

AUSTRIA

Experts

Prof. Dr. Peter Pernthaler
Dr. Anna Gamper

I. GENERAL QUESTIONS

1. How is the federation formally called (regional, federal state, other...)?

It is called Republic of Austria.

2. Since when has the power been decentralized in your federation? Was the decentralization established in its origins or in a later time?

The Republic of Austria succeeded the former Austro-Hungarian monarchy, which ended in 1918. Historically, the federal system was founded in 1918 both by the central power in Vienna, that proclaimed the new Republic of (then) German-Austria almost immediately after the end of World War I, and the former German-speaking Länder of the Crown, which, shortly afterwards, declared their intention to join the new Republic. The Länder also played a political role during the debates preceding the enactment of the federal constitution, which came into force in 1920.

Austrian doctrine, however, is divided between decentralists (who believe that the Länder simply derive their powers from the federal constitution and that the difference between Länder and municipalities depends just on the degree of decentralization) and federalists (who believe that the politico-historic origins of the federal system preceding the enactment of the federal constitution are decisive and have to be considered when interpreting the federal constitution).

3. Has decentralization been formally abandoned or practically inoperative in any historical phase?

During the centuries of the Austrian (later: Austro-Hungarian) monarchy the self-determination of the Länder, that had been incorporated into the monarchy step by step (mostly through marriage and inheritance), gradually became weaker, particularly in the era of absolutism.

Between 1918 and 1920, when the enactment of the new Republic's federal constitution was being negotiated, federalism was not enshrined in a formal constitutional provision. In 1934, a new constitution was illegitimately enacted by the Austro-fascist regime, which was in force until 1938, when Austria was occupied by Nazi Germany. Thus, neither the old federal constitution of 1920 nor the constitution of 1934 were in force until 1945.

4. Which are the deep reasons in the adoption of a politically decentralized system?

Concerning Austria, the main reason is the historic independence and self-determination of the Länder, whereas there are no basic differences regarding race, culture, religion or language. A certain consciousness of historic Land identity still remains, although differing in degree from Land to Land.

5. Could you point out the main phases of the system and the main characteristics?

The federal constitution is mainly based on the Federal Constitutional Act of 1920 (Bundes-Verfassungsgesetz, in the following: B-VG), but consists of a large number of additional federal constitutional acts and single federal constitutional provisions (lacking a principle of incorporation). Moreover, the B-VG itself has been amended more than 80 times so far. In 1945, the federal constitution was re-enacted as it had been prior to the Austro-fascist constitution of 1934 and the period of the Austrian occupation during World War II.

The federal constitution recognizes several leading principles, such as democracy, republicanism, federalism, the rule of law, a separation of powers and human rights. As to the legal enshrinement of the federal system, the B-VG contains at least the basic provisions regarding the distribution of competences, the Federal Assembly and Länder constitutional autonomy as well as elements of co-operative federalism. The financial system is regulated by specific acts, namely the Financial

Constitutional Act (Finanz-Verfassungsgesetz, in the following: F-VG) and the Financial Equalization Act (Finanzausgleichsgesetz, in the following: FAG).

6. How many territories or main territorial communities compose the federation? Do they all have the same nature (for instance, states) or do they have different nature and position (for example, states, federal capital, colonial lands, communities with a specific regime of autonomy)?

Austria consists of 9 constituent states, which are called Länder (singular: Land) and basically enjoy an equal position. As an important exception, special provisions apply to Vienna, which is both a Land, a municipality and the federal capital.

7. Do they have singular features (for historical, linguistic, geographical, political, legal or economical reasons)? Do these singular features have political or legal consequences? In other words, how have the differences between the main territorial communities been approached from the perspective of uniformity/diversity or asymmetry/symmetry?

Basically, the Austrian federal system is of a unitary character, which somehow reflects the lack of major ethno-cultural or economic differences between the Länder. Apart from their different historic background, their main difference is that of population number and size of territory. However, law provides asymmetric treatment as well, e.g. concerning the federal capital Vienna, financial equalization, the number of Länder delegates to the Federal Assembly or different linguistic minorities in the Länder.

II. CONSTITUTIONAL LAW

1. Do you have a written Federal Constitution? What is the procedure for its elaboration, ratification and amendment? To what extent can states participate in the process of elaboration, ratification, or constitutional amendment? Which have been the most important amendments or the main constitutional phases until now?

See above I.5. The federal constitution only consists of written law. In order to amend federal constitutional law, at least half of the members of the National Assembly (first chamber of the federal parliament) have to be present, and at least two thirds of the present members have to consent to the amending bill. The bill then passes on to the Federal Assembly. After the bill has passed the Federal Assembly, it will be presented to the Federal President by the Federal Chancellor, then signed by the Federal President and counter-signed by the Federal Chancellor, and finally published in the Federal Gazette, having to be explicitly called “federal constitutional act” or “federal constitutional provision”. Within the process of federal legislation, the Federal Assembly usually is entitled to object to a bill, but may be overruled by the National Assembly’s vote of persistence. Only in few cases the Federal Assembly enjoys the right of absolute veto (e.g. if a bill is intended to deprive the Länder of a competence).

In principle, the Länder themselves do not participate in the process of federal legislation. However, in rare cases the B-VG provides that the Länder are entitled to consent to a federal bill and, thus, to prevent it.

Apart from these formal rights granted by the federal constitution, the Länder are usually informally asked to deliver a statement on a drafted bill, before the federal government proposes it to the National Assembly. Since 1999 they have enjoyed a special right to be consulted if the federal legislator intends to enact a bill that is of financial impact on the Länder. This system is called “consultation mechanism” and applies vice versa as well. If an agreement cannot be reached despite consultation talks, the legislating authority will have to cover all expenses arising from this bill.

Since the B-VG alone has been amended more than 80 times, it is impossible to highlight all amendments. However, regarding the federal system one could particularly mention the following amendments and stages: 1925 (general system of the distribution of competences), 1945 (re-enactment of the B-VG as amended in 1929), 1948 (enactment of today's Financial Constitutional Act), 1962 (school and education competences), 1974 (competences, vertical and horizontal concordats), 1983 (competences), 1984 (competences, Federal Assembly's right of absolute veto), 1988 (competences, international treaty-making power of the Länder), 1990 – 1994 (competences), 1995 (EU accession), 1999 (loosening of strict homogeneity regarding civil servants, new consultation mechanism between the territorial entities), 2001 (stability pact between the territorial entities), 2002 (administrative reform, competences).

An overall reform of the Austrian federal system has been discussed for decades – and is being discussed currently with much fervour -, but has not been realized so far. In the seventies, the Länder presented their demand programs to the federal state, but were not largely successful. In connection with Austria's EU accession the reform of federalism became again a topic in the late eighties, since first the Länder did not want to join the EU unless an internal structural reform could be achieved: In 1994 a political compromise was found and a constitutional bill drafted, but – though being repeatedly proposed to the National Assembly in the following years – prevented from enactment by the Länder's refusal to modify the compromise and by new coalition governments following elections for the National Assembly, which made the constitutional amendments required for such a reform difficult.

2. Do you have any complementary constitutional federal rules? If so, which are the most important? Are "constitutional conventions", namely, unwritten binding agreements or rules of conduct, recognized in your system? Could you mention the most important?

In principle, there are no unwritten constitutional conventions, at least not of a binding nature. Of course, there exist political rules of conduct, but they are strictly separated from law (e.g. requirement of ministerial unanimity for decisions taken by the federal government).

3. Are there any written state constitutions? What is the procedure for its elaboration, ratification and amendment? To what extent can the federation intervene in these procedures? Could any federal organism provisionally suspend some of their provisions? Are state constitutions bound by federal rules other than the Federal Constitution? If so, which are they?

Each Land has enacted its own (written) Land constitution. The Federal Constitution empowers the Länder to do so as far as the Länder constitutions do not affect federal constitutional law. Although the basic organizational provisions applying to the Länder are embodied in the B-VG, the Länder constitutions are not simply "implementation laws", but are entitled to regulate all matters in accordance with the different standards of homogeneity provided by the Austrian federal constitution or even beyond, if the federal constitution is thereby not affected.

