



DIRECTORATE-GENERAL FOR INTERNAL POLICIES

**POLICY DEPARTMENT** **C**  
**CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS**



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Law and  
European Integration**

STUDY





**DIRECTORATE GENERAL FOR INTERNAL POLICIES**  
**POLICY DEPARTMENT C: CITIZENS' RIGHTS AND**  
**CONSTITUTIONAL AFFAIRES**

**CONSTITUTIONAL AFFAIRS**

# **National Constitutional Law and European Integration**

## **STUDY**

### **Abstract**

Notwithstanding the impact of European policy-making on Member states legislation, many constitutions guarantee essential characteristics of their political system. This study extracts the conditions of the European dimension of national constitutional law with regard to the prospects of future Europeanization of eight EU Member states (Czech Republic, Germany, France, Italy, Austria, Poland, Finland and Sweden). This sample of countries comprises founding members, new Member states with a rather long or brief constitutional tradition, large and medium as well as centralist and federal Member states.

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## LIST OF ABBREVIATIONS AND ACRONYMS

- AB** Anfragebeantwortung im Nationalrat (Answer to an inquiry in the Austrian Parliament)
- AJIL** American Journal of International Law
- AnwBl** Anwaltsblatt
- Art** Article
- Artt** Articoli (Articles, Italian)
- AVR** Archiv des Völkerrechts
- 
- BGBI** Bundesgesetzblatt (Federal Gazette, Austria, Germany)
- BlgNR** Beilage(n) zu den Stenographischen Protokollen des Nationalrates (Annex[es] to the Protocols of the Austrian Parliament)
- BVerfGE** Entscheidungen des Bundesverfassungsgerichts (Decisions of the ↗ GCC)
- BVerfGK** Kammerentscheidungen des Bundesverfassungsgerichts (Chamber Decisions of the ↗ GCC)
- BVG** Bundesverfassungsgesetz (Law with Constitutional Status, Austria)
- B-VG** Bundes-Verfassungsgesetz (Austrian Constitution)
- 
- CBSS** Council of the Baltic Sea States
- CDE** Cahiers du Droit Européen
- CE** Comunità europea ↗ EC (Italian)
- CECA** Comunità europea del carbone e dell'acciaio ↗ ECSC (Italian)
- CEE** Central and Eastern Europe
- CEE** Comunità economica europea ↗ EEC (Italian)
- cf** Confer
- CFI** Court of Justice of the European Union (01.01.1998-30.11.2009)
- CFSP** Common Foreign and Security Policy
- ChFR** Charter of Fundamental Rights of the EU
- cit** citato
- cl** Clause
- CMLR** Common Market Law Review
- Coll** Collection
- Cost** Costituzione (Constitution, Italy)
- CZCC** Czech Constitutional Court
- 
- DVBl** Deutsches Verwaltungsblatt
- DzU** Dziennik Ustaw Rzeczypospolitej Polskiej (Official Journal of the Republic of Poland)
- 
- EAEC** European Atomic Energy Community (Euratom)
- EC** European Community/ies
- ECB** European Central Bank

<b>ECHR</b>	European Convention of Human Rights
<b>ECJ</b>	European Court of Justice
<b>ECR</b>	European Court Reports
<b>ECSC</b>	European Coal and Steel Community
<b>Ed(s)</b>	Editor(s)
<b>EEA</b>	European Economic Area
<b>EEC</b>	European Economic Community
<b>eg</b>	exempli gratia
<b>EIoP</b>	European Integration online Papers
<b>EMU</b>	Economic and Monetary Union
<b>EN</b>	English
<b>ENEL</b>	Ente nazionale energia elettrica
<b>ERM</b>	Exchange rate mechanism
<b>esp</b>	Especially
<b>et al</b>	et alii
<b>EU</b>	European Union
<b>EuConst</b>	European Constitutional Law Review
<b>EuGRZ</b>	Europäische Grundrechte-Zeitung
<b>EuLJ</b>	European Law Journal
<b>EuR</b>	Europarecht (journal)
<b>Europol</b>	European Police Office
<b>EUZBBG</b>	Gesetz über die Zusammenarbeit von Bundesregierung und Deutschem Bundestag in Angelegenheiten der Europäischen Union (Act Amending the Act on Cooperation between the Federal Government and the German Bundestag in Matters concerning the European Union, Germany)
<b>EUZBLG</b>	Gesetz über die Zusammenarbeit von Bund und Ländern in Angelegenheiten der Europäischen Union (Act on Cooperation between the Federation and the Länder in European Union Matters, Germany)
<b>EuZW</b>	Europäische Zeitschrift für Wirtschaftsrecht
<b>f / ff</b>	following page/s
<b>FIDE</b>	Fédération Internationale du Droit Européen
<b>fn</b>	Footnote
<b>FS</b>	Festschrift
<b>GCC</b>	German Constitutional Court (Bundesverfassungsgericht)
<b>GG</b>	Grundgesetz (German Basic Law)
<b>Giur Cost</b>	Giurisprudenza Costituzionale
<b>GP</b>	Gesetzgebungsperiode (Legislative period of the Austrian Parliament)
<b>ICIC</b>	Industrie Cimiche Italia Centrale
<b>idF</b>	in der Fassung (as amended by)
<b>ie</b>	id est

- IG** Instrument of Government (Regeringsformen, Sweden)
- IntVG** Integrationsverantwortungsgesetz (Responsibility for Integration Act, Germany)
- JAP** Juristische Ausbildung und Praxisvorbereitung
- JBI** Juristische Blätter
- JHA** Justice and Home Affairs
- JRP** Journal für Rechtspolitik
- JuS** Juristische Schulung
- JZ** Juristen-Zeitung
- KPPubl** Kwartalnik Prawa Publicznego
- KU** Konstitutionsutskottet (Constitutional Committee of the Riksdag, Sweden)
- lit** Litera
- MPIL** Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht
- NATO** North Atlantic Treaty Organization
- NJW** Neue Juristische Wochenschrift
- No** Number
- Nov** November
- nyr** not yet reported
- OJ** Official Journal of the European Union (before 1 February 2003: Official Journal of the European Communities)
- ÖJT** Österreichischer Juristentag
- ÖJZ** Österreichische Juristen-Zeitung
- p** Page
- para** Paragraph
- PeVL** perustus lakivaliokunnan lausunto (Opinion of the Constitutional Law Committee, Finland)
- PiP** Państwo i Prawo
- Pol Dir** Politica del diritto
- prev vers** previous version
- PS** Przegląd Sądowy (Constitutional Review, Journal)
- QPC** Question prioritaire de constitutionnalité (France)
- Rn** Randnummer (marginal number)
- RP** Rzeczypospolitej Polskiej (Republic of Poland)
- RR** Regeringsrätten (Supreme Administrative Court, Sweden)

- RTDE** Revue trimestrielle de droit européen  
**RV** Regierungsvorlage (Government bill, Austria)
- Sb** Sbírka (Collection, Czech Republic)  
**sec** Section  
**SFS** Svensk författningssamling (Official publication of Swedish laws)
- TEC** Treaty establishing the European Community (as amended by the Treaty of Nice if not mentioned otherwise)  
**TEU** Treaty on European Union (as amended by the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007 if not mentioned otherwise)  
**TFEU** Treaty on the Functioning of the European Union  
**TKG** Telekommunikationsgesetz (Telecommunications act, Austria, ↗ BGBl I 1997/100)
- UK** United Kingdom of Great Britain and Northern Ireland  
**UN(O)** United Nations (Organization)  
**ÚS** Ústavní Soud (Constitutional Court, Czech Republic)
- VAT** Value Added Tax  
**VfGH** Verfassungsgerichtshof (Constitutional court, Austria)  
**VfSlg** Sammlung der Erkenntnisse und wichtigsten Beschlüsse des Verfassungsgerichtshofes, Neue Folge (1921-1933, 1946 ff) (Court Reports of the ↗ VfGH)  
**VwGH** Verwaltungsgerichtshof (Supreme administrative court, Austria)
- WTO** World Trade Organization
- ZERP** Zentrum für europäische Rechtspolitik  
**ZfRV** Zeitschrift für Rechtsvergleichung  
**ZfV** Zeitschrift für Verwaltung  
**ZÖR** Zeitschrift für Öffentliches Recht / Journal of Public Law  
**ZRP** Zeitschrift für Rechtspolitik

## EXECUTIVE SUMMARY

### 1. GENERAL REMARKS

"National constitutional law and European integration" is a topic touching upon one of the core issues of current and future European constitutional development: the relationship between the legal system of the European Union and the national constitutions, primarily seen from the standpoint of the latter. Two cornerstones form the essential elements of the current European landscape: On the one hand side, the jurisprudence of the ECJ and the recent developments brought about by the Lisbon Treaty on the primacy of Union law; on the other hand, the national foundations of EU membership which are, from the point of view of national constitutional law, at the same time laying the legal foundations and the conditions for the interaction between national and European law.

The standing jurisprudence of the ECJ concerning primacy of Community law arguably is of continuing relevance also for Union law after the entry into force of the Lisbon Treaty. The ECJ stated already in the early 1960s that the Community constituted "a new legal order of *international law*". Shortly afterwards, the Court changed its rhetoric by calling the Treaty on the European Economic Community an independent source of law. Still very early, the court specified the consequences of this concept for the relation between Community law and national law, arriving at *unconditional supremacy* of Community law vis-a-vis national law: "Recourse to the legal rules or concepts of national law in order to judge the validity of measures adopted by the institutions of the Community would have an adverse effect on the uniformity and efficacy of Community law. The validity of such measures can only be judged in the light of Community law. In fact, the law stemming from the Treaty, an independent source of law, cannot because of its very nature be overridden by rules of national law, however framed, without being deprived of its character as Community law and without the legal basis of the community itself being called in question. Therefore the validity of a community measure or its effect within a Member state cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that state or the principles of a national constitutional structure." Clearly, this jurisprudence goes to the heart of any national reservation against the unconditional prevalence of Community law.

The Lisbon Treaty did not substantially change the situation, but it is markedly more nuanced than the jurisprudence of the ECJ. Let us start with the difference between the Draft Constitutional Treaty and the Lisbon Treaty regarding the so called "primacy clause". The – abandoned – Constitution for the first time would have included an explicit primacy clause for the law adopted by the institutions of the union, thereby coining the respective jurisprudence of the ECJ: "The Constitution and law adopted by the institutions of the Union in exercising competences conferred on it shall have primacy over the law of the Member states."

The Lisbon Treaty, by contrast, suppresses this clause. What is included instead is a Declaration (No 17) to the Treaties "concerning primacy". It recalls "that, in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member states, under the conditions laid down by the said case law." The Intergovernmental Conference also decided to attach as an Annex to the Final Act an Opinion of the Council Legal Service. In its core part, this opinion reads as follows: "The fact that the principle of primacy will not be included in the future treaty shall not in any

way change the existence of the principle and the existing case-law of the Court of Justice”.

Primacy through this development has neither been discarded nor was it extended if compared to the Status Quo or the Constitutional Treaty. The latter stance could be considered given that Declaration No 17 is – like the standing jurisprudence of the ECJ – unconditional and does not mention the competences of the Union. However, the restriction of the Union’s powers to conferred competences by explicit Treaty provisions cannot really be challenged. Furthermore, the Lisbon Treaty not only reconfirms the limits of the Union’s competences, but also the respect for the national constitutional environment. It is this aspect which differs substantially from the cited jurisprudence of the ECJ: The Treaty stipulates explicitly that the Union “shall respect the equality of Member states before the Treaties as well as their national identities, inherent in their fundamental structures, political and *constitutional*, inclusive of regional and local self-government. It shall respect their essential state functions ...”. Additionally, regarding fundamental rights protection, it has to be borne in mind that the Charter of Fundamental Rights of the European Union not only expressly secures the level of protection as recognised by Union law, international law and international agreements, but also “by the Member states’ constitutions”. This could even encourage Member states’ reservations against the notion of unconditional supremacy of Union law over national law, and is certainly not strengthening the ECJ’s jurisprudence in this respect.

Summing up: by contrast to the clear and unconditional tendency of the ECJ’s jurisprudence, the nuanced wording of the Treaty on European Union after Lisbon points into the direction of a growing importance of the national constitutional foundations of EU membership, accepting their significance under EU law. These national provisions are the mentioned second cornerstone, and they would have to be qualified as such even without the cited reference in the TEU. For it cannot be denied that, without any exception, all Member states joined the EU on the basis of their national constitutions, either on the grounds of general provisions allowing for entering into international obligations, or on the grounds of specific provisions enacted in order to prepare the national legal order for EU membership. Inevitably, national authorities including national courts have to respect possible limits which are included in these national constitutional foundations of EU membership. Whenever further transfer of powers to the EU or possible conflicts between EU law and national law are at stake, national authorities have to take seriously the conditions the national constitution sets out for their activities.

Against this background it can be stated that our study reveals a growing body of national conditions and restrictions to European integration which are common to the Member states. The most important features are being spelt out below. However, such convergence can only be found on a rather high level of abstraction. Going into the details reveals, also in this field, the unity in rich diversity within the European Union.

## **2. CORE RESULTS OF THE COUNTRY REPORTS**

### **2.1. Czech Republic**

The Czech Constitution was amended in 2002 as a preparation for EU membership. Of specific importance is the insertion of a provision allowing for the transfer of “certain powers” to an international organisation (Art 10a of the Constitution), and the requirement to accede to the EU on the basis of a referendum. More specific provisions are missing.

A conflict between the Czech Constitution and EU law is not specifically dealt with by constitutional provisions. However, Art 10 of the Constitution introduces, on a general basis, the prevalence of international law in the case of a conflict with domestic law. The Czech legal system does not specify the legal consequences in such a case, e.g. the possible suspension or nullification of the conflicting domestic provision, or the “automatic” application, as it is required by EU law.

At several occasions, mainly in two cases scrutinising the Lisbon Treaty, the Czech Constitutional Court took the opportunity clarifying the constitutional framework for EU membership. The mentioned Art 10a Para 1 of the Constitution has to be read in accordance with the constitutional guarantee of the Czech Republic being a sovereign, unitary, and democratic state governed by the rule of law, founded on respect for the rights and freedoms of the human being and of citizens. Furthermore, it has also to be taken into account that a change in the essential requirements for a democratic state governed by the rule of law is impermissible by explicit wording of the constitution, and that legal norms may not be interpreted in such a way as to threaten the democratic foundations of the state. As a consequence of this systematic interpretation, the transfer of powers has to respect certain limits. However, and despite considerable political turmoil, the Court held the Lisbon Treaty to be fully constitutional.

The Constitutional Court also emphasised the restrictions for exercising *ultra vires* control: Only under exceptional circumstances would the Court be prepared to act „ultima ratio” and, consequently, review whether an act of the EU institutions exceeds the transferred powers.

Summing up it can be ascertained that Czech membership to the EU meets the requirements of the Czech Constitution. Contrary to some expectations, the scarce constitutional foundations proved to be flexible enough for the ratification of the Lisbon Treaty, and arguably could serve as a basis even for further steps in European integration. In this respect, however, caution is imperative given the limited practical experience.

## 2.2. Germany

The openness of German constitutional law *vis à vis* EU law is reflected in several provisions of the German Basic Law (Grundgesetz). It is also stressed in several rulings of the German Constitutional Court, including its recent *Lisbon* judgment.

The constitutional barriers for (further) EU integration ensue primarily from Articles 23, 24, 38, 79 II, and 79 III of the Basic Law. On these grounds, the jurisprudence of the German Constitutional Court on constitutional limits to European integration, if compared to other countries, appears as specifically elaborate and nuanced.

Explicit *constitutional barriers to (further) EU integration* are laid down in Article 23. These barriers comprise the democratic, social, federal and subsidiarity principles, the rule of law, and the protection of basic rights. These principles have to be respected, by German organs, in their decisions about transfers of competences to the EU level, in their participation in the EU legislature, and in the implementation of EU law. They do not, however, require a “structural congruence” in the sense that the EU would have to comply with those principles in their specific “German” version. Rather, these requirements take on a “European” meaning in the sense of setting forth standards that are commensurate to the status and the function of the Union.

An important exception in this context is the protection of fundamental rights: in this respect, Article 23 calls for a protection of basic rights on the level of EU law that is

"essentially comparable to that afforded by this Basic Law". The potential for constitutional clashes resulting in the scrutiny of secondary law, from this express link to German standards has meanwhile been defused in the jurisprudence of the German Constitutional Court.

Among the aforementioned principles, the democratic principle has received most attention in the 2009 *Lisbon* ruling. The Court stressed the principle of conferral and the maintenance of a "well-balanced equilibrium" in the distribution of competences. In this context, it also held that the new democratic elements that were instituted by the Lisbon Treaty do not fully compensate the EU's democratic deficit. As a consequence, substantial competences have to remain with the German parliament, the *Bundestag*. Furthermore, the German legislature must only consent to transfers of competences and treaty amendments whose effects are foreseeable. German scholars have submitted that Article 23 by implication also prohibits the relinquishing of German sovereignty and statehood. The Constitutional Court's approach to these issues has received severe criticism in German academic writings.

A third group of barriers is laid down in Article 23 I 3 (which is to be read in conjunction with the Basic Law's eternity guarantee in Article 79 III). Amongst others, amendments of the Basic Law must not affect the principles laid down in Article 1 (human dignity, inviolable and inalienable human rights) and Article 20 (the democratic principle, the social state principle, the federal state principle, and the rule of law principle). These substantive principles are commonly regarded as the German "constitutional identity". Due to the eternity guarantee, it is even out of the hands of the constitution-amending legislature.

In this third group, the protection of (German) democracy plays a central role. According to the *Lisbon* ruling, transfers of competences to the EU level are subject to three conditions, namely respect for the principle of conferral, for the constitutional identity of the Member States and their ability to shape the living conditions themselves. From this it follows for the Constitutional Court that the EU may not be transformed into a federal state. Furthermore, the *Lisbon* judgment has traced out content-related limits for the transfer of powers, designating "essential areas of democratic formative action" (such as the civil and military monopoly on the use of force) that are protected by several constitutional constraints deriving from the democratic principle.

Additionally, a series of national constitutional barriers have been defined in the *Lisbon* ruling for simplified treaty amendments, analogous provisions in primary law, the general bridging clause, specific bridging clauses which are not restricted to areas that are already sufficiently determined by primary law, and the flexibility clause. Further barriers result from requirements of strict interpretation of competence clauses and / or instruction of the German representative in the Council and the EU Council by German legislative bodies.

The German Constitutional Court's jurisprudence has given rise to a controversial debate. In particular, the *Lisbon* ruling has *inter alia* been criticised for being state-centred, for using the eternity clause as a shield against integration, and for being paradoxical in that it insinuates that a further augmentation of democratic structures at EU level would lead to EU statehood, which, in turn, is prohibited on the basis of the Court's reading of the Basic law. Many commentators have held that the *Lisbon* ruling unduly restricts the flexibility of German government representatives in negotiations at EU level. Nonetheless, non-German observers have pointed out that Germany is still in the "moderate camp" when compared with other Member States.

As respects the German *constitutional limits for secondary law*, it is important to distinguish two main types, namely the "human rights barrier" and the "competence barrier". While these limits were originally developed by the Constitutional Court, they are now explicitly incorporated in Article 23.

Currently, the *human rights barrier* is especially defined by the Court's 2000 *Bananas* ruling. Accordingly, constitutional complaints and submissions by courts which challenge EU secondary law on the basis of German human rights are inadmissible from the outset, if their grounds do not state that the evolution of European law, including relevant rulings of the ECJ, has resulted in a decline below the indispensable standard of fundamental rights protection under the German Basic Law. While the Constitutional Court thereby still claims a reserve competence for itself, the hurdles that need to be overcome for its activation are quite unanimously regarded as being insurmountable.

The *competence barrier* is derived from the requirement that the competences that are transferred and the programme of integration must be predictable. Hence, the German Constitutional Court regards itself to be competent for deciding whether an act of secondary law is *ultra vires*, which has caused an intense academic discussion on whether the ECJ or national courts are competent to act as the "final arbiter of constitutionality" in Europe.

According to the *Lisbon* ruling, the German Constitutional Court will in the future also scrutinize the exercise of EU competences by means of an "identity review" in order to preserve the inviolable core content of the Basic Law's constitutional identity. Apparently, the "*ultra vires* review" and the "identity review" are meant to function on a subsidiary basis, being invocable only if legal protection cannot be obtained at the EU level. Both types of review can result in EU law being declared inapplicable in Germany. In this context, the GCC has underlined that this type of review is restricted to "obvious transgressions" of EU competences and applies only "exceptionally, and under special and narrow conditions".

### 2.3. France

The opening-up of the French legal order towards EU law has been a gradual process. In a turn-around that has occurred in particular since 2004, the French judiciary has explicitly recognized that EU law is integrated into the domestic legal order and distinct from the international legal order. French authors submit, however, that the *Conseil Constitutionnel*, the *Conseil d'Etat* and the *Cour de Cassation* may still be pursuing partly divergent approaches towards EU law.

The primacy of EU law vis à vis French infra-constitutional law appears to be consistently recognized by the French judiciary. Limits to EU-integration are, however, derived from the French constitution, which is regarded as being placed at the summit of the internal legal order.

With respect to EU *primary law*, the *Conseil Constitutionnel* has made it clear that treaty amendments must not contain a *clause running counter to the Constitution* calling into question constitutionally guaranteed rights and freedoms, nor must they adversely affect the *fundamental conditions of the exercising of national sovereignty* ("*conditions essentielles d'exercice de la souveraineté nationale*"), unless the Constitution is revised beforehand. This abstractly defined barrier depends on case by case concretisation. According to the *Conseil Constitutionnel*, further amendments of the constitution will be required for any transfer of competences which jeopardizes the fundamental conditions of the exercising of sovereignty either because these transfers (i) do not relate to those

already permitted in the constitution, specifically if they are “inherent to national sovereignty”, or because (ii) there are modifications of the exercise of competences already transferred, especially modification of the EU rules on decision-making (e.g. changes from unanimity to qualified majority, transfers of decision-making competences to the EU Parliament, losses of Member State powers of initiative, and *clause passerelle*-type provisions including the general *passerelle* clause of Article 48 para 7 EU Treaty).

This jurisprudence led to a series of constitutional amendments accompanying the Treaty amendments at EU level (Maastricht, Amsterdam, Nice, Lisbon), which is to be found in Articles 88-1 to 88-7 of the Constitution which are now the constitutional anchor of EU membership, to be interpreted in consistency with several more general provisions such as Article 3 on French sovereignty, and Article 55 on the force of international agreements within the French legal order.

With respect to the scrutiny of *secondary law*, important developments have taken place in the context of the judicial re-orientation that started in 2004. While the EU law obligation to implement an EU directive is now regarded also as an obligation under French constitutional law, the *Conseil Constitutionnel* underlined that this obligation cannot override an express conflicting constitutional provision. In 2006, the *Conseil Constitutionnel* reformulated this limit such that the implementation of a directive must not run counter to a rule or principle that is inherent to the *constitutional identity* of France. The constituting power can, however, consent to necessary amendments of French constitutional law. Moreover, the *Conseil Constitutionnel* has restricted its constitutional review of a national act implementing a directive to provisions that are manifestly incompatible with the directive that the national act intends to transpose. It is incumbent on national courts of law, if need be, to refer a matter to the ECJ for a preliminary ruling.

Since 2007, the implementation of EU directives is regarded as a constitutional obligation also by the *Conseil d'Etat*. Accordingly, the constitutional review of acts implementing precise and unconditional provisions of a directive is modified. When seized with a question of constitutionality, the *Conseil d'Etat* examines whether EU law guarantees effective protection of the respective French constitutional rule or principle. If so, the *Conseil d'Etat* feels competent to examine whether the directive complies with the relevant rule or principle of EU law; should that be seriously in doubt, it would seize the ECJ for a preliminary ruling. If, by contrast, there is no such a rule or principle at EU level, then the *Conseil d'Etat* would examine directly the constitutionality of the implementing measure in question.

This judicial re-orientation has spurred an intense legal debate, in which it has *inter alia* been submitted that the *Conseil Constitutionnel's* approach of curtailing the EU law obligation to implement EU directives through its review under French constitutional law risks infringing EU law. Similarly, it has been held that it is problematic, in terms of EU law, that the *Conseil d'Etat* claims to be competent to determine itself, and without referring a relevant case to the ECJ, whether there exists equal protection of a given French right at the level of EU law, a stance which also deprives the ECJ of the possibility to further develop its case law and the *acquis* of EU law.

Furthermore, it is neither clarified which rules and principles are comprised by the notion of the French constitutional identity nor whether the *Conseil d'Etat's* approach to EU directives is fully in line with that of the *Conseil Constitutionnel*. It is also open to speculation if and to which extent their approaches could be transposed from directives to other acts of EU secondary law.

## 2.4. Italy

Up until the 2001 constitutional reform came into effect, no provision of the Italian Constitution addressed explicitly membership in the European Union and the three European Communities. Legal practice, the *Corte costituzionale* (the Italian Constitutional Court) and jurisprudence regarded Article 11 of the Constitution as the legal basis for Italy's accession to the European Communities and the European Union. Allowing restrictions of sovereignty in cases that may be necessary to establish a world order that ensures peace and justice among nations, on conditions of equality with other states, Article 11 of the Constitution permitted approval of the founding and amending treaties by ordinary law (*legge ordinaria*). Article 117 of the Constitution, introduced by the 2001 constitutional reform addresses EU membership only in a particular manner relating to membership duties and cannot serve as an (additional) basis for the Italian membership in the European Union; it obliges the state, regions and autonomous provinces to legislate not only according to the Constitution but also to the obligations deriving from Union law.

In its case law the *Corte costituzionale* confirmed the constitutionality of restrictions of sovereignty by transferring powers to the European Communities and the European Union as well as the primacy of Community law (now: Union law) on the basis of Article 11 of the Constitution. However, at the same time, the *Corte costituzionale* decided that the transfer of powers and the primacy of Community law would be limited by the so called *controlimiti*, the counter-limits. These counter-limits are established by the inalienable human rights as guaranteed in Article 2 of the Italian Constitution on the one hand, and the (written and unwritten) fundamental constitutional principles on the other.

The *controlimiti* are relevant both for any (further) transfer of powers to the European Union, and the scrutiny of primary, secondary and tertiary law as interpreted and applied by the institutions of the European Union. In its case law the *Corte costituzionale*, referring to Article 134 of the Constitution, has consistently emphasised its incompetence to review Community acts (now: Union acts) directly. Notwithstanding, it developed its competence to review in an indirect way Community acts allegedly infringing inalienable human rights or fundamental constitutional principles. In such a case the *Corte costituzionale* would feel competent to declare the Act ratifying the E(E)C-Treaty – today: the EU-Treaty and the Treaty on the Functioning of the European Union – insofar partially unconstitutional. Thus the respective Union act would become inapplicable on Italian territory. Up until now the *Corte costituzionale* has maintained its so-called *controlimiti* doctrine, but has never declared a Community (Union) act “unconstitutional” and thus inapplicable.

## 2.5. Austria

The constitutional foundation of the accession of the Republic of Austria to the European Union was a specific Act (a *lex fugitiva*): the Federal Constitutional Act on the Accession of Austria to the European Union of 1994 (EU-Accession-Act, EU-Beitritts-BVG). It authorized, “based on the acceptance of this Federal Constitutional Act on the part of the people of the Federation, the authorities competent pursuant to the Federal Constitution ... to conclude the Treaty regarding the accession of Austria to the European Union in accordance with the result of the negotiations as set forth by the accession conference on 12<sup>th</sup> April 1994”. This was done on the undisputed assumption that acceding to the EU would cause a total revision of the Austrian constitution and consequently required a positive outcome of a mandatory referendum. Once this EU-Accession-Act (EU-Beitritts-BVG) had entered into force, the ratification of the Accession Treaty was, according to Art II of this Act, done “upon approval by the National Council with the consent of the

Federal Council". Each of those resolutions required "the presence of at least half of the members and a majority of two thirds of the votes cast", which is a quorum normally needed for the passing of constitutional acts.

Given that the EU-Accession-Act was specifically tailored for this single event, later treaty amendments (including new accessions) needed fresh constitutional authorisation. Consequently, the conclusion of the treaties of Amsterdam and Nice, as well as the accession treaties of 2003 and 2005, were done on the basis of specific constitutional acts. Like for the accession treaty, qualified majority in parliament was needed. By contrast, referendums were not considered to be mandatory or necessary given that according to the prevailing view no second total revision of the constitution was at stake.

Only shortly before the conclusion of the Lisbon Treaty, in 2008, a general provision governing future amendments of EU primary law was inserted into the Federal-Constitutional Act (Bundes-Verfassungsgesetz), the core of Austria's Constitution. Article 50 now foresees that amendments of the EU Treaties have to be approved by parliament (the National Council and the Federal Council) by a qualified majority of half of the members present and two thirds of the votes cast in favour. The provision was for the first time applied with regard to the Lisbon Treaty. Also this Treaty was qualified as not totally amending the Austrian Constitution which allowed its ratification without previous referendum.

On the grounds of these constitutional amendments, primacy of EU law is generally accepted by the courts, even primacy over constitutional provisions. The resulting *barriers for further European integration* are as follows: amendments of primary EU law must be approved by qualified majority in the Austrian parliament. An explicit amendment of formal constitutional law is not necessary even if the new treaty provisions are of a constitutional nature in a material sense. As mentioned, this is how the Lisbon Treaty was handled.

The procedure applies as long as future amendments do not essentially affect the fundamental principles of the Austrian constitution – mainly the principles of democracy, rule of law, liberal state (fundamental rights protection), separation of powers, federal state, and Republican state. Several of them (democracy, rule of law, separation of powers) were already changed at the occasion of Austria's accession to the EU. In this amended version they continue to form part of the fundamental principles of the Austrian constitution. Should a new EU Treaty (again) essentially affect those principles, it could only be ratified after the previous total amendment of the Austrian constitution, meaning an amendment by formal Constitutional Act which must be accepted by a (mandatory) referendum. It is, however, not easy to define the borderline between such a total amendment and the previously mentioned "simple" amendment of the Austrian constitution.

The mentioned constitutional barriers consist in more or less burdensome procedural requirements for the approval and ratification of future EU primary law amendments. However, contrary to several other EU Member States, the Austrian constitution does not include any "eternity clause". Consequently, at least from a legal point of view, any future steps in European integration through treaty amendments are admissible.

*Ultra-vires-control* of secondary legislation or jurisprudence of the ECJ can be imagined in the following sense: should an EU measure be grossly and evidently illegal, and should that not lead to its nullification by the ECJ, Austrian organs, especially Austrian courts could disapply those measures within the Austrian legal system. However, the yardstick for such scrutiny is disputed. Partly it is argued that the principles of the Austrian

constitution could play this role and be enforced accordingly. Partly the argument runs that these constitutional principles had been amended at the occasion of Austria's EU accession, and consequently cannot deliver standards of control which would be different from those included in EU primary law. The difference between these two positions is more of a theoretical nature than of practical effect. At any event, the entire debate is theoretical in the sense that until today such ultra-vires-control has never been exercised by Austrian courts.

## 2.6. Poland

The Polish Constitution was enacted 1997 with a view to the possible accession to the EU. Of crucial importance in this respect is Article 90 of the Constitution allowing for the delegation of competences of organs of the state in certain matters to an international organisation or international organ. The legislative approval of such an agreement is enacted by the Sejm and the Senate with qualified majority, by two thirds of the votes cast in favor with at least half of the delegates being present. The approval can also be enacted by way of a national referendum, as it was done in the case of EU accession. The decision on this alternative is taken by the Sejm by absolute majority while at least half of the delegates being present.

Art 9 – according to which Poland complies with binding international law – sets out the position of Union law in the Polish legal order. According to Art 91 of the Constitution a ratified and promulgated international agreement is part of the domestic legal order and in principle also directly applicable. Such an international agreement takes, in cases of conflicts, precedence over national legislation. The same is true with regard to the law adopted by an international organisation to which Poland is a member.

Art 91 applies, even if this is not expressly stated, also to the EU accession agreement as well as the founding treaties of the European Union, and to EU secondary law. While precedence over national legislation encompasses, undisputedly, legal acts of lower rank, precedence over the Constitution is contentious.

According to the prevailing view, Article 90 of the Constitution has to be reconciled with other provisions of the Constitution, resulting in limits on the possible delegation of powers.

The resulting *barriers for further steps in European integration* were, most notably, addressed by the Constitutional Court in its decision on Polish accession to the EU. The Court held that the terms "transfer of competences in certain areas" prohibit the transfer of general competences of a state organ, the transfer of all competences in a given area, as well as the transfer of competences regarding the fundamental nature of a competence which constitute the jurisdiction of the state organ in question. The constitution would require the precise demarcation of the areas of competences which should be transferred. A transfer of competences that would put into question the meaningful existence or the functioning of a state organ would be at odds with Art 8 (1) of the Constitution guaranteeing that the Constitution is the supreme law of the Republic of Poland. Art 90 cannot be the basis for the transfer of authority to an international organization which would allow the adoption of legal acts or decisions contrary to the Constitution. Equally, a transfer of competences resulting in the Republic of Poland giving up its existence as a sovereign and democratic State would be unconstitutional.

Also in its recent decision on the constitutionality of the Lisbon Treaty the Polish Constitutional Court elaborated on the constitutional limits to European integration. It held that

Article 90 of the Constitution would, as the normative anchor to the state's sovereignty, determine the limits of conferring competences on the European Union. This limit would be constituted by certain factors determining the constitutional identity of the Republic of Poland (the respect for the principles of Polish sovereign statehood, democracy, the principle of a state ruled by law, the principle of social justice, the principles determining the bases of the economic system, protection of human dignity and the constitutional rights and freedoms).

The Constitutional Court also addressed the issue of a possible *ultra-vires-control* by Polish organs. In its judgment on the accession agreement, it held that the ECJ would be the main but not the only organ authorised to apply the Treaties in the legal system of the European Community and European Union. The ECJ would decide in exclusivity on the validity and the interpretation of Community law (now: Union law). However, the ECJ would have to respect the limits of the competences and functions transferred by the Member States, as well as the subsidiarity principle, and the principle of mutual loyalty between the Community / Union organs and the Member States.

According to the Constitutional Court the Member States retain the right to assess whether a Union organ when adopting a certain measure (a legal act) acted within the boundaries of the transferred competences and whether they exercised their competences according to the principles of subsidiarity and proportionality. Transgressing these boundaries would at the same time lead to a transgression of the boundaries for the primacy of Community law (now: Union law). In the Polish legal system such decisions would have to be taken in the light of Art 8 (1) of the Constitution declaring that the Constitution would remain the supreme law in the Republic.

## 2.7. Finland

Finnish EU membership was enacted on the grounds of the general provisions of the Constitution governing "International Relations", including the right to enter into obligations, and to incorporate them into the Finnish legal system (against the background of a dualist understanding of the relation between international and national law). Specific constitutional provisions were created for the participatory rights of the Finnish parliament in the course of creating secondary Union law, but not regarding the membership as such, or constitutional limits to European integration – neither before nor during the big constitutional reform after EU accession.

Nevertheless, such limits to European integration could be inferred from a systematic reading of Sections 94 and 95 of the Constitution allowing for the entering into international obligations including EU membership. Arguably, and according to growing practice in Finland, these limits could be:

1. "the democratic foundations of the Constitution" (Section 94 last sentence of the Constitution);
2. Finnish "sovereignty" in the sense that Finland, in co-operation with the other EU Member States, continues having the final say at European level, and that consequently no Kompetenz-Kompetenz had been or may be transferred to the European Union; and
3. the protection of fundamental rights standards as guaranteed by the Finnish constitution.

The application of such limits did not yet materialize in the sense that the application of primary or secondary EU law would have been denied in Finland. This has, amongst others,

to be seen against the background that there is no Constitutional court in Finland which could concretize and enforce those limits with binding force *erga omnes*. Instead, constitutional scrutiny is primarily a matter for a special parliamentary Committee: the Constitutional Law Committee being in charge for an ex-ante-review of legislative proposals. It can be noted that the Committee is specifically eager to enforce the respect for fundamental rights, also when it comes to implementing EU measures. In addition, the Constitution empowers Finnish courts to set aside an "Act of parliament" whenever the application of that Act would be in "evident conflict" with the Constitution. Arguably, this could also be of relevance regarding EU law, be it by means of setting aside the EU Act incorporating, in a general manner, EU law into the Finnish legal system, be it by applying the provision by analogy to EU measures. However, this has not happened yet.

## 2.8. Sweden

At the occasion of Sweden's joining the EU, the Swedish constitution – to be precise: the Instrument of Government (IG – in Swedish: Regeringsformen), mainly its Chapter 10 Article 5 – was amended aiming at the opening up for EC, today: EU law including supremacy of EU law. However, this was done by at the same time imposing limits to the transfer of powers to the EU. After an amendment which entered into force in 2003, these limits are twofold:

- The transfer of decision-making powers to the EU must "not affect the principles of the form of government"; and
- Such transfer presupposes "that protection for rights and freedoms in the field of cooperation to which the transfer relates corresponds to that afforded under this Instrument of Government and the European Convention for the Protection of Human Rights and Fundamental Freedoms".

Both of these limits are inspired by the jurisprudence of the German Constitutional Court under the German Basic Law (Bonner Grundgesetz).

These constitutional limits are relevant both for the transfer of powers through the Treaties and for the scrutiny of secondary EU law. However, the concrete consequences are far from being clarified. This is not the least due to the fact that the Swedish legal system is not equipped with a constitutional court which might concretise the legal implications by rulings which would be binding *erga omnes*. So far, Swedish courts and legal practice cope well with EU membership obligations. In principle, and also in several controversial cases, primacy of EU law has been accepted even in instances of tensions with constitutional legal traditions in Sweden.

## 3. COMPARING THE ESSENTIAL CONSTITUTIONAL CONDITIONS FOR EU MEMBERSHIP

### 3.1. Constitutional Core Values and Core Competences

At first glance, there appears to be a decisive difference between Member states which enacted, either as a preparation or at the occasion of EU accession, or at a later stage, *specific* constitutional provisions authorising EU membership, and others which did not do so (partly because they could not find sufficient parliamentary majorities for specific provisions), and consequently dealt with EU accession on the grounds of general provisions on international obligations. The difference at first sight is that countries with specific constitutional authorisations – in our study especially Austria, France, Germany,

and Sweden, – can point to explicit wording of the constitution regularly specifying not only the requirements for the transfer of powers, but also possible limits. In countries without *specific* constitutional provisions – in our study especially the Czech Republic, Finland, Italy, and Poland – such limits are often not mentioned, one could even speculate on their very existence.

A second glance, however, reveals that the divide between the two groups is less decisive. The reason is that, first, explicit constitutional provisions may be blurry and also informed by their systematic context in the constitution, which makes the conditions for EU accession and EU membership a matter of thorough interpretation of the entire constitution. This is so in Germany and Sweden despite the explicit clauses in their constitutions. Even explicit “EU provisions” might not explicitly mention concrete constitutional limits to EU membership or to the further transfer of powers (like in Austria), or they might refer to such limits only indirectly through specific authorisations of treaty amendments (like in France), thereby pointing to underlying constitutional concepts like sovereignty. Also here, the content of the constitutional authorisation and its possible limits can only be explained by systematic interpretation of the entire constitution, and not only by pointing to the concrete provisions authorising EU membership. Second, countries without specific authorisations may have to observe similar or even stricter requirements which can be inferred from the systematic interpretation of the constitutional norms governing international obligations in general (like in Finland). It may be that the lack of specific provisions is due to the dissent on the interpretation of existing constitutional limits and the desirability of changing them, like, arguably, in the Czech Republic, and to a certain extent also in Poland. In other countries, like Italy, the flexibility of existing constitutional provisions on international obligations was welcome at the beginning, and only later supplemented by constitutional amendments.

As a result, core values of the national constitutions establishing limits to European integration can be shown in all countries irrespective of the existence or nonexistence of specific constitutional provisions governing EU membership, and those limits can only be specified by thorough interpretation of the entire national constitution. It goes without saying that nevertheless, explicit provisions have the potential to clarify issues which otherwise remain controversial.

Having said that, the following core values and competences can be identified which would be relevant for any future transfer of powers to the EU. However, it must be stressed that the identification of common elements in the various countries is to be handled with caution: identical words might convey diverging meaning in the context of the respective constitution, and in the reading of national authorities including courts. “Relevance” means that the respective transfer of powers would trigger constitutional consequences like amendments requiring qualified majorities in parliament. In some instances, those majorities might be difficult to obtain. Some issues, especially relating to the “sovereignty” of the country, are specifically sensitive and partially claimed to be insurmountable as long as the national constitution remains respected.

- The *protection of fundamental rights and freedoms*, namely safeguarding the standard of protection of the national constitution, is an issue for all countries. In some (like Germany) the constitution requires a standard of protection at EU level that is “essentially comparable” to that afforded by the national constitution. In some countries (like Sweden), such a compromise seems available for some fundamental rights, but not for all, while in other countries

(like Finland and Poland), such compromise is not in sight or at least not yet accepted.

- A specific case is Article 23 of the German Basic Law. Apart from fundamental rights protection, as already mentioned, it specifies explicit barriers: the democratic, social, federal and subsidiarity principles, and the rule of law. These principles have to be respected, by German organs, in their decisions about transfers of competences to the EU level, in their participation in the EU legislature, and in the implementation of EU law. These requirements take on a "European" meaning, id est standards that are commensurate to the status and the function of the Union.
- Among the aforementioned principles, the *democratic principle* is of specific weight. First and foremost, this is true for Germany, where the Constitutional Court most recently introduced a new twofold *Solange* formula in its *Lisbon* ruling, in which the principle of conferral and the maintenance of a "well-balanced equilibrium" in the distribution of competences between the member states and the EU assume a primary role. The German parliament (*Bundestag*) must retain functions and powers of substantial importance, and the German legislature must only consent to transfers of competences and treaty amendments whose effects are foreseeable. Even if this approach received severe criticism in German academic writing, it is crucial for the further transfer of powers through Treaty amendments. Second, even if the constitutional text or the respective rulings of the (constitutional) courts might be less detailed and less far-reaching in other countries, preserving democracy, and including the balancing with the controversial concept of compensating the loss of decision-making power for national parliaments by enhancing parliamentarism at EU level, is of constitutional relevance everywhere. It is not decisive whether or not the constitutional texts allowing for the transfer of powers to the EU include an explicit reference to the preservation of democracy (like in Finland) or not (like in Austria, the Czech Republic or Poland), or refer in a more general manner to constitutional principles including democracy (like in Sweden).
- It shall be mentioned that in some countries the preservation of democratic decision taking at national level is further specified and thereby closely intertwined with another substantive barrier: the preservation of *national statehood* or sovereignty in the sense that the creation of a European federation at the expense of national statehood would be unconstitutional. This is so in Germany where the constitutional court not only identified "essential areas of democratic formative action" (such as the civil and military monopoly on the use of force) which would be exempt from the transfer of powers to the EU, but is also the Guardian of core elements of the constitution such as the democratic principle, the social state principle, the federal state principle, and the rule of law principle. These substantive principles are commonly regarded as the German "constitutional identity". Due to the eternity guarantee of the German Basic Law, it is even out of the hands of the constitution-amending legislature. Again, even if this might be spelt out less detailed in other constitutions, the preservation of national statehood is certainly a crucial barrier for all countries. For some, this is included in the notion of "sovereignty" (like in the Czech Republic, France, Finland, Germany, Italy or Poland), for others, the same is true even if the term is avoided (like in Austria, or in Sweden).

- It goes without saying that the *transfer of further competences* to the EU is always touching on the issue of a possible impact on sovereignty, even if this is partly avoided in the debate by using different expressions: competences are not “transferred” but “shared”, or sovereignty is not “transferred” but “shared” with other EU member states. In France, eg, further amendments of the constitution will be required for any transfer of competences which jeopardizes the “fundamental conditions of the exercising of sovereignty” either because these transfers (i) do not relate to those already permitted in the constitution or because (ii) there are modifications of the exercise of competences already transferred (e.g., replacing unanimity in the Council by qualified majority voting). A transfer of competences, by contrast, appears to be beyond the reach of “normal” constitutional amendments. In other countries, however, and irrespective of the constitutional dimension at stake, the constitutions allow the further transfer of powers without an *explicit* amendment of the constitutional text. Mostly, qualified majorities modelled after requirements foreseen for constitutional revision, are needed. This is the case e.g. in Austria, Finland and Poland.

### **3.2. Constitutional Conditions for the Further Transfer of Powers**

Clearly, the core values and core competences identifiable within national constitutional law at the same time can be seen as barriers to further integration. Several possibilities have to be differentiated.

First, there is a margin of discretion for the further transfer of powers – this may not only consist in opening up new fields of activity for the EU, but also the transfer of matters from unanimity to qualified majority voting in the Council – to the European Union which could be enacted on the grounds of the existing national constitutional bases without any (explicit) amendments to the constitution. This is to a certain extent possible, the national requirements differing considerably.

To give just one example: while it appears to be fully constitutional in Germany to amend the EU Treaties and transfer additional powers to the EU within certain less “sensitive” fields by a “simple” law (*Zustimmungsgesetz*), there is a range of further restrictions in other cases. The possibility to use a “simple” law for the transfer of powers is specifically remarkable insofar as such transfer might affect the division of competences as foreseen by the German Basic Law. Nevertheless, no explicit amendment of the text of the Basic Law is required. By contrast, making use of, e.g. simplified treaty amendments, the general bridging clause or specific bridging clauses would require the approval of parliament not only after, but even before the draft decision by the European Council can be taken. The parliamentary decision, however, could still be taken by simple majority. Further transfers in other fields might require previous amendments of the constitution, and several transfers would, according to the jurisprudence of the German Constitutional Court, be entirely excluded, as mentioned above.

The situation is, in its complexity, comparable in most other countries, yet different in detail. In France, e.g., the mentioned additional transfer of competences will require further amendments of the constitution. Abandoning national sovereignty by further transferring competences is not even a topic in the debate. By contrast, it is simply beyond the main aspects of the debate. In Austria and Finland, a qualified (two thirds) majority is required for further transfer of powers, but no formal amendment of the constitution.

### 3.3. Ultra-vires-acts

Ultra-vires-acts of the EU are a traditional topic not only in the academic debate on the EU, but also in the jurisprudence of several national courts. Even if until today the implicit “threat” to (permanently) disapply secondary Union legislation within the legal orders of a Member state did not materialise, it exerts a certain preventive function which might influence and certainly indeed influences daily practice.

*Ultra-vires-acts* may have different characteristics. They may range from the severely flawed use of conferred competences without specific repercussions for the national “constitutional identity” to violations of national constitutional provisions, e.g. in cases where the EU allegedly or in fact violates human rights guarantees. Clearly, it is specifically in those latter cases where the constitutional barriers to integration are of crucial importance, sometimes inseparably interwoven with the competence issue, even if the two can and have to be discerned.

Also here, the landscape is full of different flowers, not only between the member states, but sometimes also within one country. Specifically with respect to *Ultra-vires-acts*, the difference between countries equipped with a constitutional court empowered with ex-post-review of subordinated law against the yardstick of the constitution, and countries without such a mechanism, it appears to be very influential. The spelling out and concretisation of constitutional barriers is more explicit and visible in countries with a constitutional court such as the Czech Republic, (nowadays also) France, Italy, and Poland, if compared to countries like Finland and Sweden. This is not to say that the topic is less important for the latter. However, judicial ex-post review in these countries is decentralised, and traditionally limited to the correction of “manifest” or “obvious” errors. In addition, it is often dubious whether EU law might come under the reviewable provisions as specified by the national constitution. This makes an open conflict less likely.

Against this background, the two aspects of the *Ultra-vires*-debate shall be kept apart:

- In Germany, the *human rights barrier* is currently especially defined by the German Constitutional Court’s *Bananas* ruling. Accordingly, constitutional complaints and submissions by courts which challenge EU secondary law on the basis of German human rights are inadmissible from the outset, if their grounds do not state that the evolution of European law, including relevant rulings of the ECJ, has resulted in a decline below the indispensable standard of fundamental rights protection. This implies that the Court still claims a reserve competence. The hurdles for its activation are, however, quite unanimously regarded as being insurmountable. Human rights protection is also a core feature in all the other member states, even if the difference between treaty amendments and secondary legislation remains sometimes unaddressed. This is different especially when constitutional a difference whenever constitutional courts are involved, which prompted respective rulings especially in France and Italy, but also in Poland and Austria. In Finland and Sweden, similar deliberations can be found mainly in opinions of parliamentary committees entrusted with, inter alia, the ex-ante-scrutiny of implementing secondary EU legislation.
- The *competence barrier*, again starting with Germany, is derived from the requirement that the use of transferred competences must be predictable. This means that the Court regards itself to be competent for deciding whether an act of secondary law is *ultra vires*, which has caused an intense academic

discussion on whether the ECJ or national courts are competent to act as the “final arbiter of constitutionality” in Europe. Arguably, the reasoning in the *Lisbon* ruling, where the German Constitutional Court announced that in the future it will also scrutinize the exercise of EU competences by means of an “identity review” in order to preserve the inviolable core content of the Basic Law’s constitutional identity, may be seen as a specific feature of this lag of “*ultra vires* review”. The German Court underlined that this type of review is restricted to “obvious transgressions” of EU competences and applies only “exceptionally, and under special and narrow conditions”. Also in other countries, specifically France, recent jurisprudence specified constitutional restrictions for implementing secondary law: implementing a directive must not run counter to a rule or principle that is inherent to the *constitutional identity* of France. The constituting power could, however, consent to necessary amendments of French constitutional law.

### **3.4. Dissemination of Constitutional Principles throughout the EU?**

The creation, shaping and interpretation of national constitutional barriers to European integration happens – certainly not at the beginning of European integration in the 1950s, but increasingly during the last decades – in a sort of indirect and partly implicit dialogue between the national legislators, the national constitutional courts, the ECJ, and also the Member states as the “Masters of the Treaties” – one might even qualify it as an emerging system of informal cooperation between the various actors at national and European level. This is in itself a remarkable effect of European integration. However, it is very seldom that this dialogue is made transparent in the sense that explicit reference is made to a concrete piece of foreign legislation, or decision of another court – with the natural exception of preliminary references and infringement procedures before the ECJ and the respective reaction of national legislators or courts. Consequently, it is more the concurring or conflicting reasoning of courts and/or national legislators reflecting developments in different areas of the emerging “common constitutional space” with an ever increasing body of “constitutional traditions common to the Member states”. However, important exceptions can be identified, where the reciprocal influence can be identified.

This shall be illustrated by a few remarks:

- The jurisprudence of the German Constitutional Court with its reservation vis-à-vis unconditional supremacy of EC law as long as (Solange) fundamental rights protection would not be sufficiently guaranteed by the ECJ doubtlessly influenced the ECJ in its respective subsequent jurisprudence. The resulting development of a more or less fully fledged system of protection by the ECJ in return motivated the German Constitutional Court, but certainly also courts in other countries to redefine the scrutiny of EU law, and to abandon detailed scrutiny as long as the ECJ guarantees a sufficient standard of protection.
- The Swedish constitutional requirement that the transfer of decision-making powers to the EU is restricted in the sense that the level of fundamental rights protection within the EU “corresponds” to that afforded under the Swedish constitution and the European Convention for the Protection of Human Rights and Fundamental Freedoms, was clearly inspired by the mentioned Solange jurisprudence of the German Constitutional Court, and the subsequent “codification” of this jurisprudence by the German legislator.

- Close attention was also paid to the Lisbon ruling of again the German Constitutional Court, especially in the subsequent proceedings before the Polish and the Czech constitutional courts.

## PART I: GENERAL REMARKS

“National constitutional law and European integration” is a topic touching upon one of the core issues of current and future European constitutional development: the relationship between the legal system of the European Union and the national constitutions, primarily seen from the standpoint of the latter. Two cornerstones form the essential elements of the current European landscape: On the one hand side, the jurisprudence of the ECJ and the recent developments brought about by the Lisbon Treaty on the primacy of Union law; on the other hand, the national foundations of EU membership which are, from the point of view of national constitutional law, at the same time laying the legal foundations and the conditions for the interaction between national and European law.

The standing jurisprudence of the ECJ concerning primacy of Community law arguably is of continuing relevance also for Union law after the entry into force of the Lisbon Treaty. The ECJ stated already in the early 1960s that the Community constituted “a new legal order of *international law*”.<sup>1</sup> Shortly afterwards, the Court changed its rhetoric by calling the Treaty on the European Economic Community an independent source of law.<sup>2</sup> Still very early, the court specified the consequences of this concept for the relation between Community law and national law, arriving at *unconditional supremacy* of Community law vis-a-vis national law: “Recourse to the legal rules or concepts of national law in order to judge the validity of measures adopted by the institutions of the Community would have an adverse effect on the uniformity and efficacy of Community law. The validity of such measures can only be judged in the light of Community law. In fact, the law stemming from the Treaty, an independent source of law, cannot because of its very nature be overridden by rules of national law, however framed, without being deprived of its character as Community law and without the legal basis of the community itself being called in question. Therefore the validity of a community measure or its effect within a Member state cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that state or the principles of a national constitutional structure.”<sup>3</sup> Clearly, this jurisprudence goes to the heart of any national reservation against the unconditional prevalence of Community law.

The Lisbon Treaty did not substantially change the situation, but it is markedly more nuanced than the jurisprudence of the ECJ. Let us start with the difference between the Draft Constitutional Treaty and the Lisbon Treaty regarding the so called “primacy clause”.<sup>4</sup> The – abandoned – Constitution for the first time would have included an explicit primacy clause for the law adopted by the institutions of the union, thereby coining the respective jurisprudence of the ECJ: “The Constitution and law adopted by the institutions of the Union in exercising competences conferred on it shall have primacy over the law of the Member states”<sup>5</sup>.

The Lisbon Treaty, by contrast, suppresses this clause. What is included instead is a Declaration (No 17) to the Treaties “concerning primacy”. It recalls “that, in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of

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<sup>1</sup> Case 26/62, *van Gend en Loos*, 1963 ECR, 1 at 12.

<sup>2</sup> Case 6/64, *Costa v ENEL*, 1964 ECR, 585 at 593 f. However, the ECJ never explained in which respect the treaty could be “independent” from international law apart from forming a *special* international community.

<sup>3</sup> Case 11/70, *Internationale Handelsgesellschaft*, 1970 ECR, 1125, para 3.

<sup>4</sup> For a more detailed discussion compare *Griller* (2008) 47 ff.

<sup>5</sup> Article I-6 of the Constitutional Treaty. See also Declaration no. 1 to the Constitutional Treaty: “The conference notes that Article I-6 reflects existing case-law of the Court of Justice of the European Communities and of the Court of First Instance”.

Member states, under the conditions laid down by the said case law.” The Intergovernmental Conference also decided to attach as an Annex to the Final Act an Opinion of the Council Legal Service. In its core part, this opinion reads as follows: “The fact that the principle of primacy will not be included in the future treaty shall not in any way change the existence of the principle and the existing case-law of the Court of Justice”.

Primacy through this development has neither been discarded nor was it extended if compared to the Status Quo or the Constitutional Treaty.<sup>6</sup> The latter stance could be considered given that Declaration No 17 is – like the standing jurisprudence of the ECJ – unconditional and does not mention the competences of the Union. However, the restriction of the Union’s powers to conferred competences by explicit Treaty provisions cannot really be challenged.<sup>7</sup> Furthermore, the Lisbon Treaty not only reconfirms the limits of the Union’s competences, but also the respect for the national constitutional environment. It is this aspect which differs substantially from the cited jurisprudence of the ECJ: The Treaty stipulates explicitly that the Union “shall respect the equality of Member states before the Treaties as well as their national identities, inherent in their fundamental structures, political and *constitutional*, inclusive of regional and local self-government. It shall respect their essential state functions ...”<sup>8</sup>. Additionally, regarding fundamental rights protection, it has to be borne in mind that the Charter of Fundamental Rights of the European Union not only expressly secures the level of protection as recognised by Union law, international law and international agreements, but also “by the Member states’ constitutions”.<sup>9</sup> This could even encourage Member states’ reservations against the notion of unconditional supremacy of Union law over national law, and is certainly not strengthening the ECJ’s jurisprudence in this respect<sup>10</sup>.

Summing up: by contrast to the clear and unconditional tendency of the ECJ’s jurisprudence, the nuanced wording of the Treaty on European Union after Lisbon points into the direction of a growing importance of the national constitutional foundations of EU membership, accepting their significance under EU law. These national provisions are the mentioned second cornerstone, and they would have to be qualified as such even without the cited reference in the TEU. For it cannot be denied that, without any exception, all Member states joined the EU on the basis of their national constitutions, either on the grounds of general provisions allowing for entering into international obligations, or on the grounds of specific provisions enacted in order to prepare the national legal order for EU membership.<sup>11</sup> Inevitably, national authorities including national courts have to respect possible limits which are included in these national constitutional foundations of EU membership. Whenever further transfer of powers to the EU or possible conflicts between EU law and national law are at stake, national authorities have to take seriously the conditions the national constitution sets out for their activities.

Against this background it can be stated that our study reveals a growing body of national conditions and restrictions to European integration which are common to the Member states. The most important features are being spelt out below. However, such

<sup>6</sup> In the same vein *Ziller* (2007) 139 ff.

<sup>7</sup> Article 4(1)(2) and Article 5(1)(2) TEU as amended by the Lisbon Treaty.

<sup>8</sup> Article 5 para 2 TEU as amended by the Lisbon Treaty.

<sup>9</sup> Article 53 of the Charter which, according to Article 6 para 1 TEU, has the same legal value as the Treaties.

<sup>10</sup> This is not the place to dwell in detail on the conceptual foundations of the EU after Lisbon. However, it might still be defensible to characterise the Union by a statement dating back before the major reforms of the last decade, if “EC law” is being replaced by “EU law”: *de Witte* (1999) 210: “The principles of direct effect and supremacy, as presently formulated and accepted, continue to confirm the nature of EC law as that of a branch of international law, albeit a branch with some unusual, quasi-federal, blossoms.”

convergence can only be found on a rather high level of abstraction. Going into the details reveals, also in this field, the unity in rich diversity within the European Union.

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<sup>11</sup> Compare only the survey in *Grabenwarter* (2006), *Kellermann / de Zwaan / Czuczai* (eds), (2001), and in *Lenaerts / van Nuffel* (2005) para 17-015 ff, all with further references.

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## PART II: COUNTRY REPORTS

### 1. CZECH REPUBLIC

#### 1.1. Constitutional Foundations of EU-Membership

The Czech Republic joined the European Union by May 1<sup>st</sup>, 2004 after a referendum on the country's accession to the European Union has been held on 13<sup>th</sup> and 14<sup>th</sup> June 2003.<sup>12</sup> 77.3% of the votes cast were in favour of accession, the turnout in the referendum was 55%.<sup>13</sup> The accession itself proceeded *after* the Treaty of Nice<sup>14</sup> had come into force by February 1<sup>st</sup>, 2003. It has to be pointed out that the legal framework and the entire *acquis communautaire* (now *acquis unionique*) which the Czech Republic had to take over and to implement in the course of accession<sup>15</sup> and along the Accession Treaty<sup>16</sup> were based on the Treaties (Treaty on European Union and the Treaty establishing the European Community) as amended by the Treaty of Nice<sup>17</sup>. This *acquis* had not been changed until the Treaty of Lisbon<sup>18</sup> has come into force by December 1<sup>st</sup>, 2009.

As a preparation and to establish a more or less firm constitutional basis ahead of the accession, the Constitutional Act<sup>19</sup>, which for the most part had come into effect already in 1993, after Czechoslovakia peacefully had split into the Czech Republic and Slovakia on January 1<sup>st</sup>, 1993<sup>20</sup>, has been amended by<sup>21</sup>:

- The introduction of Art 1 Para 2 which calls up to meet the obligations provided by international law;
- the adaptation of Art 10 – the so called “monistic clause”<sup>22</sup> – which until that amendment referred only to international conventions on human rights to include all ratified and promulgated (international) treaties and to define these as parts of the Czech legal system.<sup>23</sup> Sentence two of this Article determines in a clear and straight way that in case of dissenting provisions in the national legal system the one of the treaty shall apply and shall therefore prevail;
- the introduction of new Art 10a – the so called “integration clause”<sup>24</sup> – which concedes to transfer (only!) certain powers<sup>25</sup> of authorities to an international organization (as the EU respectively the former EC)<sup>26</sup> by treaty (Para 1). Ratification of such a treaty requires the consent of both chambers of Parliament

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<sup>12</sup> Constitutional Act No 515/2002 Coll concerning the Referendum on the Czech Republic's Accession to the European Union and Amendments to Constitutional Act No 1/1993 Coll, the Constitution of the Czech Republic, as amended by subsequent constitutional acts; *Kühn* (2005) 164 f.

<sup>13</sup> European Election Database <[nsd.uib.no/european\\_election\\_database/country/czech\\_republic/eu\\_related\\_referendums.html](http://nsd.uib.no/european_election_database/country/czech_republic/eu_related_referendums.html)>.

<sup>14</sup> OJ 2001 C 80/1.

<sup>15</sup> *Zemánek* (2001) 423 f.

<sup>16</sup> OJ 200 L 236/1.

<sup>17</sup> OJ 2006 C 321E/1 incorporating the subsequent accessions of Bulgaria and Romania already.

<sup>18</sup> OJ 2007 C 306/1; the consolidated version of the current Treaties see OJ 2010 C 83/1.

<sup>19</sup> Regarding the legal status afore see *Balaš* (2001) 269 f.

<sup>20</sup> Constitution of the Czech Republic Constitutional Act No 1/1993 Coll. of the Czech National Council of December 16<sup>th</sup>, 1992 as amended by Acts No 347/1997 Coll, 300/2000 Coll, 448/2001 Coll, 395/2001 Coll and 515/2002 Coll.

<sup>21</sup> For questions which should have been raised in advance in this regard, see *Zemánek* (2001) 425.

<sup>22</sup> *Zemánek* (2007) 422 f.

<sup>23</sup> Cf *Klíma* (2008) 144.

<sup>24</sup> *Zemánek* (2007) 422 fn 20.

<sup>25</sup> Cf *Klíma* (2008) 140 f.

<sup>26</sup> *Kühn* (2005) 159 f.

or requires the approval of a referendum in addition if a constitutional act demands for (Para 2);

- the introduction of a new Art 10b, stipulating information duties of the government in favour of the Parliament on issues regarding obligations connected with the respective international organization (Para 1); furthermore the right of both chambers of Parliament to present their opinions on decisions made by the international organization (Para 2) and the possibility to establish a joint body of both chambers by Act (Para 3);
- the adaptation and expansion of Art 49 which stipulates the mandatory approval of both chamber so Parliament to ratify an international agreement in case<sup>27</sup>:
  - a) it is consenting rights and obliging duties to persons;
  - b) it is an alliance-, peace- or an other political treaty;
  - c) which results in a membership;
  - d) that it is an economic one or
  - e) such procedure is mandatory by law.
- the introduction of Art 62 lit l which enables the President of the Republic to call a referendum solely for purpose of the accession to the EU;
- the introduction of two provisions regarding the CZCC, which shall neither rule on appeals against the negative decision of the President regarding a referendum to be called (Art 87 Para 1 lit l) nor on the execution of a referendum in this regard and its conformity with the Constitution (lit m);
- the introduction of a new Art 87 Para 2 (and as a consequence a renumbering) which empowers the CZCC to review the conformity of such international agreements [treaties] prior to ratification and which conditions a obstruction of a ratification process until that specific decision<sup>28</sup>.

Consequently a Constitutional Act regarding the referendum on the accession to EU had to be adopted, which determined several provisions regarding the referendum and its realization, its (possible) repetition and the legal consequences of its arising result.

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<sup>27</sup> Cf *Týc* (2002) 233 f.

<sup>28</sup> Cf *Zemánek* (2007) 434.

## 1.2. Constitutional limits to EU-integration

### 1.2.1. General Provisions

The Czech Constitution is rather flexible with regard to amendments required by international issues.<sup>29</sup> The Constitution, in particular Art 10a, does not differentiate between the membership to the European Union and any other international organization eg the Council of Europe (member since 30<sup>th</sup> June 1993), the United Nations (member since 19<sup>th</sup> January 1993) or the NATO (member since 12<sup>th</sup> March 1999). Nevertheless the EU must be seen as an international organization sui generis, due to several legal aspects like the phenomenon of supranationality, the principles of supremacy of community law and its direct affect as well as some more exclusive characteristics<sup>30</sup>.

Art 39 Constitution states provisions regarding the adoption of constitutional acts or for the ratification of international treaties according to Art 10a Para 1. Para 1 asks for a quorum of at least one third of the members of both chambers of Parliament. Para 4<sup>31</sup> asks for the concurrence of three-fifths of the 200 Deputies (Art 16 Para 1) and of three-fifths of the 81 members of the Senate (Art 16 Para 2). The Charter of Fundamental Rights and Basic Freedoms (CZCharter)<sup>32</sup> is according to Art 3 Constitution an integral component of the constitutional system of the Czech Republic.

Besides essential and general legal principles which can be found in several provisions of the Czech Constitution (eg principle of sovereignty, principle of separation of powers, principle of legal certainty), the outstanding statute of Art 10a Para 1 Constitution has to be taken into account when the limits to a (further) transfer of powers to the EU are to be fathomed. Art 10a Para 1 Constitution has been introduced in the light of the prepared and expected accession

Hence, the Constitution of the Czech Republic does not regulate the status of derived law of the EU ie European legal acts of secondary<sup>33</sup> or – as of now – also tertiary<sup>34</sup> legislation<sup>35</sup>.

### 1.2.2. Limits set by the the Constitutional Court of the Czech Republic (Ústavní Soud)<sup>36</sup>

#### 1.2.2.1. Case Sugar Quote Regulation<sup>37</sup>

Judgment of 8th March 2006, PL ÚS 50/04 (Case Sugar Quote Regulation)<sup>38</sup>

A Petition filed by a group of Deputies of the Czech Parliament proposes the annulment of §§ 3 and 16 of Government Regulation No 364/2004 and of § 3 of Government Regulation No 548/2005 Coll. By the adoption of the relevant provisions in § 3 of

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<sup>29</sup> Cf *Balaš* (2001) 272 f.

<sup>30</sup> Cf *Klíma* (2008) 144.

<sup>31</sup> As amended by Constitutional Act No 395/2001 Coll of 18<sup>th</sup> October 2001.

<sup>32</sup> Resolution of the Presidium of the Czech National Council of 16<sup>th</sup> December 1992 on the declaration of the Charter of Fundamental Rights and Basic Freedoms as a part of the constitutional order of the Czech Republic No 2/1993 Coll as amended by constitutional act No 162/1998 Coll.

<sup>33</sup> Cf Art 288 TFEU.

<sup>34</sup> Cf Art 290 Para 3, Art 291 Para 4 TFEU.

<sup>35</sup> Cf *Klíma* (2008) 145.

<sup>36</sup> Cf *Kühn* (2005) 166 f; *Zemánek* (2007) 419.

<sup>37</sup> See an overview of jurisdiction of national Constitutional Courts regarding European integration Schmitz (2010). The summaries of the CZCC's decisions are mainly formed on the headnotes of the specific judgment.

<sup>38</sup> See the decision in English <concourt.cz/clanek/pl-50-04>.

Regulation No 548/2005 Coll, which merely paraphrases Art 1 Para 3 Regulation 1609/2005/EC (on production quotas scheme for the sugar sector) the Government failed to respect the fact that, as a result of the Czech Republic's accession to the EU, a transfer of powers of national organs to supra-national organs has taken place on the basis of Art 10a Constitution. In the moment when the TEC including all amendments became binding on the Czech Republic, a transfer was effected of those powers of national state organs which, according to EC (now EU) primary law, are exercised by organs of the EC (now EU), upon those organs.<sup>39</sup>

The Czech Republic conferred these powers upon EC organs. In the CZCC's view, this conferral of a part of its powers is naturally a conditional conferral, as the original bearer of sovereignty, as well as the powers flowing therefrom, still remains the Czech Republic, whose sovereignty is still founded upon Art 1 Para 1 Constitution. In the CZCC's view, the conditional nature of the delegation of these powers is manifested on two levels: the formal and the substantive level<sup>40</sup>.

4. The first of these levels concerns the power attributes of state sovereignty itself,
5. the second level concerns the substantive component of the exercise of state power. The delegation of a part of the powers of national organs may persist only as long as these powers are exercised in a manner that is compatible with the preservation of the foundations of state sovereignty of the Czech Republic. In such determination the CZCC is called upon to protect constitutionalism (Art 83 Constitution). According to Art 9 Para 2 Constitution the essential attributes of a democratic state governed by the rule of law remain beyond the reach of the domestic Parliament.<sup>41</sup>

Direct applicability in national law and applicational precedence of a regulation follows from Community law (now Union law) doctrine itself, as it has emerged from the case-law of the ECJ. If membership in the EC (now EU) brings with it a certain limitation on the powers of the national organs in favour of Community (now Union) organs, one of the manifestations of such limitation must necessarily also be a restriction on Member states. Art 10a Constitution thus operates in both directions: it forms the normative basis for the transfer of powers and is simultaneously the opening provision of the Czech Constitution up the national legal order to the operation of Community (now Union).<sup>42</sup>

The CZCC holds that – as concerns the operation of Community (now Union) law in the national law – such approach must be adopted as would not permanently fix doctrine as to the effects of Community (now Union) law in the national legal order.

#### 1.2.2.2. Case European Arrest Warrant

Judgment of 3<sup>rd</sup> May 2006, PL ÚS 66/04 (European Arrest Warrant)<sup>43</sup>

A petition filed on 4 July 2005 by a group of 29 members of the Senate of the Czech Republic proposing the annulment of a provision of the Act on Public Health Insurance<sup>44</sup>

<sup>39</sup> Cf Section VI B of the judgment.

<sup>40</sup> Cf *Zemánek* (2007) 424 f; cf *Bobek / Kosař* (2010) 3 f.

<sup>41</sup> Cf Section VI A-3 of the judgment.

<sup>42</sup> Cf Section VI B of the judgment.

<sup>43</sup> See the decision in English <concourt.cz/clanek/pl-66-04>; cf CMLR 2007, 592; *Jahrbuch für Ostrecht* 2007, 321.

<sup>44</sup> Act No 48/1997 Coll.

as well as the entire ministerial regulation implementing it,<sup>45</sup> due to their conflict with the Czech Republic's obligations resulting from Community (now Union) law and from Art 36 Para 1 CZCharter<sup>46</sup>.

A constitutional principle can be derived from Art 1 Para 2 Constitution, in conjunction with the principle of cooperation laid down in Art 10 TEC (now Art 4 Para 3 TEU) – the so called principle of loyalty according to which domestic legal enactments, including the constitution, should be interpreted in conformity with the principles of European integration and the cooperation between Community (now Union) and Member state organs.<sup>47</sup> If the Constitution, of which the CZCharter forms a part, can be interpreted in several manners, only certain of which lead to the attainment of an obligation which the Czech Republic undertook in connection with its membership in the EU, then an interpretation must be selected which supports the carrying out of that obligation, and not an interpretation which precludes it<sup>48</sup>. If the national methodology for the interpretation of constitutional law does not enable a relevant norm to be interpreted in harmony with European Law<sup>49</sup>, it is solely within the Constituent Assembly's prerogative to amend the Constitution<sup>50</sup>.

These conclusions apply to the interpretation of Art 14 Para 4 CZCharter (Freedom to enter the territory of the Republic and the interdiction to force a citizen to leave this territory) as well<sup>51</sup>.

### 1.2.2.3. Case Reimbursement of Medications

16 January 2007, PL ÚS 36/05 (Reimbursement of Medications)<sup>52</sup>

According to Art 1 Para 1 Constitution, the Czech Republic is a sovereign, unitary, and democratic state governed by the rule of law, founded on respect for the rights and freedoms of man and of citizens. All state authority emanates from the people; they exercise it through legislative, executive, and judicial bodies (Art 2 Para 1 Constitution). The fundamental rights and basic freedoms shall enjoy the protection of judicial bodies (Art 4 Constitution).<sup>53</sup>

The ascertainment of whether domestic law is in conformity with Community (now Union) law cannot be within the competence of a domestic body.<sup>54</sup> It is solely the ECJ, which is competent in this respect. The principle of applicational precedence of Community (now Union) law<sup>55</sup> substantiates this conclusion, as does the institute of the preliminary rulings according to Art 234 TEC (now Art 267 TFEU), in which national courts refer matters to the ECJ; if the CZCC could annul statutes or individual provisions thereof due to their conflict with Community (now Union) law, it would also be authorized to respond to preliminary questions.<sup>56</sup>

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<sup>45</sup> Act No 589/2004 Coll.

<sup>46</sup> Cf Para 1 ff.

<sup>47</sup> Cf *Zemánek* (2007).

<sup>48</sup> Cf ECJ 16 June 2005 Case C-105/03 (Maria Pupino) ECR 2005 I-05285.

<sup>49</sup> Cf *Roth* (2010) Rz 32.

<sup>50</sup> Cf Para 82; cf *Bobek / Kosař* (2010) 4.

<sup>51</sup> Cf Para 61 f.

<sup>52</sup> See the decision in English <concourt.cz/clanek/pl-36-05>.

<sup>53</sup> Cf Para 36.

<sup>54</sup> Cf *Zemánek* (2007) 432 f.

<sup>55</sup> Cf ECJ 5<sup>th</sup> July 1964 Case 6/64 (Costa / ENEL) ECR 1964, 585; 17<sup>th</sup> December 1970 Case 11/70 (Internationale Handelsgesellschaft) ECR 1970, 01125; cf *Bebr* (1974) 408.

<sup>56</sup> Cf Para 13.

#### 1.2.2.4. Case Treaty of Lisbon I

Judgment of 26 November 2008, Pl ÚS 19/08 (Treaty of Lisbon I)<sup>57</sup>

##### **Basic facts**<sup>58</sup>

The Lisbon Treaty amending the TEU and the TFEU can be seen as a treaty under Art 10a Para 1 of the Constitution of the Czech Republic and according to Para 2 such an international agreement requires the approval of the Parliament for ratification by the President of the Czech Republic.

The Senate of the Parliament of the Czech Republic filed a petition to the CZCC – based on § 117b Para 1 Act on the Rules of Procedure of the Senate<sup>59</sup>, and on § 71a Para 1 lit a Act on the Constitutional Court<sup>60</sup>, – concerning the consistency of specific amendments by the Lisbon Treaty with the constitutional order of the Czech Republic. Under Art 87 Para 2 Constitution the CZCC has the authority to decide on the conformity of international agreements under Art 10a with the constitutional order prior to their ratification. Until a ruling of the Constitutional Court is delivered, such an agreement cannot be ratified. Under § 71c of the Act on the Constitutional Court the Parliament, the President of the Czech Republic and the government are also Parties to the proceeding.

