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The Liechtenstein Constitutional Court and the Primacy of EEA Law

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I. INTRODUCTION

Accession to the Agreement on the European Economic Area (EEA)[1] was a turning point for Liechtenstein in economic, political and legal terms. Although Liechtenstein was already familiar with the need to adopt foreign law by virtue of the 1923 Customs Union Treaty with Switzerland[2] – so, here too, an anniversary – the multilateral EEA represents a different dimension with a far greater dynamic than previously encountered in connection with the Customs Union Treaty.[3] This chapter deals with a crucial legal aspect of Liechtenstein's accession to the EEA, namely the recognition and enforcement of the primacy of EEA law over domestic law and the central role played by the Liechtenstein Constitutional Court (Staatsgerichtshof (StGH)) in this regard.

II. THE PRIMACY OF EEA LAW

A. The Principle: Primacy of EEA Law

Pursuant to Article 7 of the EEA Agreement, legal acts referred to in the annexes to the Agreement or in decisions of the EEA Joint Committee are binding on the

[1] Agreement on the European Economic Area of 2 May 1992, Liechtenstein Law Gazette (LGBl) 1995 No 68.

[2] Treaty of 29 March 1923 between Switzerland and Liechtenstein concerning the accession of the Principality of Liechtenstein to the Swiss customs territory (Zollanschlussvertrag (ZV)), LGBl 1923 No 24. Previously, Liechtenstein had already been connected to the Austro-Hungarian Empire by the Customs Treaty of 1852; see G Baur, 'Dynamische Rechtsübernahme im EWR und der durch die Landesverfassung vorgegebene Rahmen' in H Hoch, C Neier and PM Schiess Rütimann (eds), *100 Jahre liechtensteinische Verfassung* (Schaan, Verlag der Liechtensteinischen Akademischen Gesellschaft, 2021) 315, 317 with further references.

[3] The difference is particularly due to the sheer extent of the EEA law to be adopted. However, from the perspective of the loss of sovereignty, Liechtenstein's link through the Customs Union Treaty is even closer due to the automatic adoption of law in accordance with Art 4 ZV (in contrast to 'mere' dynamic adoption in accordance with Arts 102 and 103 EEA); see Baur (n 2) 321f.

contracting parties and must be transposed into domestic law. Thus, Article 7 EEA presupposes, at least implicitly, the primacy of transposed EEA law over the domestic law of the EEA/EFTA States. Indeed, it is undisputed that transposed EEA law takes precedence over domestic laws.[4] However, the relationship between the EEA Agreement and national constitutional law is controversial. In the other two EEA/EFTA States, Norway and Iceland, national constitutional law takes precedence over any EEA law.[5] In contrast, the Liechtenstein Constitutional Court, in line with the view taken by commentators in the Liechtenstein legal literature, has always qualified the EEA Agreement as amending the Liechtenstein Constitution, like the European Convention on Human Rights (ECHR).[6] Hence, according to StGH case law, EEA fundamental freedoms can be invoked by way of individual constitutional complaints in the same way as domestic fundamental rights.[7] However, to date, this case law has not had an explicit constitutional basis, nor has this new review power of the Liechtenstein Constitutional Court even been provided for in legislation. In contrast, following Liechtenstein's accession to the ECHR in 1982 and to the International Covenant on Civil and Political Rights (ICCPR) in 1999, corresponding amendments to the Constitutional Court Act were made.[8] Nevertheless, in the legal literature, criticisms have been repeatedly voiced that these additional legal competences for the Liechtenstein Constitutional Court in relation to the ECHR and the ICCPR lack a constitutional basis. Therefore, it is all the more surprising that the analogous case law of the Liechtenstein Constitutional Court concerning EEA law hardly met with any criticism of that kind, even though not even a basis in legislation had been created for the review power.[9]

Contrary to the view taken by some legal commentators,[10] the Liechtenstein Constitutional Court has also never questioned the fact that the primacy of EEA law

[4] See also Protocol 35 to the EEA Agreement. Due to Liechtenstein's adherence to the doctrine of monism in international law (see the text to n 22 below), the Liechtenstein Constitutional Court does not clearly distinguish in its case law on the primacy of EEA law whether or not the relevant EEA legislation has been transposed into national law.

[5] See P Bussjäger and C Frommelt, 'Europäische Regulierung und nationale Souveränität. Praxisfragen zur Übernahme europäischen Rechts ausserhalb der EU' (2017) *Liechtensteinische Juristen-Zeitung* 40, 42.

[6] First in StGH 1998/2, LES 1999, 169 (171 para 1.4); see also StGH 2006/94 [2.1] (www.gerichtsentscheide.li) and B Hammermann, 'Mehrebenen im Grundrechtsschutz – die liechtensteinischen Verfassung und der EWR' in Hoch, Neier and Schiess Rütimann (n 2) 291, 294. In the legal literature, commentators sometimes accord EEA law constitutional rank; see P Bussjäger, 'Einführende Bemerkungen zur liechtensteinischen Verfassung' in Liechtenstein-Institut (ed), *Kommentar zur liechtensteinischen Verfassung* (Bendern, Liechtenstein Institut, 2016) para 156.

[7] StGH 1998/2, LES 1999, 169 (171 para 1.4); for the effects of the constitution amending character of the EEA Agreement on the judicial review powers of the Liechtenstein Constitutional Court, see section III.B below.

