



Europeanizing Legislation

Law Making in EU Member States: The Case of Austria

Marcelo Jenny & Wolfgang C. Müller

January 2007

**Institut für Staatswissenschaft
Universität Wien
Hohenstaufengasse 9
1010 Wien
wolfgang.mueller@univie.ac.at**

Research questions

The "Europeanizing Legislation" project started out to answer three descriptive questions and several analytical questions, with the answers to the former allowing us to address the latter. The three descriptive questions are:

- (1) How important is the imprint of the European Union on the legislation of a member state? This question breaks down in a quantitative and a qualitative one. Thus, we want to know to what extent the current legislation is affected by EU rules and to what extent the legal order is "Europeanized". And we want to know how important the Europeanized rules are.
- (2) Is there a difference in the legislative process between national and EU-related bills? And, if there is a difference, what is it?
- (3) With regard to the more recent legislation, have the government bills been subject to Gender Mainstreaming?¹

1) Clearly, the Gender Mainstreaming research question is a more narrow one and only indirectly related to the issue of Europeanization, however, a comprehensive study of the legislation process was too good a chance to address that topic to left out.

Our first analytical question is driven by normative concerns. It relates to the claim that politics in the European Union suffer from a "democratic deficit".

- (1) Are issues that are decided at the European level sufficiently deliberated at the national level?

The remaining analytical questions are of a positive nature:

- (2) What is the relevance of the "European dimension" for party competition?
- (3) To the extent that purely national legislation and EU-related legislation receive a different treatment in the political process, what explains the difference?

Comparative perspectives

An important function of a single-country study like the present one is to explore the potential for comparative studies. Given the pioneer character of the project it had to address a substantial number of conceptual and methodological issues in order to becoming able to answering the questions just listed. The answers provided here apply to Austria and cover the entire period of its membership in the EU plus the half-decade before entry. From the very beginning the project's aim was to extend this research to other member states. In order to reach that goal the project has engaged in community building among political science colleagues in other member states.

The major perspective for joint research is an application for an Integrated Project under the 7th Framework Programme of the EU. Such an application is agreed in general terms. Any such attempt requires preparatory community building (a purpose served by the conferences organized in the confines of this project) and academic preparation (a purpose served by our substantive research in this project and the substantive research of some of the conference participants). The "grand perspective" of an Integrated Project is paralleled by bi- and trilateral cooperations. A Swedish team (Torbjörn Bergman, Hans Hegeland) is preparing for an application for the national funding of research that, like the Austrian study, links "upstream" and "downstream" parliamentary deliberation and decisions on EU affairs. This application is closely tied to the design of our project. A Belgium-Luxembourg team (Lieven De Winter and Patrick Dumont) has already sent in a project application that aims at replicating parts of the research of the present study for these countries. Another cross-national cooperation with Dutch and Danish scholars on the scope of Europeanization of national regulation has been completed and, in the form of five journal articles, is currently under review with a leading international journal. We are optimistic that these efforts will be fruitful.

Data collection

The project "Europeanizing Legislation" has involved a major data collection effort. It builds on a wealth of data that was specifically collected for the purpose of this study:

- Legislative output data at the European level
- Legislative output data at the national level
- Legislative process data at the European level
- Legislative process data at the national level
- Parliamentary control data at the national level
- Interviews with 133 people closely involved in the national and, to a lesser extent, European legislative process, including MPs, civil servants, and interest group representatives
- Political communication attempts of national actors during the law-making process (OTS press releases)
- Judicial review data