The constitutional amendment procedure is provided by the B-VG: In order to amend Land constitutional law, at least half of the members of the Land parliament have to be present, and at least two thirds of the present members have to consent to the amending bill. The bill is published in the Land gazette by the Land Governor. Before being published, all Land bills must be presented to the Federal Government immediately after having passed the Land Parliament. The Federal Government may object to the bill for various reasons, depending on the preceding procedure. In this case, the bill must not be published unless the Land Parliament repeats its resolution to pass the bill.

The Constitutional Court may strike down Land constitutional law if it is in breach of federal constitutional law. The Court's case law has developed binding standards of homogeneity within the federal system, which, though the Court assumes them to be based on federal constitutional law, clearly outreach the codified law.

III. CONTENTS OF THE FEDERAL CONSTITUTION. DOES THE FEDERAL CONSTITUTION:

1. expressly recognize federalism or political decentralization as a constitutional principle or value?

Yes. Art 2 para 1 B-VG generally embodies the federal system: “Austria is a federation.” Apart from Art 2 B-VG, the principle of federalism is enshrined in a wide range of more specific federal constitutional provisions.

2. design a map of the territorial organization? In other words, does the Federal Constitution identify or enumerate the territories and/or the communities that conform the federation?

Yes. Art 2 para 2 B-VG enumerates the Länder: “The federation consists of the autonomous Länder: Burgenland, Kärnten, Niederösterreich, Oberösterreich, Salzburg, Steiermark, Tirol, Vorarlberg, Wien.”

3. enshrine the autonomy of the states? If so, in which way?

Yes. Art 2 para 2 B-VG calls the Länder “autonomous” (German: “selbständig”). This term – which is difficult to translate into English – was historically chosen following the Swiss model, which calls the cantons “sovereign”. As well, Art 15 B-VG speaks of the “autonomous” sphere of Länder competences. Art 99 B-VG embodies the so-called “constitutional autonomy” of the Länder (see above II.3).

4. recognize states or main territorial communities the capacity to federate among them? If so, can they establish links or celebrate conventions among them without the participation of the federation?

Within their sphere of competences, the Länder are entitled to conclude treaties among each other (Art 15a para 2 B-VG). The federal government has to be informed about such treaties without delay, but has no right to intervene. Further, the Länder strongly co-operate on an informal basis (several joint conferences [consisting of the Land governors, members of the Land governments, presidents of the Land parliaments or Land civil servants], joint working groups, Länder liaison office etc).

5. fully define the whole system of decentralization, or is this system thought to be developed to a great extent by future federal provisions? If so, which are they?

The federal system definitely was not fully developed, when the B-VG was enacted in 1920, but, due to various amendments and additions, it has now been constitutionally established for a long time. This does not mean, however, that there would be no political demand for reform or future development of Austrian federalism.

6. allow the exercise of the right to self-determination or the separation of states or other territories?

As mentioned above (see III.3), the B-VG calls the Länder “autonomous”. This term refers to their internal self-determination, which, however, is limited by the federal constitution. Neither does the B-VG assume the Länder to be sovereign under international law or entitle them to secede.

IV. INSTITUTIONAL ISSUES

- 1. Do states participate in the election, appointment or cessation of the federation's chief? Is there any other relationship between this figure and states or main territorial communities? Which one?**

No.

However, the Federal President nominally appoints the Land Governors and may dissolve a Land Parliament, if the Federal Government demands it and if a qualified majority of the Federal Assembly agrees. A Land Parliament must not be dissolved more than one time, if the reason for dissolution is the same.

- 2. Is there any Senate or second legislative assembly that represents the states? If so, does it exercise its representative role effectively? Why? What functions does the Constitution attribute to this legislative assembly? How are states represented in this chamber? Do they have the same kind of representation on the basis of the number of votes or seats? Does any state have a special position in this chamber (for instance, exclusive initiative or veto prerogatives, etc.)? How representatives are organized in this second chamber, according to their territorial origin or to their political groups?**

Yes, there is the Federal Assembly (German: Bundesrat), which is the second chamber of the Federal Parliament. Within the process of federal legislation the Federal Assembly usually is entitled to object to a bill, but may be overruled by the National Assembly's vote of persistence. Only in few cases the Federal Assembly enjoys the right of absolute veto (e.g. if a bill is intended to deprive the Länder of a competence). It may also set up its own standing rules, initiate drafted laws, demand a referendum in certain cases, challenge the validity of a law before the Constitutional Court and, apart from these legislative functions, has several particular rights of assent and control over the executive.

Basically, the Länder are represented according to their population figures. Art 34 B-VG provides certain rules of proportionality (currently, between 3 and 12 members for each Land, depending on the number of citizens). The members are elected by each Land Parliament. They need not be members of the Land Parliament, but must be eligible to the Land Parliament.

The Federal Assembly is a permanent body, as its members are not generally elected, but sit as long as the respective Land Parliament is not dissolved. Since the Land Parliaments of the 9 Länder are dissolved and newly elected at different times, the Federal Assembly as such permanently remains.

Apart from the different numbers of delegates, no Land enjoys a privileged position in the Assembly. The position of the presiding officer circulates between the Länder semi-annually according to an alphabetic scheme.

De facto, the representatives stick to their respective parties, represented in the National Assembly, rather than to their own Land. On account of these "partisan politics" the Federal Assembly turns out to be a disappointingly weak organ, which has never yet made use of its right of absolute veto and has even rarely objected to bills passed by the National Assembly.

- 3. Do states have legislative initiative over federal subject matters? Is their consent required for the enactment of certain federal acts? In other words, do they have a veto? If so, what kind of veto?**

The Länder themselves may not initiate federal laws, but their consent is needed, if a federal law obliges federal authorities to carry out those administrative matters which fall into the sphere of "indirect federal administration" (see below V.7). As well, the Länder have the right of consent, if an Independent Administrative Tribunal is to decide as an administrative court of second instance concerning certain matters.

- 4. Is there any neutral judicial court (Constitutional Court, Supreme Court, etc.) that protects the allocation of powers between the federation and the states? Do states participate in the process of designation of its members? How do you assess the influence of this court upon the current system of political decentralization? Broadly speaking, could you tell whether its case law has been most favorable to the interests of the federation or the states? Are there any subject matters or historical phases in which this phenomenon occurred? Can ordinary lower courts interfere in conflicts of powers between the federation and the states?**

The Constitutional Court (German: Verfassungsgerichtshof), consisting of its president, vice-president and 12 members, is responsible for deciding competence conflicts between the federal state and the Länder. It can either strike down a federal law or a Land law if it is unconstitutional or declare whether a drafted law falls into the ambit of the federal state or the Länder. The Länder do not formally participate in the process of designating constitutional judges, but the Federal Assembly is entitled to suggest 3 of its members and 1 deputy member, which, however, have to be nominally appointed by the federal president.

Without doubt, the court's jurisdiction has been influential on the federal system, particularly with regard to the interpretation of competences where the Court has developed certain constitutional rules (see below V.3 and V.5). However, it is not possible to assess generally whether the Court has been more favourable to the federal state or to the Länder in certain phases. In general, the jurisdiction has probably been rather centralistic. However, the Court has always held the principle of federalism to belong to the fundamental principles of the Austrian constitution, and there are several cases where he has taken a pro-Länder position.

If lower courts have to apply a federal law or a Land law in a concrete case and believe this law to be unconstitutional, they have to bring the matter before the Constitutional Court in order to let this Court decide whether the law violates the distribution of competences or not. After the Constitutional Court's decision their own procedure may continue.