[8] See the respective amendments of Art 15(2) pursuant to LGBl 1982/057 and LGBl 1999/046.

[9] See, however, A Kley, 'Die Beziehungen zwischen dem Liechtensteinischen Staatsgerichtshof und den übrigen einzelstaatlichen Rechtsetzungsorganen, einschliesslich der diesbezüglichen Interferenz des Handelns der europäischen Rechtsprechungsorgane' (2004) *Europäische Grundrechte-Zeitschrift* 43, 56. But Kley also primarily only criticises the lack of a legal basis; see also Hammermann (n 6) 294.

[10] See the references in C Baudenbacher, 'Das Vorabentscheidungsverfahren im EFTA-Pfeiler des EWR' in H Schumacher and W Zimmermann (eds), *Festschrift für Gert Delle Karth – 90 Jahre Fürstlicher Oberster Gerichtshof* (Vienna, Jan Sramek Verlag, 2013) 1, 4f; C Baudenbacher, 'Reciprocity' in C Baudenbacher (ed), *The Fundamental Principles of EEA Law* (Cham, Springer, 2017) 44, 51f.

includes the case law of the EFTA Court. Accordingly, the Liechtenstein Constitutional Court considers not only the opinions of the EFTA Court as binding for the domestic proceedings concerned, but also that the case law of the EFTA Court must generally be respected as part of EEA law.[11]

B. The Liechtenstein Constitutional Court's Reservation to the Primacy of EEA Law

However, the Liechtenstein Constitutional Court has formulated a reservation to the primacy of EEA law. Accordingly, it would exceptionally carry out a review of EEA law if a violation of 'fundamental principles and core contents of the fundamental rights of the national constitution' were suspected.[12] In doing so, the Liechtenstein Constitutional Court relied on a reservation that the Swiss Federal Council had formulated in the *travaux préparatoires* for Switzerland's accession to the EEA, which was subsequently rejected in a referendum. The wording of the Swiss and Liechtenstein reservations closely follows that of the German Federal Constitutional Court's reservation in relation to EU law.[13] The EEA reservation formulated by the Liechtenstein Constitutional Court was thus embedded in similar and also rather vague reservations expressed not only by courts in Germany, but also in numerous other EU Member States.[14] In the leading case StGH 1998/061, the Liechtenstein Constitutional Court already emphasised that this reservation would hardly ever be applied, especially since the need to protect fundamental rights is also recognised by EEA law.[15] Nonetheless, this ruling of the Liechtenstein Constitutional Court has given rise to a discussion as to whether this reservation can be qualified as a barrier to material constitutional amendments at the domestic level, for if domestic fundamental values are to be considered as barriers to EEA law, they must also be taken into account for constitutional amendments.[16]

[11] StGH 2013/044 [3.4.2]; StGH 2011/200 [3.2] (both www.gerichtsentscheide.li); H Wille, *Die liechtensteinische Staatsordnung: Verfassungsgeschichtliche Grundlagen und oberste Organe* (Schaan, Verlag der Liechtensteinischen Akademischen Gesellschaft, 2015) 704, fn 565.

[12] See especially StGH 1998/061, LES 2001, 126 (130, para 3.1), available at: www.gerichtsentscheide.li and excerpted in *Schweizerisches Zentralblatt für Staats- und Verwaltungsrecht* 1999, 585; see also StGH 2021/099 [2.3]; StGH 2021/030 [2.4.2]; StGH 2006/094 [2.1] (all www.gerichtsentscheide.li); H Hoch, 'Grundprinzipien und Kerngehalte der Grundrechte der Landesverfassung' in Hoch, Neier and Schiess Rütimann (n 2) 51, 53f with further references to case law.

[13] BVerfGE 73, 339 (*Solange II*): 'protection of fundamental rights that the Basic Law regards as indispensable', 'essential content of fundamental rights'; BVerfGE 123, 267 (Lisbon): 'inalienable core content of the constitutional identity of the Basic Law'.

[14] See Hoch (n 12) 55f with numerous references.

[15] First recital in the preamble to the EEA Agreement; StGH 1998/061, LES 2001, 126 (130 para 3.1).

[16] See on this discussion Hoch (n 12) 57. Although the reservation formulated by the Swiss Federal Council in its governmental message (Botschaft) on Switzerland's EEA accession was deprived of its intended purpose, as mentioned above, due to Switzerland's non-accession to the EEA, this reservation was referred to – as was the case in Liechtenstein, albeit 20 years later – in the context of the discussion on barriers to material constitutional amendments. See Hoch (n 12) 70 with further references.

C. The Constitutional Revision of 2003

In 2003, a constitutional revision came into force in Liechtenstein,[17] which – at least based on its wording – had far-reaching consequences for the position of EEA law in the domestic hierarchy of norms. According to the revised version of Article 104(2) of the Liechtenstein Constitution (Landesverfassung (LV)), the Liechtenstein Constitutional Court now has the additional competence to examine the constitutionality of international treaties, so that consequently international law now only has subconstitutional rank. Nevertheless, the Liechtenstein Constitutional Court has maintained its previous case law, according to which both constitutional and international fundamental rights can be invoked in individual complaint procedures and thus international fundamental rights have de facto constitutional rank as well.

