

ROUTLEDGE RESEARCH IN EU LAW

Local Government in Europe

The 'fourth level' in the EU multilayered system of governance

Edited by
Carlo Panara and Michael Varney



Local Government in Europe

This work considers the role of local government in 13 EU Member States: Austria, Belgium, Czech Republic, France, Germany, Greece, Hungary, Italy, Netherlands, Poland, Spain, Sweden and the United Kingdom. The book aims to provide an account of the system of local government in each of the countries studied along with a critical and contextual approach to the level of autonomy that local government enjoys. The approach is comparative, based on a questionnaire that all of the authors considered. There is then a detailed conclusion to the book that offers a summary and comparative analysis of the responses in order to better consider the role of local authorities as the 'fourth level' of governance in the EU. The book aims to offer an introduction to, and account of, each system of local government that may appeal to those seeking an overview of the area, but also a critical and contextual approach that will be of interest to those actively researching in the areas of local and regional government or EU-central-local government relations. It contains details of reform in local government up to November 2012, including an analysis of the impact of austerity measures on local autonomy where these have become significant.

Carlo Panara is a Senior Lecturer in EU and Public Law at LJMU School of Law. Since 2010 he has been Research Co-ordinator for the School and REF Co-ordinator for the UOA20 Law. He is widely published in Italian, German, English and Spanish. He is author of the monograph *Il federalismo tedesco della Legge Fondamentale dalla cooperazione alla competizione* (Rome: Aracne, 2008), and co-editor (with Alexander De Becker) of *The Role of the Regions in EU Governance* (Heidelberg: Springer, 2011).

Michael Varney is a Lecturer in Law and Deputy Director of the Institute of European Public Law at the University of Hull. He has research interests in public law, media law and public procurement law and has published in these fields.

Routledge Research in EU Law

Available titles in this series include:

Centralized Enforcement, Legitimacy and Good Governance in the EU
Melanie Smith

EU External Relations and Systems of Governance
The CFSP, Euro-Mediterranean Partnership and migration
Paul James Cardwell

The European Constitution, Welfare States and Democracy
The Four Freedoms vs. National Administrative Discretion
Christoffer C. Eriksen

EU External Relations Law and the European Neighbourhood Policy
A Paradigm for Coherence
Bart Van Vooren

The Evolving EU Counter-terrorism Legal Framework
Maria O'Neill

The Early Warning System for the Principle of Subsidiarity
Constitutional Theory and Empirical Reality
Philipp Kiver

European Perspectives on Environmental Law and Governance
Suzanne Kingston

The Tangled Complexity of the EU Constitutional Process
The Frustrating Knot of Europe
Giuseppe Martinico

Criminal Law and Policy in the European Union
Samuli Miittinen

Local Government in Europe

The 'Fourth Level' in the EU Multi-Layered System of Governance

Carlo Panara and Michael R. Varney

Forthcoming titles in this series include:

New Governance and the European Strategy for Employment

Samantha Velluti

Human Rights and Minority Rights in the European Union

Kirsten Sboraka

The Legitimacy of the European Union through Legal Rationality

Free Movement of Third Country Nationals

Richard Ball

This page intentionally left blank

Local Government in Europe

The 'fourth level' in the EU
multilayered system of governance

Edited by
Carlo Panara and Michael Varney

First published 2013
by Routledge
2 Park Square, Milton Park, Abingdon, Oxon OX14 4RN

Simultaneously published in the USA and Canada
by Routledge
711 Third Avenue, New York, NY 10017

Routledge is an imprint of the Taylor & Francis Group, an informa business

© 2013 editorial matter and selection, Carlo Panara and Michael Varney;
individual chapters, the contributors

The right of Carlo Panara and Michael Varney to be identified as the
editors of this work has been asserted by them in accordance with sections
77 and 78 of the Copyright, Designs and Patents Act 1988.

All rights reserved. No part of this book may be reprinted or reproduced
or utilised in any form or by any electronic, mechanical, or other means,
now known or hereafter invented, including photocopying and recording,
or in any information storage or retrieval system, without permission in
writing from the publishers.

Trademark notice: Product or corporate names may be trademarks or
registered trademarks, and are used only for identification and explanation
without intent to infringe.

British Library Cataloguing in Publication Data

A catalogue record for this book is available from the British Library

Library of Congress Cataloguing in Publication Data

Local government in Europe : the "fourth level" in the EU multi-layered
system of governance / [edited by] Carlo Panara, Michael R. Varney.

pages cm.—(Routledge research in european union law)

ISBN 978-0-415-58000-7 (hardback) —ISBN 978-0-203-76672-9

(e-book) 1. Local government—Law and legislation—European

Union countries. 2. International and municipal law—European

Union countries. I. Panara, Carlo, editor. II. Varney, Mike, 1979–

KJE5794.L63 2013

342.24'09—dc23

2012051249

ISBN 978-0-415-58000-7 (hbk)

ISBN 978-0-203-76672-9 (ebk)

Typeset in Garamond
by RefineCatch Ltd, Bungay, Suffolk

Contents

<i>List of figures and tables</i>	ix
<i>Notes on contributors</i>	xi
<i>Acknowledgements</i>	xv
<i>Introduction</i>	xvii
1 Austria – Municipalities as the “third tier” of Austrian federalism	1
HARALD EBERHARD	
2 Belgium – Local government in Belgium: A ‘Catch 22’ between autonomy and hierarchy	26
ALEXANDER DE BECKER	
3 Czech Republic – Local government in the Czech Republic: History, current position, prospective evolution	52
RICHARD POMAHÁČ	
4 France – Territorial decentralisation in France: Towards autonomy and democracy	73
IRÈNE COUZIGOU	
5 Germany – Local government in Germany: An indispensable level of EU governance	97
EIKE MICHAEL FRENZEL	
6 Greece – Local authorities in Greece: Organisation, recent trends, European integration, reform, and the “Kapodistrias” tendency	128
GRIGORIS AVDIKOS	

viii *Contents*

7	Hungary – Local government in Hungary: A creeping centralisation?	151
	ZOLTÁN SZENTE	
8	Italy – Organisation and responsibilities of the local authorities in Italy between unity and autonomy	183
	STEFANO VILLAMENA	
9	The Netherlands – Local authorities in the Polder–Dutch municipalities and provinces	231
	CHRIS BACKES AND WYTZE VAN DER WOUDE	
10	Poland – Local government in Poland: Towards consolidation?	255
	BOGUSŁAW BANASZAK	
11	Spain – Ungovernable Spain: Regional subsidiarity and the crisis of local governance	277
	GONZALO VILLALTA PUIG	
12	Sweden – Local government in Sweden: Flexibility and independence in a unitary state	305
	VILHELM PERSSON	
13	United Kingdom – Local government in England: Localism delivered?	330
	MICHAEL VARNEY	
14	Conclusion – The contribution of local self-government to constitutionalism in the member states and in the EU multilayered system of governance	369
	CARLO PANARA	
	<i>Appendix: The different tiers of government</i>	414
	<i>Index</i>	417

List of figures and tables

Figures

2.1	The three communities: Flemish-, French-, and German-speaking	29
2.2	The three Regions: Flemish, Walloon and Brussels-Capital region	29
3.1	Population density in 2009 Administrative districts of municipalities with authorised municipal office in Czech Republic	55
3.2	Sign at the entrance to the municipality of Jindřichovice pod Smrkem	64
7.1	The counties of Hungary	156
7.2	Density of local communities in 2010 (100 km ²)	157
7.3	The revenue structure of local authorities (2008)	171
7.4	Local government expenditures (2009)	173

Tables

3.1	Number of inhabitants and municipalities, 1930–2009	53
3.2	Population of big towns, small towns and villages in percentage	54
3.3	Distribution of expenditures between the levels of government	66
6.1	Fundamental changes brought about by the Callicrates reform	133
7.1	The number and types of local authorities	155
7.2	The size of population in the municipal governments (2005)	158
7.3	The size of representative bodies	160
	Appendix: The different tiers of government	414

This page intentionally left blank

Notes on contributors

Carlo Panara is a Senior Lecturer in EU and Public Law at LJMU School of Law. Since 2010 he has been Research Co-ordinator for the School and REF Co-ordinator for the UOA20 Law. He is widely published in Italian, German, English and Spanish. He is author of the monograph *Il federalismo tedesco della Legge Fondamentale dalla cooperazione alla competizione* (Rome: Aracne, 2008), and co-editor (with Alexander De Becker) of *The Role of the Regions in EU Governance* (Heidelberg: Springer, 2011).

Michael Varney is a Lecturer in Law and Deputy Director of the Institute of European Public Law at the University of Hull. He has research interests in Public Law, Media Law and Public Procurement Law and has published in these fields.

Grigoris Avdikos has been a member of the Legal Council of the State in Greece since January 2013. From 2008 to 2012 he was a lawyer, member of the Athens Association Bar, practising in the fields of public and private law. He is a PhD Candidate in Public Law at the Law School of the University of Athens. He publishes regularly in Greek law journals.

Chris Backes was born in Nettetal (Germany) and studied Law, Politics and Dutch in Freiburg im Breisgau and Münster. He gained an LLM in Dutch law for foreigners in Nijmegen. In 1995 Chris was appointed as Professor of International and European Environmental Law at Tilburg University. From 1998 until 2007 he was Professor of Environmental Law at Utrecht University and Director of the Centre for Environmental Law and Policy/NILOS (CELP/NILOS). Since October 2007 he has been Professor of Constitutional and Administrative Law at Maastricht University. Among other things, he is a member of the Dutch Commission for Environmental Impact Assessment. Chris Backes specialises in Environmental Law, European Administrative Law and Comparative Administrative Law.

Bogusław Banaszak is a Professor of Law and teaches Constitutional Law at the School of Law at the University of Wrocław, where he is the Head of the Institute of Constitutional Law. He is also professor at the State

University of Applied Science in Legnica. From 1998 to 2008 he was Professor at the European University, Viadrina, in Frankfurt on Odra. From 2006 to 2010 he was the President of the Legislative Council of the Prime Minister of the Republic of Poland. He is Doctor honoris causa at four European universities, and is a corresponding member of the Spanish Royal Academy of Moral Sciences and Politics, a corresponding member of the European Academy of Science, Arts and Humanities (Paris, France), a member of the World Jurist Association and of several other scientific associations. He is also the author and co-author of over 300 publications (over 20 in English, and over 50 in German) including monographs, textbooks, studies and articles. Many of them were published outside Poland (in Brazil, Hungary, Austria, Chile, France, Germany, Holland, Italy, Spain, South Korea and USA). He has translated nine law books and over 30 articles from English and German into Polish.

Irène Couzigou is a Lecturer in Law at the School of Law, University of Aberdeen, UK. She previously worked as a lecturer at the Universities of Heidelberg and Mannheim in Germany, and as an assistant professor at the University of Paris II in France. Irène researches in the fields of Public International Law and French Public Law, where she has published in French, English and German. She is the author of the monograph *L'évolution du statut international de l'Allemagne depuis 1945* [The Evolution of the International Status of Germany since 1945] (Bruxelles: Bruylant, 2011, pp. 732 ff.).