Measuring legal Europeanization

We identify EU-related norms by drawing on both national and EU sources. For each of our EU-related national norms one or more of the following characteristics apply: (1) a specific reference to EU rules in the introductory or final clause of the law; (2) a reference to the CELEX number in the head information of the law when published in the official law gazette (Bundesgesetzblatt) (which is also available in electronic form at the law information system of the Federal Chancellery, RIS); (3) information by national authorities that the respective law implements EU rules and has been reported to the Commission; (4) a reference to the need to conform to EU rules in the official materials accompanying government bills when they are introduced to parliament (Erläuternde Bemerkungen); (5) information extracted from the parliamentary debates; (6) data from the Eur-Lex database of the EU (sector 7). We have decided for such a broad strategy of data collection as, for various reasons, no single source is perfect. Nor are the individual sources equally reliable for each period. At the national level reporting on implementation measures was largely left to the individual government department in the early period. This allowed different ministries adopting different strategies, leading to inconsistencies in the reporting and caused some problems with regard to Austria's transposition record. In 2003 a change of the jurisdictions of the government departments put the Federal Chancellery in charge of coordinating the implementation of EU directives and the reporting of the implementation measures. The Vienna data come from the Land official law gazette, Eur-Lex, and from information kindly provided by the Vienna political documentation department.

The Europeanization of law-making

Jacques Delors speaking to the European Parliament in July 1988, predicted that by 1998 the European Community would be the source of 80 per cent of economic legislation and perhaps even also fiscal and social legislation governing EU member states. When the famous Delors statement was made, Austria was not a member of the EU, but it was in 1998. Of course, this prediction is a perhaps biased speculation of a politician about real world developments and as such of limited relevance. Yet, it is important as it raises an important substantive issue - the scope of legal Europeanization - and because of its perception by important actors, who have often taken it as an accurate description of reality.

As a 1995 accession country, Austria faced the *acquis communautaire* as it had accumulated over more than three decades, including the single-market programme. A latecomer certainly faces greater need for adaptation than countries that participated from the beginning or significantly longer in the process of EU regulation. The late accession date puts Austria in the same category as Finland and Sweden. Yet, Austria is a federal system and belongs to a different sub-group of legal culture: the German civil law tradition with strong legal positivism.

We have first addressed the impact of EU membership on current rule-making, meaning legislation and delegated legislation enacted since Austria approached the EU. The country's positivist legal culture manifests itself in a share of proper legislation among EU-related norms that is relatively high compared to other member states. As a relative latecomer to the EU, Austria faced a substantial *acquis communautaire* that needed to be adopted before membership. It is, therefore not astonishing that EU-related laws constituted a greater share of legislation in the immediate pre-

membership period than in any year thereafter. The share of EU-related legislation peaked at 45 percent before membership, the annual average of the membership period is almost 25 percent. EU-related rules constitute a much smaller share of delegated legislation - about 11 percent. All this is a far cry from Delors' 80 percent prediction that has to a large extent shaped the perception of Austrian political actors. The gross figures of new enactments suggest that EU-membership has slightly increased the amount of legislation, but clearly EU-related legislation does not come on top of the traditional level of national legislation. Indeed, the majority of laws classified as 'EU-related' do not contain EU rules exclusively but also norms of domestic origin.

Figure 1:
Number of National and EU-related laws and government decrees

Sources: Own data calculated from the Legal Information System and Eur-Lex database