In reaching this conclusion, the Liechtenstein Constitutional Court relied on the fact that in the new (recast) Constitutional Court Act (Staatsgerichtshofgesetz (StGHG)), enacted in the same year as the constitutional revision (2003), several new individual rights anchored in international treaties were added as protected rights.[18] Furthermore, the Liechtenstein Constitutional Court took account of the fact that the new Constitutional Court Act had been passed by the parliament and approved by the prince only a few months after the constitutional revision. Accordingly, 'the legislative author of the constitutional revision and of the new Constitutional Court Act are identical, so that it cannot be presumed that the provision in the Constitutional Court Act [which confirms the equivalence of constitutional and international human rights] contradicts the will of the constitutional legislator'.[19] Thus, the Liechtenstein Constitutional Court was able to temper the primacy of the Constitution over international law, provided for in the wording of Article 104(2) LV. However, with regard to EEA law, there was an additional problem, namely that the provisions of the Constitutional Court Act did not reflect the Liechtenstein Constitutional Court's equal treatment of EEA fundamental freedoms and national fundamental rights. To that extent, the Liechtenstein Constitutional Court relied on the government's argument in the *travaux préparatoires* for the new Constitutional Court Act: namely, that it was the government's intention that the new Constitutional Court Act should not affect previous Liechtenstein Constitutional Court practice regarding EEA fundamental freedoms.[20] Thus, the Liechtenstein Constitutional Court was able to preserve its case law on the primacy of EEA law, notwithstanding the constitutional revision of 2003 – albeit with reasoning that was doctrinally somewhat 'rough'.[21]

[17] LGBl 2003 No 186.

[18] See Art 15(2) StGHG (LGBl 2004 No 32). These treaties are the two conventions against racial and gender discrimination; the Convention against Torture, and the Convention on the Rights of the Child.

[19] StGH 2004/045 [2.1]; StGH 2005/089 [4] (both www.gerichtsentscheide.li); see P Schiess, *Die Stellung der EMRK in Liechtenstein* (Bendern, Liechtenstein-Institut, 2019) 31; Wille (n 11) 422; TM Wille, *Liechtensteinisches Verfassungsprozessrecht* (Schaan, Verlag der Liechtensteinischen Akademischen Gesellschaft, 2007) 69.

[20] See Stellungnahme der Regierung (Government Statement) of 4 November 2003 (BuA No 95/2003) 16f.

[21] See StGH 2006/094 [2.1] (www.gerichtsentscheide.li); *cf* Hoch (n 12) 82f, especially fn 123.

D. Case Law of the Liechtenstein Constitutional Court on the National Implementation of the Primacy of EEA Law

As already mentioned, the fact that the primacy of EEA law over national law is largely recognised in Liechtenstein does not determine how EEA law is actually applied. According to scholarly writing and case law, Liechtenstein adheres to monism in international law.[22] Accordingly, for international law, and therefore also for EEA provisions, no act of implementation into national law is required if a provision is directly applicable (ie, 'self-executing' norms). Nonetheless, Article 7 EEA requires that EEA norms be formally incorporated into Liechtenstein's legal system in accordance with the procedure laid down in this provision. In this regard, the EEA (and even less so the EU) bodies do not have any autonomous legislative powers vis-a-vis the EEA/EFTA States.[23]

Overall, Liechtenstein hardly faces any constitutional problems in enforcing the precedence of EEA law over national law – unlike the two other EEA/EFTA States, Norway and Iceland, which maintain a dualist approach to international law.[24] However, a controversy also arose in Liechtenstein in connection with the question – in the light of the power of the Liechtenstein Constitutional Court to review the legality of legislation – of how to deal with domestic legislation that violates EEA law. Furthermore, in its recent judgment in *RS*, the EFTA Court held that the Liechtenstein Constitutional Court's exercise of its power of judicial review had violated EEA law.[25] These issues are discussed in more detail below.

III. THE POWER OF THE LIECHTENSTEIN CONSTITUTIONAL COURT TO REVIEW THE LEGALITY OF LEGISLATION AND THE PRECEDENCE OF EEA LAW

A. Controversy over Domestic Provisions that Violate EEA Law

The trigger for this controversy was a 2006 ruling of the Liechtenstein Administrative Court (Verwaltungsgerichtshof (VGH)). In this ruling, the Liechtenstein Administrative Court relied on an EEC directive that was directly applicable under Liechtenstein's monistic approach and the court disregarded a Liechtenstein statutory provision that contravened it.[26] From the perspective of EEA law, this is permissible because directly applicable EEA law displaces conflicting national law without further ado. However, a controversy arose among legal scholars as to whether this approach was permissible in the light of the Liechtenstein Constitutional Court's function to review the legality

[22] See, eg, StGH 2013/196 [2.2.1] (www.gerichtsentscheide.li) with further references.

[23] See StGH Opinion 1995/014, LES 1996, 119 (122f para. 2.1); P Bussjäger, 'Kommentar zu Art. 8 LV' in Liechtenstein-Institut (n 6) para 108; C Frommelt, 'Liechtenstein and the EEA' in F Arnesen, HH Fredriksen, HP Graver, O Mestad and C Vedder (eds), *Agreement on the European Economic Area: A Commentary* (Baden-Baden, Nomos, 2018) 35, 46, para 38; Hammermann (n 6) 294; Baudenbacher, 'Reciprocity' (n 10) 44; Bussjäger and Frommelt (n 5) 40f.

