited by the national constitutional orders.

The latter approach – one could call it "perspective of national constitutionalism"⁶⁰ – is also consistent with the Austrian way of opening the legal order to Community law. As regards the primacy of Community law, the question comes up, whether the Austrian legislator limited the effect of supremacy when transferring sovereign rights to the European Union/European Community in the course of the accession in the year 1995. As there is – as mentioned – no such limitation regarding (ordinary) constitutional law, the question is focused on possible conflicts with basic principles of the Austrian constitutional order.

Even though the EU-Beitritts-BVG does not contain any explicit limitation of supremacy, the explanatory notes to the legislative proposal of the Federal Government seem to assume the existence of an inherent limitation of supremacy as regards conflicts between European Community law and basic principles of the Austrian constitutional law, a clause known as "*Integrations-schranke*". The non-existence of a written "*Integrationsschranke*" might be explained by a lack of need for such a clause.⁶¹ Regarding primary Community

58 Act concerning the conditions of accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded, see OJ C 241 of 29 August 1994.

59 See e.g. *Gialdino*, Some reflections on the *acquis communautaire*, CMLRev 1995, 1089 (1097 ff).

60 *Maduro*, Contrapunctual Law: Europe's Constitutional Pluralism in Action, in: *Walker* (ed), *Sovereignty in Transition* (2003) 501 (507).

61 1546 BlgNR 18. GP, 6.

law, it is mentioned that future treaty changes will be subject to control as regards the compatibility with the basic principles of the Austrian constitutional order. If a treaty revision means a "total revision" of the Federal Constitution according to Article 44 (3) B-VG the new treaty must once again be submitted to a referendum by the Austrian population. As regards secondary law, the explanatory notes assume that secondary Community law in case of conflicts with the treaties as well as with the basic principles of the Austrian constitution is null and void.⁶² The report of the committee on constitutional affairs of the National Council emphasizes that the Austrian opening-mechanism could not be seen as "carte blanche".⁶³

With regard to primary law, it is unproblematic to agree with the statement in the explanatory notes to the legislative proposal of the Federal Government of the EU-Beitritts-BVG. The EU-Beitritts-BVG merely refers to the accession treaty in accordance with the result of the negotiations as set forth by the accession conference on April 12, 1994. As a consequence, the scope of the "total revision" of the Austrian constitution according to Article 44 (3) B-VG is limited by the scope of the accession treaty. The "total revision", however, does not cover any further revision of the treaties. Thus, any further change of primary Community law again has to be monitored regarding the compatibility with the basic principles of the Austrian constitutional law. If a treaty revision changes or violates these basic principles – and for that reason has to be seen as "total revision" of the Austrian constitution – the new treaty must be submitted to a referendum by the Austrian population in accordance with Article 44 (3) B-VG. To that extent, the opening-technique of the Austrian legal order contains an "*Integrationsschranke*" as regards changes of primary Community law. Due to the fact that none of the treaty revisions since Austria's accession to the Union was seen as "total revision" of the Austrian constitution, there was so far no need for further referenda.⁶⁴

62 The original wording is: "Aus der Sicht des österreichischen Bundesverfassungsrechts bedeutet dies, dass Rechtsakte von EU-Organen, mit denen die Befugnisse, die sich aus dem mit dem Beitrittsvertrag übernommenen EU-Primärrecht ergeben, überschritten werden und die mit den Grundprinzipien der österreichischen Bundesverfassung in ihrer durch den EU-Beitritt modifizierten Fassung in offenkundigem kontradiktorischem Widerspruch stünden, insoweit als absolut nichtig und daher unbeachtlich anzusehen wären", 1546 BlgNR 18. GP, 7; see also 1600 BlgNR 18. GP, 14.

63 1600 BlgNR 18. GP, 14.