##### **Preliminary questions**<sup>61</sup>

Concerning to what extent the CZCC has the competence to review an international agreement such as the Lisbon Treaty, the Court stated that it is bound by the scope of the petition to open proceedings and is therefore not authorized to exceed its scope to provisions that are not contested. Within the scope of the petition the CZCC is not bound by the grounds for the alleged unconstitutionality raised by the authorized petitioner. Subject of the review are all contested provisions of the Lisbon Treaty without any difference if they are normatively new or if they only replicate existing norms of European law. Concerning the point of reference for reviewing the contested provisions of the Lisbon Treaty the CZCC applies the constitutional order of the Czech Republic as a whole and not only its so-called material core.

##### **General Points**<sup>62</sup>

Although the CZCC takes into account the constitutional order as a whole in his review, it focuses primarily on Art 10a Para 1, Art 1 Para 1 and Art 9 Para 2 and 3 Constitution.

Art 10a Para 1 provides that certain powers of Czech Republic bodies may be transferred by treaty to an international organization or institution. This Article must be interpreted in accordance with Art 1 Para 1, which provides that the Czech Republic is a sovereign, unitary, and democratic state governed by the rule of law, founded on respect for the rights and freedoms of the human being and of citizens. Furthermore, it must be interpreted in accordance with Art 9 Para 2, which provides that a change in the essential requirements for a democratic state governed by the rule of law is impermissible. Art 9

<sup>57</sup> See the decision in English < [concourt.cz/clanek/pl-19-08](http://concourt.cz/clanek/pl-19-08) >.

<sup>58</sup> Cf Para 65 to 69 of the judgment.

<sup>59</sup> Act No 107/1999 Coll amended by later regulations.

<sup>60</sup> Act No 182/1993 Coll as amended by Acts No 331/1993 Coll, 236/1995 Coll, 77/1998 Sb., 18/2000 Coll, 132/2000 Coll, 48/2002 Coll, 202/2002 Coll, 320/2002 Coll, 114/2003 Coll, 83/2004 Coll, 120/2004 Coll, 234/2006 Coll and 342/2006 Coll.

<sup>61</sup> Cf Para 70-94.

<sup>62</sup> Cf Para 95 to 120.

Para 3 provides that legal norms may not be interpreted in such a way to threaten the democratic foundations of the state. Therefore, the transfer of powers of Czech Republic institutions may not violate these provisions.

The CZCC stresses that national sovereignty could no longer be seen in the traditional concept, it is rather undergoing changes in an international context. Hence the sovereignty has to be understood as a concept with a practical, moral and existential dimension. National sovereignty means the formal power to choose between available alternatives, and not to pursue an alternative dictated by a foreign power. In reference to the EU's integration process the CZCC states that this process does not happen in a radical way, which would cause a „loss“ of national sovereignty; it is rather an evolutionary process and a reaction to the increasing globalization in the world. The CZCC also points out the ability of a Member state to withdraw from the EU by the process set forth in Art 50 TEU (Lisbon), which confirms the principle that “States are the Masters of the Treaty” and the continuing sovereignty of Member states. Besides the principle of sovereignty the CZCC emphasizes the protection of fundamental human rights and freedoms.

With regard to the transferred powers to the EU the CZCC generally recognizes the functionality of the EU institutional framework for reviewing the scope of applied conferred competences as long as<sup>63</sup> its functionality is guaranteed. Only in exceptional cases the CZCC may act with „ultima ratio“ and, therefore, review whether an act of the EU institutions exceeds the transferred powers.

### **Special Part**

Art 2 Para 1 and Art 4 Para 2 TFEU<sup>64</sup>

The CZCC refers to Art 10a Constitution in order to define the boundary for the transfer of powers of the Czech Republic to international organizations. The meaning of the wording “transfer of *certain* powers” has to be interpreted in the context of other provisions of the constitutional order, especially of Art 1 Para 1, under which the Czech Republic is a sovereign and unitary state governed by the rule of law, established on respect for the rights and freedoms of the human being and citizens. According to the judgment Sugar Quota Regulation PI ÚS 50/04 (see above) the transfer of powers is conditional at two levels – the formal and the substantive. Whereby the formal level concerns the preservation of foundations of state sovereignty by the transfer of powers, the substantive level concerns the manner of exercising the transferred powers, which may not threaten the essence of a substantive law-based state. Both levels neither exclude a transfer of competences over entire legal policies, nor an exercise of powers by the specific organization only. The CZCC states that only a sovereign state is able to undertake to observe and effectively enforce the most important constitutional rules and principles of a substantive law-based state, and preserving the essential attributes of sovereignty is conditional. The EU does not have competence-competence. It can only act within the scope of powers expressly conferred upon it by the Member states (Art 5 Para 2 TEU [Lisbon]), which have the exclusive authorization to amend fundamental regulations. From a national constitutional point of view the CZCC welcomes the clarification of exclusive competences of the EU in Art 2 Para 1 TFEU that has already been confirmed by the ECJ. In case a competence is neither an exclusive nor a shared one, it remains within the power of the Member states (Art 5 Para 2 TEU [Lisbon]).

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<sup>63</sup> Cf BVerfG 22<sup>th</sup> October 1986, 2 BvR 197/83 (Solange II).

<sup>64</sup> Cf Para 121 to 141.

Therefore, the transfer of powers under Art 10a Constitution is absolutely not unlimited. Art 10a is not infringed in this regard.

Concerning a delimitation of transferred competences the CZCC points out that Art 4 TFEU does not define the powers of the EU itself. The competences are specified by individual provisions in the TFEU. The CZCC remarks that it is not possible to create an exhaustive and detailed list of individual powers in advance, instead it can only specify policies of the EU. Art 5 TEU, the principles of subsidiarity and proportionality, as well as the specific provisions of the TEU and the TFEU provide a sufficiently certain normative framework to determine the powers transferred by the Czech Republic to the EU. The ECJ is the competent institution to review the exercise of the Unions' competences (Art 263 TFEU). In reference to the "Solange"<sup>65</sup> II-Decision" of the German Federal Constitutional Court the CZCC generally recognizes the functionality of the EU institutional framework for reviewing the scope of applied conferred competences as long as its functionality is guaranteed. Only in exceptional cases the CZCC may act with „ultima ratio“ and, therefore, review whether an act of the EU institutions exceeds the transferred powers. But also the new role of the national Parliaments in the process reviewing the exercise of competences increases the functionality of the Unions' institutional framework. Therefore, Art 2 Para 1 and Art 4 Para 2 TFEU are not inconsistent with the constitutional order.

Art 352 Para 1 TFEU<sup>66</sup>

The EU does not have the power to create its own new competences. The Member states remain the "Masters of the Treaties". The Lisbon Treaty does not change the character of the EU and – even Art 352 TFEU – does certainly not establish the ability for the EU to adopt measures beyond the scope of conferred competences under Art 10a Constitution, because such measures are limited to the objectives defined in Art 3 TEU. The so called flexibility clause in Art 352 TFEU has to comply with the following cumulative conditions: (i) one of the objectives of the EU has to be aimed; (ii) within the policies defined by the primary law of the European Union; (iii) approval by the Council and (iv) consent of the European Parliament. In reference to the Opinion 2/94 by the ECJ<sup>67</sup> the CZCC confirms that Art 352 TFEU cannot serve as a basis for widening the scope of the powers of the EU beyond the general framework created by provisions of the Treaty as a whole. The special role of national Parliaments even strengthens the position of the Member states. Therefore, Art 352 TFEU is not inconsistent with the constitutional order of the Czech Republic.

Art 48 Para 6 and 7 TEU<sup>68</sup>

Art 48 Para 6 TEU provides a simplified procedure for adopting changes to Title III of the TEU (Institutions). According to the literal wording of this provision ("... shall not increase the competences conferred on the Union in the Treaties.") no other competences can be conferred to the EU. Decisions under Art 48 Para 6 and 7 may also be reviewed by the EJC. Therefore, Art 48 Para 6 and 7 TEU are not inconsistent with the constitutional order.

The constitutional requirement of Art 15 Para 1 Constitution, that the legislative power in the Czech Republic belongs to the Parliament, is not affected in any way, nor is the sovereignty of the Czech Republic reduced below an acceptable level. The Constitutional

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<sup>65</sup> See fn 63.

<sup>66</sup> Cf Para 142 to 155.

<sup>67</sup> Regarding the accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms, ECR 1996 I-01759.

<sup>68</sup> Cf Para 156 to 168.

Court also stresses different kinds of collaboration with national Parliaments to ensure a good functioning of the EU with the consequence to strengthen the role of the Member states. Expanding voting by a qualified majority under Art 48 Para 7 TEU is not unconstitutional.

Art 83 TFEU<sup>69</sup>

Art 83 TFEU is not inconsistent with the constitution order, because even within the scope of competence of Art 83 TFEU, domestic Parliaments can fulfil their preliminary review role. The legitimate purpose of this provision is not to expand the competences of the European Union, but to increase the ability to react efficiently to threats of danger and to exceptionally dangerous crime such as terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organized crime.

Art 216 TFEU<sup>70</sup>

The negotiation of international treaties under Art 216 TFEU is not inconsistent with the constitutional order. Art 216 TFEU must be read in connection with Art 3 Para 2 TFEU emphasizing the exclusive competence for the conclusion of an international agreement. Art 216 TFEU cannot be interpreted as a competence norm that would extend the competences of the European Union. These competences are not defined by Art 216 TFEU, but by specific provisions.

Charter of Fundamental Rights of the EU<sup>71</sup> (ChFR)<sup>72</sup>

Art 6 Para 1 TEU must be interpreted to mean that the ChFR is an integral Part of the Treaties and of primary law. This approach cannot in any way cast doubt upon the standard of domestic protection of human rights.

#### 1.2.2.5. Case Treaty of Lisbon II

Judgment of 3<sup>rd</sup> November 2009, PL ÚS 29/09 (Treaty of Lisbon II)<sup>73</sup>

##### **Basic facts**

A Petition of a group of members of the Senate of the Parliament of the Czech Republic has been filed by 28th September 2009. The petitioners' claim in the course of four main points that the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community

- as a whole,
- several Articles of the TEU as for example Art 7, Art 8, Art,
- as well as several Articles of the TFEU as for example Art 3, Art 78, Para 3, Art 79 Para 1 and Art 83

are in conflict with the constitutional order of the Czech Republic.

##### **Grounds of claim**

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<sup>69</sup> Cf Para 169 to 171.

<sup>70</sup> Cf Para 176 to 186.

<sup>71</sup> Finally OJ 2010 C 83/1.

<sup>72</sup> Cf Para 187 to 204.

<sup>73</sup> Cf *Komárek*, Excerpts from a Translation by *Komárek* (2009) 346.

– **Point I of the claim**

The petitioners contest the conformity of Treaty of Lisbon as a whole with Art 1 Para 1 Constitution and argue that the Treaty of Lisbon contravenes the following essential characteristics of<sup>74</sup>:

- a “state governed by the rule of law”,
- a “democratic state governed by the rule of law”,
- a “democratic state”,
- a “sovereign democratic state governed by the rule of law” and finally
- the principle of non-retroactivity

The petitioners argue that the vote of the Czech Republic’s representative in the EU Council needs prior consent of Parliament and call it a “special mandate”. The implementation would conflict with the principle of separation of powers, which is one of the essential prerequisites of a democratic state governed by the rule of law.<sup>75</sup>

The TEU as a whole conflicts with Art 1 Para 1 Constitution or Art 2 Para 1 CZCharter<sup>76</sup> “(Democratic values)”. The objectives according to Art 3 TFEU and the TEU as a whole are contrary to the principle of political neutrality as a fundamental feature of a democratic state.

TEU and TFEU as a whole conflict with Art 1 Para 1 Constitution because a particular goal of the European integration may be a common European defence policy and the establishing of a common European federal state is not excluded.

The CZCC records, that as regards the petitions for overall review of the TEU and of the TFEU, the Court is authorised to perform such a review only to the extent to which the Treaty of Lisbon as a whole amends them. The Court does not feel authorised to formulate in advance, in an abstract context, what is the precise content of Art 1 Para 1 Constitution, as requested by the petitioners. The attempt to define the term “sovereign, unitary and democratic state governed by the rule of law, would, in contrast, be seen as an expression of judicial activism, which is, incidentally, consistently criticized by certain other political figures. The Court refers to former decisions especially to PI ÚS 19/08 (Treaty of Lisbon I) and e.g PI ÚS 36/01 or PI ÚS 27/09<sup>77</sup>.

In a supplement filed by the petitioners the CZCC is asked to review Art 2 (competences), 3 (exclusive competences), 4 (shared competences), 83 (serious crime), 216 (third country agreements) TFEU for conformity with Art 1 Para 1 and Art 10a Constitution.<sup>78</sup> But the Court denies the petition regarding Art 2, 4 and 216 TFEU and their asserted conflict with Art 1 Para 1 and Art 10a Constitution on the basis of § 35 No 2 Act of the Constitutional Court<sup>79</sup> as impermissible. Due to the judgment in the Case Treaty of Lisbon I the arguments raised by the petitioners again under the identic scope are refused because the referred questions can be seen as banned by the impediment *res iudicata*<sup>80</sup>.

<sup>74</sup> Cf Para 6.

<sup>75</sup> Cf Para 7.

<sup>76</sup> Resolution of the Presidium of the Czech National Council of 16th December 1992 on the declaration of the CHARTER OF FUNDAMENTAL RIGHTS AND FREEDOMS as a part of the constitutional order of the Czech Republic No 2/1993 Coll as amended by constitutional act No 162/1998 Coll.

<sup>77</sup> Cf Para 105 to 114.

<sup>78</sup> Cf Para 24 to 35.

<sup>79</sup> Constitutional Court Act No 182/1993 Coll as amended by Act No 342/2006 Coll.

<sup>80</sup> Cf Para 96 to 104.

– **Point II of the claim**<sup>81</sup>

1. The petitioners question the conformity of Art 7 TEU, which provides a ruling to suspend certain rights of a Member state including the voting rights in the Council in case of a clear breach by that Member state of the values referred in Art 2 TEU, with Art 1 Para 1 Constitution in particular with the principles of appropriate generality and adequate comprehensibility of legislation. Furthermore they question the conformity of Art 7 TEU with Art 2 Para 3 Constitution, which provides that the state power should serve all citizens.
2. The petitioners question the conformity of Art 8 TEU, which focuses a special relationship with neighbouring countries to be developed aiming to establish an area of prosperity and good neighbourliness based on the values of the EU, with Art 1 Para 1 Constitution in particular with the principles of appropriate generality and adequate comprehensibility of legislation.
3. The petitioners also focus on Art 10 Para 1 TEU, which states that the functioning of the Union shall be founded on representative democracy. They are of the opinion that on the contrary an international organization as the EU (which is not a state) must be based on the sovereign equality of Member states and representative democracy must remain merely adjunct. This provision thus contravenes Art 1 Para 1 and Art 10a Constitution. The latter states that certain powers of bodies of the Czech Republic may be transferred to an international organization by an international agreement only after approval of the Parliament or from a referendum.
4. Furthermore the petitioners are of the opinion the competences of the Commission according to Art 17 Para 1 and 3 TEU conflict with the requirements of appropriate generality and of adequate comprehensibility of legislation as well as with the principle of legal certainty due to unclear formulations. This contravenes with Art 1 Para 1 Constitution as well as with Art 1 Para 1 and Art 2 Para 1 and 4 CZCharter, which provide the equality of rights, an interdiction of a binding exclusive ideology, access for citizens to any elective and other public office on an equal basis.
5. Art 20 TEU, which provides for an enhanced cooperation among EU Member states, contravenes the principle of government of the people enshrined in Art 1 Para 1 Constitution according to the petitioners due to an obligatory approval by EU institutions<sup>82</sup> and therefore effects the exercise of certain powers both at European level and at Member states' level. In addition the restriction of cooperation in areas in which the Union has not yet exercised its powers also conflicts with the principle of sovereignty of the Czech Republic<sup>83</sup> and thus with Art 10a Constitution<sup>83</sup>.
6. The provisions in Art 21 Para 2 lit h TEU, which call to define and pursue common policies and actions and to work for a high degree of cooperation in all fields of international relations, contravene principles of adequate comprehensibility of legislation and of legal certainty as well as of political neutrality. Therefore Art 1 Para 1 Constitution and Art 2 Para 1 CZCharter, which states an interdiction of a binding exclusive ideology, are infringed.

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<sup>81</sup> Cf Para 11 to 18.

<sup>82</sup> Cf Art 329 Para 1 Subpara 2 TFEU.

<sup>83</sup> In the very first proceeding of an enhanced cooperation regarding the Rome III-Regulation (COM [2010] 104 final/2, COM [2010] 105 final/2) the Czech Republic did not participate.

7. Art 42 Para 2 TEU calls for a progressive framing of a common Union defence policy within the common security and defence policy, which contravenes the principle of sovereignty. Besides the requirement of unanimity in the European Council only and not a decision in accordance with the respective national constitutional requirements would from a Czech point of view violate its own Constitution (Art 1 Para 1 and Art 10a).
8. The possibility of withdrawing from The EU by a Member state according to Art 50 Para 2 – 4 contravenes the principle of sovereignty (Art 1 Para 1 Constitution) and also contravenes “the principle of retroactivity and legitimate expectations and consequently the fundamental principle of the rule of law that all rules must be known in advance” as well as Art 10a Constitution.

– **Point III of the claim**

The petitioners point out that certain parts of “The Treaty of Rome” in particular Art 78 Para 3 and Art 79 Para 1 may lack of conformity with the Constitution. The provisions mentioned allow EU institutions to adopt provisional measures in case of a sudden inflow of nationals of third countries respectively to develop a common immigration policy, which can have influence on the composition and number of refugees on the Czech territory. This would contravene the principle of sovereignty and the principles of adequate comprehensibility of legislation and of legal certainty (Art1 Para 1 and Art 10a Constitution).

– **Point IV of the claim**

The petitioners ask to find the Decision of the European Council on the concerns of the Irish People<sup>84</sup> has to be seen as an “international agreement” according to Art 10a Para 1 Constitution and therefore it would have to be approved by both Chambers of the Czech Parliament.

Regarding the scope in which the CZCC is authorized to review the treaty, especially in view of its previous judgment PI ÚS 19/08 three questions arose before the Court: to what extent do previous judgment prevent the CZCC from reviewing the Treaty of Lisbon again; the ability to review the Treaty of Lisbon, or the treaties which it amends as a whole and the related substantive limits of the review of international; misuse of this proceeding for unconstitutional obstructive practices.

– **The decision**

The CZCC rejected the grounds of claim aiming at provisions of previous Treaties as these were not amended by the Lisbon Treaty. The Court also rejected the review of the parts of the Lisbon Treaty, which were already object in the proceedings in the Case PI ÚS 19/08 (Treaty of Lisbon I).<sup>85</sup> When reviewing the acceptable parts of the claim the Court mainly refers to the former decision in the Case Treaty of Lisbon I. The CZCC refused to follow the example of the *German BVerfG* in its own decision regarding conformity of the Treaty of Lisbon with the German Grundgesetz<sup>86</sup>. and to define the

<sup>84</sup> The European Council agreed that other concerns of the Irish people, as presented by the Taoiseach, relating to taxation policy, the right to life, education and the family, and Ireland's traditional policy of military neutrality, would be addressed to the mutual satisfaction of Ireland and the other Member States, by way of the necessary legal guarantees. It was also agreed that the high importance attached to a number of social issues, including workers' rights, would be confirmed, Czech Presidency Conclusions of 19 June 2009 Annex 1 (11225/09).

<sup>85</sup> *Bobek / Kosař (2010)* 5.

<sup>86</sup> *BVerfG* 30 June 2009, 2 BvE 2/08.

substantive limits of transferred competence and to set out expressly “*the essential requirements of a democratic state governed by the rule of law*”, which cannot be transferred to a supranational level<sup>87</sup>.

The request to review the conformity of Art 2, 3, 4 and 216 TFEU with the Czech constitutional order – is denied by the CZCC due to impermissibility as a matter already decided by the CZCC (*res iudicata*)<sup>88</sup>.

The request regarding the Decision of the Heads of State or Government on the concerns of the Irish people on the Treaty of Lisbon, added certain provisions to the Treaty of Lisbon, is dismissed because it can not be seen as a international treaty according to Art 10a Constitution, but only as an act adopted in connection with such a treaty<sup>89</sup>.

Summing up the Court is of the opinion that all the raised provisions of the TEU and the TFEU respectively the Treaty of Lisbon as a whole are not in conflict with the Czech constitutional order<sup>90</sup>.

### **1.3. Resulting relationship between EU law and national law**

In case of a conflict of the Czech Constitution with the Treaties there cannot be found any provision in the Czech legal order to solve it except Art 10 Constitution, which states a kind of a national principle of primacy of international law in case a domestic law provision is contrary to it.<sup>91</sup> The Czech legal system does not present any legal consequences in this regard e.g whether the domestic provision has to be suspended or a Union law provision prevails in line with a primacy in application.

Summing up it can be ascertained that there are no constitutional obstacles to the Czech membership of the EU<sup>92</sup> and that the restrained exercise of the Czech constitutional legislation in this regard causes much less difficulties than someone could have expected<sup>93</sup>. This approach of only little and more general alterations of the constitutional order can serve as a model for other Member states. This applies a fortiori as the current and past (published) political opinion in the Czech Republic seems to be sceptical towards a further EU integration<sup>94</sup>.

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<sup>87</sup> Cf Para 110.

<sup>88</sup> Cf Para 101, 178.

<sup>89</sup> Cf Para 107.

<sup>90</sup> Cf Para 178.

<sup>91</sup> Cf *Balaš* (2001) 272.

<sup>92</sup> Cf *Týc* (2002), 237.

<sup>93</sup> More critical in this regard *Klíma* (2008) 145 f.

<sup>94</sup> Cf *Albi* (2005) 70; *Kühn* (2005) 162 f; *Georgiev* (2011).

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## 2. GERMANY

### 2.1. Constitutional Foundations of EU-Membership<sup>1</sup>

#### 2.1.1. Overview

One of the most conspicuous features of the German Basic Law<sup>2</sup> consists in its openness to EU and international law. This constitutional decision for an "open statehood" is reflected in several provisions of the Basic Law, most notably in its Preamble and in Articles 23, 24, 25, 26 and 59 II.

According to the Preamble, the German people, in the exercise of their constituent power, have been "inspired by the determination to promote world peace as an equal partner in a united Europe".<sup>3</sup> This leitmotiv is apparent also in Article 24 I, which authorizes the Federation to "transfer sovereign powers" to international organisations.<sup>4</sup> It is also visible in Article 23, which has been inserted into the Basic Law in 1992 as a new special constitutional basis for Germany's participation in EU integration.<sup>5</sup> Moreover, according to Article 24 II, the Federation may enter into systems of mutual collective security, thereby accepting limitations to national sovereignty. Pursuant to Article 24 III, the "Federation shall accede to agreements providing for general, comprehensive and compulsory international arbitration". By virtue of Article 25, the general rules of international law shall be an integral part of federal law, taking precedence over the laws and directly creating rights and duties for the inhabitants of the federal territory. Article 26 outlaws acts disturbing peaceful relations between nations. According to Article 59 II, "treaties that regulate the political relations of the Federation or relate to subjects of federal legislation shall require the consent or participation, in the form of a federal law, of the bodies responsible in such a case for the enactment of federal law".

This comparative openness to EU and international law has to be seen in the light of the experiences of World War II, since the opening-up of the constitutional order was perceived, after 1945, as a means of re-integrating Germany into the international order.<sup>6</sup> It has also been regarded as a direct response to a similar provision in the French Constitution, which accepts limitations on national sovereignty on a reciprocal basis, and, in this particular context, as an "advance performance", given that Article 24 of the Basic Law permits transfers of sovereign rights even on a non-reciprocal basis.<sup>7</sup> Articles 23 and 24 are also seen as a specific European way of complying with the UN Charter's call for cooperation in solving international problems of an economic, social, cultural, or humanitarian character.<sup>8</sup>

This concept of open statehood has also been used, by the German Constitutional Court (GCC), as a basis for inferring the "constitutional principle of openness towards

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<sup>1</sup> Citations of the English version of the German Constitutional Court's ruling in the *Lisbon* case (*Bundesverfassungsgericht* (German Constitutional Court), judgment of the Second Senate of 30 June 2009, 2 BvE 2/08 – in the following: GCC, Lisbon ruling) are based on the official English translation, published by the German Constitutional Court on its website as a "preliminary version" ([http://www.bverfg.de/entscheidungen/es20090630\\_2bve000208en.html](http://www.bverfg.de/entscheidungen/es20090630_2bve000208en.html)).

<sup>2</sup> Basic Law for the Federal Republic of Germany (*Grundgesetz*), promulgated by the Parliamentary Council on 23 May 1949, available in English (as amended up to April 2010) at [www.bundestag.de](http://www.bundestag.de).

<sup>3</sup> On the legal status and import of the Preamble see eg *Huber* (2007) para 8 ff.

<sup>4</sup> For details see below, Section I.A.2.a.

<sup>5</sup> For details see below, in particular Section I.A.2.b.

<sup>6</sup> See eg *Sommerman* (2008) 6 ff; see also GCC, Lisbon ruling, para 222; *Joerges* (2010) 30-31.

<sup>7</sup> *Sommerman* (2008) 8-9.

<sup>8</sup> *Pernice* (2006) para 5; see also Articles 1(2), 1(3) and 2(1) of the UN Charter.

international law" (*Völkerrechtsfreundlichkeit*)<sup>9</sup> and the "principle of openness towards European law" (*Europarechtsfreundlichkeit*)<sup>10</sup>.

Articles 24 and 23 do not only serve as bases for integration. They also function as barriers to integration: implicit limitations to integration have been inferred by the GCC from Article 24, read in context with other provisions of the Basic Law; in 1992, these limitations were codified in Article 23.<sup>11</sup> It should be mentioned already by way of introduction that while some of these limitations are spelt out in Article 23, additional barriers ensue from the cross-reference in Article 23 to Article 79 II, which contains formal boundaries, and Article 79 III, which sets forth substantive constraints. Further restraints have been derived, by the GCC, from the electoral guarantees that are laid down in Article 38 in its famous *Maastricht* and *Lisbon* rulings<sup>12</sup>.

## 2.1.2. The Individual Legal Provisions

### 2.1.2.1. Article 24 I

For two reasons at least, it is important to be familiar with Article 24 I of the Basic Law, although it has been superseded meanwhile by Article 23 as a *lex specialis* in matters of EU integration. First, several landmark rulings of the GCC such as *Solange I* and *Solange II* have been rendered under Article 24 I. Second, since the constitutional barriers to EU integration developed in these rulings under Article 24 I have meanwhile been codified in Article 23, Article 24 I and the respective decisions by the GCC remain relevant in the interpretation of Article 23.<sup>13</sup>

Article 24 I reads:

"The Federation may by a law transfer sovereign powers to international organisations."

Article 24 I serves several functions. On the one hand, it authorizes the "transfer of sovereign powers" to international organizations. Article 24 was therefore seen as the constitutional foundation for German EC/EU membership and as the lever opening up the German constitutional order for the direct validity and application of supranational law.<sup>14</sup> Moreover, it has been regarded as the legal basis for the recognition of the primacy of EU law.<sup>15</sup> "Sovereign powers" in the sense of this provision are commonly understood as the competence of the state to regulate legal relationships through legislation, administration and adjudication.<sup>16</sup> It has been stressed by the GCC that the wording "transfer of sovereign powers" is imprecise, given that Article 24 rather opens the national legal order in such a manner that the exclusive sovereignty of Germany within the area of application of the Basic Law is revoked, thus permitting EU law to have direct validity and application within Germany.<sup>17</sup> This opening-up of the legal order has also been

<sup>9</sup> See German Constitutional Court, decision BVerfGE 31, 58 (75-76); German Constitutional Court, decisions BVerfGE 111, 307 (317), 112, 1 (26); Chamber Decisions of the Federal Constitutional Court (Kammerentscheidungen des Bundesverfassungsgerichts - BVerfGK 9, 174 (186); German Constitutional Court, decision BVerfG, 2 BvE 2/08 (para 219). Translation according to the Lisbon ruling (BVerfG, 2 BvE 2/08 (para 219)). On this see also eg *Geiger* (2009) 2-3.

<sup>10</sup> GCC, Lisbon ruling, para 225 (English translation according the official translation, available at [http://www.bverfg.de/entscheidungen/es20090630\\_2bve000208en.html](http://www.bverfg.de/entscheidungen/es20090630_2bve000208en.html)).

<sup>11</sup> See below, Section I.A.2.b.

<sup>12</sup> Cf *infra* Section II.

<sup>13</sup> *Scholz* (2009) paras 3-4; *Heintschel von Heinegg* (2010) para 7.

<sup>14</sup> *Pernice* (2006) para 2.

<sup>15</sup> *Geiger* (2009) 165 ff; *Griller / Maislinger / Reindl* (1991) 15 ff and 182 ff.

<sup>16</sup> *Schweitzer* (2008) 23 ff; *Streinz* (2009) paras 53-54.

<sup>17</sup> GCC, decision BVerfGE 37, 271 2 BvL 52/71 (*Solange I*; English translation available at [http://www.utexas.edu/law/academics/centers/transnational/work\\_new/german/case.php?id=588](http://www.utexas.edu/law/academics/centers/transnational/work_new/german/case.php?id=588)): "Art.

understood as a constitutional decision to abstain from exercising certain national sovereign competences and to accept the common exercise, in the EU framework, of respective supranational competences.<sup>18</sup> This “transfer” requires a federal law that has to be based on Article 24 and Article 59 II at the same time, given that it has both a constitutional role (ie, opening up the domestic legal order in accordance with Article 24) and an international law purpose (under Article 59 II).<sup>19</sup>

The constitutional limits to integration, which have been derived from Article 24, will be discussed below.<sup>20</sup>

#### 2.1.2.2. Article 23

##### Overview

With the advent of the Maastricht treaty and its widening of EC/EU competences, Article 24 was commonly<sup>21</sup> regarded as an insufficient anchor for further integration.<sup>22</sup> Therefore, Article 23 was inserted, as a *lex specialis* for EU affairs, in an effort to overcome such constitutional concerns and to enhance the democratic legitimacy of EU integration by strengthening the role of the German *Bundestag* and the rights of the German *Länder* in matters of European integration.

Article 23 is considered as a compromise provision characterised by insufficient clarity.<sup>23</sup> The rather complex structure of Article 23 is arguably due to the plurality of aims pursued with this provision. Article 23 I, on the one hand, constitutes the central legal basis for German participation in EU integration; on the other hand, it also sets forth the main legal barriers. Article 23 Ia was introduced in 2009 so as to operationalize the right, granted to national parliaments by the Lisbon treaty, to bring subsidiarity complaints before the ECJ.<sup>24</sup> Articles 23 II-VII deal with the participation of the *Bundestag* and the *Bundesrat* in matters concerning the EU.<sup>25</sup> Article 23 VI was amended in 2006 in the context of the reform project on federalism.<sup>26</sup> It is commonly pointed out that few constitutions have such elaborate provisions on EU integration.<sup>27</sup>

##### Article 23 I

Article 23 I consists of three sentences of quite different legal import:

With a view to establishing a united Europe, the Federal Republic of Germany shall participate in the development of the European Union that is committed to democratic, social and federal principles, to the rule of law, and to the principle of subsidiarity, and that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law. To this end the Federation may

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24 GG ermächtigt nicht eigentlich zur Übertragung von Hoheitsrechten, sondern öffnet die nationale Rechtsordnung (in der angegebenen Begrenzung) derart, daß der ausschließliche Herrschaftsanspruch der Bundesrepublik Deutschland im Geltungsbereich des Grundgesetzes zurückgenommen und der unmittelbaren Geltung und Anwendbarkeit eines Rechts aus anderer Quelle innerhalb des staatlichen Herrschaftsbereichs Raum gelassen wird“.

<sup>18</sup> Schweitzer (2008) 23 ff; Hillgruber (2008) paras 18 ff.

<sup>19</sup> Streinz (2009) paras 60 ff.

<sup>20</sup> See below, Section II.A.2.

<sup>21</sup> For a sceptical view see Pernice (2006) para 6.

<sup>22</sup> Cf eg Heintschel von Heinegg (2010); Hillgruber (2008) para 2; Streinz (2009) paras 1 ff; Pernice (2006) para 2.

<sup>23</sup> Streinz (2009) para 6.

<sup>24</sup> See below, Subsection (3).

<sup>25</sup> See in the text below.

<sup>26</sup> Heintschel von Heinegg (2010) para 1; Act of 26 August 2006 (Federal Gazette BGBl I 2034).

<sup>27</sup> See eg Pernice (2006) para 8.

transfer sovereign powers by a law with the consent of the Bundesrat. The establishment of the European Union, as well as changes in its treaty foundations and comparable regulations that amend or supplement this Basic Law, or make such amendments or supplements possible, shall be subject to paragraphs (2) and (3) of Article 79.

*Article 23 I 1* has several normative implications. On the one hand, it concretises the Preamble in that it implies that the aim of a united Europe is to be pursued specifically within the EU integration project.<sup>28</sup> Article 23 I 1 thus determines a constitutional objective of the state<sup>29</sup>. On the other hand, Article 23 I 1 spells out structural requirements for the EU that are to be promoted by German organs. To the extent these requirements constitute barriers to integration, they are analysed below<sup>30</sup>.

In its first-mentioned "positive" integrationist function, Article 23 I 1 is perceived as a legal mandate that is incumbent on all organs of the German Federation and its *Länder*, including representatives of the German state in the EU, in particular in the Council.<sup>31</sup> These organs are thus subjected to a constitutional law yardstick,<sup>32</sup> which necessarily<sup>33</sup> leaves them wide discretion in EU matters.<sup>34</sup> Evidently, EU organs are not addressees of this provision; however, the EU and other Member states may indirectly be affected by the limits ensuing from this provision.<sup>35</sup> According to the GCC and academic writings, Article 23 I 1 does not incur a determinate obligation to pursue the objective of creating a European federal state, a confederation, or a given intermediate form.<sup>36</sup> In the literature, Article 23 I 1 is also regarded as a German constitutional counterpart of the EU principle of loyalty,<sup>37</sup> which is now enshrined in Article 4 III of the EU Treaty.

In the context of Article 23 I 1, it has been noted that the characterisation of the EU, given by the GCC in its *Maastricht* ruling, as an "association of sovereign national states" (*Staatenverbund*) is concealing rather than explaining the legal nature of the EU and does not lend itself to determinate conclusions.<sup>38</sup> A more precise definition of this notion has been given in the *Lisbon* judgment, however. According to it,

"[t]he concept of *Verbund* covers a close long-term association of states which remain sovereign, an association which exercises public authority on the basis of a treaty, whose fundamental order, however, is subject to the disposal of the Member states alone and in which the peoples of their Member states, ie the citizens of the states, remain the subjects of democratic legitimisation"<sup>39</sup>.

The meaning of this notion may become clearer with increasing usage in the jurisprudence of the GCC. In the *Lisbon* ruling, it is used e.g. for drawing the line between a decision by German state organs on joining a federal state (which according to

<sup>28</sup> Cf eg *Hillgruber* (2008) para 7.

<sup>29</sup> GCC, *Lisbon* ruling, para 225; *Sommermann* (2008) 20 ff.

<sup>30</sup> *Infra*, Section II.A.3.

<sup>31</sup> *Classen* (2005) para 12; *Scholz* (2009) para 52.

<sup>32</sup> *Pernice* (2006) para 47; *Heintschel von Heinegg* (2010) para 8.

<sup>33</sup> This follows *inter alia* from the fact that the objective of EU integration can only be realised in cooperation with the other EU Member States; cf eg *Classen* (2005) para 10.

<sup>34</sup> This appears to be the unanimous view in academic writings: cf. eg *Scholz* (2009) paras 10; *Heintschel von Heinegg* (2010) para 4; *Streinz* (2009) paras 10; *Hillgruber* (2008) para 7.

<sup>35</sup> On these barriers see *infra*, Section II.

<sup>36</sup> GCC, *Lisbon* ruling, para 226; *Streinz* (2009) para 11.

<sup>37</sup> *Classen* (2005) para 8.

<sup>38</sup> See eg *Classen* (2005) para 5; according to *Pernice*, this notion has no explanatory value (*Pernice* [2006] para 41).

<sup>39</sup> GCC, *Lisbon* ruling, para 229 and Headnote 1.

the GCC is prohibited due to Article 23 I 3 and Article 79 III) and participation in the EU, understood as a *Staatenverbund* in the sense just described, which is permissible according to Article 23 I 1.<sup>40</sup> Furthermore, the GCC relies on this notion to argue that a withdrawal from the EU is permissible for Germany<sup>41</sup>.

*Article 23 I 2* contains the second main clause of this fundamental provision. In using a wording similar to Article 24, Article 23 I 2 authorises the Federation to “transfer sovereign powers by a law” to the EU. The term “sovereign powers” essentially has the same meaning as under Article 24;<sup>42</sup> it includes the judicial competence to develop the law through judicial interpretation (*Rechtsfortbildung*), which, according to the GCC, in principle<sup>43</sup> has lawfully been vested in the ECJ.<sup>44</sup> As in the case of Article 24, the notion “transfer [of] sovereign powers” is somewhat deceptive, given that Article 23 I 2 too is seen as unclosing the national legal order for the direct validity and applicability of EU law and as an authorisation for courts and administrative authorities to recognise the supremacy of EU law.<sup>45</sup> Article 23 I 2 thereby permits substantive changes of the Basic Law, ie amendments of the constitution that are not explicitly incorporated in the text of the Basic Law. This approach, which follows from the fact that Article 23 I 2 does not refer to Article 79 I, deviates from the fundamental principle – which has been laid down in Article 79 I due to the experiences in the Weimar Republic<sup>46</sup> – that all changes of the constitution have to be made visible in the text of the Basic Law. Article 23 I 2 is regarded as not being pertinent for the intergovernmental fields of EU action<sup>47</sup>.

In formal respect, Article 23 I 2 requires that every “transfer” of competences is effectuated by means of a federal law. As a compensation for the general loss of *Länder* competences in the framework of EU integration, the *Bundesrat* has to consent to every such further opening-up of the legal order, irrespective of whether it actually concerns specific powers of the German *Länder*.<sup>48</sup> As formerly under Article 24, an amendment of the EU treaties necessitates that such a federal law (a so-called *Integrationsgesetz* or *Zustimmungsgesetz* in the sense of Article 23 I 2) be based also on Article 59 II (*Vertragsgesetz*)<sup>49 50</sup>.

<sup>40</sup> GCC, Lisbon ruling, para 228-230.

<sup>41</sup> GCC, Lisbon ruling, para 233; on this cf the critical remarks of *Von Bogdandy* (2010) 3.

<sup>42</sup> *Ie*, the competence of the state to regulate legal relationships through legislation, administration and adjudication, cf eg *Schweitzer* (2008) 23 ff; *Streinz* (2009) paras 53-54.

<sup>43</sup> Regarding the legal boundaries of the *Maastricht* ruling of the GCC, BVerfGE 89, 155, para 156.

<sup>44</sup> Cf GCC, 2 BvR 687/85, para 60 („Zwar ist dem Gerichtshof keine Befugnis übertragen worden, auf diesem Wege Gemeinschaftskompetenzen beliebig zu erweitern; ebensowenig aber können Zweifel daran bestehen, daß die Mitgliedstaaten die Gemeinschaft mit einem Gericht ausstatten wollten, dem Rechtsfindungswege offenstehen sollten, wie sie in jahrhundertelanger gemeineuropäischer Rechtsüberlieferung und Rechtskultur ausgeformt worden sind. Der Richter war in Europa niemals lediglich „la bouche qui prononce les paroles de la loi“; das römische Recht, das englische common law, das Gemeine Recht waren weithin richterliche Rechtsschöpfungen ebenso wie in jüngerer Zeit etwa in Frankreich die Herausbildung allgemeiner Rechtsgrundsätze des Verwaltungsrechts durch den Staatsrat oder in Deutschland das allgemeine Verwaltungsrecht, weite Teile des Arbeitsrechts oder die Sicherungsrechte im privatrechtlichen Geschäftsverkehr. Die Gemeinschaftsverträge sind auch im Lichte gemeineuropäischer Rechtsüberlieferung und Rechtskultur zu verstehen. Zu meinen, dem Gerichtshof der Gemeinschaften wäre die Methode der Rechtsfortbildung verwehrt, ist angesichts dessen verfehlt“).

<sup>45</sup> *Streinz* (2009) paras 58-59.

<sup>46</sup> Cf *Dreier* (2007) 3 ff.

<sup>47</sup> According to *Schweitzer* and *Streinz*, these fields are only indirectly regulated by the Basic Law (cf *Schweitzer* [2008] 23 ff; *Streinz* [2009] paras 56 and 73).

<sup>48</sup> Cf the wording of Article 23 I 2 (“the Federation may transfer sovereign powers by a law with the consent of the Bundesrat”).

<sup>49</sup> On this double function of federal laws in the sense of Article 23 I 2 cf *Streinz* (2009) paras 60 ff.

<sup>50</sup> On the legal questions raised in this context see eg *Streinz* (2009) paras 60 ff; *Classen* (2005); *Pernice* (2006).

*Article 23 I 3* sets forth formal and substantive barriers to integration, which aim to secure the fundamental structures of the German constitution. Article 23 I 3 is therefore discussed in detail below in the context of the German constitutional barriers to EU integration.<sup>51</sup>

### **Article 23 Ia**

Article 23 Ia implements the right, created by the Lisbon treaty for national parliaments, to bring subsidiarity complaints before the ECJ. This right is granted to the *Bundestag* and the *Bundesrat*:

“The Bundestag and the Bundesrat shall have the right to bring an action before the Court of Justice of the European Union to challenge a legislative act of the European Union for infringing the principle of subsidiarity. The Bundestag is obliged to initiate such an action at the request of one fourth of its Members. By a statute requiring the consent of the Bundesrat, exceptions from the first sentence of paragraph (2) of Article 42, and the first sentence of paragraph (2) of Article 52, may be authorised for the exercise of the rights granted to the Bundestag and the Bundesrat under the contractual foundations of the European Union”<sup>52</sup>.

This right to bring complaints before the ECJ does not preclude seizing the GCC in similar matters, as has been emphasized by the GCC in its *Lisbon* ruling<sup>53</sup>.

### **Article 23 II-VII**

The provisions of Article 23 II-VII are meant to increase the participation of the *Bundestag* and the *Bundesrat* in matters of EU integration so as to compensate the parliament and the German *Länder* for their loss of competences in the process of integration. This participation can also be seen as taking account of the fact that EU affairs are not restricted to classic international affairs – traditionally seen as a domaine of the executive power – any more.<sup>54</sup> Pursuant Article 23 II 1, participation is not merely a right, but a duty that is incumbent on the *Bundestag* and, through the *Bundesrat*, the German *Länder*. The main means of participation is the obligation of the Federal Government to keep the *Bundestag* and the *Bundesrat* informed. Information must be provided comprehensively and at the earliest possible time. This applies not only to legislative activities, but in principle to all matters of EU integration<sup>55</sup>.

Article 23 III requires the Federal Government to provide the *Bundestag* with an opportunity to state its position before the Government participates in legislative acts of the EU. It has to take the *Bundestag's* position into account during the negotiations. This position is not binding on the Federal Government, but is understood as requiring it to state the reasons in case it does not concur with this position.<sup>56</sup> Relevant details have been regulated in the Act on the Cooperation of the Federal Government and the German Bundestag in European Union Affairs<sup>57</sup>.

<sup>51</sup> Cf *infra*, Section II.

<sup>52</sup> See the German Constitutional Act (Gesetz zur Änderung des Grundgesetzes) of 8 October 2008 (Federal Gazette BGBl I 1926).

<sup>53</sup> On this and the amendment more generally see *Scholz* (2009) para 112.

<sup>54</sup> Cf eg *Heintschel von Heinegg* (2010) para 29.

<sup>55</sup> *Ibidem*, para 30 with further references.

<sup>56</sup> *Ibidem*, para 35 with further references; see also *Schmahl* (2009) paras 26-27.

<sup>57</sup> *Gesetz über die Zusammenarbeit von Bundesregierung und Deutschem Bundestag in Angelegenheiten der Europäischen Union*, Federal Gazette BGBl I 1993, 311 (as amended by the *Gesetz zur Änderung des*

Article 23 IV and Article 23 V deal with the participation of the *Bundesrat*. According to Article 23 IV,

[t]he *Bundesrat* shall participate in the decision-making process of the Federation insofar as it would have been competent to do so in a comparable domestic matter, or insofar as the subject falls within the domestic competence of the *Länder*.

Pursuant to Article 23 V,

[i]nsofar as, in an area within the exclusive competence of the Federation, interests of the *Länder* are affected, and in other matters, insofar as the Federation has legislative power, the Federal Government shall take the position of the *Bundesrat* into account. To the extent that the legislative powers of the *Länder*, the structure of Land authorities, or Land administrative procedures are primarily affected, the position of the *Bundesrat* shall be given the greatest possible respect in determining the Federation's position consistent with the responsibility of the Federation for the nation as a whole. In matters that may result in increased expenditures or reduced revenues for the Federation, the consent of the Federal Government shall be required.

Article 23 VI, amended in 2006, makes use of the possibility, laid down in Article 16 II of the EU Treaty, to delegate the right to be represented in the Council to a representative at *Länder* level.<sup>58</sup> It does so with respect to matters of school education, culture and broadcasting:

When legislative powers exclusive to the *Länder* concerning matters of school education, culture or broadcasting are primarily affected, the exercise of the rights belonging to the Federal Republic of Germany as a member state of the European Union shall be delegated by the Federation to a representative of the *Länder* designated by the *Bundesrat*. These rights shall be exercised with the participation of, and in coordination with, the Federal Government; their exercise shall be consistent with the responsibility of the Federation for the nation as a whole.

Pursuant to Article 23 VII, the details regarding Article 23 IV, Article 23 V and Article 23 VI are to be regulated by a law requiring the consent of the *Bundesrat*. This constitutional mandate has been implemented by means of a rather complex set of laws that will be explained below, in Section 2.3.

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*Gesetzes über die Zusammenarbeit von Bundesregierung und Deutschem Bundestag in Angelegenheiten der Europäischen Union vom 22.9.2009*, Federal Gazette BGBl I 2009, 3026).

<sup>58</sup> On this provision see also *Schmal* (2009) para 33 with further references; *Heintschel von Heinegg* (2010) paras 45 ff.

## 2.2. Constitutional Limits to EU-Integration

### 2.2.1. Limits to the (Further) Transfer of Powers to the EU through Treaty Amendments

#### 2.2.1.1. Introductory Remarks

The constitutional limits to the transfer of competences to the EU through treaty amendments have been developed primarily in the jurisprudence of the GCC. The early rulings such as *Solange I* and *Solange II*, which were rendered under Article 24 of the Basic Law, do not clearly distinguish between limits to the transfer of competences through treaty amendments, on the one hand, and barriers to the effects of EU secondary law, on the other. Nonetheless, these rulings doubtlessly contain considerations that confine the legality of transfers of powers to the EU level, as follows from the wording of these decisions<sup>59</sup> and from the fact that they have been codified meanwhile in Article 23 of the Basic Law<sup>60</sup>.

#### 2.2.1.2. Limits Developed under Article 24

Therefore, the limits that have been developed by the GCC are still relevant for understanding today's legal situation under Article 23. In the first landmark ruling, *Solange I*, the GCC held that Article 24 "does not open the way to amending the basic structure of the Basic Law, which forms the basis of its identity, without a formal amendment to the Basic Law".<sup>61</sup> The GCC went on to state that:

"the part of the Basic Law dealing with fundamental rights is an inalienable, essential feature of the valid Basic Law of the Federal Republic of Germany and one which forms part of the constitutional structure of the Basic Law. Article 24 of the Basic Law does not without reservation allow it to be subjected to qualifications".

While the GCC, in the next argumentative steps, described the conditions under which it would be prepared to give up its scrutiny of secondary law,<sup>62</sup> the preceding citations have been understood as obviously also indicating limits to the constitutionality of transfers of competences.<sup>63</sup>

Similarly, in *Solange II*, the GCC ruled that:

"the power conferred by Article 24 (1) of the Basic Law, however, is not without limits under constitutional law. The provision does not confer a power to surrender by way of *ceding sovereign rights to international institutions* the *identity* of the prevailing constitutional order of the Federal Republic by breaking into its basic framework, that is, into its very structure. That applies in particular to legislative instruments of the international institution which, perhaps as a result of a corresponding interpretation or development of the underlying treaty law, would undermine *essential, structural parts of the Basic Law*. An *essential part*

<sup>59</sup> See the next section.

<sup>60</sup> See below, Section 2.2.

<sup>61</sup> GCC, decision BVerfGE 37, 271 2 BvL 52/71 (*Solange I*; English translation available at [http://www.utexas.edu/law/academics/centers/transnational/work\\_new/german/case.php?id=588](http://www.utexas.edu/law/academics/centers/transnational/work_new/german/case.php?id=588)).

<sup>62</sup> On this see below, Section 2.2.2.

<sup>63</sup> See eg *Griller / Maislinger / Reindl* (1991) 19 ff.

which cannot be dispensed with and belongs to the basic framework of the constitutional order in force is constituted in any event by *the legal principles underlying the provisions of the Basic Law on fundamental rights*<sup>64</sup>.

It thus followed from these rulings that the GCC classified the "identity of the constitutional order", that is the "essential, structural parts of the Basic Law", in particular the "principles underlying the provisions of the Basic Law on fundamental rights", as constitutional requirements for EU membership and treaty amendments.<sup>65</sup> Shortly thereafter the GCC implied that it also considered the federal principle as a barrier to the transfer of competences<sup>66</sup>.

### 2.2.1.3. Limits Developed under Article 23

#### Preliminary Remarks

The GCC's decisions in both *Maastricht* and *Lisbon* have spelt out a considerable number of additional constitutional boundaries for EU membership, further transfers of competences and amendments of EU primary law.<sup>67</sup> Since these rulings were rendered under Article 23 I of the Basic Law in particular, the following analysis is structured in accordance with the afore-described three sentence architecture of Article 23 I. While this is also in line with German commentaries on Article 23, it should be noted, however, that the GCC, in its reasoning in the *Maastricht* and *Lisbon* rulings, does not always make it clear, through explicit references to the respective sentences in Article 23, whether the individual argumentative steps are based on Article 23 I 1, 23 I 2 or 23 I 3. Hence, the reader of these judgments is often facing the interpretative task of classifying relevant arguments herself.

Moreover, it should be noted that the *Lisbon* ruling is often regarded as being partly unclear, partly redundant and even contradictory.<sup>68</sup> It has also been criticized for employing notions that are not explicitly embodied in the wording of the Basic Law<sup>69</sup> and for using concepts that are rooted in international law rather than in EU law.<sup>70</sup> Some observers have criticized that the ruling reads like an abstract treatise rather than a judgment on a concrete case,<sup>71</sup> and that its length and technical complexity are barriers "to its understanding by a broader, even academic, public".<sup>72</sup> It has also been submitted

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<sup>64</sup> GCC, BVerfGE 73, 339 - *Solange II* (English translation available at [http://www.utexas.edu/law/academics/centers/transnational/work\\_new/german/case.php?id=572](http://www.utexas.edu/law/academics/centers/transnational/work_new/german/case.php?id=572)).

<sup>65</sup> *Griller / Maislinger / Reindl* (1991) 21.

<sup>66</sup> GCC, ruling 2 BvG 1/89 of 11 April 1989; *Griller / Maislinger / Reindl* (1991) 21.

<sup>67</sup> Furthermore, the *Maastricht* judgment contains important barriers for secondary EU law. These are analysed below, Section 2.2.2.

<sup>68</sup> Cf eg *Schwarze* (2010) 109; see also *Schönberger* (2010) ("the *Lisbon* case is lengthy, repetitive, meandering and sometimes outright fuzzy"); *Everling* (2010), who submits that the *Lisbon* ruling is arguably hardly understandable for non-Germans; *Ziller* (2010); *Müller-Graff* (2009).

<sup>69</sup> *Müller-Graff* (2009) ff.

<sup>70</sup> Cf *Terhechte* (2009) 724 ff, who criticizes that the GCC employs terms such as "union of sovereign states under the Treaties" (instead of "supranational"), "*ultra vires* acts" etc. *Terhechte* regards this as indications for an attempt of the GCC to characterize EU law as traditional law. Still, it should be noted that the GCC actually quite often uses terms such "supranational" etc. Moreover, while it is criticized that the GCC deals with international law concepts such as statehood (which is criticized for the same reason by *Terhechte*, and which is criticized by *Müller-Graff* (2009) as being unnecessary), one has to be aware that the purported loss of statehood was actually brought as one of the causes of action, thus arguably requiring a pertinent reasoning of the GCC (see also *Ziller* (2010); *Ruffert* (2009) 1198. The use of terminology such as "sovereignty" etc is also criticized by other commentators, cf eg *Everling* (2010); *Ruffert* (2009) 1197 ff.

<sup>71</sup> *Isensee* (2010); *Everling* (2010); *Tomuschat* (2009); *Ruffert* (2009) 1198.

<sup>72</sup> *Fischer-Lescano / Joerges / Wonka* (2010) 1.

that the ruling may repeatedly contain wording resulting from compromises among the judges, which makes it difficult to appreciate the import of single considerations.<sup>73</sup> In a comparative perspective, it has been remarked that no other national court has laid down national legal barriers to integration in such a detailed manner.<sup>74</sup> It is telling perhaps that many commentators designate quite different elements of the *Lisbon* judgment as most important<sup>75</sup>.

## Barriers derived from Article 23 I 1

### – Legal Relevance in General

As noted above, Article 23 I 1 not only sets forth the constitutional aim of establishing a united Europe, which is to be pursued in the framework of the European Union. In laying down qualifications for this constitutional mandate, Article 23 I 1 also defines barriers to German participation in EU integration. This becomes clear already from the wording of this provision:

With a view to establishing a united Europe, the Federal Republic of Germany shall participate in the development of the European Union that is committed to democratic, social and federal principles, to the rule of law, and to the principle of subsidiarity, and that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law.

The explicit barriers defined in this clause (the so-called structure-securing clause or *Struktursicherungsklausel*<sup>76</sup>) thus are the democratic, social, federal and subsidiarity principles, the rule of law, and the protection of basic rights. Some authors also infer barriers from the notion "Europe"<sup>77</sup>.

On a general level, and before analyzing the individual constraints, it is important to note first that these requirements – although they are aimed at the EU – set forth obligations only for *German* state organs. They have to be respected, by German organs, in their decisions about transfers of competences to the EU level, in their participation in the EU legislature, and in the implementation of EU law. As mentioned before, it is evident, however, that this requirement incurs indirect effects for the EU and the other Member states. In particular, it is inferred from this obligation that German organs are only required to cooperate in a Union that lives up to these requirements.<sup>78</sup> According to the

<sup>73</sup> Everling (2010).

<sup>74</sup> Terhechte (2009) 724-725.

<sup>75</sup> Cf eg Nettesheim (2009) 2867 (submitting that the essence of the ruling is its protection of German statehood); according to Ruffert (2009) 1205, the core of the ruling is the control of the exercise of EU competences; pursuant to Terhechte (2009) 724 ff the overall thrust of the ruling is to slow down integration; according to Schönberger (2010), the most important innovation is the GCC's effort to flesh out the requirements of Article 79 III (the Basic Law's eternity clause); by contrast, Schorkopf submits that the intellectual core of the ruling is its emphasis on electoral democracy and constitutional identity (Schorkopf [2009] 718); according to Fischer-Lescano, the strengthening of the national parliament is the guiding principle of the Lisbon ruling (see Fischer-Lescano [2010]); etc.

<sup>76</sup> GCC, Lisbon ruling, para 261.

<sup>77</sup> Cf Scholz (2009) paras 59, who argues that the term "Europe" does not cover Turkey, thus posing a constitutional obstacle for Turkey's accession to the EU. This viewpoint is not shared by other commentators; cf eg Pernice (2006) para 35, who emphasizes the semantic openness of this term.

<sup>78</sup> Streinz (2009) paras 16 ff.

GCC and some commentators, should the EU break out of these constitutional constraints, Germany would be obliged to withdraw from the EU<sup>79</sup>.

Still on this general level, it has to be underlined, second, that these substantive requirements do not demand a "structural congruence" in the sense that the EU would have to comply with "German" standards as regards the democratic, social, federal and subsidiarity principle and the rule of law. It is unanimously held in the literature, and has been confirmed in the GCC's *Lisbon* ruling,<sup>80</sup> that these requirements take on a "European" meaning in the sense of setting forth standards that are commensurate to the status and the function of the Union.<sup>81</sup> These standards have also been understood as yardsticks drawing on the common constitutional traditions in Europe.<sup>82</sup> As these traditions tend to differ considerably, their "normative density" is regarded as being low.<sup>83</sup> Also, the Basic Law's fundamental decision to opt for open statehood<sup>84</sup> constitutes an argument for deferential judicial review in this respect.<sup>85</sup> This has been confirmed also in the GCC's recent *Lisbon* ruling, which has emphasized that the interpretative "principle of openness towards European law" (*Europarechtsfreundlichkeit*) follows also from this very provision.<sup>86</sup> This, in principle, leaves leeway for German organs in EU politics. It is disputed, however, how far this room for manoeuvre has been restricted by the GCC in the *Lisbon* ruling<sup>87</sup>.

An important exception in the context of Article 23 I 1 is the protection of fundamental rights: in line with the GCC's jurisprudence under Article 24, Article 23 I 1 meanwhile calls for a protection of basic rights on the EU level that is "essentially comparable to that afforded by this Basic Law". Thus, the relevant yardstick is not a European, but a (mitigated) German one: the potential for constitutional clashes resulting, in the scrutiny of secondary law, from this express link to German standards has meanwhile been defused in the jurisprudence of the GCC<sup>88</sup>.

### – The EU and the Democratic Principle

The requirements arising from the democratic principle under Article 23 I 1 have been elaborated by the GCC in the *Maastricht* and *Lisbon* rulings, which *inter alia* concerned constitutional complaints that were brought under Article 38 of the Basic Law, which guarantees the fundamental right to vote. In both decisions, the German Court has especially emphasized that the principle of democracy is not amenable to weighing with other legal interests: it is to be regarded as inviolable under the Basic Law,<sup>89</sup> where it is protected by the eternity guarantee (Article 79 III), which is equated, by the German

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<sup>79</sup> GCC, *Lisbon* ruling, para 264; *Hillgruber* (2008) para 7; but see eg *Von Bogdandy* (2010) 3, according to whom the Basic Law only contains a duty of integration, no obligation to withdraw from the EU.

<sup>80</sup> GCC, *Lisbon* ruling, para 266 (with regard to the democratic principle).

<sup>81</sup> *Streinz* (2009) paras 16 ff ("strukturangepasste Grundsatzkongruenz"); *Pernice* (2006) para 48; GCC, *Lisbon* ruling, para 266 (with further references).

<sup>82</sup> *Streinz* (2009) paras 16 ff; *Heintschel von Heinegg* (2010) para 8.

<sup>83</sup> *Classen* (2005) para 20.

<sup>84</sup> See above, 2.1.1.

<sup>85</sup> *Classen* (2005) para 2; *Streinz* (2009) paras 16 ff.

<sup>86</sup> GCC, *Lisbon* ruling, para 225 (official English translation [http://www.bverfg.de/entscheidungen/es20090630\\_2bve000208en.html](http://www.bverfg.de/entscheidungen/es20090630_2bve000208en.html); see however *Terhechte* (2009) 724, 724 ff, who argues that this principle has been coined, but not actually used, in the argumentation of the GCC; similarly *Ruffert* (2009) 1207; for a partially different assessment see eg *Chalmers* (2010). According to the President of the GCC, the principle of openness towards European Law contains a constitutional obligation to participate in EU integration (*Voßkuhle* [2010] 2).

<sup>87</sup> This will be discussed in the following analysis.

<sup>88</sup> Cf *infra*, Section 2.2.2.

<sup>89</sup> GCC, decision BVerfGE 89, 155 (*Maastricht*).

Court, with German constitutional identity.<sup>90</sup> Nonetheless, according to the GCC, the principle of democracy is *open* to the objective of integrating Germany into the EU: thus, the EU is “not schematically subject to the requirements of a constitutional state applicable on the national level”.<sup>91</sup> More precisely, the “specific requirements placed on the democratic principles depend on the *extent* of the sovereign powers that have been transferred and on the *degree* of the independence that European decision-making procedures have reached”.<sup>92</sup> However, the GCC also points to the borderline of this possibility for structural adaptations of the democratic principle: this possibility applies as long as “the limit of the inalienable constitutional identity”, ie Article 79 III, is not transgressed.<sup>93</sup> Should an imbalance arise between the character and extent of EU competences and the degree of its democratic legitimisation, then the German organs would be constitutionally required to work towards change, and “if the worst comes to the worst, even to refuse to further participate in the European Union”.<sup>94</sup> Having designated this *ultima ratio*, the GCC demarcates the space that is left, under the democratic requirements of the German Constitution, for EU integration. It does so by adopting a new twofold *Solange* formula, in which the principle of conferral is central:

“As long as the European order of competences according to the *principle of conferral* in cooperatively shaped decision-making procedures, exists taking into account the states’ responsibility for integration, and as long as a well-balanced equilibrium of the competences of the Union and the competences of the states is retained, the democracy of the European Union cannot, and need not, be shaped in analogy to that of a state. Instead, the European Union is free to look for its own ways of democratic supplementation by means of additional, novel forms of transparent or participative political decision-making procedures [...]”<sup>95</sup>.

Yet, the liberty thus bestowed on the EU is legally confined, as the GCC is quick to add. Despite its repeated emphasis of the fact that the EU is not required to democratically develop in analogy with a state,<sup>96</sup> the GCC maintains that the EU’s democratic deficit, “when measured against requirements on *democracy in states*”,<sup>97</sup> cannot be compensated by relevant democratic elements brought about by the Treaty of Lisbon, namely double qualified majority voting in the Council, the institutional recognition of national parliaments in subsidiarity control, and mechanisms of participative, associative and direct democracy.<sup>98</sup> Moreover, the GCC sketches a new barrier to integration by indicating that the three last-mentioned elements can only assume a complementary function.<sup>99</sup> Still under the heading of the democratic principle, the GCC delineates yet another new barrier, stating that the independence of the Commission could not be “promoted even further without directly originating from an election by the demos in which due account is taken of equality”.<sup>100</sup> As in *Maastricht*, the GCC in *Lisbon* designates the EP merely as a an “*additional* independent source of democratic legitimization”.<sup>101</sup> As regards the present legal situation, including the changes introduced through the *Lisbon*

<sup>90</sup> GCC, Lisbon ruling, para 216; *Voßkuhle* (2010) 1 ff; on the notion of constitutional identity see also *Dreier* (2007) 3, 56 ff.

<sup>91</sup> GCC, Lisbon ruling, para 217.

<sup>92</sup> GCC, Lisbon ruling, para 261 (italics added).

<sup>93</sup> GCC, Lisbon ruling, para 217.

<sup>94</sup> GCC, Lisbon ruling, para 264.

<sup>95</sup> GCC, Lisbon ruling, para 272; on this cf eg *Everling* (2010) 97.

<sup>96</sup> GCC, Lisbon ruling, para 278.

<sup>97</sup> GCC, Lisbon ruling, para 289.

<sup>98</sup> GCC, Lisbon ruling, paras 290 ff.

<sup>99</sup> GCC, Lisbon ruling, para 295.

<sup>100</sup> GCC, Lisbon ruling, para 297.

<sup>101</sup> GCC, Lisbon ruling, para 271.

treaty, the GCC takes the view that the barriers derived from the Basic Law are not infringed.<sup>102</sup> (Further constraints ensue from the *third* sentence of Article 23 I, which protects the democratic rule *in Germany*. These barriers, which are discussed below,<sup>103</sup> may incur “indirect” effects also for the democratic requirements *at the EU level*.)

These considerations of the judgment have attracted criticism, on various grounds, in several of the comments that have been published so far. On the one hand, it has been argued that the GCC’s reasoning is circular in that it, having first stressed that the EU is not subject to the democratic requirements of a state, then nonetheless goes on to measure the EU against state-centred democratic standards.<sup>104</sup> On the other hand, the ruling has been criticized for upholding a conception of democracy which is fixated on states and state citizens, thus tending to abnegate the possibility of adequate democratic mechanisms beyond the nation state.<sup>105</sup> Furthermore, it has been submitted that two of the premises on which the *Lisbon* ruling purportedly relies – namely the conceptions that the individual right to vote can have a notable directive influence on policy-making and that there is a close connection between the democratic principle and the extent of competences – are questionable.<sup>106</sup> Several commentators have argued that the European Parliament, and its contribution to democratic legitimisation of EU policy-making, tend to be marginalised in the GCC judgment.<sup>107</sup> Likewise, it has been held that the contribution of double qualified majority voting for democratic legitimacy has not received sufficient attention in the *Lisbon* ruling<sup>108</sup>.

#### – The EU and the Rule of Law

Article 23 I 1 designates the principle of the rule of law as a second barrier to integration. Like the other structural specifications in Article 23 I 1, this requirement primarily has to be respected, by German organs, in their decisions about transfers of competences to the EU level, in their participation in the EU legislature, and in the implementation of EU law. Just as the other requirements in this clause, the principle of the rule of law takes on a “European” meaning in the sense of a standard flowing from common European constitutional traditions. Exactly defining the contents of such a principle on an abstract level is almost impossible, as these contents tend to vary greatly in European states.<sup>109</sup> Nonetheless, in academic writings, it is generally held that the current shape of the EU does not lead to evident tensions with this principle, given that the EU complies with the core notions associated with the rule of law, given that, in particular, the EU has been constituted by law and its institutions are bound by law; there are sufficient checks and balances in EU governance; the principle of conferral (which restricts the enactment of

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<sup>102</sup> The restrictive wording is noteworthy: “*Taking into account the provisos that are specified in the grounds, there are no decisive constitutional objections...*” (GCC, Lisbon ruling, para 207). On this cf eg *Everling*, (2010) 93, who points out that the extent of the binding effect of grounds of a GCC ruling are disputed; see also the critical remarks by *Müller-Graff* (2009) ff; *Niedobitek* (2009).

<sup>103</sup> Cf *infra*, Section 2.2.1.3.2.4.

<sup>104</sup> *Müller-Graff* (2009) ff; for a critique of this part of the judgment see also *Blauberger* (2010) 52 ff; *Wonka* (2010).

<sup>105</sup> Cf eg *Everling* (2010) 98; see also the critical remarks of *Blauberger* (2010) at 51, 53. But see eg *Joerges* (2010) 30, who argues that this focus on citizens and individual rights is eg in line with *Kantian* and *Habermasian* premises, according to which those subject to the law must be able to understand themselves as its authors.

<sup>106</sup> *Müller-Graff* (2009); the first premise is also questioned by *Wonka* (2010) at 55.

<sup>107</sup> Cf eg *Von Bogdandy* (2010) 3; *Everling* (2010) 97.

<sup>108</sup> Cf eg *Everling* (2010) 98.

<sup>109</sup> On this *Classen* (2005) para 35 ff with further references.

secondary law) applies; and the ECJ guarantees effective legal protection, legal security and proportionality.<sup>110</sup>

While this principle has not been elaborated in the *Lisbon* ruling, the GCC has recognized the concern of protecting the rule of law as a special justification for the transfer of sovereign powers in the context of criminal law.<sup>111</sup>

#### – The EU and the Social Principle

The exact substance of the social principle is as difficult to determine as that of the rule of law, especially if one tries to take a European perspective.<sup>112</sup> This is confirmed also by the *Lisbon* judgment, which, basically in line with the prevailing opinion in the German literature, holds that the requirements placed on the EU under this principle of the Basic Law “are clearly limited”, as they are in need of political and legal concretisation.<sup>113</sup> The Court rather emphasizes that the securing of the individual’s livelihood must remain a primary task of the Member states.<sup>114</sup> This reasoning is arguably in concord with the demands of the principle of subsidiarity.<sup>115</sup>

#### – The EU and the Federal Principle

Just as the other requirements of Article 23 I 1, the federal principle is directed at the EU.<sup>116</sup> Its legal import, however, is disputed. Whereas according to some authors, it is meant in especially to prevent a development of the EU into a central state, thereby also guaranteeing German statehood,<sup>117</sup> others argue that, centralisation being excluded already by the subsidiarity principle, the federal principle obliges the EU to respect national federal structures.<sup>118</sup> In line with the general thrust of Article 23 I 1, the second view, if correct, could arguably only be understood as an obligation incumbent on German organs in EU matters.<sup>119</sup> It is generally held that it seems impossible to infer precise guidelines from this constraint,<sup>120</sup> this being a task requiring further judicial concretisation by the GCC.

#### – The EU and Subsidiarity

The principle of subsidiarity, which had not explicitly formed part of the Basic Law originally, has been inspired by the Maastricht Treaty. On the one hand, this principle constitutes a mandate for German governmental representatives to preventively control the exercise of supranational competences in EU institutions, and for the German legislature to exercise their control competences. On the other hand, it serves to protect the autonomy of the German *Länder* and communal self-administration,<sup>121</sup> even though

<sup>110</sup> *Classen* (2005) para 35 ff with further references; *Streinz* (2009) paras 27 ff; *Pernice* (2006) paras 56 ff; *Hillgruber* (2008) para 10 (who, however, points out that it is problematic that EU competences are interpreted extensively); *Heintschel von Heinegg* (2010) paras 11-11.1.

<sup>111</sup> GCC, *Lisbon* ruling, para 359.

<sup>112</sup> See eg *Pernice* (2006) para 64.

<sup>113</sup> GCC, *Lisbon* ruling, paras 257-259; on this see also *Streinz* (2009) paras 30 ff; *Classen* (2005) para 40.

<sup>114</sup> GCC, *Lisbon* ruling, para 257-259.

<sup>115</sup> See eg *Pernice* (2006) para 64.

<sup>116</sup> See eg *Pernice* (2006) paras 65 ff.

<sup>117</sup> *Ibidem*.

<sup>118</sup> *Classen* (2005) para 42.

<sup>119</sup> See eg *Streinz* (2009) para 32.

<sup>120</sup> *Streinz* (2009) para 33.

<sup>121</sup> *Pernice* (2006) para 70; *Heintschel von Heinegg* (2010) para 14; *Streinz* (2009) paras 37 ff; *Hillgruber* (2008) para 13.

this can be effectuated only indirectly through the participation of German organs in the EU.<sup>122</sup>

#### – The EU and Fundamental Rights

The GCC's landmark judgments on the nexus between supranational EU governance and German fundamental rights have principally concerned the question of the extent to which German fundamental rights can serve as barriers to the legal effects of secondary law. This issue is discussed below.<sup>123</sup> Nonetheless, Article 23 I 1 is also relevant, as a barrier for treaty amendments, for German non-judicial state organs, in particular the *Bundestag*, the *Bundesrat* and representatives of the government, given that they, too, are obligated to promote the protection of fundamental rights within the EU<sup>124</sup>.

#### Barriers derived from Article 23 I 2

##### – Eternity Guarantee and Constitutional Identity

Article 23 I 2 has both a positive function, namely authorising the transfer of competences to the EU level) and a negative one, as it is understood as also containing boundaries for integration. While the first function has already been described, the present section addresses the barriers ensuing from Article 23 I 2.

In the *Maastricht* ruling already, starting out from a state-centred premise, the GCC judges emphasized that democratic legitimacy can only be derived from the Member states as long as there exist only European peoples (in the plural), but not yet one single European people. The GCC concluded that Member states need sufficiently important spheres of activities of their own in which the people of each can develop and articulate itself. From this "it follows that functions and powers of substantial importance must remain for the German *Bundestag*".<sup>125</sup> There would thus be a breach of the German Constitution, if the Act that opens up the German legal system to the direct validity and application of EC law "does not establish with sufficient certainty the powers that are transferred and the intended programme of integration."<sup>126</sup> In *Lisbon*, the GCC has placed special emphasis on this point, holding that the German legislature must only consent to transfers of competences, and treaty amendments affecting the exercise of such competences more generally, whose effects are foreseeable for the German legislature. This constitutional version of a doctrine of "informed consent" has led the GCC to rule that Article 23 I 2 applies to *any amendments* of the text of primary law, be they simplified revisions of the treaties, the rounding off of EU competences (Article 352 TFEU) or changes of decision-making procedures.<sup>127</sup> The argumentation of the GCC on this special responsibility of the German legislature for integration is clearly interwoven with the democratic principle enshrined under Article 23 I 3<sup>128</sup>.

For the same substantive reasons – foreseeability and protection of democracy – it is submitted that Article 23 I 2 only permits the transfer of individual competences,<sup>129</sup>

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<sup>122</sup> *Classen* (2005) para 45.

<sup>123</sup> *Infra*, Section 2.2.2.

<sup>124</sup> See *Streinz* (2009) para 51.

<sup>125</sup> Cf the English translation of the *Maastricht* judgment in CMLR 1994, 257.

<sup>126</sup> Cf the English translation of the *Maastricht* judgment in CMLR 1994, 258.

<sup>127</sup> GCC, Lisbon ruling, para 243 *et passim*.

<sup>128</sup> See the next section.

<sup>129</sup> Cf eg *Hillgruber* (2008) para 26.

which implicitly prohibits the relinquishing of German sovereignty<sup>130</sup> and, according to several commentators, protects German statehood<sup>131</sup>.

### Barriers derived from Article 23 I 3

Article 23 I 3 subjects changes of the treaty foundations of the EU and comparable regulations that amend or supplement the Basic law, or make such amendments or supplements possible, to a formal and a substantive barrier: in formal respect, by cross-referring to Article 79 II, Article 23 I 3 declares that such measures require a law that is carried by two thirds of the Members of the *Bundestag* and two thirds of the votes of the *Bundesrat*.

As regards the substantive barrier, by referring to Article 79 III (the Basic Law's so-called eternity guarantee<sup>132</sup>), Article 23 I 3 clarifies that such measures may not amount to amendments that affect the division of the Federation into *Länder*, their participation in the legislative process, or the principles laid down in Article 1 (human dignity, inviolable and inalienable human rights) and Article 20 (the democratic principle, the social state principle, the federal state principle, and the rule of law principle). These substantive principles are commonly regarded as the "constitutional identity" and the fundamental structure of the Basic Law.<sup>133</sup> As Article 79 III refers to Article 20, the eternity clause is seen as also protecting German statehood<sup>134</sup>.