[24] See Bussjäger and Frommelt (n 5) 40f.

[25] Case E-11/22 *RS*.

[26] VGH 2005/94, LES 2006, 300 para 29.

of legislation or, more fundamentally, whether national law could play a role in this context at all. The following section first presents the function of the Liechtenstein Constitutional Court to review the legality of legislation and its role in ensuring the precedence of EEA law, before addressing the question of how properly to deal with a domestic legal rule which violates EEA law.

B. The Power of the Liechtenstein Constitutional Court to Review the Legality of Legislation

The Liechtenstein Constitutional Court[27] is a specialised constitutional court modelled on the Austrian Constitutional Court.[28] In accordance with the Austrian model of constitutional jurisdiction, which was significantly shaped by Hans Kelsen, the Liechtenstein Constitutional Court has a monopoly on reviewing the legality of legislation (concentrated constitutional jurisdiction). In contrast, constitutional courts established in an earlier era, starting with the US Supreme Court and later the Swiss Federal Court, have additional functions as the final instances in ordinary matters; moreover, in those jurisdictions, lower courts are also authorised to review the legality of legislation (so-called diffuse constitutional jurisdiction). Finally, what is characteristic of the Kelsenian constitutional court is the fact that, due to its competence not only to determine the unconstitutionality of laws, but also to formally repeal them, it becomes an actual 'negative legislator'.[29]

The Liechtenstein Constitutional Court has, pursuant to Article 104(2) LV, a comprehensive abstract and concrete function to review the legality of legislation: from the outset, this function has pertained not only to laws, but also to ordinances (Articles 18 and 20 StGHG).[30] In individual complaint proceedings the Liechtenstein Constitutional Court can examine *ex officio* a provision that is relevant to the decision in the specific case, but such examination can also be 'suggested' by the parties to the proceedings. A concrete review of legality can also be initiated by a court through the staying of proceedings and referring a provision that it has to apply to the Liechtenstein Constitutional Court for a review of its constitutionality (Articles 18(1)(b) and (c), 20(1)(a) and (b), and 22(1) StGHG). A request for an abstract review of the legality of laws can be made at any time by the government or a municipality (Article18(1)(a) StGHG) and in relation to ordinances by 100 listed voters within one month of the date of publication in the Legal Gazette (Article 20(1)(c) StGHG).[31] The Liechtenstein

[27] The Liechtenstein Constitutional Court consists of five regular and five substitute judges. One regular and one substitute judge traditionally have Swiss and Austrian nationality, respectively. The Constitutional Court has been in continuous operation since 1926; see H Hoch, 'Verfassungsgerichtsbarkeit im Kleinstaat – das Beispiel Liechtenstein' (2021) *Zeitschrift für öffentliches Recht* 1219, 1223f with further references.

[28] See A Gamper, 'Constitutional Borrowing from Austria? Einflüsse des B-VG auf ausländische Verfassungen' (2020) *Zeitschrift für öffentliches Recht* 99, 115f.

[29] See Hoch (n 27) 1227 with further references.

[30] Although the Constitutional Court has also had the power to review the constitutionality of treaties since the revisions of the Constitution in 2003 and of the Constitutional Court Act in 2004 (Art 22 StGHG), as was mentioned earlier, this has not affected the Constitutional Court's case law on the precedence of EEA law.

[31] See Hoch (n 27) 1224 for more details.

Constitutional Court may defer the operative date of the annulment of an unconstitutional provision by up to one year (Articles 19(3), 21(3) and 23(2) StGHG).

However, the Liechtenstein Constitutional Court's monopoly on judicial review does not mean that ordinary courts and public authorities are not allowed to examine the constitutionality of provisions they apply. In fact, they are obliged to do so since all state action is bound by the Constitution.[32] From this obligation, the requirement arises to interpret provisions that are to be applied in a specific case in compliance with the Constitution.[33] However, if such a constitutionally compliant interpretation is not possible, a provision cannot simply be ignored, as would be possible in all instances in a system of diffuse constitutional jurisdiction. Instead, the seemingly unconstitutional provision to be applied in the specific case must be submitted to the Liechtenstein Constitutional Court for a review of its constitutionality and, if necessary, for its repeal.[34] Conversely, courts and public authorities entitled to submit a provision for review are not permitted to apply a provision and dispense with a submission to the Liechtenstein Constitutional Court where they have serious doubts as to the provision's constitutionality. In such a case, too, there is an obligation to submit.[35] Failure to do so could violate the guarantee of a lawful judge pursuant to Article 33 LV (or of Article 6(1) ECHR).[36]

These remarks show that, upon closer examination, the Liechtenstein Constitutional Court's judicial review monopoly is limited to a monopoly on the annulment of provisions. Other courts may and should examine the constitutionality of the provisions that they apply, but only the Liechtenstein Constitutional Court may annul them.

C. Is the Annulment of a Domestic Provision that Violates EEA Law itself a Violation of EEA Law?

We must now return to the aforementioned controversy of whether the Liechtenstein Constitutional Court may annul domestic provisions that contradict EEA law.

[32] See StGH 2021/099 [4.2] (www.gerichtsentscheide.li).