Alexander De Becker is a Professor at the Law Faculty of the University of Amsterdam (the Netherlands) and Senior Lecturer at the University of Hasselt (Belgium). He is a Member of the expert committee on Law and Criminology of the Belgian Research Council and a Member of the Belgian Young Academy. He has published widely in many languages (Dutch, French, English, Danish and Spanish). He is the author of the monograph *De overheid en haar personeel: juridische grondslagen van de rechtspositie van de ambtenaar* (Bruges: die Keure, 2007), and co-editor (with Carlo Panara) of *The Role of the Regions in EU Governance* (Heidelberg: Springer, 2011).

Harald Eberhard is Professor of Austrian and European Public Law at the Department of Public Law and Tax Law of the Vienna University of Economics and Business (WU). In his circa 120 publications, he deals with all relevant topics of Constitutional and Administrative Law, as well as Public Business Law, and their relation to European Law. A special interest is dedicated to the topic of International and Comparative Constitutional, as well as Administrative, Law. Harald is co-editor of the International and Comparative Public Law Series (Facultas/NOMOS Verlagsgesellschaft), and of the *Vienna Journal on International Constitutional Law* (www.icl-journal.com, Verlag Österreich).

Eike Michael Frenzel is a Postdoctoral Researcher and Assistant Lecturer at the Institute of Public Law (Department 5: Constitutional Law) at the University of Freiburg, Germany. His main areas of research are Constitutional Law, Regulatory and Organisational Law, and Contemporary History of Law.

Vilhelm Persson is Associate Professor in Public Law and (since 2011) Head of Department at the Faculty of Law, Lund University. He is widely published and has taken part in the works of Government committees of inquiry. He is the author of the monograph *Rättsliga ramar för gränsöverskridande samarbete* (Juristförlaget i Lund, 2005).

Richard Pomahač is Professor of Administrative Law at Charles University in Prague. He is author of the monographs *Evropské veřejné právo* [European Public Law] (Prague: ASPI-Wolters Kluwer, 2010) and *Zaklady teorie veřejné spravy* [Foundations of Administrative Science] (Prague: CENEK Publ., 2011), and co-author of textbooks *Všeobecné spravné právo* [General Administrative Law] (Bratislava: EuroKodex, 6th edn, 2012), *Spravní právo* [Administrative Law] (Prague: C.H. Beck, 8th edn, 2012) and *Veřejná správa* [Public Administration] (Prague: C.H. Beck, 2013).

Zoltán Szente DSc is a Professor of Law at the Department for Constitutional Law and Political Science, Faculty of Law of the Széchenyi István University in Győr, Hungary. He is also the leader of the Centre for Parliamentary Studies at the Faculty. Since the mid-1990s, he has been a member of the Group of Independent Experts, Council of Europe, where he contributes to the monitoring the implementation of the European Charter of Local Self-Governments. From 1990 to 2007 he was a senior research fellow at the Hungarian Institute of Public Administration. He has published widely on the Hungarian and Comparative Constitutional Law, Local Government and European Constitutional History in Hungarian, English, French, German, Russian and Croatian.

Wytze van der Woude (Amsterdam, 1976) studied law at the University of Groningen. After obtaining his LL.M., he worked for the Department of Constitutional Law of his alma mater and for the Foundation for Municipal Research (*Stichting Onderzoek Gemeenten*). A brief spell at the Ministry of the Interior was followed by his stay at the University of the Netherlands, Antilles, where he was Assistant Professor in Constitutional and Administrative Law and subsequently Dean of the Faculty of Law. Since November 2008 he has worked for the department of Public Law at Maastricht University. His main field of expertise in education and research is on Constitutional Law on both national and local level. He obtained his PhD with a thesis entitled *Financial Control in Municipal Law. A Constitutional Study on the Dualization of the Financial Function*.

Gonzalo Villalta Puig is Professor of Law at The Chinese University of Hong Kong. He is a Solicitor of the Senior Courts of England and Wales and a

Barrister and Solicitor of the High Court of Australia. A specialist in Economic Constitutional Law, Professor Villalta Puig researches the role of constitutional courts in the constitutionalisation of free trade in federations and other non-unitary jurisdictions, mostly from a comparative approach. He has published widely on matters of constitutional economics and legal issues of economic integration, including *The High Court of Australia and Section 92 of the Australian Constitution* (with a foreword by the Honourable Justice Michael Kirby AC CMG of the High Court of Australia), and *Boundaries of Commercial and Trade Law* with Prof Christian Twigg-Flesner. Gonzalo is Convenor of the Research Group for Constitutional Studies of Free Trade and Political Economy of the International Association of Constitutional Law and a member of the Committee on International Trade Law of the International Law Association. He is also Secretary of the Hong Kong Branch of the International Law Association, Associate Editor of the *Global Journal of Comparative Law*.

Stefano Villamena is a Researcher in Administrative Law at the Law Faculty of the University of Macerata, Italy, where he teaches Administrative Law. He has published widely in the fields of Administrative Law, Comparative Public Law and Law of Local Authorities. He is author of the monographs *Contributo in tema di proporzionalità amministrativa* (Milano: Giuffrè, 2008), and *Il potere di sospensione amministrativa* (Torino: Giappichelli, 2012).

Acknowledgements

We would like to express our gratitude to the publishers and, in particular, to Stephen Gutierrez for his great support during the execution of this project. We would also like to convey our immense gratitude to all of the authors for their fantastic work, and their patience and competence in answering all our questions on their national systems. Finally, we would like to express all our love and thanks to our families and friends, the most meaningful people in our lives.

This page intentionally left blank

Introduction

Local government in the EU multilayered system of governance

Carlo Panara and Michael Varney

Within the EU there is coexistence and interaction of a plurality of tiers of government: national (Member States), supranational (EU), and sub-national (regional and local authorities). Such ‘coexistence’ and ‘interaction’ are the essence of what has been called ‘multilevel governance’.¹

In the last 10–12 years, due to the growing number of Member States with a decentralised or more decentralised structure,² the interest in multilevel governance has increased significantly. This is demonstrated by the increased number of academic publications concerned with this topic, and especially by two important official documents released at EU level: the Commission’s *White Paper on European Governance* (2001), and the Committee of the Regions’ *White Paper on Multilevel Governance* (2009).³

In the *White Paper on European Governance*, the Commission expressed the view that the EU is a multilayered system of governance, including the regional and local tiers of government. This document placed considerable emphasis on the interaction between the EU and the sub-national governments, both regional and local, arguing that “There needs to be a stronger interaction with regional and local governments” and expressing a desire to “Establish a more systematic dialogue with representatives of regional and local governments through national and European associations at an early stage in shaping policy” with the objective of “Bring[ing] greater flexibility

1 Cf. G. Marks, ‘European Integration from the 1980s: State Centric v. Multilevel Governance’, in *Journal of Common Market Studies*, Vol. 34 (1996), No. 3, pp. 341–378. See also I. Bache and M. Flinders (eds.), *Multilevel Governance*, Oxford: OUP, 2004.

2 During the last twenty years, a considerable ‘wave’ of decentralisation has taken place in the Member States. Major examples of this ‘wave’ are: Belgium, which in 1994 became a federal state; the UK, which in 1997 introduced devolution to Scotland, Wales, and Northern Ireland; Germany, where in 1994 and 2006 important constitutional reforms were approved, which aimed to strengthen the position of the *Länder*; and Italy, where in 2001 an important constitutional reform was passed, which aimed to enhance the powers of the regions and of the local authorities.

3 EU Commission, *European Governance – A White Paper*, COM (2001) 428, 25 July 2001; Committee of the Regions, *White Paper on Multilevel Governance*, CdR 89/2009, 17–18 June 2009.

into how Community legislation can be implemented in a way which takes account of regional and local conditions".⁴

Eight years later, in the *White Paper on Multilevel Governance*, the Committee of the Regions defined multilevel governance as:

coordinated action by the European Union, the Member States and local and regional authorities, based on partnership and aimed at drawing up and implementing EU policies.⁵

The Committee of the Regions further specified that:

Multilevel governance is not simply a question of translating European or national objectives into local or regional action, but must also be understood as a process for integrating the objectives of local and regional authorities within the strategies of the European Union. Moreover, multilevel governance should reinforce and shape the responsibilities of local and regional authorities at national level and encourage their participation in the coordination of European policy, in this way helping to design and implement Community policies.⁶

In light of the Committee of the Regions' definition, multilevel governance appears to be a dynamic concept ('coordinated action', 'translating into local or regional action', a 'process for integrating the objectives', etc.), consisting of two main elements:

- Correct implementation of EU and national law and policy at regional and local level ("translating European or national objectives into local or regional action").
- Appropriate involvement of local and regional authorities in EU law and policies both at EU level and at national level ("integrating the objectives of local and regional authorities within the strategies of the European Union (. . .) and encourage[ing] their participation in the coordination of European policy").

The emphasis in the two White Papers and in the EU Treaties is placed together on regional and local governments, both seen as constitutive elements of the EU multilayered system of governance. The specific importance of local government within the EU is confirmed by a few elements. First is the presence within the EU institutional framework of a body, the Committee of

4 EU Commission, *European Governance – A White Paper*, COM (2001) 428, 25 July 2001, at p. 4.

5 Committee of the Regions, *White Paper on Multilevel Governance*, 17–18 June 2009, at front-page.

6 Committee of the Regions, *White Paper on Multilevel Governance*, 17–18 June 2009, p. 7.

the Regions, which has the function of representing local authorities alongside the regions. Second, the new definition of the principle of subsidiarity in the Lisbon Treaty, which makes explicit reference to local government, when it says that “the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central or at regional and local level” (Article 5(2) TEU). Third, the important role performed by local authorities in implementing EU law at local level.

A few Treaty provisions specifically deal with local government in the EU:

- TEU Preamble: “[The Member States are] RESOLVED to continue the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen in accordance with the principle of subsidiarity”;
- Art. 4(2) TEU: “The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government”;
- Art. 5(3) TEU: “Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level”;
- Art. 13.4 TEU: “The European Parliament, the Council and the Commission shall be assisted by an Economic and Social Committee and a Committee of the Regions acting in an advisory capacity”;
- Art. 2 Protocol on Subsidiarity and Proportionality: “Before proposing legislative acts, the Commission shall consult widely. Such consultations shall, where appropriate, take into account the regional and local dimension of the action envisaged”.

The concept of ‘local government’ embraces all the authorities belonging to the ‘local self-government’, that is, all sub-regional territorial authorities enjoying some degree of autonomy from the national (and regional) government, and which are the expression of (i.e. are elected by) the local communities. To an extent, the EU seems to view regions and local authorities as part of the same tier of government (the third, sub-national, tier). Indeed, the Committee of the Regions consists of regional and local representatives and the *White Paper on European Governance* often refers to ‘regional and local government’ or ‘regional and local authorities’ as a unitary level. In reality it is not often accurate to place regions (which may have millions of inhabitants) and local authorities (for example, municipalities with only a few hundred inhabitants) in one pot without distinction. Regions are usually large territorial authorities whose territory includes more than one municipality. In

a number of Member States they enjoy a special constitutional status, and are endowed with important legislative powers. By contrast, local authorities usually have a smaller territory and population, and their activity is limited to exercising administrative powers.

While many legal studies have been published on the role of the regions in the EU, there are relatively few comparative law studies on local government in the EU.⁷ This book aims to provide the scholarly community and European policymakers with the first rigorous comparative law study of the role of local government in the EU and in the Member States. The book consists of 13 chapters, providing a detailed analysis of local government in the following countries: Austria, Belgium, Czech Republic, France, Greece, Germany, Hungary, Italy, the Netherlands, Poland, Spain, Sweden, and the UK.