Hence, by contrast with Article 23 I 1 (which sets forth structural requirements, to be promoted by German organs, *for the EU*), Article 23 I 3 aims at protecting the *German Constitution* against undue legal effects of the EU integration project. Article 23 I 3 is, therefore, frequently referred to as a clause securing the *acquis* of the Basic Law („*Bestandssicherungsklausel*“).<sup>135</sup> In contrast to Article 23 I 1,<sup>136</sup> the barriers laid down in Article 23 I 3 have a "German meaning".<sup>137</sup> Due to the eternity guarantee, the constitutional identity is even out of the hands of the constitution-amending legislature.<sup>138</sup>

Therefore, pursuant to Article 23 I 3, the Basic Law can be adapted to the development of the EU, this possibility being subject to the ultimate limit set by Article 79 III<sup>139</sup>.

### – EU Integration and German Democracy

The barriers protecting German democracy that ensue from Article 23 I 3 have been concretized in the *Maastricht* and *Lisbon* judgments: given that in both cases the GCC had to decide on constitutional complaints in which the complainants argued that their fundamental right to vote was endangered by EU integration, both rulings focus on the democratic principle.

*First*, as regards the constitutional empowerment to *transfer competences* to the EU level, the GCC has defined three conditions in *Lisbon*: the sovereign statehood must be

<sup>130</sup> Sommermann (2008) 21.

<sup>131</sup> Hillgruber (2008) para 27 with further references to concurring and dissenting views. *Contra* eg Pernice (2006) para 92.

<sup>132</sup> Cf eg Degenhart (2008) 82-83.

<sup>133</sup> GCC, Lisbon ruling, *passim*; Haratsch (2009) para 31.

<sup>134</sup> Haratsch (2009) para 31; *contra*: Classen (2005) para 23.

<sup>135</sup> Cf eg Sommermann (2008) 24.

<sup>136</sup> See above.

<sup>137</sup> Classen (2005); Hillgruber (2008) para 29.

<sup>138</sup> GCC, Lisbon ruling, para 216; Degenhart (2008) 82-83.

<sup>139</sup> GCC, Lisbon ruling, para 231.

maintained on the basis of an integration programme that is based on the principle of conferral; this programme is to respect the constitutional identity of "the Member states"; and "the Member states" must not lose their ability to shape the living conditions themselves.<sup>140</sup> From this it follows for the GCC that the EU may not be transformed into a federal state,<sup>141</sup> the Member states remaining the "masters of the Treaties", as EU competences are only derived from the Member states.<sup>142</sup> Hence, there may be no transfer of legislative *Kompetenz-Kompetenz*, and, in the same vein, there must not be brought about an independence of EU powers through "steadily increased [EU] competences and by gradually overcoming existing unanimity requirements or rules of state equality" against the will of the people<sup>143</sup>.

In *Maastricht* already, the GCC had inferred from the democratic principle that the national parliament must retain substantial influence. This barrier for the transfer of competences is further elaborated in *Lisbon*, where the GCC holds that, given that an effective democracy requires tangible contexts of responsibility, there are content-related limits for the transfer of powers. Although the GCC emphasizes that it is not possible, in principle, to legally determine a given number, or types of, non-transferable competences, it declares that there are certain "essential areas of democratic formative action",<sup>144</sup> which comprise:

"*inter alia*, citizenship, the civil and the military monopoly on the use of force, revenue and expenditure including external financing and all elements of encroachment that are decisive for the realisation of fundamental rights, above all as regards intensive encroachments on fundamental rights such as the deprivation of liberty in the administration of criminal law or the placement in an institution. These important areas also include cultural issues such as the disposition of language, the shaping of circumstances concerning the family and education, the ordering of the freedom of opinion, of the press and of association and the dealing with the profession of faith or ideology"<sup>145</sup>.

In this context, the GCC enumerates several constitutional constraints, all of which are inferred from the democratic principle. As regards criminal law, harmonization must be restricted to cross-border circumstances, and the Member states must retain substantial space of action.<sup>146</sup> The deployment of the German *Bundeswehr* abroad is made dependent, in line with standing case-law, to approval by the German *Bundestag*.<sup>147</sup> There may be no supranationalization of the determination of the character and the amount of the levies affecting the citizens, as this would undermine the space for political discretion requisite for German national democracy.<sup>148</sup> Furthermore, the essential decisions in social policy must be made by the German legislature independently.<sup>149</sup> With respect to the school and education system, family law, language, the media, the status of churches and religious and ideological communities – where "the activities of the

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<sup>140</sup> GCC, Lisbon ruling, para 226 and 227 ff.

<sup>141</sup> GCC, Lisbon ruling, para 228.

<sup>142</sup> GCC, Lisbon ruling, para 229-231.

<sup>143</sup> GCC, Lisbon ruling, para 233.

<sup>144</sup> GCC, Lisbon ruling, para 244 ff.

<sup>145</sup> GCC, Lisbon ruling, para 249.

<sup>146</sup> GCC, Lisbon ruling, para 253; on this aspect of the ruling see eg Meyer (2010).

<sup>147</sup> GCC, Lisbon ruling, para 254; but see Isensee (2010) 35, who submits that the argumentation of the GCC is "bold" ("verwegen") and hardly reconcilable with the wording and meaning of the treaties. See also the critical comments by Fischer-Lescano (2010) 63, 67.

<sup>148</sup> GCC, Lisbon ruling, para 256.

<sup>149</sup> GCC, Lisbon ruling, para 257 ff.

European Union ... are already perceivable"<sup>150</sup> – the “respective political community that is connected by...traditions and convictions [must] remain the subject of democratic legitimization”<sup>151</sup>.

While the elaborations by the GCC that have just been discussed concern constitutional barriers to the transfer of competences to the supranational level (and implicitly their exercise by the EU), the *Lisbon* ruling, *secondly*, also lays down a series of national constitutional barriers for *simplified treaty amendments*. In view of the fact that the legal implications of a simplified revision of EU primary law (in line with Article 48 VI TEU) are regarded, by the GCC, as being hardly predictable for the *Bundestag*, the GCC finds that there is a constitutional obligation to generally treat the simplified revision procedure like a transfer of competences, requiring the approval of two thirds of the members of the German *Bundestag* and two thirds of the votes of the *Bundesrat*.<sup>152</sup> Analogous provisions in primary law (e.g. Articles 42 II 1 TEU, Article 25 II TFEU, Article 318 VIII 2 2 TFEU) are subject to similar requirements.<sup>153</sup> Moreover, the use of the general bridging clause (Article 48 VII TEU), constituting a “Treaty amendment under primary law”, requires a law within the meaning of Article 23 I 2 and, if necessary, Article 23 I 3. This requirement is applied also to the special bridging clause in Article 81 III 2.<sup>154</sup> Such a law is not necessary, according to the GCC, if special bridging clauses are restricted to areas already sufficiently determined by primary law. With regard to such clauses, however, a special “responsibility for integration” arises, requiring a prior approval by the *Bundestag* and, if necessary, the *Bundesrat*, ie, a parliamentary authorization that precedes the consent given by the representative of the German government in the European Council or in the Council<sup>155</sup>.

In the same vein, and given that the flexibility clause (Article 352 TFEU) makes it possible to amend the treaty foundations of the EU in almost the entire area of application of primary law without participation of the legislative bodies, its use is considered to require ratification by the *Bundestag* and the *Bundesrat* under Article 23 I 2 and 23 I 3, before the German representative in the Council approves of a pertinent proposal of the Commission<sup>156</sup>.

*Thirdly*, further barriers are erected by the GCC for *competences* that have been *newly conferred* on the EU by the *Lisbon* treaty. With respect to the areas of judicial cooperation in criminal and civil matters, external trade, common defence and social policy, the GCC insists in especially that the pertinent competences must be exercised by the EU in such a way that tasks of sufficient weight remain for the Member states, as this is considered as a precondition for a living democracy.<sup>157</sup> In particular, the competences pertaining to criminal law must be interpreted strictly,<sup>158</sup> and the use of the emergency brake proceedings is subjected, by the GCC, to the additional constitutional requirement of an instruction of the German legislative bodies.<sup>159</sup> As regards external trade, the GCC takes the view that the Member states must not be required to waive their member status in the WTO; according to the *Lisbon* ruling, this applies in particular to negotiations on multilateral trade, which may have a distinct bearing on national

<sup>150</sup> GCC, *Lisbon* ruling, para 260.

<sup>151</sup> GCC, *Lisbon* ruling, para 260.

<sup>152</sup> GCC, *Lisbon* ruling, para 312.

<sup>153</sup> GCC, *Lisbon* ruling, para 313-314.

<sup>154</sup> GCC, *Lisbon* ruling, para 319.

<sup>155</sup> GCC, *Lisbon* ruling, para 320 and 401 ff.

<sup>156</sup> GCC, *Lisbon* ruling, para 235-328 and 401 ff.

<sup>157</sup> GCC, *Lisbon* ruling, para 351.

<sup>158</sup> GCC, *Lisbon* ruling, para 358.

<sup>159</sup> GCC, *Lisbon* ruling, para 365 and 401 ff.

economic and social policies and which may touch on issues in which EU Member states may turn out to be competent.<sup>160</sup> The GCC even indicates that the EU Member states must not take second place to the EU in external relations quite generally. Moreover, pursuant to the German Court, mixed cooperation, as practiced in the WTO, may also "be a model for other international organisations and other associations of states"<sup>161</sup>.

As would be expected, the boundaries thus erected by the GCC have been quite intensively discussed in the academic reactions to the *Lisbon* ruling that have been published so far. On a general level, it has been held that, despite the fact that the judgment designates integration as a constitutional obligation,<sup>162</sup> it appears even more state-centred than the *Maastricht* judgment.<sup>163</sup> More specifically, it has been criticized that the Basic Law's eternity clause (Article 79 III), which is seen as being meant to protect Germany against dictatorship, is now turned into a shield against integration;<sup>164</sup> an appraisal which has, however, not remained uncontested.<sup>165</sup> In this vein of criticising the *Lisbon* ruling as being state-centred, it has also been argued that there is a tendency in the judgment to sacralise national democracy and to abnegate EU democracy, a bias contrasting unfavourably with judicial approaches in other countries, eg with the Czech Constitutional Court's statement that its commitment to European integration lies in the basis of its being law-based and democratic.<sup>166</sup> Also, it has been argued that the GCC's stance is paradoxical in that it insinuates that a further augmentation of democratic structures at EU level would lead to EU statehood, which, however, is prohibited on the basis of the GCC's reading of the Basic law<sup>167</sup>.

According to other commentators, the constitutional right to vote has been overstretched by the GCC, as its interpretation of this right has resulted in the possibility that constitutional complaints can be brought by any individual person claiming that German statehood or constitutional identity is endangered by EU integration.<sup>168</sup> While some authors have argued that this remarkable emphasis on individual rights<sup>169</sup> amounts to a legal misconception<sup>170</sup> or is at least disturbing in terms of traditional constitutional law doctrine,<sup>171</sup> others have observed that by thus empowering the individual the GCC tends to follow in the footsteps of the ECJ,<sup>172</sup> the difference being, of course, that the GCC's move can be perceived as having an opposite effect, namely that of decelerating integration<sup>173</sup>.

Furthermore, the GCC's aforementioned enumeration of "essential areas of democratic formative action" has attracted considerable criticism: even advocates of EU-critical parts of the *Lisbon* judgment have held that this "textbook-style" enumeration of essential state functions is hardly in keeping with supranational reality.<sup>174</sup> While it has been argued

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<sup>160</sup> GCC, *Lisbon* ruling, para 375.

<sup>161</sup> GCC, *Lisbon* ruling, para 376.

<sup>162</sup> On this see also the comment by the President of the GCC, *Voßkuhle* (2010) 2.

<sup>163</sup> *Von Bogdandy* (2010) 1 ff.

<sup>164</sup> *Ibidem*.

<sup>165</sup> See *Isensee* (2010) 35-36, who argues that the eternity guarantee has always had a broader thrust than the protection against dictatorship, which was due to Germany's historic experiences.

<sup>166</sup> *Chalmers* (2010) 7.

<sup>167</sup> *Terhechte* (2009) 724; *Schorkopf* (2009) 720.

<sup>168</sup> *Müller-Graff* (2009).

<sup>169</sup> *Blauberger* (2010) 51, 53.

<sup>170</sup> *Nettesheim* (2009) 2868.

<sup>171</sup> *Isensee* (2010); see also *Terhechte* (2009) 724, 726-727.

<sup>172</sup> *Isensee* (2010).

<sup>173</sup> See also *Terhechte* (2009) 724.

<sup>174</sup> *Isensee* (2010) 36; a similar critique has been voiced by *Wonka* (2010) 60.

that this listing does not appear to have legal consequences<sup>175</sup> and can only be meant to restrict future transfers of powers lest there be a fossilisation of integration,<sup>176</sup> it could indeed be submitted that some implied legal effects of this definition of core areas of state functions – such as e.g. a restrictive interpretation of EU rules possibly influencing these areas – might apply already today. Others have indeed gone further, apparently construing this part of the ruling as a clear threat of German disobedience<sup>177</sup> or even as a manifest designation of the legal boundaries of integration<sup>178</sup>.

Moreover, the requirements of ratification for simplified treaty amendments and uses of the flexibility clause – introduced by the GCC under the aforementioned heading “special responsibility for integration” – has come under severe criticism for several reasons. On the one hand, it has been insinuated that these requirements might be contrary to EU law.<sup>179</sup> On the other hand, many commentators have held that these requirements unduly restrict the flexibility of German government representatives in negotiations at EU level,<sup>180</sup> even though non-German observers have pointed out that, as respects the degree of parliamentary scrutiny of EU matters resulting from the *Lisbon* ruling, Germany is still in the “moderate camp” when compared with other Member states.<sup>181</sup> It has also been argued that it may still be too early to assess the degree to which political actors have actually been constrained by the *Lisbon* ruling, given that the guidelines are regarded as being too obscure.<sup>182</sup> In this context, it appears paradoxical that the GCC subjects uses of the emergency brake procedures to the requirement of a prior instruction by German legislative bodies, as this actually may make it more difficult for German government representatives to protect essential national interests.

Generally speaking, it is interesting to note a changing perception of the ruling: whereas in first reactions to its judgment the GCC was applauded for strengthening the German parliament, several authors have meanwhile held that the ruling will hardly affect parliamentary involvement in day-to-day EU politics, since it is primarily concerned with fast-track changes in EU treaty law.<sup>183</sup> Against this backdrop, it has, however, been observed that the actual effect of the *Lisbon* ruling consists in a strengthening of the GCC’s own position,<sup>184</sup> with the resulting role allocation between the GCC and the German legislature being questionable under German democratic standards<sup>185</sup>.

#### – Further Barriers Protecting the German Constitution

As noted above, Article 23 I 3 in conjunction with Article 79 III defines further substantive barriers, beside the democratic principle, that protect the German Constitution against undue legal effects of EU integration, namely the rule of law in Germany, the guarantee of the social principle in Germany, and the division of the federation into *Länder*.

<sup>175</sup> Ruffert (2009) 1204-1205.

<sup>176</sup> Everling (2010) 92, 100.

<sup>177</sup> Blauberger (2010), who argues that clashes are most likely to occur “in those areas in which European public policies can infringe upon individual freedoms, i.e. as regards the prosecution of particular crimes or the legality of telecommunications-data retention” (at 51).

<sup>178</sup> Schorkopf (2009) 721.

<sup>179</sup> Von Bogdandy (2010) 3.

<sup>180</sup> Cf eg Von Bogdandy (2010) 4; Isensee (2010) 33.

<sup>181</sup> Kiiver (2009).

<sup>182</sup> Müller-Graff (2009) (speaking of “oracular” barriers (“orakelhaft”).

<sup>183</sup> Blauberger (2010) 48; Nettesheim (2009) 2868.

<sup>184</sup> Niedobitek (2009) 1269; Blauberger (2010) 49; similarly Müller-Graff (2009); Nettesheim (2009) 2868; Terhechte (2009) 724, 727; Everling (2010) 92, 105.

<sup>185</sup> Cf eg Schwarze (2010) who speaks of a “decreed democracy” (“verordnete Demokratie”).

The principle of the *rule of law* in Germany (ensuing from Article 23 I 3 read together with Article 79 III and Article 20 II 2 and 20 III) is regarded, in principle, as not being endangered by the EU integration process. Only selected issues are seen as potentially giving rise to tensions, such as the primacy of supranational law, in particular<sup>186</sup>.

Similarly, it is held that the *social principle* (guaranteed by Article 23 I 3 read together with Article 79 III and Article 20 I) is strained in individual contexts, particularly by the market-opening effect of the fundamental freedoms. However, so far no infringements of this principle have been stated in the literature.<sup>187</sup> As indicated above, the *Lisbon* judgment has stressed, however, that the Member states must retain sufficient space for the political formation of the social circumstances of life, including social security.<sup>188</sup> According to the GCC, the limit for EU action has to be drawn where the coordination of circumstances with a cross-border dimension is factually required,<sup>189</sup> the overall responsibility, with sufficient space for political discretion, still having to be assumed in the German *Bundestag*.<sup>190</sup> Within in these confines, "coordination which goes as far as gradual approximation is not ruled out".<sup>191</sup> So far, EU law, including the changes brought about by the Lisbon Treaty, has not impaired the possibility of the German Bundestag for shaping social policy in a constitutionally objectionable manner<sup>192</sup>.

The *federal structure* of the German state is protected by Article 23 I 3 in conjunction with Article 79 III. As Article 79 III does not guarantee that the *Länder* retain concretely determined competences, it is hardly possible to establish the "turning point" at which the transfer of competences to the EU level would become unconstitutional<sup>193</sup>.

## 2.2.2. Scrutiny of Secondary Legislation, Especially *Ultra-Vires* Doctrine

### 2.2.2.1. Main Types of Constitutional Constraints

While the preceding Section has examined the limits to the transfer of competences by means of treaty amendments, the present Section examines the German constitutional barriers that are relevant for the legal effects of secondary law. In the case of Germany, it is important to distinguish two main types of such constraints, namely the "human rights barrier", which is derived from the fundamental rights enshrined in the German Basic Law, and the "competence barrier", under which EU secondary law is subjected to an *ultra vires* scrutiny by the GCC. Just as in the preceding Section, it is necessary to be aware of the fact that the limits that have originally been developed by the GCC in its jurisprudence under Article 24 have meanwhile been explicitly incorporated in Article 23. The rulings rendered under Article 24 are, therefore, still relevant in the interpretation of Article 23. It is helpful therefore to briefly discuss the constraints derived from Article 24 in the next section, before then discussing Article 23<sup>194</sup>.

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<sup>186</sup> Cf eg *Hillgruber* (2008) para 30; *Classen* (2005) para 39.

<sup>187</sup> See *Hillgruber* (2008); and *Classen* (2005) with further references.

<sup>188</sup> GCC, Lisbon ruling, para 249.

<sup>189</sup> GCC, Lisbon ruling, para 251.

<sup>190</sup> GCC, Lisbon ruling, para 256.

<sup>191</sup> GCC, Lisbon ruling, para 259.

<sup>192</sup> GCC, Lisbon ruling, para 392. For a critical appraisal of this part of the judgment cf *Joerges* (2010) 38 ff; *Blauberger* (2010) 51.

<sup>193</sup> Cf *Hillgruber* (2008) para 31; *Classen* (2005) para 44.

<sup>194</sup> This section draws on *Vranes* (2003a). It is an abbreviated version of the respective subsections in the latter contribution, which was updated in 2010 so as to take into account the legal developments in Germany between 2000 and 2010.

### 2.2.2.2. Limits Developed under Article 24

#### **Solange I and Solange II**

The first key ruling in this context is the GCC's *Solange I* decision. This decision, which takes a distinctly eurosceptical stance, was issued by the GCC in 1974 despite the fact that the ECJ had perceptibly changed its early approach towards human rights protection by recognizing, in 1969, that human rights are "enshrined in the general principles of Community law" and by its clear indication that it henceforth would also act as a protector of human rights<sup>195</sup>.

The *Solange I* judgment is commonly seen as the beginning of a judicial dialogue between national courts and the ECJ, and is discussed, in this context, until today. This ruling is the GCC's direct reply to another major ECJ precedent, the 1970 *Internationale Handelsgesellschaft* case,<sup>196</sup> in which the ECJ, in line with its established jurisprudence, had stressed that the validity of secondary law could only be judged in the light of Community law lest the uniformity and efficacy of EC law be endangered. In this case, the ECJ emphasized that respect for fundamental rights forms an integral part of the general principles of Community law and, therefore, declined to review secondary law in the light of national human rights. However, the ECJ added that the protection of fundamental rights is "inspired by the constitutional traditions common to the Member states". While this constitutes a conciliatory approach, the ECJ qualified it by underlining that the protection of fundamental rights, which it is prepared and required to grant, has to be ensured "within the framework of the structure and objectives of the Community"<sup>197</sup>.

Against this backdrop, the GCC adopted the *Solange I* ruling<sup>198</sup>, in which it held that in case of conflict between EC law and national human rights, "the guarantee of fundamental rights in the Constitution prevails as long as the competent organs of the Community have not removed the conflict of norms in accordance with the Treaty mechanism", thus inverting the hierarchy of norms that the ECJ had developed as regards the conflict-loaded zone of fundamental rights. The GCC, however, issued an important reservation implying that its finding was based on the state of integration at the time of its judgment and was meant to apply provisionally. At that stage, in the view of the GCC, the Community lacked a democratically legitimated Parliament directly elected by general suffrage, and "in particular a codified catalogue of fundamental rights". As long as (or in German: *solange*) this remained the case, national German human rights standards would serve as grounds for rendering inapplicable EC legislative measures.

Not only was the judgment heavily disputed in academic writing,<sup>199</sup> but in a dissenting opinion, judges Rupp, Wand and Hirsch claimed that the protection of fundamental rights warranted by the ECJ does not essentially differ, as regards structure and substance, from the national fundamental rights system. In their view, no Member state could claim

<sup>195</sup> Case 29/69 *Stauder* [1969] ECR 419, para 7.

<sup>196</sup> Case 11/70 *Internationale Handelsgesellschaft* [1970] 1125.

<sup>197</sup> Ibidem paras 2 ff.

<sup>198</sup> GCC, decision 2 BvL 52/1 of 29 May 1974, reprinted in NJW (1974) 1697; English translation in CMLR 1974, 540 ff.

<sup>199</sup> See eg Meier (1974); Riegel (1974); Rupp (1987); see also the analyses in the broader context of *Solange I*, *Solange II* and *Maastricht* judgment below.

that fundamental rights be protected on the EC level exactly in the same manner as in the national constitution<sup>200</sup>.

A judicial re-orientation occurred in the GCC's 1986 *Solange II* ruling, when, having taken into account the developments in fundamental rights protection on the Community level since the *Solange I* judgment, the GCC pronounced that it would not exercise its jurisdiction "so long as the European Communities, and in particular the case law of the European Court, generally ensure an effective protection of fundamental rights as against the sovereign powers of the Communities which is to be regarded as *substantially similar* to the protection of fundamental rights required unconditionally by the Constitution, and in so far as they *generally* safeguard the *essential content* of fundamental rights...".<sup>201</sup> The GCC supported this finding with a detailed analysis of the ECJ's human rights jurisprudence and several declarations made by Community organs on the protection of fundamental rights<sup>202</sup>.

Just as the *Solange I* decision, *Solange II* became the object of intense debate in academic writings, with the difference that it was more favorably received by the majority of commentators.<sup>203</sup> The ruling showed that the German judges would only exercise their review competence in rare instances, but it also raised several intricate questions. Above all, in what some commentators have seen as the "real problem" of *Solange II*,<sup>204</sup> it remained unclear what is meant by "general safeguard", ie whether the GCC intended to continue to rule in concrete cases, or whether it actually meant to exercise only a more general review of the Community fundamental rights protection system as such.<sup>205</sup> Furthermore, uncertainties persisted as to the determination of the "essential content" of fundamental rights and as to the issue of whether the GCC can actually determine its own jurisdiction not only through interpretation but by overtly restricting or declining to exercise it. Some authors have submitted that such a denial to exercise jurisdiction is unlawful under German constitutional law.<sup>206</sup> According to *Streinz*, the GCC erred in declaring the complaint as *inadmissible in limine litis*. Rather, the judges should have accepted the case for scrutiny and should do so in all future cases. The fact that the ECJ has meanwhile developed a fundamental rights jurisprudence would only allow for a less thorough scrutiny but not for restricting jurisdiction as a matter of principle.<sup>207</sup> Other commentators, however, maintain that the judicial competence in such issues has been transferred as such from the GCC to the ECJ.<sup>208</sup> Hence, in this line of reasoning, the ensuing question is that of under what conditions a "reserve" competence of the GCC can possibly "revive". As there are conceptual affinities between the *Solange II* ruling and the 2000 *Bananas* decision of the GCC, these issues will be addressed in the analysis of the *Bananas* decision below.

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<sup>200</sup> NJW (1974) 1702; cf also the analysis of the judgement by *Meier* (1974), who disapprovingly states that one can but be astonished at how the GCC can come to the conclusion that it can simply transpose the German concepts of fundamental rights protection to the European level; and at how the German judges presume to prejudge the future European Constitutional development.

<sup>201</sup> GCC, decision 2 BvR 197/83 of 22 October 1986, reprinted in NJW (1987) 577 ff; English translation in CMLR 1987, 225 ff at 265 (emphasis added).

<sup>202</sup> Cf *ibid* at 581.

<sup>203</sup> For an overview see the comprehensive references in *Streinz* (1989) 43 ff.

<sup>204</sup> Cf *Schmid* (2001) 253; *Huber* (1997).

<sup>205</sup> Cf eg *Streinz* (1989) 283-284; see also *Classen* (2000) with further references.

<sup>206</sup> Cf eg *Streinz* (1989) 283-284; *Huber* (1997); see also the analysis in *Schmid* (2001) 253-254; it is notable that the then president of the GCC still held in 2000 that the court does not "exercise" its jurisdiction, cf *Limbach* (2000) marginal note 19.

<sup>207</sup> Cf *Streinz* (1989).

<sup>208</sup> *Hirsch* (1996) 2463 ff; *Classen* (2000).

### 2.2.2.3. Limits Developed under Article 23

#### General Remarks

Under Article 23, the national “fundamental rights barrier” to secondary law that was developed under Article 24 has been reconfirmed, and elaborated, in particular in the 1993 *Maastricht* and the 2000 *Bananas* decisions of the GCC.<sup>209</sup> Moreover, in *Maastricht*,<sup>210</sup> the GCC mounted new constitutional barriers for secondary law, in that it scrutinized secondary law also under the angle of national constitutional restraints for Community *competences*.

#### The Human Rights Barrier

In *Maastricht*, the GCC re-addressed the fundamental rights barrier to secondary law, when in the course of the ratification process of the Maastricht Treaty, it was seized by complainants claiming that the amendments to the German Constitution and the law transforming the Treaty of Maastricht into national law violated their rights to, *inter alia*, freely choose a trade, occupation or profession, to property and to elect deputies of the German Parliament. The GCC dismissed all claims as inadmissible *in limine litis*, admitting only one constitutional complaint for scrutiny with Article 38 (right to elections) of the *Grundgesetz*<sup>211</sup>.

As regards human rights, the GCC seemingly<sup>212</sup> elaborated its *Solange II* doctrine, stating that it “guarantees that an effective protection of basic rights for the inhabitants of Germany will also generally be maintained as against the sovereign powers of the Communities and will be accorded the same respect as the protection of basic rights required unconditionally by the Constitution, and in particular the Court provides a *general safeguard* of the *essential content* of the basic rights”.<sup>213</sup> While this is still in line with *Solange II*, the German judges introduced a new qualification according to which they exercise their jurisdiction on the applicability of secondary law in Germany “in a relationship of cooperation” with the ECJ.

It was unclear what the GCC actually conceived of when it coined this new term of the “relationship of cooperation”. This offer of cooperation was criticized as amounting to a denial of the absolute supremacy of Community law and the role of the ECJ<sup>214</sup> and was read as perpetuating the German control of secondary law.<sup>215</sup> Even after the *Maastricht* decision it remained unclear whether a complainant or referring tribunal would have to

<sup>209</sup> See in the following text.

<sup>210</sup> Cf BVerfG, Urt. v. 12.10. 1993 - 2 BvR 2134/92 und 2 BvR 2159/92; reprinted in NJW (1993) 3047; English translation in CMLR 1994, 251-262; cf the critical comments by *Everling* (1994), 1 ff; *Herdegen* (1994) 235 ff; *Hirsch* (1996) 2457 ff; *Voss* (1996); *Everling* (1996) 401 ff; *Weiler* (1999a) 238.

<sup>211</sup> Article 38 on elections stipulates:

- (1) The deputies to the German Bundestag are elected in universal, direct, free, equal and secret elections. They are representatives of the whole people, are not bound by orders and instructions and are subject only to their conscience.
- (2) Anyone who has attained the age of eighteen is entitled to vote, anyone who has attained the age of twenty-five is eligible for election.
- (3) Details will be regulated by a Federal law.

<sup>212</sup> Note that it is disputed to what extent there is a change in jurisprudence between *Solange II*, the *Maastricht*-Judgment, and the 2000 *Bananas* decision. While the German Constitutional Court and some academics claim that there is no change in jurisprudence, many commentators do not share this view. On this see below.

<sup>213</sup> GCC, decision - 2 BvR 197/83 of 22 October 1986, reprinted in [1987] *Neue Juristische Wochenschrift* 577 ff; English translation in CMLR 1987, 225 ff at 253 (emphasis added)

<sup>214</sup> Cf *Herdegen* (1994) 239; similarly eg *Nicolaysen / Nowak* (2001) 1234.

<sup>215</sup> *Huber* (1997).

submit evidence that in the concrete case there was insufficient protection of fundamental rights or that the level of protection on the EC plane was too low in general for systemic reasons.<sup>216</sup>

Two further GCC rulings in the *Alcan* and *Bananas* cases, adopted in February and June 2000 respectively, have shed more light on these issues. In *Alcan*, the GCC declared a constitutional complaint inadmissible *ab initio*, holding that there is no reason to assume that the ECJ fundamental rights jurisprudence “generally calls into question the indispensable fundamental rights protection required by the German Constitution”.<sup>217</sup> Nonetheless, the GCC undertook a hypothetical scrutiny<sup>218</sup> under German Constitutional law in this case, in which it explicitly acknowledged that *EU* fundamental rights and the ECJ’s jurisprudence serve as *relevant standards*. In proceeding to the above-mentioned hypothetical scrutiny under German Constitutional law, the German judges insinuated that they intended to continue exercising some sort of “reserve” control.<sup>219</sup>

The details of this reserve control were further clarified in the *Bananas* decision, which was adopted against the background that several German tribunals had begun, in the wake of the *Maastricht* judgment, to call into question the supremacy and uniform effect of Community law.<sup>220</sup> In this context, the GCC was seized by an Administrative Court, which argued that an act of secondary law, the EC Banana Market Organization, violated the fundamental rights of German undertakings. In the view of the Administrative Court, the difference in fundamental rights protection offered by the GCC and the ECJ amounted to a *structural deficit*.<sup>221</sup>

The GCC, however, declared the submission of the Administrative Court as inadmissible *ab initio*. Surprisingly for many observers, the GCC maintained that there is no difference between the *Maastricht* judgment and the *Solange II* decision as regards the exercise of the GCC’s review authority.<sup>222</sup> Having reviewed its jurisprudence from *Solange I* to *Maastricht*, the GCC concluded that constitutional complaints and submissions by courts are inadmissible from the outset if their grounds do not state that the evolution of European law, including the rulings of the ECJ, has resulted in a decline below the indispensable standard of fundamental rights protection *after the Solange II* decision. In the words of the GCC, the referring Administrative Court had failed to satisfy this new “*special requirement for admissibility*”<sup>223</sup>: any claim of an infringement by secondary EC law of the fundamental rights guaranteed in the Basic Law must thus “state in detail that the protection required unconditionally by the Basic Law is not *generally* assured in the *respective case*”. The Court specified that this “requires a comparison of the protection of fundamental rights on the national and on the Community level similar to the one made

<sup>216</sup> See eg *Hoffmeister* (2001).

<sup>217</sup> “*Es ist nicht erkennbar, dass durch diese Vorentscheidung der vom Grundgesetz als unabdingbar gebotene Grundrechtsschutz generell in Frage gestellt würde*”, *Hoffmeister* (2001) at II.1.a.

<sup>218</sup> “Even if one scrutinized the [lower court’s decision which relies on the ECJ’s judgment] under German Constitutional...”, *Hoffmeister* (2001) at II.1.b.

<sup>219</sup> On the extent of control that is legally permissible see below.

<sup>220</sup> This occurred in the context of the *Bananas* litigation, which started in the 1990s. For a detailed account of these proceedings see *Vranes* (2003a).

<sup>221</sup> This is essential because the term “general” in the *Solange II* and *Maastricht* decisions has been interpreted to mean structural deficits of fundamental rights protection on the EC level by several authors, most notably by the judge rapporteur in the *Maastricht* case, *Paul Kirchhof*; see on this eg *Schmid* (2001) 251 and 253 with further references. For a detailed analysis of see also *Vranes* (2003a) 195 ff; and *Vranes* (2003b) with further references.

<sup>222</sup> According to *Lindner* (2000) 759; *Schmid* (2001) 252-253; *Limbach* (2000) at marginal note 19; *Limbach* (2001), there is no difference between these judgments. In the view of *Nicolaysen / Nowak* (2001) 1233; and *Hirsch* (1996) 2459, the approaches to this issue differ.

<sup>223</sup> GCC, decision 2 BvL 1/97 of 7 June 2000, at B.III.1.; English translation by the *Bundesverfassungsgericht* available at [www.bundesverfassungsgericht.de](http://www.bundesverfassungsgericht.de).

by the Federal Constitutional Court [in *Solange II*"].<sup>224</sup> The German supreme judges added that "[i]t would, however, not have been possible for the Administrative Court to infer a general decline of the standard of fundamental rights in the jurisdiction of the Court of Justice of the European Communities" against the background of the ECJ's relevant case law.<sup>225</sup> The GCC concluded this landmark case by underlining that the latter decision of the ECJ and the GCC's jurisprudence<sup>226</sup> "illustrate that the judicial protection of fundamental rights by national courts of justice and Community courts of justice interlock on the European level".<sup>227</sup>

This landmark ruling on the human rights barrier to secondary law has largely been welcomed with approval.<sup>228</sup> Some comments are in order still. First, the GCC has made it clear that, from a formal point of view, it still claims a "reserve" control for itself, as it again<sup>229</sup> emphasizes in the very first sentence of its reasoning that the decision is based on the present state of fundamental rights protection in the EC.<sup>230</sup> However, the hurdles that the judges have introduced for the exercise of their jurisdiction (ie the requirement of a comparison of the protection of fundamental rights on the national and on the Community level similar to the one made by the Federal Constitutional Court in *Solange II*) are quite unanimously regarded as prohibitive in academic writing.<sup>231 232</sup>

Second, even after this latest decision, there persist uncertainties, some of which have their origin in the *Solange* decisions. There are still doubts as to how one should exactly construe the qualifying term "general" decline in EU fundamental rights protection that the GCC has upheld since the *Solange II* landmark and that it imposes as the essential precondition for the exercise of its jurisdiction. For some authors it is sufficient that there is a decline in a *concrete case* that entails a fall in fundamental rights protection below the indispensable level that is held to be essentially comparable to German Constitutional standards by the German Constitutional Court.<sup>233</sup> Supporters of this view stress that it is the function of courts to decide concrete cases, and that it would amount to a discrimination between complainants if it were decided in several cases that the indispensable level of protection is not infringed, while the latest case in a series would be decided the other way because it would be accepted as proof that the level of protection has "generally" declined.<sup>234</sup> Others maintain that it is the *level in general* which has to decline, irrespective of a given concrete case. This would especially be true

<sup>224</sup> Ibidem at B.II.2.d).

<sup>225</sup> Ibidem at B.III.2.

<sup>226</sup> Ie the 1995 decision on the grant of interim relief for German banana importers, which indicated that the banana market regulation 404/93 is flexible enough to enable interim relief measures in hardship cases, GCC, decisions 2 BvR 2689/94 und 2 BvR 52/95 of 25 January 1995, reprinted in EuZW 1995, 126.

<sup>227</sup> Ibidem.

<sup>228</sup> See eg *Classen* (2000); *Nicolaysen / Nowak* (2000) 1234, 1236; *Lindner* (2000) 759; *Hoffmeister* (2001) 802; *Mayer* (2000a); see however *Schmid* (2001) 249, who speaks of a "disappointing retreat" of the Bundesverfassungsgericht; see also the very trenchant critique of *Emmerich-Fritsche* (2000), who bemoans the "retrogression of the attainments of the *Maastricht* judgment".

<sup>229</sup> Cf the *Solange I* and *Solange II* decisions which also emphasized that they were to apply "provisionally"; on this see the preceding analysis.

<sup>230</sup> Cf B.I.: "Submissions of cases to the Federal Constitutional Court for constitutional review under Article 100(1) GG which refer to rules that are part of secondary European Community law are only admissible if their grounds show in detail that *the present evolution* of law concerning the protection of fundamental rights in European Community law, especially in case law of the Court of Justice of the European Communities, does not generally ensure the protection of fundamental rights required unconditionally in the respective case."

<sup>231</sup> This view has recently also been taken by the President of the GCC, see *Voßkuhle* (2010) 6.

<sup>232</sup> See eg *Classen* (2000); *Nicolaysen / Nowak* (2001) 1234, 1236; *Lindner* (2000) 759; *Schmid* (2001) 249 ff; *Hoffmeister* (2001) 802; *Mayer* (2000a) 685 ff; *Emmerich-Fritsche* (2000); *Streinz* (2002).

<sup>233</sup> Cf *Emmerich-Fritsche* (2000); *Nicolaysen / Nowak* (2001) 1235.

<sup>234</sup> *Emmerich-Fritsche* (2000); see also the analysis in *Schmid* (2001) 253; and *Hoffmeister* (2001) 797.

if there were a structural deficit in fundamental rights jurisprudence.<sup>235</sup> According to proponents of the second view, the point is not protection of fundamental rights in every case, but the twofold determination of what legal order has to assure this protection, *and* under whose guardianship (ECJ or national courts) this has to be achieved.<sup>236</sup> As regards the first issue, it can indeed be argued that, under German Constitutional law, there has to be a weighing of constitutional principles. Hence, the explicit German constitutional goal of European integration can be regarded as justifying restrictions on the substantive review standards as long as there is an equivalent protection on the supranational level.<sup>237</sup> This approach was discernible already in the *Solange II* judgment.<sup>238</sup> It appears mandatory in view of the new Article 23 of the *Grundgesetz*<sup>239</sup>.

German commentators have supplied further arguments supporting the theory that the *Bananas* decision calls for a general decline in fundamental rights protection on the EU level as a precondition for the GCC to (re-)exercise its jurisdiction. Thus the decision requires a detailed analysis of the jurisprudence at the EU level as put forward in *Solange II*.<sup>240</sup> Moreover, as *Classen* points out, the new term "evolution of law"<sup>241</sup> indicates a more general scrutiny aloof from a given case; furthermore, the passage of the *Solange II* judgment that might have been interpreted as calling for a case by case review<sup>242</sup> has not been cited in the *Bananas* decision.<sup>243</sup> It is notable, in this context, that the then President of the GCC repeatedly maintained in public after the *Bananas* decision was rendered that the German Constitutional Court will not exercise a case by case review of ECJ judgments. Rather, while the protection of human rights on the EU level may indeed drop below the German standard, the "reserve" competence of the German Constitutional Court will only "revive" if the indispensable fundamental rights standard is generally not guaranteed by the ECJ, that is if it falls below the standard recognized in *Solange II*.<sup>244</sup>

The problem is further compounded by the fact that the *Bananas* decision introduces a new qualification, stating that "the protection required unconditionally by the Basic Law is not *generally* assured in the *respective case*".<sup>245</sup> The term general is thus tied to the "respective case". A textual analysis of this qualification, which appears in three passages of the decision,<sup>246</sup> would imply that the concrete case at issue would have to serve as a

<sup>235</sup> *Zuleeg* (1997); *Huber* (1997); both with further references.

<sup>236</sup> Cf *Hoffmeister* (2001); see also *Hirsch* (1996) 2460 ff; *Hirsch* (2000) 1818 ff.

<sup>237</sup> On this see eg the then President of the German Constitutional Court *Limbach* (2000) paras 23 ff and (2001) 2915 ff with further references.

<sup>238</sup> Cf *Schmid* (2001) 253.

<sup>239</sup> See eg *Schmid* (2001); *Nicolaysen* (2001) 102 ff.

<sup>240</sup> Cf *Nicolaysen / Nowak* (2001) 1235.

<sup>241</sup> GCC, decision 2 BvL 1/97 of 7 June 2000, at B.I., B.II.2.d and III.2.; English translation by the *Bundesverfassungsgericht* available at [www.bundesverfassungsgericht.de](http://www.bundesverfassungsgericht.de).

<sup>242</sup> GCC, decision 2 BvR 197/83 of 22 October 1986, reprinted in [1987] *Neue Juristische Wochenschrift* 577, at 587; English translation in *CMLR* 1987, 225 ff.

<sup>243</sup> *Classen* (2000).

<sup>244</sup> Cf *Limbach* in a speech on 29 June 2000 at the Berlin *Walter Hallstein Institut*: „Der Grundrechtsschutz auf europäischer Ebene darf hinter dem nationalen deutschen Grundrechtsschutz zurückbleiben“, and „Da sich das Bundesverfassungsgericht auf die generelle Gewährleistung des unabdingbaren Grundrechtsschutzes beschränkt, können Grundrechtsverstöße von europäischen Organen nicht im Einzelfall geltend gemacht werden. Nur dann, wenn der unabdingbare Grundrechtsstandard generell nicht mehr gewährleistet ist, sind Verfassungsbeschwerden und Richtervorlagen zulässig. Also nur dann revitalisiert sich die Reservezuständigkeit, wenn die Rechtsprechung des EuGH allgemein hinter das im Jahre 1986 erreichte Schutzniveau zurückgefallen ist. Der Respekt vor der grundsätzlichen Letztentscheidungskompetenz des EuGH und die Leitidee vom Kooperationsverhältnis vertragen sich nicht mit einer Einzelfallkontrolle durch nationale Verfassungsgerichte und deren Einsatz als ‚watchdogs‘“ (*Limbach* [2000] paras 23 and 25).

<sup>245</sup> GCC, decision 2 BvL 1/97 of 7 June 2000, at B.I. first sentence.

<sup>246</sup> *Ibidem* and official headnote 2; as well as in B.II.2.d) ("Therefore, the grounds for a submission by a national court of justice or of a constitutional complaint which puts forward an infringement by secondary European Community Law of the fundamental rights guaranteed in the Basic Law must state in detail that the protection of fundamental rights required unconditionally by the Basic Law is not generally assured in

starting point for a submission that there exists a general lack of adequate fundamental rights protection at EC level. This reading would cover the hypothesis that a single case in which there is a blatant violation of fundamental rights having systemic implications might suffice to “revive” the jurisdiction of the GCC. Some authors, however, maintain that the new term “respective” has to be interpreted to mean a comparison in the area concerned<sup>247</sup> in the sense that the referring Court has to proceed to a comprehensive review of the protection of the “*human right in question*” by EU institutions in its reasoning of the decision to refer the case to the German Constitutional Court.<sup>248</sup> *Schmid* claims that this is the only logically permissible interpretation<sup>249</sup>.

According to a third reading, however, the “complete picture” of human rights protection is decisive.<sup>250</sup> This view has been construed as meaning that a constitutional complaint must demonstrate a decrease of protection encompassing “all ranges of human activities which are protected by human rights”.<sup>251</sup> Interestingly enough, all authors, irrespective of their reading of the judgment, unanimously hold that the hurdle is practically insurmountable<sup>252</sup>.

Shortly after the *Bananas* decision, it emerged as probable that the GCC is indeed pursuing a new judicial policy which is apt to give a new meaning to the much-criticized concept of the “relationship of cooperation”. Thus, in a 2001 decision, it confirmed the *Bananas* decision<sup>253</sup>, and emphasized that it will monitor the obligation of national courts of last instance to refer cases to the ECJ which is *competent* to exercise the fundamental rights jurisdiction pursuant to *Community* fundamental rights.<sup>254</sup> Applying the concept of the multi-level European constitutional model<sup>255</sup>, which consists of at least two complementary constitutional layers, this means, first, that it is incumbent on national tribunals - acting as European ones - to refer cases involving fundamental rights protection to the ECJ. Second, it is the ECJ which is in principle solely competent to invalidate the legislative measures at issue. This system is, third, completed by the task of the GCC, which it underlines in this 2001 decision, of monitoring whether national authorities comply with their duty of referring pertinent cases to the ECJ<sup>256</sup>; and by its “reserve” competence that resuscitates as an *ultima ratio*<sup>257</sup>.

In 2007, the GCC transposed its reasoning also to EU directives: it has suspended its control of national implementing acts to the extent that EU law contains relevant binding provisions, which do not leave a margin of discretion to German state organs, as long as the ECJ in general guarantees an effective protection of fundamental rights which is essentially equivalent to the Basic Law’s indispensable fundamental rights standards.

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the respective case. This requires a comparison of the protection of fundamental rights on the national and on the Community level similar to the one made by the Federal Constitutional Court in BVerfGE 73, 339 (378 - 381) [=Solange II].”

<sup>247</sup> *Lecheler* (2001).

<sup>248</sup> On these issues see also *Hoffmeister* (2001) 798.

<sup>249</sup> *Schmid* (2001) 253.

<sup>250</sup> *Classen* (2000) 1158 („nicht der Einzelfall, sondern das Gesamtbild ist ausschlaggebend“).

<sup>251</sup> *Hoffmeister* (2001).

<sup>252</sup> See eg *Classen* (2000); *Nicolaysen / Nowak* (2001) 1236; *Lindner* (2000) 759; *Schmid* (2001) 249 ff; *Hoffmeister* (2000) 802; *Mayer* (2000a) 685 ff; *Emmerich-Fritsche* (2000); *Streinz* (2002).

<sup>253</sup> GCC, decision 1 BVR 1036/99 of 9 January 2001, para 15 („Gemeinschaftsrecht wird grundsätzlich nicht am Maßstab der Grundrechte durch das Bundesverfassungsgericht geprüft; Verfassungsbeschwerden und Vorlagen von Gerichten sind von vornherein unzulässig, wenn ihre Begründung nicht darlegt, dass die europäische Rechtsentwicklung einschließlich der Rechtsprechung des Europäischen Gerichtshofs unter den erforderlichen Grundrechtsstandard abgesunken ist“).

<sup>254</sup> *Ibid* paras 16 ff.

<sup>255</sup> *Pernice* (2006) paras 20 ff; *Pernice* (1995) 225 ff.

<sup>256</sup> Cf *Pernice* (2006) paras 30-31.

<sup>257</sup> See below and *Pernice* (2006); *Schmid* (2001) 256 ff.

German tribunals are required to review such requirements of EU law under EU human rights standards and, if need be, to refer the case to the ECJ.<sup>258</sup> The aforementioned controversial concept of a "relationship of cooperation" is not present any more in the *Lisbon* ruling<sup>259</sup>.

Finally, it should be mentioned that the GCC had already addressed the issue as to whether EU action in intergovernmental policy fields remains subjected to full review under German human rights standards in its *Maastricht* ruling. It held that in such fields, "the protection of basic rights for which the Basic law provides is not eclipsed by supranational legislation which may take precedence".<sup>260</sup> It has been submitted that the GCC's recent jurisprudence (notably in the *Arrest Warrant Case*<sup>261</sup>) and the entry into force of the Lisbon Treaty have not changed this legal situation<sup>262</sup>.

### Limits to EU Competences

As noted by way of introduction, the German Constitutional Court introduced a new additional barrier to the European integration process in its *Maastricht* decision, which concerns the exercise of EU competences and the scrutiny of secondary law. This barrier is derived from the consideration that the Act opening up the German legal system to the direct validity and application of supranational law must "establish with sufficient certainty the powers that are transferred and the intended programme of integration."<sup>263</sup> On this basis, the GCC has introduced a "review [of] legal instruments of European institutions and agencies to see whether they remain within the limit of the sovereign rights conferred on them or *transgress* them". Such legal acts transgressing limits of EU competences have become known as "*ausbrechende Rechtsakte*" (secondary legal acts "breaking out" of national constitutional constraints).

It ensues from this judgment that the GCC claims to be competent itself for deciding whether an act of secondary law is "*ultra vires*" or falls within the "foreseeable integration programme". The GCC therefore was understood as regarding itself as the final umpire on these issues. Some authors even inferred from the *Maastricht* judgment that *any* German tribunal would be competent to decide on these issues of constitutional importance,<sup>264</sup> and, as several proceedings in the 1990s in the *Bananas* litigation showed, several German tribunals actually understood the *Maastricht* judgment in this way and started scrutinizing EC regulations for "constitutionality" when they suspected transgressions of EC competences<sup>265</sup>.

In a way this widening of conflict was to be expected, as human rights protection is but one method of placing supranational EU legislation under national supervision. An alternative, but complementing one is that of patrolling the limits of Community competences. Whereas human rights protection envisaged by the GCC focuses on the

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<sup>258</sup> GCC, decision 1 BvF 1/05 of 13 March 2007 (*Emissionshandel*), paras 69 ff.

<sup>259</sup> *Von Bogdandy* (2010) 4.

<sup>260</sup> GCC, decision BVerfGE 89, 155, part B 2 c5 (reprinted in [1994] 33 International Legal Materials 444, 414: "In cases in which joint action and measures pursuant to Titles V and VI of the Maastricht Treaty impose a binding obligation upon the Member States under international law to interfere with basic rights, any such interference which takes place in Germany may be subjected to full review before the German courts. In this respect the protection of basic rights for which the Basic law provides is not eclipsed by supranational legislation which may take precedence").

<sup>261</sup> GCC, decision 2 BvR 1826/09 of 3 September 2009.

<sup>262</sup> *Schmal* (2009) para 25.

<sup>263</sup> Cf the English translation of the *Maastricht* judgment in CMLR 1994, 258.

<sup>264</sup> Cf *Everling* (1994) 11; and the critical remarks of *Hirsch* (1996) 2460-61 with further references.

<sup>265</sup> On this cf *Vranes* (2003a); and *Vranes* (2003b).

general applicability<sup>266</sup> of secondary law, scrutiny under competence aspects focuses on the coming-into-being of these norms. As there was an increasing awareness of the growing scope of EC/EU competences, in especially after the SEA had taken force and majority voting was resumed and further extended to other fields of EC/EU competences, it did not come as too much of a surprise (at least with the benefit of hindsight) that the GCC should also introduce this second form of national control over EC/EU law<sup>267</sup>.

From the viewpoint of EU law, however, it is clear that this approach is problematic, at least as regards the extent of control that the GCC purports to exercise, namely a continuous control of the EU legislature, since this endangers the unity of EU law. The Court's approach was heavily criticized by German and foreign commentators, both as regards its human rights and competence aspects, as being rooted in an old-fashioned understanding of the state<sup>268</sup>, being static and overemphasizing public international law concepts<sup>269</sup> and the Nation-State, and overlooking the fact that the EU's task and accomplishment of securing peace in Europe has to be regarded as a legitimate constitutional goal which can be weighed up with the democratic principle.<sup>270</sup> The judgment was thus described as not corresponding to the realities of the late 20<sup>th</sup> century by a former German judge of the ECJ<sup>271</sup> and others<sup>272</sup>.

However, it is widely held that the supremacy of supranational EU law depends on a corresponding authorization by national law.<sup>273</sup> By implication, it also follows that the issue of which court is the "final arbiter of constitutionality" in Europe<sup>274</sup> cannot be decided solely from the perspective of EU law, but has to take into account national law and - in the view of some authors - also public international law. Following the *Maastricht* judgment, an intense academic discussion therefore arose on the issue of which legal order - the European or the national one - was to serve as the "yardstick" for the exercise of EU competences, and on which court(s) - the ECJ or national courts - was competent to act as the "final arbiter of constitutionality" in Europe.

A new layer of complexity has been added by the *Lisbon* ruling, according to which the GCC will in the future scrutinize the exercise of EU competences by means of an "identity review" in order to preserve the inviolable core content of the Basic Law's constitutional identity; this type of review will exist beside the "*ultra vires* review" just discussed. Apparently, both mechanisms function on a subsidiary basis, being invocable only *if* legal protection *cannot* be obtained at the EU level.<sup>275</sup> Both types of review can result in EU law being declared inapplicable in Germany, the GCC being competent alone for these proceedings.<sup>276</sup> In this context, it is of particular relevance that the GCC has underlined that this type of review is restricted to "*obvious* transgressions" of EU competences<sup>277</sup>, ie - put differently - to situations where the mandatory constitutional order to apply EU law

<sup>266</sup> Cf *Hirsch* (1996), who rightly emphasizes that there is no difference in the consequences of declaring an EC act generally inapplicable or declaring it invalid within a given Member State.

<sup>267</sup> Cf eg *Weiler* (1999b).

<sup>268</sup> *Everling* (1994) 18.

<sup>269</sup> *Herdegen* (1994) 242.

<sup>270</sup> Cf *Nicolaysen* (2001) 102 ff, who also points out that the EC's success in this regard is taken for granted or even forgotten. Thus, the EC's greatest success is also its greatest threat.

<sup>271</sup> *Everling* (1994) 18.

<sup>272</sup> *Ress* (1994) 547, cited in *Hoffmeister* (2001) 803 at footnote 51.

<sup>273</sup> Cf *Mayer* (2000b) 140 ff with extensive further references; see also *Streinz* (1989) 346 ff who argues in a comparative perspective that there are constitutional restraints in all (of the then 12) Member States.

<sup>274</sup> See eg *Schilling* (1996); *Weiler* (1999b); *Schmid* (1998) 415 ff.

<sup>275</sup> GCC, Lisbon ruling, para 240; on this also *Everling* (2010) 102; see also *Ruffert* (2009) 1205, who argues that the exact preconditions for the exercise of this subsidiary reserve-competence of the GCC are not made clear in the the *Lisbon* ruling.

<sup>276</sup> GCC, Lisbon ruling, para 239-240.

<sup>277</sup> GCC, Lisbon ruling, para 239.

"is evidently lacking".<sup>278</sup> This review applies only "exceptionally, and under special and narrow conditions"<sup>279</sup>.

First academic reactions have held that the object of the identity review – which apparently is meant to apply even within those parts of the legal order that have constitutionally been opened up for the effects of EU law<sup>280</sup> – is uncertain.<sup>281</sup> Whereas some commentators have taken the view that this new review mechanism will primarily be relevant for transfers of additional competences to the EU,<sup>282</sup> others have read the *Lisbon* judgment as implying that every single EU legal act is potentially subject to scrutiny as to whether it infringes German constitutional identity, the contents of which have been held to be unclear.<sup>283</sup> It may have to be seen against this backdrop that the President of the GCC has meanwhile confirmed that the identity review will apply to possible violations of the substantive core of constitutional identity in the sense of Article 23 I in conjunction with Article 79 III<sup>284</sup>.

As has also been re-confirmed by the GCC President, the *ultra vires* review "theoretically" applies to legal acts of all EU institutions, including the ECJ.<sup>285</sup> Importantly, as an apparent reaction to academic writings who had submitted that relevant parts of the *Lisbon* ruling may have to be read as indicating an imminent intensification of the GCC's control<sup>286</sup> (which according to some observers may already have taken place after the *Lisbon* judgment<sup>287</sup>), the GCC president has also pointed out that the constitutional yardstick applicable within *ultra vires* review – and apparently also within identity review – is modified in accordance with Article 23 I, when German legal acts with EU-relevance are at issue.<sup>288</sup> This may arguably be in line with voices in the academia, according to whom the identity review mechanism must be restricted to evident and extreme cases<sup>289</sup>.

This reading of the judgment shows conceptual affinities to views in the literature which had stressed, already before the *Lisbon* ruling, that there may be convergent guidelines under EU law, international law and national law that help delineating a framework solution to the problem of which court – the ECJ or national courts like the GCC – is competent to address transgressions of EU competences (and violations of national human rights):<sup>290</sup> a first key to this problem is constituted by the concept of necessity,<sup>291</sup> which is recognized in EU,<sup>292</sup> international and German constitutional law.<sup>293</sup> An analogous approach to this problem is possible on the basis of the international law theory of evidence.<sup>294</sup> A similar third approach, which is apparently adopted by the GCC

<sup>278</sup> GCC, *Lisbon* ruling, para 339.

<sup>279</sup> GCC, *Lisbon* ruling, para 340.

<sup>280</sup> Cf eg *von Bogdandy* (2010) 4.

<sup>281</sup> *Everling* (2010) 101; *von Bogdandy* (2010) 4.

<sup>282</sup> *Everling* (2010) 101; on this see also *Terhechte* (2009) 724.

<sup>283</sup> *Von Bogdandy* (2010) 4; on all of this see also *Schorkopf* (2009) 722.

<sup>284</sup> *Voßkuhle* (2010) 6-7.

<sup>285</sup> *Voßkuhle* (2010) 7 ("theoretisch Rechtsakte aller Gemeinschaftsorgane ... auch Entscheidungen des EuGH").

<sup>286</sup> *Tomuschat* (2009).

<sup>287</sup> Cf *von Bogdandy* (2010) 4, according to whom the GCC has already struck a rougher tone vis à vis the ECJ in its 3 September 2009 ruling on the European arrest warrant (GCC, BVerfGE 2 BvR 1826/09).

<sup>288</sup> *Voßkuhle* (2010) 6-7.

<sup>289</sup> *Ruffert* (2009) 1206; similarly *Sauer* (2009) at 196.

<sup>290</sup> On this and the following cf *Vranes* (2003a) with further references; *Vranes* (2011).

<sup>291</sup> On this cf *Pernice* (2006) paras 29 ff, and *Pernice* (2001) 436. According to *Pernice*, the competence of the GCC is restricted to cases of evident, serious and general violations. See also *Pernice* (1995) para 59.

<sup>292</sup> On this reading of Articles 6 and 7 TEU see *Vranes* (2003a) 195 ff; *Vranes* (2011) with further references.

<sup>293</sup> Cf *Pernice* (2006) paras 29 ff (referring to "constitutional necessity").

<sup>294</sup> This approach is staked by *Schmid* (1998); a similar approach was proposed by *Eibach* (1986) 107 ff.

in *Lisbon*<sup>295</sup>, is based on constitutional law: from the fact that the EU is not yet a state, it follows that Member state courts retain a *restricted reserve* competence to review secondary law for *evident* and/or *serious* breaches of national law.<sup>296</sup> The approaches based on the concept of necessity and on the theory of evidence both lead to a compulsory conciliation procedure, whose exact procedural requirements ensue from EU law in conjunction with national law, which are confirmed and complemented by relevant guidelines from international law<sup>297</sup>.

### 2.3. Constitutional Rules on Implementing EU Law

As has been explained above, relying on the democratic principle in particular, the GCC's *Lisbon* ruling has defined concrete conditions for the participation of the *Bundestag* and the *Bundesrat* in matters of EU integration. Accordingly, Germany is only permitted to take part in the "dynamic development" of primary law, which is foreseen in several provisions of the EU Treaty and the TFEU, if there are sufficient participatory rights – rights of consent, empowerment and instruction – for the *Bundestag* and the *Bundesrat*.<sup>298</sup>

The conditions defined by the GCC have been implemented in the so-called "accompanying laws".<sup>299</sup> This term comprises the "Act Extending and Strengthening the Rights of the Bundestag and of the Bundesrat in Matters concerning the European Union" (*Gesetz über die Ausweitung und Stärkung der Rechte des Bundestages und des Bundesrates in Angelegenheiten der Europäischen Union*), which amends existing legislation and introduces a new "Responsibility for Integration Act" (*Integrationsverantwortungsgesetz, IntVG*),<sup>300</sup> the "Act Implementing the Amendments to the Basic Law for the Ratification of the Treaty of Lisbon" (*Gesetz zur Umsetzung der Grundgesetzänderungen für die Ratifizierung des Vertrags von Lissabon*), "the Act Amending the Act on Cooperation between the Federal Government and the German Bundestag in Matters concerning the European Union" (*Gesetz über die Zusammenarbeit von Bundesregierung und Deutschem Bundestag in Angelegenheiten der Europäischen Union*", hereinafter EUZBBG)<sup>301</sup>, and the Act Amending the Act on Cooperation between the Federation and the Länder in European Union Matters (*Gesetz über die Zusammenarbeit von Bund und Ländern in Angelegenheiten der Europäischen Union*),

<sup>295</sup> GCC, *Lisbon* ruling, para 334 ("From the continuing sovereignty of the people which is anchored in the Member States and from the circumstance that the states remain the masters of the Treaties, it follows - at any rate until the formal foundation of a European federal state and the change of the subject of democratic legitimisation which must be explicitly performed with it - that the member states may not be deprived of the *right to review* adherence to the integration programme"). This consideration constitutes the basis for the GCC's claim to its competence to "exceptionally, and under special and narrow conditions" review, and declare inapplicable, EU law (cf para 340).

<sup>296</sup> *Griller* (1994) 54-55.

<sup>297</sup> See *Schmid* (1998); *Vranes* (2003a) 231 ff with further references.

<sup>298</sup> On this see *Hahn* (2009). See also *Nettesheim* (2010); *Lecheler* (2009).

<sup>299</sup> On this and the following see also *Deutscher Bundestag* (without date); *Nettesheim* (2010); see also *Hahn* (2009) and *Lecheler* (2009).

<sup>300</sup> Integrationsverantwortungsgesetz of 22 September 2009 (Federal Gazette BGBl I 3022), as amended by Article 1 of the Act of 1 December 2009 (Federal Gazette BGBl I 3822). English Translation available at [http://www.bundestag.de/htdocs\\_e/bundestag/committees/a21/legalbasis/intvg.html](http://www.bundestag.de/htdocs_e/bundestag/committees/a21/legalbasis/intvg.html).

<sup>301</sup> Gesetz über die Zusammenarbeit von Bundesregierung und Deutschem Bundestag in Angelegenheiten der Europäischen Union of 12 March 1993 (Federal Gazette BGBl I 311) as amended by the Act of 22 September 2009 (Federal Gazette BGBl I 3026).

hereinafter EUZBLG)<sup>302</sup>. These accompanying laws have been described as complex, labyrinthine and virtually nonreadable<sup>303</sup>.

The IntVG implements the guidelines defined in the *Lisbon* ruling. It is structured as follows: in line with the GCC's guidelines, a first group of provisions requires that approval by the Federal Republic of Germany of decisions at EU level shall take the *form of a law* as defined in Article 23(1) of the Basic Law (Sections 2, 3, 4, 7 and 8 of the IntVG). This covers e.g. the *simplified revision procedure* envisaged in Article 48(6) TEU;<sup>304</sup> the *special revision procedure for the treaties* set forth e.g. in the second sentence of Article 218(8) second subparagraph and Article 311, third paragraph TFEU;<sup>305</sup> the *bridging clauses* within the meaning of Article 48(7) TEU;<sup>306</sup> the approval of a proposal within the meaning of Article 83(1) third subparagraph or Article 86(4) TFEU and amendments referred to in Article 308, third paragraph TFEU;<sup>307</sup> and the *flexibility clause* in Article 352 TFEU<sup>308</sup>.

A second group of provisions does not require a law in the sense of Article 23(1) of the Basic Law, but a *prior decision* by the *Bundestag*. Such a prior decision is required in the case of *special bridging clauses*: thus e.g., the German representative may approve, in the European Council, a proposal for a decision within the meaning of Article 31(3) TEU or Article 312(2), second subparagraph TFEU, or abstain from voting on such a proposal, only after the Bundestag has taken a decision to that effect.<sup>309</sup> Similarly, a prior decision by the Bundestag is required for approval in the *Council* in the case of special bridging clauses<sup>310</sup>.

A third type of provision addresses the emergency brake mechanism: In the cases referred to in the first sentence of Article 48, second paragraph, in the first sentence of Article 82(3), first subparagraph, and in the first sentence of Article 83(3), first subparagraph of the TFEU, the German representative in the Council must table a motion that the matter be referred to the European Council if the Bundestag has adopted a decision instructing him to do so<sup>311</sup>.

Fourth, the Responsibility for Integration Act provides a legal basis for the subsidiarity objection and national parliaments' right to make known their opposition regarding bridging clauses. The Responsibility for Integration Act has been amended to also incorporate the instrument of the subsidiarity action<sup>312</sup>.

Moreover, two pre-existing agreements on cooperation on matters concerning the EU between the Bundestag and the Federal Government on the one hand, and between the

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<sup>302</sup> Gesetz über die Zusammenarbeit von Bund und Ländern in Angelegenheiten der Europäischen Union of 12 March 1993 (BGBl I 313) as amended by the Act of 22 September 2009 (Federal Gazette BGBl I 3031).

<sup>303</sup> Cf eg *Lecheler* (2009).

<sup>304</sup> Section 2 IntVG.

<sup>305</sup> Section 3 IntVG.

<sup>306</sup> Section 4 IntVG.

<sup>307</sup> Section 7 IntVG.

<sup>308</sup> Section 8 IntVG.

<sup>309</sup> Section 5 IntVG. This requirement applies also if areas of activity are affected for which no federal legislative competence exists, in which the Länder are empowered to legislate by virtue of Article 72(2) of the Basic Law, in which the Länder may adopt divergent provisions under Article 72(3) or Article 84(1) of the Basic Law, or the regulation of which by means of a federal law requires the consent of the Bundesrat (Section 5(2)).

<sup>310</sup> Section 6 IntVG.

<sup>311</sup> Section 9 IntVG. According to Section 9(2), if areas of activity within the meaning of section 5(2) of this Act are primarily affected, the German representative in the Council must table a motion in accordance with paragraph 1 above, even if a decision to that effect has already been taken by the Bundesrat.

<sup>312</sup> Sections 11 and 12 IntVG.

Federation and the Länder on the other, have been incorporated into the Act on Cooperation between the Federal Government and the German Bundestag in Matters concerning the European Union and the Act on Cooperation between the Federation and the Länder in Matters concerning the European Union, respectively. Both laws expand on the requirement enshrined in Article 23 (2) of the Basic Law that the Federal Government keep the Bundestag and the Bundesrat informed, comprehensively and at the earliest possible time, in matters concerning the European Union.<sup>313</sup>

## 2.4. The Resulting Relationship between EU Law and National Law

- The openness of German constitutional law *vis à vis* EU law is a leitmotiv that is reflected in several provisions of the German Basic Law. It is also stressed in several rulings of the GCC, including its *Lisbon* judgment.
- The constitutional barriers for EU integration ensue primarily from Articles 23, 24, 38 79 II and 79 III of the Basic Law.
- As respects the German *constitutional barriers for amendments of EU primary law*, it follows from the GCC's *Solange I* and *Solange II* rulings (which were rendered under Article 24) that in particular the protection of the fundamental rights forms part of the basic structure ("identity") of the Basic Law, which cannot be modified without a formal amendment of the Basic Law.
- Explicit barriers have been laid down in Article 23. According to Article 23 I 1, these comprise the democratic, social, federal and subsidiarity principles, the rule of law, and the protection of basic rights. These principles have to be respected, by German organs, in their decisions about transfers of competences to the EU level, in their participation in the EU legislature, and in the implementation of EU law. They do not, however, require a "structural congruence" in the sense that the EU would have to comply with "German" standards as regards the democratic, social, federal and subsidiarity principles and the rule of law. Rather, these requirements take on a "European" meaning in the sense of setting forth standards that are commensurate to the status and the function of the Union.
- An important exception in this context is the protection of fundamental rights: in this respect, Article 23 I 1 calls for a protection of basic rights on the level of EU law that is "essentially comparable to that afforded by this Basic Law". The potential for constitutional clashes resulting, in the scrutiny of secondary law, from this express link to German standards has meanwhile been defused in the jurisprudence of the GCC.
- Among the aforementioned principles, the democratic principle has received most attention in GCC jurisprudence relating to amendments of primary law. Most recently, a new twofold *Solange* formula has been introduced in the GCC's *Lisbon* ruling, in which the principle of conferral and the maintenance of a "well-balanced equilibrium" in the distribution of competences assume a primary role. In this context, the GCC has also held that the new democratic elements that were instituted by the Lisbon Treaty do not fully compensate

<sup>313</sup> See also *Deutscher Bundestag* (without date); *Hahn* (2009). See also *Nettesheim* (2010); *Lecheler* (2009).

the EU's democratic deficit. The GCC's approach to these issues has received severe criticism in German academic writings.

- Further constitutional barriers for amendments of primary law are derived from Article 23 I 2. According to the GCC, the German *Bundestag* must retain functions and powers of substantial importance. Furthermore, the German legislature must only consent to transfers of competences and treaty amendments whose effects are foreseeable. German scholars have submitted that Article 23 I 2 by implication prohibits the relinquishing of German sovereignty and statehood.
- A third group of barriers is laid down in Article 23 I 3. By contrast with Article 23 I 1 (which sets forth structural requirements for the EU), they aim at protecting the German Constitution. According to Article 23 I 3 (which has to be read in conjunction with the Basic Law's eternity guarantee in Article 79 III), regulations that amend or supplement the Basic Law, or make such amendments or supplement possible, must not affect the division of the Federation into *Länder*, their participation in the legislative process, or the principles laid down in Article 1 (human dignity, inviolable and inalienable human rights) and Article 20 (the democratic principle, the social state principle, the federal state principle, and the rule of law principle). These substantive principles are commonly regarded as the German "constitutional identity". Due to the eternity guarantee, it is even out of the hands of the constitution-amending legislature.
- In this third group of barriers for integration, the protection of (German) democracy plays a central role. According to the *Lisbon* ruling, transfers of competences to the EU level are subject to three conditions, namely respect for the principle of conferral, for the constitutional identity of the Member states and their ability to shape the living conditions themselves. From this it follows for the GCC that the EU may not be transformed into a federal state. Furthermore, the *Lisbon* judgment has traced out content-related limits for the transfer of powers, designating "essential areas of democratic formative action" (such as the civil and military monopoly on the use of force) that are protected by several constitutional constraints deriving from the democratic principle.
- Additionally, a series of national constitutional barriers have been defined in the *Lisbon* ruling for simplified treaty amendments, analogous provisions in primary law, the general bridging clause, specific bridging clauses which are not restricted to areas that are already sufficiently determined by primary law, and the flexibility clause. Moreover, further barriers have been erected by the GCC for competences that have been newly conferred on the EU by the *Lisbon* treaty (e.g. requirements of strict interpretation or instruction by German legislative bodies).
- The GCC's stance has given rise to a controversial debate in Germany. In particular, its *Lisbon* ruling has *inter alia* been criticised for being state-centred, for using the eternity clause as a shield against integration, and for being paradoxical in that it insinuates that a further augmentation of democratic structures at EU level would lead to EU statehood, which, in turn, is prohibited on the basis of the GCC's reading of the Basic law. Many commentators have held that the *Lisbon* ruling unduly restricts the flexibility of German government representatives in negotiations at EU level.

Nonetheless, non-German observers have pointed out that Germany is still in the “moderate camp” when compared with other Member states.

- As respects the German *constitutional limits for secondary law*, it is important to distinguish two main types, namely the “human rights barrier” and the “competence barrier”. While these limits were originally developed by the GCC, they are now explicitly incorporated in Article 23.
- Currently, the *human rights barrier* is in especially defined by the GCC’s 2000 *Bananas* ruling, which has further developed the GCC’s *Solange II* and *Maastricht* jurisprudence. Accordingly, constitutional complaints and submissions by courts which challenge EU secondary law on the basis of German human rights are inadmissible from the outset, if their grounds do not state that the evolution of European law, including relevant rulings of the ECJ, has resulted in a decline below the indispensable standard of fundamental rights protection after the *Solange II* decision. While the GCC still claims a reserve competence for itself, the hurdles that need to be overcome for its activation are quite unanimously regarded as being insurmountable.
- The *competence barrier* is derived from the requirement that the competences that are transferred and the programme of integration must be predictable. Hence, the GCC regards itself to be competent for deciding whether an act of secondary law is *ultra vires*, which has caused an intense academic discussion on whether the ECJ or national courts are competent to act as the “final arbiter of constitutionality” in Europe.
- According to the *Lisbon* ruling, the GCC will in the future also scrutinize the exercise of EU competences by means of an “identity review” in order to preserve the inviolable core content of the Basic Law’s constitutional identity. Apparently, the “*ultra vires* review” and the “identity review” are meant to function on a subsidiary basis, being invocable only if legal protection cannot be obtained at the EU level. Both types of review can result in EU law being declared inapplicable in Germany. In this context, the GCC has underlined that this type of review is restricted to “obvious transgressions” of EU competences and applies only “exceptionally, and under special and narrow conditions”.<sup>314</sup>

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<sup>314</sup> GCC, Lisbon ruling, para 340.

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### 3. FRANCE<sup>1</sup>

#### 3.1. Constitutional Foundations of EU-Membership

##### 3.1.1. Introductory Remarks

The opening-up of the French legal order towards European and international law has been regarded as one of the most important constitutional developments in France after World War II.<sup>2</sup> This process has been a gradual one. On the one hand, while the steps made in EC/EU integration were not reflected in amendments of the French constitution until 1992, there have since then been several successive modifications of the constitutional provisions most relevant for EU matters. These amendments were prompted by rulings of the French Constitutional Council (*Conseil Constitutionnel*) on the compatibility, with the French constitution, of the Maastricht treaty, the Amsterdam treaty, the Treaty Establishing a Constitution for Europe and the Lisbon Treaty.<sup>3</sup> On the other hand, it was not until recently that French judicial organs have started to more explicitly take into account, in their legal reasoning, those features that are particularly characteristic for EU integration: only after a considerable period of time, in which international law and EC/EU law were not clearly differentiated as to their effects within the French legal order in particular, have the French supreme judicial organs, in a remarkable turnaround, started to more distinctly stress the *spécificité* of EC/EU law eg by regarding Community law as a legal order “[that is] integrated into the domestic legal order and distinct from the international legal order”<sup>4</sup> and by eg also more explicitly recognizing that this body of law may require a differentiated judicial approach in several respects.<sup>5</sup>

Given that in France there are three supreme decision-making bodies exercising judicial functions (the *Conseil Constitutionnel*, the *Conseil d’Etat* and the *Cour de Cassation*), the French judiciary’s approach towards EU integration has not been uniform, and the recent judicial turnaround just mentioned has not occurred simultaneously in these organs either. French scholars have even submitted that the *Conseil Constitutionnel*, the *Conseil d’Etat* and the *Cour de Cassation* may be pursuing partly divergent approaches towards EU law,<sup>6</sup> an estimation that is also upheld in quite recent writings.<sup>7</sup>

<sup>1</sup> The author would like thank *Prof. Jacqueline Dutheil de la Rochère* for valuable comments on the first version of this paper. All errors and omissions are mine.

