

Country Reports

Austria

Regulatory Constitutional Law: The Implementation of European Regulatory Law in Austria in the Energy Sector

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The implementation of the third energy package has led to the enactment of various constitutional provisions, which can be understood as the development of regulatory constitutional law. The incoherent and inconsistent approach towards a constitutional law for regulatory authorities has created different constitutional challenges, eg regarding the democratic concept of the constitution. Moreover, a shift from administrative authorities towards European-style agencies can be observed. This article highlights the findings of a study on regulatory aspects, 'REGULATIE', commissioned by the Austrian Chamber of Labour (<http://wien.arbeiterkammer.at/interessenvertretung>).

I. The Constitutional Concept of Austrian Administration

In Austria, the executive board of E-Control Austria, which is the central body of the Austrian energy regulator, is appointed by the Federal Minister of Economic Affairs. According to the relevant Austrian law (the E-Control Act¹), a hearing takes place prior to the appointment in the Austrian parliamentary committee responsible. At first sight, this provision does not seem unusual. On the contrary, it guarantees a certain legitimacy of the energy regulator. The particularity of this obligatory hearing is that it is enacted on the

basis of a constitutional provision.² Hence, the details of the appointment to the Austrian energy regulator form part of the Austrian Constitution. This provision is just one example of various rules in which the constitution itself determines particular issues regarding the organisation of network regulations in Austria. For the purposes of the present case note, this kind of legal development is subsumed under the notion of 'regulatory constitutional law'.

The reason for this rather unusual legal method of implementing European regulatory directives relates to the Austrian constitutional concept of administration and its legitimacy. Based on the Constitution of 1920, Austrian administration follows a hierarchical scheme, which gives the Government strong powers to control the whole administration.³ Independent administrative authorities were always the exception. The accession to the European Union in 1995 and the following implementation of the acquis led not only to the liberalisation of network industries in Austria, but also had a major impact on the democratic concept of administration in general.

The following report will focus on the impact of the implementation of the EU's third energy package, in particular on regulatory constitutional law and its implications for the Austrian constitution as well as for regulatory law in the energy sector. The

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1 Bundesgesetz über die Regulierungsbehörde in der Elektrizitäts- und Erdgaswirtschaft, StF: BGBl. I Nr. 110/2010 ('E-Control Act').

2 *ibid*, Article 6, para 6.

3 Manfred Stelzer, *The Constitution of the Republic of Austria. A Contextual Analysis* (Hart Publishing 2011), 127.

report will narrow down the topic in three steps: first, it will focus on the implementation of the EU's third energy package on the Austrian constitution, second, the change of the administrative system will be analysed, and third, the implications for Austrian and European democracy will be illustrated. Finally, some lessons can be learned from the Austrian example for the European regulatory approach.

II. The Impact of Implementation

To understand the conceptual impact of European regulatory law on Austrian constitutional law, one has to be aware of two important characteristics of the latter. First, Austrian constitutional law is not codified in one document, but consists – besides a core constitutional document, which is the Federal Constitutional Act from 1920 – of several constitutional acts, or rather constitutional provisions, which are included in statutory law, and of international treaties, which have constitutional rank. Second, Austrian constitutional law is regularly amended and changed by the government with the consent of a 2/3 parliamentary majority.⁴ The consequence of these two characteristics is a very dynamic constitution, which includes several provisions determining even administrative law in certain details.

As mentioned above, the European concept of regulatory law did not fit into the Austrian concept of administrative law. Being based on a hierarchical approach, Austrian administration had to be re-adjusted to enable the implementation. In 2008, the possibility of establishing independent administrative bodies was broadened and the concept of parliamentary review of these independent bodies was enforced.⁵ These attempts at adjustment have proven to be insufficient.

The implementation of the EU's third energy package⁶ led to the reorganisation of regulatory authorities in Austrian energy law.⁷ Before the adoption of the new concept, the Austrian regulatory concept consisted of a state-based, though independent, regulatory committee and an auxiliary body, which was organised as a state-owned private corporation.⁸ The implementation of the EU's third energy package led to a new organisational framework of the regulatory authorities in energy law. A legal entity - E-Control Austria - consisting of an executive board, a commission and a supervisory board was established under

public law. This entity is, as a regulating authority, independent.⁹

The new regulatory concept did not fit into the constitutional framework. In the traditional Austrian manner, the legislator enacted a number of constitutional provisions to give the new concept a constitutional foundation. The existing regulatory constitutional law was extended and became even more fragmented.