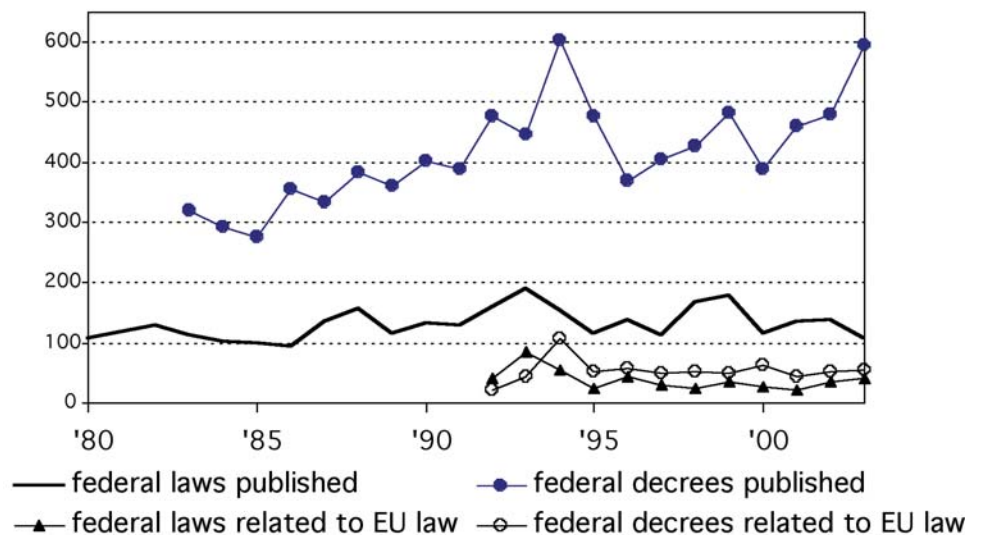


Figure 1 contains proper legislation and delegated legislation in the form of federal decrees. In our observation period the yearly number of published decrees varied between a low of 275 in 1985 and a high of 602 in 1994. In each year the number of decrees exceeded the number of laws by several times. Measured over the period 1983-2003 the relation in the number of federal decrees to federal laws is 3.1 to 1. It has slightly risen to 3.2 to 1 for the membership period (1995-July 2003). Yet, only a marginal share of government decrees is EU-related. Nevertheless, government decrees outnumber laws as a means of transposition of EU regulations in all but the first two years of our time series. The peak in EU-related decrees lagged the peak in EU-related laws by a year. This may reflect the constitutional need for delegating the specific legislative powers to the government by law before the executive can resort to issuing decrees in order to transpose EU rules.

The Europeanization of the legal order

Europeanizing legislation, of course, over time should lead to the Europeanization of the legal order. This effect is what constitutes the core of Delors' statement. Our check on the Austrian legal order for mid-2003 shows that one out of ten laws in force and 1.4 out of ten government decrees are EU-related. Of course, policy areas differ widely, but nowhere the share of EU-related norms is much above a quarter (laws) or a third (decrees). Again, this suggests that the expectations about legal Europeanization were considerably exaggerated. Yet, the Austrian legal order is a very diverse universe, comprising landmark legislation and politically irrelevant pieces, comprehensive laws and minute revisions. We have therefore introduced another measure: original laws, i.e. laws regulating a topic for the first time. Collectively, the 1520 original laws constitute the core of the Austrian legal order. 42 percent of the original laws are affected by EU rules. Again, we have found important differences between policy areas. Predictably, a sector including agriculture, health, and environment has the greatest share of EU-related original laws: 53 percent. Other 'usual suspects' - including labour law and transport - have shares well above 40 percent and none is below 21 percent. Of course, the lumping together of more specific policy areas in large sectors in our sources affects our results. We have also found Europeanized laws to contain more regulatory content than purely domestic legislation (as measured by the number of words). Thus, our research suggests that Europeanization, while missing some inflated expectations, is indeed a major feature of today's legal order in Austria. We are confident that this also holds true for the other member states.

Europeanized legislation

Apply objective and subjective criteria we distinguish Europeanized from purely domestic legislation. EU-related laws tend to be longer than domestic ones and they are much more likely to be original laws (Stammgesetze). Our interviews with MPs suggest that Austrian actors have a differentiated view of EU-influenced legislation. In some policy areas EU membership is seen as mostly beneficial: trade, competition, education & research, capital mobility, and freedom of labour receive a large share of positive evaluations and hardly any negative ones. Transport constitutes the opposite end: no single MP sees improvements from the influence EU rules exercise on legislation or policy more generally. The EU impact on labour relations and environment is also evaluated mostly in negative terms. While parties take different positions on different policy areas, their overall evaluations of the EU impact on Austrian legislation is very similar and on the positive side.