- 5. Which legal mechanisms do the federation and the states have to protect their powers? Are they recognized only against legislative acts, or against regulations and administrative decisions or omissions as well? Could you tell whether the safeguards and procedural position of the federation and the states are symmetrical? In other words, can the federation challenge state acts before a court? And vice-versa? Has the federation a veto against state legislative acts, regulations or decisions? And the states against the federation? Can a state bring a conflict of powers against another state before a court? In each state, which is the legitimate organism –legislative, executive, etc.- to bring judicial actions to protect state powers? Can local entities or municipalities bring judicial actions to protect their autonomy against federal or state acts or rules? Are there any other institutions or individuals legitimate to challenge federal or state legislative acts, regulations, rules or decisions on the basis of a conflict of powers?**

Apart from the aforementioned possibilities to take influence on a bill before it is enacted (pre-legislative scrutiny) – which are obviously much more advantageous to the federal state than, vice versa, to the Länder, and thus not symmetrical at all –, both the federal state (Federal Government) and the Länder (Land Governments) may challenge each other's laws before the Constitutional Court on account of their unconstitutionality (e.g. violation of competences).

The same applies regarding regulations.

Administrative rulings can be brought before the Constitutional Court by individuals, if these decisions violate their fundamental rights and are based on an unconstitutional federal or Land law/regulation. If the law/regulation directly and currently violates their rights, individuals may directly challenge a federal or Land law/regulation on account of its unconstitutionality, unless an administrative ruling or a judgment has been passed in this matter or unless one could reasonably expect from the person to claim such a decision. Further, higher courts and Independent

Administrative Tribunals have to appeal to the Constitutional Court, if, on the occasion of a case which they have to decide, they believe a law to be unconstitutional. Finally, a third of the members of the National Assembly and the Federal Assembly respectively and a third of the members of a Land Parliament, if the Land constitution does so provide, may challenge the validity of a law before the Constitutional Court, if they believe it to be unconstitutional. However, the latter institutions may only challenge laws enacted by their own entity.

The Länder (i.e. the Land Governments) may ask the Court to deliver a judgment on the question whether an agreement between them is an agreement under Art 15a B-VG (see above III.4) and if the obligations, imposed on them in this treaty, have been met.

Municipalities may challenge federal or Land regulations, if they cancelled municipal regulations, that were enacted within their autonomous sphere (see below VI.1), before the Constitutional Court on account of their alleged illegality. As well, they are entitled to challenge administrative rulings before the Constitutional Court, if they were passed by a supervisory (federal or Land) authority.

If, in certain matters, the Länder omit to pass an implementative law, their competence will devolve to the federal state after a fixed period of time. The federal state will then become competent to enact the required law, which will remain in force as long as the Länder do not substitute it by another law.

6. Who is in charge of the official appointment of the main state authorities (the chief of the state, government, parliament or legislative assembly, judicial power of the state, etc.)? Does the federation intervene in the process of appointment?

The Land Governor is elected by the Land Parliament and nominally appointed by the Federal President. The Land Government is elected by the Land Parliament and formally appointed by the Land Governor. The Land Parliament is usually summoned after elections by the presiding officer of the dissolved parliament (depending on the Land constitution). It is also noteworthy that the supreme Land civil servant, who is head of the Land Government's office, is appointed only with the consent of the Federal Government.

The Austrian Länder do not have their own judiciary. However, the Federal President may dissolve a Land Parliament, if the Federal Government demands it and if a qualified majority of the Federal Assembly agrees. A Land Parliament must not be dissolved more than one time, if the reason for dissolution is the same. In practice, however, this has never occurred yet.

7. Does the judicial power follow the allocation of powers? In other words, are there federal and state courts with jurisdiction to solve federal and state cases respectively? Regarding state courts, is the appointment of judges, magistrates and administrative staff a state power? Do states enjoy legislative power to regulate these issues? Is there any body of self-government of the judicial power? If so, which is its composition? What functions does it have? Who is responsible for the provision of material resources to the administration of justice (federation or states)? Which are the criteria for the allocation of resources? Can federal courts review state court's decisions? In what circumstances?

There are no Land courts, although this has been demanded by the Länder for a long time. Since 1988 Independent Administrative Tribunals have been installed in the Länder, but they are only responsible for deciding administrative cases and do not enjoy the ordinary courts' institutional requirements.

8. Are there others mechanisms for state participation in federal institutions or functions? Do states participate or are represented in relatively autonomous federal organisms, regarding, for instance, citizen's rights or intervention in the economy (independent agencies with regulative, financial and arbitration powers, etc.)?

Basically, this is not the case. However, it is up to ordinary law to provide that certain agencies or committees include a Länder representative among other members (e.g. within the Austrian Public Broadcasting Organisation according to the Broadcasting Law).

Further, one could mention the Independent Administrative Tribunals, which are Länder authorities from an organizational viewpoint, but, among other tasks, are responsible for deciding on a large number of federal administrative matters as a second instance.

Moreover, cooperative federalism (see below VII) is characterized by consultation talks within joint conferences and working groups, where Länder delegates are represented. This is particular the case with respect to negotiations preceding the enactment of the Financial Equalisation Act (see below VIII) and relating to EU matters.

Finally, the Länder representatives participate in several joint organs on a private law basis, where they are not restricted by the distribution of competences (e.g. national parks, road companies, universities, regional development agencies).

9. Can states freely convoke a referendum regarding political or legal measures? Are there any constraints? In other words, does the federation have any power over this field?

Direct democracy at the Länder level is not explicitly determined by the federal constitution, but, in principle, left to the Land constitutions to decide. However, there are implicit restrictions of homogeneity, as a recent judgment of the Constitutional Court shows. The Länder must not provide direct democracy in a way which would be in breach of the democratic principle inherent in the federal constitution, as this principle is considered to provide mainly representative democracy, whereas direct democracy is provided by way of exception. This means, for instance, that a Land Parliament must not be forced by a referendum to enact a certain law, but that it may be obliged just to take the referendum into consideration.

10. Is there any pro-state provision concerning symbolic issues (flags, protocol, languages, etc.)? The federal constitution has left these issues to the Land constitutions, without even explicitly mentioning them. Notwithstanding certain minority rights, however, the official language in Austria is the German language (see below IX.1).

V. THE ALLOCATION OF POWERS

1. Is the system of allocation of powers mainly enshrined in the Federal Constitution? Is it secured by the Federal Constitution?

Yes. The general system is enshrined in Art 10 – 15 B-VG, but one should keep in mind that there is a number of specific federal constitutional laws and provisions which enshrine specific competences. If a competence is to shift from the federation to the Länder, a federal constitutional law is needed. If it is to shift from the Länder to the federation, a federal constitutional law is needed as well, but requires the consent of the Federal Assembly (right of absolute veto). If the distribution of competences in general is to be largely modified, this will be recognized to be a “total revision” of the federal constitution and therefore need a referendum as well.

2. Which is the basic design of the system (a list of federal powers, a list of state powers, a double list, other solutions)?

There are 3 basic categories:

enumerated list of exclusive federal powers

enumerated list of shared powers (

• legislation – federal state, administration – Länder

• framework legislation – federal state, implementative legislation and administration – Länder)

residuary competence of the Länder

3. Is there any constitutional provision concerning residual powers, namely, "new" subject matters, not allocated either to the federation or to the states by constitutional law? If so, where are allocated the residual powers (federal or state level)? Is it actually effective? Are there any rules or principles that presume that the power is vested in a certain level of governance?

According to Art 15 B-VG all competences that are not enumerated as federal competences automatically fall into the residuary Länder competence. This means, that "new" subject matters will fall into the Länder competence, unless they are "complex matters", which are extremely split between the federal state and the Länder (in particular, EU matters if they are to be implemented in Austria). The problem, however, is that such a wide range of important matters is allocated at the federal level that the Länder have been left very limited residuary competences. If a new matter evolves (e.g. data protection), a federal constitutional regime will usually be enacted in order to cover this new competence.

The Constitutional Court has developed the rule of in-dubio-pro-Länder, which means that a subject matter falls into the Länder residuary competence if, after having exhausted all kinds of interpretation, there remains a doubt whether the matter falls into a federal competence. Notwithstanding the theoretical importance of this rule, however, there have not been many cases where this rule has been applied so far.

4. Is there any rule that gives preference to federal law in case of conflict with state law? If so, has it been actually applied?

In principle, there are no concurrent powers. This means that even if both the federal state and the Länder believe a subject matter to be covered by their respective competences, there can only be one competent entity. As a consequence, there is no rule such as "federal law breaks Länder law" (only federal constitutional law breaks Länder law).