The Member States subject to analysis were selected on the basis of multiple, concurring criteria: the size of the Member State (all the largest states, but also a significant sample of mid-sized and smaller states were researched); the uniqueness of the constitutional structure; the impact of the constitutional tradition of a state beyond the state borders and for the EU; the year in which a state joined the EU (there are representatives of all the different waves of EU enlargement, with the sole exception of the 2007 round, when Romania and Bulgaria joined the Union). Each national chapter considers the following questions:

1 Introduction: Local authorities and basic features of their autonomy

- What are the local authorities in your country?
- Are the bodies you include among the ‘local authorities’ autonomous legal persons without any functional relation to the State (as it is, for example, in Italy), or are they bodies of the State with a certain degree of autonomy (as, for example, in the UK)?
- What is their territorial dimension (village or town, area wider than a village or town)? What is their dimension in terms of inhabitants? Is there any local body at the intermediate level between the town or village and the Region (or the central State)? Do the territorial boundaries of the local bodies reflect the history and culture or depend – at least in some cases – on other factors (such as, for example, the will to create jobs in the public sector at local level)?
- How can the single local authorities (for example, the single municipalities) be established and suppressed? On the initiative of the central Parliament or Government, on the initiative of the Region (if any), or also (or only)

⁷ See e.g., E. Page, *Localism and Centralism in Europe: The Political and Legal Bases of Local Self-Government*, Oxford: OUP, 1991, and A.-M. Moreno (ed.), *Local Government in the Member States of the European Union: A Comparative Perspective*, Madrid: National Institute of Public Administration, 2012.

on the basis of a local initiative? Is the existence of the local authorities as a level of governance guaranteed by the Constitution?

- A brief history of local government in your country.

2 The internal organisation of local authorities

- Who is competent to enact legal norms to regulate the internal organisation of local authorities and the system of election (and the composition) of the organs?
- What is the typical form of government adopted in the local authorities in your countries? Is the mayor – if any – directly elected by the citizens, or is he elected by the local council? Does the mayor have active ruling powers or is the function a symbolic figure with representative capacity?
- Are the local authorities left with any room for decision as to their organisation? Do they have the right to provide themselves with self-drafted and self-approved local ‘statutes’ (such as, for example, the ‘statuti comunali’ and ‘statuti provinciali’ in Italy) which entail some basic rules for the functioning of that local body and sometimes also some ‘constitutional’ principles regarding the life of the local community (for example, a declaration of some basic rights, etc.)? If yes, what is their typical content and what is their importance in practice?

3 Functions of local authorities

- What are the functions of each level of local government and where are they provided for (in the Constitution, in ordinary parliamentary statutes or somewhere else)?
- Can single local authorities (for example, a single municipality) create networks with other authorities for the common exercise of activities?
- Does the principle of subsidiarity play a role in the allocation of the competences to the local authorities?
- What is the role of local authorities in the implementation and enforcement of the EU law?

4 Coordination of the different levels of governance

- Is there any form of coordination between the action of local authorities and that of central government and regional authorities?

5 Control on local authorities

- Do the local authorities undergo forms of control by the State or other sub-state entities (such as the Regions)? Is there an ombudsman at local level? If yes, what are his functions? Did the institution of the ombudsman at local level prove to be effective?

6 Local finance

- Do the local authorities have some limited power of taxation? Do they receive funds from the State (or from the Region)? Evaluation of the system of funding in the light of the autonomy of the local authorities.

7 Associations and other organisations of local authorities

- Are there associations or organisations of the local authorities (such as, for example, the Italian ANCI)? If yes, what are their status (public or private body) and their tasks?

8 External relations of the local authorities

- Do the local authorities carry out exchange programmes or cooperation with public (or private) bodies outside the country, especially within the European context?

9 The impact of the EU on local authorities

- How did the European integration – if at all – affect local government in your country? In particular: did the European integration process play any role on past and currently discussed reforms of local government?

10 The reform of local government

- Brief report on the reform proposals of local government currently discussed in your country and on the general trends of evolution of local government in your country.

At the end of such a wide-ranging and detailed analysis, a legal comparison takes place in the conclusion. The conclusion will outline the main features of local government in the examined EU Member States and explain the crucial role of local government in the EU multilayered system of governance.

Liverpool and Hull, November 2012

Carlo Panara

Michael R. Varney

1 Austria

Municipalities as the “third tier” of Austrian federalism

*Harald Eberhard*¹

1.1 Introduction: municipalities and basic features of their autonomy

Austria is a federal state,² which consists of three levels: the *Bund* (hereafter “Federation”), the nine provinces (hereafter “*Länder*”)³ and the *Gemeinden* (hereafter “municipalities”). Within the *Länder*, there are a total of 2,357 municipalities: 15 cities (including the capital Vienna) with their own statutes (*Statutarstädte*), 200 towns (*Stadtgemeinden*),⁴ 762 markets (*Marktgemeinden*) and 1,395 villages (*Ortsgemeinden*).⁵

In this way, one can say that in the Austrian federal system the *Länder* represent the intermediate level of governance⁶ between the Federation and the municipalities. The latter could also be seen as the basic level of a

1 The author is very grateful to his assistant Julia Kolar, LL.M., for her critical review.

2 Cf. Art. 2 para 1 of the *Bundes-Verfassungsgesetz* (Federal Constitutional Law Act, hereinafter referred to as B-VG), in *Bundesgesetzblatt* (Federal Law Gazette, hereinafter referred to as BGBl., 1920/1, dating from 1920 and amended about 100 times until today). See in detail M. Stelzer, *The Constitution of the Republic of Austria. A Contextual Analysis*, Oxford and Portland: Hart Publishing, 2011, pp. 147ff; A. Gamper, *Introduction to the Study of the Law of the Austrian Federal Constitution*, *Vienna Online Journal on International Constitutional Law* Vol 2 (2), 2008, p. 92 (pp. 104 ff) (www.icl-journal.com).

3 Cf. Art. 2 para 2 B-VG: The Federal State is composed of the autonomous *Länder* of Burgenland, Carinthia, Lower Austria, Upper Austria, Salzburg, Styria, Tyrol, Vorarlberg and Vienna.

4 The qualification as *town* (*Stadtgemeinde*) and *market* (*Marktgemeinde*) is defined by the Local Government Acts of the *Länder* (see in detail H. Eberhard, “*Gemeinderecht*”, in E. Pürgy (ed.), *Das Recht der Länder*, Vienna: Jan Sramek Verlag, 2012, p. 593 (p. 600)). From a constitutional point of view, there are no differences between these specific forms of municipalities.

5 Given that Austria’s population is about 8 million, the average municipality has around 3,500 inhabitants and about 1,500 municipalities have fewer than 2,000 inhabitants. There are 16 municipalities with more than 20,000 inhabitants, while the smallest municipality has a population of around 60. Thus, Austria has a large number of small municipalities.

6 About this term, see – especially in the European context – H. Eberhard, C. Konrath, R. Trattnigg and S. Zleptnig, “Governance – zur theoretischen und praktischen Verortung des Konzepts in Österreich”, *Journal für Rechtspolitik (JRP)*, 2006, pp. 35–60.

2 Harald Eberhard

system of European governance consisting of four tiers of government; the European Union, the Federation, the *Länder*, and the municipalities. Unlike the Federation and the *Länder*, the municipalities do not have any legislative powers and, therefore, are only *administrative bodies*. The special feature of them is represented in their *constitutional right of self-government (Selbstverwaltung)*, which can be protected by a procedure before the Austrian Constitutional Court (*Verfassungsgerichtshof, VfGH*).⁷ The Federal Constitutional Law of Austria (*Bundes-Verfassungsgesetz, B-VG*) recognises the *principle of self-government* in two manners: on the one hand, with regard to territorial self-government of the municipalities and, on the other hand, with regard to non-territorial or personal forms of government such as professional, social and cultural government.⁸ In this way, the principal constitutional document, the B-VG, contains a Chapter V titled “Self-Government”, which in turn contains a subsection about the municipalities⁹ and – since 2008¹⁰ – a section about “other self-government bodies”.¹¹

Article 115–120 B-VG contain provisions about the organisation of municipalities, their bodies, functions and the relations between them and the Federation or *Länder*.¹² Article 120a–120c B-VG set up rules for all personal self-government bodies, especially the constitutional preconditions for such bodies, which for a long time had been quite unclear and derived mainly from the jurisprudence of the Austrian Constitutional Court (VfGH).¹³

The concept of self-government could be seen as part of the idea of a vertical separation of powers because of the fact that the executive powers both of the Federation and the *Länder* are curtailed.¹⁴ The constitutional status of the municipalities, as the most important form of territorial self-government in the Austrian system, does not generally match that of the *Länder*. However, the municipalities are recognised as a third partner in the system of fiscal

7 See e.g., the position of the municipalities regarding supervisory measures ruled in Art. 119a para 9 B-VG: “The municipality has the status of a party to supervisory authority proceedings; it is entitled to lodge complaints with the Administrative Court (Arts 131 and 132) and with the Constitutional Court (Art. 144) against the supervisory authority.”

8 L. Prakke, ‘The Republic of Austria’, in L. Prakke and C. Kortmann (eds), *Constitutional Law of 15 EU Member States*, Deventer: Kluwer, 2004, p. 3 (p. 65).

9 Art. 115–120 B-VG.

10 BGBl I 2008/2.

11 Art. 120a–120c B-VG. About this novel see in detail H. Eberhard and K. Lachmayer, *Constitutional Reform 2008 in Austria. Analysis and Perspectives*, Vienna Online Journal on International Constitutional Law Vol 2 (2), 2008, p. 112 (pp. 118 ff) (www.icl-journal.com).

12 Special provisions for the Capital Vienna which also can be qualified as municipality (beside its function as *Land*, district and city with its own charter) contain Art. 108–112 B-VG. See in detail G. Wielinger, ‘Local Government Administration’, in Federal Chancellery (ed.), *Public Administration in Austria*, Vienna: self-published, 1992, p. 149 (pp. 166 ff).

13 See in particular, the *leading case* in the field published in the official collection of the decisions of the Austrian Constitutional Court (*Erkenntnisse und Beschlüsse des Verfassungsgerichtshofes*, in acronym VfSlg.), 8215/1977.

14 M. Stelzer, *Constitution*, 171.

equalisation and national budgeting where cooperation between the Federation, the *Länder*, and the municipalities is closer than in other areas.¹⁵ In this way one can say that the municipalities have – in the light of their constitutional regulation and their importance in constitutional reality – quite a strong position in the Austrian federal system as a “third tier” of it.¹⁶ It is accurate to talk about a “three-layered” type of federalism in Austria¹⁷ and – with regard to the European level – of a “multi-tier system”.¹⁸

The historic roots of municipalities in their function as local government go back quite far into the past. In their modern understanding, the municipalities are a result of changes brought by the Civil Revolution of 1848.¹⁹ The provisional Local Government Act of 1849²⁰ constituted the municipality as a self-governing body within the Provinces of the Austrian-Hungarian Monarchy (the so-called *Kronländer*).²¹ In 1862 an Imperial Local Government Act (*Reichsgemeindegesetz*)²² was passed, which became the legal basis for local government for the following 100 years. After the decline of the Monarchy and the foundation of the Republic in 1918,²³ a vivid political discussion took place about the status of the municipalities. The Federal Constitution of 1920²⁴ contained general provisions on local government and stipulated that these principles were to be implemented by Federal and Provincial laws. However, this programme was never implemented. In 1925 a provision came into effect, according to which until specific regulations on the constitutional status of self-governing bodies had been passed, the basic provisions of the Imperial Local Government Law of 1862 still have to be applied.²⁵ This provision is the result of a political compromise, given that in the constitutional discussion of 1919/20 an agreed solution on the legal status of the municipalities could not be found. This provisional situation came to an end in 1962, when the relevant provisions of the B-VG were fundamentally redrafted.²⁶ With some modifications, these provisions are still today the

15 A. Gamper, “The ‘Third Tier’ in Austria: Legal Profiles and Trends of Local Government”, *Hrvatska Javna Uprava*, 2008, p. 71 (pp. 85 ff).