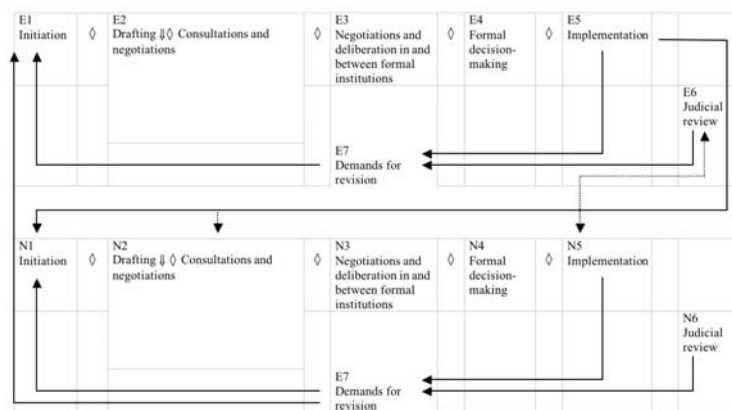
The legislative process in the multi-level European polity

Figure 2 captures the legislative process at the European and national levels in functional (rather than institutional) terms. Note that specific actors are not confined to one of these levels. Indeed, national actors and institutions impinge on the European process, as do European actors and institutions on the national process. The main function of Figure 2 is to map out the politics of the multi-level European legislation process. As the focus of our study is the Europeanization of national legislation, our research has mainly concentrated on the national legislative cycle.

Yet, it would be highly misleading to simply ignore the involvement of national actors in the European legislative cycle, as it can provide crucial information about the preferences of national actors. These may be well aligned. Then we can speak of a national position and national interests. However, this is not necessarily the case. National actors of different ideological convictions, economic interests, and with diverging expectations of future developments are likely to take different and sometimes conflicting positions with regard to decisions at the European level. Often, the division lines between different social groups or economic sectors are more important than those between different nations. Thus, we do not assume that national actors necessarily pursue a common or coordinated strategy at the European level. Hence, different government departments, interest groups, and party delegations may have and follow through their own battle plan in rule-making at the EU level.

The European Legislative Cycle

Figure 2:
 The double legislative cycle in the European Union (stylized version)



The National Legislative Cycle

Our research shows that domestic debate on EU impact on legislation occurs mostly only after the EU rules have gone into force and therefore can no longer be influenced but need to be transposed. At the same time the voting record of Austria in the Council of Ministers suggests that cases of major disagreement between the national government and the majority of EU member states in making EU rules are relatively rare. Yet, the position advanced by Austria in EU bodies is not necessarily one shared by the parliamentary opposition.

Our reconstruction of the legislative processes devoted to transposing EU rules shows that it is mostly up to civil servants to initiate new domestic legislation responding to new EU rules. Those engaged in the relevant negotiations at the EU level are particularly important in that respect. Typically, the need for revisions of the Austrian legal order is recognized before the Council of Ministers has decided. When the EU rules are made, member states are free to choosing the method of transposition. This, according to our interviewees, is almost entirely a technical matter. Hence the Constitution and the existing laws in a policy area determine what will become a law and therefore be subjected to parliamentary deliberation and decision making, and what will remain largely unnoticed by the broad public as secondary legislation.

The interviews suggest that our three groups of “legislators” - civil servants, interest group representatives, and MPs - differ quite considerably with regard to estimating what leeway EU rules leave to domestic politics, with civil servants being most conservative and politicians most optimistic. Likewise, the three groups distinguish themselves in their attitudes towards risk-taking, with again the civil servants being most concerned about the timeliness and correctness of transpositions. To be sure, politicians also believe in these virtues, but seem more ready to test the limits of the national rooms for manoeuvre when politically important or hot issues are at stake.

Once EU demands are transformed into ministerial draft bills they enter the formal consultation procedure. Our research has not identified significant differences in the length of that process between EU-related and purely domestic draft bills. The same applies to the number of opinions issued on draft legislation in that procedure. In contrast, EU-related legislation takes longer to get through Parliament. EU-related legislation also gets more time allocated for plenary debate and attracts more speakers. When we control for the substantive relevance of legislation (as measured by our quantitative measure of regulatory content), this holds for the number of speakers but not for the length of debates. However, we note that differences between legislative periods exist that can be related to the party-political constellation. With regard to parliamentary voting we find no overall pattern distinguishing EU-related legislation from purely domestic one. Yet, again we find differences between the various legislative periods that can be explained by the party composition of government, the general EU attitudes of the parties, and government-opposition relations in general.