<sup>2</sup> See *Olson / Cassia* (2006) 40 ff.

<sup>3</sup> See below, Sections 3.1.3.5., 3.1.3.6. and 3.2.1.

<sup>4</sup> *Conseil Constitutionnel*, decision 2004-505 DC of 19 November 2004 (Treaty establishing a Constitution for Europe) para 11 (“*un ordre juridique communautaire intégré à l’ordre juridique interne et distinct de l’ordre juridique international*”); decisions of the *Conseil Constitutionnel* are available at <http://www.conseil-constitutionnel.fr>.

<sup>5</sup> Cf eg *Conseil d’Etat*, decision 287110 of 8 February 2007 (Arcelor), which stresses that the scrutiny of national legal acts implementing EU directives may require adaptations (“*le contrôle de constitutionnalité des actes réglementaires assurant directement cette transposition est appelé à s’exercer selon des modalités particulières dans le cas où sont transposées des dispositions précises et inconditionnelles*”). On this decision see below, 3.2.2.2.

<sup>6</sup> *Olson / Cassia* (2006) 55.

<sup>7</sup> Cf eg *Charpy* (2009) 628 ff with respect to the question as to why the *Conseil d’Etat*, by contrast with the *Conseil Constitutionnel*, continues to refer to Article 55, beside Article 88-1, as a constitutional basis of EU integration. On these provisions see below, Sections 3.1.3.4. and 3.1.3.5.

### 3.1.2. The bloc de constitutionnalité

In France, the present constitutional order in a wide sense is established by the Constitution of 4 October 1958 and, as has been recognized by the *Conseil Constitutionnel*,<sup>8</sup> the legal texts to which its preamble refers (as a whole called the *bloc de constitutionnalité*), in particular the 1789 *Déclaration des droits de l'homme et du citoyen* and the Preamble of the Constitution of 27 October 1946. Limitations to French sovereignty that are necessary for international organization and peace are permissible on the basis of Paragraph 15 of the Preamble of the Constitution of 27 October 1946. Articles 88-1 ff of the Constitution of 1958, inserted in 1992, constitute constitutional provisions that are central for EU integration. Several other provisions, too, are relevant in the context of, and as limits to, EU integration. The most important of these will be briefly described in the next Section.

### 3.1.3. The Individual Legal Provisions

#### 3.1.3.1. Preamble and *Déclaration* of 1789

As indicated, the reference in the Preamble of the Constitution of 1958 to the *Déclaration des droits de l'homme et du citoyen* is understood as an incorporation of this declaration into the wider body of French constitutional law. Further rights and liberties can however, be inferred from other provisions of the Constitution of 1958 such as Articles 1, 3, 4, 66 and 72.<sup>9</sup> Although human rights have not as prominently figured as barriers to EU integration as in Germany, for example,<sup>10</sup> the *Conseil Constitutionnel* has recognized them as potential limits to integration.<sup>11</sup>

Beside this incorporation of the 1789 *Déclaration*, the preamble is also read as bringing in particular the preamble of the Constitution of 1946 within the scope of the *bloc de constitutionnalité*. For the purposes of EU integration, Paragraph 15 of the latter preamble is of particular interest:

Subject to reciprocity, France shall consent to the limitations upon its sovereignty necessary to the organization and preservation of peace<sup>12</sup>.

This clause has been regarded as a basis for limiting French sovereignty and transferring competences to the EC/EU in its first *Maastricht* ruling.<sup>13</sup> Since the aforementioned judicial turnaround, which was triggered by the *Conseil Constitutionnel* in 2004 and will be discussed below,<sup>14</sup> Article 88-1, inserted at the occasion of the 1992 amendment of the constitution, is also regarded as a – possibly general – *basis* for EU integration.<sup>15</sup> Nonetheless, Paragraph 15 is still consistently cited as a norm of reference, along with Article 88-1, in the assessment of whether amendments of EU primary law are

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<sup>8</sup> *Conseil Constitutionnel* 71-44 of 16 July 1971 (*Loi complétant les dispositions des articles 5 et 7 de la loi du 1er juillet 1901 relative au contrat d'association*).

<sup>9</sup> Cf *Formery* (2010-11) 6-7.

<sup>10</sup> Cf eg *Mayer / Lenski / Wendel* (2008).

<sup>11</sup> Cf below, Section 3.2.1.3.2.

<sup>12</sup> Official English translation (available at <http://www.elysee.fr>).

<sup>13</sup> *Conseil Constitutionnel*, decision 92-308 DC of 9 April 1992 (*Maastricht*) paras 9 ff.

<sup>14</sup> *Conseil Constitutionnel*, decision 2004-496 DC of 10 June 2004 (*économie numérique*). On this decision see also below, Sections 3.1.3.4. and 3.2.2.1.

<sup>15</sup> See *infra*, Section 3.1.3.2.

compatible with the French constitution.<sup>16</sup> The *limits* to amendments of primary law are, however, derived from the interplay of this clause with other constitutional provisions.<sup>17</sup>

### 3.1.3.2. Article 3

Article 3 of the constitution of 1958 stipulates that national sovereignty shall vest in the people. Similarly, Article 3 of the Declaration of 1789 proclaims that sovereignty resides in the nation. However, due to the interrelationship with other provisions (in this regard, the *Conseil Constitutionnel* cites in particular paragraphs 14<sup>18</sup> and 15 of the Constitution of 1946, Article 53 and Title XV (governing EU integration) of the Constitution of 1958), French sovereignty is not per se seen as a barrier to EU integration.<sup>19</sup> Nonetheless, the “fundamental conditions of the exercise of national sovereignty”, a notion derived from these provisions by the *Conseil Constitutionnel*, has come to serve as a French constitutional barrier for amendments of EU primary law<sup>20</sup>.

### 3.1.3.3. Article 54, Article 61(2), Article 61-1

Article 54 empowers the *Conseil Constitutionnel* to scrutinize international undertakings as to whether they contain a clause that is contrary to the constitution. A referral can be made by the President of the Republic, the Prime Minister, the President of one or the other Houses, or by sixty Members of the National Assembly or sixty Senators. It must take place before ratification or approval of the international undertaking.

Since 1992, Article 54 has routinely been used to *a priori* review amendments of the EU treaties,<sup>21</sup> which as mentioned has led to several amendments of the French constitution: thus, after the *Conseil's Maastricht* ruling,<sup>22</sup> Articles 88-1, 88-2 and 88-3 were inserted into the constitution; due to its *Amsterdam* judgment,<sup>23</sup> these provisions were amended again. Likewise, the *Conseil's* rulings on the Treaty Establishing a Constitution for Europe<sup>24</sup> and the Treaty of Lisbon have resulted in respective amendments and the insertion of Articles 88-6 and 88-7<sup>25</sup>.

A second avenue to scrutiny of international agreements is opened by Article 61 para 2: by virtue of this provision, before their promulgation acts of parliament may be referred to the Constitutional Council, which shall rule on their conformity with the constitution. This provision has been interpreted by the *Conseil Constitutionnel* as empowering it to indirectly review international undertakings via the acts of parliament serving to ratify them<sup>26</sup>.

While the French system of constitutional review has thus traditionally been characterized by its limitation to *a priori* scrutiny of legal acts and international undertakings, mention should also be made of a new type of *a posteriori* review that has entered into force on 1 March 2010: according to Article 61-1, if, during proceedings in progress before a court of law, it is claimed that a statutory provision infringes constitutional rights, the matter

<sup>16</sup> Cf eg *Conseil Constitutionnel*, decision 2007-560 of 20 December 2007 (Treaty of Lisbon) para 5.

<sup>17</sup> See *infra*, Section 3.2.1.

<sup>18</sup> According to Paragraph 14, France is to comply with public international law.

<sup>19</sup> See *infra*, Section 3.2.1.3.

<sup>20</sup> Cf *infra*, Section 3.2.1.3.1.

<sup>21</sup> Cf also *Azoulay / Agerbeek* (2005).

<sup>22</sup> *Conseil Constitutionnel*, decision 92-308 DC of 9 April 1992 (Maastricht).

<sup>23</sup> *Conseil Constitutionnel*, decision 97-394 DC of 31 December 1997 (Amsterdam).

<sup>24</sup> *Conseil Constitutionnel*, decision 2004-505 DC of 19 November 2004 (Treaty establishing a Constitution for Europe).

<sup>25</sup> See also *Formery* (2010-11) 116-117; *Carcassonne* (2009) 381 ff.

<sup>26</sup> On this see eg *Pactet / Mélin-Soucremanien* (2009) 567 ff with further references; *Charpy* (2009) 630 ff.

may be referred to the *Conseil Constitutionnel*. This new leg of constitutional review, which has become known as the *question prioritaire de constitutionnalité* or *QPC*, has attracted a considerable amount of scholarly attention<sup>27</sup> not least due to the fact that the *Cour de Cassation* in a 2010 referral to the ECJ took the view that the *QPC* exception may be contrary to EU law.<sup>28</sup> According to the *Cour de Cassation*, French law requires French courts seized with a *question prioritaire de constitutionnalité* to rule as a matter of priority on whether to refer, to the *Conseil Constitutionnel*, a question on whether a provision of national law is consistent with the French constitution, when at the same time the conflict of that provision with EU law is at issue.<sup>29</sup> Reacting immediately, the *Conseil Constitutionnel* and the *Conseil d'Etat* held in *obiter dicta* in two other 2010 proceedings that the *Cour de Cassation's* point of view was erroneous, taking a viewpoint close to that of the French Government in the ECJ proceedings triggered by the *Cour de Cassation*.<sup>30</sup> In a Solomonian ruling, the ECJ referred the matter back to the *Cour de Cassation*, indicating that if the *Cour de Cassation's* interpretation of the *QPC* mechanism was correct, then there would indeed be an infringement of EU law; if, by contrast, the view maintained by the French Government was appropriate, then the *QPC* system is compliant with EU law<sup>31</sup>.

The ECJ's ruling is noteworthy also in a second respect, namely in that it appears to indicate that the *Conseil Constitutionnel's* constant jurisprudence, according to which it regards itself as being prevented from referring matters to the ECJ under Article 267 TFEU (ex-Article 234 EC Treaty) due to the one month time limit set for its rulings by Article 61 of the constitution, may be inconsistent with EU law.<sup>32</sup> However, the ECJ's judgment can perhaps also be understood as implying that it belongs to national courts to interpret the relevant national procedural provisions in manner which guarantees that the supremacy of EU law.

#### 3.1.3.4. Article 55

Article 55 has consistently played a central role in the relationship between French constitutional law, EC/EU law and international law more generally. It is worded as follows:

Treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, with respect to each agreement or treaty, to its application by the other party<sup>33</sup>.

In the words of French scholars, this provision has given rise to a "saga of three decades".<sup>34</sup> This appears to be due, inter alia, to the fact that Article 55 does not explicitly state which judicial organ is called upon to ensure the primacy of international agreements *vis à vis* French acts of parliament<sup>35</sup> and is competent, therefore, to review

<sup>27</sup> See eg *Cassia* (2008); *Cassia* (2010); *Le Prado* (2010); *Levade* (2010a); *Levade* (2010b); *Manin* (2010); *Roblot-Troizier* (2010); *Bon* (2009); *Fombeur* (2010).

<sup>28</sup> *Cour de Cassation*, decision 10-40001 of 16 April 2010 (*Melki*).

<sup>29</sup> Cf ECJ, joined Cases C-188/10 *Aziz Melki* and C-189/10 *Sélim Abdeli* of 22 June 2010 (nyr) paras 22 and 31.

<sup>30</sup> *Conseil constitutionnel*, decision 2010- 605 DC of 12 May 2010; *Conseil d'Etat*, decision 312305 of 14 May 2010.

<sup>31</sup> ECJ, joined Cases C-188/10 *Aziz Melki* and C-189/10 *Sélim Abdeli* of 22 June 2010 (nyr) paras 40 ff.

<sup>32</sup> *Ibidem*, para 56 ("...imposing a strict time-limit on the examination by the national courts cannot prevent the reference for a preliminary ruling on the validity of the directive in question").

<sup>33</sup> Official EN translation (italics added), available at <http://www.assemblee-nationale.fr/english/8ab.asp>.

<sup>34</sup> *Olson / Cassia* (2006) 47 ("saga jurisprudentielle d'une trentaine d'années"); see also *Hagueau-Moizard* (2008) 37; *Mathieu* (2007).

<sup>35</sup> See also *Formerly* (2010-11) 119.

French legal acts as to their compliance with international and/or EU obligations. Since a ruling delivered in 1975,<sup>36</sup> the *Conseil Constitutionnel* has persistently taken the view that it is not competent to examine whether French laws are in conformity with French international undertakings. An important exception has, however, recently been made by the *Conseil*, when it held in 2004 that it is obligated, due to Article 88-1, to review whether a French act implementing an EU directive complies with unconditional and precise requirements of the directive in question<sup>37</sup>.

While the *Cour de Cassation* immediately reacted to the *Conseil's* 1975 ruling by holding that it is incumbent on it to ensure the *contrôle de conventionnalité* of French acts of parliament,<sup>38</sup> the *Conseil d'Etat* did not accept this competence before its 1989 ruling in the *Nicolo* case.<sup>39</sup> This type of control was then, however, quickly extended by the *Conseil d'Etat*, which introduced a scrutiny of French legal acts as to their conformity with Community regulations and directives in 1990<sup>40</sup> and 1992<sup>41</sup>, respectively.

Since the *Conseil Constitutionnel's* 2004 judicial turnaround, the *Conseil* has ceased referring to Article 55 in its rulings on the relationship between EU and French law, as Article 88-1 is now assuming a cardinal place in its argumentation.<sup>42</sup> By contrast, the *Conseil d'Etat* continues to refer to Article 55 along with Article 88-1. The underlying legal reason for the latter approach has so far remained obscure<sup>43</sup>.

### 3.1.3.5. Article 88-1

The second central constitutional provision for EU integration is Article 88-1. It has been inserted into the Constitution of 1958 due to the *Conseil Constitutionnel's* 1992 Maastricht ruling.<sup>44</sup> With a view to the signing of the Lisbon Treaty, Article 88-1 was modified by the *loi constitutionnelle* of 4 February 2008. Since the coming into force of the Lisbon Treaty in December 2009, Article 88-1 is therefore worded as follows:

The Republic shall participate in the European Union constituted by states which have freely chosen to exercise some of their powers in common by virtue of the Treaty on European Union and of the Treaty on the Functioning of the European Union, as they result from the treaty signed in Lisbon on 13 December, 2007.<sup>45</sup>

Article 88-1 had originally been understood as a mere declaratory introductory provision to Title XV of the Constitution, which is consecrated to EU affairs.<sup>46</sup> It was the "judicial revolution" brought about by the *Conseil Constitutionnel* in its 2004 ruling in the *économie numérique* case, which has attributed quite a different legal status, and a

<sup>36</sup> *Conseil Constitutionnel*, decision 74-54 DC of 15 January 1975 (*loi relative à l'interruption volontaire de la grossesse*; the so-called IVG ruling).

<sup>37</sup> *Conseil Constitutionnel*, decision 2004-496 DC of 10 June 2004 (*économie numérique*). On this see below, Section 3.2.2.1.

<sup>38</sup> *Cour de Cassation*, decision 73-13556 of 24 May 1975 (*Vabre*), available at <http://www.legifrance.gouv.fr>.

<sup>39</sup> *Conseil d'Etat*, decision 108.243 of 20 October 1989 (*Nicolo*), available at <http://www.legifrance.gouv.fr>.

<sup>40</sup> *Conseil d'Etat*, decision of 24 September 1990 (*Boisdet*), available at <http://www.legifrance.gouv.fr>.

<sup>41</sup> *Conseil d'Etat*, decision of 28 February 1992 (*Rothmans*), available at <http://www.legifrance.gouv.fr>.

<sup>42</sup> Cf eg *Conseil Constitutionnel*, decision 2004-505 DC of 19 November 2004 (Treaty establishing a Constitution for Europe); *Conseil Constitutionnel*, decision 2007-560 of 20 December 2007 (Treaty of Lisbon); on this see eg Charpy (2009) 626.

<sup>43</sup> Cf Charpy (2009) 626 and 628 ff.

<sup>44</sup> It then read: "*La République participe aux Communautés européennes et à l'Union européenne, constituées d'États qui ont choisi librement, en vertu des traités qui les ont instituées, d'exercer en commun certaines de leurs compétences*" (text available at [www.legifrance.gouv.fr](http://www.legifrance.gouv.fr)).

<sup>45</sup> Official English translation, available at <http://www.assemblee-nationale.fr/english/8ab.asp>.

<sup>46</sup> Cf Dutheil de la Rochère (2005).

primary role in EU integration, to this clause. According to this judgment, which dealt with a French act of parliament implementing an EU directive, Article 88-1 gives rise to a *constitutional obligation* to transpose EU directives.

In the central passage of the ruling, the *Conseil Constitutionnel*, relying on Article 88-1, held:

*qu'ainsi la transposition en droit interne d'une directive communautaire résulte d'une exigence constitutionnelle à laquelle il ne pourrait être fait obstacle qu'en raison d'une disposition expresse contraire de la Constitution; qu'en l'absence d'une telle disposition, il n'appartient qu'au juge communautaire, saisi le cas échéant à titre préjudiciel, de contrôler le respect par une directive communautaire tant des compétences définies par les traités que des droits fondamentaux garantis par l'article 6 du Traité sur l'Union européenne*<sup>47</sup>.

With respect to the French act at issue, the *Conseil Constitutionnel* furthermore found that, given that the act's litigious clauses restricted themselves to drawing the *necessary consequences from unconditional and precise provisions* of the directive, it was *incompetent* to review the French legal provisions.<sup>48</sup> In a subsequent decision, the *Conseil Constitutionnel* confirmed that to the extent an implementing act does *not* restrict itself to drawing the necessary conclusions from unconditional and precise provisions of a directive, it is competent to scrutinize the implementing act under French constitutional law<sup>49</sup>.

This judgment is remarkable for several reasons. Above all, the EU obligation at issue – ie to transpose a directive – is regarded also as an *obligation under French constitutional law* by virtue of Article 88-1. The *Conseil* is quick to add, however, that this constitutional obligation exists only to the extent that there is no express contrary provision in the French constitution. If this is not the case, then Article 88-1 is understood, by the *Conseil Constitutionnel*, as a sufficient reason to regard itself as incompetent to review the implementing act and to recognize the ECJ as being solely competent for assessing the directive under EU law. As indicated, this conclusion only applies to the extent that the French legislator has no margin of manoeuvre due to the requirements of the directive (ie to the extent that the implementing merely draws the necessary consequences from precise and unconditional directive requirements).

This ruling has been further elaborated upon in a number of subsequent cases,<sup>50</sup> culminating in the *Conseil Constitutionnel's* 2004 judgment on the Treaty Establishing a Constitution, in which, on the basis of Article 88-1, the *Conseil* for the first time explicitly regarded EC law as a legal order that is "*integrated into the domestic legal order and distinct from the international legal order*".<sup>51</sup> This ruling has also been read as

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<sup>47</sup> *Conseil Constitutionnel*, decision 2004-496 DC of 10 June 2004 (*économie numérique*) para 7.

<sup>48</sup> *Ibidem*, para 9 („*Considérant que [...] les 2 et 3 du I de l'article 6 se bornent à tirer les conséquences nécessaires des dispositions inconditionnelles et précises du 1 de l'article 14 de la directive susvisée sur lesquelles il n'appartient pas au Conseil Constitutionnel de se prononcer ; que, par suite, les griefs invoqués par les requérants ne peuvent être utilement présentés devant lui*”).

<sup>49</sup> *Conseil Constitutionnel*, decision 2004-497 DC of 1 July 2004 (*Loi relative aux communications électroniques et aux services de communication audiovisuelle*) para 20.

<sup>50</sup> *Conseil Constitutionnel*, decision 2004-497 DC of 1 July 2004 (*Loi relative aux communications électroniques et aux services de communication audiovisuelle*); *Conseil Constitutionnel*, decision 2004-498 of 29 July 2004 (*Loi relative à la bioéthique*).

<sup>51</sup> Decision 2004-505 DC of 19 November 2004 (Treaty establishing a Constitution for Europe) para 11.

recognizing Article 88-1 as a constitutional basis for, and a potential limit to,<sup>52</sup> the primacy of EU law.<sup>53</sup> It has also been submitted that it follows from Article 88-1, as interpreted in this judgment, that France could not be integrated into a European federal state<sup>54</sup>.

This new line of case law has set off an intense debate in the French academia.<sup>55</sup> Nonetheless, there remain several unclarities. In particular, it is still uncertain whether the *Conseil Constitutionnel's* approach of regarding the EU obligation of implementing a directive also as an obligation under *French constitutional law* is transposable to other obligations stemming from EU law. Moreover, it remains to be seen to what extent the *Conseil* will use Article 88-1, which is already seen by some authors as a basement for all legal effects of EU law,<sup>56</sup> as a foundation from which other constitutional obligations with respect to EU integration might be inferred in its future jurisprudence<sup>57</sup>.

Despite these uncertainties, the *spécificité* of EU law today seems recognized to a considerably greater extent in decisions of the French judiciary than before the judicial turnaround, based on Article 88-1, that has been set off in the course of the last years.

### 3.1.3.6. Articles 88-2 to 88-7

Article 88-2, at the time of its insertion in 1992, served as a constitutional basis for transfers of powers that were necessary in the context of the establishment of the EU Economic and Monetary Union and the EU's rules on the crossing of external borders. After several amendments,<sup>58</sup> it now addresses the European arrest warrant:

Statutes shall determine the rules relating to the European arrest warrant pursuant to acts adopted by the institutions on the European Union.

Article 88-3 deals with municipal elections. According to it,

[s]ubject to reciprocity and in accordance with the terms of the Treaty on European Union signed on 7 February 1992, the right to vote and stand as a candidate in municipal elections shall be granted only to citizens of the Union residing in France. Such citizens shall neither hold the office of Mayor or Deputy Mayor nor participate in the designation of Senate electors or in the election of Senators. An Institutional Act passed in identical terms by the two Houses shall determine the manner of implementation of this article.

This provision has its roots in the *Conseil's* 1992 Maastricht ruling, in which it had found that the EU rules on municipal elections were contrary to the French Constitution, as it inferred from Article 3 (according to which only French citizens are entitled to vote) and Article 24 (according to which the Senate, which is indirectly based on municipal elections, participates in the exercise of national sovereignty) that the right to vote and to stand as a candidate for municipal elections was reserved for French citizens. The restriction in the wording of Article 88-3, according to which EU citizens residing in

<sup>52</sup> The question of the constitutional *limits* to the primacy of EU law will be discussed below, Section 3.2.

<sup>53</sup> Cf *ibidem*, paras 9-13; on this see below, Section 3.2.1.3.4.

<sup>54</sup> *Azoulay / Agerbeek* (2005) 884.

<sup>55</sup> See eg *Alberton* (2005); *Bailleul* (2004); *Belorgey J.-M. et al* (2004), *Blachère / Protière* (2007); *Chagnollaud* (2005); *Chaltiel* (2004); *Genevois* (2004); *Levade* (2007); *Sales* (2005).

<sup>56</sup> See *Charpy* (2009) 626 with further references.

<sup>57</sup> *Charpy* (2009) 626.

<sup>58</sup> Cf eg *Formery* (2010-11) 162; *Carcassonne* (2009) 385.

France may not serve as mayor or deputy mayor nor participate in the designation of senators or in the election of senators, is meant to remedy this problem<sup>59</sup>.

Article 88-4, inserted in 1992 and amended in 1999 and 2007, is meant in especially to compensate the French Parliament for its loss of competences in the context of EU integration.<sup>60</sup> It is worded as follows:

The Government shall lay before the National Assembly and the Senate drafts of or proposals for Acts of the European Communities and the European Union containing provisions which are of a statutory nature as soon as they have been transmitted to the Council of the European Union. It may also lay before them other drafts of or proposals for Acts or any instrument issuing from a European Union Institution.

In the manner laid down by the Rules of Procedure of each House, resolutions may be passed, even if Parliament is not in session, on the drafts, proposals or instruments referred to in the preceding paragraph. A committee in charge of European affairs shall be set up in each of the Houses of Parliament.

In its current wording, the provision takes into account the conclusions of the *Conseil Constitutionnel's* 2004 ruling on the Treaty Establishing a Constitution for Europe and its 2007 Lisbon decision, pursuant to which the French Constitution did not enable the French Parliament to exercise the rights envisaged for national parliaments in the Treaty Establishing a Constitution for Europe and the Lisbon Treaty, respectively.<sup>61</sup>

Article 88-5, introduced in 2005 and modified in 2008,<sup>62</sup> makes future EU accessions in principle dependent on a positive referendum:

Any Government Bill authorizing the ratification of a treaty pertaining to the accession of a state to the European Union shall be submitted to referendum by the President of the Republic.

Notwithstanding the foregoing, by passing a motion adopted in identical terms in each House by a three-fifths majority, Parliament may authorize the passing of the Bill according to the procedure provided for in paragraph three of article 89.

This provision in especially envisages an eventual accession by Turkey, as becomes clear when it is read in conjunction with Article 47 of the *loi constitutionnel* of 23 July 2008, by virtue of which Article 88-5 is rendered inapplicable to accessions that result from an EU intergovernmental conference whose meeting was decided by the European Council before July 1 2004, a clause which was meant to cover Bulgaria, Romania and Croatia.<sup>63</sup>

Articles 88-6 and 88-7, which entered into force on 1 December 2009, were included in the Constitution so as to accommodate the conclusions of the *Conseil Constitutionnel's*

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<sup>59</sup> Cf eg *Formery* (2010-11) 62 ff and 162-163.

<sup>60</sup> Cf *Formery* (2010-11) 163.

<sup>61</sup> *Conseil Constitutionnel*, decision 2004-505 DC of 19 November 2004 (Treaty establishing a Constitution for Europe) paras 37-41 and *Conseil Constitutionnel*, decision 2007-560 of 20 December 2007 (Treaty of Lisbon) paras 28-32.

<sup>62</sup> Cf *loi constitutionnelle* of 1 March 2005 and *loi constitutionnelle* of 23 July 2008, respectively.

<sup>63</sup> See also *Formery* (2010-11) 164-165.

Lisbon ruling. Article 88-6 lays the constitutional groundwork for the French parliament's involvement in the control of subsidiarity, as envisaged by the Lisbon Treaty:

The National Assembly or the Senate may issue a reasoned opinion as to the conformity of a draft proposal for a European Act with the principle of subsidiarity. Said opinion shall be addressed by the President of the House involved to the Presidents of the European Parliament, the Council of the European Union and the European Commission. The Government shall be informed of said opinion.

Each House may institute proceedings before the Court of Justice of the European Union against a European Act for non-compliance with the principle of subsidiarity. Such proceedings shall be referred to the Court of Justice of the European Union by the Government.

For the purpose of the foregoing, resolutions may be passed, even if Parliament is not in session, in the manner set down by the Rules of Procedure of each House for the tabling and discussion thereof. Such proceedings shall be obligatory upon the request of sixty Members of the National Assembly or sixty Senators.

Article 88-7 empowers the Parliament to oppose modifications deriving from the simplified revision procedure and modifications in the field of judicial cooperation on civil matters:

Parliament may, by the passing of a motion in identical terms by the National Assembly and the Senate, oppose any modification of the rules governing the passing of Acts of the European Union in cases provided for under the simplified revision procedure for treaties or under judicial cooperation on civil matters, as set forth in the Treaty on European Union and the Treaty on the Functioning of the European Union, as they result from the treaty signed in Lisbon on December 13, 2007.

## 3.2. Constitutional Limits to EU-Integration

### 3.2.1. Limits to the (Further) Transfer of Powers to the EU through Treaty Amendments

#### 3.2.1.1. Introductory Remarks

The limits to the (further) transfer of competences through treaty amendments have been clarified, to a considerable extent, in the jurisprudence of the *Conseil Constitutionnel*, whose conclusions are reflected in the text of the Constitution of 1958, as repeatedly modified due to these rulings. It is important, in legal and political terms alike, to note also that the *Conseil* declines to re-examine provisions in EU primary law which it has examined already in earlier judgments,<sup>64</sup> an approach which appears to provide a shield for the *acquis* at the level of primary law.

<sup>64</sup> Cf eg *Conseil Constitutionnel*, decision 2004-505 DC of 19 November 2004 (Treaty establishing a Constitution for Europe) para 8.

### 3.2.1.2. The Constitutional Yardstick (Norms of Reference)

The yardstick that is regarded as relevant by the *Conseil Constitutionnel* for the assessment, under constitutional law, of amendments of EU primary law has been carved out in its rulings on the Maastricht and Amsterdam Treaties, the Treaty Establishing a Constitution for Europe and the Lisbon Treaty. Thus, the *Conseil Constitutionnel* explicitly refers to the 1789 *Déclaration*, as “confirmed and completed” by the Preamble of 1946, the principle of national sovereignty enshrined in Article 3 of the *Déclaration* and Article 3 of the Constitution of 1958, Paragraph 15 of the Preamble of the Constitution of 1946 which permits limitations to national sovereignty,<sup>65</sup> and Article 53 of the Constitution of 1958.<sup>66</sup>

Since its Amsterdam judgment, the *Conseil Constitutionnel* has consistently included Article 88-1 in this group of explicit norms of reference. Moreover and as mentioned above, since the *Conseil's* ruling on the Treaty Establishing a Constitution for Europe, which was delivered as part of the aforementioned judicial turnaround begun in 2004, there is no reference any more to Article 55 (which deals with international agreements) in its respective judgments, which confirms that EU law is increasingly recognized as a specific body of law in the *Conseil Constitutionnel's* case law.<sup>67</sup>

### 3.2.1.3. The Ensuing Constitutional Barriers

#### **The Barriers Abstractly Defined**

From these provisions, the *Conseil Constitutionnel* has inferred in 1992 that national sovereignty does not per se constitute an obstacle preventing France from concluding international agreements “for participation in the establishment or development of a permanent international organisation enjoying legal personality and decision-making powers on the basis of transfers of powers decided on by the Member states, subject to reciprocity”.<sup>68</sup> After its judicial re-orientation in 2004, and apparently on the basis of the new role played by Article 88-1 since then, the *Conseil Constitutionnel* has slightly reworded its conclusion, emphasizing that “texts having constitutional value enable France to participate in the creation and development of a permanent European organization, vested with separate legal personality and powers of decision-making by reason of the transfer of powers agreed to by the Member states”.<sup>69</sup> However, in its 2007 Lisbon ruling, the *Conseil Constitutionnel* has chosen a more restrictive formulation, underlining the supreme position of the French Constitution in matters of EU integration:

While confirming the *place of the Constitution at the summit of the domestic legal order*, [the aforementioned] constitutional provisions enable France to participate in the creation and development of a permanent European organisation vested with a separate legal personality and

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<sup>65</sup> Cf above, Section 3.1.3.1.

<sup>66</sup> Cf *Conseil Constitutionnel*, decision 92-308 DC of 9 April 1992 (Maastricht) paras 9 ff; *Conseil Constitutionnel*, decision 97-394 DC of 31 December (Amsterdam) 1 ff; *Conseil Constitutionnel*, decision 2004-505 DC of 19 November 2004 (Treaty establishing a Constitution for Europe) paras 1 ff; *Conseil Constitutionnel*, decision 2007-560 of 20 December 2007 (Treaty of Lisbon) paras 3 ff.

<sup>67</sup> Cf *Conseil Constitutionnel*, decision 2004-505 DC of 19 November 2004 (Treaty establishing a Constitution for Europe) para 11.

<sup>68</sup> *Conseil Constitutionnel*, decision 92-308 DC of 9 April 1992 (Maastricht) para 13 (official translation, available at <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/1992/92-308-dc/version-en-anglais.45100.html>); see also *Conseil Constitutionnel*, decision 97-394 DC of 31 December (Amsterdam) para 6.

<sup>69</sup> *Conseil Constitutionnel*, decision 2004-505 DC of 19 November 2004 (Treaty establishing a Constitution for Europe) para 6.

decision-taking powers by reason of the transfer of powers agreed to by the Member states.<sup>70</sup>

This formulation leads us directly to the question of the legal *barriers* to changes of primary law that are inferred by the *Conseil Constitutionnel* from French constitutional law: From the aforementioned constitutional provisions, the *Conseil Constitutionnel* has concluded that primary law must not contain “a *clause running counter to the Constitution*” that calls into question “constitutionally guaranteed rights and freedoms”, nor must it “adversely affect the *fundamental conditions of the exercising of national sovereignty*” (“*conditions essentielles d’exercice de la souveraineté nationale*”), unless the Constitution is revised beforehand.<sup>71</sup>

In terms of legal reasoning, this essential conclusion is arrived at in a fairly sudden and somewhat obscure manner, given that the *Conseil* confines itself to making this inference from a mere listing of the aforementioned constitutional provisions. Arguably, this is also a reason why it is difficult to assess eg the extent of the constitutional function(s) that Article 88-1 is playing in EU integration after the *Conseil’s* judicial turnaround.<sup>72</sup>

Moreover, in terms of legal content, it is evident that this barrier, *abstractly defined* as it is, provides rather limited guidance as to the exact constitutional borderlines for future developments in EU treaty law, since the notion of “fundamental conditions of the exercising of national sovereignty” clearly depends on case by case concretisation in the – past and future – jurisprudence of the *Conseil Constitutionnel*.<sup>73</sup>

The next section therefore turns to the guidelines that have so far been developed in the *Conseil’s* case law. Sections 3.2.1.3.3. and 3.2.1.3.4. then deal with further barriers to changes of primary law.

#### “Fundamental Conditions”: Concretisations in Case Law

Two indications as to the meaning of the clause “fundamental conditions of the exercising of national sovereignty” can be derived already from the *Conseil’s* Maastricht ruling, the first of which is not, however, very informative as to the underlying legal reasoning: after an – arguably purely descriptive – overview of the EMU provisions laid down in the former EC treaty, the *Conseil Constitutionnel* briefly holds that these provisions have the effect of depriving Member states of competences in a field that touches upon conditions that are essential for the exercise of sovereignty.<sup>74</sup> The second suggestion given in this ruling is considerably more helpful in that it makes it clear that the “fundamental conditions of the exercising of national sovereignty” are infringed – *in casu*, in the field of the measures relating to the entry and movement of persons – when the *unanimity* rule is abandoned in favour of qualified majority voting.<sup>75</sup>

This barrier has been re-described in a more general manner in later *Conseil* jurisprudence, where it was held that further amendments of the constitution will be required for any transfer of competences which jeopardizes the fundamental conditions of the exercising of sovereignty either because these transfers (i) do not relate to those

<sup>70</sup> *Conseil Constitutionnel*, decision 2007-560 of 20 December 2007 (Treaty of Lisbon) para 8.

<sup>71</sup> *Conseil Constitutionnel*, decision 2007-560 of 20 December 2007 (Treaty of Lisbon) para 9.

<sup>72</sup> Cf above, Section 3.1.3.5.

<sup>73</sup> On this see also Azoulay / Agerbeek (2005); Dutheil de la Rochère (2005).

<sup>74</sup> *Conseil Constitutionnel*, decision 92-308 DC of 9 April 1992 (Maastricht) para 43.

<sup>75</sup> *Ibidem*, para 49.

already permitted in the constitution or because (ii) there are modifications of the exercise of competences already transferred.<sup>76</sup>

The first barrier follows from the fact that the French constitutional legislator has typically (with the exception of the Nice Treaty) reacted to amendments on the level of EU primary law by authorising transfers of competences only as required by the concrete EU Treaty: thus, for example, after the *Conseil's* Maastricht ruling, Article 88-2 was inserted which explicitly permitted only transfers of powers to the extent that was necessary eg for the establishment of EMU "in accordance with the Treaty on European Union signed on 7 February 1992", ie the Maastricht Treaty. This type of static reference to a fixed point in time – ie a given EU amendment treaty – has necessitated repeated modifications of the French constitution that are "synchronized" with changes in EU primary law. Therefore, the *Conseil's* decisions on the Amsterdam Treaty, the Treaty Establishing a Constitution for Europe and the Lisbon Treaty have each indicated a series of provisions in EU amendment treaties that required amendments of the French constitution. In the Lisbon judgment, these fields of EU action have been referred to as competences that are "inherent to national sovereignty":

The provisions of the Treaty of Lisbon which transfer to the European Union under the 'ordinary legislative procedure' powers inherent in the exercising of national sovereignty require a revision of the Constitution. This applies to Article 75 of the Treaty on the Functioning of the European Union as regards the fight against terrorism and related activities, to Article 77 as regards border controls, to d) of paragraph 2 of Article 79 as regards the fight against trafficking in human beings, to Article 81, as regards judicial cooperation on civil matters and to Articles 82 and 83 thereof as regards judicial cooperation in criminal matters, and as regards the powers mentioned in said Articles which do not come under the provisions of Articles 62 and 65 of the Treaty establishing the European Community nor Article 31 and 34 of the Treaty on European Union<sup>77</sup>.

As regards the second aforementioned clarification (modifications of the exercise of competences already transferred to the EU), the *Conseil* has underlined that also a loss of the right of Member state initiative in a given field – *in concreto*: the field of visas, asylum and the free movement of persons<sup>78</sup> – can amount to an infringement of the "fundamental conditions of the exercising of national sovereignty". Most recently, in its Lisbon ruling, the *Conseil* has formulated more generally that in fields of competences that have already been transferred to the EU, but which are "inherent" to national sovereignty, any modification of the EU rules on decision-making – namely changes from unanimity to qualified majority, transfers of decision-making competences to the EU Parliament and losses of Member state powers of initiative – require amendments of the French constitution.<sup>79</sup> Likewise, *clause passerelle*-type provisions are regarded as

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<sup>76</sup> *Conseil Constitutionnel*, decision 97-394 DC of 31 December 1997 (Amsterdam) para 9 ("It follows that further amendment to the Constitution will be required for the clauses of the Treaty of Amsterdam which transfer powers to the European Community in such a way as to jeopardise the essential conditions for the exercise of national sovereignty, either because these transfers do not relate to European economic and monetary union or the crossing of external borders, or because they lay down conditions not already provided by the Treaty on European Union signed on 7 February 1992 for the exercise of powers the transfer of which was authorised by Article 88-2"; official translation, available at [www.conseil-constitutionnel.fr](http://www.conseil-constitutionnel.fr)).

<sup>77</sup> *Conseil Constitutionnel*, decision 2007-560 of 20 December 2007 (Treaty of Lisbon) para 18.

<sup>78</sup> *Conseil Constitutionnel*, decision 97-394 DC of 31 December (Amsterdam) paras 22 ff; on this see also ruling 2004-505 DC (Treaty Establishing a Constitution for Europe) paras 14 ff.

<sup>79</sup> *Conseil Constitutionnel*, decision 2007-560 of 20 December 2007 (Treaty of Lisbon) para 20.

requiring constitutional amendment in fields that are inherent to national sovereignty, as they do not require ratification or approval under French constitutional law, which in turn prevents scrutiny, by the *Conseil*, in line with Article 54 or Article 61 para 2 of the French constitution.<sup>80</sup> This reasoning also applies to the general *passerelle* clause (Article 48 para 7 EU Treaty), which allows for simplified revision of EU decision-making procedures.<sup>81</sup> By contrast, Article 48 para 6 of the EU Treaty, which permits simplified revisions of EU internal policy areas, is regarded as being in conformity with French constitutional law, as the reference to national constitutional law in Article 48 para 6 of the EU Treaty is read, by the *Conseil*, as referring to Article 53 of the French constitution, which requires parliamentary ratification or approval of international agreements<sup>82</sup>.

Furthermore, the *Conseil Constitutionnel* has ascribed the protection of *fundamental rights* to the array of “fundamental conditions of the exercise of national sovereignty”. In this respect, it is noteworthy that while the *Conseil* initially took a rather lenient attitude, declining to see an endangerment of such fundamental conditions on the basis that fundamental rights “are guaranteed by the Court of Justice”,<sup>83</sup> it proceeded, in 2004, to a selective scrutiny of the EU Charter of Fundamental Rights (eg its eventual impacts on collective rights of groups in the sense of Article 1 para 3 of the French constitution, on the French constitutional principle of secularism, and on restrictions of public access to court hearings).<sup>84</sup> The *Conseil* found that the EU Charter does not endanger any of these rights. Its reasoning is based above all on frequent references to the explanations of the Praesidium of the EU Convention that drafted the Charter and to the Charter’s general limitation clause, in which the principle of proportionality plays a pivotal role (Article 52 of the Charter; Article II-112 of the Charter as incorporated in the Treaty Establishing a Constitution for Europe). This way of reasoning arguably risks underestimating the potential for conflict between human rights standards at EU and national level, since, on the one hand, the explanations of the Praesidium merely constitute supplementary means of interpretation.<sup>85</sup> On the other hand, this risk of conflict arguably is not fully defused by the Charter’s general limitation clause<sup>86</sup> and the principle of proportionality enshrined in it, given that decisions on proportionality are balancing decisions that depend on the concrete circumstances of single cases and on the standard of deference, which is applied by a tribunal and which may vary from one tribunal to another and on a case by case basis<sup>87</sup>.

## Reciprocity

As indicated above, according to paragraph 15 of the Preamble of the Constitution of 1946, limitations to sovereignty are subject to the requirement of reciprocity.<sup>88</sup> This proviso gave rise to a – rather brief – examination in the Maastricht judgment, where it was held that the Maastricht treaty fulfilled the reciprocity requirement, as the treaty and

<sup>80</sup> *Conseil Constitutionnel*, decision 2004-505 DC of 19 November 2004 (Treaty establishing a Constitution for Europe) paras 33 ff and *Conseil Constitutionnel*, decision 2007-560 of 20 December 2007 (Treaty of Lisbon) paras 23 ff. On the role of Article 54 and Article 61 para 2 of the French constitution, see above Section 3.1.3.3.

<sup>81</sup> *Conseil Constitutionnel*, decision 2004-505 DC of 19 November 2004 (Treaty establishing a Constitution for Europe) para 35; and *Conseil Constitutionnel*, decision 2007-560 of 20 December 2007 (Treaty of Lisbon) para 27.

<sup>82</sup> *Ibidem*.

<sup>83</sup> *Conseil Constitutionnel*, decision 92-308 DC of 9 April 1992 (Maastricht) para 17.

<sup>84</sup> *Conseil Constitutionnel*, decision 2004-505 DC of 19 November 2004 (Treaty establishing a Constitution for Europe) paras 14-21.

<sup>85</sup> See the introduction to the explanations of the Charter [2007] OJ C 303/17.

<sup>86</sup> On this cf *Griller* (2002); *Vranes* (2003).

<sup>87</sup> On this cf *Vranes* (2009).

<sup>88</sup> See above, Section 3.1.3.1.; on this cf also *Dero* (2006).

its protocols would take effect only after the last instrument of ratification was deposited.<sup>89</sup> Hence, there was in particular no scrutiny as to the reciprocity of the substantive contents of the obligations entered into by the various Member states. It appears that this criterion has not been re-applied in later rulings, however<sup>90</sup>.

### Limits to the Primacy of EU Law

In rulings on primary law, the EU principle of primacy has explicitly been addressed in the *Conseil's* judgment on the Treaty Establishing a Constitution for Europe, since the principle of primacy was to be expressly laid down in Article I-6 of this treaty. The *Conseil* held, first, that this treaty would remain an international agreement, which – according to its Article I-5 – would not impact on the existence of the French constitution, nor its place “at the summit of the domestic legal order”.<sup>91</sup> Moreover, from the declaration on the primacy of EU law that was annexed to this treaty, the ruling inferred that the ambit of the principle of primacy was to remain the same as before.<sup>92</sup> Against this background and that of the provisions of the treaty more generally, and in particular in view of the interplay between Articles I-5 and I-6, the *Conseil* concluded that the treaty would not modify the *scope* of the principle of primacy *as it results from Article 88-1 of the French constitution* (“la portée du principe de primauté du droit de l’Union telle qu’elle résulte...de l’article 88-1”).<sup>93</sup> In other words, Article 88-1 of the constitution is not only seen as a foundation for the effects of EU law, but quite obviously also as a limit for the scope of the principle of primacy.<sup>94</sup> (It appears noteworthy in this central respect that the official English translation of the ruling appears misleading, as it seems to imply quite the contrary, namely that the scope of the principle of the principle of primacy is derived from EU law and is merely “*duly acknowledged* by Article 88-1 of the Constitution”)<sup>95</sup>.

Hence, it appears that the *Conseil Constitutionnel* does not only insist on the supreme position of the French constitution,<sup>96</sup> but also that it – in particular in view of its reference to the interplay between Articles I-5 and I-6 of the Constitutional Treaty – regards the principle of primacy as being confined by the national identity that is inherent in a Member state’s fundamental political and constitutional structures in line with Article I-5 of the Constitutional Treaty, a principle that is now incorporated in Article 4 para 2 of the EU Treaty.

Although the ECJ will have to take into account Article 4 para 2 in its rulings and although the ECJ has in recent years tended to mitigate the consequences of the primacy of EU law by displaying increased deference to domestic constitutional concerns in cases such

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<sup>89</sup> *Conseil Constitutionnel*, decision 92-308 DC of 9 April 1992 (Maastricht) para 16.

<sup>90</sup> Cf *Conseil Constitutionnel*, *Jurisprudence du Conseil Constitutionnel. Tables d’analyses au 18 juin 2010* (2010, available at <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/actualites/cinquante-ans-de-jurisprudence.45836.html>), in particular pages 980 ff.

<sup>91</sup> *Conseil Constitutionnel*, decision 2004-505 DC of 19 November 2004 (Treaty establishing a Constitution for Europe) paras 9-10 (official translation available at <http://www.conseil-constitutionnel.fr>).

<sup>92</sup> *Conseil Constitutionnel*, decision 2004-505 DC of 19 November 2004 (Treaty establishing a Constitution for Europe) para 12.

<sup>93</sup> *Conseil Constitutionnel*, decision 2004-505 DC of 19 November 2004 (Treaty establishing a Constitution for Europe) para.

<sup>94</sup> See also *Charpy* (2009) 626 with further references.

<sup>95</sup> Official translation (available at <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2004/2004-505-dc/decision-n-2004-505-dc-du-19-novembre-2004.888.html>).

<sup>96</sup> Cf again the ruling *Conseil Constitutionnel*, decision 2004-505 DC of 19 November 2004 (Treaty establishing a Constitution for Europe) paras 9-10.

as *Schmidberger* and *Omega*,<sup>97</sup> it does not seem, however, that the French constitutional barriers for the principle of primacy are per se in line with EU law,<sup>98</sup> since the ECJ – despite this judicial *rapprochement* – has not as desisted from its view that EU law has primacy also over national constitutional law.

A further recent judicial re-orientation should be mentioned in this context, as it can be understood as a variant of the issue of the primacy of EU law: In a famous line of jurisprudence which was started with the 1978 *Cohn-Bendit* ruling,<sup>99</sup> the *Conseil d'Etat* had consistently declined to follow the ECJ's case law according to which non-transposed directives may have direct effect. Although most practical effects of this line of case law have been mitigated by a series of other judicial techniques by French tribunals (such as the recognition of state liability or the obligation to interpret French law in accordance with directives), it was not before its 30 October 2009 ruling in *Perreux* that the *Conseil d'Etat* formally followed the ECJ on this issue<sup>100</sup>.

In sum, while the primacy of EU law over French infra-constitutional law is meanwhile firmly recognized by the French judiciary,<sup>101</sup> EU law has not been recognized as having primacy *vis à vis* the French constitution. This follows not only from the jurisprudence, just described, of the *Conseil Constitutionnel*,<sup>102</sup> but also from rulings by the *Conseil d'Etat*<sup>103</sup> and the *Cour de Cassation*.<sup>104</sup> To some extent, the stance taken by the French judiciary may, however, have been moderated by its new approach to secondary law, in particular EU directives, which are now reviewed in a more limited manner under French constitutional law. This leads us to the constitutional barriers for secondary law, which are addressed in the next Section.

### 3.2.2. Scrutiny of Secondary Legislation, Especially *ultra-vires* Doctrine

#### 3.2.2.1. Scrutiny by the Conseil Constitutionnel

Until 2004, it was not quite clear whether the *Conseil Constitutionnel* was prepared to review EU secondary law as to its conformity with French constitutional law.<sup>105</sup> It was the aforementioned judicial turnaround, begun in that year, which has shed more light on this issue, as it has also clarified the constitutional barriers for EU secondary law. Thus, it not only follows from the *Conseil Constitutionnel's* respective rulings, which have dealt with the French acts implementing EU directives, that this duty of implementation constitutes a duty under French constitutional law, but also that there are barriers to this obligation that derive from the French constitution.

<sup>97</sup> ECJ, Case C-112/00 *Schmidberger* [2003] European Court Reports I-05659; ECJ Case C-36/02 *Omega* [2004] European Court Reports I-09609.

<sup>98</sup> For a contrary view see *Mathieu* (2007) 680-681.

<sup>99</sup> *Conseil d'Etat*, decision N° 11604 of 22 December 1978 (*Cohn-Bendit*) available at <http://www.legifrance.gouv.fr>.

<sup>100</sup> *Conseil d'Etat*, decision N° 298348 2009 (*Perreux*). This line of case law and the judicial re-orientation have attracted a considerable number of comments in academic writings. See eg *Chrestia* (2010); *Guyomar* (2009); *Cassia* (2006); *Liéber / Botteghi* (2009); *Ritleng* (2009) (2010); *Canedo-Paris* (2010).

<sup>101</sup> Cf above, Section 3.1.3.4.

<sup>102</sup> Ie, the rulings in *Conseil Constitutionnel*, decision 92-308 DC of 9 April 1992 (Maastricht); *Conseil Constitutionnel*, decision 97-394 DC of 31 December (Amsterdam); *Conseil Constitutionnel*, decision 2007-560 of 20 December 2007 (Treaty of Lisbon).

<sup>103</sup> *Conseil d'Etat*, decisions N° 200286 200287 of 30 October 1998 (Sarran); *Conseil d'Etat*, decision 287110 of 8 February 2007 (Arcelor). See below, Section 3.2.2.2.

<sup>104</sup> *Cour de Cassation*, decision 99-60274 of 2 June 2000 (*Fraisie*).

<sup>105</sup> See eg *Kovar* (2004).

It ensues from the *Conseil Constitutionnel's* 2004 jurisprudence – which has already been briefly addressed above<sup>106</sup> and which has to some extent been refined meanwhile (cf in the following text) – that this obligation cannot override an express conflicting constitutional provision (“*disposition expresse contraire de la Constitution*”).<sup>107</sup> By contrast, if there is no such provision, then the ECJ is regarded as solely competent to monitor the respect by an EU directive of both the competences set forth in the treaties and the fundamental rights guaranteed at EU level.<sup>108</sup> This appears to imply that the *Conseil Constitutionnel* will review directives under the aforementioned constitutional yardstick. It also follows from this jurisprudence that the *Conseil Constitutionnel* does not examine provisions in a national implementing act that restricts itself to drawing the necessary consequences from unconditional and precise requirements of a directive.<sup>109</sup> If, however, the requirements laid down in a directive leave a margin of manoeuvre to France, then the *Conseil Constitutionnel* will review respective implementing acts<sup>110</sup> – a distinction which, according to the secretary general of the *Conseil Constitutionnel* is influenced by the jurisprudence of the Austrian Constitutional Court.<sup>111</sup> Moreover, the *Conseil Constitutionnel* appears to have made its review dependent on whether a given fundamental right is equally protected at EU level<sup>112</sup>.

In the course of the vigorous discussion<sup>113</sup> of this new line of jurisprudence, it has been pointed out by the Secretary General of the *Conseil Constitutionnel* that a “*disposition expresse contraire de la Constitution*” (which will make the *Conseil Constitutionnel* exercise its competence) must be *specific* to the French constitution, which means that there must be no equivalent in EU fundamental rights and general principles of EU law.<sup>114</sup> An example given by a Member of the *Conseil Constitutionnel* is the French principle of secularism.<sup>115</sup> This enquiry into whether there exists equivalent protection at EU level arguably appears to be reflected also in the more recent jurisprudence of the *Conseil d'Etat*<sup>116</sup>.

The *Conseil Constitutionnel's* line of jurisprudence has been further elaborated in 2006 in a ruling on the statute pertaining to copyright and related rights in the information society which implemented directive 2001/29/EC. The *Conseil Constitutionnel* first reconfirmed that the implementation of directives “results from a constitutional obligation”,<sup>117</sup> which is monitored by the *Conseil*.<sup>118</sup> This control is then, however, subjected to a “double limit”: first, the directive’s implementation must not “run counter to a rule or principle inherent to the *constitutional identity* of France, except when the constituting power consents thereto”.<sup>119</sup> This first limit may give rise to a review of the

<sup>106</sup> See *supra*, Section 3.1.3.5.

<sup>107</sup> *Conseil Constitutionnel*, decision 2004-496 DC of 10 June 2004 (*économie numérique*) para 7.

<sup>108</sup> *Ibidem*.

<sup>109</sup> *Conseil Constitutionnel*, decision 2004-496 DC of 10 June 2004 (*économie numérique*) para 9 and *Conseil Constitutionnel*, decision 2004-498 of 29 July 2004 (*Loi relative à la bioéthique*) para 7.

<sup>110</sup> *Conseil Constitutionnel*, decision 2004-497 DC of 1 July 2004 (*Loi relative aux communications électroniques et aux services de communication audiovisuelle*) para 20.

<sup>111</sup> On this cf *Dutheil de la Rochère* (2004) (referring to the secretary general of the *Conseil* *ibidem* at 864).

<sup>112</sup> *Conseil Constitutionnel*, decision 2004-498 of 29 July 2004 (*Loi relative à la bioéthique*); on this see also Charpy (2009); Olson / Cassia (2006) 55 ff.

<sup>113</sup> See eg Alberton (2005); Bailleul (2004); Belorgey et al (2004); Blachère / Protière (2007); Chagnollaude (2005); Chaltiel (2004); Genevois (2004); Levade (2007); Sales (2005).

<sup>114</sup> See *Dutheil de la Rochère* (2005) (referring to the secretary general of the *Conseil* *ibidem* at 866).

<sup>115</sup> *Dutheil de Lamothe* (2008); see also *Dutheil de la Rochère* (2005), who refers to French prohibition on automatic extradition in relation to political crimes as an example.

<sup>116</sup> Cf *infra*, next Section.

<sup>117</sup> *Conseil Constitutionnel*, decision 2006-540 of 27 July 2006 (*loi relative au droit d'auteur*) para 17.

<sup>118</sup> *Ibidem*, para 18.

<sup>119</sup> *Ibidem*, para 19 (official translation, available at <http://www.conseil-constitutionnel.fr>).

EU directive itself under French constitutional law.<sup>120</sup> Secondly, given that the *Conseil Constitutionnel* holds itself to be prevented, due to the timeframe set forth in Article 61 of the Constitution,<sup>121</sup> from requesting a preliminary ruling of the European Court of Justice,<sup>122</sup> it holds that it can “only find a statutory provision unconstitutional under Article 88-1 of the Constitution if this provision is *obviously* incompatible with the Directive which it is intended to transpose”.<sup>123</sup> It is, therefore, incumbent on national courts of law, if need be, to refer a matter to the ECJ for a preliminary ruling.<sup>124</sup> Implementing provisions that restrict themselves to drawing necessary conclusions from unconditional and precise provisions of a directive continue not to be reviewed by the *Conseil Constitutionnel* after this 2006 clarification of its case law<sup>125</sup>.

A series of questions arise from this judicial adjustment. On the one hand, there is the issue of the content of the notion *identité constitutionnelle*. In academic writings, it has been submitted that it encompasses principles such as the indivisibility of the French Republic, secularism, democracy, decentralisation, the welfare state and French participation in EU integration.<sup>126</sup> According to *Mathieu*, the constitutional identity may comprise objective principles (eg secularism) as well as fundamental rights, which raises the question, not yet clarified by the *Conseil Constitutionnel*, as to whether the French constitutional identity is (co-)defined by the mere formal existence of a given fundamental right or by the specific interpretation that it has received in French jurisprudence.<sup>127</sup> In this context, one needs to be aware of the fact, however, that the constitutional identity can in any case be modified by the constituting power.<sup>128</sup> On the other hand, the question of the probable impact of this presumptive widening of the French constitutional reserve, as compared to the afore-described 2004 case law, arises. It is noteworthy, in this respect, that the French identity review has been referred to as a quite theoretic mechanism by a member of the *Conseil Constitutionnel*.<sup>129</sup> Furthermore, it has not so far become clear whether the *Conseil Constitutionnel* will be prepared to extend the constitutional reserve to other types of secondary law.<sup>130</sup> Although it has been argued by French academics that the *Conseil's* approach tends to be in line with EU law,<sup>131</sup> it has appropriately been submitted that a constitutional review, as envisaged by the *Conseil*, of the obligation, stemming from EU law, to implement directives finds no legal basis in EU law<sup>132</sup>.

### 3.2.2.2. Scrutiny by the *Conseil d'Etat*

Shortly after the *Conseil Constitutionnel's* re-orientation, the *Conseil d'Etat*, too, has been confronted with a French legal act implementing an EU directive, which has led to its 2007 landmark decision in *Arcelor*. Relying on Article 55, the *Conseil d'Etat* has held

<sup>120</sup> Cf *Conseil Constitutionnel*, decision 2006-540 of 27 July 2006 (*loi relative au droit d'auteur*) para 28 (“...the abovementioned Directive of May 22nd 2001 does not run counter to any rule or principle inherent to the constitutional identity of France”; official translation, available at <http://www.conseil-constitutionnel.fr>).

<sup>121</sup> On this provision see above, Section 3.1.3.3.

<sup>122</sup> On this issue cf already above, Section 3.1.3.3.

<sup>123</sup> *Ibidem*, para 20 (official translation, available at <http://www.conseil-constitutionnel.fr>).

<sup>124</sup> *Ibidem*.

<sup>125</sup> *Ibidem*, para 35.

<sup>126</sup> *Chaltiel* (2006).

<sup>127</sup> *Mathieu* (2007) 690.

<sup>128</sup> Cf the proviso “except when the constituting power consents thereto” in para 19 of the *Conseil's* ruling. This is also emphasized eg by *Mayer / Lenski / Wendel* (2008) 71; and *Mathieu* (2007) 692.

<sup>129</sup> “assez théorique”, cf O Dutheillet de Lamothe, ‘Le contrôle de conventionnalité’ (intervention lors de la visite à la Cour constitutionnelle italienne le 9 mai 2008; available at [www.conseil-constitutionnel.fr/...constitutionnel/.../discours\\_interventions/2008/o\\_dutheillet\\_rome\\_9mai2008.pdf](http://www.conseil-constitutionnel.fr/...constitutionnel/.../discours_interventions/2008/o_dutheillet_rome_9mai2008.pdf)).

<sup>130</sup> On this see eg *Charpy* (2009) with further references; *Mathieu* (2007) 689-690.

<sup>131</sup> *Mathieu* (2007) 680-681.

<sup>132</sup> *Mayer / Lenski / Wendel* (2008) 71.

that international obligations cannot take precedence over French constitutional law. Evidently taking account of the *Conseil Constitutionnel's* new case law, the *Conseil d'Etat* inferred a constitutional obligation from Article 88-1 to implement EU directives. However, pursuant to the *Conseil d'Etat*, the constitutional review of acts implementing precise and unconditional provisions of a directive has to take place under *modified conditions*. Accordingly, when seized with a question of constitutionality, the *Conseil d'Etat* is to examine whether on the level of EU law there exists a rule or a general principle of EU law which, in the way it is currently interpreted by the ECJ, guarantees effective protection of the respective French constitutional rule or principle.<sup>133</sup> If this is the case, then it is incumbent on the *Conseil d'Etat* to examine whether the directive complies with the relevant rule or principle of EU law and to reject the complaint, unless there are serious doubts, which would require seizing the ECJ for a preliminary ruling. If, by contrast, there does not exist such a rule or principle at EU level, then the *Conseil d'Etat* regards itself as competent to examine directly the constitutionality of the implementing measure in question<sup>134</sup>.

Like the *Conseil Constitutionnel's* new line of case law, the *Conseil d'Etat's Arcelor* decision has spurred an intense debate in France that has even spilled over to the wider public.<sup>135</sup> It is evident, that this ruling involves a considerable number of issues both from the perspective of EU and French law, the latter of which have received quite controversial assessments. As regards the perspective of EU law, it is clearly problematic that the *Conseil d'Etat* claims to be competent to determine itself, and without referring a relevant case to the ECJ, whether there exists equal protection of a given French right at the level of EU law, a stance which also deprives the ECJ of the possibility, clearly envisaged by EU primary law, to further develop its case law and the *acquis* of EU law.<sup>136</sup> As regards French constitutional law, it has been submitted that the ruling's reference to Article 55 of the Constitution of 1958<sup>137</sup> indicates that it appears legally impossible, for the *Conseil d'Etat*, to recognize the primacy of EU law vis à vis French constitutional law. This would imply that EU law could even receive less favourable treatment than international law, given that complaints based on constitutional law can be raised against

<sup>133</sup> *Conseil d'Etat*, decision 287110 of 8 February 2007 (*Arcelor*).

<sup>134</sup> *Conseil d'Etat*, decision 287110 of 8 February 2007 (*Arcelor*) („*Considérant que si, aux termes de l'article 55 de la Constitution, les traités ou accords régulièrement ratifiés ou approuvés ont, dès leur publication, une autorité supérieure à celle des lois, sous réserve, pour chaque accord ou traité, de son application par l'autre partie, la suprématie ainsi conférée aux engagements internationaux ne saurait s'imposer, dans l'ordre interne, aux principes et dispositions à valeur constitutionnelle; qu'eu égard aux dispositions de l'article 88-1 de la Constitution, selon lesquelles la République participe aux Communautés européennes et à l'Union européenne, constituées d'Etats qui ont choisi librement, en vertu des traités qui les ont instituées, d'exercer en commun certaines de leurs compétences, dont découle une obligation constitutionnelle de transposition des directives, le contrôle de constitutionnalité des actes réglementaires assurant directement cette transposition est appelé à s'exercer selon des modalités particulières dans le cas où sont transposées des dispositions précises et inconditionnelles ; qu'alors, si le contrôle des règles de compétence et de procédure ne se trouve pas affecté, il appartient au juge administratif, saisi d'un moyen tiré de la méconnaissance d'une disposition ou d'un principe de valeur constitutionnelle, de rechercher s'il existe une règle ou un principe général du droit communautaire qui, eu égard à sa nature et à sa portée, tel qu'il est interprété en l'état actuel de la jurisprudence du juge communautaire, garantit par son application l'effectivité du respect de la disposition ou du principe constitutionnel invoqué; que, dans l'affirmative, il y a lieu pour le juge administratif, afin de s'assurer de la constitutionnalité du décret, de rechercher si la directive que ce décret transpose est conforme à cette règle ou à ce principe général du droit communautaire; qu'il lui revient, en l'absence de difficulté sérieuse, d'écarter le moyen invoqué, ou, dans le cas contraire, de saisir la Cour de justice des Communautés européennes d'une question préjudicielle, dans les conditions prévues par l'article 234 du Traité instituant la Communauté européenne; qu'en revanche, s'il n'existe pas de règle ou de principe général du droit communautaire garantissant l'effectivité du respect de la disposition ou du principe constitutionnel invoqué, il revient au juge administratif d'examiner directement la constitutionnalité des dispositions réglementaires contestées*”).

<sup>135</sup> Cf Mayer / Lenski / Wendel (2008) with further references on French literature.

<sup>136</sup> See also Mayer / Lenski / Wendel (2008) 85-86.

<sup>137</sup> On this provision cf above, Section 3.1.3.3.

EU law.<sup>138</sup> In this context, it has also been held that the *Conseil d'Etat* has confirmed a *noyau dur de souveraineté*.<sup>139</sup> Moreover, it has been submitted that the fact that the *Conseil d'Etat* has chosen not to employ the notion of constitutional identity, as introduced by the *Conseil Constitutionnel*,<sup>140</sup> but has opted for inquiring into the existence of equivalent protection at EU level, may suggest that the *Conseil d'Etat* may not be prepared to fully concur with the *Conseil Constitutionnel's* new approach to EU law.<sup>141</sup> Nonetheless, it should be noted that the *Conseil Constitutionnel's* approach, too, has been interpreted, by its secretary general, as encompassing an examination as to whether there is equivalent protection of fundamental rights at EU level.<sup>142</sup> Finally, as in the case to the *Conseil Constitutionnel's* judicial re-orientation, there remains the question as to which extent the *Conseil d'Etat's* approach can be transferred to other acts of secondary law.

### 3.3. The Resulting Relationship between EU law and National Law

- The opening-up of the French legal order towards EU law has been a gradual process. In a turn-around that has occurred in particular since 2004, the French judiciary has explicitly recognized that EU law is integrated into the domestic legal order and distinct from the international legal order. French authors submit, however, that the *Conseil Constitutionnel*, the *Conseil d'Etat* and the *Cour de Cassation* may still be pursuing partly divergent approaches towards EU law. To some extent, this tends to be illustrated also by the current debate on the compatibility of the *question prioritaire de constitutionnalité* (QPC) with EU case law.
- The primacy of EU law vis à vis French infra-constitutional law appears to be consistently recognized by the French judiciary.
- Limits to EU-integration are, however, derived from the French constitution, which is regarded as being placed at the summit of the internal legal order.
- With respect to EU *primary law*, the *Conseil Constitutionnel* has made it clear that treaty amendments must not contain a *clause running counter to the Constitution* calling into question constitutionally guaranteed rights and freedoms, nor must they adversely affect the *fundamental conditions of the exercising of national sovereignty* ("*conditions essentielles d'exercice de la souveraineté nationale*"), unless the Constitution is revised beforehand.
- This abstractly defined barrier depends on case by case concretisation. Relevant indications can be derived from the *Conseil Constitutionnel's* jurisprudence, according to which further amendments of the constitution will be required for any transfer of competences which jeopardizes the fundamental conditions of the exercising of sovereignty either because these transfers (i) do not relate to those already permitted in the constitution or because (ii) there are modifications of the exercise of competences already transferred.

<sup>138</sup> See Mayer / Lenski / Wendel (2008) 77 with further references to academic writings.

<sup>139</sup> Charpy (2009) 639 ff.

<sup>140</sup> Cf the preceding Section.

<sup>141</sup> Mayer / Lenski / Wendel (2008).

<sup>142</sup> Cf the preceding Section.

- As respects the first barrier, which appears to be defined in terms of the policy fields affected by a (new) transfer of competences, the *Conseil Constitutionnel* has, in its most recent judgment (concerning the Lisbon treaty) referred to a series of treaty provisions which it regards as “inherent to national sovereignty”.
- As respects the second barrier, which relates to modifications of the exercise of competences already transferred to the EU, the *Conseil Constitutionnel* has emphasized that as regards such competences which are “inherent to national sovereignty”, any modification of the EU rules on decision-making require amendments of the French constitution. This comprises changes from unanimity to qualified majority, transfers of decision-making competences to the EU Parliament, losses of Member state powers of initiative, and *clause passerelle*-type provisions including the general *passerelle* clause (Article 48 para 7 EU Treaty).
- Furthermore, the *Conseil Constitutionnel* has subsumed the protection of fundamental rights under the notion of *conditions essentielles d'exercice de la souveraineté nationale*.
- The principle of primacy of EU law has been regarded as being confined by its traditional scope and by the national identity that is inherent in a Member state's fundamental political and constitutional structures in line with Article I-5 of the Constitutional Treaty, a principle that is now incorporated in Article 4 para 2 of the EU Treaty.
- With respect to the scrutiny of *secondary law*, important developments have taken place in the context of the judicial re-orientation that was started in 2004.
- While the EU law obligation to implement an EU directive is now regarded also as an obligation under French constitutional law by the *Conseil Constitutionnel*, the *Conseil Constitutionnel* underlined in 2004 that this obligation cannot override an express conflicting constitutional provision.
- In 2006, the *Conseil Constitutionnel* has reformulated this limit such that the implementation of a directive must not run counter to a rule or principle that is inherent to the *constitutional identity* of France. The constituting power can, however, consent to necessary amendments of French constitutional law. Moreover, the *Conseil Constitutionnel* has restricted its constitutional review of a national act implementing a directive to provisions that are manifestly incompatible with the directive that the national act intends to transpose. It is incumbent on national courts of law, if need be, to refer a matter to the ECJ for a preliminary ruling.
- Since 2007, the implementation of EU directives is also regarded as a constitutional obligation by the *Conseil d'Etat*. According to it, the constitutional review of acts implementing precise and unconditional provisions of a directive has to take place under modified conditions: When seized with a question of constitutionality, the *Conseil d'Etat* proceeds to an examination as to whether, on the level of EU law, there exists a rule or a general principle of EU law which, in the way it is currently interpreted by the ECJ, guarantees effective protection of the respective French constitutional rule or principle. If this is the case, then the *Conseil d'Etat* regards itself as

competent to examine whether the directive complies with the relevant rule or principle of EU law and to reject the complaint, unless there are serious doubts, which would require seizing the ECJ for a preliminary ruling. If, by contrast, there does not exist such a rule or principle at EU level, then the *Conseil d'Etat* regards itself as competent to examine directly the constitutionality of the implementing measure in question.

- This judicial re-orientation has spurred an intense legal debate, in which it has *inter alia* been submitted that the *Conseil Constitutionnel's* approach of curtailing the EU law obligation to implement EU directives through its review under French constitutional law risks infringing EU law. Similarly, it has been held that it is problematic, in terms of EU law, that the *Conseil d'Etat* claims to be competent to determine itself, and without referring a relevant case to the ECJ, whether there exists equal protection of a given French right at the level of EU law, a stance which also deprives the ECJ of the possibility to further develop its case law and the *acquis* of EU law.
- This judicial re-orientation also raises a series of questions under French constitutional law, given that it has not become clear so far eg which rules and principles are comprised by the notion of the French constitutional identity nor whether the *Conseil d'Etat's* approach to EU directives is fully in line with that of the *Conseil Constitutionnel*. Moreover, it is not yet clear if and to which extent their approaches can be transposed from directives to other acts of EU secondary law.

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## 4. ITALY

### 4.1. Constitutional Foundations of EU-Membership

#### 4.1.1. Overview

Up until the 2001 constitutional reform came into effect,<sup>1</sup> no provision of the Constitution of the Italian Republic was concerned with European integration and the membership of Italy in the European Union and the three European Communities respectively. Proposals for such constitutional provisions concerning the cooperation of European States<sup>2</sup>, although – due to obvious historical reasons – not about Italy's membership in the European Communities, were discussed in the Constituent Assembly (*Assemblea costituente*) in 1946 and 1947, but they were finally dismissed. This was justified with the argument that the concept of international organisations encompasses European organisations and that the wording of Article 11 of the Constitution is regarded as flexible enough to also include European integration.

Jurisprudence, established case law and legal practice took Article 11 of the Constitution therefore as the constitutional foundation for Italy's membership in the European Communities and in the European Union. The Treaties of Paris<sup>3</sup> and Rome<sup>4</sup>, the Single European Act<sup>5</sup>, the Treaties of Maastricht<sup>6</sup>, Amsterdam<sup>7</sup> and Nice<sup>8</sup>, the Treaty establishing a Constitution for Europe<sup>9</sup> as well as the Treaty of Lisbon<sup>10</sup> were ratified by ordinary law (*legge ordinaria*) on the basis of Article 11 of the Constitution.

The constitutional reform in 2001 finally introduced a provision (Article 117, section 1, Constitution) which addressed the membership of Italy in the European Communities explicitly by imposing the obligation on the state, Regions and Autonomous Provinces to legislate not only according to the Constitution but also to the obligations deriving from Community legislation and international law.

#### 4.1.2. Individual legal provisions

##### 4.1.2.1. Article 11 of the Constitution

Article 11 of the Italian Constitution allows restricting sovereignty in cases that may be necessary to establish a world order that ensures peace and justice among nations, on conditions of equality with other states.

During the ratification of the Treaties of Paris and Rome, it was argued by some in Italian jurisprudence and political practice that the ratification and implementation of the Treaties required constitutional legislation ("*legge costituzionale*"). The Parliament did not follow this opinion, and ratified as well as implemented the Treaties of Paris and Rome – in accordance with a part of jurisprudence and the government – by ordinary law;<sup>11</sup> this

<sup>1</sup> Constitutional law 18 October 2001, no 3.

<sup>2</sup> Cassese (1975) 463 ff, 466 ff, 476 f and 578.

<sup>3</sup> Law 25 June 1952, no 766.

<sup>4</sup> Law 14 October 1957, no 1203.

<sup>5</sup> Law 23 December 1989, no 909.

<sup>6</sup> Law 3 November 1992, no 454.

<sup>7</sup> Law 16 June 1998, no 209.

<sup>8</sup> Law 11 May 2002, no 102.

<sup>9</sup> Law 7 April 2005, no 57. Cf *Cartabia* (2007).

<sup>10</sup> Law 2 August 2008, no 130.

<sup>11</sup> *Bartole* (2004) 276.

was justified with the argument that a transfer of sovereign powers finds a sufficient constitutional basis in Article 11 of the Constitution<sup>12</sup>.

In its verdict of 24 February 1964 in the case *Costa / ENEL* in a concrete judicial review, the *Corte costituzionale*, appealed to by the *Giudice conciliatore di Milano*, ruled that Article 11 of the Constitution could be regarded as the constitutional basis for EEC membership. If the criteria mentioned in Article 11 of the Constitution are met, this provision allows as permission clause ("*norma permissiva*") to enter treaties which constrain national sovereignty and can be implemented by ordinary law<sup>13</sup>.

From this point on, Article 11 of the Constitution was regarded by the *Corte costituzionale* and by the prevailing doctrine as the constitutional basis for the membership of Italy in the European Communities and the European Union<sup>14</sup>.

In context of deepened European integration through the Treaty of Maastricht<sup>15</sup> and the aspired constitutionalisation of the European Union, the –often-suppressed – issue arose of whether further integration steps with significant constitutional effect on the Italian legal system had to be based on a constitutional act. Based on the constitutional Act of 3 April 1989, a consultative referendum about the future development of the European Communities was held.<sup>16</sup> The Italian public was asked whether the European Communities should be turned into a real Union with a government responsible to the Parliament, and whether the European Parliament should have a mandate to draft a constitution for Europe, which was to be ratified by the competent bodies of the Member States of the EEC.<sup>17</sup> Almost 88 % of those entitled to vote agreed in 1989 to the constitutionalisation of the European Union.<sup>18</sup> Also in the process of ratifying the Treaty establishing a Constitution for Europe, it was argued in Italy that ratification should be done by way of a constitutional act. The Treaty establishing a Constitution for Europe was, however, finally ratified by the Parliament with overwhelming majority by dint of an ordinary law<sup>19</sup>.