[33] TM Wille, 'Verfassungs- und Grundrechtsauslegung in der Rechtsprechung des Staatsgerichtshofes' in Liechtenstein-Institut (ed), *Beiträge zum liechtensteinischen Recht aus nationaler und internationaler Perspektive. Festschrift zum 70. Geburtstag von Herbert Wille* (Schaan, Verlag der Liechtensteinischen Akademischen Gesellschaft, 2014) 131, 170ff.

[34] As mentioned above, public authorities only have a limited right to submit provisions for review. In the absence of such a right, public authorities must therefore apply an unconstitutional provision if it cannot be interpreted in a constitutionally compliant manner. The affected party then has no choice but to go through the court system until a competent court submits the provision to the Liechtenstein Constitutional Court for review. And if this does not happen in the ordinary court system, the affected party can still bring an individual complaint to the Liechtenstein Constitutional Court and initiate a review of legality.

[35] StGH 1995/020, LES 1997, 30 (39, para 6); also StGH 1996/36, LES 1997, 211 (216, para 9). These decisions relate to the provisions of the old Constitutional Court Act (LGBl 1925 No 8). As the wording of the relevant provisions – Arts 24(1) and 28(2) of the old Constitutional Court Act – did not provide for an obligation to submit, this expansive case law was criticised by commentators. The new Constitutional Court Act no longer contains such judicial discretion and is therefore more aligned with the case law; see Wille (n 19) 171f with further references.

[36] This is the view of the EFTA Court concerning its own referral procedure set out in Case E-18/11 *Irish Bank Resolution Corporation Ltd v Kaupþing hf* [2012] EFTA Ct Rep 592 [64]; see P Christiansen, 'Article 34 Advisory Opinion' in Arnesen et al (n 23) 1032, 1037, para 19.

As already noted, commentators in the legal literature and the Liechtenstein Constitutional Court agree that the EEA Agreement has a 'constitution changing and supplementing character'. And as the EEA Agreement is considered to be on the same level as the Constitution, established case law implies that the compatibility of domestic laws and ordinances with EEA law can also be challenged by means of judicial review proceedings before the Liechtenstein Constitutional Court.[37]

However, this competence asserted by the Liechtenstein Constitutional Court to review the conformity of domestic provisions with EEA law, and in particular the associated competence to repeal such provisions, was called into question by some commentators in the legal literature following the VGH 2005/94 ruling. This was based on the argument that the direct applicability of suitable EEA law left no room for proceedings before the Constitutional Court for a review of legality.[38] The Constitutional Court countered this in its StGH 2006/94 ruling, holding that it was not apparent 'to what extent it should be a violation of EEA law to formally remove provisions contrary to EEA law from the national legal order – even if this is not strictly necessary to enforce the precedence of EEA law'.[39] In this connection, the EFTA Court has ruled that the question of whether the national provision is repealed or displaced by EEA law is to be answered not by EEA law, but by the national legal order.[40]

In its StGH 2006/94 ruling, the Liechtenstein Constitutional Court repealed a provision of the Civil Procedure Code (Zivilprozessordnung (ZPO)) concerning security for costs as contrary to EEA law. It justified the formal setting aside of the domestic provision, first, on account of legal certainty considerations and, second, by the finding that:

> Without a formal setting aside the relevant ZPO provisions would continue to apply, apart from third-country nationals, also to Liechtenstein nationals with a foreign residence, so that they would be disadvantaged compared to EEA foreigners. Admittedly, such so-called

[37] See StGH 1996/34, LES 1998, 74 (80). This pre-existing case law has been upheld although it was only confirmed for ordinances (but not for laws) in Art 20(1) StGHG. Pursuant to this new provision, ordinances can be reviewed by the Liechtenstein Constitutional Court for their 'treaty conformity', therefore including conformity with EEA law; see A Batliner, 'Die Anwendung des EWR-Rechts durch liechtensteinische Gerichte – Erfahrungen eines Richters' (2004) *Liechtensteinische Juristen-Zeitung* 139, 141.

[38] P Bussjäger, 'Rechtsfragen des Vorrangs und der Anwendbarkeit von EWR-Recht in Liechtenstein' (2006) *Liechtensteinische Juristen-Zeitung* 140, 145.

[39] StGH 2006/94 [3] (www.gerichtsentscheide.li), referring to H Wille, 'Das Abkommen über den Europäischen Wirtschaftsraum und seine Auswirkungen auf das liechtensteinische Verfassungs- und Verwaltungsrecht' in T Bruha, ZT Pállinger and R Quaderer (eds), *Liechtenstein – 10 Jahre im EWR, Bilanz, Herausforderungen, Perspektiven* (Schaan, Verlag der Liechtensteinischen Akademischen Gesellschaft, 2005) 108, 132; see also Wille (n 11) 704 ff.