16 A. Gamper, *Hrvatska Javna Uprava*, 2008, p. 74.

17 See with further references, A. Gamper, *Hrvatska Javna Uprava*, 2008, pp. 87 ff.

18 A. Gamper, “Local Government in Austria”, in A.-M. Moreno (ed.), *Local Government in the Member States of the European Union: A Comparative Legal Perspective*, Madrid: National Institute of Public Administration, 2012, p. 23 (pp. 23 f).

19 See H. Hausmaninger, *The Austrian Legal System*, Vienna: Manz, 2011 (4th edn), p. 3; M. Stelzer, *Constitution*, p. 4.

20 *Reichsgesetzblatt (Imperial Law Gazette*, hereinafter referred to as RGBI) 1850/170.

21 G. Wielinger, *Local Government Administration*, p. 150.

22 RGBI 1862/18.

23 M. Stelzer, *Constitution*, pp. 6 ff.

24 BGBl 1920/1.

25 G. Wielinger, *Local Government Administration*, p. 151.

26 BGBl 1962/205.

relevant constitutional foundation of the municipalities.²⁷ Article 120 B-VG²⁸ contains a programmatic provision about the possible combination of local communities into larger territorial communities, whose representative bodies would be elected by the respective municipalities, and declares this future combination as a “business of federal constitutional legislation”.²⁹

Article 116 para 1 B-VG³⁰ states that each *Land* is divided into municipalities and that each municipality is a territorial and administrative body of its own, enjoying the right of self-government.³¹ In contrast to the administrative bodies of the Federation and of the *Länder*, the municipalities enjoy a certain amount of autonomy, as they are – within their autonomous sphere (“*eigener Wirkungsbereich*”)³² – not subject to instructions from the Federation or the *Länder*.³³ In this way, they operate outside the concept of ministerial

27 See in detail, T. Öhlinger and H. Eberhard, *Verfassungsrecht*, Vienna: Facultas, 2012 (9th edn), pp. 249–257; R. Walter, H. Mayer and G. Kucsko-Stadlmayer, *Grundriss des österreichischen Bundesverfassungsrechts*, Vienna: Manz, 2007 (10th edn), pp. 136–140; Grabenwarter/Holoubek, *Verfassungsrecht. Allgemeines Verwaltungsrecht*, Vienna: Facultas, 2009, pp. 365–367; M. Stelzer, *Introduction to Austrian Constitutional Law*, Vienna: LexisNexis, 2009 (2nd edn), pp. 57 ff; M. Stelzer, *Constitution*, pp. 171–173; A. Gamper, “The ‘Third Tier’ in Austria: Legal Profiles and Trends of Local Government”, *Hrvatska Javna Uprava*, 2008, pp. 71–94; H. Eberhard, *Gemeinderecht*, pp. 598–648; The Congress of Local and Regional Authorities, *Local and Regional Democracy in Austria*, Report, 2010, Z, 70 ff (http://www.kommunalnet.at/upload/1/Oesterreich_Report.pdf).

28 “The combination of local communities into territorial communities, their establishment in line with the pattern of self-administration, and the determination of other principles for the organisation of the ordinary public administration in the *Länder* is the business of Federal constitutional legislation; its implementation devolves upon the *Land* legislatures. Settlement of the competence in matters pertaining to the service code for and staff representation rights of the territorial community employees is the business of Federal constitutional legislation.”

29 See in detail, A. Kahl, ‘Art 120 B-VG’, in B. Kneihs and G. Lienbacher (eds), *Rill-Schäffer-Kommentar Bundesverfassungsrecht, Kommentar*, Vienna and New York: Springer, 2006, p. 1.

30 “Every *Land* is divided into municipalities. The municipality is a territorial corporate body entitled to self-administration while being at the same time an administrative local district. Every piece of land must form part of a municipality.”

31 H. Stolzlechner, ‘Art 116 Abs 1 B-VG’, in B. Kneihs and G. Lienbacher (eds), *Rill-Schäffer-Kommentar Bundesverfassungsrecht, Kommentar*, Vienna and New York: Springer, 2001, pp. 16 ff; A. Gamper, *Local Government in Austria*, pp. 30–31; H. Neuhofer, *Gemeinderecht. Organisation und Aufgaben der Gemeinden in Österreich*, Vienna and New York: Springer, 1998 (2nd edn), pp. 71 ff.

32 These are specific fields of regulation referred to as in Art. 118 paras 2 and 3 B-VG.

33 Art. 115–120 B-VG. Cf. especially Art. 116 paras 1 and 2 B-VG: “(1) Every *Land* is divided into municipalities. The municipality is a territorial corporate body entitled to self-administration while being at the same time an administrative local district. Every piece of land must form part of a municipality.”

“(2) The municipality is an independent economic entity. It is entitled, within the limits of the ordinary laws of the Federation and the *Länder*, to possess assets of all kinds, to acquire and to dispose of such at will, to operate economic enterprises as well as to manage its budget independently within the framework of the constitutional finance provisions and to levy taxation.”

See regarding the provision setting up the specific autonomy of the municipalities – Art.

responsibility.³⁴ At the same time, in order to ensure the democratic legitimacy of their administrative action, they are subject to supervision by the Federation and the *Länder*.³⁵

The sphere of competence of Austrian local authorities includes two types of responsibilities: those responsibilities which belong to the autonomous sphere of local authorities, and those responsibilities which are delegated to the local authorities. The first type of competence comprises all matters that concern exclusively or predominantly the local community, and are appropriate to be handled by it.³⁶ Local self-government in this sense includes the right and the ability of local authorities to regulate an important part of public affairs under their own responsibility and in the interest of the local population.³⁷

With regard to those powers which are only delegated to the municipalities by the Federation or the *Länder* (“*übertragener Wirkungsbereich*”, assigned sphere of competence),³⁸ they are bound by instructions from the delegating authority. Within this sphere of delegated action, municipalities can be qualified as common administrative authorities, like those of the Federation and the *Länder*, which are bound by instructions of the highest authorities in the relevant field (Art. 20 para 1 B-VG³⁹).

As the municipalities are only *administrative* bodies, they have, as opposed to the Federation⁴⁰ and the *Länder*,⁴¹ no right to create legislation in a

118 para 4 B-VG: “The municipality shall perform the business for which it is competent within the framework of the laws and ordinances of the Federation and the *Land* on its own responsibility free from instructions and – subject to the provisos of Art. 119a para 5 – to the exclusion of legal redress to administrative authorities outside the municipality. . . .”

34 M. Stelzer, *Constitution*, p. 171.

35 See in detail, Art. 119a B-VG.

36 M. Stelzer, *Constitution*, p. 171.

37 A. Gamper, *Hrvatska Javna Uprava*, 2008, pp. 76 ff.

38 Art. 119 B-VG. See H. Stolzlechner, ‘Art 119 B-VG’, in B. Kneihs and G. Lienbacher (eds), *Rill-Schäffer-Kommentar Bundesverfassungsrecht, Kommentar*, Vienna and New York: Springer, 2006, p. 2 f; K. Weber, ‘Art 119 B-VG’, in K. Korinek and M. Holoubek (eds), *Österreichisches Bundesverfassungsrecht, Kommentar*, Vienna and New York: Springer, 1999, p. 3.

39 “Under the direction of the highest authorities of the Federation and the *Länder* elected functionaries, appointed professional functionaries or contractually appointed functionaries conduct the administration in accordance with the provisions of the laws. They are responsible to their superiors for the exercise of their office and, save as provided otherwise by laws pursuant to para 2, bound by the instructions of these. The subordinate officer can refuse compliance with an instruction if the instruction was given by an authority not competent in the matter or compliance would infringe the criminal code.”

40 Cf. Art. 24, 41 ff B-VG.

41 Cf. Art. 95 ff B-VG. The legislation of the *Länder* is carried out by the *Länder* Parliaments (*Landtage*). Their members are elected on the basis of proportional representation by equal, direct, personal, free and secret suffrage of all male and female *Land* citizens who, in accordance with the *Land* Parliament electoral regulations, are entitled to vote.

formal sense (i.e., an act of a Parliament).⁴² Administrative bodies can enact only ordinances (“*Verordnungen*”), which are general administrative acts and, in the light of the principle of legality (Art. 18 para 2 B-VG⁴³), need a legal basis in each case, and are only entitled to specify the relevant legal provisions. In contrast, both the Federation and the *Länder*, the other two levels of the Austrian Federal system, exercise legislative *and* administrative powers.⁴⁴

The existence of an autonomous sphere of competence can be qualified as the core element of self-government in general.⁴⁵ Behind this element, there is the idea that the handling of state functions affecting matters which affect the exclusive or preponderant common interest of the members of a particular group – such as the population of a local community, or professional chambers, like that of the lawyers – can be delegated to members of this group, insofar as these matters can be handled by them.⁴⁶

The territorial dimension of the municipalities shows a high degree of variation; the smallest municipality (Rattenberg/Tyrol) counts 0.11 square kilometres, the biggest municipality (Sölden/Tyrol) has an area of 466.91 square kilometres, whilst Vienna, the capital city, has an area of 414.89 square kilometres. Changes in municipal boundaries and the merging or splitting of municipalities require a special decision by the local council and the approval of the respective *Land* Government.⁴⁷ From a legal point of view, the changes take place through ordinances of the *Land* Government or through *Land* acts.⁴⁸ Depending on the legislation in each *Land*, the public do not necessarily

42 See M. Stelzer, *Introduction*, pp. 11 ff; L. Prakke, ‘The Republic of Austria’, in L. Prakke and C. Kortmann (eds), *Constitutional Law of 15 EU Member States*, Deventer: Kluwer, 2004, p. 3 (pp. 60–66, esp. 64–65).

43 Art. 18 para 2 B-VG: “Every administrative authority can on the basis of law issue ordinances within its sphere of competence.”

44 About regions with such legislative powers, see from a comparative perspective A. Gamper, *Die Regionen mit Gesetzgebungshoheit. Eine rechtsvergleichende Untersuchung zu Föderalismus und Regionalismus in Europa*, Frankfurt am Main: Peter Lang, 2004, pp. 111 ff.

45 G. Wielinger, *Local Government Administration*, p. 152.

46 See in particular for local government units, Art. 118 para 2 B-VG: “Its own sphere of competence comprises, apart from the matters mentioned in Art. 116 para 2, all matters exclusively or preponderantly the concern of the local community as personified by a municipality and suited to performance by the community within its local boundaries. Legislation shall expressly specify matters of that kind as being such as fall within the municipality’s own sphere of competence.”