64 This was not without controversy as regards the ratification of the Constitutional Treaty; see 789 BlgNR 22. GP, ref 3.5; Schäffer, Gemeinschaftsrechtskonforme Interpretation und Anwendungsvorrang am Beispiel des Verfahrensrechts, in: Holoubek/Lang (eds), Abgabenverfahrensrecht und Gemeinschaftsrecht (2006) 41; Schramm, Gesamtänderung der Bundesverfassung durch die EU-Verfassung? ZÖR 61 (2006) 41; Hummer, Zum weiteren Schicksal des Vertrages über eine Verfassung für Europa, JRP 2005, 257 (277 ff); Öhlinger, Der Vorrang des Unionsrechts im Lichte des Verfassungsvertrages, in: Bröhmer/Bieber/Calliess/Langenfeld/Weber/Wolf (eds), Internationale Gemeinschaft und Menschenrechte, Festschrift Ress (2005) 685 (692 ff); Hammer, EU-Verfassungsvertrag, Gesamtänderung der Bundesverfassung und pouvoir constituant, juridikum 2004, 112; Öhlinger, EU: Referendum über Verfassung nötig? Die Presse of 5 July 2004; Griller, Referendum über EU-Verfassung Pflicht? Keine Argumente in Sicht, Die Presse of 12 July 2004.

As for secondary Community law, one needs to distinguish between acts in line with primary Community law and acts in conflict with the treaties.⁶⁵ As regards the former, there is no limitation mentioned in the explanatory notes to the legislative proposal of the Federal Government of the EU-Beitritts-BVG. Rather, as mentioned earlier, the intention of the EU-Beitritts-BVG was to open the Austrian legal order in a way resulting from the special claim of validity of the European Community's legal order, in particular supremacy and direct effect.⁶⁶ This "conformity" with the treaties has to be seen in reference also to the jurisdiction of the ECJ and its tendency to widen the scope of Community powers.⁶⁷ By acceding to the Union, Austria thus also accepted this integrationist approach of the ECJ.

The situation is different when it comes to secondary Community law which is in conflict with the treaties. The explanatory notes to the legislative proposal of the Federal Government of the EU-Beitritts-BVG state that such acts are – under the condition that there is also a conflict with the basic principles of the Austrian constitution – null and void.⁶⁸ The conformity of such acts with the basic principles of the Austrian constitution has to be scrutinized by any legislative or administrative organ.⁶⁹ As a consequence, the legislator assumed that there is an unwritten "*Integrationsschranke*" as regards "*ultra vires*"-acts of secondary Community law which – at the same time – conflicts with basic principles of the Austrian constitutional order. Although even the ECJ⁷⁰ accepts – under certain circumstances⁷¹ – legally non-existent provisions of secondary Community law, "*ultra vires*"-acts as referred to in the explanatory notes to the legislative proposal of the Federal Government of the EU-Beitritts-BVG are different and understood in a wider sense. According to the ECJ⁷², the finding that an act of a Community institution is non-existent "is reserved for quite extreme situations". It is obvious that the ECJ does not cover the same decisive factors as the Austrian Government (a "mere" conflict to the primary law and – in addition – a conflict to the basic principles of the Austrian constitution). The fact that the "*Integrationsschranke*" as meant by the legislator of the EU-Beitritts-BVG is not

65 This matter does not cover secondary law adopted before the accession of Austria.

66 1546 BlgNR 18. GP, 4.

67 See e.g. case C-148/02 *Garcia Avello* [2003] ECR I-11613 and case C-176/03 *Commission/Council* [2005] ECR I-7879.

68 1546 BlgNR 18. GP, 7.

69 See *Holzinger*, Die Auswirkungen der österreichischen EU-Mitgliedschaft auf das österreichische Verfassungsrecht, JRP 1996, 160 (167).

70 See e.g. case C-475/01 *Commission/Greece* [2004] ECR I-8923, ref 19; see *Weinzierl*, Die Ouzo-Entscheidung des EuGH (Rs. C-475/01) – Eine ungenutzte Möglichkeit der Bereinigung der Gemeinschaftsrechtsordnung von Widersprüchen, EuR 2005 H 6, 759; see also case C-137/92 *BASF* [1994] ECR I-2555, ref 48 ff; case C-74/91 *Commission/Germany* [1992] ECR I-5437, ref 11; cases 7/56 and 3/57 – 7/57 *Algera* [1957] ECR 39.