[40] See Hammermann (n 6) 304 referring to the judgment in Case E-4/01 *Karl K. Karlsson hf v Iceland* [2002] EFTA Ct Rep 240 [28]. Neither in this nor in any other case has the EFTA Court made reference to Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* ECLI:EU:C:1978:49, [1978] ECR 629 (*Simmenthal II*), where the CJEU decided that a national constitutional review procedure must not hinder the precedence of EU law. Indeed it is questionable whether *Simmenthal II* could at all be relevant in the EEA setting; however, see G Baur, 'Kohärente Interpretationsmethoden als Instrument europarechtskonformer Rechtsanwendung – eine rechtspolitische Skizze' in Liechtenstein-Institut (ed), *25 Jahre Liechtenstein-Institut (1986–2011)* (Schaan, Verlag der Liechtensteinischen Akademischen Gesellschaft, 2011) 47, 54f. But even beyond *Simmenthal II* national judicial review procedure can conflict with EEA law, as the recent judgment in Case E-11/22 shows (see section III.B below, last para).

> discrimination against nationals does not fall within the scope of Article 4 EEA, as this provision is intended only to prevent discrimination against EEA foreigners. In the light of the equality principle of the Constitution, however, such discrimination against nationals is indeed problematic.[41]

The problem of discrimination against nationals was overlooked when it was argued by commentators in the legal literature[42] that the formal abolition of domestic laws that violate EEA law would overshoot the mark, as EEA law only required non-application to EEA nationals.[43]

In summary, it is clear that the Liechtenstein Constitutional Court may annul domestic laws that violate EEA law without, in so doing, in itself violating EEA law. As already mentioned, the Liechtenstein Constitutional Court has a monopoly on the annulment of unconstitutional domestic laws. It remains to be examined below whether, due to this monopoly, the Liechtenstein Constitutional Court is not only permitted but also required to annul such laws.

D. The Liechtenstein Constitutional Court's Monopoly on the Annulment of Laws and the Precedence of EEA Law

Neither in the StGH 2006/094 ruling nor in a subsequent judgment has the Liechtenstein Constitutional Court had to reach a finding on whether domestic laws that violate EEA law must be annulled by the Constitutional Court.

In fact, Liechtenstein's courts have always directly addressed the EFTA Court on the question of the compatibility of a Liechtenstein provision with EEA law. Likewise, domestic legal norms recognised by the EFTA Court as violating EEA law have not been submitted to the Liechtenstein Constitutional Court for formal annulment.[44] However, as mentioned earlier, in its ruling in VGH 2005/94, the Administrative Court simply did not apply a statutory provision it deemed – even without referral to the EFTA Court – to be obviously in violation of EEA law in the specific case. However, Herbert Wille has strongly criticised this legal position. He argues that, due to the Liechtenstein Constitutional Court's monopoly on the annulment of legislation, domestic laws that violate EEA law cannot just be ignored, but must be formally

[41] StGH 2006/94 [3] (www.gerichtsentscheide.li), with reference to A Schäfer, 'Die Prozesskostensicherheit – Eine Diskriminierung' (2006) *Liechtensteinische Juristen-Zeitung* 17, 23.

[42] Bussjäger (n 38) 145.

[43] See also StGH 2016/066 [4.3]; StGH 2011/155 [3.4]; and StGH 2009/145 [5] (all at www.gerichtsentscheide.li) on the unlawfulness of discrimination against nationals.

[44] It is not surprising that this has not been necessary so far for the parties to the proceedings. It is irrelevant for the parties whether a domestic rule recognised as being contrary to EEA law by the EFTA Court is also formally annulled by the Liechtenstein Constitutional Court or not. Even a party disadvantaged by the finding of the EFTA Court has no interest in bringing such a case before the Liechtenstein Constitutional Court, as the latter would have no other option but to annul the relevant provision due to the precedence of EEA law (including the case law of the EFTA Court; see the text to n 11 above; see also Wille (n 11) 705). But in its ruling in StGH 2013/196 [2.4.2] (www.gerichtsentscheide.li), the Liechtenstein Constitutional Court also calls upon the legislator, in the interests of legal certainty, to formally annul or amend at the first opportunity domestic provisions from which it must be derogated as a result of directly applicable EEA law.

annulled by the Constitutional Court. Even if the EFTA Court has determined the incompatibility of a national provision with EEA law in an advisory opinion, this incompatibility with EEA law corresponds to the unconstitutionality of the provision, meaning that the domestic court 'must proceed in the same way as with the unconstitutionality of a comparable provision of domestic law. Therefore, there is an obligation to submit [the provision to the Constitutional Court for review]'.[45] Herbert Wille's analysis is convincing. First, under EEA law, as already mentioned, the decision on whether a national provision is repealed or displaced by EEA law is left to national law. In addition, only formally repealed provisions of national law are removed from the national legal order; accordingly, only then may they no longer be applied. Apart from the legislator (and, in the case of ordinances, the government), the Constitutional Court is the only authority with the power to repeal domestic norms. According to the leading decision of the Liechtenstein Constitutional Court (StGH 2006/94), considerations of legal certainty and, depending on the circumstances, the avoidance of discrimination against nationals also speak in favour of formal annulment.