Two major problems arose from this solution: First, the new concept was only implemented regarding energy law without taking all other kinds of network regulation into consideration: The Austrian approach towards regulation lacks a comprehensive approach and each sector is conceptualised in a different manner with no coherent structure as regards the constitutional framework. This leads not only to an increasing enactment of constitutional provisions but also to increased constitutional inconsistencies.¹⁰ Second, the creation of constitutional exemptions does not fully take into account the necessity of democratic legitimacy and accountability. Again, the lack of a comprehensive approach towards regulatory authorities creates a random mixture of provisions, which only consider democratic elements to a certain extent.¹¹ The possibilities for the Austrian Constitutional Court to review the overall concept

4 See Stelzer (n 3), 18-31.

5 Austrian Constitution, Article 20 para. 2 and Harald Eberhard and Konrad Lachmayer, 'Constitutional Reform 2008 in Austria. Analysis and Perspectives' [2008] 2 Vienna Journal on International Constitutional Law 112-23.

6 See Regulation (EC) No 713/2009 establishing an Agency for the Cooperation of Energy Regulators [2009] OJ L211/1; Regulation (EC) No 714/2009 on conditions for access to the network for cross-border exchanges in electricity [2009] OJ L211/15; Regulation (EC) No 715/2009 on conditions for access to the natural gas transmission networks [2009] OJ L211/36; Directive 2009/72/EC concerning common rules for the internal market in electricity [2009] OJ L211/55; Directive 2009/73/EC concerning common rules for the internal market in natural gas [2009] OJ L211/94.

7 Regarding the organisational part see the Austrian Energy Control Act, Federal Law Gazette 2010/110 and, regarding the substantive provisions, see for example the Austrian Electricity Industry and Organization Act, Federal Law Gazette 2010/110.

8 See eg Bernhard Müller, *Das österreichische Regulierungsbehördenmodell [The Austrian Model of Regulatory Authorities]* (Springer Publishing 2010).

9 See the Austrian E-Control Act, Section 5 para 2.

10 The enactment of ordinances by the independent regulatory commission is one example which does not fit into the constitutional framework and is enacted by a constitutional provision in the Austrian E-Control Act (Section 12 para 2).

11 For further details, see section IV below.

are quite limited, as most of the relevant provisions have the rank of constitutional law.¹²

III. From Authority to Agency

The establishment of the new Austrian energy regulator, shows moreover a general development from an administrative authority towards a European-style agency, a development which has been stopped halfway by the creation of a new kind of hybrid authority. This hybridity relates to the following three elements: the authority is located between national and European law, between public and private law and between the legislation, the executive and the judiciary.

E-Control is already quite independent from the Austrian State and collaborates intensively with European institutions like the European Commission or other European agencies like the Body of European Regulators for Electronic Communication (BEREC).¹³ The European Commission has the possibility to influence certain procedures.¹⁴ This development towards a European network of domestic energy agencies of the Member States has not yet been completed, and might never be. The Austrian government is still appointing the members of the executive and supervisory board as well as the members of the regulatory commission. A limited possibility for governmental supervision still exists, although this might be challenged by European institutions.¹⁵

The Austrian energy regulator is established under public law, however its structure is based on the organisational concept of private corporations. The

regulator is using his powers under public law, but can also use soft law mechanisms to steer the market. Thus, the distinction between private and public law in the Austrian legal system becomes blurred. EU law does not recognise such a strict distinction between acts of public and private law.

Finally, the activities of the Austrian energy regulator are traditionally understood as administrative law. However, the regulator also has significant judicial functions¹⁶ and a certain influence on legislation, eg by drafting certain statutory amendments or by the enactment of ordinances. As a consequence, the activities of the regulatory authorities no longer fit into the traditional concept of the separation of powers, instead resembling the European concept of institutional balance much more¹⁷.

In conclusion, the European regulatory approach has led to a significant change in the domestic concept of administration. The domestic regulators are progressing from a national authority towards a European-style agency, not resulting in a European agency, but rather in hybrid organisational bodies fulfilling neither national nor European standards. A consequence of this is that the energy regulator does not fit into the framework of Austrian constitutional law. The Austrian solution is the development of regulatory constitutional law. This fragmented and incoherent legislative area creates further challenges for constitutionalism, eg regarding democracy.