71 According to the ECJ, "measures tainted by an irregularity whose gravity is so obvious that it cannot be tolerated by the Community legal order must be treated as having no legal effect, even provisional, that is to say they must be regarded as legally non-existent", see case C-475/01 *Commission/Greece* [2004] ECR I-8923, ref 19.

72 Case C-137/92 *BASF* [1994] ECR I-2555, ref 50.

covered by the ECJ's doctrine of legally non-existent acts of secondary law does not imply that setting such limitations to supremacy is illegitimate from a Member States' point of view. On the contrary, it is up to the Member States to set limits when authorizing the transfer of sovereignty to the European Union/European Community. Obviously, the approach of the legislator of the EU-Beitritts-BVG is based on this understanding when mentioning the "authorization to integration" ("*Integrationsermächtigung*"⁷³). It is just as obvious that the legislator of the EU-Beitritts-BVG wanted to set a limit to supremacy when provisions of secondary Community law are in conflict with primary law and the basic principles of the Austrian constitution. The fact that there is no written "*Integrationssschranke*" does not change this undoubted finding.⁷⁴

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73 1600 BlgNR 18. GP, 14.

74 See also *Walter/Mayer/Kucsko-Stadlmayer*, Grundriss des österreichischen Bundesverfassungsrechts¹⁰ (2007) ref 246/10; *Janko*, Gesamtänderung der Bundesverfassung (2004) 412 ff, in particular 427 ff; *Mayer*, Die österreichische Grundrechtsordnung nach dem EU-Beitritt, AnwBl 1996, 152 (155); *Kucsko-Stadlmayer*, Der Vorrang des EU-Rechts vor österreichischem Recht, eolex 1995, 338 (343); *Öhlinger*, Unmittelbare Geltung und Vorrang des Gemeinschaftsrechts und die Auswirkungen auf das verfassungsrechtliche Rechtssystem, in: *Griller/Korinek/Potacs* (eds), Festschrift Rill (1995) 359 (366); *Öhlinger*, Ein Verfassungsstaat an der Schwelle zur Europäischen Union, Zu den verfassungsrechtlichen Grundlagen der EU-Mitgliedschaft Österreichs, in: *Due/Lutter/Schwarze* (eds), Festschrift Everling (1995) 1017 (1020). It has to be mentioned that this opinion is disagreed by a considerable part of the Austrian literature: See *Öhlinger/Potacs*, Gemeinschaftsrecht und staatliches Recht³ (2006) 57; *Winkler*, Integrationsverfassungsrecht (2003) 141 f; *Baumgartner*, Der Rang des Gemeinschaftsrechts im Stufenbau der Rechtsordnung, JRP 2000, 84 (86); *Frank*, Altes und Neues zum Vorrang des Gemeinschaftsrechts vor staatlichem Recht, ZÖR 55 (2000) 1 (18 ff); *Hengstschläger*, Grundrechtsschutz kraft EU-Rechts (Teil 2), JBl 2000, 494 (496); *Moritz*, Zum Stufenbau nach dem EU-Beitritt, ÖJZ 1999, 781 (784); *Öhlinger*, EU-BeitrittsBVG, in: *Korinek/Holoubek* (eds), Österreichisches Bundesverfassungsrecht, Textsammlung und Kommentar (1999) ref 25; *Öhlinger*, Verfassungsfragen einer Mitgliedschaft zur Europäischen Union (1999) 182; *Potacs*, Anmerkungen zum Urteil des VfGH v 24.6.1998, G 2/97, JBl 1999, 176 (176); *Potacs*, Erfahrungen eines neuen Mitgliedstaates im Hinblick auf die europäische Rechtseinheit – das Beispiel Österreichs, EuR 1998 Beiheft 1, 59 (59 ff).