But even if the formal annulment of a national provision contrary to EEA law is basically a matter of domestic law, in so doing, the Liechtenstein Constitutional Court nonetheless recently came into conflict with EEA law. In its StGH 2019/095 ruling, the Liechtenstein Constitutional Court annulled a Liechtenstein tax law provision which infringed the freedom of movement for workers (Article 28(2) EEA); however, the date on which the annulment became operative was deferred by one year pursuant to Article 19(3) StGHG. The Liechtenstein Constitutional Court reasoned that the annulment required action by the legislature to avoid legal uncertainty and results that were questionable from the perspective of legal policy, including considerable losses in tax revenue.[46] When in a different case the Administrative Court had to apply the annulled tax provision as the deferral period had not yet expired, it made a referral to the EFTA Court for an advisory opinion. In its judgment in *RS*, the latter confirmed that in exceptional cases, for reasons of legal certainty, EEA States may temporarily maintain the effects of a national rule that is contrary to EEA law. But the EFTA Court held that in the case at hand, a 'mere reference to the budgetary and administrative problems' arising from the immediate annulment of the contested provision was not sufficient to establish overriding considerations of legal certainty. Therefore, the Administrative Court had to grant an effective remedy, including the repayment with interest of any taxes already paid in breach of EEA law. If that was not possible, state liability could be invoked.[47]

[45] Wille (n 11) 704f. It has been argued that since such an advisory opinion from the EFTA Court was binding upon (and hence the relevant domestic provision had to be ignored by) the national courts, the requirement that the provision be decisive in the case at hand was not met and, consequently, the Liechtenstein Constitutional Court had no power of review and could not repeal that provision (see V Morat, 'Das EWR-Recht als Teil der liechtensteinischen Rechtsordnung', Arbeitspapiere Liechtenstein-Institut No 79 (Bendern, Liechtenstein-Institut, 2023) 62. In contrast, the Constitutional Court has emphasised the necessity to repeal any national provision that violates EEA law, especially in light of considerations of legal certainty, and hence that the requirement for the provision to be decisive is fulfilled (see StGH 2019/095 [1.2.1f] (www.gerichtsentscheide.li)).

[46] StGH 2019/095 [5] (www.gerichtsentscheide.li).

[47] Case E-11/22 *RS v Steuerverwaltung des Fürstentums Liechtenstein*, 4 July 2023, [46f], [59]. The EFTA Court further emphasised in recital 44 that an unconditional and sufficiently precise EEA rule which has

IV. REFERRAL TO THE EFTA COURT

A. Is there an Obligation to Refer?

Unlike the provision concerning references to the European Court of Justice (Article 267 TFEU), the third paragraph of Article 34 of the Surveillance and Court Agreement (SCA) allows for the right of referral to the EFTA Court to be limited to the final national instance. However, none of the three EEA/EFTA States has made use of this possibility.[48] Due to the Liechtenstein Constitutional Court's monopoly on the annulment of legislation, it would have been appropriate for Liechtenstein to restrict the right to refer accordingly. This would have allowed the Liechtenstein Constitutional Court to better enforce its monopoly on the annulment of legislation. However, unlike the rule for EU Member States set out in the third paragraph of Article 267 TFEU, the wording of the third paragraph of Article 34 SCA does not impose an obligation on final national courts of the EEA/EFTA States to refer to the EFTA Court national provisions that are potentially incompatible with EEA law. However, in its judgments in *Irish Bank* and *Jonsson*, the EFTA Court postulated, based on the loyalty principle under Article 3 EEA, a 'quasi-obligation' for the final national instances to refer if the legal situation is 'unclear'.[49]

The question of whether there is an obligation to refer a case to the EFTA Court arises in a similar way to the corresponding question in domestic proceedings. The Liechtenstein Constitutional Court has postulated a referral obligation 'in the case of serious doubts' as to the constitutionality of a domestic provision, going beyond the wording of the old Constitutional Court Act.[50] Against this background, it was by no means surprising that the Liechtenstein Constitutional Court did not reject the approach taken by the EFTA Court in its *Irish Bank* ruling. In the leading case (StGH 2013/172), the Liechtenstein Constitutional Court held as follows in relation to its own obligation to refer to the EFTA Court: 'The Constitutional Court, as a court within the meaning of Article 34 paragraph 2 [SCA], refers a question on the interpretation of EEA law to the EFTA Court for a preliminary ruling or for the preparation of an opinion if the legal situation is unclear.' Where, in addition, the legal question at issue is decisive in the complaint case at hand, 'the application of the complainant for referral and subsequently for suspension of the individual complaint proceedings in question must be granted'.[51] From the StGH 2013/172 ruling, it is not evident whether this

been duly incorporated into national law 'must be fully and uniformly applied in all the EFTA States from the day on which the respective legal act is made part of the EEA Agreement'. However, this consideration does not seem to prohibit a lower court from submitting a national provision contrary to EEA law to the Liechtenstein Constitutional Court for formal annulment. From the viewpoint of EEA law, it seems essential that such a provision be not applied. Whether the provision is also formally annulled or not is a matter of domestic law (see n 40 above).

[48] See Christiansen (n 36) 1036f, para 18.

[49] *Irish Bank* (n 36) [57f]; and Case E-3/12 *Staten v/Arbeidsdepartementet v Stig Arne Jonsson* [2013] EFTA Ct Rep 138 [60]. See also Baudenbacher, 'Reciprocity' (n 10) 57, subheading 'Irish Bank and Jonsson: A Quasi-obligation to Refer'.

[50] See n 34 above.

[51] StGH 2013/172 [2.1] (www.gerichtsentscheide.li = LES 2014, 148).

obligation to refer only affects last instance courts or courts of all instances.[52] On the one hand, in its StGH 2013/172 ruling, the Liechtenstein Constitutional Court cited the *Jonsson* decision of the EFTA Court, which had been handed down shortly beforehand; on the other hand, the Constitutional Court did not refer to the third paragraph of Article 34 SCA, which concerns only supreme instances, but to the second paragraph of this provision, which provides for the right to refer for all national court instances.