In its rulings in the cases *Acciaierie San Michele / CECA*<sup>20</sup>, *Frontini* and *Industrie Camiche Italia Centrale (ICIC)* in 1965, 1973 and 1975, the *Corte costituzionale* confirmed Article 11 of the Constitution as the constitutional basis for EEC membership, and thereby also reaffirmed the transfer of powers.

In the case *Frontini*<sup>21</sup> the *Corte costituzionale* affirmed that the Act ratifying the EEC Treaty found a secure foundation ("*sicuro fondamento*") in Article 11 of the Constitution. Although the constitutional legislator (*costituente*) referred to an impending accession of Italy to the United Nations as it added Article 11 to the Constitution, it was motivated by general, pragmatic principles on which the EEC and other regional European organisations rest. It is therefore beyond doubt that the Treaty of Rome meets the aims mentioned in Article 11 of the Constitution ("*... non è dunque possibile dubbio sulla piena*

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<sup>12</sup> *Cartabia / Gennusa* (2009) 8 ff; and *Panara* (2008) no 17.

<sup>13</sup> Corte costituzionale Judgement of 24 February 1964, 16/1964, in law no 6.

<sup>14</sup> *Panara* (2008) no 17.

<sup>15</sup> See *Luciani* (1992) 557.

<sup>16</sup> Constitutional law 3 April 1989, no 2.

<sup>17</sup> Article 2: "Ritenete voi che si debba procedere alla trasformazione delle Comunità europee in una effettiva Unione, dotata di un Governo responsabile di fronte al Parlamento, affidando allo stesso Parlamento europeo il mandato di redigere un progetto di Costituzione europea da sottoporre direttamente alla ratifica degli organi competenti degli Stati membri della Comunità?".

<sup>18</sup> Cf *Caravita* (1989) 319.

<sup>19</sup> Cf *Cartabia* (2007); and *Cartabia* (2005) 9.

<sup>20</sup> Corte costituzionale Judgement of 16 December 1965, 98/1965, in law no 1.

<sup>21</sup> Corte costituzionale Judgement of 18 December 1973, 183/1973, in law no 4 and 5.

*rispondenza del Trattato di Roma alle finalità indicate dall'Art. 11 della Costituzione ...").* The *Corte costituzionale* adjudged also that the constitutional legislator allowed with Article 11 of the Constitution to restrict sovereign powers in its legislative, executive and judicatory dimension to the extent that this is necessary to establish a community of European states and that Italy and other EEC Member States transfer certain sovereign powers and thereby establish the EEC as an organisation equipped with an independent legal system. Regarding the contested issue of whether the transfer of powers to the EEC and the Ratification Act of the EEC Treaty respectively require a constitutional act, or whether ratification is possible by ordinary law, the *Corte costituzionale* referred to a similar issue in the context of the 1951 ECSC Treaty and determined that ratification on by an ordinary act was lawful.<sup>22</sup> With reference to its ruling in the case *Costa/ENEL* of 24 February 1964, the *Corte costituzionale* argued that the completion and implementation of an international treaty that results in a transfer of powers is admissible by dint of an ordinary act, when the criteria mentioned in Article 11 of the Constitution are met. After all, Article 11 of the Constitution would lose its normative substance, if one argued that every restriction of sovereignty it envisages needed a constitutional act. It is obvious that Article 11 of the Constitution has not only substantive but also procedural significance ("*... valore non soltanto sostanziale ma anche procedimentale ...*"), since it allows the restriction of sovereignty under the mentioned conditions and aims, and in some instances relieves the Parliament from the requirement to refer to its power to amend the Constitution ("*... esonerando il Parlamento dalla necessità di ricorrere all'esercizio del potere di revisione costituzionale ...*").

With its ruling of 22 October 1975 in the case *Industrie Camiche Italia Centrale (ICIC)*<sup>23</sup>, the *Corte costituzionale* affirmed especially that the transfer of legislative powers to the institutions of the European Communities under simultaneous restriction of the powers of the Member States finds a secure foundation ("*sicuro fondamento*") in Article 11 of the Constitution, which justifies the restriction of state power in favour of the Communities with regard to the exercise of legislative, executive and judicatory functions.

Doctrine also followed the case law of the *Corte costituzionale* in the respect that Article 11 of the Constitution can be taken as the constitutional basis for Italy's membership in the European Communities and the European Union, although the constitutional legislator intended this provision originally to cover the accession of Italy to the United Nations. It was regarded as constitutional that constitutional provisions can detach themselves from the will of the constitutional legislator and their original cause, which can lead to an interpretation not (yet) envisaged by the historical constitutional legislator<sup>24</sup>.

#### 4.1.2.2. Article 117, section 1, of the Constitution

The 2001 constitutional amendment modified Article 117, section 1, located in Title V of the Constitution which deals with Regions, Provinces and municipalities. The constitutional reform was especially aiming to decentralise Italy. Article 117, section 1, of the Constitution obliges the state, Regions and Autonomous Provinces to legislate not only according to the Constitution but also to the obligations deriving from European Union law and international law.

In jurisprudence, different interpretations of Article 117, section 1, of the Constitution can be found. Partly, the provision is taken to establish the case law of the *Corte costituzionale*, and especially to leave unchanged the relationship between Union and

<sup>22</sup> Corte costituzionale Judgement of 18 December 1973, 183/1973, in law no 6.

<sup>23</sup> Corte costituzionale Judgement of 22 October 1975, 232/1975, in law no 4.a.

<sup>24</sup> Cf *Cartabia / Weiler* (2000) 134; and *Pitruzella* (2004) 385.

national law, given the unchanged Article 11 of the Constitution.<sup>25</sup> Partly, it is argued in the opposite direction, namely that in difference to the legal opinion of the *Corte costituzionale* the dualism of legal orders has now been overcome.<sup>26</sup> If one followed this opinion, the *controlimiti* doctrine would have to be given up. However, Article 117, section 1, of the Constitution offers no clear indication that this proposition could justify giving up the dualist view.<sup>27</sup> Article 117, section 1, of the Constitution is also seen as the explicit constitutional recognition of the commitment to honour in the generation of law legal obligations resulting from Union law. A violation of legal obligations resulting from Union law represent at the same time a violation of Article 117, section 1, of the Constitution; unconstitutionality can therefore only be assessed and established with the help of the relevant provisions of Union law<sup>28</sup>.

## 4.2. Constitutional limits to EU-integration

### 4.2.1. Limits to the (further) transfer of powers to the EU through Treaty amendments ("non transferable" constitutional identities?)

In its rulings in the cases *Costa / ENEL*, *Frontini* and *Industrie Camiche Italia Centrale (ICIC)* the *Corte costituzionale* acknowledged Article 11 of the Constitution as the constitutional basis for EEC membership and, hence, the transfer of powers. However, it stated in its rulings in the cases *Frontini*, *Granital* and *Fragd* that the transfer of powers finds its limits in the fundamental constitutional principles and inalienable human rights.

With its rulings of 16 December 1965 and 18 December 1973 in the cases *Acciaierie San Michele / CECA*<sup>29</sup> and *Frontini*<sup>30</sup>, the *Corte costituzionale* first adjudged that it is admissible to subject an ordinary act ratifying and implementing an international treaty ("*... legge ordinaria di ratifica ed esecuzione di un trattato internazionale ...*") to an examination of its constitutionality with regard to individual provisions of the treaty ("*... con riguardo a specifiche disposizioni del trattato stesso ...*"). In the case *Acciaierie San Michele / CECA*<sup>31</sup>, the *Corte costituzionale* then established two different things: on the one hand, the recognition of Community law by the Italian legal system only applies to Community legislation which has been passed in the framework of the principle of referral ("*... i loro [gli organi della CECA] atti costituiscono soltanto materia di qualificazione legislativa da parte di singoli ordinamenti, sia pure nei limiti in cui può esistere un obbligo di non disconoscere gli effetti*"). On the other hand, Article 11 of the Constitution allows only restrictions of sovereignty which do not violate the unalienable human rights protected under Article 2 of the Constitution ("*... questo diritto [del singolo alla tutela giurisdizionale] é tra quelli inviolabili dell'uomo, che la Costituzione garantisce all'art 2 ...*").

Although the legislative powers of EEC institutions is limited to economic matters under Art 189 EEC Treaty and the precise contractual provisions offer sufficient security, so the *Corte costituzionale* in its ruling in the case *Frontini*<sup>32</sup>, it seems difficult to imagine abstractly ("*... appare difficile configurare anche in astratto l'ipotesi ...*") that an EEC Regulation concerning civil, ethic-social or political issues could affect matters through

<sup>25</sup> Pinelli (2001) 195; and Caravita (2002) 116.

<sup>26</sup> Torchia (2001) 1206 ff; Galetta (2001) 305 ff; and Bartole (2008) 902. See also Paterniti (2004); Pajno (2003) 814; and Catalano (2006) 129.

<sup>27</sup> Cf Sorrentino (2002) 1358.

<sup>28</sup> Happacher (2010) 155.

<sup>29</sup> Corte costituzionale Judgement of 16 December 1965, 98/1965, in law no 1.

<sup>30</sup> Corte costituzionale Judgement of 18 December 1973, 183/1973, in law no 2.

<sup>31</sup> Corte costituzionale Judgement of 16 December 1965, 98/1965, in law no 2.

<sup>32</sup> Corte costituzionale Judgement of 18 December 1973, 183/1973, in law no 9.

provisions which contradict the Italian Constitution (“... *un regolamento comunitario possa incidere in materia di rapporti civili, etico-sociali, politici, con disposizioni contrastanti con la Costituzione italiana*”). Given that based on Article 11 of the Constitution restrictions of sovereignty are only allowed in order to pursue aims mentioned there (“... *unicamente per il conseguimento delle finalità ivi indicate ...*”), it can hence be ruled out that such restrictions of sovereignty, as put into concrete terms in the Treaty of Rome (by referral), could transfer inadmissible powers (“... *un inamissibile potere ...*”) to EEC institutions which violated the fundamental principles of the Italian Constitution or the inalienable human rights (“... *violare i principi fondamentali del nostro ordinamento costituzionale, o i diritti inalienabile della persona umana ...*”). According to the *Corte costituzionale*, it is obvious that, if Article 189 EEC Treaty were interpreted in such an unfounded way, there would be the guarantee of the *Corte costituzionale*’s permanent review of the compatibility of the EEC Treaty with the fundamental constitutional principles (“... *sempre assicurata la garanzia del sindacato giurisdizionale di questa Corte sulla perdurante compatibilità del Trattato con i predetti principi fondamentali*”).

The *Corte costituzionale* confirmed this legal interpretation in its 1984 and 1989 rulings in the cases *Granital* and *Fragd*. The so-called counterlimits doctrine (*la dottrina controlimiti*) finds its origin in this very case law<sup>33</sup>.

In its ruling of 5 June 1984 in the case *Granital*<sup>34</sup>, the *Corte costituzionale* stated first that the change of case law concerning the direct applicability and primacy of Community law implied by the ruling did not mean that hitherto the entire spectrum of relations between Community law and domestic law was beyond its jurisdiction (“... *non implicano, tuttavia, che l’intero settore dei rapporti fra diritto comunitario e diritto interno sia sottratto alla competenza della Corte*”). Then, it affirmed its legal position in the ruling of the case *Frontini* according to which the Act ratifying and implementing the EEC Treaty could be subjected to its review with regard to the fundamental principles of the Italian constitutional order and the inalienable human rights.

Appealed to by the *Tribunale di Venezia* in a concrete judicial review, the *Corte costituzionale* had to tackle the following question in the case *Fragd*<sup>35</sup>: Is the Act ratifying and implementing the EEC Treaty compatible with Article 24 of the Constitution to the extent that by introducing Article 177 EEC Treaty into the Italian legal system, it authorised the European Court of Justice (ECJ) in the preliminary ruling procedure to limit the period of the effect of rulings concerning the validity of EEC Regulations – in analogous application of Article 174, section 2, EEC Treaty – and in this way to exclude those national implementation measures from the declaration of nullity which have been enacted before the decision of the ECJ, even if those are subject of the case which was the reason for the preliminary ruling procedure in the first place? Article 24 of the Constitution guarantees the right to effective legal protection.<sup>36</sup> According to the opinion of the *Tribunale di Venezia*, the ECJ violated Article 24 of the Constitution through a ruling in a preliminary ruling procedure under Article 177 EEC Treaty initiated by the *Tribunale di Venezia*<sup>37</sup>. In its ruling the ECJ had confirmed the previously established<sup>38</sup> nullity of an EEC Regulation, but did not exclude the retroactive effect of the ruling on

<sup>33</sup> See, in particular, *M. Cartabia*, *Principi inviolabili e integrazione europea* (1995), 95 ff.

<sup>34</sup> *Corte costituzionale* Judgement of 5 June 1984, 170/1984, in law no 7.

<sup>35</sup> *Corte costituzionale* Judgement of 13 April 1989, 232/1989.

<sup>36</sup> Cf *de Vergottini* (2001) 288.

<sup>37</sup> ECJ Judgement of 22 May 1985, 33/84, *Fragd I*, 1985 ECR 1605.

<sup>38</sup> ECJ Judgement of 15 October 1980, 145/79, *Roquette Frères*, 1980 ECR 2917.

claims previous to its pronouncement so that the claimant in the original case could not refer to the nullity of the Regulation.

In its ruling of 13 April 1989 in the cases *Frontini* und *Granital*, the *Corte costituzionale* had the opportunity to affirm and detail its existing case law.<sup>39</sup> First, it again affirmed its jurisdiction by reviewing the constitutionality of the Act ratifying and implementing the EEC Treaty; it assessed whether any provision of the Treaty (“... *qualsiasi norma del Trattato ...*”) contradicts in their interpretation and application by the EEC institutions the fundamental principles of the Italian constitutional order or the inalienable human rights. According to the *Corte costituzionale*, this jurisdiction can neither be abolished by the fact that the Community legal order possesses an extensive and effective system to protect the rights and interest of the individual (“... *un ampio ed efficace sistema di tutela giurisdizionale dei diritti e degli interessi dei singoli ...*”), in which the request for a preliminary ruling and the preliminary ruling procedure under Article 177 EEC Treaty represents the most important instrument (“... *lo strumento più importante ...*”), nor by the fact that, according to the case law of the ECJ, the fundamental rights derivable from the legal orders of the Member States are a significant integral part of the legal order of the Community (“... *parte integrante ed essenziale dell’ordinamento comunitario*”). According to the *Corte costituzionale*, a contradiction between a Treaty provision and the fundamental principles of the Italian constitutional order or the inalienable human rights is highly unlikely, but also always possible (“... *quel che è sommamente improbabile è pur sempre possibile ...*”); it has also to be noted that, at least theoretically, not all fundamental principles of the Italian constitutional order are among the principles common to all Member States of the EEC and are hence part of the Community’s legal order (“... *non potrebbe affermarsi con certezza che tutti i principi fondamentali del nostro ordinamento costituzionale si ritrovino fra i principi comuni agli ordinamenti degli Stati membri e quindi siano compresi nell’ordinamento comunitario*”).

Although the *Corte costituzionale* declared the question of the constitutionality of the Act ratifying and implementing the EEC Treaty under Article 24 of the Constitution, presented by the *Tribunale di Venezia*, as irrelevant for deciding the original case and hence as inadmissible (“... *la questione di legittimità costituzionale sollevata dal Tribunale di Venezia deve pertanto essere dichiarata inammissibile per irrelevanza ...*”),<sup>40</sup> the following conclusions of the *Corte costituzionale* have to be stressed: First, it qualified Article 24 of the Constitution as a fundamental principle of the Italian legal order (“... *un principio fondamentale del nostro ordinamento ...*”) by referring to its own existing case law as well as to its ruling of 22 January 1982<sup>41</sup>, which explicitly affirmed that the right to judicial legal protection, which is a unalienable human right (“... *già annoverato fra quelli inviolabili dell’uomo ...*”), is among the highest principles of the Italian constitutional order (“*tra i principi supremi del nostro ordinamento costituzionale*”).<sup>42</sup> Then, the *Corte costituzionale* argued that the system of legal protection provided by the legal system of the Community is entirely effective and appropriate (“... *pienamente valido ed adeguato ...*”) and that it is especially Article 177 EEC Treaty (“... *proprio l’art. 177 del Trattato ...*”) which guarantees complete and comprehensive legal protection to the individual.<sup>43</sup> The application of Article 174, section 2, EEC Treaty, in accordance with the permanent case law of the ECJ, to rulings under Article 177 EEC Treaty, which renders null EEC Regulations, does per se not provoke objections (“... *non suscita per sé alcuna obiezione ...*”); to the contrary, it can be seen as a logical consequence of the general effect

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<sup>39</sup> Corte costituzionale Judgement of 13 April 1989, 232/1989, in law no 3.1.

<sup>40</sup> Corte costituzionale Judgement of 13 April 1989, 232/1989, in law no 7.

<sup>41</sup> Corte costituzionale Judgement of 22 January 1982, 18/1982.

<sup>42</sup> Corte costituzionale Judgement of 13 April 1989, 232/1989, in law no 3.2.

<sup>43</sup> Corte costituzionale Judgement of 13 April 1989, 232/1989, in law no 4.

attributed by the case law of the ECJ to rulings under Article 177 EEC Treaty, in case they declare EEC Regulations to be null. However, when a ruling excludes a legal act or legal acts, which are the subject of the request for preliminary ruling of a national court that triggers the initial proceeding, from the effect of being declared null, the fact cannot be concealed, so the *Corte costituzionale*, that serious contradictions arise regarding the compatibility of Treaty provisions which allow such a ruling with the essential substance of the right to judicial legal protection ("*... non si può nascondere che sorgono gravi perplessità in ordine alla compatibilità con il contenuto essenziale del diritto alla tutela giurisdizionale della norma che consente una pronuncia siffatta*").<sup>44</sup> However, the *Corte costituzionale* stated this only in an *obiter dictum*, since it argued that the legal issue which triggered the judicial review in the case *Fragd* was not the one which had led the contested EEC Regulation to be declared null by the ECJ. Therefore, the necessary connections are absent between the initial proceeding and the concrete judicial review procedure. Furthermore, the legal case was brought before a national court only after the ECJ ruling had been made public for more than a year<sup>45</sup>.

The *Corte costituzionale* has up until now maintained its so-called *controlimiti* doctrine and case law<sup>46</sup>.

As far as apparent, the *controlimiti* doctrine has only once explicitly affected legislation. According to Article 1, section 1, of the Act of 22 April 2005<sup>47</sup> implementing the Council Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States<sup>48</sup>, the provisions of the Framework Decision are implemented in those legal acts which are compatible with the highest principles of the Italian constitutional order regarding fundamental rights as well as the rights to personal freedom and to a fair trial<sup>49</sup>.

#### 4.2.2. Scrutiny of secondary legislation, especially *ultra-vires* Doctrine

With its ruling of 16 December 1965 in the case *Acciaierie San Michele / CECA*<sup>50</sup>, the *Corte costituzionale* had made clear that the institutions of state judiciary have no competence to review the legal acts of ECSC bodies, because these bodies are not subject to the sovereign powers of the ECSC Member States, because they do not "live" in the legal system of one of these states and because their legal acts are recognised by the individual legal system as acts of legislation, be it also only in the confines in which the obligation can exist to recognise their effects ("*Gli organi della giurisdizione interna non hanno competenza a sindacare gli atti degli organi della CECA, perché questi organi non sono soggetti al potere sovrano degli Stati che partecipano alla comunità, non vivono nell'ordinamento di nessuno di tali Stati, e i loro atti costituiscono soltanto materia di*

<sup>44</sup> Corte costituzionale Judgement of 13 April 1989, 232/1989, in law no 4.1.

<sup>45</sup> Corte costituzionale Judgement of 13 April 1989, 232/1989, in law no 6.

<sup>46</sup> Cf, eg Corte costituzionale Judgements of 11 November 1987, 399/1987, in law no 2; 15 December 1988, 1146/1988, in law no 2.1; 11 April 1989, 203/1989, in law no 3; 13 April 1989, 232/1989, in law 3.1; 8 April 1991, 168/1991, in law no 4; 23 March 1994, 117/1994, in law no 2; 11 December 1995, 509/1995, in law no 2; 17 April 1996, 126/1996, in law no 5.c; 26 March 1997, 93/1997, in law no 3; 19 March 2001, 73/2001, in law no 3.1; 4 July 2007, 284/2007, in law no 3; 22 October 2007, 348/2007, in law no 4.7; and 13 February 2008, 102/2008, in law 8.2.8.1. See also Decisions of 7 March 1990, 132/1990; 15 December 1995, 536/1995; 13 December 2006, 454/2006; and 13 February 2008, 103/2008. See also Consiglio di Stato Judgement of 19 April 2005, 10778/2004 and 10788/2004, 3.2.

<sup>47</sup> Law 22 April 2005, no 69.

<sup>48</sup> Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ L 190, 18 July 2002, 1.

<sup>49</sup> "... nei limiti in cui tali disposizioni non sono incompatibili con i principi supremi dell'ordinamento costituzionale in tema di diritti fondamentali, nonché in tema di diritti di libertà e del giusto processo". See *Marin* (2008) 257 ff.

<sup>50</sup> Corte costituzionale Judgement of 16 December 1965, 98/1965, in law no 2.

*qualificazione legislativa da parte di singoli ordinamenti, sia pure nei limiti in cui può esistere un obbligo di non disconoscerne gli effetti.”).*

The *Corte costituzionale* then ruled in the *Frontini* case that a transfer of powers to the European Communities is permissible on the basis of Article 11 of the Constitution, but that it also finds its limits in the fundamental constitutional principles and unalienable human rights.<sup>51</sup> The *Corte costituzionale* established that individual legal acts of the EEC, like EEC Regulations, are not subject to its review under Article 134 of the Constitution. Rather, only national legislation exhaustively listed in Article 134 of the Constitution is subject to judicial review (*“Deve invece escludersi che questa Corte possa sindacare singoli regolamenti, atteso che l’art. 134 della Costituzione riguarda soltanto il controllo di costituzionalità delle leggi e degli atti aventi forza di legge dello Stato e delle Regioni, e tali, per quanto si è detto, non sono i regolamenti comunitari.”*). This also includes the Act ratifying the EEC Treaty. Thus, the *Corte costituzionale* sees itself as authorised to constantly monitor whether the relevant limits are observed (*“... sarebbe sempre assicurata la garanzia del sindacato giurisdizionale di questa Corte sulla perdurante compatibilità del Trattato con i predetti principi fondamentali”*)<sup>52</sup>.

The *Corte costituzionale* affirmed this interpretation in its 1984 ruling in the case *Granital*.<sup>53</sup> It confirmed its legal opinion, justified in the case *Frontini*, according to which the Act ratifying and implementing the EEC Treaty can be subjected to its review with regard to the fundamental principles of the Italian constitutional order and the inalienable human rights, although such a case is taken to be unlikely (*“... sia pure come improbabile ...”*).

As already outlined, the *Corte costituzionale* used the opportunity in its ruling of 13 April 1989 in the case *Fragd* to confirm and detail its existing case law laid down in the rulings in the cases *Frontini* and *Granital*.<sup>54</sup> It affirmed – again and in clear terms – its jurisdiction for the review of the constitutionality of the Act ratifying and implementing the EEC Treaty, and in particular whether a Treaty provision in its interpretation or application by EEC institution (*“... qualsiasi norma del Trattato, così come essa è interpretata ed applicata dalle istituzioni e dagli organi comunitari ...”*) contradicts the fundamental principles of the Italian Constitution or the unalienable human rights.

As established in the case *Frontini*, the *Corte costituzionale* is given Article 134 of the Constitution not competent to declare unconstitutional and null an EEC legal act on the basis of a violation of the fundamental principles of the constitutional order or the inalienable human rights. However, it is authorised in the case of such a violation to declare unconstitutional the Act ratifying and implementing the EEC Treaty – in accordance with Article 134 of the Constitution – and hence to repeal the legal command to apply. The repeal of the legal command to apply concerns however not the entire Act ratifying and implementing the EEC Treaty, but only those parts which allow those provisions of Community law to enter the Italian legal order which violate the fundamental principles of the Constitution or the inalienable human rights. With this mechanism, the *Corte costituzionale* justified its own power to repeal legal acts of the EEC – with its scope limited to the Italian sovereign territory. The *Corte costituzionale* justified this jurisdiction with the argument that based on Article 11 of the Constitution restrictions of sovereignty are only allowed in order to pursue the aims established there (*“... unicamente per il conseguimento delle finalità ivi indicate ...”*); it is therefore

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<sup>51</sup> Corte costituzionale Judgement of 18 December 1973, 183/1973, in law no 9.

<sup>52</sup> Corte costituzionale Judgement of 18 December 1973, 183/1973, in law no 9.

<sup>53</sup> Corte costituzionale Judgement of 5 June 1984, 170/1984, in law no 7.

<sup>54</sup> Corte costituzionale Judgement of 13 April 1989, 232/1989, in law no 3.1.

unconstitutional that such restrictions of sovereignty, as put into concrete terms by the Treaty of Rome (through referral), transferred inadmissible powers (*"un inamissibile potere"*) to the institutions of the EEC which violated the fundamental principles of the Italian Constitution or the inalienable human rights (*"... violare i principi fondamentali del nostro ordinamento costituzionale, o i diritti inalienabile della persona umana ..."*)<sup>55</sup>.

#### 4.2.3. Background: EU law and national law and the jurisdiction of the *Corte costituzionale* after its judgement in the case *Granital*

In its 1964 ruling in the case *Costa / ENEL*<sup>56</sup>, the *Corte costituzionale* commented for the first time on the relationship between Community law and national law. Appealed to by the *Giudice di pace di Milano*, the *Corte costituzionale* had to decide about the constitutionality of the Act that nationalised energy production in a concrete judicial review. The submitting court had doubts about the compatibility of the Act with Article 11 of the Constitution with regard to different provisions of the EEC Treaty (Article 37 section 3, Article 53, Article 93 section 3 and Article 102 EEC Treaty). In its ruling the *Corte costituzionale* made clear that Article 11 of the Constitution can be regarded as the constitutional basis for EEC membership and that a simple act of parliament is sufficient for the transfer of powers. However, Article 11 of the Constitution grants no special status to the Ratification Act (*"... ma ciò non importa alcuna deviazione dalle regole vigenti in ordine alla efficacia nel diritto interno degli obblighi assunti dallo Stato nei rapporti con gli altri Stati, non avendo l'art. 11 conferito alla legge ordinaria, che rende esecutivo il trattato, un'efficacia superiore a quella propria di tale fonte di diritto"* and *"L'art. 11 ... non attribuisce un particolare valore, nei confronti delle altre leggi, a quella esecutiva del trattato."*); a subsequent act is able to override a provision of the EEC Treaty pursuant to the *lex posterior derogat legi priori*-rule (*"... secondo i principi della successione delle leggi nel tempo ..."*). In effect the Italian Parliament was completely unbound by Community law; it could at any time enact a statute contrary to Community law. Italy could even abandon its membership of the EEC by means of a simple act of Parliament, so the *Corte costituzionale* (*"Non vale, infine, l'argomento secondo lo Stato ..., ove volesse riprendere la sua libertà d'azione, non potrebbe evitare che la legge, con cui tale atteggiamento si concreta, incorra nel vizio di incostituzionalità."*). The *Corte costituzionale* argued, therefore, that the Act that nationalised energy production was constitutional, since no indirect violation of Article 11 of the Constitution could be established (*"Né si può accogliere la tesi secondo cui la legge che contenga disposizioni difformi da quei patti sarebbe incostituzionale per violazione indiretta dell'art. 11 attraverso il contrasto con la legge esecutiva del trattato."*). In this context, the *Corte costituzionale* argued further that it was also insignificant whether the concomitant violation of the EEC Treaty would trigger obligations under international law (*"... non giova occuparsi del carattere della Comunità economica europea e delle conseguenze che derivano dalla legge di esecuzione del Trattato istituivo di essa, né occorre indagare se con la legge denunziata siano stati violati gli obblighi assunto con il Trattato predetto"*). In doing so, the *Corte costituzionale* classified European integration as a matter of international law and advocated a strictly dualistic viewpoint. In this context it is recalled, that the *Corte costituzionale* approached European integration with the same theoretical tools used in the Italian legal system to deal with the problems of international law.<sup>57</sup> That time the law of the European Economic Community was regarded as international

<sup>55</sup> Corte costituzionale Judgement of 18 December 1973, 183/1973, in law no 9.

<sup>56</sup> Corte costituzionale Judgement of 24 February 1964, 16/1964, in law no 6.

<sup>57</sup> *Cartabia* (1998) 133.

law and the theoretical construct upon which the Italian relationship to international law was based, was dualism<sup>58</sup>.

The Court of Justice of the European Communities (ECJ) was also appealed to by the *Giudice di pace di Milano*. Within the framework of a preliminary ruling procedure under Article 177 EEC Treaty, the ECJ presented, however, a fundamentally opposing legal interpretation in its ruling in the case *Costa / ENEL* on July 15 1964.<sup>59</sup> According to the ECJ, the Member States were not allowed to take subsequent unilateral measures against the Community's legal order. This would pose a risk to the uniform application of Community law. The latter was independent, an autonomous source of law, which no national legislation took precedence over. In contrast to the legal interpretation of the *Corte costituzionale*, the ECJ taking a monist position thus interpreted Community law and national law as a single legal order based on the Treaties, in which Community law takes precedence over national law and also subsequent legislation.

It has to be stressed that for a period of more than four years after the publication of the ECJ ruling in the case *Costa / ENEL* of 15 July 1964, no Italian court sent a request for preliminary ruling to the ECJ.<sup>60</sup> Only on the 9 July 1968, the *Corte d'Appello di Roma* asked the ECJ for a preliminary ruling<sup>61</sup>.

While the ECJ maintained its case law in the following, the *Corte costituzionale* at first stood by its legal opinion regarding the relationship of national and Community law. In its 1965 ruling in the case *Acciaierie San Michele / CECA*<sup>62</sup>, it reaffirmed its strictly dualist viewpoint. It qualified the legal order of the Community as an external legal order, different in every aspect from the domestic one and established, that the domestic legal order has accepted the legal order of the Community not to implement it into its system, but to operate in its framework an international cooperation corresponding to its objectives ("*La CECA, avendo lo scopo di coordinare alcune iniziative economiche svolgentisi nel territorio di più Stati compone un ordinamento del tutto distinto da quello interno; il quale ha riconosciuto l'ordinamento comunitario, non per inserirlo nel suo sistema, ma per rendere in questo operante la cooperazione internazionale che è nei suoi fini ...*").

The *Corte costituzionale* explicitly recognised the precedence of Community law over national law not until 1973. In difference to the ECJ, however, it justified this position from a dualist viewpoint in the cases *Frontini*<sup>63</sup> and *Industrie Camiche Italia Centrale (ICIC)*<sup>64</sup>.<sup>65</sup> The *Corte costituzionale* still qualified Community and national law as independent and different legal orders, although coordinated by the division of powers laid down in the Treaty ("*... sistemi giuridici autonomi e distinti, ancorché coordinati secondo la ripartizione di competenze stabilita e garantita dal Trattato*"). However, the *Corte costituzionale* gave up to strictly categorise the relationship between Community and national legislation as international law. Community law was neither international law, nor foreign law, nor domestic law of the Member states ("*... non qualificabili come fonte di diritto internazionale, né di diritto straniero, né di diritto interno dei singoli Stati*").

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<sup>58</sup> The first Italian scholars who adopted the "dualist" position were *Anzilotti* (1928); and *Romano* (1945).

<sup>59</sup> ECJ Judgement of 15 July 1964, 6-64, *Costa / ENEL*, 1964 ECR 585.

<sup>60</sup> *Ruggeri Laderchi* (1998) 148.

<sup>61</sup> ECJ Judgement of 12 December 1968, 13/68, *Salgoil*, 1968 ECR 679.

<sup>62</sup> Corte costituzionale Judgement of 16 December 1965, 98/1965, in law no 2.

<sup>63</sup> Corte costituzionale Judgement of 18 December 1973, 183/1973.

<sup>64</sup> Corte costituzionale Judgement of 22 October 1975, 232/1975.

<sup>65</sup> It seems that the decision of the Corte costituzionale in the *Frontini* case was inspired by the concept presented by *F. Sorrentino* in his book "Corte Costituzionale e Corte di Giustizia delle Comunità europee", published in June 1973, a few months before the judgement. See *Cartabia* (1998) 144 ff.

*membri ...*). According to the *Corte costituzionale*, the fundamental necessity for equality and legal security requires that all norms of Community law have to have obligatory and direct effect in all Member States ("*... avere piena efficacia obbligatoria e diretta applicazione ...*") without the need of laws for their reception or of the adaptation of the national legal order. They function as acts with legal powers in all EEC Member States ("*... come atti aventi forza e valore di legge in ogni Paese della Comunità ...*") so that they come into force everywhere at the same time and are applied in the same way to all those subject to law. Furthermore, it established that EEC Regulations as direct source of rights and obligations for both Member States as well as their citizens as Community citizens ("*... come fonte immediata di diritti ed obblighi sia per gli Stati sia per i loro cittadini in quanto soggetti della Comunità ...*") must not be subject to state measures of a reiterated, complementary or executive kind which change or require the coming into force of EEC Regulations, and change or repeal those, although also only in part.<sup>66</sup> However, admissible is only the passing of national provisions that serve the implementation and application of EEC Regulations.<sup>67</sup> Permissible with the EEC membership under Article 11 of the Constitution, the restrictions of sovereignty have the effect, so the *Corte costituzionale* in the *Industrie Camicie Italia Centrale (ICIC)* case, that both a subsequent single act contradicting an EEC Regulation as well as an act implementing an EEC Regulation ("*... norme interne successive incompatibili con quelle emanate dai competenti organi delle Comunità europee, ma anche nell'ipotesi di norme interne, legislative o regolamentari, di contenuto puramente riproduttivo ...*") are to be seen as unconstitutional due to a indirect violation of Article 11 of the Constitution.<sup>68</sup> The indirect violation of Article 11 of the Constitution would result from a direct violation of Article 189 and Art 177 EEC Treaty, which would put into concrete terms the mentioned constitutional provisions. Article 177 and Article 189 EEC Treaty function as *norme interposte* vis-à-vis Article 11 of the Constitution ("*È dunque evidente il contrasto con i principi enunciate dagli art. 189 e 177 del Trattato istitutivo della C.E.E., che comporta violazione dell'art. 11 della nostra Costituzione ...*"). The *Corte costituzionale* declared itself as exclusively authorised to decide on the precedence of Community law by stating the unconstitutionality of contradicting law annulling unconstitutional legislation. In this way, the *Corte costituzionale* obliged ordinary judges to apply contradicting national legislation, until it has come to a decision.<sup>69</sup> It justifies this way of action with the argument that the national legal order does not authorise the Italian judge to not apply ("*disapplicarne*") subsequent national ordinary laws which contradict EEC Regulations on the basis of a general primacy of Community law over national law ("*... nel presupposto d'una generale prevalenza del diritto comunitario sul diritto dello Stato*"). To resolve this contradiction, it is not a solution to declare null the subsequent national law ("*... und declaratoria di nullità della legge successiva interna ...*"); since it has to be ruled out that the transfer of legislative powers to EEC institutions results in the radical negation of the effectiveness of the sovereign will of the Member States' legislative bodies ("*... comporti come conseguenza una radicale privazione di efficacia della volontà sovrana degli organi legislativi degli Stati membri ...*"); nor is non-application conceivable as the result of a choice by the Italian judge between a national provision and a provision of Community law ("*Non sembra nemmeno possibile configurare la possibilità della disapplicazione come effetto di una scelta tra norma comunitaria e norma interna, consentita di volta in volta al giudice italiano sulla base di una valutazione della rispettiva resistenza.*"). In the

<sup>66</sup> Corte costituzionale Judgements of 18 December 1973, 183/1973, in law no 7; and 22 October 1975, 232/1975, in law no 4.b.,c. and d. See also Judgement of 22 December 1977, 163/1977, in law no 8.

<sup>67</sup> Corte costituzionale Judgements of 12 June 1973, 86/1973, in law; 18 December 1973, 183/1973, in law no 7; and 22 October 1975, 232/1975, in law no 4.d.

<sup>68</sup> Corte costituzionale Judgement of 15 July 1976, 205/1975, in law no 3. ECJ Judgements of 31 January 1978, 94/77, *Zerbone*, 1978 ECR 99; and 10 October 1973, 34-73, *Variola*, 1973 ECR 981.

<sup>69</sup> Corte costituzionale Judgement of 22 October 1975, 232/1975, in law no 6 und 8.

latter case, the Italian judge has not only the opportunity to choose between a number of applicable legal provisions but also to determine the only lawfully applicable legal provision, which would amount to a power to establish a, although limited, absolute non-jurisdiction of the Italian legislator ("*... potere di accertare e dichiarare una incompetenza assoluta del nostro legislatore, sia pur limitamente a determinate materie ...*"), a power which is certainly not bestowed upon the judge by the Italian legal order ("*... sicuramente non gli è attribuito*").

As is well known, the ECJ responded strongly to the *Corte costituzionale's* case rulings in *Frontini* and *Industrie Camiche Italia Centrale (ICIC)* regarding the precedence of Community law.<sup>70</sup> Confronted with the legal opinion of the *Corte costituzionale* by the *Pretore di Susa*, the ECJ vehemently objected to its position in the 1978 ruling in the case *Simmenthal II*.<sup>71</sup> As in the Italian legal system judges are submitted to the law pursuant to Article 101 of the Constitution, are expected to apply legislation and not to put it in question, the divergence of views between the *Corte costituzionale* and the ECJ was lively debated in Italy. Nobody of the Italian "constitutional scholars" ever doubted that the *Corte costituzionale* was right in pretending that it was its exclusive competence to invalidate national legislation conflicting with Community law<sup>72</sup>.

Concerning past national ordinary laws which contradict EEC Regulations, the *Corte costituzionale* adjudged in 1976 in an abstract judicial review that there is no doubt that Regulations enacted on the basis of Article 189 EEC Treaty have full and direct effect and repeal any contradicting past legal provision ("*... abrogando ogni eventuale incompatibile normativa statale o regionale preesistente ...*").<sup>73</sup> It affirmed this legal opinion in its rulings of 22 December 1977 and 5 June 1984 in the cases *UNIL-IT* and *Granital*<sup>74</sup>.

However, the *Corte costituzionale* has not yet changed its case law on the primacy of Community law, although it had a number of opportunities to do so. It avoided to engage with this issue by declaring inadmissible the submission of ordinary courts<sup>75</sup>.

In 1984 the *Corte costituzionale* finally followed the ECJ's position on the precedence of Community law with its ruling of 5 June in the case *Granital*, yet it still maintained its own reasoning.<sup>76</sup> Then, it had also the opportunity to affirm and detail its past definition of the relation between national and Community law, which it began by stating that this relation had evolved ("*... è venuto evolvendosi ...*"). It hitherto rests on the principle that a EEC Regulation takes precedence over contradicting national provisions ("*... sul principio secondo cui il regolamento della CEE prevale rispetto alle confliggenti statuizioni del legislatore interno*"<sup>77</sup>).

The *Corte costituzionale* first confirmed the fundamental assumption that national legal provisions are conform with Community law ("*... vige la presunzione di conformità della legge interna al regolamento comunitario*");<sup>78</sup> among a number of possible

<sup>70</sup> Cf *Corte costituzionale* Judgements of 15 July 1976, 205/1975, in law no 3; and 22 December 1977, 163/1977, in law no 8; and Decision of 15 July 1976, 206/1976.

<sup>71</sup> ECJ Judgement of 9 March 1978, 106-77, *Simmenthal II*, 1978 ECR 629.

<sup>72</sup> *Sorrentino* (1973); and *Barile* (1973). See also *Cartabia* (1998) 136 f.

<sup>73</sup> *Corte costituzionale* Judgement of 14 July 1976, 182/1976, in law no 3.

<sup>74</sup> *Corte costituzionale* Judgements of 22 December 1977, 163/1977, in law no 8; and 5 June 1984, 170/1984, in law no 3. See also Judgements of 6 October 1981, 176/1981, in law no 1; and 177/1981, in law 1.

<sup>75</sup> *Corte costituzionale* Judgements of 6 October 1981, 176/1981, in law no 1; and 177/1981, in law no 1.

<sup>76</sup> *Corte costituzionale* Judgement of 5 June 1984, 170/1984.

<sup>77</sup> *Corte costituzionale* Judgement of 5 June 1984, 170/1984, in law no 3.

<sup>78</sup> *Corte costituzionale* Judgements of 6 October 1981, 176/1981 and 177/1981.

interpretations of a national law, the one has to be chosen which fulfils the criteria laid down in Community law. If the contradiction between Community law and national law cannot be resolved by way of interpretation, Community law has primacy (*"in ogni caso"*). For the case that an EEC Regulation follows a contradicting national law, the *Corte costituzionale* confirmed its existing case law<sup>79</sup>, according to which the latter has to be regarded as repealed (*"... caducata per effetto della successiva e contraria statuizione del regolamento comunitario ..."*) and – necessarily – the EEC Regulation has to be applied by the judge. The repeal has also retroactive effect, if the EEC Regulation affirms existing Community law, which concerns the same subject matter and was in force before the contradicting national provision came into force. However, the *Corte costituzionale* reached the conclusion that it has to reconsider its existing case law<sup>80</sup> and its supporting fundamental considerations on the case that a EEC Regulation precedes a contradicting national law which has the consequence that the latter has to be declared unconstitutional by the *Corte costituzionale* due to a direct violation of Article 11 of the Constitution and that the Italian judge is not allowed to apply it before this point in time (*"... tale ultima conclusione, e gli argomenti che la sorreggono, debbano essere riveduti"*)<sup>81</sup>.

Regarding the relation between national and Community law, the *Corte costituzionale* assumed a fixed point in its case law (*"un punto fermo nella costruzione giurisprudenziale"*),<sup>82</sup> ie that these legal systems have to be regarded as independent and different ones, although also as legal systems coordinated by the division of powers established by the Treaty (*"... sistemi giuridici autonomi e distinti, ancorché coordinate secondo la ripartizione di competenze stabilita e garantita dal Trattato"*). The primacy of EEC Regulations over national law, for the first time recognised in the ruling in the case *Frontini*, has to be seen in the context of this principle. The coordination of both legal systems results from the fact that the Act ratifying and implementing the EEC Treaty transfers in accordance with Article 11 of the Constitution those powers to the institutions of the EEC which they exercise or are reserved for them respectively. The precondition of the principle according to which both legal systems are separated but at the same time coordinated is that derived Community law is not part of the national legal order (*"... fonte comunitaria appartenga ad altro ordinamento, diverso da quello statale"*). The derived Community law is directly applied in Italian sovereign territory on the basis of Article 11 of the Constitution, but not to an element of the system of sources of national law (*"... rimangono estranee al sistema delle fonti interni"*). This is the reason why the mechanisms meant to resolve norm conflicts in national legal orders cannot be used<sup>83</sup>.

The state legal system itself opens up for Community law and allows the latter to be in effect on Italian sovereign territory in the way it is enacted by the competent EEC institutions. The exercise of powers transferred to the EEC institutions becomes manifest, here the *Corte costituzionale* refers again to its ruling in the case *Frontini*<sup>84</sup>, in a "legal act", which is regarded as an "act with legal force" by the national legal system (*"... viene qui a manifestarsi in un 'atto', riconosciuto nell'ordinamento interno come 'avente forza e valore di legge'"*). The provisions of such a legal act are applied by dint of their own force on Italian sovereign territory (*"per propria forza"*). The distinction between national and Community legal order have the effect that Community legal acts become neither a part

<sup>79</sup> Corte costituzionale Judgements of 14 July 1976, 182/1976, in law no 3; and 22 December 1977, 163/1977, in law no 8.

<sup>80</sup> Corte costituzionale Judgement of 22 October 1975, 232/1975, in law no 6 und 8.

<sup>81</sup> Corte costituzionale Judgement of 5 June 1984, 170/1984, in law no 3.

<sup>82</sup> Cf Corte costituzionale Judgements of 18 December 1973, 183/1973, in law no 7; and 22 October 1975, 232/1975, in law no 4.b.

<sup>83</sup> Corte costituzionale Judgement of 5 June 1984, 170/1984, in law no 4.

<sup>84</sup> Cf Corte costituzionale Judgement of 18 December 1973, 183/1973, in law no 5.

of national law nor that they are subject to laws and acts with legal force which concern the domestic realm. The Italian legal order allows EEC Regulations – as such and because of such (*"in quanto tale e perché tale"*) – to exert legal effect on Italian sovereign territory; it is ascribed "legal force" (*"forza e valore di legge"*) only because, and in the sense, it is awarded the effect with which it was bestowed upon by its original legal order (*"... l'efficacia di cui è provvisto nell'ordinamento di origine"*)<sup>85</sup>.

According to the *Corte costituzionale*, this results in the following: The Italian judge determines that the provisions of the EEC Regulation regulates the case to be decided upon and consequently, applies these provisions with exclusive reference to the legal order of the Community (*"... con esclusivo riferimento al sistema dell'ente sovvrana nazionale"*). Contradicting Italian legal provisions can present no hindrance for the recognition of its validity, which is given to the Regulation by the EEC Treaty. The national legal order does not interfere into the legislation of the independent and different legal system of the EEC, although it guarantees its effect on Italian sovereign territory. Due to Article 11 of the Constitution, this guarantee is comprehensive and permanent (*"... la garanzia ... è ... piena e continua ..."*). Community law which meets the conditions for the direct applicability is and remains in effect on Italian sovereign territory without an ordinary law being able to interfere with its scope. This applies indiscriminately to national law enacted before or after the EEC Regulation; in any case, the EEC Regulation determines the regulation which has to be applied. The effect linked to its validity is not to repeal (*"caducare"*) contradicting national provisions but to prevent that they become significant for the ruling in a given case (*"... impedire che tale norma venga in rilievo ..."*). In any case, this phenomenon has to be distinguished from the formal repeal of an act as well as from any other derogatory act in the national legal system (*"... distinto dall'abrogazione, o da alcun altro effetto estintivo o derogatorio ..."*). As already stated by the *Corte costituzionale* in its ruling in the case *Industrie Camiche Italia Centrale (ICIC)*<sup>86</sup>, the national legal provision which contradicts Community law is also not affected by nullity determined and declared by an Italian judge. The EEC Regulation can – as such and because of such (*"in quanto tale e perché tale"*) – neither repeal nor amend nor derogate contradicting national legal acts, nor can it invalidate their provisions (*"... non può abrogare, modificare o derogare le confliggenti norme nazionali, né invalidarne le statuizioni"*). According to the *Corte costituzionale's* position, this would only be the case if both legal orders were to be turned into a unitary one (*"Diversamente accadrebbe, se l'ordinamento della Comunità e quello dello Stato – ed i rispetti processi di produzione normativa – fossero composti ad unità."*). However, it argues that they remain independent and separate, although coordinated. In this way the *Corte costituzionale* maintained its dualist viewpoint. National law does not interfere in the sphere occupied by a legal act of the Community; it is entirely subject to Community law. However, this applies only as long and as far the powers transferred to the EEC become manifest in a comprehensive legal provision which is directly applicable by an Italian judge. Outside of its material and temporal scope, national law remains in effect; it remains subject to the possibilities of control established by the Constitution, including the judicial review through the *Corte costituzionale*<sup>87</sup>.

The *Corte costituzionale* ruled that every Italian judge has to apply lawful, directly applicable Community legislation – possibly with the aid of a preliminary ruling procedure under Article 177 EEC Treaty – and has to refrain from applying contradicting (previous or subsequent) national legislation without the need to ask the *Corte costituzionale* to determine the constitutionality of legislation that contradicts Community law (*"Ed è,*

<sup>85</sup> Corte costituzionale Judgement of 5 June 1984, 170/1984, in law no 4.

<sup>86</sup> Corte costituzionale Judgement of 22 October 1975, 232/1975, in law no 6.

<sup>87</sup> Corte costituzionale Judgement of 5 June 1984, 170/1984, in law no 5.

*certamente, significativo che il controllo sulla compatibilità tra il regolamento comunitario e la norma interna, anche posteriore, sia lasciato alla cognizione del giudice ordinario pur dove un apposito organo giudicante è investito, analogamente a questa Corte [Costituzionale], del sindacato di costituzionalità sulle leggi.”). On the one hand, it was quick to add that this is similarly handled in the legal system of Germany, although with a different justification. On the other hand, it was forced to engage with the ECJ’s case law. Although the latter reaches the same conclusions, it starts from prerequisites different from those of the *Corte costituzionale*, namely that the national and Community legal order are integrated into one legal system (“... *la fonte normativa della Comunità e quella del singolo Stato come integrate in un solo sistema ...*”). Here it is particularly significant, and this is sufficient to agree with the ECJ, that the direct and uninterrupted effect of EEC Regulations is guaranteed. This is sufficient to be in agreement on the principle that an EEC Regulation is always and immediately applicable by an Italian judge, when there are contradicting domestic legal provisions<sup>88</sup>.*

Following its ruling in the case *Granital*, the *Corte costituzionale* adapted its case law to the one of the ECJ. In accordance with the ECJ ruling of 26 June 1989 in the case *Fratelli Costanzo*,<sup>89</sup> the *Corte costituzionale* in its ruling of 4 July 1989<sup>90</sup> in the case *Provincia Autonoma di Bolzano / Stato* concerning a conflict of powers extended the obligation to refrain from applying national legislation that contradicts Community law to administrative bodies (“... *si deve concludere ... che tutti i soggetti competenti nel nostro ordinamento a dare esecuzione alle leggi ... – tanto se dotati di poteri di dichiarazione del diritto, come gli organi giurisdizionali, quanto se privi di tali poteri, come gli organi amministrativi – sono giuridicamente tenuti a disapplicare le norme interne incompatibili con le norme stabilite dagli art. 52 e 59 del Trattato CEE nell’interpretazione datane dalla Corte di giustizia europea*”). This decision of the *Corte costituzionale* brought about another profound change to the Italian legal system. The rule of law (“*principio di legalità*”), one of the general principles governing the Italian legal system, requires all administrative and executive authorities to be bound by the acts of Parliament. Basis and measure of powers conferred on administrative authorities are to be found in the acts of parliament. As a consequence of the decision of the *Corte costituzionale* Community acts can surrogate the acts of the Italian Parliament as to the requirements of the rule of law.<sup>91</sup> In the same ruling of July 4 1989 it also acknowledged the direct effect of Treaty provisions,<sup>92</sup> in the case at stake of Articles 52 and 59 EEC Treaty on the freedom of establishment and the freedom to provide services (“... *si è di fronte a norme, come quelle contenute negli art. 52 e 59 del Trattato, alle quali, essendo decorso il periodo transitorio, deve riconoscersi una diretta efficacia ...*”), as interpreted in the ECJ ruling of January 14 1988 in the case *Commission / Italy*.<sup>93</sup> On the other hand, in accordance with the ECJ rulings in the cases *van Duyn*<sup>94</sup>, *Ratti*<sup>95</sup> and *Becker*<sup>96</sup>, the *Corte costituzionale* accepted the vertical direct effect of Directives in its ruling of January 18 1990<sup>97</sup> in a case regarding admissibility of a referendum pursuant to Article 75 of the Constitution and in its ruling of April 8 1991 in the case *Giampaoli*<sup>98</sup> (“... *le direttive comunitarie, la cui possibilità di immediata applicazione è già stata riconosciuta – nei limiti indicati dalla*

<sup>88</sup> Corte costituzionale Judgement of 5 June 1984, 170/1984, in law no 6.

<sup>89</sup> ECJ Judgement of 26 June 1989, 103/88, *Fratelli Costanzo*, 1989 ECR 1839.

<sup>90</sup> Corte costituzionale Judgement of 4 July 1989, 389/1989, in law no 4.

<sup>91</sup> *Cartabia* (1998) 142.

<sup>92</sup> Corte costituzionale Judgement of 4 July 1989, 389/1989, in law no 3.

<sup>93</sup> ECJ Judgement of 14 January 1988, 63/88, *Commission/Italy*, 1988 ECR 29.

<sup>94</sup> ECJ Judgement of 4 December 1974, 41/74, *van Duyn*, 1974 ECR 1337.

<sup>95</sup> ECJ Judgement of 5 April 1979, 148/78, *Ratti*, 1979 ECR 1629.

<sup>96</sup> ECJ Judgement of 19 January 1982, 8/81, *Becker*, 1982 ECR 53.

<sup>97</sup> Corte costituzionale Judgement of 18 January 1990, 64/1990, in law no 2.2.

<sup>98</sup> Corte costituzionale Judgement of 8 April 1991, 168/1991, in law no 4.

*Corte di Giustizia ... – da questa Corte ...*). Furthermore the *Corte costituzionale* accepted the direct effect of ECJ rulings, both of rulings in the preliminary procedure (Article 177 EEC-Treaty) as well as of rulings in infringement procedures (Article 164 EEC Treaty), in its rulings of April 19 1985 in the case *BECA*<sup>99</sup> and of July 4 1989 in the case *Provincia Autonoma di Bolzano / Stato*<sup>100</sup>.

As already elaborated, the *Corte costituzionale* extended to administrative bodies the obligation to not apply Community legislation that contradicts national law in its ruling of 4 July 1989<sup>101</sup> in the case *Provincia Autonoma di Bolzano / Stato*, which concerned a conflicts of powers between regional authorities. In its ruling of 27 November 1998<sup>102</sup>, it adjudged in the framework of a concrete judicial review that in the absence of national laws the statutory reservation is met by the EC Directive ("*Analoga funzione ... di delimitazione della discrezionalità dell'amministrazione, deve essere riconosciuta alle norme comunitarie, ...*"). In the given context, it made a year later also clear in its ruling of 27 October 1999 in the case *Regione Emilia-Romagna, Provincia Autonoma di Trento, Provincia Autonoma di Bolzano / Stato*<sup>103</sup> that the principle of legality is also maintained, if the administration acts on the basis of provisions of Community law and if their discretion is limited by the latter.

Finally it accepted the precedence of Community law over national constitutional law with the exception of the fundamental constitutional principles and the unalienable human rights in its ruling of March 23 1994 in the case *Zerini*<sup>104</sup> ("*... pur potendo derogare a norme interne di rango costituzionale (purché non contenenti principi fondamentali o diritti inalienabili della persona umana) ...*"). At the same time, the *Corte costituzionale* adjudged, however, that the legal acts of Community law, which are part of a legal order different from but coordinated with the national legal order, cannot be regarded as legal acts equipped with the power of constitutional law under the Italian legal order ("*... appartengono a un ordinamento distinto, anche se coordinato, rispetto a quello interno, pertanto, non possono essere qualificate come atti aventi valore costituzionale alle stregua dell'ordinamento nazionale*"). Before, the case law of the *Corte costituzionale* was inconsistent with regard to the primacy of Community law over contradicting constitutional law. In its ruling of 11 November 1987 in the case *Regione Emilia-Romagna, Regione Liguria / Stato*<sup>105</sup> concerning a conflict of powers under Article 134, second point, the *Corte costituzionale* had first adjudged that the institutions of the EEC are not obliged to follow in detail national law and the constitutional distribution of powers between state and Regions but that they can enact divergent provisions to the extent that they respect the fundamental principles of the Italian constitutional order as well as the inalienable human rights. In this case, the provisions of Community law take the place of national law, and if they derogate provisions of a constitutional rank, the former have to be regarded as on a par with the latter – on the basis of Article 11 of the Constitution ("*... le norme comunitarie si sostituiscono a quelle della legislazione interna e, se hanno derogato a disposizioni di rango costituzionale, debbono ritenersi equiparate a queste ultime, in virtù del disposto dell'art. 11 Cost ...*"). In contrast, the *Corte costituzionale* stated in a ruling of 24 March 1993 in the case *Regione Veneto / Stato* in an abstract judicial review – in an *obiter dictum* – that provisions of Community law must not intervene in the distribution of powers between the state and Regions ("*... la norma*

<sup>99</sup> Corte costituzionale Judgement of 19 April 1985, 113/1985, in law 4.

<sup>100</sup> Corte costituzionale Judgement of 4 July 1989, 389/1989, in law no 3. See also Judgements of 8 April 1991, 168/1991, in law no 4; and 4 July 2007, 284/2007, in law no 3; and Decision of 7 March 1990, 132/1990.

<sup>101</sup> Corte costituzionale Judgement of 4 July 1989, 389/1989, in law no 4.

<sup>102</sup> Corte costituzionale Judgement of 23 November 1998, 383/1998, in law no 4.3.

<sup>103</sup> Corte costituzionale Judgement of 27 October 1999, 425/1999.

<sup>104</sup> Corte costituzionale Judgement of 23 March 1994, 117/1994, in law no 2.

<sup>105</sup> Corte costituzionale Judgement of 11 November 1987, 399/1987, in law no 2.

*comunitaria ... non è idonea ad incidere sulla articolazione delle competenze nei rapporti tra Stato e regioni*).<sup>106</sup> After its ruling in the case *Zerini*, the *Corte costituzionale* affirmed its position already expressed there in its rulings of 26 May 1994 and 17 April 1996 in the cases *Provincia Autonoma di Bolzano, Regione Sardegna, Provincia Autonoma di Trento, Regione Trentino-Alto Adige / Stato*<sup>107</sup> and *Province Autonome di Trento e Bolzano / Stato*<sup>108</sup> in an abstract judicial review. It stated that provisions of Community law can derogate the provisions of the Constitution which entail the division of powers between the state and Regions<sup>109</sup>.

With its ruling in the case *Granital* the *Corte costituzionale* clarified the relation between national and Community law and maintained this position in its permanent case law.<sup>110</sup> Also in the case *Stato / Regione Sardegna*<sup>111</sup>, the *Corte costituzionale* did not divert from this legal position in its ruling and decision of 13 February 2008; however, it now defined the relation between national and Community law in different words. From Article 11 of the Constitution, which allows to ascribe obligatory effect to Community law in the Italian legal order ("*... riconoscere alle norme comunitarie efficacia obbligatoria nel nostro ordinamento ...*") and from the new wording of Article 117, section 1, of the Constitution, which affirms that obligations resulting from the legal order of the Community bind the national legislator, results that Italy participates in an autonomous, "integrated" (!) and coordinated legal order by dint of its ratification of the Community Treaties ("*... far parte di un ordinamento giuridico autonomo, integrato e coordinato con quello interno ...*"); and that it transferred the jurisdiction and also legislative powers concerning the subjects regulated in the Treaties on the basis of Article 11 of the Constitution. However, the *Corte costituzionale* did not state whether the use of the word "integrated" indicates a substantive change of the relation between national and Community law<sup>112</sup>.

According to the legal position of the *Corte costituzionale* expressed in its ruling in the case *Granital*, the ordinary judge is authorised and obliged to leave contradicting national law unapplied, yet the *Corte costituzionale* retains certain competences ("*Le osservazioni ... non implicano, tuttavia, che l'intero settore dei rapporti fra diritto comunitario e diritto interno sia sottratto alla competenza della Corte*")<sup>113</sup>.

The *Corte costituzionale* retains jurisdiction when it comes to determine whether the Act ratifying the EEC Treaty is unconstitutional, in the case that the *controlimiti* are violated by Community law. According to its case law, the legal acts of the derived Community law are not subject to judicial review. Concerned in a concrete judicial review with the constitutionality of a provision of Regulation (EEC) 1408/71<sup>114</sup>, the *Corte costituzionale* adjudged on 11 December 1995 that the disputed provision was not part of the national but of the Community legal order ("*... un atto normativo non riferibile all'ordinamento*

<sup>106</sup> Corte costituzionale Judgement of 24 March 1993, 115/1993, in law no 4.

<sup>107</sup> Corte costituzionale Judgement of 26 May 1994, 224/1994, in law no 5.

<sup>108</sup> Corte costituzionale Judgement of 17 April 1996, 126/1996, in law no 5.c.

<sup>109</sup> See also Corte costituzionale Judgement of 26 March 1997, 93/1997, in law no 3.

<sup>110</sup> Corte costituzionale Judgements of 19 February 1985, 47/1985, in law no 1; 19 February 1985, 48/1985, in law no 1; 19 April 1985, 113/1985, in law no 3.1; 11 November 1987, 403/1987, in law no 5; 8 April 1991, 168/1991, in law no 4; 4 July 2007, 284/2007, in law no 3; 22 October 2007, 348/2007, in law no 3.3; and 22 April 2009, 125/2009, in law no 2.2. See also Decisions of 19 March 1985, 81/1985; 7 March 1990, 132/1990; 15 December 1995, 536/1995; and 12 December 2006, 454/2006.

<sup>111</sup> Corte costituzionale Judgement of 13 February 2008, 102/2008; and Decision of 13 February 2008, 103/2008.

<sup>112</sup> Corte costituzionale Judgement of 13 February 2008, 102/2008, in law no 8.2.8.1; and Decision of 13 February 2008, 103/2008.

<sup>113</sup> Corte costituzionale Judgement of 5 June 1984, 170/1984, in law no 7.

<sup>114</sup> Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community, OJ L 149, 5 July 1971, 2.

*giuridico nazionale, ma a quello comunitario*). With reference to the case *Frontini*<sup>115</sup>, it argued that Article 134 of the Constitution does not allow the *Corte costituzionale* ("*... deve escludersi ...*") to review EC Regulations for their constitutionality. The appealing *Corte di cassazione* had asked the *Corte costituzionale* to directly examine the constitutionality of the Regulation provisions and not for an indirect examination via the Act ratifying and implementing the EEC Treaty ("*... in via diretta e non per il tramite della legge di esecuzione del Trattato ...*") with the claim of a violation of the highest constitutional principles and the inalienable human rights whose guarantee, with regard to Community law, is the task of the *Corte costituzionale*<sup>116</sup>.

The *Corte costituzionale* also retains jurisdiction when it comes to determine whether national legislation is unconstitutional because preventing or diminishing the permanent observance of the system and the fundamental principles of the EEC Treaty ("*... statuizioni della legge statale che si assumano costituzionalmente illegittime, in quanto dirette ad impedire o pregiudicare la perdurante osservanza del Trattato, in relazione al sistema o al nucleo essenziale dei suoi principi*"). The *Corte costituzionale* claimed this jurisdiction for the first time in its ruling in the case *Granital*<sup>117</sup>; it frequently repeated this claim in the following.<sup>118</sup> Up till now, the *Corte costituzionale* has not established a permanent obstruction or restriction of the system or essential core of the fundamental principles of the EEC Treaty through a national law and its unconstitutionality. In the case *Pulos Georgis*<sup>119</sup>, the appealing *Corte d'appello di Napoli* claimed a violation of the principle anchored in the Articles 12, 37 and 95 EEC Treaty according to which it is the primary task of the EEC to foster harmonic economic activity in the areas covered by the Treaty through establishing a Single European Market and the gradual convergence of Member States' policies ("*... principio secondo cui compito principale della Comunità è quello di promuovere, mediante l'instaurazione di un Mercato Comune ed il graduale avvicinamento delle politiche degli Stati aderenti, lo sviluppo armonioso dell'attività economica nell'ambito coperto dal Trattato ora citato*"); however, the *Corte costituzionale* negated a violation of this principle in a concrete judicial review. The jurisdiction of the *Corte costituzionale* does not only contradict the ruling of the ECJ in the case *Simmenthal II*,<sup>120</sup> but stands also in the context of the question of whether the withdrawal of Italy from the European Union would require an ordinary law or a constitutional law; since this is a law which aims at preventing the permanent compliance with the Treaties regarding their system and essential core of principles. Here, the binding effect of the obligations stemming from Union law on legislation has to be mentioned, which results from Article 117, section 1, newly introduced to the Constitution with the 2001 constitutional reform<sup>121</sup>.

In difference to its judicial self-restraint in concrete judicial reviews, as for the first time expressed in its ruling in the case *Granital*, the *Corte costituzionale* maintains its jurisdiction in cases which concern the discrimination of the resident population. It decides about the constitutionality of national legal provisions which discriminate against

<sup>115</sup> Corte costituzionale Judgement of 18 December 1973, 183/1973, in law no 9.

<sup>116</sup> Corte costituzionale Judgement of 11 December 1995, 509/1995, in law no 2.

<sup>117</sup> Corte costituzionale Judgement of 5 June 1984, 170/1984, in law no 7.

<sup>118</sup> Corte costituzionale Judgements of 19 April 1985, 113/1985, in law no 4; and 19 December 1986, 286/1986, in law; and Decisions of 7 March 1990, 132/1990; and 13 December 2006, 454/2006.

<sup>119</sup> Corte costituzionale Judgement of 19 December 1986, 286/1986, in law.

<sup>120</sup> See *Panara* (2008) no 31.

<sup>121</sup> See *Panara* (2008) no 40.

Italian citizens with regard to better legal positions of Union citizens derived from Community law<sup>122</sup>.

Furthermore, its jurisdiction applies if a contradiction emerges between Community law lacking direct effect or direct applicability and national legislation, since in these cases no opportunity exists for ordinary judges (or administrative bodies) to not apply the contradicting national law.<sup>123</sup> So the *Granital* rationale does not apply in these procedures (of abstract judicial review). The *Corte costituzionale* argues, that its jurisprudence complies with the ECJ's case law, because Member states are obliged to "clean" their legal system by the elimination of all the laws contradicting Community law.

The jurisdiction of the *Corte costituzionale* remains unchanged concerning the review of the constitutionality of the abrogative referendum (*referendum abrogativo*) under Article 75 of the Constitution and the provisions in the relevant case law.<sup>124</sup> The *Corte costituzionale* had already adjudged in 1981 that the repeal of a national law by dint of an abrogative referendum is inadmissible, if this resulted in a violation of obligations stemming from the EEC Treaty – in the sense of Article 75, section 2, of the Constitution.<sup>125</sup> Within the framework of a review of the admissibility of an abrogative referendum with regard to the obligations resulting from EEC Directives, it made two points in its ruling of 18 January 1990. First, the abrogative referendum as a legal source of national law ("*... referendum che è fonte-atto di diritto interno ...*") has to be coordinated with Community law according to the division of powers laid down and guaranteed by the EEC Treaty ("*... deve essere coordinato con la normativa comunitaria 'secondo la ripartizione di competenza stabilita e garantita dal Trattato'*"). And second, as a consequence of this coordination, provisions of EEC Directives cannot be used against the abrogative referendum in the case that the prerequisites for a vertical direct effect are met.<sup>126</sup> In this way, the *Corte costituzionale* extended its jurisdiction concerning the review of the admissibility of abrogative referendums beyond the cases laid down in Article 75, section 2, of the Constitution. It is now authorised to review the application for an abrogative referendum also with regard to its compatibility with provisions of EEC Directives ("*... verificare la compatibilità del quesito con le prescrizioni delle direttive comunitarie ...*"), if they seem able to result in inhibiting the repeal of legal provisions, which would prevent fulfilling obligations which stem from derived Community law ("*... qualora ... queste siano idonee a produrre effetti tali da inibire l'abrogazione delle norme interne, in quanto preclusiva del corretto adempimento degli obblighi derivanti allo Stato italiano dal diritto comunitario derivato*"). It has therefore to be ruled out that the result of an abrogative referendum conflicts with relevant EEC Directives<sup>127</sup>.

Finally, the *Corte costituzionale* retains jurisdiction for the abstract judicial review. Up until the 2001 constitutional amendment came into effect, the *Corte costituzionale* used the provisions of Community law as *norme interposte* in order to put Article 11 of the Constitution into concrete terms, when it had to determine the constitutionality of

<sup>122</sup> Corte costituzionale Judgements of 13 June 1995, 249/1995; 22 February 1996, 61/1996; and 16 December 1997, 447/1997. See *Nascimbene* (2007).

<sup>123</sup> Corte costituzionale Judgements of 18 January 1990, 63/1990, in law no 6; and 5 June 1984, 170/1984, in law no 6. See also *Cartabia* (1998) 137.

<sup>124</sup> Cf *de Vergottini* (2001) 222-224. See also Corte costituzionale Judgement of 2 February 1978, 16/1978, in law no 3.

<sup>125</sup> Corte costituzionale Judgements of 12 February 1981, 30/1981, in law; and 31/1981, in law. See also Judgements of 16 January 1987, 25/1987, in law; 16 January 1993, 26/1993, in law no 2.1 and 30 January 1997, 15/1997, in law no 2.

<sup>126</sup> Corte costituzionale Judgement of 18 January 1990, 64/1990, in law no 2.2.

<sup>127</sup> Corte costituzionale Judgements of 3 February 2000, 41/2000, in law no 7; and 45/2000, in law no 3. See also Judgements of 30 January 1997, 36/1997, in law 2; 3 February 2000, 31/2000, in law no 4; and 30 January 2003, 43/2003, in law no 3.

legislation in abstract judicial review procedures in the cases *Stato / Regione Umbria*<sup>128</sup> and *Stato / Regione Sicilia*<sup>129</sup> pursuant to Article 127 of the Constitution. In case of a violation of Article 11 of the Constitution put into concrete terms by Community law, the *Corte costituzionale* declares an act to be unconstitutional<sup>130</sup>.

Following the 2001 constitutional amendment, the modified Article 117, section 1, now obliges the state, Regions and Autonomous Provinces to legislate not only in accordance with the Constitution but also with obligations under Community and international law. Even though in jurisprudence different interpretations are found, Article 117, section 1, of the Constitution can be considered in any case as an explicit recognition of the obligation to adhere to Community law under constitutional law; an obligation which hitherto derived from Article 11 of the Constitution. At the latest with its ruling of 24 October 2005 in the case *Stato / Regione Abruzzo*<sup>131</sup> in an abstract judicial review, the *Corte costituzionale* established Article 117, section 1, of the Constitution as the decisive constitutional norm when it comes to voiding acts, if they violate obligations resulting from Community law.<sup>132</sup> The respective norm under Community law puts into concrete terms the obligations under Community law mentioned in Article 117, section 1, of the Constitution and in this respect, therefore, constitutes the applicable and decisive *norma interposta*. In its ruling of October 2005, the *Corte costituzionale* qualified, for instance, Directive 2000/75/EC<sup>133</sup> regarding the bluetongue disease as *norma interposta*.<sup>134</sup> Already in 2006, the *Corte costituzionale* affirmed that EC Directives can as *norme interposte* be used to put into more concrete terms Article 117, section 1, of the Constitution; Article 117, section 1, of the Constitution confirms the requirement of the coherence between national and Community legal order, resulting from Article 11 of the Constitution.<sup>135</sup> The *Corte costituzionale* reaffirmed its established case law concerning Article 117, section 1, of the Constitution with regard to the commitment to adhere to obligations under international law in its rulings of 22 October 2007. Both rulings concerned the status of the European Convention on Human Rights in the Italian legal system.<sup>136</sup> In its ruling of 13 February 2008 in the case *Stato / Regione Sardegna*, the *Corte costituzionale* again affirmed its case law concerning Article 117, section 1, of the Constitution.<sup>137</sup> The provisions of Community law function as *norme interposte* for the concretisation of Article 117, section 1, of the Constitution, in order to review the compatibility of national laws with this constitutional provision ("*... fungono da norme interposte atte ad integrare il parametro per la valutazione di conformità della normativa regionale all'art. 117, primo comma, Cost'*"); this renders operable the standard of review of Articles 117, section 1, of the Constitution ("*... rendono concretamente operativo il parametro costituito dall'art 117, primo comma, Cost ...*").

<sup>128</sup> Corte costituzionale Judgement of 7 November 1994, 384/1994, in law no 2.

<sup>129</sup> Corte costituzionale Judgement of 20 March 1995, 94/1995, in law no 3.

<sup>130</sup> See also the case law concerning the international responsibility of the State for implementation on regional level, eg Corte costituzionale Judgements of 4 April 1963, 49/1963, in law 2; 30 June 1969, 120/1969, in law; 14 July 1976, 182/1976, in law no 3; 8 June 1988, 632/1988, in law; 18 October 1993, 382/1993, in law; 7 November 1994, 384/1994, in law no 2; and 17 April 1996, 126/1996, in law no 5.b.

<sup>131</sup> Corte costituzionale Judgement of 24 October 2005, 406/2005, in law 1 and 3.

<sup>132</sup> See *Celotto* (2006) 1124; and *Calvano* (2005) 4442.

<sup>133</sup> Council Directive 2000/75/EC of 20 November 2000 laying down specific provisions for the control and eradication of bluetongue, OJ L 327, 22 December 2000, 74.

<sup>134</sup> Corte costituzionale Judgement of 24 October 2005, 406/2005, in law 1 and 3. See also Judgement of 18 December 2003, 7/2004, in law no 1 and 3.

<sup>135</sup> Corte costituzionale Judgements of 23 March 2006, 129/2006, in law no 5.3; and 4 July 2007, 284/2007, in law no 2.

<sup>136</sup> Corte costituzionale Judgements of 22 October 2007, 348/2007, in law no 4-4.7; and 349/2007, in law no 6. and 6.2. See eg *Pollicino* (2008); *Biondi Dal Monte / Fontanelli* (2008); and *Rossi* (2009).

<sup>137</sup> Corte costituzionale Judgement of 13 February 2008, 102/2008, in law no 8.2.8.1. See also Judgement of 9 June 2010, 216/2010, in law no 3.

Legal doctrine perceives the use of the provisions of Community law as *norme interposte* for the concretisation of Article 117, section 1, of the Constitution by the *Corte costituzionale* as a deviation from its dualist position on the relation of national and Community law<sup>138</sup>.

Following the gist of the legal interpretation of the *Corte costituzionale* presented in its ruling in the case *Granital*, now the concerned court itself had to answer questions about the application of Community law – possibly with the help of the ECJ via the preliminary ruling procedure under Article 177 EEC Treaty and Article 234 EC Treaty respectively.<sup>139</sup> An appeal to the *Corte costituzionale* concerning the constitutionality of a national act due to a violation of Community law (before or while the ECJ was dealing with the matter) was regarded as inadmissible and hence rejected. That way the *Corte costituzionale* "favoured" references by ordinary courts.<sup>140</sup> Only when Community law was not directly applicable and not subject to interpretation, the *Corte costituzionale* examined its constitutionality. When an issue of interpretation arose nevertheless, it sometimes interrupted proceedings and waited for an ECJ ruling in a pending proceeding which concerned the issue in question,<sup>141</sup> or it provided an interpretation of its own<sup>142</sup>.