5. Are there other general rules? Which are they?

According to the Constitutional Court's jurisdiction, both the federal state and the Länder are obliged to take each other's interests into consideration when enacting their own laws (principle of mutual consideration). According to the principle of different aspects both the federal state and the Länder may enact law on the same subject matter, if their respective laws concern different aspects which are covered by their respective competences. According to the "theory of petrification" a federal competence comprises only those subject matters which it was thought to comprise when the competence was enacted (regarding most competences, on 1 October 1925), i.e. within the limits of the (ordinary) law regulating a certain subject matter at that time. Additional subject matters are only comprised if there is a close intra-systematic relationship to the "petrified" subject matters. Regarding the rule of in-dubio-pro-Länder see above V.3.

6. Does the Constitution allow making more flexible the allocation of powers by mechanisms other than constitutional amendment? In other words, can the federation, by itself, transfer or delegate powers to states? Through which mechanisms? What role did all those mechanisms play on the evolution of the federation? How have the decisions regarding the material, economic and human resources to be transferred as a consequence of a transfer or delegation of powers been taken?

Basically, no. As an exception, federal legislation may empower Land legislation to enact certain implementative provisions in a very limited range of federal matters (Art 10 para 2 B-VG).

One could also mention the system of indirect federal administration, which indeed is an important element of Austrian federalism. Art 102 B-VG provides this system as the general concept, excepting

however a wide range of federal matters which need not, but could be directly executed by federal administrative authorities. It is up to federal law to decide whether these matters should be executed by the Länder as well (which usually is the case). The Länder have to cover mainly all expenses on materials and staff, whereas the federal state has to cover all expenses directly required for realizing the purpose of a certain matter of indirect federal administration. See below V.7 and V.11.

Under Art 17 B-VG both the federation and the Länder are free to act under private law. This means that they are not bound by the distribution of competences when concluding private contracts, subsidizing projects or performing any legal acts as a private person. These private law capacities are seen as an important “safety valve” against the strongly centralized distribution of competences.

7. Has any subject matter been fully attributed to just one of the territorial levels of governance –federal or state-?

In principle, there are no concurrent competences of the federal state and the Länder. However, as there are several aspects of nearly all subject matters, the Constitutional Court has held that both the federal state and the Länder may enact laws on the same subject-matter, if these laws concern different aspects.

However, there are several subject matters which are called “complex” subject matters (e.g. spatial planning, environmental protection). In comparison to other subject matters, they cover an extremely broad matter, which is split into a plethora of individual part-competences of both the federal state and the Länder.

Regarding the division between legislative and administrative competences, the major part of competences is fully attributed – i.e. comprising both legislation and administration in a certain field – to either the federal state or the Länder. However, there is a couple of competences where the federal state is only competent for legislation, and the Länder for administration or where the federal state is only competent for framework legislation, and the Länder for implementative legislation and administration. Moreover, the Länder are responsible for the administration of a wide range of matters which originally are federal matters (system of indirect federal administration): Whereas the competence formally remains a federal competence, it is administered either by the Land Governor, who in this case is bound by the instructions of the competent Federal Minister, or, since 2002, by the Independent Administrative Tribunals, depending on the respective matter.

8. Is the technique of "shared" powers recognized (both federation and states have legislative powers, although federal law takes precedence over state law in case of conflict)?

Both the federal state and the Länder enjoy (exclusive) legislative competences, but federal law does not take precedence over state law in Austria.

9. Are there any subject matters in which legislative power is exclusively attributed to the federation, while executive power is attributed to the states? If so, is the regulative power regarded as legislative or executive power? Can federal legislation determine state administrative organization and practice?

Yes, in particular according to Art 11 B-VG: Such matters comprise, for instance, state citizenship, certain aspects of the representation of professional groups, housing, traffic police, and shipping.

The power to enact regulations generally belongs to the executive and not to the legislative power. From the viewpoint of competences, however, Art 11 para 3 B-VG specifically entitles the federal state – and not the Länder, which are usually responsible for administration under Art 11 B-VG – to enact implementative regulations in those matters which are enumerated in Art 11 para 1 and 2 B-VG. State administrative organization is basically determined by federal constitutional law and, in conformity with these provisions, by the Länder constitutions. If “administrative practice” means “administrative procedure”: The federal state has enacted uniform acts on the general administrative procedure and on administrative offences, making use of an overruling competence “due to

administrative need”, which leaves the Länder nothing but the right to set up their own administrative procedural rules if such a measure would be highly imperative.

10. Are there any subject matters in which the federation can establish principles or basis for the state legislation? If so, has the federation made an extensive use of this power? Is there any mechanism to correct that situation?

Yes, in particular according to Art 12 B-VG: The federal state may enact framework laws in a couple of matters, such as in the field of social policy, health, agriculture, protection of plants, electricity, non-litigious settlement of disputes and agricultural or forest employees. If a framework law has not been enacted, the Länder are competent to set up their own laws, being bound to modify them, should a future framework law be enacted. The Constitutional Court holds that a framework law must not be as detailed as to permit its direct execution by an administrative organ. In order to observe the strict rule of legality, an implementative Länder law is therefore needed as an intermedium component between the framework law and the execution of the concerned matter.

In practice, however, most framework laws are over-detailed without being struck down by the Constitutional Court.

11. Does the federation have an own administrative organization on the state territory? How strong is that administration? In which fields does it act? Can the state administration exercise any federal power delegated by the federation? If so, are state administrative bodies hierarchically dependent of the federal administration? What mechanisms of review are reserved to the federation to secure that states correctly enforce federal law?

There are very few authorities that specifically carry out federal matters in the Länder: Of major importance are the Federal Police Departments or the School Councils set up in each Land.

Most federal administrative matters are carried out indirectly, i.e. not by federal administrative authorities themselves, but, according to the traditional concept of the B-VG, by the Land Governor and, supervised by him, the district administration authorities. Being Land authorities from an organizational viewpoint, these agencies basically serve both the federal state and the Länder as administrative authorities of first instance.

The Land Governor is bound by the instructions of the competent Federal Ministers, when he carries out an indirect federal administrative matter. Since 2002, however, a wide range of indirect federal administrative matters has been removed from the Land Governor: In these matters, the district administration authorities decide as a first instance, and the Independent Administrative Tribunals of each Land as a second instance.

Apart from the Federal Ministers’ instructions by which the Land Governor is bound when carrying out indirect federal administrative matters, all state organs are bound by the general principle of legality. If a Land regulation is in breach of a federal law, the Federal Government may appeal to the Constitutional Court to strike it down as unconstitutional on account of illegality. In particular cases the federal state enjoys special rights (e.g. to be informed about the execution of a certain matter). Further, the Federal Ministers are entitled to lodge a complaint against an administrative Land ruling at the Administrative Court, if the parties involved have exhausted all administrative remedies and if it concerns matters such as those of Art 11 and 12 B-VG.

12. What are the general limits of state powers?

The limits of state powers are set by the federal constitution (standards of homogeneity). In particular, the fundamental principles of the federal constitution (representative democracy, federalism, republicanism, the rule of law, human rights), but also other constitutional provisions of a more general character (e.g. the liability of state organs) form the pattern of homogeneity. It is noteworthy that these general standards do not only bind the Länder, but also the federal state.

13. In your opinion, what are the most important federal powers?

There are so many important federal powers that it is only possible to mention some of them: foreign affairs, defense, most matters of traffic, energy and economy, civil law, criminal law, water, forestry, commerce, universities, many school, environmental and health matters, employment matters, police, etc.

14. In your opinion, what are the most important state powers?

Building law, general spatial planning, nature protection, fishery, agriculture, real estate transfer, sport, folklore, event planning etc.

15. Have any of these federal or state powers been extensively interpreted?

See above V.5. As a general rule, both the petrification theory and the principle of “in-dubio-pro-Länder” should prevent an extensive interpretation of federal competences. However, the Court has severally held a competence to be federal on account of “intra-systematic” reasons.