For personal self-government bodies, see Art. 120a para 1 B-VG: “People may be united by law to self-administrating bodies to autonomously take care of public interests being in their exclusive or preponderant common interest and qualified to be handled jointly by them.”

47 See with further references, H. Eberhard, ‘Gemeinderecht’, in E. Pürgy (ed.), *Das Recht der Länder*, Vienna: Jan Sramek Verlag, 2012, p. 593 (pp. 614 ff).

48 See in detail, H. Neuhofer, ‘Gemeindegebiet und Gemeindebewohner’, in F. Klug, P. Oberndorfer and E. Wolny (eds), *Das österreichische Gemeinderecht*, Vienna: Manz, 2008, pp. 70 ff.

have to be consulted. In the early 1970s, a number of ‘area reform acts’ (*Gebietsreformen*) were passed, which unified smaller municipalities to bigger units, thus abolishing these former local communities. The Austrian Constitutional Court (VfGH) has clarified that a single municipality does not have a constitutional right of existence, but that municipalities as a ‘tier of government’ cannot be abolished.⁴⁹ When abolishing a municipality, the *Land* legislator and Government have to consider the public interest, as well as the ability of each municipality to carry out its functions (both those belonging to its autonomous sphere and those delegated). Furthermore, the economic and cultural interests of the local inhabitants have to be taken into account.⁵⁰ Ultimately, despite all of the structures outlined above, the legislators of the *Länder* may determine the number and the territorial dimension of the municipalities.

1.2 The internal organisation of the local authorities and their democratic dimension

1.2.1 Internal organisation

The Federal Constitutional Law (Arts 116, 117, and 118 B-VG) lays down detailed requirements for the organisation and operation of local self-government.⁵¹

Furthermore, according to Art. 115 B-VG, the *Länder* may lay down detailed legislative frameworks for local authorities (the so-called *Gemeindeordnungen*), in accordance with the principles of the Federal Constitutional Law.⁵² In this respect, *Land* constitutional and ordinary laws usually determine the administrative arrangements of the local authorities, electoral processes at local level, local taxes, the representation of local authorities in the *Land* legislative process, and municipalities’ rights to initiate legislation or specific forms of direct democracy, such as referendums.⁵³

The *Länder* has also passed a number of ordinary laws in order to implement the rules established by the B-VG and by their own Constitutions

49 See e.g., VfSlg 6697/1972, 7830/1976, 9373/1982. See with further references, Neuhofer, *Gemeindegebiet und Gemeindebewohner*, p. 45.

50 VfSlg 8108/1977.

51 From a comparative constitutional perspective, there has to be mentioned that the Austrian Constitution in general contains a lot of detailed provisions with regard to the organisation of administrative authorities.

52 Art. 115 para 2 B-VG “Save as competence on the part of the Federation is expressly stipulated, *Land* legislation shall prescribe laws pertaining to municipalities in accordance with the principles of the Articles contained in this Section. Competence for the settlement of matters which, pursuant to Arts 118, 118a and 119, are to be performed by the municipalities will be determined in accordance with the general provisions of this Federal Constitutional Law.” See in detail, H. Neuhofer, *Gemeinderecht*, pp. 28 ff; A. Gamper, *Local Government in Austria*, pp. 27 ff.

53 A. Gamper, *Hrvatska Javna Uprava*, 2008, p. 76.

respectively. These concern issues such as local government acts, city statutes, inter-municipal associations, election statutes for local communities and cities.

The Federal Constitutional Law does not distinguish between different types of municipalities, but refers to the concept of “uniform municipality” (*abstrakte Einheitsgemeinde*), which means that all municipalities have to perform the same tasks and must be granted equal legal treatment, irrespective of the size, economic situation, population or legal status (city with their own statute, town [*Stadtgemeinde*], market [*Marktgemeinde*] or village).⁵⁴ Only Vienna, in its function as the capital of Austria,⁵⁵ and 15 other cities have a particular statute (“*Städte mit eigenem Statut*”, “*Statutarstädte*”) and are required to perform specific tasks of district administration. This kind of administration usually is operated by special *Land* authorities, the *Bezirkshauptmannschaften* (chief district administrative authorities), and is situated between the level of the *Land* and that of the municipalities. The constitutional basis for these cities with own statutes is situated in Art. 116 para 3 B-VG.⁵⁶ According to this provision, a municipality with at least 20,000 inhabitants shall at its own request, if *Land* interests are not thereby jeopardised, be awarded its own charter (town statute) by *Land* legislation. Such an enactment may only be published with the approval of the Federal Government. The specific feature of the municipalities ‘with town status’, thus, lies in their double function; besides their municipal administrative duties, they shall also perform those of the district administration.⁵⁷ The mayors of these municipalities are at the same time the heads of the elected local governments and of the *Land* territorial administrations.

The capital city, Vienna, has 1.7 million inhabitants for an area of 414 square kilometres. Vienna has today a special statute being simultaneously a *Land* of its own, a municipality, and a statutory city. The municipal council

54 H. Stolzlechner, ‘Art 115 B-VG’, in B. Kneihls and G. Lienbacher (eds), *Rill-Schäffer-Kommentar Bundesverfassungsrecht, Kommentar*, Vienna and New York: Springer, 2001, pp. 5 f; K. Weber, ‘Art 115 B-VG’, in K. Korinek and M. Holoubek (eds), *Österreichisches Bundesverfassungsrecht, Kommentar*, Vienna and New York: Springer, 1999, p. 8; A. Gamper, *Hrvatska Javna Uprava*, 2008, p. 74; A. Gamper, *Local Government in Austria*, p. 25.

55 Art. 5 para 1 B-VG.

56 “A municipality with at least 20,000 inhabitants shall at its own request, if *Land* interests are not thereby jeopardized, be awarded its own charter by way of *Land* legislation (town charter). Such an enactment may only be published with Federal Government approval. This shall be deemed given if the Federal Government within eight weeks from the day of the enactment’s arrival at the competent Federal Ministry has not informed the Governor that the approval is refused. A town with its own charter shall perform besides its municipal administrative duties also those of the district administration.”

57 H. Neuhofer, *Gemeinderecht*, pp. 123 ff; H. Stolzlechner, ‘Art 116 Abs 3 B-VG’, in B. Kneihls and G. Lienbacher (eds), *Rill-Schäffer-Kommentar Bundesverfassungsrecht, Kommentar*, Vienna and New York: Springer, 2001, p. 1; K. Weber, ‘Art 116 B-VG’, in K. Korinek and M. Holoubek (eds), *Österreichisches Bundesverfassungsrecht, Kommentar*, Wien New York: Springer, 1999, pp. 23 ff.

therefore also acts as *Land* Parliament, the municipal senate as *Land* Government, and the mayor as *Land* Governor. Due to its double status as both a *Land* and a municipality, Vienna receives its share of the fiscal equalisation scheme both as *Land* and as municipality. As capital city, Vienna has no specific rights, with the exception that it hosts all federal institutions.⁵⁸ As a municipality, Vienna is subdivided into 23 municipal districts, which have their own district parliaments. They are headed by elected district chairpersons. The mayor chairs the municipal senate and convenes its meetings. Beneath him there are the executive city councillors (as heads of the municipal authority's working groups), as well as the 23 municipal district chairpersons. Finally, it is the mayor's task to represent the city abroad.⁵⁹

Article 117 B-VG recognises three main bodies of local self-government: the local council (*Gemeinderat*), the local board (*Gemeindevorstand*) and the mayor (*Bürgermeister*).⁶⁰ This provision can be seen as constituting a "minimum institutional standard"⁶¹ because the *Länder* legislation can create further municipal bodies.

- Local council (*Gemeinderat*) – The local council can be qualified as both the general representative body⁶² and the highest authority of the municipality. Pursuant to Art. 117 B-VG,⁶³ local councils are directly elected for five or six years by all local citizens, according to the same

58 See Art. 5 para 1 B-VG.

59 Cf. also, H. Neuhofer, *Gemeinderecht*, pp. 127 ff; G. Wielinger, *Local Government Administration*, pp. 166 ff.

60 See in detail and with further references, H. Eberhard, *Gemeinderecht*, pp. 603 ff; The Congress of Local and Regional Authorities, *Local and Regional Democracy in Austria*, Report, pp. 86 ff.

61 H. Stolzlechner, 'Art 117 B-VG', in B. Kneihls and G. Lienbacher (eds), *Rill-Schäffer-Kommentar Bundesverfassungsrecht, Kommentar*, Vienna and New York: Springer, 2010, pp. 3 f; A. Gamper, *Hrvatska Javna Uprava*, 2008, p. 81.

62 G. Wielinger, *Local Government Administration*, 160; A. Gamper, *Local Government in Austria*, p. 33.

63 Art. 117 para 2 B-VG: "The municipal council is elected on the basis of proportional representation by equal, direct, personal and secret suffrage by the male and female Federal nationals who have their principal domicile in the municipality. The election regulations laws can, however, stipulate that nationals who have a domicile (but not their principal domicile) in the municipality are also entitled to vote. In the electoral regulations the conditions for suffrage and electoral eligibility may not be more restrictive than in the electoral regulations for the Diet; the provision can, however, be made that individuals who have not yet been a year resident in the municipality shall not be entitled to vote or to stand for election to the municipal council if their residence in the municipality is manifestly temporary. Among the conditions to be laid down by the election regulation is the entitlement to suffrage and electoral eligibility also for nationals of other European Member States. The electoral regulation can provide that the voters exercise their suffrage in self-contained constituencies. A division of the electorate into other electoral bodies is not admissible. Article 26 para 6 is to be applied accordingly. The electoral regulations can, in cases where no election proposals are brought forward, decree that individuals shall be deemed elected whose names appear most frequently on the ballot papers."

electoral principles as apply to the election of the National Council (*Nationalrat*)⁶⁴ and the *Länder* Parliaments:⁶⁵ equal, direct, secret and personal suffrage on a proportional basis.⁶⁶ The number of members of the local council is decided by the *Land* legislator and usually depends on the number of inhabitants.⁶⁷ Art. 118 para 5 B-VG says that all other bodies of the municipalities are responsible to the local council for the performance of their functions within the autonomous sphere of the municipality. Thus, the local council serves as the supreme local body that oversees the functions exercised in the autonomous sphere.⁶⁸ Most of the Local Government Acts entitle the local council to perform all tasks which no other body is explicitly competent to manage. The local council is the appellate body against decisions of the mayor or of the local board, it has the power to pass ordinances within its autonomous sphere of authority, and it decides on the local government's draft budget.⁶⁹

- Local board (*Gemeindevorstand*) – Local boards are collegiate bodies elected by the local councils in a proportional representation voting system. The political parties represented in the local council have a claim to representation in the local board in accordance with their electoral strength.⁷⁰ In a city with its own statute the local board is called municipal senate (*Stadtsenat*). The main task of the local board is to prepare the sessions of the local council, especially with regard to preliminary discussion and the agenda items of the local council, such as the applications of its members. Furthermore, it has typical administrative functions such as purchase and sale of moveable goods.⁷¹
- Mayor (*Bürgermeister*) – In practice, the most important political organ of the municipality is the mayor, who represents the municipality externally, also with regard to private law matters. The mayor is the president of the local council, as well as of the local board. Furthermore, the mayor is the head of the local administrative office (the *Gemeindeamt*, which is the core administrative unit acting on behalf of all the organs of the municipality)⁷² and of local civil servants,⁷³ and he also manages

64 Art. 26 para 1 B-VG.

65 Art. 95 para 1 B-VG.

66 H. Neuhofer, *Gemeinderecht*, pp. 171 ff; H. Stolzlechner, 'Art 117 B-VG', pp. 9 ff.

67 A. Gamper, *Local Government in Austria*, p. 33.

68 Ibid.

69 G. Wielinger, *Local Government Administration*, p. 160.

70 H. Stolzlechner, 'Art 117 B-VG', pp. 23 ff; A. Gamper, *Local Government in Austria*, p. 34.

71 G. Wielinger, *Local Government Administration*, 161.

72 Art. 117 para 8 B-VG: "The business of the municipalities will be performed by the local administrative office (city administrative office), that of towns with their own charter by the City administration. A civil servant with legal training shall be appointed to take charge as city administration's chief executive of the City administration's internal services."