In any case, up until the 13 February 2008, the *Corte costituzionale* refused to see itself as a court under Article 177 EEC Treaty and Article 234 EC Treaty respectively and declined to send requests for preliminary rulings to the ECJ. Although it did not rule out the possibility of a request for a preliminary ruling in its verdict of 8 April 1991 in the case *Giampaoli* ("*... la Corte – la quale, ferma restando la facoltà di sollevare anch'essa questione pregiudiziale di interpretazione ai sensi dell'art. 177 cit, ...*"), without dealing with the obligation to refer under Article 177, comma 3, EEC Treaty and its position as court of last instance pursuant to Article 137, comma 3, of the Constitution<sup>143, 144</sup> the court negated this explicitly in its decision of 15 December 1995 in the case *Messaggero Servizi*<sup>145</sup>. By asserting that its statement in the *Giampaoli* case was pure theoretical ("*... come pur ipotizzato in una precedente pronuncia (sentenza n. 168/91) ...*"), the *Corte costituzionale* ruled, that it could not refer to the ECJ ("*... che detto giudice comunitario non può essere adito ... dalla Corte costituzionale ...*"). With reference to a ruling from the 1960s,<sup>146</sup> it stressed its task of supreme constitutional review – the highest guarantee for the preservation of the Constitution by the constitutional bodies of the state and the Regions ("*... la quale [la Corte costituzionale] 'esercita essenzialmente una funzione di controllo costituzionale, di suprema garanzia della osservanza della Costituzione della Repubblica da parte degli organi costituzionali dello Stato e di quelli delle Regioni' (sentenza n. 13 del 1960)*") – and emphasised that this task did not fall within the competences of ordinary or special courts. The differences would be too stark between its task and the tasks of those courts, so that it could not be regarded as a court under Article 177 EEC Treaty and Article 234 EC Treaty respectively ("*nella Corte costituzionale non è ravvisabile quella 'giurisdizione nazionale' alla quale fa riferimento*

<sup>138</sup> *Happacher* (2010) 154; *Cartabia / Weiler* (2000) 131; and *Sorrentino* (2006) 629.

<sup>139</sup> Cf eg *Corte costituzionale* Judgements of 19 February 1985, 47/1985, in law, and 48/1985, in law; 19 April 1985, 113/1985, in law no 5; and 11 November 1987, 403/1987, in law no 5.

<sup>140</sup> Cf *Corte costituzionale* Decisions of 15 July 1976, 206/1976; 19 March 1985, 81/1985; 7 March 1990, 132/1990; 21 July 1992, 391/1992; 15 December 1995, 536/1995; 18 July 1996, 319/1996; 26 March 1998, 108/1998 and 109/1998; 5 July 2001, 249/2001; 1 March 2002, 85/2003; 10 March 2003, 99/2003; 4 July 2007, 284/2007; and 14 April 2008, 109/2008.

<sup>141</sup> Eg *Corte costituzionale* Decision of 26 May 2004, 165/2004.

<sup>142</sup> Eg *Corte costituzionale* Judgements of 6 October 1981, 176/1981; 11 November 1987, 403/1987; and 18 July 1996, 317/1996. See also Decision of 11 June 1999, 267/1999.

<sup>143</sup> See *Cartabia* (2008a) 1313.

<sup>144</sup> *Corte costituzionale* Judgement of 8 April 1991, 168/1991, in law no 6.

<sup>145</sup> *Corte costituzionale* Decision of 15 December 1995, 536/1995.

<sup>146</sup> *Corte costituzionale* Judgement of 16 March 1960, 13/1960, in law no 1.

*l'art. 177 del trattato istitutivo della Comunità Economica Europea, poiché la Corte non può essere inclusa fra gli organi giudiziari, ordinari o speciali che siano, tante sono, e profonde, le differenze tra il compito affidato alla prima, senza precedenti nell'ordinamento italiano, e quelli ben noti e storicamente consolidate propri degli organi giurisdizionali' (sentenza n. 13 del 1960)".* The *Corte costituzionale* argued furthermore in its decision of 15 December 1995 that it is not authorised to interpret Community law – except that the interpretation is “clearly obvious” (“... non compete ... a questa Corte fornire l'interpretazione della normativa comunitaria che non risulti per sé di 'chiara evidenza' ...”) – and to resolve emerging contradictions in interpretation (“... nè tanto meno le spetta risolvere i contrasti interpretativi insorti ...”), but rather the ECJ; and that, on the other hand, the ordinary judge has to take it on herself to appeal to the ECJ via the preliminary ruling procedure, in order to come to a certain and reliable (“*certa ed affidabile*”) interpretation of Community law.

Jurisprudence discussed this legal interpretation given in the decision of 15 December 1995 in the case *Messaggero Servizi*<sup>147</sup> in detail and finally rejected it.<sup>148</sup> Although the status of the *Corte costituzionale* in the constitutional order has always been disputed, it could not be seen as completely located outside of the judiciary so that it could nevertheless be regarded as a court under the ECJ rulings concerning Article 177 EEC Treaty and Article 234 EC Treaty respectively. Jurisprudence also gave as reason for the negative position of the *Corte costituzionale* that it was entrusted with a particular task – constitutional review; constitutional provisions regarding ordinary and special courts were not applicable to the *Corte costituzionale*. As the ultimate guardian of the Constitution, it could not submit itself to another court, since there is for courts of last instance not only the right but also the obligation to refer to the ECJ pursuant to Article 177, section 3 EEC Treaty/Article 234, section 3, EC Treaty. In turn, it could however be argued that, on the one hand, the Treaties do not suggest a hierarchical order and, on the other hand, that the obligation to refer has been significantly restricted by the ruling of the ECJ of October 6 1982 in the case *CILFIT*<sup>149</sup>; and more generally, that the *Corte costituzionale* has recognised the ECJ and its jurisdiction. It was also criticised that although the *Corte costituzionale* is not regarded as a court under Italian constitutional law, it ought not to transfer this qualification to the autonomous concept of court under Community law without discussing the criteria developed by the ECJ in the rulings of 30 June 1966, 6 October 1981 and 17 May 1994 in the cases *Vaassen-Göbbels*<sup>150</sup>, *Broekmeulen*<sup>151</sup> and *Corsica Ferries*<sup>152</sup> (permanent, legal body, compulsory jurisdiction, application of legal norms). Moreover, the ECJ had also accepted the appeal of tribunals that were domestically not categorised as courts, so for example the *Consiglio di Stato*<sup>153, 154</sup>. Finally, the *Corte costituzionale* was also criticised for the inconsistency between its decision of 15 December 1995 in the case *Messaggero Servizi* and its permanent case law, according to which it is authorised to initiate a concrete judicial review, ie that in a pending case it is able to present itself with issues concerning the constitutionality of

<sup>147</sup> Corte costituzionale Decision of 15 December 1995, 536/1995.

<sup>148</sup> Cf in particular *Sorrentino* (1994) 646 ff; and *Cartabia* (2008b) 153 ff and 156 ff.

<sup>149</sup> ECJ Judgement of 6 October 1982, 283/81, *CILFIT*, 1982 ECR 3415.

<sup>150</sup> ECJ Judgement of 30 June 1966, 61/65, *Vaassen-Göbbels*, 1966 ECR 261.

<sup>151</sup> ECJ Judgement of 6 October 1981, 246/89, *Broekmeulen*, 1981 ECR 2311.

<sup>152</sup> ECJ Judgement of 17 May 1994, C-18/93, *Corsica Ferries*, 1994 ECR 1783.

<sup>153</sup> ECJ Judgement of 22 June 1993, C-222/91, *Ministero delle Finanze and Ministero della Sanità / Philip Morris Belgium*, 1993 ECR 3469.

<sup>154</sup> See *Tizzano* (2010) 9 f.

laws and legal acts,<sup>155</sup> although it has stressed the difference between itself and courts authorised to submit cases<sup>156 157</sup>.

In the case *Stato/Regione Sardegna*, which led to the judgement and the order of 13 February 2008, the *Corte costituzionale* had to determine the constitutionality of a number of provisions of an Act of the Region of Sardinia in the framework of an abstract judicial review procedure.<sup>158</sup> Among other things, the Act exclusively introduced a regional tax on the landing of vessels and aircrafts in Sardinia for tourist purposes for companies that had their fiscal domicile outside of the Region of Sardinia. In his complaint the Prime Minister asserted a violation of Article 117, section 1, of the Constitution put into concrete terms by Article 49, Article 81 and Article 87 EC Treaty as *norme interposte*; he had also explicitly asked the *Corte costituzionale* to send a request for a preliminary ruling to the ECJ.

The abstract judicial review confronted the *Corte costituzionale* with the issue that an assessment of the constitutionality of the criticised provisions required an interpretation of Community law which was not yet provided by the ECJ. It had therefore to send a request – the very first request – for a preliminary ruling to the ECJ. Before the submission of the request for a preliminary ruling the *Corte costituzionale* had to clarify three issues: First, whether Community law can be regarded as a standard of judicial review, since it can be used to put Article 117, section 1, of the Constitution into concrete terms; second, to which extent Community law can be used as a standard in the abstract judicial review procedure; and third, whether and what prerequisites exist for initiating a preliminary decision procedure<sup>159</sup>.

With regard to the first issue, whether Community law is a standard of judicial review since it can be used to put Article 117, section 1, of the Constitution into concrete terms, the *Corte costituzionale* referred at first to its rulings concerning Article 11 of the Constitution as well as to the new Article 117, section 1 of the Constitution, which reaffirmed the obligations of the legislator that result from Community law, obligations limited by the *controlimiti* ("*Le norme comunitarie vincolano in vario modo il legislatore interno, con il solo limite dell'intangibilità dei principi fondamentali dell'ordinamento costituzionale e dei diritti inviolabili dell'uomo garantiti dalla Costituzione.*"). It also stressed that Italy participated through its EC membership in a legal order that was autonomous but integrated and coordinated with the Italian legal system ("*... con la ratifica dei Trattati comunitari, l'Italia è entrata a far parte di un ordinamento giuridico autonomo, integrato e coordinato con quello interno ...*"). Finally, it confirms its previous rulings according to which in abstract judicial review procedures the conformity of acts with Community law is guarded via Article 117, section 1, of the Constitution by putting it into concrete terms with the help of the violated Community legislation as *norme interposte* ("*... le norme [comunitarie] fungono da norme interposte atte ad integrare il parametro per la valutazione di conformità della normativa regionale all'Art. 117, primo comma, Cost. ..., o più precisamente, rendono concretamente operativo il parametro costituito dall'art. 117, primo comma, Cost. ... con conseguente declaratoria di illegittimità costituzionale delle norme regionali che siano giudicate incompatibili con il*

<sup>155</sup> See eg Corte costituzionale Judgements of 10 May 2001, 156/2001; and 12 July 2001, 288/2001; and Decisions of 5 April 1960, 22/1960; 4 January 1977, 2/1977; 1 June 1995, 225-297/1995; 27 May 1996, 183-197/1996; and 5 February 2001, 42/2001.

<sup>156</sup> Corte costituzionale Judgement of 13 March 1960, 13/1960, in law no 1; and Decision of 15 December 1995, 536/1995.

<sup>157</sup> Fontanelli / Martinico (2010) 359 f; Groppi (1997) 186 f; and Cossiri (2008) 9.

<sup>158</sup> Corte costituzionale Judgement of 13 February 2008, 102/2008; and Decision of 13 February 2008, 103/2008.

<sup>159</sup> Corte costituzionale Judgement of 13 February 2008, 102/2008, in law no 8.2.8.

*diritto comunitario*”). In case of a violation of the concretising Community law, the act would be declared void. In any case, the complaint has to include those pieces of Community law used for concretisation of Article 117, section 1, of the Constitution.<sup>160</sup> Concerning the second question, the *Corte costituzionale* stated that it would be limited to those norms of Community law whose violation was subject of the complaint. Only these could be used to put Article 117, section 1, of the Constitution into concrete terms, i.e. those which could be used as *norme interposte*. This would correspond to the established case law of the *Corte costituzionale* according to which the *thema decidendum* (with regard to subject, standard and reasons) is determined by the action that initiates proceedings.<sup>161</sup> In order to answer the third issue, the *Corte costituzionale* comes to the opinion that it has to be seen as a court of last instance, despite its function as guardian of the Constitution (“... questa Corte, pur nella sua peculiare posizione di organo di garanzia costituzionale, ha natura di giudice e, in particolare, di giudice di unica istanza”). It therefore considers itself authorised but not obliged to send requests for preliminary rulings to the ECJ under Article 234, section 3, EC Treaty in the abstract judicial review procedures (“Essa [la Corte costituzionale] pertanto, nei giudizi di legittimità costituzionale in via principale, è legittimata a proporre rinvio pregiudiziale ai sensi dell’art. 234, terzo paragrafo, del Trattato CE.”). It considers itself authorised, because it meets without any doubt (“Non v’è dubbio ...”) the criteria of the concept of court introduced by the ECJ’s established case law. Decisive is the concept of court under Community law and not under national law (“... la nozione di ‘giurisdizione nazionale’ rilevante ai fini dell’ammissibilità del rinvio pregiudiziale deve essere desunta dall’ordinamento comunitario e non dalla qualificazione ‘interna’ dell’organo rimettente”). On the one hand, the *Corte costituzionale* is the only court that is appointed to come to a decision in the abstract judicial review procedure; on the other hand, the *Corte costituzionale*’s inadmissibility of requests for a preliminary ruling in an abstract judicial review procedure would diminish the interest in the unitary application of Community law in the ECJ’s interpretation (“... comporterebbe un’inaccettabile lesione del generale interesse all’uniforme applicazione del diritto comunitario, quale interpretato dalla Corte di giustizia CE”)<sup>162</sup>.

The *Corte costituzionale* perceives their questions obviously as not unjustified, but rather as necessary for the decision in the abstract judicial review,<sup>163</sup> and it decided therefore to send a request for preliminary ruling to the ECJ.<sup>164</sup> Based on the ECJ ruling of 17 November 2009<sup>165</sup>, the abstract judicial review was decided on 9 June 2010 by the *Corte costituzionale*, and the relevant provision of the Act of the Region Sardinia was declared null due to its incompatibility with Article 49 EC Treaty as *norma interposta* and the violation of Article 117, section 1, of the Constitution<sup>166</sup>.

Regarding the justification of the *Corte costituzionale* for the change in its case law on the admissibility of the initiation of a request for preliminary rulings, the following has to be noted: The change in the judiciary is clear.<sup>167</sup> Despite its, for decades unchanged,

<sup>160</sup> Corte costituzionale Judgement of 13 February 2008, 102/2008, in law no 8.2.8.1; and Decision of 13 February 2008, 103/2008.

<sup>161</sup> Corte costituzionale Judgement of 13 February 2008, 102/2008, in law no 8.2.8.2.

<sup>162</sup> Corte costituzionale Judgement of 13 February 2008, 102/2008, in law no 8.2.8.3; and Decision of 13 February 2008, 103/2008.

<sup>163</sup> Corte costituzionale Judgement of 13 February 2008, 102/2008, in law no 8.2.8.4. and 8.2.8.5; and Decision of 13 February 2008, 103/2008.

<sup>164</sup> Corte costituzionale Decision of 13 February 2008, 103/2008.

<sup>165</sup> ECJ Judgement of 17 November 2009, C-169/08, *Presidente del Consiglio dei Ministri / Regione Sardegna*, 2009 ECR 821.

<sup>166</sup> Corte costituzionale Judgement of 9 June 2010, 216/2010, in law no 3.

<sup>167</sup> See *Happacher* (2010) 158.

special position in the constitutional order as guardian of the Constitution and as court of first and last instance in the abstract judicial review under Article 137, section 3, of the Constitution, the *Corte costituzionale* now suddenly and doubtlessly ("*Non v'è dubbio ...*") meets the criteria of the concept of court laid down in Article 234 EC Treaty. Why this is the case, it does not justify; it only recognises that the concept of court stems from Community law ("*... deve essere desunta dall'ordinamento comunitario e non dalla qualificazione 'interna' dell'organo rimettente ...*"),<sup>168</sup> and thereby departs clearly but not explicitly from its decision of 15 December 1995 in the case *Messaggero Servizi*<sup>169</sup>.

In this context, the *Corte costituzionale* stressed also clearly that it regards itself authorised ("*è legittimata*") to submit under Article 234, section 3, EC Treaty; however, in its discussion of the ECJ interpretation of this provision, the *Corte costituzionale* does not at all engage with the resulting obligation to submit, although it refers to this Treaty provision.<sup>170</sup> In any case, it acknowledges it also for itself, not like hitherto for other courts, the ECJ and its jurisdiction in abstract judicial review procedures. Due to the restrictions of sovereignty resulting from Article 11 of the Constitution, the explicit anchoring of Community law as standard for the judicial review in the amended 117, section 1, of the Constitution and also because the constitutional institutions are themselves bound by the obligations that result from Community law, the *Corte costituzionale* could not help but do so.<sup>171</sup> It has to remain open, what convinced it to do so, whether it was the ECJ's case law concerning government liability for judicial injustice<sup>172</sup> and / or the established practice of the constitutional courts of Austria<sup>173</sup>, Belgium<sup>174</sup> and Lithuania<sup>175</sup>.<sup>176</sup> Given its chosen wording, the *Corte costituzionale* limited its right to initiate a request for preliminary ruling clearly to abstract judicial review procedures<sup>177</sup> and affirmed its established case law on the application of Community law in the abstract judicial review procedure.<sup>178</sup> This change of case law is typical for the style of the *Corte costituzionale* to conduct changes of judicature slowly; although there is no explicit reference to the case rulings *Giampaoli* and *Messaggero Servizi* in 1991 and 1995, the *Corte costituzionale* both renewed and confirmed its case law in its rulings in the case *Stato/Regione Sardegna*. It renewed it by utilising the preliminary ruling procedure. It confirmed it by assuming a right to initiate a request for preliminary ruling only in the abstract judicial review procedure, a point on which it had stated no clear position in the previously mentioned rulings<sup>179</sup>.

<sup>168</sup> See *Bartole* (2008) 899; *Cossiri* (2008) 8 f; and *Happacher* (2010) 159.

<sup>169</sup> *Cartabia* (2008b) 1313.

<sup>170</sup> *Ibidem*.

<sup>171</sup> See *Happacher* (2010) 159.

<sup>172</sup> ECJ Judgements of 13 June 2006, C-173/03, *Traghetti del Mediterraneo*, 2006 ECR 5177; and 30 September 2003, C-224/01, *Köbler*, 2003 ECR 10239, no 59. See *Fontanelli / Martinico* (2010) 362 f; *Cossiri* (2008) 8 f; and *Happacher* (2010) 159.

<sup>173</sup> ECJ Judgements of 8 November 2001, C-143/99, *Adria-Wien-Pipeline*, 2001 ECR 8365; 8 May 2003, C-171/01, *Wählergruppe Gemeinsam*, 2003 ECR 4301; and 20 May 2003, C-465/00, C-138/01 and C-139/01, *Österreichischer Rundfunk*, 2003 ECR 4989.

<sup>174</sup> ECJ Judgements of 16 July 1998, C-93/97, *Fédération belge des chambres syndicales de médecins*, 1998 ECR 4837; 1 October 2004, C-480/03, *Clerens*, not reported; 26 June 2007, C-305/05, *Ordre des barreaux francophones et germanophone*, 2007 ECR 5305; 1 April 2008, C-212/06, *Gouvernement de la Communauté française and Gouvernement wallon*, 2008 ECR 1683; 13 April 2010 C-73/08, *Bressol*, nyr; 6 October 2010, C-389/08, *Base*, nyr; and 21 October 2010, C-306/09, *I.B.*, nyr. See also ECJ, C-236/09, *Association Belge des Consommateurs Test-Achats*, not reported; and C-182/10, *Solvay*, OJ C 179, 3 July 2010, 18 f.

<sup>175</sup> ECJ Judgement of 9 October 2008, C-239/07, *Sabatauskas*, 2008 ECR 7523.

<sup>176</sup> Cf *Fontanelli / Martinico* (2010), 361 f; and *Happacher* (2010) 159.

<sup>177</sup> *Cartabia* (2009) 24 f; *Cartabia* (2007); and *Dani* (2008).

<sup>178</sup> Cf eg *Corte costituzionale* Judgement of 4 July 2007, 284/2007; and Decision of 1 March 2002, 85/2002; 26 May 2004, 165/2004; and 10 March 2004, 99/2004. See *Cartabia* (2008b) 1314.

<sup>179</sup> See *Cartabia* (2008b) 1314 f.

A future extension of this right by the *Corte costituzionale* cannot be ruled out. Theoretically, the following proceedings might be considered: Proceedings resolving conflicts of powers between state bodies as well as between the state and Regions and among Regions (Article 134, second point, of the Constitution); concerning the admissibility of the abrogative referendum (Article 75 of the Constitution), which gives rise to the issue that the *Corte costituzionale* has to decide within legally laid down periods; concerning the constitutionality of Regional Statutes (Article 123, section 2, of the Constitution) as well as proceedings concerning charges brought against the President of the Republic (Article 134, last point, of the Constitution). In practice, it seems however rather unlikely that the case law is extended to decisions under criminal law on charges against the President of the Republic (Article 134, last point, of the Constitution) and to conflicts of powers between state bodies regarding the existence of a provision of Union law which could put into concrete terms the relevant constitutional provisions as *norma interposta*.<sup>180</sup> It cannot be ruled out that the *Corte costituzionale* finds itself under particular conditions<sup>181</sup> also entitled to send a direct request for preliminary ruling to the ECJ in the concrete judicial review procedure<sup>182</sup>.

Finally, the relation between national and Community law has to be addressed as defined by the *Corte costituzionale* in its ruling in the case *Granital*. Both in the ruling as well as in the decision of 13 February 2008 in the case *Stato / Regione Sardegna*, the *Corte costituzionale* stressed that, through its membership in the EC, Italy participates in an autonomous legal order, which is "integrated" and coordinated with the Italian legal order ("*... con la ratifica dei Trattati comunitari, l'Italia è entrata a far parte di un ordinamento giuridico autonomo, integrato e coordinato con quello interno ...*").<sup>183</sup> If one contrasts this choice of words of the *Corte costituzionale* with its previous definition of the relation between national and Community law, according to which they have to be regarded as "independent and different, although they are legal systems coordinated by the division of powers laid down in the Treaty" ("*... sistemi giuridici autonomi e distinti, ancorché coordinate secondo la ripartizione di competenze stabilita e garantita dal Trattato*")<sup>184</sup>, it is noteworthy that both autonomous legal systems are not only regarded as coordinated but also as "integrated". However, it can currently not be decided conclusively, whether the use of the term "integrated" implies also a change of case law on the relation of national and Community law, ie a shift from the established dualist to a monist perspective. Whether this constitutes a deviation of the *Corte costituzionale* from the "fix point" in its case law ("*un punto fermo nella costruzione giurisprudenziale*")<sup>185</sup> or only an emphasis of the coordination of both legal systems remains open<sup>186</sup>.

#### 4.3. Resulting relationship between EU law and national law

Up until the 2001 constitutional reform came into effect, no provision of the Italian Constitution addressed explicitly membership in the European Union and the three European Communities. The *Corte costituzionale*, legal practice and jurisprudence regarded Article 11 of the Constitution as the legal basis for Italy's accession to the European Communities in 1951 and the European Union in 1991. Allowing restrictions of sovereignty in cases that may be necessary to establish a world order that ensures peace

<sup>180</sup> See *Cartabia* (2008b) 1315 f; and *Happacher* (2010) 160.

<sup>181</sup> Corte costituzionale Decisions of 26 May 2004, 165/2004; and 14 April 2008, 109/2008.

<sup>182</sup> See *Cartabia* (2008b) 1315.

<sup>183</sup> Corte costituzionale Judgement of 13 February 2008, 102/2008, in law no 8.2.8.1; and Decision of 13 February 2008, 103/2008.

<sup>184</sup> Corte costituzionale Judgement of 5 June 1984, 170/1984, in law no 4. See also Corte costituzionale Judgements of 18 December 1973, 183/1973, in law no 7; and 22 October 1975, 232/1975, in law no 4.b.

<sup>185</sup> Corte costituzionale Judgement of 5 June 1984, 170/1984, in law no 4.

<sup>186</sup> See *Bartole* (2008) 901 f; and *Happacher* (2010) 158.

and justice among nations, on conditions of equality with other states, Article 11 of the Constitution permitted ratification of the founding and amending treaties by ordinary law. Article 117 of the Constitution, in contrast, does not serve as an (additional) basis for the Italian membership in the European Union. This provision, introduced by the 2001 constitutional reform, obliges the state, regions and autonomous provinces to legislate not only according to the Constitution but also to the obligations deriving from Union law. The constitutionality of restrictions of sovereignty by transferring powers to the European Communities and the European Union as well as the primacy of Community law (now: Union law) was confirmed by the *Corte costituzionale* in its case law on the basis of Article 11 of the Constitution. At the same time, however, the *Corte costituzionale* decided that the transfer of powers and the primacy of Community law would be limited by the so called *controlimiti*, the counter-limits. These counter-limits are established by the inalienable human rights as guaranteed in Article 2 of the Italian Constitution on the one hand and the (written and unwritten) fundamental constitutional principles elaborated by the *Corte costituzionale* on the other hand. The counter-limits doctrine, applied for the first time in the case *Acciaierie San Michele* in 1965, was further elaborated by the *Corte costituzionale* in its 1984 and 1989 decisions in the cases *Granital* and *Fragd*.

According to the case law of the *Corte costituzionale* the *controlimiti* are relevant both for any (further) transfer of powers to the European Union in the context of treaty revisions and the scrutiny of primary, secondary and tertiary law as interpreted and applied by the institutions of the European Union. The *Corte costituzionale*, referring to Article 134 of the Constitution, has consistently emphasised being not competent to review Community acts (now: Union acts) directly. Notwithstanding, it developed its competence to review Community acts infringing inalienable human rights or fundamental constitutional principles in an indirect way by declaring the Act ratifying the E(E)C-Treaty insofar partially unconstitutional. Thus the respective Community act becomes inapplicable on Italian territory.

Up until now the *Corte costituzionale* has maintained its counter-limits doctrine, but has never declared a Community act "unconstitutional" and thus inapplicable. As far as legislation is concerned, the counter-limits doctrine has also only once explicitly affected the work of the Italian parliament. According to Article 1, section 1, of the Act of 22 April 2005, nr. 69, implementing the Council Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States, the provisions of the Framework Decision are implemented in those legal acts which are compatible with the highest principles of the Italian constitutional order regarding fundamental rights as well as the rights to personal freedom and to a fair trial.

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## 5. AUSTRIA

### 5.1. Constitutional Foundations of EU-Membership

#### 5.1.1. Overview

With the Accession Treaty of 24 June 1994, the Republic of Austria became a member of the European Union and a contracting party to the Treaties establishing the Union (EU Treaty, EC Treaty, ECSC Treaty and EAEC Treaty) as amended at the time of accession. The Accession Treaty entered into force on 1 January 1995<sup>1</sup>.

Based on the fact that Art 9, sec 2 B-VG as amended at the time of EU accession could not provide the basis under federal constitutional law for the accession of the Republic of Austria to the European Union, the opening up of the Austrian legal order for European Community law had to be carried out by amending existing provisions geared to incorporate international law into national law<sup>2</sup>.

In the run-up to the EU accession, wide-ranging consensus existed in jurisprudence that this would have to be qualified as a total revision of the federal constitution in the terms of Art 44, sec 3 and would hence require a referendum. On the other hand, it was disputed in jurisprudence whether Art 44, sec 3 B-VG was also applicable to state treaties, and whether it was permissible under constitutional law to bring about a total revision of the Austrian Federal Constitution in the terms of Art 44, sec 3 B-VG by the conclusion of a state treaty.

As basis for the accession of the Republic of Austria to the European Union under federal constitutional law, the Federal Constitutional Act on the Accession of Austria to the European Union of 9 September 1994 (EU-Beitritts-BVG)<sup>3</sup> was passed – after the approval by the National Council and Federal Council with qualified majority each and the consent of the people of the Federation with a majority of 66.58 % of the votes cast in the referendum of 12 June 1994. The Act authorised to conclude the Accession Treaty in accordance with the results determined by the accession conference on 12 April 1994. The subject of the referendum was therefore not the EU accession per se, but the authorisation to conclude an accession treaty in form of the EU-Beitritts-BVG<sup>4</sup>.

Signed on 24 June 1994, the Accession Treaty was ratified by the National Council and approved by the Federal Council according to Art II EU-Beitritts-BVG.<sup>5</sup> Signed by the Federal President, the ratification instrument was deposited with the Italian government on 24 November 1994.

The 1997 Treaty of Amsterdam, the 2001 Treaty of Nice and the 2004 Treaty establishing a Constitution for Europe<sup>6</sup> as well as the 2003 and 2005 Accession Treaties<sup>7</sup> were not recognised by both the federal legislator and jurisprudence as state treaties that cause a total revision of the Austrian Federal Constitution in the terms of Art 44, sec 3 B-VG, and were in each case concluded and approved with an authority based on a particular federal constitutional act – modelled after the EU-Beitritts-BVG.

<sup>1</sup> OJ 1994 C 241. BGBl 1995/45.

<sup>2</sup> *Griller* (2000a) 279.

<sup>3</sup> See the announcement of the Federal Government, BGBl 1994/735.

<sup>4</sup> The Constitutional Court (VfGH) confirmed that the referendum was lawful. See VfSlg 13.839/1994.

<sup>5</sup> BlgNR 19 GP RV 11, BlgNR 19 GP AB 25.

<sup>6</sup> OJ 1997 C 340. OJ 2001 C 80. OJ 2004 C 310.

<sup>7</sup> OJ 2003 L 236 and C 227E. OJ 2005 L 157.

In the context of the B-VG amendment 2008/2 Art 50 B-VG was fundamentally modified by 1 January 2008.<sup>8</sup> According to Art 50, sec 1, cl 2 B-VG, state treaties that change the contractual bases of the European Union requires henceforth the approval of the National Council. Under Art 50, sec 4 B-VG, these state treaties may only be concluded with the approval of the National Council with the consent of the Federal Council by a qualified majority in both cases – notwithstanding Art 44, sec 3. Henceforth, the requirement to introduce a Federal Constitutional Act for state treaties which change or amend the primary law of the European Union, set as a precedent by the legal technique of the EU-Beitritts-BVG, should not apply anymore.

Like the Treaties of Amsterdam, Nice and the Treaty establishing a Constitution for Europe as well as the Accession Treaties of 2003 and 2005, the Treaty of Lisbon has also not be recognised by the Federal legislator and jurisprudence as a state treaty that causes a total revision of the Austrian Federal Constitution in the terms of Art 44, sec 3 B-VG. It was concluded and approved on the basis of the new Art 50, sec 1, cl 2 in connection with sec 4 B-VG<sup>9</sup>.

### 5.1.2. Individual Legal Provisions

#### 5.1.2.1. Article 9, sec 2 B-VG

Under Art 9, sec 2 B-VG as amended by the time of the EU-accession,<sup>10</sup> “by law or state treaty having been approved according to Art 50 para 1 [...] specific Federal competences [may be transferred] to intergovernmental organizations. [...]”.<sup>11</sup> Although this provision constitutes a basis for the transfer of sovereign rights under federal constitutional law, it could not be applied to the EU accession due to its limited scope.<sup>12</sup> On the one hand, it limited the power to transfer only sovereign rights of the Federation; on the other hand, Art 9, sec 2 B-VG allows only the transfer of “single” competences<sup>13</sup> but not of extensive sovereign rights.<sup>14</sup> Based on the assumption that in the course of an EU accession the extent of transferred Federation sovereign rights did not allow to speak of single transferred competences,<sup>15</sup> and the fact that also competences of the Federal States had to be transferred, Art 9, sec 2 B-VG was considered inapplicable<sup>16</sup>.

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<sup>8</sup> BGBl I 2008/2.

<sup>9</sup> OJ 2007 C 306, amended by OJ 2009 C 290.

<sup>10</sup> Art 9, sec 2 B-VG, BGBl 1930/1 idF BGBl 1981/350.

<sup>11</sup> Now Art 9, sec 2, B-VG BGBl 1930/1 as amended by BGBl I 2008/2. See *Öhlinger* (2002a); as well as *Lienbacher* (2008a) 23, 30 f.

<sup>12</sup> *Griller* (1991) 687.

<sup>13</sup> *Grabewarter* (1995) 86; *Adamovich / Funk / Holzinger* (1997) Rn 17.061.

<sup>14</sup> *Öhlinger* (2002a) Rn 7.

<sup>15</sup> *Griller* (1990a) 21; and *Azizi* (1989) 288.

<sup>16</sup> *Öhlinger* (2002a) Rn 8; *Azizi* (1989) 288.

### 5.1.2.2. Federal Constitutional Act on the Accession of Austria to the European Union

The foundation for the accession of the Republic of Austria to the European Union under federal constitutional law was the Federal Constitutional Act on the Accession of Austria to the European Union of 9 September 1994 (EU-Beitritts-BVG)<sup>17</sup>.

According to Art I of the EU-Beitritts-BVG, "based on the acceptance of this Federal Constitutional Act on the part of the people of the Federation, the authorities competent pursuant to the Federal Constitution shall be authorized to conclude the Treaty regarding the accession of Austria to the European Union in accordance with the result of the negotiations as set forth by the accession conference on 12<sup>th</sup> April 1994". Under Art II "the Treaty on the Accession of Austria to the European Union shall only be entered into upon ratification by the National Council with the consent of the Federal Council. Each of the resolutions requires the presence of at least half of the members and a majority of two thirds of the votes cast".

In the run-up to the EU accession, there was wide-ranging consensus in jurisprudence<sup>18</sup> that the accession had to be qualified as a total revision of the Austrian Federal Constitution in the terms of Art 44, sec 3 B-VG. The Government bill on the EU-Beitritts-BVG also shared this opinion. The EU accession would significantly affect the principles of democracy, rule of law, separation of powers and federalism entailed in the Federal Constitution.<sup>19</sup> Regarding the democratic principle, the Government bill explicated that the EU accession had to be seen as a total revision, since certain legislative powers were transferred to Community bodies and that hence the participation of the general representative bodies (ie, the National Council under the contribution of the Federal Council at the federal level and Federal State Parliaments at the federal state level) in generating the legal provisions authoritative for Austria would be limited in those legal areas covered by European Union law. Concerning the principle of the rule of law, the central role of the ECJ was stressed, which assigns itself the ultimate decision on the conformity of domestic legal acts with EU law as well as on the legality of legal acts under Community law. The jurisdiction of the ECJ in the so-called preliminary decision procedure regarding issues of the interpretation of Community law would also limit the independent decision making of domestic high courts. Regarding the separation of powers, the Government bill made clear that Community law entailed no conventional organisational or functional separation of the (state) areas of responsibility, ie, legislation, administration and judiciary, but rather a special functional order under Community law, which was based in particular on the dualism of the representation of the Community interest and the interests of the individual Member states. Finally, it was stated that the interventions into federal state powers associated with the EU accession would also impose restrictions on the principle of federalism.<sup>20</sup> According to *Öhlinger*<sup>21</sup>, it could be argued, in view of an assessment of the effects of EU accession on the democratic principle, that this doubtlessly significant impact on the federal constitutional order alone would qualify as a total revision of the Federal Constitution in terms of Art 44, sec 3 B-VG.

<sup>17</sup> BGBl 1994/744.

<sup>18</sup> *Öhlinger* (1999a) Rn 2; *Öhlinger* (1968); *Öhlinger* (1973) 213; *Öhlinger* (1999b) 82 f; *Griller* (1995); *Stolzlechner* (1994); *Adamovich / Funk / Holzinger* (1997) Rn 17.060; as well as *Azizi* (1989) 273 ff. But differently *Rack* (1988); *Esterbauer* (1989) 10.

<sup>19</sup> BlgNR 18 GP RV 1546, 3.

<sup>20</sup> BlgNR 18 GP RV 1546, 3 f. For the democratic principle, see also *Pernthaler* (1997) 777 ff; *Öhlinger* (1988) 56 ff; and *Rill / Schäffer* (2001) Rn 24 f. For the constitutional principle, see *Pernthaler* (1997) 789 ff. For the federal principle, see *ibidem* 783 ff; *Burtscher* (1990). For the liberal and republican principle, see *Öhlinger* (1999a) Rn 2 with further references.

<sup>21</sup> *Öhlinger* (1999a) Rn 3; *Öhlinger* (1998) 58 ff; cf also *Rill* (1990) 15 ff.

However, the EU accession does not only change the content of the Austrian Federal Constitution, the function of the state constitution is also fundamentally limited. According to *Öhlinger*, due to the precedence of Community law (henceforth, Union law) over state law, including constitutional law, the federal constitutional law would lose its highest rank among the legal provisions in force on the territory of the Republic of Austria. This massive functional loss alone, which concerned the federal constitutional law in its very definition, would have to be qualified as a total revision.<sup>22</sup> Therefore, the concept of constitution itself had changed fundamentally<sup>23</sup>.

In the run-up to the EU accession, it was contested within jurisprudence whether Art 44, sec 3 B-VG was also applicable to state treaties, and whether it would constitutionally be admissible to cause a total revision of the Austrian Federal Constitution in the terms of Art 44, sec 3 B-VG by concluding a state treaty. Under Art 50, sec 1 B-VG as amended at the time of the EU accession,<sup>24</sup> political state treaties and state treaties which modify or complement existent laws and do not fall under Art 16 B-VG require the approval of the National Council. When these state treaties concern the autonomous area of activity of the Federal States, the approval of the Federal Council is also required. Under Art 50, sec 3 B-VG, Art 42, sec 1 to 4 B-VG has to be applied to resolutions of the National Council under sec 1 and 2, and if the state treaty amends or complements constitutional law, Art 44, sec 1 and 2 B-VG has to be applied. In an approving resolution under sec 1, such state treaties and such provisions of state treaties have explicitly to be qualified as "constitution"-amending. Since an explicit reference<sup>25</sup> to Art 44, sec 3 B-VG is missing in Art 50, sec 3 B-VG, the legal situation could not be clarified unambiguously.

Essentially, three different positions were advocated in jurisprudence: Especially *Walter* argued that state treaties which entail a total revision do not require a referendum, since Art 50, sec 3 B-VG only refers to Art 44, sec 1 and 2 but not to sec 3.<sup>25</sup> *Öhlinger* suggested, however, that also state treaties with total revision effect required a mandatory referendum.<sup>26</sup> Finally, there was the position in academia that a total revision by dint of state treaty was inadmissible; in turn, this required that concluding such a state treaty would need to be based on a Federal Constitutional Act with mandatory referendum in such a way that the issue of a total revision of the Federal Constitution would not emerge, when it comes to the approval of the state treaty.<sup>27</sup> The Constitutional Court (VfGH) apparently argued that the total revision of the Federal Constitution was possible by dint of concluding a state treaty, and that in such a case a procedure under Art 44, sec 3 B-VG was required<sup>28</sup>.

In view of these circumstances, the Government bill suggested to introduce a special provision on the membership of Austria in the European Union under federal constitutional law and to subject it to the procedure under Art 44, sec 3 B-VG.<sup>29</sup> The latter was meant to establish the basis for the conclusion of the Accession Treaty with the help of a substantively tailor-made Federal Constitutional Act, which preceded total constitutional revision. This would allow to conclude the Accession Treaty, without this international treaty being subject to a renewed debate about a total constitutional revision. On the other hand, it was meant to open up the Austrian legal order for the legal order of the

<sup>22</sup> *Öhlinger* (1999a) Rn 4 with further references.

<sup>23</sup> *Öhlinger* (2009a) Rn 137.

<sup>24</sup> Art 50 B-VG, BGBl 1930/1 as amended by BGBl 1988/685.

<sup>25</sup> *Walter / Mayer* (1992) Rn 230. See also *Kelsen / Froehlich / Merkl* (1922) 137; and *Metall* (1928) 111.

<sup>26</sup> *Öhlinger* (1998) 47 ff; *Öhlinger* (1973) 211 ff; *Öhlinger* (1968) 178.

<sup>27</sup> *Rill* (1990) 17 f; *Azizi* (1989) 287. Critical *Öhlinger* (1988) 15 ff. See also *Griller* (1991) 687. *Holzinger*, (1993) 13 with further references. Cf also *Retter* (1994/95) 84.

<sup>28</sup> *Holzinger* (1993) 13, referring to VfSlg 11.500/1987.

<sup>29</sup> BlgNR 18 GP RV 1546, 4. cf *Öhlinger* (1999a) Rn 5; and *Griller* (1995) 90.

European Union in a way that accommodated the latter's particular validity claim, determined especially by the primacy and direct enforcement of Community law.

Art. I EU-Beitritts-BVG authorised the competent authorities under federal constitutional law – the Federal President under Art 65, sec 1 B-VG as well as the contributing Federal Government or its individual members respectively under Art 67 B-VG – to enter the Accession Treaty in accordance with the negotiation result set forth by the accession conference on 12<sup>th</sup> April 1994<sup>30</sup>.

The EU-Beitritts-BVG stated in its Art II that the Accession Treaty was only to be entered into upon ratification by the National Council and the approval of the Federal Council – in both cases with a majority of two thirds. This would also have been a result of Art 50, sec 3 in connection with Art 44, sec 1 and 2 B-VG. As *lex specialis* to Art 50, Art II EU-Beitritts-BVG released its sec 3 also from the obligation, stated in the second clause, to explicitly denote those provisions in a state treaty that change the constitution as such.<sup>31</sup> According to the Government bill, this was the explicit aim of Art II EU-Beitritts-BVG, since a precise determination of the constitution-amending parts of the Accession Treaty was hardly possible, while an anchoring of the whole Accession Treaty under constitutional law was highly impractical; these circumstances were not least due to the comprehensive precedence of directly applicable Community law over domestic law<sup>32</sup>.

This leaves open the question of whether the normative contents of Art II EU-Beitritts-BVG does not go beyond the exclusion of the duty of determination<sup>33</sup>, or whether it entirely overrides Art 50 B-VG with regard to the Accession Treaty.<sup>34</sup> This was not only important with regard to Art 50 B-VG and the corresponding Art 49 B-VG concerning the disclosure duty<sup>35</sup> and the applicability of Art 140a B-VG<sup>36</sup> to judicial reviews of the Constitutional Court; rather it was also especially significant for the question of whether and under what status the Accession Treaty was incorporated into the Austrian legal order.<sup>37</sup> This left also unclear, how future amendments of the primary law of the European Union would have to be approved in Austria.

At first, let's turn to the question of whether the Accession Treaty can be considered a part of the Austrian legal order. Concerning this matter, the opinion can be found that Art II EU-Beitritts-BVG had entirely overridden Art 50, sec 3 B-VG with regard to the Accession Treaty and that the Treaty had, hence, not become a part of the Austrian legal order. In this way, the Accession Treaty was only part of Community law in effect in Austria.<sup>38</sup> *Öhlinger* considers this opinion untenable because the interpretation of the Accession Treaty as sole Community law would misjudge the fact that the Treaty adapts not

<sup>30</sup> BlgNR 18 GP RV 1546, 8; and BlgNR 18 GP AB 1600, 15. cf also *Stolzlechner* (1994) 169. For criticism of the reference to the unfinished Treaty text as well as the topic of the referendum only accessible by a "labyrinthian reference technique", see *Öhlinger* (1999a) Rn 8 and 9 with further references; and *Griller* (1995) 90 f.

<sup>31</sup> See *Öhlinger* (1999a) Rn 10 ff with further references; and with critical attitude *Griller* (1995) 94.

<sup>32</sup> BlgNR 18 GP RV 1546, 4 f. See also *Holzinger* (1996) 165. Cf also *Griller* (1995) 94.

<sup>33</sup> So apparently *Stolzlechner* (1994) 172.

<sup>34</sup> So the Government draft, BlgNR 18 GP RV 1546, 4 f. According to *Holzinger* (1996) 165, the Accession Treaty cannot be qualified as state treaty under Art 50, sec 1, B-VG with all resulting consequences, such as the validity of Art 49 and 140a B-VG. But differently *Griller* (1995) 93 f, who excludes the duty of determination under Art 50, sec 3, B-VG, the decision on a reservation of implementation under Art 50, sec 2 B-VG as well as the applicability of the mentioned Art 42, sec 2-4 and Art 44, sec 1 and 2 B-VG, but not the applicability of Art 49 and Art 140 in connection with 140a B-VG.

<sup>35</sup> Cf *Lienbacher* (1994).

<sup>36</sup> *Öhlinger* (1999a) Rn 18. Cf *Laurer* (1997) 804; and *Vcelouch* (1996), 58 ff.

<sup>37</sup> Unrewarding since contradictory, BlgNR 18 GP RV 1546, 4 f.

<sup>38</sup> *Adamovich / Funk / Holzinger* (1997) Rn 17.062; similarly *Funk* (1995) 97 f. But differently by taking recourse to the Government draft *Stolzlechner* (1994) 173; as well as *Holzinger* (1996) 163 ff.

only Community law but also Union law (international law in the classical sense) that entails no autonomous validity claim. From this followed that this opinion was untenable with regard to this part of the Accession Treaty. Furthermore, although the primary Union law entailed obligations under international law, it had no domestic legal effects so that every activity of an Austrian authority within the confines of the EU Treaty would remain without a foundation under constitutional law. On the other hand, *Öhlinger* also objects that since the EU-Beitritts-BVG denotes the Accession Treaty as "state treaty"; such a state treaty would (also) become a part of the Austrian legal order by dint of the collaboration of Austrian authorities and its publication in the Federal Law Gazette alone. The Accession Treaty should rather also be considered a part of Austrian law. Concerning the received Community law, its content would not go beyond the unreserved opening up of the Austrian legal order for the autonomous validity claim of Community law, in order to immediately step behind the validity claim of the law it received<sup>39</sup>.

Concerning the question of the rank of the Accession Treaty in the Austrian legal order: Reduced to the Accession Treaty, the issue arises only in cases of an amendment of the Accession Treaty<sup>40</sup> or of its review by the Constitutional Court<sup>41</sup>. According to *Öhlinger*,<sup>42</sup> the rank is determined by the EU-Beitritts-BVG, which deliberately refrained from allocating a formal hierarchy and was enacted in the procedure under Art 44, sec 3, B-VG. Based on the assumption that the status of the EU-Beitritts-BVG, justified at the highest level of the Austrian legal order, would be transferred to the state treaty based on it, the latter would be superior to contradicting older state law of every level and would hence be immune to derogation by future state law, except at the highest level of the Austrian legal order. The withdrawal from the European Union, *contrarius actus* to the accession, required therefore in turn a procedure according to Art 44, sec 3 B-VG<sup>43</sup>.

Based on the assumption that the substantive content of the Accession Treaty does not go beyond the conditions stipulated in the Act of Accession, Community law (henceforth, Union law) extended to the Republic of Austria by the Accession Treaty is not transformed into Austrian law and, hence, not a part of the Austrian legal order. Thus, the question of its rank within the Austrian legal order does not emerge; while the rank of Community law in its relation to Austrian law is determined by Community law itself.<sup>44</sup>

With regard to hitherto existing Union law, especially the EU Treaty (prev vers), which was qualified as international law, the following has to be said: With the Accession Treaty the EU Treaty (prev vers) became a part of the Austrian legal order. Although the Accession Treaty was authorised by the EU-Beitritts-BVG, it could not be assumed, according to *Öhlinger*, that it is on a par with the guiding constitutional principles of Art 44, sec 3 B-VG.<sup>45</sup> This was to be justified with the fact that the intention of the EU-Beitritts-BVG was to bridge the contradictions between European Union law and the guiding principles of the Austrian Federal Constitution, but not to elevate the entire legislation of the European Union to the rank of such principles. Rather, it only ranks in such a way as far as there is a contradiction between the fundamental order under constitutional law and the Union law adapted by the Accession Treaty, which will hardly be the case concerning Union law. *Öhlinger* principally ascribed the rank of mere "ordinary" constitutional law to the

<sup>39</sup> See *Öhlinger* (1999a) Rn 14 f with further references. See also *Griller* (1996) 643.

<sup>40</sup> On this *Stolzlechner* (1994) 172 ff.

<sup>41</sup> See *Öhlinger / Potacs* (2006) 178 f with further references.

<sup>42</sup> See *Öhlinger* (1999a) Rn 16.

<sup>43</sup> So also *Baumgartner* (1997) 88 ff and 112; and *Baumgartner* (1998) 121. But differently *Griller* (1995) 95, who assumes that the EU Accession Act authorises accession, but does not oblige to the latter. *Holzinger* (1996) 168, also argues that a possible withdrawal would not cause a total revision of the Constitution.

<sup>44</sup> Cf *Öhlinger* (1999a) Rn 17.

<sup>45</sup> See *Öhlinger* (1999a) Rn 18.

EU Treaty (prev vers), while the view would also be conceivable that the provisions of the EU Treaty would have to be put at the respective level within the hierarchy of the Austrian legal system at which they would have to be generated in Austrian law.<sup>46</sup> This would at least require to assume the status of law; however, an unambiguous answer would not be possible in view of a definition in terms of Art 50, sec 3 B-VG. The rank of legal acts enacted on the basis of the EU Treaty (prev vers) was therefore determined according to Art 9, sec 2 B-VG.<sup>47</sup>

#### 5.1.2.3. Federal Constitutional Acts on the conclusion of the Treaties of Amsterdam and Nice, of the Treaty establishing a Constitution for Europe as well as the Accession Treaties of 2003 and 2005

The 1997 Treaty of Amsterdam<sup>48</sup>, the 2001 Treaty of Nice<sup>49</sup> and the Treaty establishing a Constitution for Europe of 2004<sup>50</sup> as well as the Accession Treaties of 2003<sup>51</sup> and 2005<sup>52</sup> were not regarded by the federal constitutional legislator and jurisprudence as state treaties that trigger a total revision of the Austrian Federal Constitution in terms of Art 44, sec 3 B-VG; they were individually concluded and approved on the basis of a special authorisation granted by a Federal Constitutional Act modelled after the EU-Beitritts-BVG.

#### 5.1.2.4. Art. 50, sec 1, cl 2 B-VG and the Treaty of Lisbon

The B-VG reform 2008/2 primarily aimed at a simplification of the Constitution. On the one hand, it was intended to generally eradicate the category of constitution-amending and -complementing state treaties as well as constitution-amending and -complementing state treaty provisions from the Austrian constitutional order and to prevent any future generation of constitutional law in the form of a state treaty or single state treaty provisions. Furthermore, the requirement should in future be abandoned to establish a special Federal Constitutional Act, set as a precedent by the legal technique of the EU-Beitritts-BVG, as legal foundation for the conclusion of state treaties that amend or complement the primary law of the European Union.<sup>53</sup>

Under Art 50, sec 1, cl 2 B-VG, state treaties by which the contractual bases of the European Union are modified require the approval of the National Council. According to Art 50, sec 4 B-VG, such state treaties may only be concluded – notwithstanding Art 44, sec

<sup>46</sup> Similarly but also mistaken with regard to Community law *Laurer* (1997) 806 ff.

<sup>47</sup> *Öhlinger* (1996) 195 ff; and *Öhlinger / Potacs* (2006) 16 ff.

<sup>48</sup> OJ 1997 C 340. Bundesverfassungsgesetz über den Abschluss des Vertrages von Amsterdam, BGBl I 1998/76; BlgNR 20 GP RV 1152, 3; BlgNR 20 GP AB 1168, 1. Genehmigung des Vertrages von Amsterdam, BGBl III 1999/83; BlgNR 20 GP RV 1211, 130; BlgNR 20 GP AB 1253. See *Öhlinger* (1998), 301 ff; and *Öhlinger* (2001) 224 f. Cf *Winkler* (2003) 55.

<sup>49</sup> OJ 2001 C 80. Bundesverfassungsgesetz über den Abschluss des Vertrages von Nizza, BGBl I 2001/120; BlgNR 21 GP RV 565, 3; BlgNR 21 GP AB 807, 1. Genehmigung des Vertrages von Nizza, BGBl III 2003/4; BlgNR 21 GP RV 600, 75; BlgNR 21 GP AB 888, 14. Cf *Winkler* (2003) 55.

<sup>50</sup> OJ 2004 C 310. Bundesverfassungsgesetz über den Abschluss des Vertrages über eine Verfassung für Europa, BGBl I 2005/12; BlgNR 22 GP RV 789, 9; BlgNR 22 GP AB 820. Genehmigung des Vertrages über eine Verfassung für Europa, erteilt, aber wegen des Scheiterns des Ratifikationsprozesses nicht kundgemacht; BlgNR 22 GP RV 851; BlgNR 22 GP AB 919. For the debate about the issue of an overall amendment, see *Öhlinger* (2004a); and *Griller* (2004). Cf also *Hammer* (2004) 113 f; *Obwexer* (2004); *Schäffer* (2006) 58; *Schramm* (2006); *Hummer* (2005) 277 ff; *Öhlinger* (2007a) 347 ff; *Öhlinger* (2008a); and *Öhlinger* (2005) 692 ff.

<sup>51</sup> OJ 2003 L 236 and C 227E. Bundesverfassungsgesetz über den Abschluss des Beitrittsvertrages 2003, BGBl I 2003/53; BlgNR 22 GP RV 110, 2; BlgNR 22 GP AB 161. Genehmigung des Beitrittsvertrages 2003, BGBl III 2004/20; BlgNR 22 GP RV 230, 15 f; BlgNR 22 GP AB 286, 7 f.

<sup>52</sup> OJ 2005 L 157. Bundesverfassungsgesetz über den Abschluss des Beitrittsvertrages 2005, BGBl I 2006/25; BlgNR 22 GP RV 1265, 2; BlgNR 21 GP AB 1278, 1. Genehmigung des Beitrittsvertrages 2005, BGBl III 2006/185; BlgNR 22 GP RV 1389, 16; BlgNR 22 GP AB 1395, 2.

<sup>53</sup> See *Öhlinger* (2009b) Rn 11; also *Lienbacher* (2008b); *Janko* (2009); and *Lindermuth* (2009).

3 B-VG – with the approval of the National Council and the consent of the Federal Council – each requiring the presence of at least half of its members and the majority of two thirds of the votes cast. These state treaties are not subject to provisions regarding the simplified procedure for the amendment of state treaties and regarding the decision about a reservation of implementation by the National Council under Art 50, sec 2, cl 1 and 3 B-VG and also under Art 50, sec 3 B-VG – Art 42, sec 1 to 4 B-VG<sup>54</sup>.

The contractual primary law of the European Union can be regarded as “state treaties by which the contractual bases of the European Union are modified”, ie the founding Treaties of the European Communities (EC Treaty and EAEC Treaty) as well as of the European Union (EU Treaty after the coming into effect of the Treaty of Lisbon: EU Treaty and Functioning of the EU Treaty) including attachments, appendices and protocols as well as subsequent contractual amendments and complements of these Treaties including the Accession Treaties. Also covered are simplified Treaty amendments of the primary law of the European Union under contribution of the Member states. An analogous application of Art 50, sec 1, cl 2 B-VG can be considered for treaties under international law which only the European Union (henceforth, also the European Communities) enters into, if the law of the European Union itself requires the involvement of the Member states according to their constitutional provisions, given that the primary law of the European Union is concerned.<sup>55</sup> Consideration should, for instance, be given to the accession of the European Union to the European Convention on Human Rights (ECHR)<sup>56</sup>.

Art. 50, sec 1, cl 2 B-VG replaces the existing state practice of special authorisation under federal constitutional law for the conclusion of state treaties by which the contractual bases of the European Union are modified with the general authorisation of the National Council to approve such state treaties and in this way to establish the foundation for their transfer into the Austrian legal order. Art 50, sec 4 B-VG demands for the approval of such state treaties particular requirements for the respective resolutions. The approval of the National Council and the consent of the Federal Council each require the presence of at least half of its members and the majority of two thirds of the votes cast. The approval turns such a state treaty neither into federal constitutional law in the formal sense nor into a standard for judicial review of the Constitutional Court<sup>57</sup>.

If a state treaty by which the contractual bases of the European Union are modified causes a total revision of the Austrian Federal Constitution, a referendum has to take place (compulsory referendum). This follows from the passage “notwithstanding Art 44 para 3” B-VG included in Art 50, sec 4 B-VG. According to the Government bill, Art 50, sec 1, cl 2 B-VG does in connection with its sec 4 not authorise to conclude state treaties that have the effect of total revision. The conclusion of such a state treaty requires therefore a corresponding special authorisation under federal constitutional law, which as total revision had to be subject to a referendum under Art 44, sec 3 B-VG. Based on this, in the literature it is mainly argued,<sup>58</sup> especially by *Lienbacher*<sup>59</sup> and *Siess-Scherz*<sup>60</sup>, that the federal constitutional legislator had emphasised especially through the constituent fact “notwithstanding Art 44 para 3” B-VG that this exemption regime for state treaties that amend the contractual bases of the European Union finds its limits in the total revision of the Federal Constitution. For such a case, the general provisions for the conclusion of constitution-amending state treaties have therefore to be applied; a domestic

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<sup>54</sup> On this *Öhlinger* (2009b) Rn 72 f.

<sup>55</sup> See *Öhlinger* (2009b) Rn 62; *Öhlinger* (2008b).

<sup>56</sup> Cf *Obwexer* (2008) 83.

<sup>57</sup> See *Öhlinger* (2009b) Rn 68; *Öhlinger* (2009a) Rn 195.

<sup>58</sup> See *Weichselbaum* (2007); *Wiederin* (2008) 55 ff; and *Grabenwarter / Ohms* (2008) Art 44 B-VG, note 1.

<sup>59</sup> *Lienbacher* (2009) 430 f; *Lienbacher* (2008a) 32 f.

<sup>60</sup> *Siess-Scherz* (2009) 102 f.

foundation under constitutional law was required, which was subject to the provision of Art 44, sec 3 B-VG. On the other hand, *Öhlinger* argues that a state treaty by which the contractual bases of the European Union is modified in a manner that implies a total revision of the Austrian Federal Constitution may itself be subject to a (compulsory) referendum under Art 44, sec 3 B-VG, since the opinion advocated in the Government bill finds no basis in the legal text of Art 50, sec 4 B-VG. However, a special foundation under federal constitutional law that would pave the way for a total revision was of course possible.<sup>61</sup> *Adamovich* also assumes that in the case of a total revision of the Federal Constitution, the referendum has to directly address the state treaty<sup>62</sup>.

Concerning a voluntary referendum under Art 44, sec 3 B-VG on a state treaty by which the contractual bases of the European Union are modified but no total revision of the Austrian Federal Constitution is caused, *Lienbacher*<sup>63</sup> and *Siess-Scherz*<sup>64</sup> assume that henceforth Art 50, sec 4 B-VG only allows a voluntary referendum, if a foundation under federal constitutional law has been established previously, which becomes then the subject of vote. Such an authorisation under federal constitutional law would be quite admissible, if the state treaty to be concluded had no total revising effect. A voluntary referendum could be conducted on such an authorisation under federal constitutional law under Art 44, sec 3 B-VG, but this would not be possible in the parliamentary approval procedure under Art 50 B-VG. On this *Öhlinger* argues, however, that based on the fact that Art 50, sec 4 B-VG refers generally to Art 44, sec 3 B-VG, the legal admissibility for a voluntary referendum on such state treaties that cause no total revision emerges provided that conditions specified in Art 44, sec 3 B-VG are met – the demand of one third of the members of the National Council or the Federal Council.<sup>65</sup> *Adamovich* also assumes that a voluntary referendum on such a state treaty was legally admissible<sup>66</sup>.

Since neither the federal constitutional legislator nor jurisprudence regarded it as a state treaty that caused a total revision of the Austrian Federal Constitution in terms of Art 44, sec 3 B-VG, the Treaty of Lisbon was concluded and approved on the basis of the new Art 50, sec 1, cl 2 in connection with sec 4 B-VG.<sup>67</sup>

#### 5.1.2.5. Art. 23i B-VG

With the Lissabon-Begleitnovelle<sup>68</sup>, coming into effect on 1 August 2010, the new Art 23i B-VG was established.<sup>69</sup>

According to Art 23i, sec 1 B-VG, the Federal Chancellor as Austrian representative in the European Council may only approve an initiative under Art 48, sec 7 TEU (simplified Treaty amendment procedure via passerelle clauses/ bridging clauses), if he has previously been authorised to do so by the National Council with the consent of the Federal Council on the basis of a suggestion by the Federal Government. The resolutions of the National Council and the Federal Council each require the presence of at least half of its members and the majority of two thirds of the votes cast.

<sup>61</sup> See *Öhlinger* (2009b) Rn 70.

<sup>62</sup> *Adamovich* (2007) 2.

<sup>63</sup> *Lienbacher* (2009) 430 f; *Lienbacher* (2008a) 32 f.

<sup>64</sup> *Siess-Scherz* (2009) 103.

<sup>65</sup> See *Öhlinger* (2009b) Rn 71.

<sup>66</sup> *Adamovich* (2007) 2 and 8.

<sup>67</sup> OJ 2007 C 306, amended by OJ 2009 C 290. Genehmigung des Vertrages von Lissabon, BGBl III 2009/132; BlgNR 23 GP RV 417, 42-49; BlgNR 22 GP AB 484, 21-25. See *Öhlinger* (2008a); *Öhlinger* (2009c) 419; *Öhlinger* (2007a); *Lienbacher* (2009) 434; *Adamovich* (2007); *Cede* (2008); *Fischer* (2008).

<sup>68</sup> BGBl I 2010/57. See BlgNR IA 978, A-BR 691, AB 827.

<sup>69</sup> *Critical Griller* (2011); and *Kröll* (2010).

To the extent that Union law provides the opportunity for national parliaments to reject an initiative or a suggestion concerning (1) the transition from unanimity to qualified majority or (2) the transition from a special to an ordinary legislative procedure, the National Council can with consent of the Federal Council under Art 23i, sec 2 B-VG reject this initiative or this proposal within the time stipulated by Union law. Art 23i, sec 2 B-VG has to be applied in the case of an initiative of the European Council according to Art 48, sec 7 B-VG as well as a proposal by the European Commission under Art 81, sec 3 TFEU (establishing of aspects of family law with cross-border implications).

According to sec 3, resolutions of the Council under Art 311, sec 3, cl 2 and 3 TFEU which introduce new categories of resources of the European Union require the approval of the National Council with the consent of the Federal Council. The terms of Art 50, sec 4, sub-sec. 2 B-VG have to be applied. Other decisions of the Council applying Art 311, sec 3, sub-sec 1 TFEU which lay down provisions regarding the system of the Union's own resources have to be approved by the National Council; here, the terms of Art 50, sec 1, cl 1 B-VG have to be applied.

Decisions of the European Council and the Council which according to Union law only come into effect after the approval of the Member states in accordance with their respective constitutional requirements<sup>70</sup> require the approval of the National Council with the consent of the Federal Council under sec 4 in the general sense of Art 50, sec 4 B-VG. All decisions of the National Council and the Federal Council under Art 23i, sec 1 to 4 B-VG have to be published in the Federal Law Gazette according to sec 5.

## 5.2. Constitutional limits to EU-integration

### 5.2.1. Limits to the (further) transfer of powers to the EU through Treaty amendments ("non transferable" constitutional identities?)

In the following, it has to be discussed from the perspective of the limits of integration, whether and to what extent the authorisation of accession under federal constitutional law should be limited in favour of certain principles or fundamental values of the Austrian Federal Constitution; and whether and to what extent the Austrian Federal Constitution itself limits the development of primary and secondary law of the European Union.

The EU-Beitritts-BVG was enacted without any explicit substantive limits to integration. In this regard, the Government bill<sup>71</sup> stated that, even without such an explicit substantive reference to the constitutionally relevant aspects of Community law, the EU-Beitritts-BVG in connection with the state of development of EU law at the time of the Austrian accession would constitute the standard for the Constitutional Court's judicial review of future developments of the law. In substantive view, the EU-Beitritts-BVG refers finally to the result of the negotiations of 12 April 1994 from which substantive standards could be derived. Although the EU accession would modify the fundamental principles of the Austrian Federal Constitution (especially the democratic principle, but also the principles of the separation of powers, the rule of law and federalism), they still persisted but in the modified form shaped by the Accession Treaty, whose conclusion was based on the EU-

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<sup>70</sup> In question are, for instance, Art 48, sec. 6, sub-sec. 2 TEU (simplified Treaty amendment procedure), Art 25, sec. 2 TFEU (addition of citizens' rights Art 20, sec 2 TFEU), Art 218, sec. 8, sub-sec 2 TFEU (EU accession to the ECHR), Art 223, sec 1, sub-sec 2 TFEU (direct election of the European Parliament), Art 262 TFEU (jurisdiction of the ECJ in disputes relating to European intellectual property rights) and Art 40.2. of the Protocol on the Statute of the European System of Central Banks and the European Central Bank (composition of the General Council of the ECB). cf BlgNR 24 GP AB 827, 15.

<sup>71</sup> BlgNR 18 GP RV 1546, 6 f.

Beitritts-BVG. Also future total revisions of such a modified fundamental order of the federal constitutional law required therefore a renewed referendum before coming into effect. This would also apply to the case that a future amendment of the Union Treaty would imply a total revision; in this context, it should be self-evident that only in rare cases the amendment of the Union Treaty would have such an effect. In the framework of the decision about the EU-Beitritt-BVG, a report of the constitutional committee<sup>72</sup> of the National Council also emphasised that the fundamental principles would remain in effect in their modified form. This fact became of particular significance for the issue, discussed in the proceedings of the committee, whether it would be necessary or expedient to establish provisions under federal constitutional law that could work as "integration limits". When this notion was finally abandoned, it would mainly happen due to agreement with the Government bill. Future amendments of the Community Treaties had also totally revising character given that they concern these modified fundamental principles; in this case, they would only be admissible via a total revision of the Federal Constitution including a referendum – even without the laying down of special integration limits. It would therefore not be necessary to reiterate the fundamental principles modified by the EU-Beitritts-BVG in the form of integration limits.

Given the fact that there was no reason in legal theory to introduce explicit substantive integration limits into the EU-Beitritts-BVG, the EU-Beitritts-BVG was enacted without explicit limits due to mere reasons of judicial policy; there was especially the fear that the expected disputes about the expedient wording of such integration limits would hamper the constitutional preparations of Austrian EU accession unnecessarily<sup>73</sup>. Nevertheless, the existence of integration limits is almost anonymously recognised in the Austrian literature<sup>74</sup>.

Future amendments of the primary law of the European Union have to be judged by the fundamental principles of the Austrian Federal Constitution – in their substance modified by the EU accession. If the assessment of this Treaty amendment establishes on the basis of the fundamental principles modified by the EU accession that a total revision of the Austrian Federal Constitution would be caused in terms of Art 44, sec 3 B-VG, a renewed referendum had to be conducted. However, this means also that not every amendment of the primary law of the European Union requires a referendum, although this does not directly derive from the EU-Beitritts-BVG.<sup>75</sup> The Treaty of Amsterdam, the Treaty of Nice and the Treaty establishing a Constitution for Europe as well as the 2003 and 2005 Accession Treaties were not regarded by both jurisprudence and state practice as state treaties that cause a total revision of the Austrian Federal Constitution.

With regard to the totally revising or partially revising effect of an amendment of the primary law of the European Union, two points have to be made: On the one hand, it is extremely difficult<sup>76</sup> to precisely demarcate the totally revising from the partially revising effect of a Treaty amendment due to the vague nature of the term "total revision of the Federal Constitution"<sup>77</sup>. According to the prevailing legal doctrine, a "total revision of the Federal Constitution" exists, if the latter is modified in such a way that one of its "build-

<sup>72</sup> BlgNR 18 GP AB 1600, 14.

<sup>73</sup> See *Holzinger* (1996) 166.

<sup>74</sup> *Adamovich / Funk / Holzinger* (1997) Rn 17.061; *Baumgartner* (1997) 104 ff; *Holzinger* (1996) 166; *Öhlinger* (1999a) Rn 19; *Öhlinger* (1998) 299 f; *Öhlinger / Potacs* (2006) 56 ff; *Pernthaler* (1997) 795; *Rill* (2001) Rn 51 f; *Stolzlechner* (1994) 177; *Thun-Hohenstein* (1995); and *Walter / Mayer / Kucsko-Stadlmayer* (2007) Rn 246/10. More cautious *Griller* (1995) 96. Doubtful *Klecatsky* (1997) 75; and *Retter* (1994/95) 87 f.

<sup>75</sup> *Öhlinger* (1999a) Rn 19 f; and *Griller* (1995) 96.

<sup>76</sup> *Öhlinger* (1999a) Rn 21; also *Stolzlechner* (1994) 177.

<sup>77</sup> Cf *Pernthaler* (1998).

ing precepts" (fundamental principles) is abolished or changed, or if the relation of these "building precepts" (fundamental principles) is substantially modified. However, concerning the number of "building precepts" (fundamental principles) and their substance in part significant divergence of opinions exists in jurisprudence and judicature. A detailed definition of a "total revision of the Federal Constitution" was however even missing before the enactment of the EU-Beitritts-BVG.<sup>78</sup> Established is only that the EU-Beitritts-BVG modified the principles of democracy, rule of law, separation of powers and federalism<sup>79</sup>.

On the other hand, it is extremely unclear and can finally not be clearly answered by legal theory to what extent the fundamental principles have been modified by the EU-Beitritts-BVG and, correspondingly, to what extent the EU membership itself has become a guiding principle of the Federal Constitution.<sup>80</sup> The – rather awkward<sup>81</sup> – legal technique of the EU-Beitritts-BVG is rather an indication that the EU membership itself does not rank among the fundamental principles<sup>82</sup>.

With the coming into effect of the EU accession on 1 January 1995, the fundamental principles of the Austrian Federal Constitution were partly modified by the law of the European Union. This substantive modification results from the linking of the law of the European Union and Austrian law. According to *Griller*, the fundamental principles of the Austrian Federal Constitution acquire a new changed content in their interlink with the law of the European Union. The latter's provisions, which impact on the generation of law in Austria under the principles of democracy, rule of law, separation of powers and federalism, had themselves become a part of the fundamental principles of the Austrian Federal Constitution<sup>83</sup>.

Even a Treaty amendment that implies a significant amendment of EU internal, constitutional principles can due to the close link of EU law and Austrian law imply a total revision of the Austrian Federal Constitution, although the former does not cause any changes within the latter.<sup>84</sup> One can, for instance, think of the transformation of the European Union into a federal state or significant changes in the relation between the European Parliament, the Council and the Commission.

### 5.2.2. Scrutiny of secondary legislation, especially *ultra-vires*-Doctrine

Now the matter has to be discussed to what extent integration limits result from the Austrian Federal Constitution also for secondary Community law (henceforth, Union law) enacted after the EU accession, including the judicature of the ECJ and the CFI (henceforth, the Court of Justice of the European Union); and, correspondingly, whether acts of secondary Community law (henceforth, Union law) including the judicature which are not "covered" by the Treaties have at all to be regarded as legally relevant (*ultra-vires*-acts).

As already outlined, the EU-Beitritts-BVG was enacted without any explicit substantive integration limits. In the Government bill<sup>85</sup> the following was argued concerning acts of secondary Community law and the case law of ECJ and CFI: From the perspective of European law, it could with regard to the substantive amendment of the Union Treaty by

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<sup>78</sup> Cf *Ringhofer* (1977), 151; and *Öhlinger* (2009a) Rn 65.

<sup>79</sup> BlgNR 18 GP RV 1546, 3 f; BlgNR 18 GP AB 1600, 13 f. Also *Griller* (1995) 97.

<sup>80</sup> On this *Pernthaler* (1997) 794 f.

<sup>81</sup> So *Pernthaler* (1997) 795.

<sup>82</sup> So *Öhlinger* (1999a) Rn 21; *Griller* (1995) 95; and *Holzinger* (1996) 168. But differently *Baumgartner* (1997) 88 ff; and *Baumgartner* (1998) 121.

<sup>83</sup> *Griller* (1995) 96.

<sup>84</sup> Cf *Öhlinger* (1999a) Rn 22; *Griller* (1995) 96 f; and *Pernthaler* (1997) 782 and 795.

secondary EU law be said in advance that amendments of EU secondary law that exceeded its jurisdiction would have been inadmissible and, hence, illegal under current EU primary law. It could be assumed that if European institutions and bodies exceeded their jurisdiction, they would be subject to judicial review by the ECJ or CFI respectively, according to EU primary law as amended. If the explicit introduction of integration limits under constitutional law is advocated with reference to the argument that then also ultra-vires-acts of Union authorities (ie, acts enacted by exceeding the authorities' jurisdiction under the Union Treaty) can be opposed easier, the following may be added: From a legal perspective, such grossly poor acts by the institutions could not remain in force due to their serious and obvious nature, even without the explicit enactment of integration limits under constitutional law – especially with regard to the fundamental principles of the Austrian Constitution that limit the authorisation of integration under constitutional law. Hence, such acts can potentially be regarded as absolutely void.<sup>86</sup> To the extent to which national constitutional law implicitly or explicitly links the participation in the European Union to the preservation of certain fundamental principles, this could – considering the powers of the EU bodies – be regarded as a substantial approval of the Accession Treaty, which would limit the merely internal legal development without a formal Treaty amendment. From the viewpoint of the Austrian federal constitutional law, this means that legal acts of EU institutions that exceeded the competences resting in EU primary law adopted by the Accession Treaty and that obviously contradicted the fundamental principles of the Austrian Federal Constitution in its form modified by the EU accession were to be regarded as absolutely void and hence insignificant (absolute voidness due to serious and obvious defectiveness of a legal act).

In this context, the report of the constitutional committee<sup>87</sup> of the National Council emphasised in the framework of deciding upon the EU-Beitritt-BVG that legal acts not covered by the Community Treaties were inadmissible and, hence, that they were from the start not covered by the "integration authorisation" under federal constitutional law even without such integration limits. Such legal acts would therefore have to be judged by the standard of the mentioned fundamental principles by the competent domestic institutions and, if applicable, be regarded as void – as already detailed in the Government bill<sup>88</sup>.

According to *Holzinger*, the absolute voidness of ultra-vires-acts was to be established autonomously by each state institution that had to observe such a defective institutional act in a decision it had to take.<sup>89</sup> Based on the fact that the VfGH has no jurisdiction to subject Community law (henceforth, Union law) to a judicial review, it possesses in this regard no monopoly of review.<sup>90</sup> *Öhlinger* indicates that the exercise of such a incidental review authority by Austrian institutions would lead to a legally irreconcilable conflict with the monopoly of review and dismissal for Community law claimed by the ECJ; such a

<sup>85</sup> BlgNR 18 GP RV 1546, 7.

<sup>86</sup> In the literature, it was argued that limitations to integration would not only derive from the fundamental principles of the Federal Constitution but also from a far-reaching precept to preserve the identity of the Constitution, cf *Herbst* (1995) 300. For *Holzinger* (1996) 167, the question of the – potential – absolute voidness of acts of secondary Community law arises not only when such an act contradicts the fundamental principles of the Federal Constitution; the effect on them can be an indication for the seriousness and evidence of the deficiency, which results from the violation of jurisdiction, but it is not the merely decisive criterion of assessment. According to *Wimmer* (1990) 138 f, also the fundamental values of the social order have to be protected beyond the realm of the fundamental principles of the Federal Constitution. On this *Baumgartner* (1997) 108 ff.