16. Does the Constitution provide the transfer of sovereign powers to regional or international organizations? Does it address this issue in the domestic legal system, taking into account the decentralized structure of the federation? Does it give the states the right to ratify international treaties or agreements? If so, in which conditions? How is the international responsibility of the federation addressed?

Art 9 para 2 B-VG only provides the transfer of individual single powers of the federal state to international organizations. As an exception, a special federal constitutional law was enacted in order to join the EU, since the extensive transfer of powers which was connected with EU accession made it impossible to enumerate individual transferred matters.

Under Art 16 B-VG the Länder are competent to conclude international treaties with neighbouring states or their component parts, if the respective matter concerns their competences. However, the federal state has strong rights of supervision over such Länder treaties.

If the federation itself concludes an international treaty which involves Länder competences the Federal Assembly has the right of consent (absolute veto) during the parliamentary sanctioning procedure. If the consent was given and the treaty sanctioned by the federal parliament, the Länder have to take all (legislative or administrative) measures required for the implementation of the treaty. Administrative acts of implementation may be determined by the instructions of Federal Ministers. If a Land does not act accordingly, its competence will devolve to the federal state which will then be able to take all measures in order to meet the international obligations imposed by the treaty, until the Land is willing to make use of its competence.

VI. LOCAL AND MUNICIPAL GOVERNMENT

1. Does the Federal Constitution recognize local or municipal autonomy? And the state Constitutions? If so, which term is it used to refer this autonomy? What substantially follows from this constitutional recognition?

Yes, Art 116 B-VG states that each municipality is a territorial entity and is entitled to self-administration (Selbstverwaltung). The Länder constitutions recognize this right as well.

The main consequence is that municipalities enjoy a sphere of “autonomy” where they can act freely on a private economic basis and where they can carry out administrative tasks without being bound by the instructions of federal or Länder authorities, who have only limited rights of supervision.

2. Are the local representatives democratically elected by the people of the municipality or local entity? If not, which is the method for the election?

All municipal councils are elected directly by the local citizens according to a proportional system. Political parties are represented in the municipal board according to their representation in the municipal council. Mayors may be elected directly if the Land constitution provides it (this is the case in 6 Länder).

3. Are local entities under federal or state control? If so, are these controls limited to issues of legality or do they also cover issues of opportunity? Can municipalities or other local entities challenge federal or state law or other decisions, on the grounds that they violate their autonomy? Before which bodies or courts?

Within their sphere of “delegation”, municipal organs are constitutionally obliged to observe instructions given by the competent federal or Land authority.

Within their sphere of “autonomy” they can act more freely, remaining, however, under the supervision of federal and Land authorities. Supervision involves controlling measures regarding the illegality or unconstitutionality of municipal legal acts, as to whether they duly perform all tasks which are imposed on them by law and whether they perform them according to the principles of economy, expediency and thrift. Controlling measures include the right of information, the annulment of municipal regulations, the dissolution of the municipal council or the requirement of the supervising authority’s approval for the enforcement of local law.

Municipalities may lodge a complaint at the Constitutional Court or Administrative Court, if a supervising authority’s ruling violates their right to self-administration.

4. Is the design of the local government (kind of local entities, organization, powers, human resources, etc.) under federal or state power? What local subject matters or functions are allocated to the federation and the states? Can the federation establish direct bilateral relationships with municipalities or other local entities? Can the federation intervene upon their activities by exercising federal powers concerning a particular sector or through its spending power?

The basic structures of municipal government are laid down in Art 115 – 120 B-VG. The Länder are competent to determine these structures more precisely or to determine what has been left undecided by the B-VG, and have thus enacted Municipality Acts and City Statutes. Apart from these organizational issues, it depends on the distribution of competences whether and how a federal or Land law allocates a function at the municipal level (within their sphere of autonomy, certain tasks must be allocated at the municipal level by a federal or Land law).

Municipalities form the third tier of the three-layered territorial structure (federal state, Länder, municipalities). They are represented by the Austrian Association of Municipalities and the Austrian Association of Towns. In particular regarding financial questions (Financial Equalisation Law, consultation mechanism, stability pact) the federal state and the Länder consult and co-operate with municipalities via these two associations. However, so far there neither is a general bilateral relationship between these associations and the federal state and the Länder nor a direct bilateral relationship between an individual municipality and one of the latter entities.

The federation can certainly intervene in all municipal matters: It is simply a matter of law (in some cases, federal constitutional law), for instance on the Financial Equalisation Act (in the preparation whereof municipalities may, however, informally participate).

5. Are there "city-states" in your system? According to which provision? Is their regime equivalent to the states' one? Apart from these city-states, are there any municipalities with a particular autonomous regime? Which ones? Which is the basis for the recognition of this regime?

The capital Vienna is the only city-state. As it is both a Land, a municipality and the federation's capital, Art 108 - 112 B-VG provide specific organizational rules for Vienna.

There are 15 towns with their own city statute. These towns comprise all larger towns and several smaller towns for historic reasons. Art 116 para 3 B-VG further provides that every municipality populated by at least 20,000 inhabitants may apply for its own city statute (which is a Land law). Such a city statute has to be enacted unless Land interests would be endangered or the federal government refuses to give its approval within a certain period of time. Within their territories, statutory cities have to administer all tasks which are usually performed by district administration authorities.

- 6. Can states create "intermediate" local entities between municipalities and states? Are there any intermediate local entities in your system? Do they exist only in some states or in the whole territory of the federation? Are states free to establish their territorial limits? What powers do they have? To what extent are they dependent on the states? What is the system for the election or appointment of the chiefs of their governmental bodies? Can the federation intervene in the organization, powers or financing of these intermediate local entities? How? For which purposes?**

There are no intermediate local entities between municipalities and the Länder (district administration authorities are no territorial entities, merely administrative agencies). Neither are municipal associations "intermediate" territorial entities, as they may only be established for the purpose of jointly performing single tasks belonging to the sphere of autonomy.

- 7. How are local powers determined? Can local governments provide services or perform federal or state powers? If so, which legal mechanisms coordinate their collaboration (delegation, assignment, etc.)? In which subject matters can this form of collaboration exist? Are local governments obliged to cooperate? Do they have a right to receive financial funds from the federation or the state that asks for the collaboration?**

Local governments provide public services and perform federal or state tasks either within the sphere of autonomy or delegation (see above VI.3). Art 118 B-VG provides that all matters which are in the specific interest of a local community and may be suitably performed by them, must belong to the sphere of autonomy (principle of subsidiarity). Art 118 B-VG also provides some examples, such as local building or local spatial planning.

Local governments can be obliged to join municipal associations (see above VI.6) by a federal or Land law, but have to be heard on this matter. Moreover, their functions as self-administrating entity must be maintained and their influence on the association as well as their representation within its organs must be granted.

They have no general claim to receive financial funds for their collaboration. Neither does the federal constitution embody such a claim. Instead, it depends on the respective federal or Land law whether it provides such funds, which usually is the case with those associations that are established by law and not voluntarily by the municipalities.

- 8. Do local governments have normative or regulatory power? Which other general powers do they have? What powers are lacking?**

They do not have any legislative or judicial powers, but they may enact regulations, issue administrative rulings or other individual administrative acts.

VII. INTERGOVERNMENTAL RELATIONS

- 1. Does a principle of collaboration or constitutional loyalty among the different political and administrative authorities exist in your federation? If so, where is recognized (constitutional law, convention)? Which is its content and what consequences follow from this principle? To what extent is there a hierarchy among the different administrations?**

The principle of “mutual consideration”, as a general rule, is no written principle, but has been developed by the jurisdiction of the Constitutional Court. It means that both the federal state and the Länder do have to consider each other’s interests when enacting their own law. They must not contravene those interests excessively, even if this would not permit them to make full use of their own competence. Theoretically, the principle is mutual, i.e. there is no hierarchy of whose interests have to be considered first. In practice, however, the Constitutional Court has applied this principle more in favour of the federal state.

It is important to note that, in principle, federal administration and Länder administration are on an equal footing. Due to this lack of hierarchy, cooperation between the units is the more important.