73 A. Gamper, *Local Government in Austria*, p. 33.

the local property and budget.⁷⁴ The mayor has the right to table motions and to issue instructions. Mayors are accountable to the local councils for matters related to their sphere of competence. In the performance of all tasks delegated to the local level, they are subject to the instructions of either the federal or *Länder* authorities, depending on whether the task in question involves a federal or a *Länder* competence. In the event of illegal conduct, mayors may be dismissed by the *Land* Government on behalf of the *Land*, or by the *Land* Governor on behalf of the Federation.

The B-VG provides that mayors are elected by the local council. Since 1995,⁷⁵ however, it has allowed the *Länder* to deviate from this provision.⁷⁶ So far, six *Länder* have adopted constitutional provisions allowing the direct election of mayors.⁷⁷

1.2.2 Municipalities and democracy

Democracy at the level of local government has – like at the level of the Federation and of the *Länder* – a strong representative element, which means that instruments of direct democracy are not very important. The strengthening of these instruments has become an increasingly pressing political demand.⁷⁸

Article 117 para 8 B-VG⁷⁹ determines that the legislation of the *Länder* can provide for direct participation of the citizens.⁸⁰ Depending on the legislation in force in each *Land*, the citizens of the municipalities have various possibilities to participate directly in the decisions of their communities, such as citizens' vote (*Bürgerabstimmung*), citizens' initiative (*Bürgerbegehren*), citizens' consultation (*Bürgerbefragung*), and annual citizens' assemblies (*Bürgerversammlung*).⁸¹ The structure of these instruments varies considerably from *Land* to *Land*.⁸² They all share the common feature that they should trigger democratic participation of the local population with regard to issues of general interest. The jurisdiction of the Austrian

74 H. Neuhofer, *Gemeinderecht*, pp. 163 ff; A. Gamper, *Hrvatska Javna Uprava*, 2008, p. 82.

75 BGBl 1994/504. See for the constitutional necessity of this regulation, VfSlg 13.500/1993.

76 H. Neuhofer, *Gemeinderecht*, pp. 184 ff; H. Stolzlechner, 'Art 117 B-VG', p. 26.

77 See in detail, G. Trauner, 'Die Direktwahl des Bürgermeisters', in F. Klug, P. Oberndorfer and E. Wolny (eds), *Das österreichische Gemeinderecht*, Vienna: Manz, 2008, pp. 37 ff.

78 A. Gamper, *Hrvatska Javna Uprava*, 2008, p. 84.

79 "The *Land* legislature can in matters pertaining to the municipality's own sphere of competence provide for the direct participation and assistance of those entitled to vote in the municipal council election."

80 H. Stolzlechner, 'Art 117 B-VG', p. 30.

81 The Congress of Local and Regional Authorities, *Local and Regional Democracy in Austria*, Report, p. 142.

82 See in detail, H. Eberhard, *Gemeinderecht*, pp. 617 ff.

Constitutional Court (VfGH) has developed certain requirements for these instruments. More specifically, direct democracy instruments of the *Länder*, as well as on local level, cannot have a stronger position than the same type of instruments on the level of the Federation.⁸³ In other words, the autonomy of the *Länder* concerning direct democracy is limited by the provisions concerning instruments of direct democracy which the B-VG formulates in detail for the Federation.⁸⁴

Municipalities are – as all other administrative bodies – bound by law according to the principle of legality (as one of the main elements of the Austrian Rule of Law⁸⁵) set up in Art. 18 para 1 B-VG.⁸⁶ Otherwise, an important provision in the chapter about the municipalities – Art. 118 para 4 B-VG – says that the “municipality shall perform the business for which it is competent *within* the framework of the laws and ordinances of the Federation and the *Land* on its own responsibility and free from instructions”.⁸⁷ One could suppose that this formulation permits a little bit more autonomy to set up rules without being bound completely to a strict interpretation of the principle of legality. Nevertheless, the Austrian Constitutional Court (VfGH) clarified that the municipalities are completely bound by law, unless another constitutional provision provides for specific autonomy for certain ordinances.⁸⁸ The single exception in this sense is accepted with regard to ‘local policy ordinances’ (*ortspolizeiliche Verordnungen*) to prevent serious grievances in local affairs (Art. 118 para 6 B-VG⁸⁹).⁹⁰ Although such ordinances may be issued directly on the basis of Art. 118 para 6 B-VG, they must not contravene federal or *Land* legislation. The practical importance of such measures is limited. To sum up, one can say that municipalities do not enjoy a significant amount of local autonomy.

83 VfSlg 16.241/2001.

84 See in detail, Art. 41 para 2 B-VG (“popular initiative”; see M. Stelzer, *Constitution*, pp. 80 ff) and Art. 49b B-VG (“consultation of the people”).

85 M. Stelzer, *Constitution*, pp. 87 ff; A. Gamper, Vienna Online *Journal on International Constitutional Law* Vol 2 (2), 2008, pp. 105 ff.

86 “The entire public administration shall be based on law.”

87 Art. 118 para 4 B-VG.

88 VfSlg 10.953/1986, 11.633/1988, 12.555/1990, 13.633/1993.

89 “The municipality is entitled in matters pertaining to its own sphere of competence to issue on its own initiative local police ordinances for the prevention of imminently to be expected or existent nuisances interfering with local communal life as well as to declare non-compliance with them an administrative contravention. Such ordinances may not violate existent laws and ordinances of the Federation and *Land*.”

90 H. Stolzlechner, ‘Art 118 B-VG’, in B. Kneihns and G. Lienbacher (eds), *Rill-Schäffer-Kommentar Bundesverfassungsrecht, Kommentar*, Vienna and New York: Springer, 2004, pp. 31 ff; K. Weber, ‘Art 118/1–7 B-VG’, in K. Korinek and M. Holoubek (eds), *Österreichisches Bundesverfassungsrecht, Kommentar*, Vienna and New York: Springer, 1999, pp. 34 ff.

1.3 Functions of the local authorities

The constitutional principle of differentiation between state bodies (federal and regional) and local self-government bodies is the fundamental guarantee of local autonomy. As noted above, municipalities in Austria are not merely administrative units, but autonomous bodies with a right to self-government. This is demonstrated by the fact that administrative tasks are performed by bodies other than the Federation and the *Länder*. As a characteristic of self-government, their sphere of competence includes autonomous⁹¹ and assigned/delegated⁹² functions. When municipalities perform tasks within their own sphere of competence (autonomous functions), they may not – as previously discussed⁹³ – be given instructions by the Federation or the *Länder*. When they perform delegated tasks, however, they are subject to instructions from federal or *Länder* authorities.

Municipalities' powers have a sound written basis in the Federal Constitutional Law, which clearly reflects the principle of subsidiarity.⁹⁴ Article 116 para 2,⁹⁵ which constitutes municipalities as private law bodies,⁹⁶ and Art. 118 para 2⁹⁷ B-VG, stipulate that municipalities' autonomous sphere of competence includes all matters that exclusively or preponderantly concern their local communities, and may reasonably be performed by the authorities within their municipal boundaries.⁹⁸ Article 118 para 3 B-VG sets out an illustrative list of matters⁹⁹ for which municipalities are responsible within their autonomous sphere, such as the appointment of the municipal authorities,¹⁰⁰ local public security administration,¹⁰¹ local building police,¹⁰²

91 Art. 118 B-VG.

92 Art. 119 B-VG.

93 See above I.

94 With further references, P. Oberndorfer, 'Allgemeine Bestimmungen des Gemeinderechts', in F. Klug, P. Oberndorfer and E. Wolny (eds), *Das österreichische Gemeinderecht*, Vienna: Manz, 2008, pp. 13 ff; H. Neuhofer, *Gemeinderecht*, p. 226; A. Gamper, *Hrvatska Javna Uprava*, 2008, p. 77; A. Gamper, *Local Government in Austria*, p. 31.

95 "The municipality is an independent economic entity. It is entitled, within the limits of the general laws of the Federation and the *Länder*, to possess assets of all kinds, to acquire and to dispose of such at will, to operate economic enterprises as well as to manage its budget independently within the framework of the constitutional finance provisions and to levy taxation."

96 K. Weber, 'Art 116 B-VG', pp. 13 ff.

97 "Its own sphere of competence comprises, apart from the matters mentioned in Art. 116 para 2, all matters exclusively or preponderantly the concern of the local community as personified by a municipality and suited to performance by the community within its local boundaries. Legislation shall expressly specify matters of that kind as being such as fall within the municipality's own sphere of competence."

98 H. Stolzlechner, 'Art 118 B-VG', pp. 2 ff; K. Weber, 'Art 118/1–7 B-VG', 1999, pp. 6 ff.

99 See in detail, H. Stolzlechner, 'Art 118 B-VG', pp. 9 ff; K. Weber, 'Art 118/1–7 B-VG', pp. 11 ff.

100 Art. 118 para 3 No 1 B-VG.

101 Art. 118 para 3 No 1. See also, Art. 15 para 2 B-VG.

102 Art. 118 para 3 No 9 B-VG.

local fire control,¹⁰³ and local development planning.¹⁰⁴ This list provides an illustration of the most important fields of those comprised, in abstract, by the general clause in the constitution. Federal and *Land* legislation must specify which matters fall within the autonomous sphere of the municipalities.¹⁰⁵ Should they not assign matters that fulfil the requirement of Art. 118 para 2 B-VG to this autonomous sphere, they would violate the Federal constitution.¹⁰⁶ Municipalities' own responsibilities cover issues of local interest as defined by the respective *Land*, in addition to those set out by the B-VG. They include the police, urban and spatial planning, transport, environmental protection, water supply and sewerage, household waste collection, construction and upkeep of primary and vocational schools, as well as health (municipal hospitals) and welfare. As a kind of counterpart to balance the concept of "uniform municipality" there exists the possibility to transfer certain matters which fall within the autonomous sphere to state authorities.¹⁰⁷

On the other hand, issues of the delegated sphere of competence which are administered by the mayor include, *inter alia*, registration of the inhabitants, organisation of elections and health measures. In contrast to the tasks assigned to the municipalities' autonomous sphere, the Austrian Federal Constitution neither enumerates the tasks falling into the delegated sphere, nor does it entrench them in a general clause.¹⁰⁸

In addition, the Federation and the *Länder* share responsibilities with the municipalities in areas such as education and health care.