<sup>87</sup> BlgNR 18 GP AB 1600, 14.

<sup>88</sup> The minority report attached to the committee report reveals, however, that this was hardly consensus. See BlgBG 18 GP AB 1600, 23 ff and 26 ff.

<sup>89</sup> *Holzinger* (1996) 166 f.

<sup>90</sup> *Öhlinger / Potacs* (2006) 178 ff with further references; similarly *Holzinger* (1996) 167.

conflict would also arise, if an Austrian institution qualified a ruling of the ECJ as an ultra-vires-act<sup>91</sup>.

For *Thun-Hohenstein*, absolute voidness does in contrast not only result from the hardly conceivable fact that an act of secondary Community law (henceforth, Union law) would obviously contradict the fundamental principles of the Federal Constitution as modified by the EU accession. Rather in case of such a legal act, absolute voidness could only be assumed under the criteria of legal non-existence outlined in the case law of the ECJ. If they do not apply, the only option is the explicit dismissal of the respective act by the ECJ. In turn, the legal non-existence of an act of secondary Community law is also possible, if it does not obviously contradict the fundamental principles. The same applies to the dismissal of a legal act by the ECJ.<sup>92</sup> For *Öhlinger* it is insufficient to simply negate integration limits under constitutional law for secondary Community law with the mere reference to the monopoly of review and dismissal of the ECJ, as *Thun-Hohenstein* does.<sup>93</sup> Based on the fact that this monopoly of review and dismissal rests in the pre-eminence of Community law over national law, which was commonly accepted for ordinary statute law and sub-statutory law but not for constitutional law, and which was still contested concerning certain central areas of state constitutions in the majority of Member states, at the same time a right to review for state (constitutional) courts is demanded concerning the compatibility of Community law with constitutional law, which is not subject to its primacy. In this extent, integration limits under constitutional law had also to be assumed for secondary Community law.

On the occasion of the EU accession, the Austrian federal constitutional legislator had deliberately refrained from laying down integration limits, well-aware of the unrestrained primacy of Community law (henceforth, Union law) demanded by the ECJ at this time and the corresponding monopoly of review and dismissal of the ECJ for secondary Community law. For *Öhlinger*, it seems hard to justify due to this renunciation alone that from the fundamental principles of the Federal Constitution limits can be derived for the legislation of Community institutions. Such an argument would entirely lose its foundation, once one turns to the scope of Community law unconditionally accepted by the EU-Beitritts-BVG. For *Öhlinger*, the most arguments indicate that no integration limits for secondary Community law can be derived from Austrian federal constitutional law<sup>94</sup>.

In this context, *Griller* refers to the argument that the ECJ alone is competent for the review of secondary Community law (henceforth, Union laws), which was also covered by the Accession Treaty and by the EC Treaty the latter referred to. The transfer of sovereign rights in the course of EU membership, hence, included also the exclusive jurisdiction of the ECJ. In any case, Austrian institutions may not exercise such a review. Only in cases of blatant ultra-vires-acts of the Communities including the ECJ, the review by Austrian institutions can become relevant<sup>95</sup>.

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<sup>91</sup> *Öhlinger* (1999a) Rn 23.

<sup>92</sup> *Thun-Hohenstein* (1995) 67 f; doubtful *Annacker* (1995) 760.

<sup>93</sup> *Öhlinger* (1999a) Rn 24.

<sup>94</sup> *Öhlinger* (1999a) Rn 25.

<sup>95</sup> *Griller* (1995) 100. Similarly *Baumgartner* (1997) 113 ff; and *Potacs* (1998). See also *Öhlinger / Potacs* (2006) 56 f; *Holzinger* (1996) 166 f; *Grabenwarter* (2008) Rn 55; *Retter* (1994/95) 87 f; *Vcelouch* (1996) 127 ff. But differently *Walter / Mayer / Kucsko-Stadlmayer* (2007) Rn 246/10 and 246/22; and *Mayer* (1996) 154 f.

Finally, it should be remarked that both *Holzinger*<sup>96</sup> as well as *Griller*<sup>97</sup> admit that the practical relevance of these questions is perhaps lower than the significant judicial interest would let one to assume.

### 5.3. Constitutional rules on implementing EU law

By dint of the precedence of Union law (henceforth, Community law) also over Austrian constitutional law – in Austria recognised at any case in principle, but limited in favour of the guiding principles of the Federal Constitution – Union law can override, replace, modify Austrian constitutional law and even assume the function of constitutional law<sup>98</sup>.

It exerts this effect but only to the extent to which the jurisdiction of the Union law (hitherto, Community law) reaches substantively: Outside of its jurisdiction but also inside the discretion left within Union law for state implementing regulations, there remains a binding effect of the Austrian legislator, which implements legal acts of secondary and tertiary Union law, to Austrian constitutional law<sup>99</sup>. The Austrian legislator is therefore subject to a double binding, a commitment to the Union law as well as – within the discretion left by the latter – to constitutional law (principle of double binding)<sup>100</sup>. This applies also to ordinances enacted by the competent authority implementing Union law as well as to state treaties concluded by Austria. Also in these cases a binding to higher-ranking state law exists so far as Union law does not determine the legal act.

Today the principle of double binding is uncontested in jurisprudence<sup>101</sup>. It is applied in the permanent case law of the VfGH<sup>102</sup>.

The binding to the constitutional law is subject to the review of the VfGH in the terms of Art 139 ff B-VG, including cases of the implementation of Union law (hitherto, Community law). To the extent that Union law determines the Austrian legislator, a review according to the standards of higher-ranking domestic law and a possible dismissal by the VfGH is out of the question – as consequence of the primacy of Union law<sup>103</sup>.

Domestic law – the federal constitutional law – determines the jurisdiction for the implementation of legal acts under secondary and tertiary Union law. It follows the distribution of jurisdictions in the federal state under Art 10 to 15 B-VG. If a Directive which concerns a subject within the autonomous jurisdiction of the Federal states is implemented by federal law, the VfGH has to abrogate this law due to a violation of the division of jurisdictions in the federal state in a possible judicial review under Art 140 B-VG<sup>104</sup>.

On the other hand, there is the question of whether the implementation of a Directive requires formal legislation, or whether it can also be implemented by ordinance, if the Directive is sufficiently determined. In this way, a Directive can be implemented by an ordinance, if a sufficiently determined legal foundation exists which includes all substan-

<sup>96</sup> *Holzinger* (1996) 167.

<sup>97</sup> *Griller* (1995) 100.

<sup>98</sup> *Öhlinger* (1999a) Rn 74.

<sup>99</sup> For this discretion, see *Holzinger* (1996) 181; *Mayer* (1996) 156; *Holoubek* (1997) 85; *Pauger* (1997) 707 ff.

<sup>100</sup> *Öhlinger* (1999a) Rn 75.

<sup>101</sup> Cf *Öhlinger / Potacs* (2006) 116; *Öhlinger* (2009a) Rn 200; *Öhlinger* (1996), 184 f; *Öhlinger* (1995a) 370 with further references; *Potacs* (2010) 251; *Holzinger* (1996) 181; *Holzinger* (2004) 149; *Holzinger* (1997) 355; *Korinek* (2004) 131 and 134 ff; *Griller* (2000b) 71; and *Ranacher* (2002) 182 ff.

<sup>102</sup> See, for instance, VfSlg 14.863/1997, 15.106/1998, 15.204/1998, 15.321/1998, 16.260/2001, 17.001/2003, 17.022/2003, 17.347/2004 and 18.642/2008.

<sup>103</sup> Cf VfSlg 18.642/2008.

<sup>104</sup> Cf VfSlg 17.022/2003.

tial elements of the intended regulation.<sup>105</sup> It remains contested, however, whether a Directive itself can constitute such a legal foundation. Evidence for this is that the concept of law under Art 18 B-VG is not limited to formal law but encompasses also, for instance, state treaties approved by the Parliament. If and to the extent that a Directive – in the terms of the case law of the VfGH concerning Art 18, sec 2 B-VG – is sufficiently determined, it can be implemented by an ordinance.<sup>106</sup> The VfGH adjudicated, however, that the implementation of a Directive is only admissible in the form of an act, while implementation in form of an ordinance requires a special, sufficiently determined formal-legal authorisation<sup>107</sup>.

Finally, the question has to be addressed of how a Directive has to be implemented that requires compulsory implementation in contradiction to Austrian constitutional law. It remains contested, whether such a Directive has to be implemented by a constitutional provision<sup>108</sup>.

In its case law, the VfGH differentiates between the case that a regulation under Union law can be achieved by non-application, on the one hand,<sup>109</sup> and the case that the mere non-application allows no solution conform with Union law, on the other hand.<sup>110</sup> The constitutional legislator, for instance, has necessarily to take action, if the implementation of a Directive contradicts the division of jurisdictions in the federal state, because a unitary solution required by the Directive cannot entirely be based on the competences of either the Federation or the Federal States<sup>111</sup>.

#### 5.4. Resulting relationship between EU law and national law

In its case law, the ECJ adjudicated that primary and secondary Community law (henceforth, Union law) possesses precedence over the entire state law, including constitutional law and constitutional principles.<sup>112</sup> This case law is not unreservedly recognised in the Member states of the European Union. In the majority of Member states reservations exist with regard to state constitutional law or guiding constitutional principles.<sup>113</sup>

With regard to the relationship of Community law (henceforth, Union law) and national law, the Government bill about the EU-Beitritts-BVG states that the latter should achieve to open the Austrian legal order for the legal order of the European Union in a way according to the latter's particular validity claim – which mainly results from the primacy and direct enforcement of Community law. It was further stated explicitly: Directly applicable legal acts of Community law possessed a primacy in application vis-à-vis contradicting domestic law. This applied especially to EC regulations as well as to parts of EC Directives that are as an exception directly applicable. In contrast to the EEA Treaty, this

<sup>105</sup> See *Öhlinger / Potacs* (2006) 113.

<sup>106</sup> So *Öhlinger* (1995b) 642 ff; *Öhlinger* (1996) 186 f; *Öhlinger* (2004b) 85 ff; *Baumgartner* (1997) 31; *Walter / Mayer / Kucsko-Stadlmayer* (2007) Rn 598, but also 246/7; *Ranacher* (2002) 182 ff. Siehe auch *Korinek* (2004) 135 f.

<sup>107</sup> Cf VfSlg 15.189/1998. In the final analysis also *Holzinger* (1995); *Griller* (1997) 52 f; differentiating *Griller* (2000b) 68 ff; *Korinek* (1999) 64. Cf also *Obenaus* (1999) 118.

<sup>108</sup> Cf., on the one hand, *Öhlinger* (1999a) Rn 77 f; *Öhlinger* (1995a) 372; *Holzinger* (1996) 181; *Holzinger* (1997) 355; *Holoubek* (1997) 87; *Hengstschläger* (2000) 498; on the other hand, *Baumgartner* (1997) 196 f; *Baumgartner* (2000) 89; *Korinek* (1998) 470 f; *Korinek* (1999) 61 f; and *Vcelouch* (1997) 724. Differentiating *Thienel* (2001) 356.

<sup>109</sup> Cf VfSlg 18.642/2008.

<sup>110</sup> VfSlg 17.347/2004 under recourse to *Korinek* (2004) 136 ff.

<sup>111</sup> Cf VfSlg 17.022/2003. See also *Öhlinger / Potacs* (2006) 116.

<sup>112</sup> ECJ, Case 26/62, *Van Gend und Loos*, ECR 1963, 1; Case 6/64, *Costa/ENEL*, ECR 1964, 585; Case 11/70, *Internationale Handelsgesellschaft*, ECR 1970, 1125; Case 106/77, *Simmenthal II*, ECR 1978, 629; and Joint Cases C-97/87, C-98/87 and C-99/87, *Dow Chemical Iberica*, ECR 1989, I-3165.

<sup>113</sup> See on this *Grabenwarter* (2009) 123 ff; *Mayer* (2003) 249 ff; and *Arnold* (2003) 90 ff.

principal precedence over domestic law existed also over such legal provisions that are only enacted after the concerned EC legal act had come into effect in Austria. Non-directly applicable legal acts of EC law (especially Directives) as well as resolutions of the contracting parties in the framework of the Common Foreign and Security Policy as well as the areas of justice and home affairs have a binding effect for Austria, but they do not exert domestic precedence. The outlined primacy in application of directly effective Community law in the Austrian legal order has the consequence that all domestic legislative and executive institutions had to ignore domestic legal provisions – no matter whether constitutional law, statutory law or ordinances are concerned – so far as they contradict directly applicable legal acts under Community law. This means that the otherwise existing VfGH monopoly to review – and potentially dismiss – legal provisions was broken by this primacy in application<sup>114</sup>.

According to the opinion of *Griller*,<sup>115</sup> the EU-Beitritts-BVG opens the Austrian legal order for the legal order of the European Union in accordance with its claims of validity and application. This was also expressed in the text of the EU-Beitritts-BVG, although on the basis of an, at first glance, rather opaque chain of references: The EU-Beitritts-BVG referred to the Accession Treaty, one of which's component was the Act of Accession. Under its Art 2, not only the original Treaties but also legal acts of Union institutions adopted before the accession became binding for the new Member states and came into force in these countries according to the mentioned Treaties and this Act. According to almost uncontested opinion, this includes also those ECJ rulings which shape the basic structures of the EC legal order. The EU-Beitritts-BVG therefore fulfilled the obligation under EC law to open up the national legal order accordingly. According to *Griller*, the exact substance of this opening is that all specific claims of validity and application of EC law have to be seen as sanctified under constitutional law through the EU-Beitritts-BVG in connection with the actually concluded accession; this would not require any further explicit amendments of the Constitution. If one argues that there are no limits deriving from the fundamental principles of the Federal Constitution, as they existed before the accession, in accordance with the impact of primary and secondary EC law on the Austrian legal order, against the prevailing legal doctrine<sup>116</sup>, then it became clear that the constitutional legislator ordered a particularly wide opening of the Austrian legal order in the interest of a smooth participation in the European Union. The fundamental principles remain in effect in the form modified by the accession. *Griller* argues that they could however not counter the application of EC law. It could even be said that the federal constitutional law was losing its highest rank within the law in effect in Austria. Nevertheless, the fundamental principles modified by the EU accession were portrayed to be at the highest level in the derogatory pyramid of norms, ie coequal with EC law and genuine constitutional law. Totally revising constitutional law was derogatorily inferior to the layer of fundamental principles safeguarded by EC law but even also to "ordinary" EC law.<sup>117</sup> The last statement does however not coincide with prevailing state practice and prevailing legal doctrine. The latter rather assume that the fundamental principles in their modified form after the 1994 total revision of the Federal Constitution now entailed a limiting function. However, *Griller's* view fully applies to "ordinary" constitutional law.

For *Öhlinger*<sup>118</sup>, it seems that no limits to the primacy of Community law (henceforth, Union laws) can be derived from the EU-Beitritts-BVG – apart from the domestically re-

<sup>114</sup> B1gNR 18 GP RV 1546, 4 and 7.

<sup>115</sup> *Griller* (2000a) 278 ff.

<sup>116</sup> Reference here is to *Öhlinger* (1999a) Rn 23 ff and 54 ff.

<sup>117</sup> See also *S. Griller*, Der Anwendungsvorrang des EG-Rechts (FN 39), 642 f. cf *C. Grabenwarter*, in: IPE II (2008), § 20 – Österreich, Rn 34.

<sup>118</sup> *Öhlinger* (1999a) Rn 55.

quired approval to the contractual development of primary law<sup>119</sup>. Also the primacy of Community law based on Austrian constitutional law would therefore lead to no other result than the justification under Community law demanded by the ECJ: The primacy (in application) of Community law is unreservedly in force in Austria.

According to majority opinion, the precedence of Community law (henceforth, Union laws) does not affect the fundamental principles of the Austrian Federal Constitution.<sup>120</sup>

In its case law, the VfGH has already recognised the precedence of Community law (henceforth, Union laws) over state constitutional law – unreservedly and without discussion<sup>121</sup> – at a number of times.<sup>122</sup> The VfGH has hence adjudicated in its verdict<sup>123</sup> about the Telecommunications Act (TKG)<sup>124</sup> that the primacy in application of a Directive, which requires an effective legal remedy against decisions of a regulatory authority, had the effect that for the scope of the Directive Art 133, cl 4. B-VG<sup>125</sup> became replaced. It was therefore possible, although this was not stipulated in the Telecommunications Act, to appeal against rulings of the regulatory authority before the Administrative Court (VwGH).

Finally, the effects of Union law (henceforth, Community law) on the system of judicial review under the Constitutional Courts have to be discussed. In the given context, it has again to be stressed that the EU-Beitritts-BVG has opened the Austrian legal order for the legal order of the European Union in accordance with its claims of validity and application.<sup>126</sup> The Community law (henceforth, Union law) extended by the Accession Treaty to Austria has thereby not been transformed into Austrian law and has not become a part of the Austrian legal order. Therefore the question of the rank of the former in the latter does not arise; Union law determines its rank itself in relation to national law.

First, the Union law (henceforth, Community law) as subject of the judicial review by the Constitutional Court:

Union law (henceforth, Community law) is in principle no subject of the judicial review by the VfGH. This is a result of the precedence of Union law over national law; accordingly, Union law cannot be judged by the standard of Austrian constitutional law.

Adopted through the Accession Treaty, primary Community law (henceforth, Union law) is excluded from the judicial review of the VfGH under Art 140a B-VG, since the Accession Treaty is safeguarded by the EU-Beitritts-BVG. Assuming that the EU-Beitritts-BVG belongs to the highest legal strata of Austrian constitutional law, it cannot be subject to a review.<sup>127</sup> Future amendments of the founding Treaties of the European Union (and henceforth the European Communities), which are not safeguarded by the procedure under Art 44, sec 3 B-VG, like the EU-Beitritts-BVG, are however subject to the judicial

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<sup>119</sup> See also *Öhlinger / Potacs* (2006) 81 f.

<sup>120</sup> *Öhlinger* (2009a) Rn 158; *Öhlinger* (2006) 31; and *Grabenwarter* (2009) 124. See *Walter / Mayer / Kucsko-Stadlmayer* (2007) Rn 246/10; *Pernthaler* (2003) 434 f; *Pernthaler* (1998) 14 f. With certain reservations *Öhlinger* (2002b). But differently *Winkler* (2003) 67 ff.

<sup>121</sup> So *Öhlinger* (2005) 692 ff.

<sup>122</sup> For instance, VfSlg 15.215/1998, 15.427/1999, 17.065/2003.

<sup>123</sup> VfGH, Erkenntnis vom 24.2.1999, VfSlg 15.2427/1999.

<sup>124</sup> TelekommunikationsG – TKG, BGBl I 1997/100.

<sup>125</sup> Under Art 133, cl 4, B-VG, rulings of tribunals can only be appealed against before the VwGH, if the appeal is explicitly allowed by law.

<sup>126</sup> *Griller* (2000a) 278 ff.

<sup>127</sup> *Öhlinger / Potacs* (2006) 178; and *Walter / Mayer / Kucsko-Stadlmayer* (2007) Rn 246/21. According to *Holzinger* (1997) 353 f, it is also doubtful whether Art 140a B-VG is at all applicable to the Accession Treaty, since the latter is not a state treaty in terms of Art 50 B-VG.

review of the VfGH under Art 140a B-VG; if one follows the report<sup>128</sup> of the constitutional committee of the National Council in the framework of deciding upon the EU-Beitritt-BVG, future amendments of the Accession Treaty have to be regarded as state treaties in the terms of the B-VG, for which – if no special provision has been introduced concerning the procedure of approval in Parliament – Art 50 B-VG would be applicable.<sup>129</sup> These state treaties can be judged by the VfGH under Art 140a B-VG against the standard of the fundamental principles of the Austrian Federal Constitution; and in case of a conflict with the latter, the treaties can be declared inapplicable.

Secondary and tertiary Union law (henceforth, Community law) cannot be subsumed under the legal forms which are subject to a judicial review by the Constitutional Court (acts, ordinances and state treaties)<sup>130</sup>. Consequently, a future legal act of secondary or tertiary Union law that contradicts the fundamental principles – which function as integration limits – of the Austrian Federal Constitution would be absolutely void; as would, for instance, be an ultra-vires-act of the European Union enacted in violation of the principle of conferral. The secondary and tertiary Union law is not subject to one of the legal forms reviewed by the VfGH; it is hence not subject to a deficiency calculation<sup>131</sup>.

According to Union law, the judicial review of secondary and tertiary Union law is exclusively the task of the ECJ and the General Court. In this regard, the ECJ possesses a monopoly of review and dismissal.

The Union law (henceforth, Community law) as standard for the judicial review of the Constitutional Court:

Based on the fact that the judicial review of the VfGH under Art 139 and 140 B-VG is geared towards the types of legal sources of the Austrian Federal Constitution, Union law (henceforth, Community law) is not considered as standard for the review of acts and ordinances. Violations of the provisions of primary, secondary or tertiary Union law are not contrary to law in the terms of Art 139 B-VG or unconstitutional in the terms of Art 140 B-VG.<sup>132</sup> Applications of a court or of another institution entitled to apply for a concrete judicial review concerning the abrogation of an act or ordinance due to Union unlawfulness have to be rejected by the VfGH as inadmissible.

In accordance with the prevailing legal doctrine,<sup>133</sup> the VfGH adjudicated that the compatibility of an act with Community law (henceforth, Union law) as such cannot be subject of the review of the VfGH.<sup>134</sup> However, parts of jurisprudence criticise this case law, since it leads into problems in terms of legal protection.<sup>135</sup> Rather, as standard of assessment cannot only be considered laws and constitutional acts in the formal sense, but also every violation of the very rules which determine their generation and substance. Since this applies also to Union law, acts and ordinances contradicting Union law were opposable and potentially to be abrogated – no matter whether they violate directly or non-directly applicable Union law.

<sup>128</sup> BlgNR 18 GP AB 1600, 15. On this *Öhlinger / Potacs* (2006) 178 f.

<sup>129</sup> *Öhlinger / Potacs* (2006) 178; *Walter / Mayer / Kucsko-Stadlmayer* (2007) Rn 246/21; *Baumgartner* (1997) 242 ff; and *Holzinger* (1997) 354.

<sup>130</sup> *Öhlinger* (2009a) Rn 191; *Öhlinger / Potacs* (2006) 179; *Walter / Mayer / Kucsko-Stadlmayer* (2007) Rn 246/22; *Korinek* (1999) 55; and *Baumgartner* (1997) 242 ff.

<sup>131</sup> So *Öhlinger* (2009a) Rn 191; and *Walter / Mayer / Kucsko-Stadlmayer* (2007) Rn 246/10 and 22.

<sup>132</sup> For ordinances which fulfil the criteria of an individual application, see *Öhlinger* (2009a) Rn 195.

<sup>133</sup> So *Öhlinger* (1995a), 373 ff; *Öhlinger / Potacs* (2006) 176 ff; *Potacs* (2010) 250; *Holzinger* (1997) 357; and *Schäffer* (2001) Rn 33.

<sup>134</sup> VfSlg 14.805/1997, 15.368/1998, 15.583/1999, 15.810/2000, 16.130/2001, 16.627/2002. Cf *Korinek* (1998) 467.

<sup>135</sup> See *Walter / Mayer / Kucsko-Stadlmayer* (2007) Rn 246/27; *Griller* (1990b) 135; and *Vcelouch* (1997) 724.

As already results from the Government bill about the EU-Beitritts-BVG,<sup>136</sup> the primacy in application of Union law (henceforth, Community law) requires that all courts and administrative bodies apply Union law to the extent that it has to be applied to the cases at hand; here Union law has to be given precedence over contradicting Austrian law. In doing so, the courts and administrative bodies have to review the compatibility of Austrian law with Union law independently (incidental review). Here, the monopoly of review and dismissal of the VfGH regarding general norms (acts, ordinances and state treaties), so typical for the Austrian legal system, is limited in favour of the incidental review powers of all authorities (courts and administrative bodies)<sup>137</sup>.

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<sup>136</sup> BlgNR 18 GP RV 1546, 7.

<sup>137</sup> *Öhlinger* (2009a) Rn 193 f.

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## 6. POLAND

### 6.1. Constitutional Foundations of EU-Membership

#### 6.1.1. Overview

Until the coming into force on the 17<sup>th</sup> October 1997<sup>1</sup>, the Polish Constitution which had been adopted by the national assembly and approved via a national referendum did not contain – neither the Constitution before nor the Constitution after the Second World War – provisions about the status of international law. Calls of the academia for the adoption of such provision fell on fertile ground in the constitutional committee of the national assembly in the first half of the 1990s as the Constitution should express the positive stance of the Republic of Poland towards international law<sup>2</sup>.

Eventually, a number of provisions concerning international law were included in the Constitution. According to Art 9, contained in the Chapter I (The Republic) of the Constitution, the Republic of Poland complies with international law by which it is bound.

Concerning the rank of different sources of international law in the national legal order, the constitutional legislator names expressly only international agreements which have been ratified by the Republic of Poland. In addition to the Constitution, Acts of Parliament and regulations, ratified international agreements are a source of law for the Republic of Poland according to Art 87 (1) of the Constitution<sup>3</sup>.

In the situations listed in Art 89 (1) (1)-(5) of the Constitution, the ratification and the termination of an international agreement of the Republic of Poland needs legislative approval. According to Art 91 of the Constitution a ratified international agreement, reported in the Official Journal of the Republic of Poland, which does not require further implementation by national legislation is directly applicable and part of the national legal order. International agreements are also named as subject of constitutional review and moreover as standard for judicial review by the Constitutional Court. According to Art 188 (1)-(3) of the Constitution the Constitutional Court adjudicates on the compatibility of act of parliament and international agreements with the Constitution, on the compatibility of national act of parliament with ratified international agreements, approved by an act of parliament, and on the compatibility of legislation adopted by state organs with the Constitution, international agreements and the laws.

International agreements which require ratification are – pursuant Art 146 (4) (10) of the Constitution – concluded by the cabinet, which also approves and terminates other international agreements. As representative of the state in foreign matters the President of the Republic of Poland ratifies and terminates international agreements according to Art 133 (1) (1) of the Constitution and notifies the Sejm and the Senate thereof.

The rank of legal acts of international organizations was a contentious issue during the adoption of the Constitution.<sup>4</sup> Finally, the provision now found in Art 91 (3) of the Constitution was included in the text. According to this provision legal acts of an

<sup>1</sup> Dziennik Ustaw Rzeczypospolitej Polskiej – DzU 1997 Nr 78 Pos 483 [Official Journal of the Republic of Poland] available in English at <http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm>.

<sup>2</sup> *Biernat* (2008) para 2 f with further references; *Banaszak* (2003) 63; and *Łazowski* (2002) with further references.

<sup>3</sup> See in this regard *Banaszak* (2003) 64 f.

<sup>4</sup> *Biernat* (2008) para 3 with further references.

international organisation are directly applicable and take precedence over conflicting national law, if this precedence results from a ratified international agreement which sets up the international organisation in question.

In the context of the consultation proceedings in the constitutional committee of the National Assembly about the inclusion of the provisions on the rank of international law within the Constitution the issue of embedding special constitutional provisions for a possible integration of Poland in the European Union was raised.<sup>5</sup> Special provisions for the accession and the Accession Treaty preferred by some were objected by others. The opinion which claimed that provisions regarding international agreements would be sufficient was rooted in an opposition to the accession to European Union as accession would involve a loss of sovereignty<sup>6</sup>.

The result of the consultations was finally Art 90 of the Constitution: It is permissible to transfer certain areas of competences of the state to an international organisation or an international organ on the basis of an international agreement pursuant a particular procedure. Special limits regarding such a transfer of competences have not been included in the text of the Constitution, even though the issue was recognised by the constitutional legislator.<sup>7</sup> Initially the positioning of the provision finally placed in Art 90 was contentious. Ultimately the provision was not included under Chapter I (The Republic) of the Constitution but under Chapter III (Sources of Law). Moreover, the question of the adoption procedure was debated. In the drafts either a parliamentary approval or a binding national referendum with a high minimum for the turnout was foreseen. As a compromise a solution was adopted where the Sejm would decide about the adoption procedure.<sup>8</sup> In the case of a national referendum on the adoption Art 125 of the Constitution applies equally.<sup>9</sup> National referenda may be organised pursuant Art 125 (1) and (2) of the Constitution in matters of particular importance for the state by the Sejm and the President of the Republic with approval of the senate. According to Art 125 (3) of the Constitution a national referendum is only binding if more than half of the eligible voters participate.

Regarding the rank of the Accession Treaty and the primary and secondary law of the EU and the EC within the national legal order Art 91 (2) and (3) are decisive.

## 6.1.2. Individual legal provisions

### 6.1.2.1. Article 9 of the Constitution

Pursuant Art 9 of the Constitution the Republic of Poland complies with the binding international law. According to *Biernat* this provision normatively specifies the declaration of the Constitution's preamble which sets out that the Polish nation has enacted the Constitution being "aware of the need for cooperation with all countries for the good of the Human Family"<sup>10</sup>.

While some are of the opinion that Art 9 of the Constitution has solely a declaratory character,<sup>11</sup> the majority considers this provision to serve several functions. While Art 9 of the Constitution has to be seen in relation to the outside world as a solemn assertion

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<sup>5</sup> Cf *Albi* (2005a) 407-410; and *Albi* (2005b) 78-82.

<sup>6</sup> *Biernat* (2008) para 4 with further references.

<sup>7</sup> *Biernat* (2008) para 5 with further references.

<sup>8</sup> *Biernat* (2008) para 6 with further references.

<sup>9</sup> *Banaszak* (2003) 129-134.

<sup>10</sup> *Biernat* (2008) para 8.

<sup>11</sup> *Czapliński* (2001) 62; as cited in *Biernat* (2008) para 9.

of the Republic of Poland towards its international obligations,<sup>12</sup> domestically the provision obliges all state organs to comply with international law.<sup>13</sup> Art 9 equally obliges to an interpretation of national law in the light of international law<sup>14</sup> and to recognition of sources of international law that are not explicitly named in the Constitution, like not yet ratified international agreements, general principles of international law and customary international law.<sup>15</sup> This interpretation is also adopted by the courts<sup>16</sup>.

Contrary to jurisprudence which mainly views the EU law – differentiating between EC and Union law<sup>17</sup> – as legal order that has to be distinguished from international law,<sup>18</sup> neither the Constitution and its Art 9 nor the Constitutional Court differentiate between international and Union law.

In this line the Constitutional Court has in its decision of the 19<sup>th</sup> December 2006<sup>19</sup> acknowledged that Art 9 of the Constitution applies *mutatis mutandis* to Community law. The finding was made in the context of a concrete judicial review procedure pursuant Art 193 of the Constitution concerning the validity of the act of the 23<sup>rd</sup> January 2004<sup>20</sup> on the excise duties with Art 90 TEC (now Art 110 TFEU) and Art 91 of the Constitution<sup>21</sup>.

In its decision of the 11<sup>th</sup> May 2005<sup>22</sup> on the accession treaty of the Republic of Poland to the European Union<sup>23</sup> the Constitutional Court also considered Art 9 of the Constitution. The legal consequence of Art 9 would be that on the territory of the Republic of Poland not only legal norms adopted by the national legislator would apply, but equally legal norms adopted outside the Polish legislative organs. The constitutional legislator would thereby consciously allow that the legal system governing the territory of the Republic would have a multiple character. Apart from legal acts adopted by national legislative organs also acts of international law would be applicable. However with regard to the Polish state, Community law would not be an entirely external law. Based on the fact that in the Republic of Poland subsystems of legal norms form different legislative centres would be applicable, Community law as well as national law should be interpreted in a favourable way towards each other and should be applied in a cooperative spirit of mutual applicability in co-existence. As consequence of Art 9, 87 (1) as well as 90 and 91, the Constitution would acknowledge the multiple-facet structure of the legal norms which are applicable in Poland<sup>24</sup>.

In the context of the relationship between national and EU and EC law the Constitutional Court declared that the obligation to apply Community law would follow from international agreements that are ratified in accordance with the Constitution and which would pursuant to Art 9 of the Constitution constitute binding international law for the Republic of Poland. The obligation imposed by the Constitution to apply the Community law applicable to Poland would therefore also encompass the independent judges (Art

<sup>12</sup> *Wasikowski* (2006) 11 f; and *Wyrozumska* (2006); both as cited in *Biernat* (2008) para 9.

<sup>13</sup> *Banaszak* (2003) 68; *Masternak-Kubiak* (2003) 183 f; as cited in *Biernat* (2008) para 9.

<sup>14</sup> *Banaszak* (2003) 68.

<sup>15</sup> *Banaszak* (2003) 67 ff with further references. *Wasikowski* (2006) 13; as cited in *Biernat* (2008) para 9.

<sup>16</sup> *Wyrozumska* (2006) 35 f; as cited in *Biernat* (2008) para 9.

<sup>17</sup> *Kenig-Witkowska / Łazowski* (2004); and *Wróbel* (2005); both as cited in *Biernat* (2008) para 10.

<sup>18</sup> In contrast *Mik* 301-308; und *Wyrozumska* (2003) 47-56; both as cited in *Biernat* (2008) para 10.

<sup>19</sup> Constitutional Court Decision of 19 December 2006, P 37/05, English translation available on the webpage of the Constitutional Court [www.trybunal.gov.pl](http://www.trybunal.gov.pl). See *Łazowski* (2008).

<sup>20</sup> DzU 2004 Nr 29 Pos 257.

<sup>21</sup> Constitutional Court, P 37/05, para 4.2.

<sup>22</sup> Constitutional Court Judgement of 11 May 2005, K 18/04, see EuR 2006, 236. On this *Łazowski* (2007); *Kowalik-Bańczyk* (2005) 1361 ff; *Albi* (2007) 40 f; *Hofmann* (2009) 38 ff; and *Szczeponek* (2008) 300 ff.

<sup>23</sup> See OJ 2003 L 236, 17; and OJ 2003 C 227E, 1.

<sup>24</sup> Constitutional Court, K 18/04, para 2.2.

178 (1) of the Constitution) and the judges of the Constitutional Court (Art 195 of the Constitution)<sup>25</sup>.

In its case law the Constitutional Court has established further obligations based on Art 9 of the Constitution. In its judgment of the 27<sup>th</sup> April 2005<sup>26</sup> concerning the European Arrest Warrant the Constitutional Court found that the implementation of third pillar framework decisions<sup>27</sup> adopted according to the (old) TEU – in this specific case framework decision 2002/584/JHA on the European Arrest Warrant – was constitutionally required by Art 9 of the Constitution.<sup>28</sup> The obligation derived from Art 9 of the Constitution and the EU-membership would inevitably demand a change of the current law in order to ensure not only the full but equally the constitutionally demanded implementation of framework decisions, here the framework decision 2002/584/JHA.<sup>29</sup> To realise this task a corresponding amendment of the infringed Articles of the Constitution – Art 55 Abs 1 of the Constitution – could not be ruled out. For years the amendment of the Constitution would be used as an indispensable tool to ensure the effectiveness of Union law in the legal orders of the Member states.<sup>30</sup> The Constitutional Court with regard to the temporal suspension of the invalidity of the unconstitutional implementing legislation – Art 607t (1) of the criminal procedure act of 6<sup>th</sup> June 1997<sup>31</sup> – stated that Art 9 of the Constitution would not only entail a declaration to the international community but would equally oblige the organs of the state, among others the Government, the Parliament, and the courts, to comply with the international law that binds the Republic of Poland. The implementation of this obligation could also entail the enactment of specific measures which are part of their competences. Taking into account the obligation of Art 9 of the Constitution and the temporal suspension of invalidity, courts would be obliged to apply the unconstitutional implementation provision due<sup>32</sup>.

According to *Biernat* one would need to question if a general reference to Art 9 of the Constitution in the context of the accession and membership in the European Union is in fact correct and sufficient. For him it is preferable to take regress to Art 90 of the Constitution, as the opening of the domestic legal order towards Union law and all the obligations imposed by the Constitutional Court in the context of the EU-Membership would be the consequence of a transfer of competences towards an international organisation. The obligation to comply with Union law would follow on one hand from Art 90 of the Constitution which entails an authorisation by means of the accession agreement that was concluded according to a special procedure and on the other hand from the founding treaties of the EU and EC which have been accepted by means of the accession agreement<sup>33</sup>.

In the context of the EU-Membership the Constitutional Court deduces from Art 9 of the Constitution and its preamble the 'principle of openness towards Europe and a benevolent attitude towards interstate cooperation'<sup>34</sup>. This principle has to be taken into

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<sup>25</sup> Constitutional Court, K 18/04, para 11.2.

<sup>26</sup> Constitutional Court Judgment of 27 April 2005, P 1/05, see EuR 2005, 494. On this see *Albi* (2007) 38 ff; *Łazowski* (2005); *Kowalik-Bańczyk* (2005) 1358 ff; *Leczykiewicz* (2006); *Komárek* (2005) 9-14.

<sup>27</sup> Council framework decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA) OJ 2002 L 190, 1.

<sup>28</sup> Constitutional Court, P 1/05, para 2.4.

<sup>29</sup> Constitutional Court, P 1/05, para 5.1.

<sup>30</sup> Constitutional Court, P 1/05, para 5.1. and 5.7.

<sup>31</sup> DzU 1997 Nr 89 Pos 555 with amendments.

<sup>32</sup> Constitutional Court, P 1/05, para 5.5.

<sup>33</sup> Cf *Biernat* (2008) para 10.

<sup>34</sup> Cf Constitutional Court, judgment of 27 May 2003, K 11/03, German summary on the webpage of the Constitutional Court available: [www.trybunal.gov.pl](http://www.trybunal.gov.pl). See *Albi* (2007) 37.

account when interpreting national legislation. According to *Bainczyk* and *Ernst* it would however not be clear which exact content and extent this principle would encompass and whether this would include the obligation of interpretation in way that is open and benevolent towards European law<sup>35</sup>. The interpretation of national law in way that is open and benevolent towards European law is seen by the jurisprudence as an obligation stemming from the EU-Membership and the Constitutional Court has meanwhile developed it to principle of Polish law.

The Constitutional Court had already before the EU-accession<sup>36</sup> on the basis of Art 68 of the association agreement from the 13<sup>th</sup> December 1993<sup>37</sup> ruled that national legal provisions had to be applied in a way which ensured the greatest possible alignment with Community law.<sup>38</sup> With regard to interpretation of national law in way that is open and benevolent towards European law the Constitutional Court also commented in its judgments of 21<sup>th</sup> April 2004<sup>39</sup> in the context of an abstract judicial review procedure pursuant Art 191 (1) (1) of the Constitution on the constitutionality of the act of 2<sup>nd</sup> October 2003<sup>40</sup> on bio components in fluid fuels and fluid biofuels initiated by the Commissioner for Citizen rights, in the judgment of 31<sup>st</sup> May 2004<sup>41</sup> in the context of an abstract judicial review procedure pursuant Art 191 (1) (1) of the Constitution initiated by several members of the Sejm on the constitutionality of the act of 23<sup>rd</sup> January 2004<sup>42</sup> on the voting rules for the European Parliament and finally in the judgment of the 12<sup>th</sup> January 2005<sup>43</sup> in the context of an abstract judicial review procedure pursuant Art 191 (1) (1) of the Constitution initiated by several senators on the constitutionality of the act of 11<sup>th</sup> March 2004<sup>44</sup> on the cooperation between the cabinet and the Sejm and the Senate in matters relating to the membership of Poland in the EU. Even though in these judgments the Constitutional Court does not use a uniform term for the interpretation of national law in way that is open and benevolent towards European law the postulation of such a principle can be deduced from these judgments<sup>45</sup>.

In its judgment on the accession agreement<sup>46</sup> the Constitutional Court once more addressed the issue of the interpretation of national law in way that is open and benevolent towards European law. Based on the fact in the Republic of Poland subsystems of legal norms from different legislative centres would be applicable, Community law as well as national law should be interpreted in a favourable way towards each other and should be applied in a cooperative spirit of mutual applicability in co-existence. The Constitutional Court however also acknowledged that the interpretation of national law in way that is open and benevolent towards European law would also have its limits. In no case could this lead to situation where the interpretation would be

<sup>35</sup> *Bainczyk / Ernst* (2006) 252.

<sup>36</sup> Constitutional Court Judgment of 29 September 1997, K 15/97. See in this regard *Hofmann* (2009) 35; *Kühn* (2005) 566; und *Bainczyk / Ernst* (2006) 252. See moreover *Biernat* (2005) 191-207; and *Albi* (2007) 37 f.

<sup>37</sup> OJ 1993 L 348, 1. See also *Łazowski* (2002) 301 with further reference; and *Hofmann* (2009) 31 ff.

<sup>38</sup> *Bainczyk / Ernst* (2006) 252 with further reference. See also *Łazowski* (2002) 304 f with further reference; *Łazowski* (2001) 7 ff; and *Banaszkiewicz* (2005).

<sup>39</sup> Constitutional Court Judgment of 21 April 2004, K 33/03, para 9 ff, German summary available on the webpage of the Constitutional Court at: [www.trybunal.gov.pl](http://www.trybunal.gov.pl).

<sup>40</sup> DzU2003 Nr 199 Pos 1934.

<sup>41</sup> Constitutional Court Judgment of 31 May 2004, K 15/04, para 4, German summary available on the webpage of the Constitutional Court at: [www.trybunal.gov.pl](http://www.trybunal.gov.pl). See *Albi* (2007) 35 f; and *Hofmann* (2009) 80.

<sup>42</sup> DzU 2004 Nr 25 Pos 219.

<sup>43</sup> Constitutional Court Judgment of 12 January 2005, K 24/04, para 6, English summary available on the webpage of the Constitutional Court at: [www.trybunal.gov.pl](http://www.trybunal.gov.pl).

<sup>44</sup> DzU 2004 Nr 52 Pos 515.

<sup>45</sup> In this regard *Bainczyk / Ernst* (2006) 254.

<sup>46</sup> Constitutional Court, K 18/04, para 2.2 and 6.4.

against the explicit wording of constitutional provisions and where it would be impossible to reconcile it with the minimum of the constitutionally guaranteed functions which are implemented by the Constitution. The Constitutional Court finally addressed the issue of the applicability and the limits of the concept of the interpretation of national law in way that is open and benevolent towards European law in its judgment on the European Arrest Warrant.<sup>47</sup> On the one hand it ruled that the obligation of interpreting national law in way that is open and benevolent towards European law also applies to the third pillar of the European Union.<sup>48</sup> On the other hand the obligation would have – notabene even pointed out by the ECJ – its limits and in particular if the consequence of this interpretation would have a negative effect on the position on an individual, especially the creation or aggravation of criminal liability.

#### 6.1.2.2. Article 90 of the Constitution

Article 90 of the Constitution has to be seen as the constitutional foundation for the accession and membership of the Republic of Poland in the European Union<sup>49</sup>.

According to Art 90 (1) of the Constitution the Republic of Poland can transfer competences of organs of the state in certain matters to an international organisation or international organ. The legislative approval of an international agreement within the meaning of para 1 is enacted by the Sejm and the Senate with qualified majority, two thirds of the votes while at least half of the statutory delegates of the Sejm (460 according to Art 96 (1) of the Constitution) and the Senate (100 according to Art 97 (1) of the Constitution) must be present. According to para 3 the approval can also be enacted by way of a national referendum pursuant Art 125 of the Constitution. The decision on whether the ratification of the international agreement within the meaning of para 1 should proceed by way of parliamentary approval or by way of national referendum is taken by the Sejm with absolute majority while at least half of the statutory delegates must be present.

With regard to the approval of the ratification of an international agreement within the meaning of Art 90 (1) of the Constitution by means of a national referendum it has to also to be taken into account that according to Art 125 (3) of the Constitution the result of the national referendum is only binding if more than half of the eligible voters have participated. As the Constitution does not foresee any rules for cases where the result of the national referendum is non-binding because less than half of the eligible voters have participated, it has been opined prior to the national referendum on the EU accession of Poland that a participation of less than half of the eligible voters would constitute a non-approval or that this case would at least be a regulatory gap that had to be closed by a constitutional amendment.<sup>50</sup> Based on a combined reading of Art 90(1) and Art 125 of the Constitution it has also been argued that if the necessary quorum of more than half of the eligible voters has not been met that the national referendum has not reached a result.<sup>51</sup> This opinion has been enshrined in Art 75 of the act of 4<sup>th</sup> March 2003<sup>52</sup> on the national referendum. Is the result of the national referendum not binding the Sejm may

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<sup>47</sup> Constitutional Court, P 1/05, para 3.4. Cf ECJ Judgement of 8 October 1987, 80/86, *Kolpinghuis Nijmegen*, 1987 ECR 3969.

<sup>48</sup> Constitutional Court, P 1/05, para 3.4. The judgment was handed down before the *Pupino* judgment of the ECJ. See ECJ Judgement of 16 June 2005, C-105/03, *Pupino*, 2005 ECR 2005 I-5285.

<sup>49</sup> See *Jankowska-Gilberg* (2003) 418; and *Biernat* (1998) 400-408. Moreover *Barcz* (1998) 5-10; *Mik* (1999) 145-166; and *Działocha* (1999a) 1-5; all as cited in *Biernat* (2008) para 11.

<sup>50</sup> *Mojak* (2000) 182 f; as cited in *Biernat* (2008) para 25.

<sup>51</sup> *Biernat* (2004a) 83 f.

<sup>52</sup> DzU 2003 Nr 57 Pos 507 with amendments.

again decide on the ratification procedure.<sup>53</sup> The Constitutional Court has confirmed the constitutionality of the act on the national referendum in its verdict of 27<sup>th</sup> May 2003<sup>54</sup>.

Art 90 (1) of the Constitution does not define the notion of international organisation.<sup>55</sup> While the European Communities have undoubtedly to be seen as international organisations within the meaning of Art 90 (1) of the Constitution,<sup>56</sup> within the Polish jurisprudence the opinions on the European Union before the entry into force of the Lisbon Treaty on 1<sup>st</sup> December 2009 are divided: While the majority is of the opinion that the European Union does not possess legal personality,<sup>57</sup> others acknowledged this.<sup>58</sup> Occasionally it is argued that Art 90 (1) of the Constitution is not a sufficient legal basis for the EU-Accession of Poland<sup>59</sup>.

In its decision on the accession agreement<sup>60</sup> the Constitutional Court pointed out, when faced with the argument that the European Union and the European Communities would be supranational organisations, a category not envisaged by the Constitution, that the accession agreement would have the features of an international agreement within the meaning of Art 90(1) of the Constitution, the Member states would remain sovereign subjects and would be parties of the founding treaties. None of the normative acts that have been subject of the complaint would qualify the European Union as supranational organisation; the previous case law would support this finding of an international organisation.<sup>61</sup> The founding treaties and the secondary law of the European Communities would not use the term supranational organisation. Even though the notion of organisation mentioned in Art 90 (1) and Art 90 (3) of the Constitution is not further qualified in the Constitution, currently only the European Communities and the European Union would fulfil the criteria set out in the Constitution. Constitutional Court further elaborated that the plea would be founded on an insufficient legal basis for the distinction between supranational and international which would neither exist in international law nor in the accession agreement and the act of accession. Finally, one might note that the European Communities have been attributed with legal personality in the international law jurisprudence and in the international law judicature; the character of the European Union (before 1<sup>st</sup> December 2009) as subject to international law would however not be fully and in all aspects be developed. The notion supranational organisations is not used by the Constitutional Court but however by the jurisprudence<sup>62</sup>.

By means of an international agreement within the meaning of Art 90 (1) of the Constitution competences of organs of the state in certain areas are transferred to an international organisation.<sup>63</sup> In this context competences may be involved which on the one hand are conferred and reserved by the Constitution or law for a Polish state organ by the time of the transferral to the European Community or European Union, or on the other hand competences which remain with the state organs but these are limited in exercising these competences in so far as the primary or secondary law of the European Community or European Union demands it<sup>64</sup>. As organs of the state all institutions have

<sup>53</sup> See *Jankowska-Gilberg* (2003) 419 ff with further reference.

<sup>54</sup> Constitutional Court, K 11/03.

<sup>55</sup> In this line also the Constitutional Court, K 18/04, para 8.5. Cf also *Jankowska-Gilberg* (2003) 421 ff with further references; and *Szczeponek* (2008) 290 ff.

<sup>56</sup> In this line *Biernat* (2008) para 12.

<sup>57</sup> *Barcz J.* (2003) 70 ff; as cited in *Biernat* (2008) para 12.

<sup>58</sup> *Mik* (1999) 145-166; as cited in *Biernat* (2008) para 12.

<sup>59</sup> *Pawlowicz* (2002) 61; as cited in *Biernat* (2008) para 12.

<sup>60</sup> Constitutional Court, K 18/04, Para 8.5.

<sup>61</sup> The Constitutional Court refers to the judgment of 31 May 2004, K 15/04.

<sup>62</sup> *Barcz* (2004) 36; as cited in *Biernat* (2008) para 12.

<sup>63</sup> Cf with regard to the principle of sovereignty *Jankowska-Gilberg* (2003) 423 ff.

<sup>64</sup> Cf *Biernat* (2008) para 14.

to be considered which are named in Art 10 (1) and (2) of the Constitution: Sejm and Senate as organs of the legislature,<sup>65</sup> the President of the Republic and the Cabinet as organs of the executive and the courts and the Tribunals as organs of the judiciary<sup>66</sup>.

### 6.1.2.3. Article 91 of the Constitution

Art 91 of the Constitution determines the rank of the Union and Community law in the Polish legal system<sup>67</sup>.

According to Art 91 (1) of the Constitution an international agreement which has been ratified by the Republic of Poland and has been published in the Official Journal is part of the domestic legal order and is directly applicable, as long as its application does not require the enactment of legislation. After the enactment of legislative approval for a ratified international agreement such an agreement takes pursuant para 2 precedence over conflicting national legislation. If this follows from an international agreement ratified by the Republic of Poland which set up an international organisation the law enacted by this organisation is, pursuant para 3, directly applicable and takes precedence in case of conflict.

Art 91 (1) and (2) of the Constitution concern both the accession agreement and the founding treaties of the European Union and the European Community and its reception by the Polish legal order<sup>68</sup>. The fact that the accession agreement has not been approved by means of legislative approval within the meaning of Art 90 (2) of the Constitution but by means of a national referendum pursuant Art 90 (3) in conjunction with Art 125 of the Constitution is irrelevant in this context. The Constitutional Court has confirmed in its decision on the accession agreement<sup>69</sup> that both proceedings are constitutionally of equal value.<sup>70</sup> In contrast Art 91 (3) of the Constitution concerns secondary law of the European Union and the European Communities.

Ratified international agreements which had pursuant Art 91 (1) of the Constitution become part of the domestic legal order are however not becoming domestic legal acts but remain due to their origin acts of international law<sup>71</sup>.

The Constitutional Court has acknowledged regarding Art 91 (2) of the Constitution in its decision of the 19<sup>th</sup> December 2006<sup>72</sup> on the validity of the act of the 23<sup>rd</sup> January 2004 on the excise duties with Art 90 TEC (now Art 110 TFEU) and Art 91 (2) of the Constitution that the general obligation to comply with international law and Community law – with regard to the judicature – has been further elaborated in Art 91 (2) regarding cases of conflict. National Courts would therefore not be entitled but instead had to dismiss the application of domestic legal provisions if these would be in conflict with Community law. In this case the court would have to disapply the domestic legal

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<sup>65</sup> *Wójtowicz* (2004) 59-65; *Jaskiernia J.* (2002) 9-23; and *Fedorowicz* (2004) 71-100; all as cited in *Biernat* (2008) para 15. See also Constitutional Court, judgment of 12 January 2005, K 24/04.

<sup>66</sup> *Biernat* (2001) 5-46; and *Szpunar* (2003) 277-301; both as cited in *Biernat* (2008) para 15.

<sup>67</sup> *Biernat* (1998) 411-419. *Działocha* (1990) 1-10; and *Wyrozumska* (2006) 41-57 and 81-87; both as cited in *Biernat* (2008) para 18.

<sup>68</sup> With regard to the question whether Art 91 (1) of the Constitution encompasses a monist or a dualistic approach and with regard to the differences between direct applicability and direct effect in the Polish legal order see *Biernat* (2008) para 18 f.

<sup>69</sup> Constitutional Court, K 18/04, para 4.2.

<sup>70</sup> *Biernat* (1998) 408-411. *Garlitzki* (2000) 57-62; and *Mojak* (2000) 178-185; both as cited in *Biernat* (2008) para 24.

<sup>71</sup> Constitutional Court, decision of 19 December 2006, P 37/05, para III.3.

<sup>72</sup> Constitutional Court, P 37/05, para III.4.3.

provisions as far as this was necessary to give precedence to Community law; however the former would not be invalid but would remain in force<sup>73</sup>.

*Biernat* refers with regard to the secondary law of the European Union and the European Community to three problematic areas:<sup>74</sup> First, the primacy of Community law would not follow directly from EC Treaty and would only encompass regulations and decisions but directives would not be directly applicable; Art 91 (3) of the Constitution would therefore have to be interpreted broadly and following the ECJ. It would be unclear whether Art 91 (3) of the Constitution would also encompass the law of the third pillar of the European Union and these uncertainties would also exist in practice. The Constitutional Court found in its decision on the accession agreement that primacy would not apply to law of the third pillar, in its decision on the European Arrest Warrant it found that the obligation to implement framework decisions would equally apply directives.<sup>75</sup> Finally the demarcation between Art 91 (1) and (2) of the Constitution on the one hand and Art 91 (3) on the other would not be clear enough. Thus, it would be claimed that the secondary law of the time of the EU-Accession would be part of the accession agreement and hence part of an international agreement, so that the bindingness would result from Art 91 (1) and (2) of the Constitution. Art 91 (3) would in contrast only cover the secondary law which came and comes into force after the EU-Accession. This would in particular be relevant with regard to the competences of the Constitutional Court pursuant Art 188 of the Constitution<sup>76</sup>.

#### 6.1.2.4. Article 188 of the Constitution

Art 188 of the Constitution stipulates the competences of the Constitutional Court. International agreements are subject and standard of the constitutional review of the Constitutional Court: According to Art 188 of the Constitution the Constitutional Court adjudicates on the compatibility of international agreements with the Constitution (1), on the compatibility of legislation with ratified international agreements whose ratification requires prior approval by the parliament (2), as well as on the compatibility of legislation adopted by the central state organs with ratified international agreements (3).

## 6.2. Constitutional limits to EU-integration

### 6.2.1. Limits to the (further) transfer of powers to the EU through Treaty amendments ("non transferable" constitutional identities?)

According to Art 90 (1) of the Constitution the Republic of Poland can transfer competences of state organs in certain areas to international organisations and international organs. Neither Art 90 (1) nor other provisions of the Constitution stipulate limits concerning the transfer of sovereign powers.

While one part of the jurisprudence argues that Art 90 (1) would provide the desirable flexibility for the Constitution<sup>77</sup> another part criticises the missing limits as this would provide an unnecessary wide gateway for the European Integration<sup>78</sup>. Occasionally, it is

<sup>73</sup> With regard to the case law of the administrative courts see *Zirk-Sadowski* (2005).

<sup>74</sup> See *Biernat* (2008) para 23.

<sup>75</sup> Constitutional Court, K 18/24; and P 1/05, para 2.4.

<sup>76</sup> *Biernat* (1998) 417 ff. *Zoll* (1998) 138; as cited in *Biernat* (2008) para 23.

<sup>77</sup> *Barcz* (1998); as cited in *Biernat* (2008) para 16.

<sup>78</sup> *Mojak* (2000) 169 f; as cited in *Biernat* (2008) para 16.

even said that the transfer of sovereign powers would endanger the existence of the state, which would lead to a self-destruction and self-dissolution of the Polish state<sup>79</sup>.

Another approach sees immanent limits in the Constitution for the transfer of competences. These would follow from those constitutional provisions that would be essential to the existence of the Polish state and its identity as well as the adopted value system. Some provisions of the Chapters I (The Republic) and II (Freedoms, Rights and Obligations of the People and Citizens – General Principles) of the Constitution are being declared unimpeachable and their restriction or amendment would be prohibited:<sup>80</sup> Named are the following provisions of the Constitution: Art 1 which stipulates that the Republic of Poland is common property of all citizens. Art 2 which proclaims that the Republic of Poland is a democratic state governed by the rule of law and implementing the principles of a social equity. Art 3 which proclaims the Republic of Poland as a unitary state. Art 5 according to which the Republic of Poland protects its independence and integrity of its territory, protects the freedoms and rights of the people and citizens as well as ensures the safety of its citizens, protects the national heritage and ensures environmental protection, whereby it is led by the principle of sustainable development. Moreover, Art 20 of the Constitution according to which the foundation of the economic order of the Republic of Poland is the social market economy based on the freedom of economic activity, private property and solidarity, and the dialog and cooperation between the social partners. From the Chapter II one should particularly name Art 30 guaranteeing human dignity, Art 31 enshrining freedom and Art 32 enshrining equality.

In the light of this eclectic and seemingly random selection it has occasionally been suggested to use a synthetic formulation such as "core competences" or "hard core of sovereignty".<sup>81</sup> One can view the call for the "principle of constitutional statehood"<sup>82</sup> or ensuring the "Polish constitutional identity"<sup>83</sup> in the same line. Given that these notations can be seen as ambiguous and not clear enough it has been called in the jurisprudence for leaving this issue of the outer limits of the transfer of competences under Art 90 (1) of the Constitution to the Constitutional Court<sup>84</sup>.

In its decision on the accession agreement the Constitutional Court<sup>85</sup> considered extensively the issue of transferring competences to an international organization. According to the Constitutional Court the terms "transfer of competences in certain areas" would mean that it would be prohibited to transfer the general competences of the state organ, the transfer of all competences in a given area, as well as the prohibition of transfer of competences regarding the fundamental nature of a competence which constitute the jurisdiction of the state organ in question. The precise demarcation of the areas as well as the designation of the area of competences which should be transferred would be demanded by Art 90 (1) of the Constitution. A transfer of competences that would lead to questioning the meaningful existence or the functioning of a state organ would be at odds with Art 8 (1) of the Constitution which demands that the Constitution is the supreme law of the Republic of Poland. Neither Art 90 (1) nor Art 90 (3) of the Constitution could form the basis for a transfer of authority to an international organization which would allow the adoption of legal acts or decisions that would be

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<sup>79</sup> Pawłowicz (2002) 61; as cited in *Biernat* (2008) para 16. Cf also the pleas of the applicant to the Constitutional Court, K 18/04, para 1.

<sup>80</sup> See *Jankowska-Gilberg* (2003) 425 f; and *Biernat* (1998) 406. Moreover *Mik* (1999) 154 f; and *Mojak* (2000) 175; both as cited in *Biernat* (2008) para 17.

<sup>81</sup> *Wójtowicz* (2003) 98; as cited in *Biernat* (2008) para 17.

<sup>82</sup> *Mik* (1999) 155; as cited in *Biernat* (2008) para 17.

<sup>83</sup> *Wójtowicz* (2003), 113 f; as cited in *Biernat* (2008) para 17.

<sup>84</sup> *Mik* (1999) 155 f; und *Wójtowicz* (2003) 464; as cited in *Biernat* (2008) para 17.

<sup>85</sup> Constitutional Court, K 18/04, para 8.5.

contrary the Constitution. Art 90 (1) and Art 91 (3) of the Constitution could not lead to a transfer of competences to the extent that would result in the Republic of Poland giving up its existence as a sovereign and democratic state<sup>86</sup>.

### 6.2.2. Scrutiny of secondary legislation, especially *ultra-vires*-Doctrine

In the context of the relationship between Union law and the domestic legal regime the Constitutional Court held in its judgment on the accession agreement that the ECJ would be the main but not the only depositary of the empowerment to apply the Treaties in the legal system of the European Community and European Union. The ECJ would decide in exclusivity on the validity and the interpretation of Community law. The interpretation of Community law by the ECJ should on the one hand be exercised within the competences and functions transferred by the Member states to the European Communities and correlate with the subsidiarity principle and on the other should be based on mutual loyalty between the Community/Union organs and the Member states. This assumption would create – on parts of the ECJ – the necessity of goodwill towards the national legal systems and on parts of the Member state the necessity of the highest standard of respect towards Community norms<sup>87</sup>.

According to the Constitutional Court the Member states retain the right to access whether the Community or Union organ when adopting a certain measure (a legal act) have acted within the transferred competences and whether they exercised their competences according to the principles of subsidiarity and proportionality. Transgressing these boundaries would lead to the result that the acts adopted outside these boundaries would not be subject to the primacy of Community law<sup>88</sup>.

### 6.3. Constitutional rules on implementing EU law

In its judgment on the European Arrest Warrant the Constitutional Court held on the one hand that the obligation to implement framework decisions would represent a constitutional requirement which would result from Art 9 of the Constitution. On the other hand it made clear that the realisation of this constitutional requirement would not necessarily and not in every case mean that the secondary EU law and the corresponding national implementation laws would comply with the provisions of the Constitution<sup>89</sup>. The control whether normative acts comply with the Constitution would be the fundamental function of the Constitutional Court in the constitutional framework. The obligation to review legal acts would equally apply if the alleged non-compliance with the Constitution would concern a part of the legislation that implements Union law. The Constitutional Court further explained that due to Art 9 of the Constitution and the obligations derived from the EU-Membership an amendment of the current law would be necessary in order to allow not only the complete but also the constitutional implementation of the framework decision 2002/584/JHA of the 13th July 2002 on the European Arrest warrant<sup>90</sup>.

<sup>86</sup> Constitutional Court, K 18/04, para 4.1 and 4.5. According to the Constitutional Court its decision would – in general – be in line with the decisions of the German Bundesverfassungsgericht in 2BVR 2134, 2159/92 (*Maastricht*-judgment of 12 October 1993) and the Danish Constitutional Court in I 361/1997 (*Carlsen / Premierminister*, judgment of 6 April 1998).

<sup>87</sup> Constitutional Court, K 18/04, para 10.2. with reference to *Barcz* (2004) 23 f; as cited in *Biernat* (2008) para 12; and *Mayer* (2003).

<sup>88</sup> Constitutional Court, K 18/24, para 10.3. with further references. The Constitutional Court did however not specify in what way the Member States would exercise such a control. Cf *Bainczyk / Ernst* (2006) 251.

<sup>89</sup> Constitutional Court, P 1/05, para 2.4.

<sup>90</sup> Constitutional Court, P 1/05, para 5.

## 6.4. Resulting relationship between EU law and national law

As already explained, Art 9 of the Constitution sets out the position of the Union and Community law in the Polish legal order. According to Art 91 (1) of the Constitution an international agreement is, given that it fulfils the conditions of this provision, part of the domestic legal order and is directly applicable if the application does not require the enactment of legislation. Such an international agreement takes precedence over national legislation pursuant Art 9 of the Constitution if the legislation is inconsistent with it. If this follows from an international agreement which set up an international organisation the law adopted by this organisation is directly applicable and takes precedence over conflicting national law according to para 3.

Art 91 (1) and (2) of the Constitution concern the accession agreement as well as the founding treaties of the European Union and the European Community and Art 91 (3) the secondary law. The precedence over national legislation encompasses also precedence over legal acts of lower rank but not over the Constitution<sup>91</sup>.

Art 91 (2) and (3) of the Constitution are silent on the nature of this precedence over national law. *Biernat* argues that this would, due to the jurisdiction of the Constitutional Court, mean precedence in form of invalidity of the conflicting national norm, as the finding of incompatibility with an international agreement would involve the invalidation of the act or legal act of lower rank; in contrast the provision would stipulate for ordinary courts the primacy of international agreements<sup>92</sup>.

Contentious within Polish jurisprudence is the issue of precedence of Union and Community law over the Constitution<sup>93</sup>.

One part of jurisprudence rejects such precedence, as the literal and systematic interpretation of the Constitution would contradict this.<sup>94</sup> The Constitution would differentiate in Art 87 (1) between the Constitution and legislation;<sup>95</sup> moreover Art 8 (1) would stipulate that the Constitution is the supreme law of the Republic of Poland.<sup>96</sup> In this context it is also recalled that during the drafting of the Constitution a proposal had been discussed that would have set out the precedence of the law enacted by an international organisation in cases of conflict with the constitutional provisions<sup>97</sup>.

Another part of jurisprudence acknowledges the precedence of Community law as a general legal principle developed by the ECJ. According to the ECJ the Community law would also take precedence over the Constitutions of the Member states.<sup>98</sup> With the acceptance of the *aquis communautaire* Poland would have also accepted the principle of precedence. Equally Art 90 (1) of the Constitution should be regarded as basis for the precedence of Union and Community law over the Constitution.<sup>99</sup> The ratification procedure would be subject to stricter rules as the procedure for constitutional

<sup>91</sup> In this line *Biernat* (2008) para 21 f.

<sup>92</sup> In this line *Biernat* (2008) para 21.

<sup>93</sup> With regard to the supremacy of the Constitution see *Tuleja*, para 50 ff.

<sup>94</sup> *Działocha* (1999a) 5-10; and *Safjan* (2001) 9 f; both as cited in *Biernat* (2008) para 42.

<sup>95</sup> *Biernat* (1998) 419.

<sup>96</sup> *Safjan* (2001) 10; and *Garlicki* (2000) 64; both as cited in *Biernat* (2008) para 42.

<sup>97</sup> *Działocha* (1999b) 8; as cited in *Biernat* (2008) para 18. See also *Bainczyk / Ernst* (2006) 249 with further references.

<sup>98</sup> In this line *Jankowska-Gilberg* (2003) 428 f. See *Barcz* (1998) 12; *Wójtowicz* (2003) 473; both as cited in *Biernat* (2008) para 43.

<sup>99</sup> *Barcz* (1998) 12; *Masternak-Kubiak* (2003) 121; and *Czapliński / Wyrozumski* (2004) 570; all as cited in *Biernat* (2008) para 43.

amendment regulated in Art 235 of the Constitution.<sup>100</sup> Equally the Constitutional Court would have acknowledged that the procedure prescribed in Art 90 of the Constitution would be akin to the procedure for constitutional amendment.<sup>101</sup> It is also argued that the conclusion of the accession agreement would have led to a shift of the position of the Constitution in the system of legal sources; the primacy of the Constitution would only be preserved as long as the state would retain its competences. In the other areas the founding treaties of the European Union and the European Communities take effect. One would therefore have to speak of a constitutional dualism<sup>102</sup>.

Finally, the view is taken that the conflict between the principle of precedence of Union law and the precedence of the Constitution could not be solved on an abstract and general level. An open clash of these principles should rather be avoided and one should adopt a pragmatic position so as to identify all possible areas of collision and subsequently find a solution for every conflict. The interpretation of the Constitution in an open and accommodating way towards Europe would constitute one of the instruments to achieve this<sup>103</sup>.

In its verdict on the accession agreement the Constitutional Court considered the precedence of Union and Community law in the Polish legal order in principle.

The in Art 91 (2) of the Constitution guaranteed primacy of international agreements would not directly lead (in fact in no area) to an acknowledgement of an analogous primacy of these agreements vis-à-vis the Constitution. It would – due to its particular force of validity – be “the supreme law of the Republic of Poland” in relation to all binding international agreement for the Republic of Poland, equally in relation to those named in Art 90 (1) of the Constitution. Due to superordination following from Art 8 (1) of the Constitution, the Constitution would have higher legal force and primacy.<sup>104</sup> The concept and model of Union and Community law would have created a new situation in which autonomous legal orders would be applicable in parallel. The emergence of a relative autonomy of legal orders which rest on their own internal hierarchical principles would not mean that these would not interact with each other; equally it would also not eliminate the possible collision of provisions of Community law and the Constitution. Such a collision would arise if an unsolvable discrepancy between provisions of the Constitution and Community law would occur. In fact a discrepancy which could not be resolved by the application of an interpretation that would respect the relative autonomy of the European and the national law.<sup>105</sup> Such a discrepancy could in the Polish legal system on no account be resolved by accepting the primacy of the Community provision over the constitutional provision, it could also not lead to loss of validity of the constitutional provision and its substitution by a Community provision nor could it lead to a restriction of the scope of application of the constitution provision to the area where the Community law would not be applicable. In such a situation the Polish legislator would have obligation to either amend the Constitution or to provoke an amendment of Community law or – ultimately – to decide about the withdrawal from the European Union. In the area of individual rights and freedoms the Constitution would set the minimum standard that could not be lowered or questioned as a consequence of the introduction of Community provision; the Constitution would in this regard act as a guarantee. The

<sup>100</sup> Szafarz (1997) 34; and Garlicki (2000) 64; both cited in *Biernat* (2008) para 43.

<sup>101</sup> Constitutional Court, K 18/04, para 2.2.

<sup>102</sup> *Wojtyczek* (2002) 107; as cited in *Biernat* (2008) para 43.

<sup>103</sup> *Biernat* (2004b) 23 ff; and *Łętowska* (2005) 1136-1146; both as cited in *Biernat* (2008) para 44.

<sup>104</sup> Constitutional Court, K 18/04, para 4.2.

<sup>105</sup> Constitutional Court, K 18/04, para 6.3.

Constitutional Court hence does not acknowledge the possibility of questioning the validity of the Constitution if it conflicts with the Community law<sup>106</sup>.

In this regard the Constitutional Court held that the supremacy of the Constitution with regard to the entirety of the legal order in the realm of the sovereignty of the Republic of Poland would manifest itself in different areas: The process of European integration by means of transferral of competences in certain matters to organs of the European Union and European Communities would have a basis in the Constitution itself. The mechanism of the accession would find its distinctive expression in the provisions of the Constitution; its application and effectiveness would depend on the compliance with the constitutional elements of the integration procedure. Moreover, one could find support for the supremacy of the Constitution in the fact that the accession agreement and its integral acts would be subject to the mechanisms of the constitutionality review. Subject to the review would also, even though only indirectly, be the other acts of the primary law of the European Union and the European Communities which are appendices to the accession agreement. Finally, provisions of the Constitution, as an act which is supreme and the expression of the sovereign will of the nation, could not lose their validity or be subject to change only because of an unsolvable conflict between certain provisions (Community acts and the provisions of the Constitution). In such a situation the sovereign Polish constitutional legislator would retain the independent decision power over the manner in which this conflict should be solved, among these would also be the question of usefulness of a possible amendment of the Constitution itself<sup>107</sup>.

With regard to the principle of primacy of Community law over national law the Constitutional Court held the following: This principle would be emphatically emphasized by the ECJ; this would be justified by the objective of integration and the necessity of the creation of a common European legal sphere. This principle would undoubtedly represent the effort to ensure the uniform application and enforcement for European law. However, the Constitutional Court found that it would not be the ECJ alone – in the meaning of exclusivity – that determines the ultimate decision which had to be taken by sovereign Member states in the case of a hypothetical conflict between the Community's legal order and the constitutional provisions. In the Polish legal system such decisions should always be made in the light of Art 8 (1) of the Constitution; according to Art 8 (1) the Constitution would remain the supreme law in the Republic<sup>108</sup>.

With regard to the plea that the principle of primacy would result from the case law of the ECJ, the Constitutional Court held that the juridical statements of the ECJ could not be subject to the directly exercised review of the constitutionality; this would hold true with regard to concrete decisions of the ECJ as well as – the of concret decisions caved out – long standing case law of the European Court of Justice. The jurisdiction over the case law of any judicial organ of the European Communities would clearly fall out of the scope of the competence of the Constitutional Court as stipulated in Art 188 of the Constitution<sup>109</sup>.

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<sup>106</sup> Constitutional Court, K 18/04, para 6.4.

<sup>107</sup> Constitutional Court, K 18/04, para 7.

<sup>108</sup> Constitutional Court, K 18/24, para 7.

<sup>109</sup> Constitutional Court, K 18/04, para 9.1-3. In this regard it has been pointed out that it would not be problematic that the Constitutional Court would have negated the competence to adjudicate on the ECJ; this would however ignore that the case law of the ECJ would have developed a general principle of Community law. Therefore the Constitutional Court would have had in this case not only to decide on individual decisions or long standing case law. In the Polish jurisprudence it would have before often been highlighted that the acceptance of Art 2 of the Act on the Conditions of Accession would at the same time mean an acceptance of the principle of primacy of Community law over national law as developed by the ECJ. In this line *Bainczyk / Ernst* (2006) 251 with further references.

In this line the Constitutional Court has, in its decision of the 19<sup>th</sup> December 2006<sup>110</sup> on validity of the act of the 23<sup>rd</sup> January 2004 on the excise duties with Art 90 T (now Art 110 TFEU) and Art 91 (2) of the Constitution, held that a conflict between decisions of the ECJ and the Constitutional Court might arise. This against the background that the ECJ would undoubtedly safeguard the Community law and thereby would not have to take into account the requirements of the individual Member states including their constitutions and on the other hand the Constitutional Court would safeguard the Constitution – according to Art 8 (1) the supreme law of the Republic. The Constitutional Court would therefore, equally because of Art 8 (1) of the Constitution, be obliged to acknowledge its position as the final arbiter in matters concerning fundamental questions regarding the constitutional system.<sup>111</sup> *Łazowski* criticises that this reservation would be unclear and stretchable; as the Constitutional Court would not define its jurisdiction it would keep the practice in the dark about the relevance of this case law<sup>112</sup>.

Based on the findings of the Constitutional Court on the relationship between Constitution and Union and Community law as well as the three named options to solve conflicts between the provisions of the Constitution and the Union and Community law (constitutional amendment, amendments to the Union and Community law or withdrawal from the European Union<sup>113</sup>) *Łazowski* questions if the solution offered by Constitutional Court would really mean the supremacy of the Constitution. Even if this would on first sight seem this way, it could equally mean something different, if one considers the effect of a constitutional amendment. One could argue that this amendment initiated by conflicting provision of the Union or Community law would lead to an indirect supremacy of the Union or Community law over the Constitution.<sup>114</sup> A similar position is taken by *Kowalik-Bańczyk*; the call for the legislator to amend the Constitution would mean that the Constitutional Court would in fact acknowledge the supremacy of the Union law. The Constitutional Court would have declared Art 607t (1) of the Criminal Procedure Act of the 6<sup>th</sup> June 1997 as unconstitutional but would have at the same time suggested that the unconstitutionality should be remedied by constitutional amendment. With this decision the Court would have accepted that the Constitution would no longer be the absolute framework for the Court's review function; would the Constitution hinder the correct implementation of Union law it would have to be amended. Thereby the Constitutional Court would have implicitly accepted the supremacy of Union law over the Constitution<sup>115</sup>.