2. Does the Federal Constitution establish a system of intergovernmental relations between the federation and the states? If so, through which mechanisms? Are these mechanisms established in other constitutional or legislative provisions? To what extent are institutional practices or conventions important on this matter? Generally, which is the importance of intergovernmental relations for the dynamics of the system? To what extent do they allow to make more flexible the formal allocation of powers?

Regarding the federal constitution, one could mention the agreements under Art 15a B-VG (both between the Länder themselves and between the federal state and the Länder). Art 23a – 23f provide instruments and mechanisms of Länder participation regarding issues relating to the EU.

Further to that, a couple of laws establish certain commissions, working groups or arbitrary bodies in which both entities are represented, e.g. the National Security Council.

Even more perhaps, intergovernmental relations are based on informal processes and institutions (e.g. joint conferences and working groups, e.g. on spatial planning and regional policy [Österreichische Raumordnungskonferenz ÖROK]). It is difficult to evaluate their work in exact terms, but they certainly are of great importance and apt to smooth out difficulties arising from split competences.

3. Are there organisms to coordinate the horizontal collaboration among states? Does the federation participate in these organisms? Is an authorization required for their creation? How the states are represented? Are they important for the system?

There are a number of joint Länder working groups and conferences, in which either political functionaries, such as the Land Governors or the presidents of the Land parliaments, or Länder civil servants participate. As well there exists a Länder liaison office. All these institutions, which do not need any particular authorization, perform important, if informal functions of coordination, cooperation and information which make the federal system work more smoothly and effectively.

Federal representatives do not participate in them, but they meet their Länder counterparts in joint federation-Länder-workings groups and conferences.

4. Which role do local governments play in the system of intergovernmental relations? In which organisms of collaboration do they participate?

Individual municipalities (except Vienna, of course) do not directly play a role in the system of intergovernmental relations. Instead, the Austrian Association of Municipalities and the Austrian Association of Towns represent municipal interests within the negotiations preceding the enactment of the respective Financial Equalisation Law, within the procedures inherent in the consultation mechanism and the stability pact. Both associations, however, have claimed for more substantial recognition regarding intergovernmental relations: Their key demand is to be generally empowered to enter into formal agreements with the federal state and the Länder (Art 15a B-VG), which has not been met so far.

5. Do different governments or administrations usually participate in organisms or entities with legal entity (public or private: consortiums, associations, foundations, private societies, etc.)? Is this joint collaboration usual for developing public works, managing services, or financing of activities? Which legal regime is applicable?

For years, there has been a strong trend toward privatization which can be perceived on all levels of government. The performance of many former state tasks has been transferred to private companies, associations and foundations. Government, however, keeps its influence on these bodies, as it usually holds the major part of shares and is represented in all their organs.

In principle, all three territorial entities are free to act under private law, being only bound by constitutional obligations (e.g. fundamental rights, the principle of economy, expediency and thrift etc) and the relevant laws (e.g. Civil Code, Commercial Code).

VIII. TAXATION

1. What is the level of state autonomy regarding incomes? Can they establish taxes? If so, are there any constraints? In other words, can they make use of the same kind of taxes (official prices, rates, extra charges, etc.) that the federation establishes? Can they use both direct and indirect taxation? Can they establish taxes over subject matters already charged by the federation?

The Financial Constitutional Act (Finanz-Verfassungsgesetz, F-VG) basically determines the different kinds of taxes:

exclusive federal taxes

exclusive Länder taxes

exclusive local taxes

shared taxes:

These taxes are shared between the federal state, the Länder and the municipalities or between at least two of them. “Sharing” either means that all sharing entities may levy taxes on the same subjects of taxation or that the federal state/Länder levy a basic tax, whereas the other entities are only entitled to levy additional taxes on the same subjects of taxation, or that only the federal state/Länder levy a tax, whereas the other entities receive part of its revenues (“joint taxes”).

It is up to the Financial Equalisation Act (Finanzausgleichsgesetz, FAG) to provide, which of these taxes may be levied by which entity on which subjects of taxation. The FAG is an ordinary federal law, which is usually enacted every 4 years for reasons of fiscal flexibility. Traditionally, however, the federal government negotiates the Act with the Länder and the Associations of Municipalities and Towns. If all tiers have basically agreed on the drafted act, the FAG will be presumed not to be discriminatory by the Constitutional Court.

The question whether the Länder may levy the same taxes as the federal state or whether they may use both indirect and direct taxation, thus depends on the respective FAG, which is constitutionally empowered to distribute the taxes according to the principle of equality and the consideration of all tiers’ economic encumbrances and capacities.

The Constitutional Court holds that the Länder are entitled to “invent” all taxes which have not been already determined by the FAG, but this amounts to nearly nothing in practice.

2. Can states ask for credit or issue public debit within the state or federation without the authorization of the federation? Can they do this abroad? If the federation has the power to authorize these operations, which are the legal basis that regulate this?

§ 14 F-VG provides that it is up to Land legislation to determine whether and how the Länder may ask for credit or take up loans. However, the Federal Government may object to a Land bill providing these possibilities. If the Land Parliament sticks to its bill despite the Federal Government’s objection, a joint committee, consisting of representatives of both the National Assembly and the Federal Assembly, has to decide within a certain period whether the federal government’s objection is to be maintained or not.

Credits may be granted to the Länder by the federal state only on account of the Federal Financial Law (Bundesfinanzgesetz) or another specific federal law.

However, due to the regime of the Stability Pact 2001, which was concluded in order to meet the Maastricht criteria of convergence, the Länder have obliged themselves not to run into debt, but to achieve a considerable budgetary surplus (see below).

3. To what extent are state incomes important in contrast to the transfers that the states receive from the federation? How are these transfers regulated?

§§ 12 and 13 F-VG provide that the federal state may grant financial transfers to the Länder (“second stage of financial equalization”). Financial transfers can either be granted according to a key, which takes account of the average duties imposed on the transferees and their own revenue-raising powers, or on demand, i.e. either as hardship allowances (equalizing hardships mostly arising from the “first stage of financial equalization”, i.e., roughly speaking, the primary distribution of the tax yield) or in order to achieve a balanced budget or to cover extraordinary requirements. Further, the federation may grant subsidies bound to certain purposes. Transfers on demand and subsidies for a fixed purpose may be granted on certain conditions (e.g. a balanced budget), the performance of which may be supervised by the transferor.

Notwithstanding the preponderance of the Länder’s share in joint federal taxes, “secondary” financial transfers have usually much importance within the financial equalization system and modify its “primary stage” significantly. The exact relationship between these two kinds of “income” is determined by the respective FAG.

4. Do states participate in federal taxes? If so, in which taxes and to what extent do they participate? When states participate in federal taxes, do they have any kind of normative power (for instance, power to fix deductions, exemptions, discounts, etc.)?

Again, this depends on the respective FAG. Currently, the most important joint federal taxes are the corporation income tax, income tax, wage tax, capital-yield tax, motor vehicle tax, turnover tax, several kinds of beverage taxes, mineral oil tax, advertisement tax, real estate transfer tax and inheritance tax. The average Länder shares in these taxes are between 15 and 30 %, regarding the more lucrative taxes, however, only around 15 %. The Länder do not themselves levy these taxes, but just receive their revenues from the federation without being able to determine how they are levied.

5. Do states receive direct transfers or funds from the federation? What criteria are used to determine the amount of these transfers? Do states participate in the determination of the amount of transfers? If so, through which mechanisms?

See above VIII.3. The amount of transfers is determined by the respective FAG. The Länder can influence it only during the informal negotiation process preceding its enactment. However, the federal legislator has to observe the principle of equality and has to take account of economic encumbrances and capacities of the Länder.

6. Can the federation intervene in what the transferred funds will be allocated to? If so, in which subject matters? To what extent? Generically or specifically? Can the federation determine their management or procedure? In general, how has the federal spending power determined state powers? What is its percentage with regard to state incomes? How does this system work regarding other federal and state transfers to local governments?