1.4 Coordination of the different levels of governance

Given the number of small municipalities inter-municipal cooperation is a key feature of local government in Austria, as it provides the necessary economies of scale and expertise individual municipalities frequently lack. In practice, there exists a wide range of formal and informal instruments of such a

103 Art. 118 para 3 No 9 B-VG.

104 Art. 118 para. 3 No 9 B-VG.

105 H. Stolzlechner, 'Art 118 B-VG', p. 7.

106 M. Stelzer, *Constitution*, p. 171.

107 Art. 118 para 7 B-VG: "On application by a municipality the performance of certain matters in its own sphere of competence can, in accordance with Art. 119a para 3, be assigned by ordinance of the *Land* Government or by ordinance of the Governor to a state authority. In so far as such an ordinance is meant to assign competence to a Federal authority, it requires the approval of the Federal Government. In so far as such an ordinance by the Governor is meant to assign competence to a *Land* authority, it requires the approval of the *Land* Government. Such an ordinance shall be rescinded as soon as the reason for its issue has ceased. Assignment does not extend to the right to issue ordinances in accordance with para 6 above." See H. Neuhofer, *Gemeinderecht*, pp. 149 ff; Stolzlechner, 'Art 118 B-VG', pp. 36 ff; Weber, 'Art 118/1–7 B-VG', pp. 46 ff.

108 H. Stolzlechner, 'Art 119 B-VG', pp. 4 ff; K. Weber, 'Art 119 B-VG', pp. 4; A. Gamper, *Local Government in Austria*, p. 32.

cooperation: *de facto* collaboration, mutual assistance, private law contracts, associations and companies under the Austrian Civil Law Code (ABGB) and under company law.¹⁰⁹ On the constitutional level, it is important to mention the Municipality Associations (*Gemeindeverbände*). Article 116a B-VG¹¹⁰ provides that municipalities may join together – by agreement or by law – to form Municipality Associations to deal with specific matters within their own or delegated spheres of competences. Municipality Associations enjoy legal personality and may be voluntary, as well as mandatory.¹¹¹ In the first case the approval of the supervisory authority is necessary. This approval must be given under certain conditions specified in the constitution. Cases of mandatory cooperation concern, for example, waste management associations. Intermunicipal cooperation has been growing rather quickly in areas such as school education, environmental protection, water supply, health and social services.

Other forms of institutionalised cooperation include Administrative Associations (*Verwaltungsgemeinschaften*). These are associations, usually with no legal personality, which are set up to jointly handle a function.¹¹² One of the main purposes of such Administrative Associations is the joint operation of local council offices.¹¹³ Since 2011,¹¹⁴ municipalities can sign public treaties for cooperation with other municipalities without forming a Municipality Association (Art. 116b B-VG).¹¹⁵ This provision makes it possible that treaties between municipalities not only regulate private law aspects, but also exercise specific administrative functions. The expectation is that these treaties will provide an alternative both to Municipality Associations and to Administrative Associations and, in this way, will strengthen the local autonomy.

109 A. Gamper, *Local Government in Austria*, pp. 34 ff.

110 Art. 116a para 1 B-VG: "For the performance of specific matters within their own sphere of competence municipalities can by agreement associate in municipality associations. Such an agreement requires the sanction of the supervisory authority. The sanction shall be conferred by ordinance if a lawful agreement between the municipalities concerned is on hand and the formation of the municipal association:

- 1 does not in the case of performance of tasks appurtenant to the sovereign administration jeopardize the function of the municipalities concerned as self-administrative corporate bodies,
- 2 in the case of performance of tasks appurtenant to the municipalities as holders of private rights it lies for reasons of expediency, economic efficiency, and thrift in the interest of the municipalities concerned."

111 G. Wielinger, *Local Government Administration*, pp. 163 ff.

112 H. Eberhard, *Gemeinderecht*, pp. 643 ff.

113 H. Stolzlechner, 'Art 116a B-VG', in B. Kneihls and G. Lienbacher (eds), *Rill-Schäffer-Kommentar Bundesverfassungsrecht, Kommentar*, Vienna and New York: Springer, 2004, pp. 7 ff; G. Wielinger, *Local Government Administration*, p. 164.

114 BGBl I 2011/60.

115 See, A. Gamper, *Local Government in Austria*, p. 24.

1.5 Supervision on the local authorities

Self-governing bodies are, from a Rule of Law perspective, bound by law, but they are not bound by directives of the executive bodies of the Federation or of the *Länder*. However, self-governing bodies are subject to the administrative supervision of the Federation and of the *Länder*. The main features of this supervision are provided for in Art. 119a B-VG.¹¹⁶ This supervision should ensure that self-governing bodies fulfil their functions and do not infringe the law.¹¹⁷ In general, supervision of the activities of local government organs focuses solely on legality.¹¹⁸ To ensure legality, a number of supervisory instruments, including preventive measures, the right to information,¹¹⁹ and even the right to approve local ordinances in some cases,¹²⁰ are available both to the Federation and the *Länder*. With specific reference to ordinances, the supervisory authority has the power to annul those which are contrary to the law.¹²¹ A special instrument of supervision, which shares the features of a legal remedy, is a supervisory authority's power to repeal unlawful local administrative acts (*Vorstellung*).¹²² In case of repeated illegal conduct, as an *ultima ratio* punitive measure, a supervisory authority has the power to dissolve local councils.¹²³

116 H. Neuhofer, *Gemeinderecht*, pp. 327 ff; H. Stolzlechner, 'Art 119a B-VG', in B. Kneih and G. Lienbacher (eds), *Rill-Schäffer-Kommentar Bundesverfassungsrecht, Kommentar*, Vienna and New York: Springer, 2007, pp. 9 ff, 21 ff; A. Gamper, *Local Government in Austria*, p. 39.

117 G. Wielinger, *Local Government Administration*, p. 164.

118 See, Art. 119a para 1 B-VG: "The Federation and the *Land* exercise the right of supervision over a municipality to the purpose that it does not infringe laws and ordinances in dealing with its own sphere of competence, in particular does not overstep its sphere of competence, and fulfils the duties legally devolved to it."

119 Art. 119a para 4 B-VG: "The supervisory authority is entitled to collect information about every kind of municipal business. The municipality is bound to impart the information demanded in individual cases by the supervisory authority and to allow examination to be conducted on the spot."

120 Art. 119a para 8 B-VG: "Individual measures to be taken by a municipality in its own sphere of competence but which to a special degree affect extra-local interests, such as in particular those which have a distinct financial bearing, can be tied by the competent legislature (. . .) to a sanction on the part of the supervisory authority. Only a state of affairs which unequivocally justifies the preference of extra-local interests may come into consideration as a reason for withholding the sanction."

121 Art. 119a para 6 B-VG.

122 Art. 119a para 5 B-VG: "Whoever alleges infringement of his rights through the ruling of a municipal authority in matters pertaining to its own sphere of competence can, after exhaustion of all channels of appeal (Art. 118 para 4), within two weeks after issue of the ruling make representations against it to the supervisory authority. The latter shall rescind the ruling, if the rights of the intervener have been infringed by it, and refer the matter for a fresh decision to the municipality. For towns with their own charter the competent legislature (para 3) can direct that representation to the supervisory authority does not take place." See, H. Neuhofer, *Gemeinderecht*, pp. 341 ff; A. Gamper, *Local Government in Austria*, p. 40.

123 See, H. Neuhofer, *Gemeinderecht*, pp. 223 f, 365 ff.

The Federation may exercise its supervisory powers in relation to the performance of the federal tasks that are carried out by municipalities in their autonomous sphere. In general, supervisory powers shall be used in a manner that secures the greatest possible consideration for third parties' acquired rights.¹²⁴

The *Länder* have the additional power to scrutinise the budgets of the municipalities against the criteria of economy, efficiency and expediency.¹²⁵ Municipalities are ordinarily supervised by the district agencies, by the *Länder* Governments and by the *Land* Governor on behalf of the Federation.

Budgetary and financial supervision at municipal level depend on each *Land's* legislation. While the municipalities in most *Länder* are audited by the control authority in their respective *Land* (*Gemeindeaufsicht*), all of the *Länder* have established their own Regional Courts of Auditors (*Landesrechnungsböfe*). Pursuant to Art. 127 paras 1¹²⁶ and 3¹²⁷ B-VG, all municipalities with at least 10,000 inhabitants are subject to auditing by the Federal Court of Auditors (*Rechnungshof*).¹²⁸ The relevant regulation was modified at the beginning of 2011.¹²⁹ Prior to this change, only municipalities with at least 20,000 inhabitants were subject to the control of the Federal Court of Auditors.

1.6 Local finance

In addition to the B-VG, the major provisions on financial and fiscal autonomy of Austrian municipalities are set out in the Fiscal Constitutional Act

124 Art. 119a para 7 B-VG.

125 Art. 119a para 2 B-VG: "The *Land* has furthermore the right to examine the financial administration of a municipality with respect to its thrift, efficiency, and expediency. The result of the examination shall be conveyed to the mayor for submission to the municipal council. The mayor shall within three months inform the supervisory authority of the measures taken by reason of the result of the check." See in detail, H. Neuhofer, *Gemeinderecht*, pp. 335 ff.

126 "The Federal Court of Auditors shall examine the financial administration of municipalities with at least 10,000 inhabitants as well as the financial administration of endowments, funds and institutions administered by the authorities of a municipality or persons (groups of persons) appointed for the purpose by the authorities of a municipality. The examination shall extend to the arithmetical correctness, compliance with existing regulations, and the employment of thrift, efficiency and expediency in the financial administration."

127 "The Federal Court of Auditors also examines the financial administration of enterprises where a municipality with at least 20,000 inhabitants is either the sole participant or holds at least fifty per cent of the share, stock, or equity capital together with other legal entities falling within the competence of the Federal Court of Auditors or where the municipality is either their sole or joint operator with other such legal entities. As regards the powers of examination in case of de facto control Art. 126b para 2 holds good analogously. The competence of the Federal Court of Auditors extends moreover to enterprises of any additional category where the conditions pursuant to this paragraph exist."

128 See in detail, Art. 121 ff B-VG.

129 BGBl I 2010/98.

(*Finanz-Verfassungsgesetz [F-VG]*).¹³⁰ According to § 2 F-VG, municipalities must meet the expenses incurred in the performance of their tasks, whether they belong to their autonomous or delegated sphere of competence, unless federal or *Länder* legislation stipulates otherwise. However, such legislation must not contravene § 4 F-VG, which lays down the principle of fiscal equality and requires the Federation and the *Länder* to take account of the efficiency of each territorial entity and of the distribution of public tasks between them. Pursuant to § 6 F-VG, municipalities are entitled to levy either exclusive local taxes or shared taxes. § 7 F-VG gives power to the federal legislature to regulate federal shared taxes, to declare specific taxes to be exclusively local taxes, and to authorise municipalities to levy certain taxes on account of resolutions adopted by local councils.¹³¹ *Länder* legislatures are mainly responsible for determining shared *Länder* taxes and exclusive local taxes. They may also require local governments to levy certain taxes if their budgetary position demands it. The provisions of the F-VG also provide that financial appropriations may be granted to municipalities by both the Federation and the *Länder* in the form either of rate support grants or of allocations in accordance with specific requirements.¹³² In general, on average, 60 per cent of the expenditures of the municipalities are covered by their tax revenues,¹³³ and 40 per cent by other sources of income, such as charges for the use of public goods, such as water supply charges, or funds deriving from leisure or public transport facilities.¹³⁴

A more detailed determination is made by the Fiscal Equalisation Act (*Finanzausgleichsgesetz*), which requires consensus of the Federation, the *Länder*, and the municipalities, and which is re-enacted usually every four years in order to adapt it to the current financial situation. In these negotiations the municipalities are represented by the Austrian Association of Cities and Towns (*Österreichischer Städtebund*) and by the Austrian Association of Municipalities (*Österreichischer Gemeindebund*). The Austrian Constitutional Court (VfGH) would normally assume that the Fiscal Equalisation Act has treated all the parties fairly and equally, if an agreement has been reached between all the “partners” before the Act became a law.¹³⁵ Although the agreement, as such, does not have a legal character, it may acquire a legal effect, should a Fiscal Equalisation Act be challenged before the Austrian Constitutional Court (VfGH).