What is evident is the following. According to the view presented here, as argued for by Herbert Wille, Liechtenstein national courts must, if the EEA law conformity of a domestic provision is questionable, either refer the matter to the EFTA Court or to the Liechtenstein Constitutional Court. For if a court does not refer the question to the EFTA Court, it must, in light of the Liechtenstein Constitutional Court's case law on the domestic obligation to refer, submit the question to the Constitutional Court, since the question of EEA law conformity is equivalent to the question of constitutional conformity. In the case of any doubt concerning the conformity with EEA law, the Constitutional Court, as a national court of last instance, is in any case obliged to refer the matter to the EFTA Court, provided that it does not immediately annul the domestic provision as incompatible with EEA law. And even if, upon a referral by a lower court, the EFTA Court has qualified the domestic provision as incompatible with EEA law, the lower court must, according to the view advanced here, still turn to the Constitutional Court for the formal annulment of the provision.

B. Referral Practice

Until today, a total of 45 referrals from Liechtenstein courts have been made to the EFTA Court.[53] While the Administrative Court made its first referrals to the EFTA Court as early as 1998 and the Princely Court of Liechtenstein (Landgericht) did so in 2004, the Liechtenstein Constitutional Court only initiated its first reference in the context of StGH 2013/044.[54] Since then, the Constitutional Court has submitted just one further reference to the EFTA Court.[55]

However, the Liechtenstein Constitutional Court never justified this rather restrained practice of referral by arguing that there was no obligation to refer.[56] Furthermore, the Liechtenstein Constitutional Court was hardly deterred from making referrals to the EFTA Court by political or other extraneous motives, as has been partly surmised of the Norwegian and Icelandic Supreme Courts.[57] Nor is it apparent

[52] See W Ungerank, 'Anmerkung zu StGH 2013/172' (2014) *Liechtensteinische Entscheidsammlung* 149.

[53] Requests for advisory opinion submitted before 1 February 2024.

[54] Decision to refer of 8 November 2013; Case E-24/13 *Casino Admiral AG v Wolfgang Egger* [2014] EFTA Ct Rep 732; see also StGH 2013/044 [14f] in the section 'Facts' (Sachverhalt) (www.gerichtsentscheide.li).

[55] Decision to refer of 20 January 2015 in StGH 2014/57; Case E-3/15 *Liechtensteinische Gesellschaft für Umweltschutz v Gemeinde Vaduz* [2015] EFTA Ct Rep 512.

[56] Ungerank (n 52) 149.

[57] Baudenbacher, 'Vorabentscheidungsverfahren' (n 10) 21.

that the first reference procedure initiated by the Liechtenstein Constitutional Court was prompted by the stricter case law of the EFTA Court on referral, even though the relevant rulings in *Irish Bank* and *Jonsson* had been delivered shortly beforehand. In any event, neither in the decision to refer nor in the ensuing StGH 2013/044 ruling is there a reference to this case law. As already mentioned, it was not until its StGH 2013/172 ruling that the Liechtenstein Constitutional Court referred to this new case law of the EFTA Court, which it took note of approvingly without further ado.[58]

As an alternative to referring to the EFTA Court, the Liechtenstein Constitutional Court does not hesitate to annul domestic provisions that appear obviously contrary to EEA law without referring them to the EFTA Court for review, as it did in the aforementioned StGH 2006/94 ruling.[59]

While it cannot be assumed that the Liechtenstein Constitutional Court will refer to the EFTA Court significantly more often in the future than it has done thus far, it stated in the StGH 2013/172 ruling that it will do so in accordance with the *Irish Bank* case law of the EFTA Court whenever it has doubts about the EEA legality either of a decision submitted to it for review or of the domestic provision underlying that decision.

V. OUTLOOK

On the occasion of the thirtieth anniversary of the EFTA Court, the following conclusions can be drawn. The Liechtenstein Constitutional Court has recognised the primacy of EEA law, including the case law of the EFTA Court, over domestic law from the outset to just about the greatest extent possible. In line with the EFTA Court, it has postulated an obligation, at least for Liechtenstein courts of last instance, to refer 'unclear' cases. Accordingly, it has also made its own referrals to the EFTA Court. In addition, the Liechtenstein Constitutional Court declares domestic provisions void without referring them to the EFTA Court if they appear obviously contrary to EEA law and therefore must also be considered unconstitutional. If the EFTA Court considers provisions of Liechtenstein law submitted to it by other Liechtenstein courts to be contrary to EEA law, according to the view expressed here, a referral to the Liechtenstein Constitutional Court would still have to be made, so that the latter can annul the provision in question and thus eliminate any possible discrimination against nationals and, in any event, establish legal certainty. However, this is a question of domestic law, which does not call into question the primacy of EEA law and of the case law of the EFTA Court.

[58] StGH 2013/172 [2.1], [2.3.9] (www.gerichtsentscheide.li). Ironically, this leading judgment of the Liechtenstein Constitutional Court on the obligation to refer was delivered in a case where, due to the fact that the provision was not decisive to the ruling, no referral was made to the EFTA Court.

[59] See the text to n 41 above.