See above VIII.3. The F-VG provides that only transfers on demand and subsidies for fixed purposes may depend on conditions, the performance of which may be supervised by the federal state. These conditions – where permitted by the F-VG - and indeed all transfers are provided and enumerated in detail by the FAG. The exact percentage depends on the same Act – its assessment is difficult, since Vienna is both a municipality and a Land and because there are so many different transfers and subsidies. The Länder revenues which they receive in the “first stage” of financial equalization – i.e.

shares in joint federal taxes and, much less, their own exclusive taxes – are certainly higher than what they get in the “second stage” of financial equalization.

In contrast to the Länder, who are more or less getting “equalized” in the first stage of financial equalization, the municipalities are treated very unequally in this first stage. In particular, this is due to a key according to which municipalities receive over-proportional first stage-revenues, if their population amounts to a certain number. The more they depend on second-stage transfers.

7. What follows from the principle of "tax solidarity" among states? In other words, what kind of economic contributions do the states make to the federation? How does this system work, on the basis of which criteria?

The FAG itself provides several keys according to which the Länder receive different shares from the joint federal taxes as well as different amounts regarding transfers and subsidies. This means that the Act does not simply provide a quota distributing shared taxes between the three tiers, but provides sub-quotas concerning the exact shares of each Land. The criteria used are the number of Länder inhabitants on the one hand and specific sub-quotas which have to consider the respective economic encumbrances and capacities of the Länder.

Under much pressure, the Länder finally obliged themselves to achieve significant budgetary surpluses over the next years, whereas the federal state may still show a deficit and the municipalities at least a balanced budget (stability pact of 2001).

8. Can the federation unilaterally compensate the debts that states owe to the federation (for example, reducing federal transfers)? If so, in which fields do this power exist? Do states have any safeguards (right of audience, judicial actions, etc.)?

The federal state can grant the Länder credit only under the Federal Financial Law or specific credit federal laws. Transfers are provided by the FAG. If the federal legislator wants to reduce federal transfers – on account of which reason whatsoever - it simply has to enact a new FAG. However, a new FAG is usually enacted only after the Länder have agreed to its draft. If this is not the case, there will at least be no a priori-presumption of the FAG's equality.

The Länder will be able to bring the matter before the Constitutional Court who will strike down the Act if it does not take account of the economic capacities and encumbrances of the Länder.

9. Who is in charge of the management, liquidation and collection of taxes? Can local governments collect taxes on behalf or by order of the federation or the state where they are located? To what extent and in which fields is this method used? To what extent is it relevant?

The federal state, Länder and municipalities respectively are each in charge of their exclusive taxes. Regarding shared taxes, the federal state is in charge of federal joint taxes, distributing Länder and municipal shares among them after having levied these taxes, and the Länder are in charge of Länder joint taxes, shares of which are given to the municipalities. The municipalities may levy certain exclusive taxes of their own, if a respective Land law entitles them to do so. The range of such exclusive taxes, however, is determined by the FAG (e.g. real estate tax, communal tax, tourism tax, hunting and fishing tax, charges for local services, tolls etc). Another range of taxes, which are enumerated by the FAG as well, does not even need a Land law, but may be directly levied if the municipal councils do so resolve (e.g. entertainment tax, charges for local services etc). The amount of these taxes is significant, although still less than what the municipalities get from the shares they hold in joint taxes.

10. What is the percentage of public spending in which each level of government –federal, state and local- incurs? How would these percentages change excluding the spending on defense,

education, health, pensions and administration of justice? How many civil servants or administrative officials have each level of territorial government? Which are the figures excluding the above-mentioned fields?

Federal State: expenditure in 2001 (closed accounts): 97,523.2 mio. Euro

Länder: expenditure in 2002 (budget estimate, without Vienna): 20,266.2 mio. Euro

Municipalities: expenditure in 2000 (closed accounts, without Vienna): 13,311.1 mio. Euro

Vienna: expenditure in 2002 (budget estimate): 9,262.5 mio. Euro

(Source: Statistik Austria. More recent figures not available.)

11. To what extent are the relationships between levels of governance regarding the tax system satisfactory? Which elements are more satisfactory? Which elements are less satisfactory? At present, is there any trend that should be noticed?

From the Länder perspective, it is not very satisfactory that most important taxes are federal taxes and that, as far as these taxes are joint taxes, their shares are too small. Although they have a theoretical right to “invent” all taxes which are not determined by the FAG, this amounts to nearly nothing, as all possible kinds of taxes are already taken account of by this Act. This is the more difficult, as the Länder are obliged to reach a significant budgetary surplus, without receiving more revenues from financial equalisation.

12. Can the federation establish the maximum or specified levels of state indebtedness or budgetary deficit? Can the federation establish the maximum wage of public officials (federal, state, local, etc.)?

As mentioned above (VIII.8), under the new stability pact of 2001 the Länder have to reach a fixed budgetary surplus, whereas the federal state may show a fixed deficit and the municipalities at least a balanced budget. The stability pact is an agreement under Art 15a B-VG, which means that it could not be formally forced upon the Länder by the federal state, since their consent was needed. Still, they were politically forced to do so, as the federal state would otherwise have imposed on them considerable penal sanctions, amounting to the demanded surplus quota, through the FAG.

In general, the maximum wages of Land and municipal civil servants may not be determined by the federal state. However, maximum wages of top political functionaries of the Länder and municipalities are determined by a specific Federal Constitutional Law on the Limitation of Public Functionaries' Wages.

13. Are there coordination mechanisms among the different levels of governance? If so, are there institutions with a political nature (for instance, an assembly of territorial representation –Senate-, governmental institutions -councils of prime ministers-, etc.)? Are there mechanisms of technical coordination? (i.e., deductions in quotes of subcentral taxes in central taxes, etc.).

See above VIII.1. The Länder discuss the drafted FAG and coordinate their position in various meetings, in which usually either the members of the Länder governments responsible for financial issues or the Land Governors meet. Traditionally, negotiations with the Federal Minister for Finances and the Associations of Municipalities and Towns were held in “big meetings”, where the financial representatives of all tiers met. The negotiations preceding the enactment of the last FAG, however, did not follow this tradition: The Länder and municipalities met separately to discuss what the Federal Minister for Financial Affairs had prepared and passed on to them via the Länder liaison office in the form of a written statement. Thus, the traditionally cooperative way of negotiating the FAG has more and more given way to a top-down approach and increasing isolation and particularisation of the tiers' political interests.

The transfer of shares in joint taxes is coordinated by the Federal Ministry for Financial Affairs.

IX. LANGUAGES

(Section to be addressed only in those systems where their multilingual reality is somehow legally recognized)

- 1. Does the Federal Constitution recognize more than one official language in the whole federal territory? If so, which are they? At the federal level, are they officially used on equal basis in the whole territory of the federation by the different authorities? Are they equally used in private? Why? Does the federal Constitution or law establish linguistic citizens' rights or duties?**

The official language of the Republic is German. However, there are 6 formally recognized minorities (Slovenes, Croats, Hungarians, Czechs, Slovaks, Roma) which traditionally live in the Länder Burgenland (Burgenland Croats, Hungarians, Roma), Carinthia (Carinthian Slovenes), Lower Austria (Slovaks), Styria (Hungarians, Slovaks, Styrian Slovenes), Upper Austria (Slovaks) and Vienna (Czechs, Hungarians, Roma and Slovaks). They have the right to use their own languages before the courts or administrative authorities. If a municipality in a certain area is populated by a certain percentage of persons belonging to a minority its official name must be written down both in German and the respective minority language. In certain areas of the Länder Burgenland and Kärnten law requires the establishment of schools where children belonging to a minority are taught in their own language.

All these rights are based on different sources of federal constitutional law (cf. Art 8 B-VG, State Treaty of St. Germain, State Treaty of Vienna, Minority School Acts for Burgenland and Carinthia). Individuals belonging to a minority may appeal to the Constitutional Court, if these rights have been violated.

- 2. Beyond recognizing of not more than one official language, does the Federal Constitution recognize the existence of other languages and the need of protecting them as well? Could you tell, approximately, the quantitative importance of these diverse linguistic communities?**

See above IX.1. According to the nation-wide census of 2001 the Slovene minority consisted of 17,953 Austrian nationals, the Burgenland Croat minority of 19,374 nationals, the Hungarian minority of 25,884 nationals, the Roma minority of 4,348 nationals, the Czech minority of 11,035 nationals and the Slovakian minority of 3,343 nationals. In quantitative terms, their numbers are low in relation to the total number of inhabitants, which is a little more than 8 million people.