Two agreements seeking to coordinate fiscal relations have been concluded by the Federation, the *Länder* and, on behalf of the municipalities, the Austrian

130 BGBl 1948/45.

131 A. Gamper, *Hrvatska Javna Uprava*, 2008, p. 86; A. Gamper, *Local Government in Austria*, p. 36 f.

132 § 12 F-VG. See A. Gamper, *Local Government in Austria*, p. 37.

133 See the recent data at, A. Gamper, *Local Government in Austria*, p. 38.

134 G. Wielinger, *Local Government Administration*, p. 159.

135 See, for example, VfSlg 12.505/1990, 16.849/2003.

Association of Towns and the Austrian Association of Municipalities. These agreements are the “consultation mechanism”¹³⁶ and the “Austrian stability pact”.¹³⁷ According to the consultation mechanism, a consultation must take place between the Federation, the *Länder* and the municipalities if one of these parties intends to adopt legislation that would impose financial obligations on the other. If no agreement can be reached, the party that proposes the relevant provision will be responsible for financing the costs incurred as a result of the provision.¹³⁸ The “Austrian stability pact”, which usually covers several years, obliges the contracting parties to restrict their expenditure in order to meet the EU convergence criteria.¹³⁹

Furthermore, municipalities require authorisation from the supervisory authority (*Land* government) to take out loans. The criteria taken into account by the *Länder* for granting permission to take out loans are the purpose of the loan and the income of the municipality. Municipalities’ limited discretion over the rates and base of their tax revenue results in a situation where the proportion of shared taxes in municipal budgets has been gradually increasing, which means that the amount of municipal fiscal autonomy is getting smaller. Given the differences in municipalities’ revenues, an appropriate equalisation scheme is of particular importance. This is mainly determined by political negotiations, in which municipalities are represented by both associations.¹⁴⁰

From a comparative perspective, municipalities have little leeway regarding taxes raised through the exercise of their own competence. They are not allowed to set the rates or to introduce new taxes. The type of taxes, the tax bases, and most of the tax rates, are determined either by *Land* or by federal law.

1.7 Associations of local

Pursuant to Art. 115 para 3 B-VG, two associations are competent to represent the interests of local authorities: the Austrian Association of Municipalities and the Austrian Association of Cities and Towns.¹⁴¹ The latter represents larger cities, whilst the former represents all other municipalities. Membership of these associations is voluntary, but the clear majority of local governments are members of these Associations which play – in Austrian constitutional practice – an enormous role. They are private law entities which are funded exclusively by contributions from the

136 BGBl I 1999/35. See in detail, A. Gamper, *Hrvatska Javna Uprava*, 2008, p. 87.

137 See also, A. Gamper, *Hrvatska Javna Uprava*, 2008, p. 87.

138 A. Gamper, *Local Government in Austria*, p. 30.

139 See for the moment, the “Austrian stability pact 2011” BGBl I 2011/117.

140 See the critical review of this situation at The Congress of Local and Regional Authorities, *Local and Regional Democracy in Austria*, Report, p. 136.

141 H. Stolzlechner, ‘Art 115 B-VG’, p. 11; K. Weber, ‘Art 115 B-VG’, pp. 19 ff.

member communities. They are involved in the appointment of some Austrian delegates to the EU Committee of the Regions.¹⁴² They are also involved in the conclusion of an agreement on a consultation mechanism and on the Austrian stability pact. Their principal task is to defend the interests of the municipalities in the periodic negotiations of the Fiscal Equalisation Law (*Finanzausgleichsgesetz*), in the negotiations on intergovernmental revenue sharing, and to express their point of view on the many bills that originate in the national parliament.

1.8 External relations of the local authorities

Most of the external activities in which the local authorities engage are based on private contracts,¹⁴³ especially in the form of partnership agreements with foreign municipalities. In this field, cooperation projects could be formalised and further strengthened in the future within the framework of a European Grouping of Territorial Cooperation (EGTC).¹⁴⁴ With regard to private autonomy, one has to mention public-private partnerships that local communities have with private companies which support investments of the local authorities and operate local institutions, such as public transport companies or leisure facilities.

1.9 The impact of the EU on local authorities

One may argue that the manner in which the Federation and the *Länder*, as well as the municipalities are affected by EU legislation is quite similar.¹⁴⁵ Municipalities are self-governed administrative authorities which, in addition to implementing the law of the Federation and the laws of the *Länder*, also have to implement provisions of EU law.

In areas which do not fall in its exclusive competence, the EU shall only act “if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central or at regional and local level, but can rather, by reason of the scale or effects of the proposed

142 Art. 23c para 4 B-VG: “Austrian participation in the nomination of members of the Committee of the Regions and their deputies shall be effected on the basis of proposals from the *Länder* as well as from the Austrian Association of Cities and Towns (Austrian Municipal Federation) and the Austrian Association of municipalities (Austrian Communal Federation). In this connection the *Länder* shall propose respectively one, the Austrian Association of Cities and Towns and the Austrian Association of municipalities jointly three representatives.”

143 Cf. Art. 116 para 2 B-VG. See, A. Gamper, *Local Government in Austria*, p. 38.

144 Regulation (EC) No 1082/2006 on a European Grouping of Territorial Cooperation (EGTC). See in detail, H. Eberhard, *Gemeinderecht*, pp. 644–648.

145 See, T. Öhlinger, “Die österreichischen Gemeinden und die Europäische Union”, in *Österreichischer Gemeindebund/Österreichischer Städtebund* (eds), *40 Jahre Gemeindeverfassungsnovelle 1962*, Vienna: Manz, 2002, pp. 6 ff.

action, be better achieved at Union level” (principle of subsidiarity, Art. 5 para 3, Treaty on European Union¹⁴⁶). Accordingly, the EU lawmaking institutions’ chances to abridge the competences of the municipalities are limited. The Federation has an obligation to provide information to the municipalities regarding any EU legislative proposal that falls within the municipalities’ autonomous sphere, or that concerns their important interests (Art. 23d para 1 B-VG¹⁴⁷). The municipalities have then the opportunity to make representations on the content of an EU proposal through the Austrian Association of Cities and Towns and the Austrian Association of Municipalities.¹⁴⁸ A representation is not legally binding, but the Federation must take it into consideration.

Unlike the *Länder* Parliaments, which are authorised to receive information about draft EU legislation and to present to the Federal Council a statement concerning whether they find the draft in accordance with the principle of subsidiarity,¹⁴⁹ the municipalities do not have this right.¹⁵⁰ If the National Council and the Federal Council (the two chambers of the national parliament) come to the conclusion that a draft legislative act of the Union infringes the principle of subsidiarity, the national parliament has the right to raise an objection or to file a ‘subsidiarity suit’ (*Subsidiaritätsklage*), depending on the progress of that legislative act (cf. Protocol on the principles of subsidiarity and proportionality as implemented in the B-VG in 2010¹⁵¹).¹⁵²

146 “Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.”

147 “The Federation must inform the *Länder* without delay regarding all projects within the framework of the European Union which affect the *Länder’s* autonomous sphere of competence or could otherwise be of interest to them and it must allow them opportunity to present their views within a reasonable interval to be fixed by the Federation. Such comments shall be addressed to the Federal Chancellery. The same holds good for the municipalities in so far as their own sphere of competence or other important interests of the municipalities are affected. Representation of the municipalities is in these matters incumbent on the Austrian Association of Cities and Towns (Austrian Municipal Federation) and the Austrian Association of municipalities (Austrian Communal Federation) (Art. 115 para 3).”

148 Art. 23g and 23h B-VG. See in detail, T. Öhlinger and M. Potacs, *EU-Recht und staatliches Recht. Die Anwendung des Europarechts im innerstaatlichen Bereich*, Vienna: LexisNexis, 2011 (4th edn), p. 46.

149 Art. 23g para 3 B-VG.

150 A. Gamper, *Local Government in Austria*, p. 41.

151 BGBl I 2010/57.

152 Art. 23h B-VG. See in detail, T. Öhlinger and M. Potacs, *EU-Recht und staatliches Recht*, pp. 36 f.

1.10 The reform of local self-government

As a result of a legal initiative of the Federal Council, the possibilities to form Municipality Associations have been enlarged and the limitations as discussed in Chapter IV have been widely repealed in 2011.¹⁵³ The creation of Municipality Associations is no longer limited to one specific purpose, and it is now possible to form Associations across different *Länder* (Art. 116a B-VG). In addition, the municipalities may now also sign public treaties for cooperation with other municipalities without forming a Municipality Association (Art. 116b B-VG).¹⁵⁴ These changes will presumably lead to increased flexibility, better use of economies of scale, and a strengthening of the municipalities' rights. Currently, discussions are underway to tighten the commitments of municipalities with regard to their budget compliance. Where budgets are exceeded, information shall be displayed separately for Federation, *Länder* and municipalities. The purpose of this government bill is to strengthen the coordination of the separate budgets under Art. 13 para 2 B-VG¹⁵⁵ in order to fulfil the European provisions on budgetary discipline under Arts 121, 126 and 136 of the Treaty on the Functioning of the European Union.¹⁵⁶ Finally, it is important to note that recently – particularly in the *Land* Styria – a vivid discussion has taken place about the potential amalgamation of smaller municipalities into larger local government bodies.

1.11 Final remarks

The Austrian municipalities derive their powers from the Federation and/or the *Länder* under a system that reflects the principle of subsidiarity. Despite their relatively strong constitutional position, even within the province of their autonomous tasks, local self-government is subject to penetrating supervision by federal and *Länder* authorities. Municipalities have important administrative powers in their autonomous sphere of competence, which are supplemented by an array of delegated tasks. The fiscal autonomy of the municipalities is too limited to grant them complete autonomy. This explains the political demand that fiscal autonomy should ideally be strengthened in a revenue-neutral fashion.¹⁵⁷ The issue of increasing sub-national fiscal autonomy will raise the question of which taxes should be assigned to each of the

153 BGBl I 2011/60. See, A. Gamper, *Local Government in Austria*, p. 24.

154 See, A. Gamper, *Local Government in Austria*, p. 24.

155 “The Federation, the *Länder*, and the municipalities must aim at the securement of an overall balance and sustainable balanced budgets in the conduct of their economic affairs. They have to coordinate their budgeting with regard to these goals.”

156 Explanation report to Government Bill 1516 (*Regierungsvorlage*), XXIV, legislation period; introduced by the Ministry of Finance.

157 The Congress of Local and Regional Authorities, *Local and Regional Democracy in Austria*, Report, p. 147.