IV. Democratic Shortcomings

The European regulatory strategy fosters independence in all its forms (institutional, functional and financial). This development is endorsed not only by market actors but also by state influence. Democratic legitimacy is substituted by expert knowledge and efficiency. However, democracy constitutes a legitimate aim of domestic constitutional law, which has to be optimised within the European regulatory framework on a national level. Thus, further concepts have to be introduced into regulatory constitutional law in Austria to guarantee European standards of regulation on the one hand and to improve the effectiveness of the democratic principle in the context of network regulation on the other.

The independence of regulatory authorities and their limited democratic legitimacy have to be addressed in two different ways. First, the possibilities

12 The Austrian Constitutional Court can declare constitutional law as unconstitutional, but only in extreme cases of violations of the basic principles of the Austrian Constitution.

13 See eg Austrian E-Control Act, section 23.

14 See Natalie Grimm, *The Shift of Energy Regulatory Powers under the Framework of Directive 2009/72/EC* (PhD thesis, Department of Law; University of Vienna 2011), 137-215, <<http://othes.univie.ac.at/16217/>> accessed 10.10.2014..

15 See the ECJ's case law with regard to the Austrian Data Protection Authority in Case C-614/10 *Commission v Austria* [2012] ECR I-00000, judgment of 16th October 2012, [42-54].

16 See Austrian E-Control Act, section 12.

17 Jörg Monar, 'The European Union's Institutional Balance of Power after the Treaty of Lisbon', in European Commission DG Education and Culture, 'The European Union after the Treaty of Lisbon: Visions of leading policy-makers, academics and journalists' (2011), 60-89. <<http://bookshop.europa.eu/en/the-european-union-after-the-treaty-of-lisbon-pbNC3110682/>> accessed 10.10.14.

of legitimacy have to be improved, and second, the competences of the regulatory authorities have to be limited. It is the function of constitutional law to limit governmental powers.¹⁸ The independent structure of regulatory authorities requires a constitutional regulatory law, which also fulfils the function of limiting regulatory competences.

The tasks of regulatory authorities are steadily increasing, with the state devolving further powers to the regulatory bodies.¹⁹ If these regulatory authorities can only offer limited democratic legitimacy and accountability, it is necessary to limit the tasks of the regulatory authorities to the strictly necessary powers and competences. This includes statutory limits to the discretionary power of regulatory authorities, which should only offer the proportionate margin of discretion.

Moreover, effective state supervision would be necessary. Although the state still has many possibilities to gain information from the regulatory agencies,²⁰ the options for legal review and the accountability of regulatory agencies are limited.²¹ Within the hybrid concept of regulatory authorities, it is necessary to find a new kind of domestic institutional balance between the state and the regulatory authorities. The most important challenge – especially for smaller countries like Austria – is the availability of knowledge. The establishment of independent regulatory authorities binds huge personal resources, because only a limited number of persons have the relevant expertise. The state authorities, which co-operate with the regulatory authorities, cannot uphold a big supervisory body, mainly for financial reasons. The limited resources of state authorities create dependence on the knowledge of the regulatory authority, leading to a considerable limitation of supervisory powers.

V. Lessons to be Learned

The Austrian case shows that it is necessary for the national legal framework to adapt its democratic

concept of administration to comply with the European standards of regulation. The structural influence of the European regulatory approach is significant and does not necessarily fit into domestic constitutional law. The Austrian approach of creating regulatory constitutional law which is still highly fragmented seems to be a questionable way. A comprehensive and coherent approach towards a particular democratic concept for national regulatory regimes, however, would be a reasonable possibility.

In its third energy package, the EU deals with the limitation of state influence for reasons of increased objectivity and efficiency.²² Nowadays, the Union is also strengthening its attempts to secure constitutional values in the Member States.²³ At the same time, the political developments foster the legitimacy of the European Commission. In the context of network regulation, the Union's legislation has to take better account of democratic implications than it has done up until now. Output and efficiency-oriented ways of legitimacy cannot create sufficient legitimacy and accountability.

Finally, the hybrid concept of domestic regulatory authorities needs to step up on a European level of regulatory legitimacy and accountability and the question of democracy has also to be addressed at this level. The dynamics of the Union's democracy can create a change for a stronger European approach towards an intensified democratic concept of regulation.

18 See Andras Sajó, *Limiting Government* (Central European University Press 1999).

19 See eg a search engine for petrol stations in Austria: see <www.spritpreisrechner.at/>, accessed 10.10.14.

20 eg Austrian E-Control Act, sections 13-6, 19, 28.

21 See Grimm (n 14), 71-135.

22 See eg Directive 2009/72/EC (n 6), Article 35.

23 See European Commission, 'A new EU Framework to Strengthen the Rule of Law', COM (2014) 158 final/2.