- 3. Do state constitutions recognize official languages different from those recognized by the Federal Constitution? If not, are they allowed to do it? Are federal and state official languages on an equal footing? Can states establish linguistic duties to citizens and companies different from those established by the federation? Can states exclusively or mainly use an official language different from the one established by the federation as official?**

Art 8 B-VG provides that German is the official language of the Republic (as a whole). This means that the Länder constitutions must not provide any other official languages. Regarding minority language rights, those Länder in which minorities settle are entitled to establish these rights as far as this would not contravene federal constitutional law or the relevant federal law which was enacted under the federal state's main competence of minority protection. On account of the principle of mutual consideration, the Länder may – as a side-aspect – protect minorities in their own law in order to make the relevant federal law more effective.

- 4. Broadly speaking, which is the linguistic system regarding education?**

In principle, pupils are educated in the German language. However, in certain areas of the Länder Burgenland and Kärnten, federal constitutional law, which has been particularly enacted in order to protect their autochthonous minorities, requires the establishment of (elementary and grammar) schools where children belonging to a minority are taught in their own language.

5. To what extent are legislation and administrative practice adapted to the multilingual reality of the federation? To what extent are they the origin of conflicts between the different levels of governance or among the population? Are the different languages an important identity symbol of the state?

It is not really possible to speak of a “multilingual reality of the federation”, as German is the only general official language and, practically, by far predominant. Thus, the different minority languages are definitely no identity symbol of Austria.

In 2001 a conflict arose between the Constitutional Court and the right-wing Governor of Kärnten, as the Court had struck down a law which had provided that a municipality’s name had to be written down in a minority language if at least 25 % of local citizens belonged to this minority. The Court held that the percentage number was too high in order to come up to the obligations imposed on Austria by the State Treaty of Vienna. The Land Governor, however, felt disinclined to grant the Carinthian Slovenes any stronger rights. Apart from this recent case and notwithstanding the minority representations’ pressure for more promotion, minority issues form no typical source of conflicts between the levels of government or within the population.

X. GLOBAL ASSESSMENT AND ADDITIONAL COMMENTS

1. At present, how is the level of political decentralization generally assessed? What is your assessment?

Internationally, Austria is classified as a “real”, if weak, federal system. However, under several aspects it is not easy to discern whether it really goes much beyond a strongly regionalized system. Formally, all elements of a federal system are provided and protected by the federal constitution, but, in practice, turn out to be rather unsatisfactory (the major part of important competences belong to the federation, trend to “executive” federalism, political weakness of the Federal Assembly, centralistic system of financial equalization, limited ambit of the Länder constitutions etc). What may be even more alarming is the increasingly strong political trend towards centralism, which has not only prevented a “reform of federalism” that was particularly demanded by the Länder in the nineties, but, if the current political discussion continues, may even degenerate to an abolishment of key elements of federalism (above all, the legislative competences of Land parliaments) for alleged reasons of economy and expediency. The EU, which was once seen as the very chance of connecting accession with an internal reform of federalism, has further weakened the Länder’s position who increasingly appear to be mere administration machineries, implementing legislation either made in Brussels or Vienna. Endeavors to establish trans-border “European regions” have so far not gone much beyond vague political ideas and concepts.

Neither has the Austrian population shown much interest in this matter. The “reform of federalism”, although it appears as a medial topic from time to time, thus remains a controversial subject which is left to academic discussion and endangered by strong centralistic policies, which are not only traditionally backed by left-wing parties, but are increasingly supported from the Conservative side as well.

2. What are the main historical claims by states? To what extent are they satisfied?

Formally, they are satisfied in as far as the Länder voluntarily joined the new federal system after World War I and as the federal constitution vests them with the status of “autonomous” Länder within the federal system. See, however, X.1.

3. What are the risks and main opportunities for the development and consolidation of the system of political decentralization?

The Austrian federal system does not really need to consolidate – it rather has to be reformed. Nevertheless, a reform might be risky, since, as mentioned above, it is currently understood rather as a reform towards centralism, weakening the legislative and strengthening the administrative powers of the Länder. Joining the reform of federalism with a basic reform of the Austrian administration, which is being demanded as well, could be advantageous to the Länder, if federal bureaucracy would thereby be repealed. Instead, the more realistic option is that the need for administrative reform is seen as a vehicle to legitimate centralistic demands.

EU membership could be seen as favourable to the Länder only if the status of the European constitutional regions, such as the Austrian Länder, will be recognized formally by the EU, if these regions get more powers at the European level than hitherto and if trans-border cooperation between these regions is facilitated.

4. What are the main trends of development? Which is the likelihood of them coming true?

See above X.1 and X.3.

5. Generally, would you say that the system is becoming more centralized, decentralized or that it is in a relative equilibrium?

It is getting more centralized. See X.1.

6. Would you like to add any additional comment about the political decentralization of the federation that was not mentioned in the Questionnaire? Would you like to make any suggestion about the structure or the contents of it?

Some questions overlap (in particular, the chapter on taxation).

The term “federation” is not always used in the meaning explained in the introductory chapter.

Some important features of Austrian federal system cannot not be fully considered, as the questionnaire neglects the following issues:

co-operative federalism, which is a remarkably strong feature of Austrian politics and administration

trend to executive federalism (Land administration becomes much more important than Land legislation, loss of power of the Land parliaments)

federalism and the EU/European regionalism (Austrian experience)

7. Would you mind listing particularly remarkable literature -on the basis its prestige, depth, clarity, approach-, which allows to achieve a better knowledge of your federal system?

There is really a plethora of literature – for general bibliographical data see:

Peter Pernthaler/Nicoletta Bucher/Anna Gamper, *Bibliographie zum österreichischen Bundesstaat und Föderalismus*, Vienna (Braumüller) 1998.

One may particularly mention the Institut für Föderalismus, located at Innsbruck (www.foederalismus.at), which has published around 100 books and occasional papers on all issues of Austrian federalism.

For a general view on the constitutional framework of Austrian federalism see the following selection: Felix Ermacora, *Österreichischer Föderalismus*, Vienna (Braumüller) 1976.

Friedrich Koja, *Das Verfassungsrecht der österreichischen Bundesländer*, 2nd ed., Vienna/New York (Springer) 1988.

Karl Korinek/Michael Holoubek (eds.), *Österreichisches Bundesverfassungsrecht*, Vienna/New York (Springer) loose-leaf edition.

Heinz Mayer, *B-VG*, 3rd ed., Vienna (Manz) 2002.

Theo Öhlinger, *Der Bundesstaat zwischen Reiner Rechtslehre und Verfassungsrealität*, Vienna (Braumüller) 1976.

Theo Öhlinger, *Verfassungsrecht*, 4th ed., Vienna (WUV) 1999.

Peter Pernthaler, *Die Staatsgründungsakte der österreichischen Bundesländer*, Vienna (Braumüller) 1979.

Peter Pernthaler, *Österreichische Finanzverfassung*, Vienna (Braumüller) 1984.

Peter Pernthaler, *Kompetenzverteilung in der Krise*, Vienna (Braumüller) 1989.

Peter Pernthaler (ed.), *Auswirkungen eines EG-Beitrittes auf die föderalistische Struktur Österreichs*, Vienna (Braumüller) 1989.

Peter Pernthaler, *Der differenzierte Bundesstaat*, Vienna (Braumüller) 1992 (also published in Spain: *El estado federal asimétrico*, Oñati [IVAP] 1999).

Peter Pernthaler, *Raumordnung und Verfassung*, 3 vols., Vienna/New York (Springer) 1975, Vienna/New York (Springer) 1978, Vienna (Braumüller) 1990.

Heinz Peter Rill/Heinz Schäffer (eds.), *Bundesverfassungsrecht*, Vienna (Verlag Österreich) loose-leaf edition.

Karl Weber, *Die mittelbare Bundesverwaltung*, Vienna (Braumüller) 1987.