Finally, our review of parliamentary oversight suggests that EU-influenced government rule application receives a fair share of attention. In the two legislative periods that we have been able to analyze, 25 and 29 percent, respectively, of the parliamentary questions were concerned with EU-related matters. That roughly equals the share of EU-related legislation.

Gender Mainstreaming in legislation

The "Europeanizing Legislation" project has provided a unique opportunity to probe into the question to what extent Gender Mainstreaming impacts on legislation. Responding to a constitutional pledge the Austrian Cabinet has issued specific guidelines for Gender Mainstreaming to be taken into consideration in law-making. Accordingly the Gender Mainstreaming perspective has to be applied to all government-sponsored bills going through the obligatory consultation procedure (the Begutachtungsverfahren) in which public authorities and interest groups can issue their concerns and comments. The Cabinet has also decided that the gender-specific analyses and their results have to be documented in the papers accompanying the bills. These guidelines apply equally to nationally-induced and EU-induced legislation.

In the 22nd LP (2002-2006), the first one to which these rules apply, 372 government bills were introduced to parliament until 25 July 2006. Of those we have been able to analyze the relevant accompanying papers in 369 cases. Yet, in only 16 cases (4 %) the Gender Mainstreaming perspective was even mentioned. The majority of these legislative proposals denied that a Gender Mainstreaming perspective could be applied reasonably to their subject. Counting generously, the Gender Mainstreaming perspective had a positive effect, i.e. a recognizable effect on the substantive outcome, in four legislative proposals.

Clearly, legislation is not the only site where Gender Mainstreaming can be applied, and indeed many activities are currently conducted at the administrative level. We also notice that it is still relatively early in the game, as Gender Mainstreaming has not been introduced before 2002 and the providing of detailed guidelines has been delayed for some unfortunate reason. Yet, it is fair to conclude that legislation has not been exposed to much of Gender Mainstreaming.

Conclusion At that point we can briefly return to the questions posed at the outset. We hope that we have provided more convincing answers to our first question (“How important is the imprint of the European Union on the legislation of a member state?”) than have been available so far. With regard to our second main question (“Is there a difference in the legislative process between national and EU-related bills?”) we have identified a number of important similarities and differences. In the full report we have suggested a few tentative answers to the “Why” question that are rooted in party politics. We will continue to explore this question for the purpose of publication. On the basis of these answers to the first two descriptive questions, tentative as they may still be, we can address the three analytical questions. Again, our answers will remain provisional, but at least they will suggest the direction we will take when approaching definitive answers in the course of shaping the project’s output for publication.

Our question - inspired by deliberative democracy concerns - whether issues decided at the European level are sufficiently deliberated at the national level is a qualified “yes”. It is a “yes” because Austria processes a large share of EU rules through Parliament (rather than resorting to secondary legislation, as most member states do) and because the behavioural record we have marshalled here suggests that a fair amount of attention is given to these rules throughout the legislative process. The “yes” is qualified because we are not convinced that the amount of attention given to these rules at the decision-making stage at the EU level and afterwards, when they need to be transposed, is optimal balanced. We also notice a trend towards the use of government decrees rather than laws.

The quick answer to the second analytical question (“What is the relevance of the ‘European dimension’ for party competition?”) is “quite considerable”. That can be inferred from the differences in parliamentary voting on European and domestic legislation and changing patterns over time and under different party-political constellations. A more elaborated answer will require more sophisticated analyses that are still ahead of us. The same applies to the question what explains the differences in the treatment of purely national legislation and EU-related legislation in the political process. In this project we have collected the data to control for many potentially important factors such as objective relevance of legislation, policy area, etc. Clearly, pushing the project to the shape of publication will require some more work, but all the foundations have been laid for that.

In the first place, “Europeanizing Legislation” is a pioneering study that contributes to the growth industry of “Europeanization of the nation state” research. Yet, in order to separating out the effects of EU membership, we have been forced to establish a baseline for comparison, i.e. the legislative process in general. In so doing “Europeanizing Legislation” provides the most comprehensive picture of the legislative process that is available in any member state of the EU.