Finally, one has to look at the jurisdiction of the Constitutional Court with regard to the accession agreement as well as the primary and secondary Union and Community law. As already explained, the competences of the Constitutional Court are set out in Art 188 of the Constitution. Equally international agreements are subject to and standard for the judicial review by the Constitutional Court: According to Art 188 of the Constitution the Constitutional Court adjudicates on the compatibility of international agreements with the Constitution (1), on the compatibility of the legislation with ratified international agreements which needed prior approval by the legislature (2), as well as on the compatibility of legalisation adopted by the central state organs with ratified international agreements (3).

<sup>110</sup> Constitutional Court Decision of 19 December 2006, P 37/05, English Translation available on the web page of the Constitutional Court [www.trybunal.gov.pl](http://www.trybunal.gov.pl). See *Łazowski* (2008).

<sup>111</sup> Constitutional Court, P 36/04, para II.

<sup>112</sup> Cf *Łazowski* (2008) 194.

<sup>113</sup> Constitutional Court, K 18/24, para 6.4.

<sup>114</sup> In this line *Łazowski* (2007a) 160.

<sup>115</sup> *Kowalik-Bańczyk* (2005) 1360 f.

According to *Banaszkiewicz* and *Biernat* Union or Community law could be subject to constitutional review in five different situations:<sup>116</sup> The Constitutional Court reviews the constitutionality of (a) provisions of the primary Community law, as well as (b) of domestic provisions with the rank of parliamentary acts or lower rank which should fulfil obligations derived from Community law. Moreover, the Constitutional Court decides on the compatibility of (c) domestic legal provisions with the rank of parliamentary acts or lower with primary Community law as far as it is alleged the obligation to implement Community law has been infringed by the national legislator, (d) of domestic legal provisions with the rank of parliamentary acts or lower with Community law which because of the Constitution has primacy, and finally (e) a directly applicable act of secondary Community law with the Constitution<sup>117</sup>.

The Constitutional Court has already considered the cases of (a) – in the case on the constitutionality of the accession agreement,<sup>118</sup> (b) – in the case on the constitutionality of the domestic provisions implementing the European Arrest Warrant<sup>119</sup>, and (c) initially in the case on the constitutionality of Polish VAT Act with Art 10 in conjunction with Art 249 TEC (now Art 4(3) TEU in conjunction with Art 288 TFEU)<sup>120</sup> and later in the case on the constitutionality of the Act of the 23<sup>rd</sup> January 2004 on the excise duties with Art 90 TEC (now Art 110 TFEU) and Art 91 (2) of the Constitution<sup>121</sup>.

From the outset it has been discussed in Polish jurisprudence whether the accession agreement and founding treaties of the European Union and the European Community could be reviewed with regard to their constitutionality by the Constitutional Court.

It has been argued that the accession agreement and founding treaties of the European Union and the European Community had to be seen as international agreements and would as such be subject to the unlimited review by the Constitutional Court, as Art 188 (1) of the Constitution would apply to all international agreements.<sup>122</sup> This has been countered with the argument that the review of the Constitutional Court regarding the accession agreement and founding treaties of the European Union and the European Community should have been restricted, even though this would directly follow from the Constitution. The Union and Community law would have a special nature and could have in certain cases take precedence over the Constitution which would exclude a review by the Constitutional Court. Additionally, the particular nature of the international agreement within the meaning of Art 90 of the Constitution, the content of the agreement, as well as the far reaching legal consequences of the conclusion of the agreement and the specific procedure for the approval would support a special treatment.<sup>123</sup>

According to the jurisprudence which proclaims the primacy of Union and Community law, the jurisdiction of the Constitutional Court with regard to the accession agreement and founding treaties of the European Union and the European Community is seen as partly not given. In part it is taken the view that the review of the constitutionality would

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<sup>116</sup> See *Banaszkiewicz* (2005) 11-15; and *Biernat* (2008) para 34 f.

<sup>117</sup> For *Banaszkiewicz* it seems questionable whether the Constitutional Court should actually make use of its review powers in the cases of (d) and (e). See *Banaszkiewicz* (2005) 11-15.

<sup>118</sup> With regard to this case: Constitutional Court, K 18/04.

<sup>119</sup> With regard to this case: Constitutional Court, P 1/05.

<sup>120</sup> With regard to this case: Constitutional Court Decision of 9 March 2005, K 36/04; on this *Banaszkiewicz* (2005) 12 f.

<sup>121</sup> With regard to this case: Constitutional Court, P 37/05.

<sup>122</sup> *Garlicki* (2000) 65 f; and *Wojtyczek* (2002) 105; and *Safjan* (2001) 8 f; all as cited in *Biernat* (2008) para 29.

<sup>123</sup> *Barcz* (1998) 12; *Wójtowicz* (2003) 473; *Masternak-Kubiak* (2003) 121; *W. Czaplinski/A. Wyrozumska* (FN 99), 570; *R. Szafarz* (FN 100), 34; and *K. Wojtyczek* (FN 102), 107; all as cited in *Biernat* (2008) para 29.

be admissible but from a policy point would not be desirable.<sup>124</sup> Hence, the preventive review of the constitutionality pursuant Art 133 (2) of the Constitution would be the only and desirable option.<sup>125</sup> A review *ex post* by the Constitutional Court should, however, be limited<sup>126</sup>.

The Constitutional Court held in its judgment on the accession agreement that it would not be empowered to independently review the constitutionality of primary law of the European Union; such a competence would however exist with regard to the accession agreement as an international agreement pursuant Art 188 (1) of the Constitution.<sup>127</sup> The Constitutional Court could not review the judicial statements of the ECJ in its direct constitutionality review, this would hold true with regard to concrete judgement as well as "settled case law" of the ECJ, even if the provisions of the accession agreement and the act on the conditions of the accession and the final accord and indirectly through the accession treaty also the founding treaties of the European Union and the European Communities in its current version<sup>128</sup> and future amendments<sup>129</sup> would be subject to the review. A review of the case law of any judicial organ of the European Union and the European Communities would clearly be outside the competences assigned to the Constitutional Court by Art 188 of the Constitution<sup>130</sup>.

According *Biernat* it is not possible to establish whether the criteria of assessment for an international agreement which has been approved by a national referendum is the same as for other international agreements, since at the time of the Constitutional Court's judgment on the accession treaty the court had not yet ruled on the constitutionality of an international agreement. *Biernat* is of the opinion that the Constitutional Court would use this approach also in future cases which concern the compatibility of primary Union and Community law with the Constitution. Should the same primary provisions be challenged due to a similar submission as in the case of the accession agreement the Constitutional Court would probably apply the "ne bis in idem" principle and would close the proceedings<sup>131</sup>.

The Constitutional Court in its judgment on the European Arrest Warrant<sup>132</sup> had to engage in the examination of the situation (b). It considered the constitutionality of a domestic norm with legislative rank – Art 607t (1) of the Criminal Procedure Act of 6<sup>th</sup> June 1997 – to implement obligations derived from Union law, namely the implantation of the framework decision 2002/584/JHA of 13<sup>th</sup> June 2002 on the European Arrest Warrant. The Constitutional Court held on the one hand that the obligation to implement framework decisions would constitute a constitutional requirement which would result from Art 9 of the Constitution. On the other hand it held however that the realisation of this constitutional obligation would not necessarily and not in any case mean that the secondary Union law and its implementing legislation at national level would comply with the Constitutional provisions.<sup>133</sup> The compatibility review of normative acts with the Constitution would be the fundamental function of the Constitutional Court in the constitutional framework; this obligation would also apply in the situation where the

<sup>124</sup> Zoll (1998) 136; and Wyrozumska (2006), 88; both as cited in *Biernat* (2008) para 30.

<sup>125</sup> Wójtowicz (2003) 473; Mojak (2000) 183 ff; Zoll (1998) 136 f; and *Biernat* (1999) 183 f; all as cited in *Biernat* (2008) para 30.

<sup>126</sup> Barcz (2004) 39; and Safjan (2001) 9 ff; both as cited in *Biernat* (2008) para 30.

<sup>127</sup> Constitutional Court, K 18/24, para 1.2.

<sup>128</sup> Constitutional Court, K 18/04, para 7.

<sup>129</sup> In this line *Bainczyk / Ernst* (2006) 258.

<sup>130</sup> Constitutional Court, K 18/04, para 9.1-3.

<sup>131</sup> *Biernat* (2008) para 31 f.

<sup>132</sup> Constitutional Court, P 1/05.

<sup>133</sup> Constitutional Court, P 1/05, para 2.4.

alleged infringement of the Constitution would relate to the part of legislation which implements Union law. The Constitutional Court, moreover, declared that due to the obligations derived from Art 9 of the Constitution and the EU-Membership of Poland an amendment of the current law would be necessary which would not only allow the full but equally the constitutional implementation of the framework decision 2002/584/JHA. To realise this task one could not preclude an amendment of the infringed constitutional provision – Art 55 (1) of the Constitution;<sup>134</sup> Art 607t (1) of the Criminal Procedure Act of the 6<sup>th</sup> June 1997 would be unconstitutional, as it would clash with the current Art 55 (1) of the Constitution which would prohibit any extradition and would there also prevent the extradition according to the European Arrest Warrant.<sup>135</sup> Given that the imitate invalidation of the unconstitutional national provision would lead to an infringement of the obligations under Union law, the Constitutional Court ordered that the invalidation of Art 607t (1) of the Criminal Procedure Act of 6<sup>th</sup> June 1997 would be suspended for 18 month. This approach would allow the competent state organs enough time for the adoption of actions which would prevent the consequences resulting from the non-application of the framework decision and would be an expression of self-restraint which follows from the principle of separation of powers<sup>136</sup>.

*Bainczyk* and *Ernst* argue that the future would need to show whether the Constitutional Court would claim jurisdiction if the infringement by legal acts implementing Union and Community law would not be as evident due to the direct wording of the Constitution as it was the case with the absolute prohibition of extradition stipulated in Art 55 (1) of the Constitution and if the directives or framework decision do not allow for discretion with regard to national implantation. Instead it would be imaginable that the review of fundamental rights would be left to the ECJ. However, equally the temporary suspension of the invalidity of the provision which was found to be unconstitutional would offer the chance of uninterrupted enforcement of Union and Community law<sup>137</sup>.

*Banaszkiewicz*<sup>138</sup> is fundamentally skeptic with regard to the jurisdiction of the Constitutional Court concerning judicial review in the situation (c) in which it decides on the compatibility of legal norms of the rank of parliamentary act or lower with primary Community law if it is alleged that the obligation under Community law to implement would be violated by the national legislator: The competence of the Constitutional Court to scrutinise the compatibility of legislation with ratified international agreements would express the high status of international law within the Polish legal system. The exercise of this competence would be reasonable and legitimate from an international law point of view where the agreement in the international or supranational area would not foresee a complete and effective system to monitor the compliance of the parties and/or where the legal questions cannot be decided by a court with binding force on the infringing party of the agreement (postulation of subsidiarity concerning the application of the review competence of the Constitutional Court<sup>139</sup>). As far as Community law would have its own control system – with the ECJ on top – the control by the Constitutional Court would be unnecessary; if it would in such cases find that the national provision would be contrary Community law the further question would arise whether it would in certain cases be allowed to accept the transitional applicability of the provision. If this question would be answered in the affirmative this would mean that the Constitutional Court could effectively sanction the non-compliance with obligations arising out of the EU-

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<sup>134</sup> Constitutional Court, P 1/05, para 5.1. and 5.7.

<sup>135</sup> Constitutional Court, P 1/05, para 3.6. and 4.4.

<sup>136</sup> Constitutional Court, P 1/05, para 5.2.-5.

<sup>137</sup> *Bainczyk / Ernst* (2006) 257 f.

<sup>138</sup> *Banaszkiewicz* (2005) 13.

<sup>139</sup> According to *Banaszkiewicz* a certain similarity to the “Solange II/Banana decisions” of the German Bundesverfassungsgerichts could not be overlooked.

Membership. For *Banaszkiewicz* it would finally be problematic whether secondary Community law could be relevant for the review of national provision by the Constitutional Court. He demonstrates this using the example of the abstract judicial review of norms concerning the VAT Act as far as it exempted internet services from the VAT and infringed Directive 77/388/EC<sup>140</sup>.<sup>141</sup> Formally in line with the respective competence clause of the Constitution, the applicant would have alleged a breach of the EC Treaty; however, in fact this claim would only be a vehicle for the claim that the Polish law was infringing Directive 77/388/EC. However, the Polish constitutional legislator would have consciously have chosen only ratified international agreement and not acts of international organisations as criteria for the review of the Constitutional Court<sup>142</sup>.

The Constitutional Court with the decision of the 19<sup>th</sup> December 2006<sup>143</sup> on validity of the Act of the 23<sup>rd</sup> January 2004 on the excise duties with Art 90 TEC (now Art 110 TFEU) and Art 91 (2) of the Constitution has abstained from the assessment of the material issues involved, as such an assessment would result in the interpretation of Community law. Subject of the proceeding would be the application of the law and not the validity of the applicable norms. Based on Art 178 (1) of the Constitution, according to which the judge is only bound by the law and the Constitution, in conjunction with Art 91 (2) and (3) which stipulate the precedence of Community law, the Court would have in the case of a conflict either to apply the directly applicable Community provision (and disapply the contravening domestic provision) or in the case that the Community provision is not directly applicable apply the domestic provision in accordance with Community law; in a case of doubt regarding the interpretation the ECJ should be asked by means of a preliminary ruling.<sup>144</sup> The prospect of the Constitutional Court invalidating a conflicting national provision would mean a pre-emption of the safeguarding of the Community law's effectiveness. This would, however, fall within the application of the law. The Constitutional Court would not have jurisdiction regarding the decision of individual questions regarding the application of the law, including Community law. The referral procedure pursuant Art 193 of the Constitution would therefore only be applicable in cases where the decision of the pending case is depend on the answer to the referred question. This would lead to the result that the conditions for the referral procedure pursuant Art 193 of the Constitution would not (anymore) be existent, if in a case of conflict between national and Community law the latter takes precedence and needs to be applied. The submitting court has to solve the conflict between the norms alone, in the case of doubt with support of the ECJ.<sup>145</sup> The missing relevance of the legal question for the pending case would also justify the termination of the referral procedure by the Constitutional Court given its inadmissibility. It would therefore not be necessary to refer questions regarding the compatibility of national law with Community law to the Constitutional Court; this would also apply in situations where the referring courts intends to disapply the domestic provision. The solution for such conflicts of norms would be outside the jurisdiction of the Constitutional Court, instead these questions would

<sup>140</sup> Sixth Directive of the Council of 17 May 1977 on the common system of value added tax OJ 1977 L 145, 1, in the version of Regulation 2006/18/EC of the Council of 14 February 2006, OJ 2006 L 51, 12.

<sup>141</sup> Constitutional Court Decision of 9 March 2005, K 36/04.

<sup>142</sup> The proceedings have been suspended.

<sup>143</sup> Constitutional Court Decision of 19 December 2006, P 37/05. Cf the application to the ECJ for a preliminary ruling in the Case C-313/05, *Brzeziński*, 2007 ECR I-523.

<sup>144</sup> *Łazowski* criticises that the Constitutional Court bases its reasoning concerning the precedence of Community law solely on Art 91 (2) and (3) of the Constitution and does not mention the case law of the ECJ, in particular the judgments of the ECJ in Case 6/64, *Costa / ENEL*, 1964 ECR 585, and Case 106/77, *Simmenthal II*, 1978 ECR 629. Cf *Łazowski* (2008) 194.

<sup>145</sup> The Constitutional Court omits it to consider the restrictions of the preliminary reference procedure according to Art 68 EC and Art 35 TEU old version. Cf *Łazowski* (2008) 195.

have to be decided by the Supreme Court, the administrative courts and by the ordinary courts. The right of every court to initiate a referral procedure to the Constitutional Court pursuant Art 193 of the Constitution would therefore in the case of conflict between domestic and Community law be restricted by Art 91 (2) and the principle of primacy of Community law<sup>146</sup>.

Regarding the competence to review the compatibility of legislation with ratified international agreements that demand ratification by means of a parliamentary act according to Art 188 (2), the Constitutional Court pointed out that its jurisdiction would be limited to cases where no other instrument would be available to remedy the norm conflict, hence cases where an international agreement is not directly applicable or in cases where due to reasons of legal certainty intervention by the Constitutional Court is necessary, i.e. in the case where the realm of the binding effect of the international agreement aligns with the domestic law with the consequence that the domestic law would be emptied out of content from a normative point of view.<sup>147</sup> *Łazowski* criticises in this context that the Constitutional Court omitted it to elaborate on these two cases and would, hence, leave the legal practice in the dark<sup>148</sup>.

*Banaszkiewicz*<sup>149</sup> considers the situation (d) in which the Constitutional Court decides on the compatibility of domestic legal provisions with the rank of a parliamentary act or lower rank with Community law which due to the Constitution enjoys precedence as particularly problematic with regard to the jurisdiction of the Constitutional Court. This situation would not be a question of validity of legal norms but would be a question of concrete application of the law which the courts could, if necessary after referring to the ECJ, decide themselves. The invalidation of the disappplied national norm by the Constitutional Court could only be necessary due to reasons of legal certainty; one could however counter that the Constitution would allow such uncertainty.

The Constitutional Court has not yet conclusively ruled on the admissibility of a possible review of acts of secondary Community in the situation (e).<sup>150</sup> In its judgment on the accession agreement the Constitutional Court held with regard to Art 31 (3) of the Constitution - which stipulates that restrictions of constitutionally guaranteed freedoms and rights are only permissible if there is a legislative basis and the restriction in a democratic state is justified by one of the reasons named in that provision and does not infringe the nature of the freedom or right - that these provisions would be addressed to the Polish legislator and that a direct transfer of the requirements of Art 31 (3) of the Constitution to the area of Community law making would not be justified. This would, however, as the Constitutional Court pointed out not eradicate possibility of scrutinising legal provisions including EC regulations with regard to its validity on the territory of the Republic of Poland as parts of the Polish legal order, inter alia with regard to the question whether those would respect requirements of Art 31 (3) of the Constitution, in particular the proportionality of restrictions.<sup>151</sup> It seems as the observations of the Constitutional Court regarding the claim that the extension of the legislative competences of the European Community would undermine the right to make a constitutional complaint lead in the opposite direction, as the subject of a constitutional review by means of a constitutional complaint - like hitherto - could only be a norm applicable on the territory of the Republic of Poland (a legislative or another normative act). If the Polish legislator would as a consequence of further integration into the European Union consider the

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<sup>146</sup> Constitutional Court, P 37/05, para II and III.3 and 4.2.

<sup>147</sup> Constitutional Court, P 27/05, para III.3.

<sup>148</sup> Cf *Łazowski* (2008) 194.

<sup>149</sup> *Banaszkiewicz* (2005) 14.

<sup>150</sup> Cf Constitutional Court, K 18/24, para 18. Cf *Łazowski* (2007b) 179.

protection of individual rights in form of the constitutional complaint as insufficient then it would be within the competence of the Polish constitutional legislator to change its shape<sup>152</sup>.

Based on the fact that acts of secondary Community law are not mentioned in Art 188 of the Constitution, have to be subsumed under Art 91 (3) of the Constitution and are therefore not comparable to international treaties,<sup>153</sup> Polish jurisprudence considers whether it would be possible to review secondary Community acts in the context of the constitutional complaint procedure pursuant Art 79 (1) of the Constitution or in the context of the referral procedure pursuant Art 193 of the Constitution (concrete judicial review procedure), as both procedures would involve normative acts. It is contentious whether only acts of Polish authorities (normative act in the formal sense), or whether equally acts of Union and Community organs (normative act in the material sense) have to be considered as normative acts<sup>154</sup>.

*Bainczyk* and *Ernst* believe that this means the observations that the Constitutional made in the judgement on the accession agreement have to be seen as expressing that EC Regulations could not be subject to the constitutional complaint. The negation of the admissibility of constitutional complaints could only be explained by the formal interpretation of normative acts. Consequently applications for the initiation of the concrete judicial review procedure must fail based to the same argument. However, one would need to question how a review would be possible. It would be unlikely that the Constitutional Court would view other courts as having jurisdiction on this matter. Concerning direct applicable secondary acts a grey area would exist, and based on the approach of the Constitutional Court rather unacceptable discrepancies with the Constitution could not be detected<sup>155</sup>.

Based on the fact that the jurisdiction of the Constitutional Court only covers ratified international agreements but not legal acts of International Organisations it seems impossible for *Banaszkiewicz*<sup>156</sup> that a court in the case of a conflict between applicable secondary Community law and the Constitution would refer pursuant Art 193 of the Constitution. The courts would have first, if necessary after the referring the question to the ECJ, strive for an interpretation of the secondary Community act in the light of the Constitution. Even in the case of an evident unconstitutionality a referral to the Constitutional Court would not be admissible. The review of the constitutionality of the application of the law – in particular the Community law – would not be within the competence of the Constitutional Court.

<sup>151</sup> Constitutional Court, K 18/04, para 18.5.

<sup>152</sup> Constitutional Court, K 18/04, para 18.6.

<sup>153</sup> See *Jankowska-Gilberg* (2003) 435 ff; and *Biernat* (1998) 422. *Safjan* (2001) 11 and 19; *Wójtowicz* (2003) 106; *Masternak-Kubiak* (2003) 221; *Barcz* (2004) 40; as well as (unclear) *Wyrozumska* (2006) 90 f; all as cited in *Biernat* (2008) para 33.

<sup>154</sup> See *Hofmann* (2009) 84 with further refernces; *Jankowska-Gilberg* (2003) 435 ff; and *S. Biernat Constitutional Aspects* (FN 49), 422 f. Moreover *Safjan* (2001) 11 f; and *Barcz* (1998) 16 f; both as cited in *Biernat* (2008) para 33.

<sup>155</sup> In this line *Bainczyk / Ernst* (2006) 259 with further references.

<sup>156</sup> In this line *Banaszkiewicz* (2005) 14.

#### 6.4.1. On the recent Judgement of the Constitutional Court on the Lisbon Treaty

At the time of completing the Country Report on Poland the Constitutional Court handed down its judgement on the constitutionality of the Act granting the consent for the ratification of the Lisbon Treaty. As the judgement is currently available only in Polish, it is referred to the press release of the Constitutional Court.

In its Judgement of 24 November 2010<sup>157</sup> the Constitutional Court held that Article 1 and Article 2 of the Lisbon Treaty, more precisely the ordinary revision procedure (Article 48(2)-(5) TEU), the simplified revision procedures (Article 48(6)-(7) TEU) and the flexibility clause (Article 352 of the TFEU), were consistent with Article 8 (1) and Article 90 (1) of the Constitution. According to the opinion of the Constitutional Court these procedures would arise from the experiences accompanying European integration and constitute a premise of an effective functioning of the European Union; additionally they would include various guarantees of respect for sovereignty of the Member states of the European Union, which functions as an international organisation. In addition, the delegation of competences to the European Union would require consent, pursuant Article 90 of the Constitution, regardless of the fact whether this is done by an international agreement or by application of simplified revision procedures.

Moreover the Constitutional Court held that Article 90 of the Constitution – a normative anchor to the state's sovereignty – would determine the limits of conferring competences on the European Union. This limit would be constituted by certain factors determining the constitutional identity of the Republic of Poland (the respect for the principles of Polish sovereign statehood, democracy, the principle of a state ruled by law, the principle of social justice, the principles determining the bases of the economic system, protection of human dignity and the constitutional rights and freedoms).

Thus the transfer of the aforementioned competences would be admissible, since they do not endanger the identity of the nation and the state sovereignty only to the extent this does not infringe on the constitutional basis of the state. This rule would be, in principle, recognised in the primary law of the EU. The review of the observance of this rule would be guaranteed by the constitutional review of the delegation of competences, which is carried out by means of the constitutional review of normative acts granting the consent for the said delegation of competences.

Finally the Constitutional Court stated that the model of the European Union, which has been presented in the Treaty of Lisbon, would ensure respect for the principle of protection of the state's sovereignty in the process of integration, as well as respect for the principle of favourable predisposition towards the process of European integration and the cooperation between states. This would find confirmation in the full compatibility of values and goals of the European Union determined in the Treaty of Lisbon as well as the values and goals of the Republic determined in the Constitution of the Republic of Poland, and in specifying the principles of distribution of competences between the European Union and its Member states.

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<sup>157</sup> Constitutional Court Judgement of 24 November 2010, K 32/09. See the respective press release on [www.trybunal.gov.pl](http://www.trybunal.gov.pl).

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## 7. FINLAND

### 7.1. Constitutional Foundations of EU-Membership

#### 7.1.1. The Finnish Constitution

The Finnish constitution was completely revised in 1999<sup>1</sup>. Accession to the EU in 1995 was based on the former version of the constitutional legal order. As for the substance, however, the new order did not change the relevant constitutional set of rules governing Finland's EU membership.<sup>2</sup> Despite the occasion of a constitutional reform, no specific rules for the transfer of powers to the EU and possible limits to be respected were created. Thus, these issues have to be settled on the grounds of the general provisions governing international relations in their systemic context of the Constitution.

At the time of accession the Finnish Constitution consisted of several constitutional acts,<sup>3</sup> most important of which were the Constitution Act (of 1919) and the Parliament Act (of 1928). International agreements were to be concluded by the President. Important international agreements such as the Accession Treaty to the EU had also to be approved by Parliament, in the form of a resolution. Simple majority was at that time sufficient<sup>4</sup>.

However, due to a dualist tradition of the Constitution, the conclusion of an international Treaty alone would not produce any legal effect internally. Thus it was (and today still is) also necessary to incorporate the agreement into an internal act. Usually the agreement is simply attached to that act – a decree or an act of parliament – without changing its original wording, which appears to bring the procedure near to that of general transformation<sup>5</sup>.

#### 7.1.2. The "Specific" Basis for Membership

As for the necessary act to be adopted in the special case of EU membership, the Accession Treaty was considered to derogate fundamentally from the Constitution.<sup>6</sup> The impingement on Finland's sovereignty and also the transfer of powers to supranational bodies was of specific importance. This was done in an ex ante scrutiny of the Accession Treaty by the Constitutional Law Committee of Parliament,<sup>7</sup> which is in charge of the supervision of the constitutionality of proposals and other matters.<sup>8</sup> Against the background that there is no Constitutional Court in Finland, this ex ante scrutiny of

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<sup>1</sup> The Constitution of Finland (731/1999) was adopted on 11 June 1999. The English version can be found at <http://web.eduskunta.fi/Resource.phx/parliament/relatedinformation/constitution.htm> (Nov 2010). The reform at the time was not a total revision, but a careful restructuring of the constitutional system, building on the continuity of the old traditions. The aims were primarily codification, modernisation, and a revision specifically regarding the separation of powers.

<sup>2</sup> Compare for the following esp *Aalto* (1995); *Cottier* (1999); *Griller* (2001); *Jääskinen* (1999); *Jyränki*, (2001); *Ojanen T.* (2004); *Ojanen T.* (2007); *Pohjolainen* (1996); *Tiitinen* (1995); *Rosas* (1999).

<sup>3</sup> That has been changed under the new constitution which repealed, among others, the Parliament Act of 1928.

<sup>4</sup> See *Aalto* (1995) 619.

<sup>5</sup> Some authors call that a "de facto monism" – see *Rosas* (1999) 167. The issue shall not be deepened here. However, it shall be said that the incorporation technique of international law into the national legal order is not decisive for its monist or dualist character. Rather is it the eventual change of the legal foundation of the incorporated provisions.

<sup>6</sup> See esp *Aalto* (1995) 620 ff; *Rosas* (1999) 167 ff.

<sup>7</sup> Constitutional Law Committee of Parliament, PeVL 14/1994 vp, p. 92.

<sup>8</sup> Section 74 of the New Constitution: "The Constitutional Law Committee shall issue statements on the constitutionality of legislative proposals and other matters brought for its consideration, as well as on their relation to international human rights treaties." See *Ojanen* (2004) 532.

proposals – not only the decision to accede to the EU – is specifically important. It covers issues of constitutional importance which, in other countries, would usually be dealt with by constitutional courts<sup>9</sup>.

The Finnish constitution allows for constitutional *leges fugitivae* that is derogations from the constitution which need not be incorporated formally into the text of the constitution.<sup>10</sup> In the case of international agreements, this incorporation into the Finnish legal system -- which is to be differentiated from the approval of the agreement -- can be done by a two-thirds majority of the votes cast in parliament.<sup>11</sup> In the case of the Accession Treaty this possibility was used in order to adopt the EU Act<sup>12</sup>.

Consequently, EU accession produced no formal change to the wording of the Finnish constitution, neither in the ratification nor in the incorporation procedure. The fundamental change to the Finnish legal system has to be understood by the meaning of the EU Act itself.<sup>13</sup> This Act is very short and contains only three sections. It states Finland's EU membership and provides for the internal legal force of primary and secondary EC and EU law under the conditions laid down by the *acquis communautaire*.

The same technique was used for the incorporation of the Amsterdam Treaty. The Committee of Constitutional Law in this case was of the opinion that this was necessary because of the additional transfer of powers by the communitarization of parts of the third pillar, other new competences, but also the explicit possibility to conclude agreements with third parties in the field of the CFSP<sup>14</sup>.

The new Finnish constitution entered in force on 1 March 2000. Consequently, it had neither been applicable on the occasion of Finland's EU accession nor to the conclusion of the Amsterdam Treaty. However, it became relevant for the subsequent developments like the conclusion of the Nice Treaty and the Treaty of Lisbon. The Constitution includes a Chapter 8 on "International Relations". This Chapter implicitly acknowledges Finland's EU membership by regulating the participatory rights of parliament in EU matters.<sup>15</sup>

<sup>9</sup> The Committee also deals with the constitutionality of secondary EU measures such as regulations and directives.

<sup>10</sup> This is still possible to a certain extent under Section 73 para 1 of the new Constitution which allows for "the enactment of a limited derogation of the Constitution".

<sup>11</sup> Article 69 para 1 of the Parliament Act at the time of Finland's EU accession. This was upheld by Section 95 para 2 of the new Constitution, which reads as follows: "A Government bill for the bringing into force of an international obligation is considered in accordance with the ordinary legislative procedure pertaining to an Act. However, if the proposal concerns the Constitution or a change to the national territory, the Parliament shall adopt it, without leaving it in abeyance, by a decision supported by at least two thirds of the votes cast."

By contrast, according to Section 73 of the new Constitution – corresponding to Article 67 of the Parliament Act in force at the time of the decision on EU membership – amendments or derogations of the Constitution by internal law "shall in the second reading be left in abeyance, by a majority of the votes cast, until the first parliamentary session following parliamentary elections. The proposal shall then ... be adopted without material alterations in one reading in a plenary session by a decision supported by at least two thirds of the votes cast. However, the proposal may be declared urgent by a decision that has been supported by at least five sixths of the votes cast. In this event, the proposal is not left in abeyance and it can be adopted by a decision supported by at least two thirds of the votes cast."

<sup>12</sup> No 1540/1994.

In addition, a consultative referendum was organized in October 1994. It produced 57% of Yes-votes.

<sup>13</sup> A specific constitutional provision on the transfer of powers was not only considered unnecessary, but also questionable. This was so for the mentioned Article 69 Parliament Act which allowed for derogations from the constitution with regard to international agreements. Presumably, Article 69 would not have allowed changing the wording of the constitution. That would have to be done by the specific procedure foreseen for such amendments; compare *Aalto* (1995) 623.

<sup>14</sup> Opinion of 27 March 1998, PeVL 10/1998 vp.

<sup>15</sup> See Sections 93 para 2, 96 and 97 of the Constitution; compare also Section 50 para 3, where EU membership has its consequences. It would be speculative to conclude that the participatory rights of the

However, it does not draw on the membership status itself, or on any question concerning the relationship between Finnish law and European Union law. Apparently, it did not change the original and specific foundation of EU membership, especially also not the dualist approach of the constitution.

There is still the categorical difference between the acceptance of an international obligation and its bringing into force within the internal legal order.<sup>16</sup> According to Section 94 para 2 of the Constitution an international obligation concerning the Constitution now is also to be *approved* – not only incorporated – by at least two thirds of the votes cast, and no longer by simple majority, as had been the case at the time of EU accession. Subsequently, in order to bring such Agreement – concerning the Constitution – into force internally, Section 95 para 2 requires two thirds of the votes cast in Parliament.

Furthermore, Section 94 para 3 stipulates that “(a)n international obligation shall not endanger the democratic foundations of the Constitution”. This can be read as a pertaining condition of EU membership, and a limit to EU integration which could not even be overcome by a “constitutional majority” of two thirds<sup>17</sup> but only by a “regular” amendment of the constitution, which requires two parliamentary decisions on an identical text, the second with a two thirds majority, and general parliamentary elections in between the two voting procedures<sup>18</sup>.

## 7.2. Constitutional Limits to EU-Integration

The “Finnish way” into the EU entails specific consequences for the specific features of EU law: primacy and direct effect. The opening up of the Finnish legal order was done using a procedure generally considered as allowing “exceptions”<sup>19</sup> from the Constitution, or, as it is metaphorically called, on the basis of the “hole theory”<sup>20</sup> meaning that the contents of the exception from the Constitution are to be found in the provisions authorized by this procedure. In the case of EU membership this implies not only an exemption from constitutional law boundaries for the whole *acquis communautaire* as accepted at the time of accession, but also for future secondary law enacted on the grounds of the accepted *acquis*.<sup>21</sup> Consequently, according to this “hole theory” as applied by the Constitutional Law Committee of the Finnish Parliament, “Parliament can legislate within the framework of the obligations deriving from Community law with simple majority as the constitutional impediment has already been removed by the adoption of the *EU Act* as an exception to the Constitution, even if the Community obligation would materially conflict with the Constitution.”<sup>22</sup> Eventual limits to that exception might thus arise primarily whenever the competence of the Union or the Communities to legislate is disputed.

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Finnish Parliament enshrined in these provisions would be a formal condition of EU membership in the sense of the reasoning of the German constitutional court (integration responsibility – *Integrationsverantwortung*).

<sup>16</sup> Section 94 and 95 of the new Constitution.

<sup>17</sup> Its applicability in the case of EU membership as developed before its entering into force remains uncertain.

<sup>18</sup> Section 73 of the Constitution.

<sup>19</sup> *Aalto* (1995) 620; *Rosas* (1999) 168.

<sup>20</sup> *Jääskinen* (1999) 408, 411.

<sup>21</sup> Some experts criticized this as a violation of the constitution. They contended that fundamental changes of the core elements of the constitution effecting sovereignty, democracy, representativity, rule of law, primacy of the constitution and fundamental rights, have to be done by the “normal” procedure for the amendment of the constitution by constitutional law (compare above fn 11) – see esp. *Jyränki* (1996) (with a summary in German language).

<sup>22</sup> *Jääskinen* (1999) 411 – see also at 411 ff regarding the subsequent practice of the Constitutional Law Committee based on this theoretical approach.

This theory leaves ample room for discussion on the relation between Finnish law and Union law.

Illustrative in this context is the case of entering into the third stage of EMU. The Committee of Constitutional Law of the Parliament not only accepted the large margin of discretion for the Council, but also the prerogative of the ECJ in determining the legality of such a decision.<sup>23</sup> The Committee also found the loss of the decision-making powers of the Bank of Finland covered.<sup>24</sup> It extended that reasoning even to Community measures based on Article 308 TEC.<sup>25</sup> By contrast, the Committee was of the opinion that, at the time of accession, Finland did not accept any definitive obligation to participate in the Exchange Rate Mechanism.<sup>26</sup> It did so despite the fact that participation in the ERM was one of the so called convergence criteria which had to be fulfilled as a prerequisite to enter into the third stage of EMU. As a consequence of the Committee's opinion, the legislative procedure applicable to the accession to the ERM was not "covered" by the EU Act.

There was also a case where a proposal for a regulation was deemed unconstitutional for the fact that it included a provision for officials of *other Member states* to participate in inspections in Finland<sup>27</sup>. The Committee made a difference between such inspection rights of Community institutions (which are covered) and of Member states' officials. The final version of the regulation made this right subject to the permission of the other Member state which resolved the matter for Finland. But the example illustrates eventual future conflicts between the constitution and EC measures. The conclusion might be that the Committee considered the Draft Regulation *ultra vires*. It is not easy to argue how else its position could be reconciled with the "hole theory", since there is no a priori reason in sight why the exception from the constitution could not include the right of the Community to confer inspection rights to officials of other Member states.

It is also obvious that there might arise a tension with regard to the prerogative of the ECJ to determine the legality and the reach of secondary legislation as accepted by the Committee<sup>28</sup>. Insofar the situation resembles that in other Member states. An eventual conflict between such ex-ante review and finally enacted secondary Union law in its reading by the ECJ would trigger the need for an amendment of the Constitution. Should that not be done, Finnish courts might come into the position to judge on the secondary legislation with a view to an eventual "evident conflict with the Constitution"<sup>29</sup>.

Experience in everyday life of the Finnish courts shows that the issue of a possible conflict between the "constitutional authorization" of EU membership and supremacy of EC law is rather theoretical in nature. However, it can be added that precedence over *constitutional* law in the above mentioned sense of the limits of the "hole theory" so far has not been tested. But apart from that, ample case law is proving that the Finnish courts rapidly accepted primacy and direct effect according to the case law of the ECJ.<sup>30</sup> The first case was decided in 1996 when the Supreme Administrative Court (*Korkein hallinto-oikeus*) ruled that Finnish authorities had to set aside the Finnish VAT Act (an Act of Parliament) which was found to be in conflict with the VAT directive providing for more

<sup>23</sup> Opinion of 11 June 1997, PeVL 18/1997 vp. This is clearly in contrast to, eg, the Maastricht decision of the German Constitutional Court, BVerfGE 89, 155 (187 f).

<sup>24</sup> Opinion of 11 March 1998, PeVL 7/1998 vp.

<sup>25</sup> Opinion of 14 June 1996, PeVL 3/1996 vp. Today, this would be Article 352 TFEU, as amended also in its substance by the Treaty of Lisbon.

<sup>26</sup> Opinion of 19 April 1996, PeVL 7/1996 vp.

<sup>27</sup> Opinion of 14 June 1996, PeVL 3/1996 vp – compare *Jääskinen* (1999) 412 f.

<sup>28</sup> See above fn 23.

<sup>29</sup> Section 106 of the Constitution. For that issue, compare below in the text near fn 34.

<sup>30</sup> Compare esp *Jääskinen* (1999) 416 ff.

far-reaching tax deduction rights of the citizens.<sup>31</sup> The Administrative Court expressly referred to the principles expressed in the case law of the ECJ.

To give only one more example: The Supreme Administrative Court<sup>32</sup> held that the national regulations on parallel imports of medicines were incompatible with the Community principle of free movement of goods. According to the Court, the National Agency for Medicines (*Lääkelaitos*) could not refuse a parallel importer authorisation to sell medicines on the grounds that he used a different size of packaging from the approved importer.

This development is all the more remarkable against the background that originally – and in the absence of a Constitutional Court in the Finnish legal system – Finnish courts were not empowered to measure Finnish law by the provisions of the constitution.<sup>33</sup> This changed under the new Constitution. Now there is, similarly to the situation in Sweden, the power of the courts, according to Section 106 of the Constitution, to “give primacy to the provision in the Constitution” over an Act of parliament whenever the application of that Act would be in “evident conflict” with the Constitution.<sup>34</sup> Consequently, like in Sweden, the right to “review” the legality of Acts of Parliament against the yardstick of EU law exceeds the right to scrutiny against the yardstick of constitutional law.

Regarding the scrutiny of Union law, however, the situation appears to be more complicated. Section 106 appears not to be directly applicable: Union law might, strictu sensu, not come under the term “Act” in Section 106.<sup>35</sup> Nevertheless, it could, on the one hand, be argued that the EU Act is an Act of parliament in the sense of Section 106. Consequently, it could be set aside. On the other hand, this Act is at the same time an Act amending the Constitution in the sense of Section 95 para 2 which makes it difficult to take this very Constitution as the yardstick for the legality of the EU Act.

This could, however, be different on the grounds of a systematic interpretation of Sections 94 und 95 to the end that they would not cover every amendment of the Constitution.

A first element for such reading of the Constitution could be Section 94 last sentence: “An international obligation shall not endanger the democratic foundations of the Constitution.” As a consequence, EU membership and its incorporation through the EU Act would have to respect this limit. Arguably, this could lead to restricting the transfer of decision-making powers to the EU which would seriously curtail or marginalize the powers of the Finnish parliament. This would lead to similar deliberations as in other Member states, eg Germany, and it would be an open issue whether and to what extent such a development could be balanced by increasing and fostering democratic law making structures at EU level.

On a more fundamental level it has been submitted that Finnish sovereignty – mainly in the sense that the Member states including Finland continue having the final say at

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<sup>31</sup> Supreme Administrative Court, 31 Dec 1996, KHO 1996 B 577; See *Jääskinen* (1999) 416 f.

<sup>32</sup> Korkein hallinto-oikeus, 10 September 1999, No 1789/3/98 2461.

<sup>33</sup> See *Pohjola* (1996) 417.

<sup>34</sup> Section 106 of the new Constitution: “If, in a matter being tried by a court of law, the application of an Act would be in evident conflict with the Constitution, the court of law shall give primacy to the provision in the Constitution.”

<sup>35</sup> Even if the question is, by analogy, answered in the affirmative, it must be added that according to the acceptance of the prerogatives of the ECJ as mentioned above (fn 23), the Finnish court would in any case first have to refer the matter to the ECJ under Article 267 TFEU. The materialisation of a conflict would thus require an ultra vires act of the Union together with an ultra vires act of the ECJ upholding the illegal secondary legislation.

European level, and that consequently no Kompetenz-Kompetenz had been or may be transferred to the European Union – is a constitutional restriction to European integration, at least that this is the understanding of the Constitutional Committee of the Parliament<sup>36</sup>.

Another element might be the protection of fundamental rights standards as guaranteed by the Finnish constitution.<sup>37</sup> It has to be noted that according to the development of Finnish practice, EU measures are “not allowed to weaken the domestic standard of protection of constitutional and human rights”.<sup>38</sup> In several instances this approach led to a “mitigated” implementation of EU measures, e.g. of the Council Framework Decision on the European Arrest Warrant, in order to secure constitutional and human rights standards.

On a methodological level, these limits can be qualified as being inferred from the systematic context of Sections 94 and 95 allowing for the transfer of powers in the context of, inter alia, EU membership, but not for endangering the democratic foundations of the state, its sovereignty, of its fundamental rights standard.

Taken altogether it cannot entirely be ruled out that constitutional limits for EU integration could be inferred from a systematic reading of the Constitution, and that these limits could then be applied to the scrutiny of the EU Act. However, it has to be repeated that this scenario is rather theoretical, not the least against the background that the constitutionality of the EU Act is subject to the ex-ante-review of the Constitutional Law Committee of Parliament, as mentioned.<sup>39</sup> What might be more likely is, as mentioned with regard to the European Arrest Warrant, the constitutional-conform interpretation of the EU Act and, consequently, the obligations to implement secondary EU measures accordingly.

This leads us to the question of a possible scrutiny of secondary EU measures (or rulings of the ECJ) against the yardstick of constitutional limits such as democracy and fundamental rights. In this respect, the legal situation is at least as unclear as regarding primary EU law.<sup>40</sup> As far as the respective contraventions against constitutional limits would *not be covered by the EU Act* – and consequently be ultra-vires in a wide sense – the argument could run that the authorisation by the EU Act (the exception rule in the sense of the “hole theory”) cannot apply, which would render secondary legislation inapplicable by way of analogous application of Section 106 of the Constitution. At first sight such setting aside of EU law could happen irrespective of the gravity of the mistake. However, given that the EU Act does not empower the courts to scrutinize the legality of secondary legislation, also this feature of Section 106 (“evident conflict”) could be applied by analogy. This would make it possible for Finnish courts to indirectly scrutinize the constitutionality of secondary EU measures.

However, given the silence of the Finnish constitution in this respect – especially the silence of Section 106 with regard of EU law –, it must be added, that also a different “solution” of conflicts between ultra-vires-acts of the EU and Finnish constitutional requirement could be advocated for: this would be to deny any right of the courts of setting aside secondary EU measures. Eventual consequences of such a conflict would

<sup>36</sup> *Ojanen* (2004) 540 f.

<sup>37</sup> See esp *Ojanen* (2004) 541 ff.

<sup>38</sup> *Ojanen* (2007) 99.

<sup>39</sup> Section 74 of the Constitution; see above in the text near fn 7.

<sup>40</sup> With respect to secondary measures, however, it must be added that such a situation may “easily” occur in the absence of an opinion of the Constitutional Law Committee which cannot be expected to anticipate ultra-vires-measures of the EU when scrutinizing the constitutionality of the transfer of powers as such.

then have to be drawn by parliament and the Finnish government – either by changing the Constitution or by withdrawing from the EU.

### **7.3. The Resulting Relationship between EU Law and National Law**

Finnish EU membership was enacted on the grounds of the general provisions of the Constitution governing “International Relations”, including the right to enter into obligations, and to incorporate them into the Finnish legal system (against the background of a dualist understanding of the relation between international and national law). Specific constitutional provision were created for the participatory rights of the Finnish parliament in the course of creating secondary Union law, but not regarding the membership as such, or constitutional limits to European integration – neither before nor during the big constitutional reform after EU accession.

Nevertheless, such limits to European integration could be inferred from a systematic reading of Sections 94 and 95 of the Constitution allowing for the entering into international obligations including EU membership. Arguably, and according to growing practice in Finland, these limits could be:

- “the democratic foundations of the Constitution” (Section 94 last sentence of the Constitution);
- Finnish “sovereignty” in the sense that Finland, in co-operation with the other EU Member states, continues having the final say at European level, and that consequently no Kompetenz-Kompetenz had been or may be transferred to the European Union; and
- The protection of fundamental rights standards as guaranteed by the Finnish constitution.

The application of such limits did not yet materialize in the sense that the application of primary or secondary EU law would have been denied in Finland. This has, amongst others, to be seen against the background that there is no Constitutional court in Finland which could concretize and enforce those limits with binding force *erga omnes*. Instead, constitutional scrutiny is primarily a matter for a special parliamentary Committee: the Constitutional Law Committee being in charge for an ex-ante-review of legislative proposals. It can be noted that the Committee is specifically eager to enforce the respect for fundamental rights, also when it comes to implementing EU measures. In addition, the Constitution empowers Finnish courts to set aside an “Act of parliament” whenever the application of that Act would be in “evident conflict” with the Constitution. Arguably, this could also be of relevance regarding EU law, be it by means of setting aside the EU Act incorporating EU law into the Finnish legal system, be it by applying the provision by analogy to EU measures. However, this has not happened yet.

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## 8. SWEDEN

### 8.1. Constitutional Foundations of EU-Membership

#### 8.1.1. Overview

The Swedish Constitution consists of four fundamental laws: the Act of Succession (1810), the Freedom of the Press Act (1949), the Instrument of Government (1974) and the Freedom of Expression Act (1991)<sup>1</sup>. Any amendment of these laws requires two decisions of the Riksdag of identical wording. The second decision may not be taken until elections for the Riksdag have been held following the first decision, and the newly-elected Riksdag has been convened. On the request of at least one third of the members of the Riksdag a decisive referendum is to be held simultaneously with the election for the Riksdag<sup>2</sup>.

#### 8.1.2. The Specific Basis for Membership

The most important element of the Swedish Constitution, the *Instrument of Government* (Regeringsformen – in the following: IG) was amended as a preparation for EU membership<sup>3</sup>, and once again in 2003.

Chapter 10 IG on the “Relations with other states” includes Article 5 providing – already in its version prior to the preparation for EU membership – for the transfer of powers to international organizations. According to that article, any right of decision-making may be entrusted, to a limited extent, to an international organization for peaceful cooperation of which Sweden is a member or is to become a member or to an international court of law. However, no right of decision-making relating to matters concerning the enactment, amendment, or repeal of a fundamental law, of the Parliament Act or of the Act concerning elections for the Parliament, or which regards a limitation of any of the rights and freedoms guaranteed by the IG may be delegated<sup>4</sup>.

These provisions were considered to be insufficient as a sound basis for Sweden’s EU membership.<sup>5</sup> Consequently, a new first paragraph was inserted in 1994 into Article 5 specifically dealing with the accession to the EU. It read – until 1 January 2003 – as follows:

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<sup>1</sup> See [http://www.riksdagen.se/templates/R\\_Page\\_5562.aspx](http://www.riksdagen.se/templates/R_Page_5562.aspx) (November 2010). Further quotations of the actual version are primarily taken from this source.

<sup>2</sup> Chapter 8, Article 15 IG. In the case of a referendum, the Bill shall be deemed to be rejected, if the majority of those taking part in the referendum vote against the proposal, and if the number of voters exceeds half the number of those who registered valid votes in the election.

<sup>3</sup> Compare for the following esp *Bernitz* (2000); *Bernitz* (2002); *Cottier* (1999); *Griller* (2001); *Holmberg / Stjernquist* (2000); *Lysén* (1996); *Lysén* (2002).

<sup>4</sup> *Bernitz* as well as *Holmberg / Stjernquist* also provide for a general survey on the Swedish legal system.

<sup>5</sup> The provisions relating to the enactment of fundamental laws shall apply in respect of any decision concerning such delegation. If time does not permit a decision in accordance with such provisions, the Riksdag may approve a delegation of the right of decision-making by a majority of no fewer than five sixths of those present and voting and no fewer than three fourths of the total membership of the Riksdag.

<sup>5</sup> The prevailing view was that these provisions could not accommodate the actual needs, despite the fact that they had been drafted – some thirty years ago – with a view of an eventual accession to the then European Communities. The conditions of an a priori “limited extent” of an eventual transfer of powers as well as the exclusion of any limitation of fundamental rights was considered to preclude the use of the provision for an accession to the EU as it stood at the beginning of the 90ies – compare *Bernitz* (2000) 447 f; *Holmberg / Stjernquist* (2000) 39.

"The Riksdag may transfer a right of decision-making<sup>6</sup> to the European Communities so long as the Communities have protection for rights and freedoms corresponding to the protection provided under this Instrument of Government and the European Convention for the Protection of Human Rights and Fundamental Freedoms. The Riksdag shall authorise such transfer<sup>7</sup> in a decision which has the support of at least three quarters of those voting. The Riksdag may also take such a decision according to the procedure prescribed for the enactment of fundamental law"<sup>8</sup>.

When Parliament gave its assent to the accession Treaty on 14 Dec 1994 based on this provision, it also passed a second measure: The *Act on the Accession to the EU*<sup>9</sup>, which was mainly aiming at incorporating EC law into the Swedish legal order. This was done against the background of a dualist tradition of the Swedish legal system. The Accession Act enumerates the most important basic treaties and instruments of the EU. The Act on Accession also sort of a doubles the constitutional authorization to transfer decision-making powers to the EU: It allows for the EC to take decisions with legal force in Sweden to the extent and with the effects which follow from the Treaties and other instruments listed in that law<sup>10</sup>. The Act of Accession had to be amended in order to insert the Amsterdam, the Nice, and finally the Lisbon Treaty as a source of primary law determining the transfer of powers.

During the ratification process of the Amsterdam Treaty it became apparent that the drafting of Chapter 10 Article 5 IG, which allowed for the transfer of powers to the "European Communities", being at the same time silent on the European Union, was too narrow.<sup>11</sup> However, it was only in 2002 that respective proposals for a change were tabled by the government and adopted on 20 November 2002. The Riksdag is now allowed to transfer its rights "within the framework of the European Union", thus widening the scope of transfer of powers, now encompassing the sphere of former pure

<sup>6</sup> This is the version taken from the book edited by the Riksdag (*Holmberg / Stjernquist* [2000] at 82) The English wording which was earlier given at the website of the Riksdag – which is not longer available today – was instead: "may entrust the right of decision-making".

<sup>7</sup> This is again the version from the book edited by the Riksdag (*Holmberg / Stjernquist* [2000]). By contrast, the version originally displayed at the website of the Riksdag – removed in the meantime – instead used the words "authorises such delegation". It goes without saying that this is an important difference. While the term "delegation" might insinuate that the delegated power is bound to respect all limits valid for the delegating authority, that might be different for a "transfer" of powers in certain areas.

The Swedish text used (and still uses in today's version, compare below in fn 15) the word "överlåtelse" which might rather point into the direction of the book version. The original was as follows:

"Riksdagen kan överlåta beslutanderätt till Europeiska gemenskaperna så länge som dessa har ett fri- och rättighetsskydd motsvarande det som ges i denna regeringsform och i den europeiska konventionen angående skydd för de mänskliga rättigheterna och de grundläggande friheterna. Riksdagen beslutar om sådan överlåtelse genom beslut, varom minst tre fjärdedelar av de röstande förenar sig. Riksdagens beslut kan också fattas i den ordning som gäller för stiftande av grundlag."

<sup>8</sup> A transitional provision – attached to the Instrument of Government – on the enactment of the amendment act (SFS 1994:1375) states: "If the Riksdag has approved an agreement on Swedish accession to the European Union following the holding of a referendum in the matter throughout the whole of the country, the Riksdag shall be entitled to entrust to the European Communities rights of decision-taking resulting from such accession without applying the qualified majority rules set out in Chapter 10, Article 5. The Riksdag shall also be entitled to approve the incorporation into Swedish law of the Communities' rules at the time of accession in the same manner as applies to the delegation of rights of decision-making."

The referendum on EU accession which took place in Nov 1994 was of a consultative nature and not mandatory. It produced 52,3% yes-votes of the votes cast.

<sup>9</sup> Lag med anledning av Sveriges anslutning till Europeiska unionen (SFS 1994:1500).

<sup>10</sup> It is not quite clear which *additional* legal effects might flow from this part of the Act on Accession to the EU, given that the authorization to transfer decision-making powers is already included in 10:5 IG, and given that this authorization presumably also covers the specific Union features of supremacy and direct effect. Since parliaments approval of the Accession Treaty was based on this constitutional authorization, it was argued that the enactment of the Accession Act had been superfluous; compare on the subject *Lysén* (1996) 432 ff.

<sup>11</sup> Compare for the following esp *Bernitz* (2000) 431 ff; *Cottier* (1999) 250 f; *Lysén* (2002).

intergovernmental cooperation.<sup>12</sup> At the same time, a “non-affection-clause” relating to the “principles of the form of government” (“principerna för statskicket”) was inserted into the text. Those amendments entered into force on 1 January 2003.

The decisive passages of Chapter 10 IG now are as follows:

Article 2<sup>13</sup>:

“The Government may not conclude an international agreement which is binding upon the Realm without Riksdag approval, if the agreement presupposes the amendment or abrogation of an act of law or the enactment of a new act of law, or if it otherwise concerns a matter which is for the Riksdag to determine ...”

Article 5 in its first sentences reads as follows:

“The Riksdag may transfer a right of decision-making which does not affect the principles of the form of government within the framework of European Union cooperation. Such transfer presupposes that protection for rights and freedoms in the field of cooperation to which the transfer relates corresponds to that afforded under this Instrument of Government and the European Convention for the Protection of Human Rights and Fundamental Freedoms. The Riksdag approves such transfer by means of a decision in which at least three fourth of those voting concur. The Riksdag’s decision may also be taken in accordance with the procedure prescribed for the enactment of fundamental law.<sup>14</sup> Transfer cannot be approved until after the Riksdag has approved the agreement under Article 2<sup>15</sup>”.

In 2008, the Lisbon Treaty was approved on the basis of these provisions, together with the approval of the (additional) transfer of decision-making rights to the EU.

## 8.2. Constitutional Limits to EU-Integration

### 8.2.1. Limits to the (Further) Transfer of Powers to the EU through Treaty Amendments

As mentioned, Chapter 10 Article 5 paragraph 1 IG stipulates two distinct limits to European Integration within the EU: the “principles of the form of government”, and human rights protection.

To start with the second, more debated issue: the transfer of decision-making powers by the Swedish parliament to the European Union presupposes “that protection for rights

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<sup>12</sup> It controversial question the enactment of a new European Constitution might have come under this new wording, was predominantly answered in the affirmative: compare *Nergelius* (2007).

<sup>13</sup> Compare [www.riksdagen.se/templates/R\\_PageExtended\\_6327.aspx](http://www.riksdagen.se/templates/R_PageExtended_6327.aspx) (Nov 2010).

<sup>14</sup> As mentioned, Chapter 8, Article 15 IG requires two decisions of identical wording taken by the Riksdag, with general elections having been held in between.

<sup>15</sup> The original wording runs as follows (compare <http://www.riksdagen.se/webbnav/index.aspx?nid=3925#K10> – Nov 2010):

“Inom ramen för samarbete i Europeiska unionen kan riksdagen överlåta beslutanderätt som inte rör principerna för statskicket. Sådan överlåtelse förutsätter att fri- och rättighetsskyddet inom det samarbetsområde till vilket överlåtelsen sker motsvarar det som ges i denna regeringsform och i den europeiska konventionen angående skydd för de mänskliga rättigheterna och de grundläggande friheterna. Riksdagen beslutar om sådan överlåtelse genom beslut, varom minst tre fjärdedelar av de röstande förenar sig. Riksdagens beslut kan också fattas i den ordning som gäller för stiftande av grundlag. Överlåtelse kan beslutas först efter riksdagens godkännande av överenskommelse enligt 2 §.”

and freedoms in the field of cooperation to which the transfer relates corresponds to that afforded under this Instrument of Government and the European Convention for the Protection of Human Rights and Fundamental Freedoms". The original wording made such transfer subject to the restriction "as long as" equivalent protection would be guaranteed at EU level. This made the conceptual origin even more apparent: The passage was and still is inspired by the German Basic law [Grundgesetz (GG)], especially by the so called "*Solange*"-jurisprudence of the German constitutional Court,<sup>16</sup> and its subsequent "incorporation" into Article 23 GG. It mirrors the requirement of a comparable level of fundamental rights protection not only as a prerequisite but also as a continuing condition for membership. Consequently, similar questions as to eventual reservations of the courts regarding supremacy and direct effect might arise like in Germany.

Nevertheless, until today this is regarded as a rather theoretical possibility in Sweden. Courts appear to accept the prevalence of EC law in general,<sup>17</sup> and the absence of a Constitutional Court which could be regarded as a specific guardian of the Swedish Constitution leads commentators to conclude that a scenario of an open conflict between the constitution and EU law might be unlikely. However, experience from other Member states reveals that such a "theoretical possibility" might gain actual importance very quickly<sup>18</sup>.

Against this background, the specific ambiguity of the Constitutional situation is rather delicate: It has to be noted that an eventual (limited) derogation from fundamental rights and freedom is mentioned only with regard to guarantees provided for by the IG itself and by the ECHR. It has been submitted that the more detailed rights as enshrined in the Freedom of the Press Act and the Fundamental Law on Freedom of Expression, including the right to "free access to official documents"<sup>19</sup>, might *not* be protected by Chapter 10 Article 5 IG.<sup>20</sup> Derogations from those rights would thus be less problematic, as regards supremacy of Union law<sup>21</sup>.

However, the contrary appears to be more plausible, taking the preparatory works into account<sup>22</sup>. The Parliamentary Constitutional Committee,<sup>23</sup> among others, stressed the limits of the constitutional authorization to "delegate" powers and the fundamental importance of the freedom of opinion, which entails public access to official documents.<sup>24</sup> Thus, the conclusion would be that eventual derogations from the Freedom of the Press Act and the Freedom of Expression Act could not take effect without prior amendment of

<sup>16</sup> Compare e.g. *Bernitz* (2002) at p. 30: "... the *solange* doctrine constitutes a part of the written Swedish constitution".

<sup>17</sup> In its first case involving a conflict between EC law and national law (RR 1997:65) the Supreme Administrative Court held that the prohibition of an appeal against a decision of the Department of Agriculture was in conflict with the general principles of Community law which had to prevail – compare as for the details *Bernitz* (2000) 447 ff. The case led to an amendment of the relevant procedural laws in Sweden.

Another example that the issue is thoroughly scrutinized even in cases where it is not obvious, see Case C-319/97, *Kortas*, [1999] ECR, I-3143.

*Bernitz* (2002) 31 stresses that no actual conflicts of this fundamental type so far occurred.

<sup>18</sup> For a discussion of the specific German case compare the contribution of *Vranes*. It is to be added that the conflict in question is not depending from the existence of a Constitutional Court.

<sup>19</sup> Article 2 Freedom of the Press Act.

<sup>20</sup> *Cottier* (1999) 249.

<sup>21</sup> *Bull* (2002).

<sup>22</sup> Compare *Bernitz* (2000) 420 f; *Holmberg / Stjernquist* (2000) 40 f.

<sup>23</sup> According to Article 4 Riksdag Act, the Committee on the Constitution, among others, shall prepare matters concerning the fundamental laws. The supplementary provision in Article 4.6.1. specifies that this includes to "prepare matters concerning legislation in the fields of constitutional and general administrative law".

<sup>24</sup> 1993/94:KU 21, Grundlagsändringar inför ett svenskt medlemskap i Europeiska unionen.

the Swedish constitution.<sup>25</sup> This implies a serious reservation against the principle of supremacy.

The first restriction mentioned in Chapter 10 Article 5 IG is that the transfer of decision-making capacity must not "affect the principles of the form of government". These are spelt out in Chapter 1 IG ("Basic principles of the form of government"), and include (representative) democracy, the rule of law, organisational issues such as guarantees of local powers, and the control by courts. Chapter 1 also highlights several fundamental rights of private persons such as equality, liberty, dignity, and fundamental policy aims of public institutions such as the personal, economic and social welfare of private persons, and sustainable development. Even if it might be questionable whether the latter would come under principles of the *form* of government, they undeniably are subsumed under this very heading in Chapter 1 IG.

Already before the 2003 amendment, which made these restrictions explicit, it had been submitted that Sweden had not accepted that EC law – today: EU law – "would take precedence in relation to national constitutional principles of a fundamental nature".<sup>26</sup> And even if it has to be conceded that those national principles usually would not be at stake at EU level,<sup>27</sup> it must be said that also this perspective changes dramatically as soon as every transfer of decision-making capacity to the EU is seen as compromising national democratic decision taking.<sup>28</sup> This is so since EU membership necessarily entails important changes to the fundamental rules concerning the governing of the state, not the least the system of (democratic) law making. The latter is inevitably "affected" by law making at EU level in combination with supremacy of EU law. As a consequence it has to be said that also the notion of "principles of the form of government" might give rise to disputes.

Such controversy – even if it did materialize so far – might be fuelled by the legal reasoning of the Parliamentary Constitutional Committee: it differentiates between the delegation of powers according to Chapter 10 Article 5 IG and the procedural requirements for formal amendments of the constitution according to Chapter 8 Article 15 IG. As a consequence, eventual derogations from the Swedish constitution would have to be implemented by constitutional law, thus putting an obstacle to Community law – today: Union law – to take precedence over conflicting Swedish constitutional law. This is remarkable insofar as opening up the national constitutional order for the supremacy of future European law can be understood as a specific form of an anticipated amendment of the constitution,<sup>29</sup> the specificity being that law – and even constitutional law –

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<sup>25</sup> It shall be mentioned that the position referred in the above text partly implies a specific protection also with regard to Chapter 2 IG (despite the wording of Chapter 10 Article 5 IG). This is so since Chapter 2 includes the "freedom of information" (Article 13), that is the "freedom to procure and receive information and otherwise acquaint oneself with the utterances of others". Insofar as the Freedom of the Press Act and the Law on Freedom of Expression cover specific aspects of the freedom of information, they might be seen as *leges speciales*.

It should also be noted that the Freedom of the Press Act actually was modified on the occasion of EU accession. Chapter 1 Article 9 No 2 now allows for bans on commercial advertising "in accordance with obligations pursuant to accession" to the EU; and Chapter 5 Article 1 now provides that the owner of a periodical may not only be a Swedish citizen or a Swedish legal person, but also "a foreign national or foreign legal person", subject to a specific act of law (which might still include sort of a discrimination). See for these provisions *Bernitz* (2000) 441 f.

<sup>26</sup> *Bernitz* (2002) 31.

<sup>27</sup> Compare *Nergelius* (2007) 185 f. There are certainly areas and aspects of governing the state which are excluded from Union competences – such as the rules to elect the members of the Riksdag and to enact Swedish law, or the rights of local authorities.

<sup>28</sup> As, arguably, is the case especially in the jurisprudence of the German Bundesverfassungsgericht, which might be of specific weight given the role model of the "German approach" for Sweden.

<sup>29</sup> To use another terminology (taken from Chapter 10 Article 5 IG): a transfer of the power to amend the constitution.

conflicting with directly applicable Union law would not be deleted but would instead no longer be applicable within the scope of Union law.<sup>30</sup> This view appears to be implicitly rejected by the mentioned differentiation between the delegation of powers and the amendment of the constitution. If this is so, than it could endanger primacy not only for the “excluded” parts of the constitution, especially the Freedom of the Press and the Freedom of Expression Act, but in general, especially for those fundamental rights provided for in Chapter 2 IG. However, it has to be added that such interpretation would undermine the core object to open the Swedish legal order, including, at least in principle, constitutional provisions, for European Community – nowadays: European Union – law. Consequently the better reasons strike for the contention that supremacy is accepted, with the exception of the rights enshrined in the Freedom of the Press, and the Freedom of Expression Act, and with the exception of the fundamental rules concerning the form of government.<sup>31</sup> However, the ambiguities of the text reveal that there is ample room for debate.

### 8.2.2. Scrutiny of Secondary Legislation, Especially *ultra-vires* Doctrine

The Constitutional restrictions to EU integration – as enshrined in Chapter 10 Article 5 IG – are primarily modelled with regard to the transfer of powers through the Treaties, including treaty amendments. The Constitution is silent on secondary measures, including possible *ultra-vires*-acts of the EU. However, it has to be concluded, from the general nature of these constitutional limits that, at least in principle, they are also valid vis-a-vis secondary Union law. Disregarding the Swedish limits to European integration by secondary Union law or by the ECJ, through interpreting EU law, would render these measures unconstitutional. However, the topic seems to be little discussed in Swedish literature, and until today of no practical relevance in the courts. Consequently, also any in depth debate on further differentiating between the two possible scenarios of such conflict seems to be missing. The first is that the “violation” of the Swedish limits to European integration would be correctly based on EU primary law. This would mean that already the transfer of powers had been unconstitutional. The second possibility is that these constitutional limits were observed when transferring powers to the European Union, but consequently disregarded by the EU or the ECJ respectively. This would at the same time constitute a violation of the principle of conferral as laid down in Article 5 Paragraph 2 TEU. Both of these scenarios would lead to a contravention against the Swedish constitution.

This leads us to the question of enforcement of the mentioned constitutional limits to European integration. There is no Constitutional Court established in the Swedish legal system. Scrutiny of general norms consequently is not centralised, but decentralised, and limited. Chapter 11 Article 14 IG foresees that, if a court or other public body finds that a provision conflicts with a rule of fundamental law or other superior statute, or finds that a procedure laid down in law has been disregarded in any important respect when the provision was made, the provision shall not be applied. However, this privilege is limited when it comes to measures enacted by the parliament or by the government: “If the provision has been approved by the Riksdag or by the Government, however, it shall be waived only if the error is manifest.”

The provision is tailored for the relation between the Swedish constitution and subordinated internal law, especially Swedish legislation. In this respect, the powers of the courts are limited in so far as they may only set aside subordinated provisions when

<sup>30</sup> The duty of the member state to *explicitly* adjust its legal order accordingly is to be distinguished.

<sup>31</sup> See also *Bernitz* (2000) 423.

the conflict is “manifest”<sup>32</sup>. It must be said that within the Swedish system this would be a very extraordinary step taken by courts.

Furthermore, it is open to debate whether these rules would also apply to treaties concluded by the Realm, or at least to primary EU law.<sup>33</sup> Assuming that this is, at least in principle, the case, would lead to correspondingly restricted scrutiny of EU primary law. It should be noted, though, that there is a certain asymmetry: while the scrutiny of Swedish legislation – and consequently, argueably, also of EU Treaties as such – is restricted to “obvious” conflicts, there is no such limit when it comes to conflicts between EU law and Swedish law, in the sense of Swedish law contravening EU law.<sup>34</sup> As a consequence, Swedish courts would be prepared to give full precedence to Union law, which implies that their power to review Swedish legislation against the yardstick of EU law goes beyond their powers when scrutinizing Swedish law against the yardstick of the Swedish constitution.

Arguably, even more questions arise when it comes to the scrutiny of secondary EU legislation. Such measures would, as a rule, enter into force without having been “approved by the Riksdag or by the Government”. At first glance, this could be an argument supporting full review by the courts. However, the basis of such secondary measures would always be EU primary law which is in principle exempted from the scrutiny of the courts, or at best subject to such scrutiny against the yardstick of “manifest” conflicts. Moreover, Chapter 11 Article 14 IG does not mention EU law as a yardstick for the scrutiny of subordinate law. Nevertheless, it might be submitted that, by analogy, it might be possible to apply EU law as “superior statute” in the sense of this provision. However, against the background that primary law has been approved by the Riksdag, and that primary law includes the centralisation of scrutinising secondary EU legislation with the ECJ, the better reasons seem to strike for a limited scrutiny of secondary law by Swedish courts. The latter would only encompass “manifest” errors leading to violations of the Swedish constitution.

However, it shall be repeated that these deliberations are “theoretical” in the sense that they have not been of any practical relevance in Sweden so far. At an equally theoretical level it might not even be entirely excluded that Swedish courts could deny any right of reviewing EU law, and instead would call for the Riksdag and the Government to take action in case of a conflict, be it by amending the Swedish constitution, or by deciding to withdraw from the EU<sup>35</sup>.

## 8.3. Examples

### 8.3.1. Access to Official Documents

That access to official documents was a delicate issue for Sweden from the outset is obvious from the unilateral declarations attached to the Act of Accession.<sup>36</sup> A

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<sup>32</sup> Compare, also regarding the following deliberations in the above text, *Holmberg / Stjernquist* (2000) 22 f; *Bernitz* (2002) 41 ff.

<sup>33</sup> With regard to the European Convention of Human Rights (ECHR) Sweden enacted a specific constitutional provision prohibiting any contraventions by Swedish law. For the – tricky – legal consequences compare *Bernitz* (2002) 47 ff, 81 ff.

<sup>34</sup> *Bernitz* (2002) 41.

<sup>35</sup> Which is now explicitly allowed by Article 50 TEU.

<sup>36</sup> See OJ 1994 C 241, 397. Declaration No 47 by Sweden reads as follows: “Open government and, in particular, public access to official records as well as the constitutional protection afforded to those who give information to the media are and remain fundamental principles which form part of Sweden's constitutional, political and cultural heritage.”

The Member States “answered” by a unilateral declaration stating: “The present Member States of the European Union take note of the unilateral Declaration of Sweden concerning openness and transparency.

reconfirmation followed immediately after Sweden's accession to the EU. Already at the beginning of 1995, the *Svenska Journalistförbundet* (the Swedish Journalists' Union) tested the way in which the Swedish authorities applied Swedish citizens' right of access to information in respect of documents relating to European Union activities. It contacted 46 Swedish authorities, among whom were the Swedish Ministry of Justice and the national Police Authority (Rikspolisstyrelsen), seeking access to a number of Council documents relating to the setting up of the European Police Office (Europol), including eight documents held by the national Police Authority and 12 held by the Ministry of Justice. In response to its requests the applicant was granted access to 18 of the 20 documents requested. It was refused access by the Ministry of Justice to two documents on the ground that they concerned the negotiating positions of the Netherlands and German Governments. The *Svenska Journalistförbundet* also contacted the Council to get access to the same 20 documents. The Council granted access first to only two, and finally to four of these documents, and refused access to the remaining 16. The reasons given for that negative decision were that in the Council's view "access to those documents cannot be granted because their release could be harmful to the public interest (public security) and because they relate to the Council's proceedings, including the positions taken by the members of the Council, and are therefore covered by the duty of confidentiality"<sup>37</sup>.

Access to the Council's documents at that time was governed by Council Decision 93/731/EC on public access to Council documents.<sup>38</sup> This decision established the principle of access of the public to Council documents, and specifies exceptions to that principle. "Access to a Council document shall not be granted where its disclosure could undermine:

- the protection of the public interest (public security, international relations, monetary stability, court proceedings, inspections and investigations),
- the protection of the individual and of privacy,
- the protection of commercial and industrial secrecy,
- the protection of the Community's financial interests,
- the protection of confidentiality as requested by the natural or legal person who supplied any of the information contained in the document or as required by the legislation of the Member state which supplied any of that information."<sup>39</sup>

Article 4(2) of the Decision opened an additional exception by adding that "[a]ccess to a Council document may be refused in order to protect the confidentiality of the Council's proceedings".

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They take it for granted that, as a member of the European Union, Sweden will fully comply with Community law in this respect."

<sup>37</sup> Case T-174/95, *Svenska Journalistförbundet*, [1998] ECR, II-2289, para 18.

<sup>38</sup> OJ 1993 L 340, p. 43, as amended by OJ 1996 L 325, p. 19. The Decision has been superseded by Regulation (EC) 1049/2001, OJ 2001 L 145, p. 43. According to it, particularly Articles 4 and 5 of the regulation introduced several changes. Article 5 now states that "where a member States receives a request for a document in its possession, originating from an institution, unless it is clear that the document shall or shall not be disclosed, the Member State shall consult with the institution concerned in order to take a decision that does not jeopardise the attainment of the objectives of this Regulation. The Member State may instead refer the request to the institution." However, also this version does not seem to provide clear cut solutions for all instances of a tension between the national law and EC law on transparency.

<sup>39</sup> Article 4(1) Decision 93/731/EC.

For the purpose of this analysis, it is not necessary to go into the details of the cited CFI's judgement.<sup>40</sup> Suffice it to sketch the main aspect (insufficient reasoning of the Council) which determined the CFI to annul the Council decision denying access to the documents.

According to the Court, the Council is, regarding the first category of *mandatory exceptions* "obliged to consider in respect of each requested document whether, in the light of the information available to it, disclosure is in fact likely to undermine one of the facets of public interest protected".<sup>41</sup> Things are different with regard to the second category, the so called *discretionary exceptions*. "By way of contrast, the wording of the second category, drafted in enabling terms, provides that the Council may also refuse access in order to protect the confidentiality of its proceedings ... It follows that the Council enjoys a margin of discretion which enables it, if need be, to refuse access to documents which touch upon its deliberations. It must, nevertheless, exercise this discretion by striking a genuine balance between on the one hand, the interest of the citizen in obtaining access to the documents and, on the other, any interest of its own in maintaining the confidentiality of its deliberations<sup>42</sup>...". The Council might also rely jointly on an exception derived from the first category and one relating to the second category in order to refuse to grant access to documents.

The statement of reasons for a decision refusing access to a document must, according to the Court, contain "— at least for each category of documents concerned — the particular reasons" for which the Council considers that disclosure of the requested documents comes within the scope of one of the exceptions provided for in Decision 93/731.<sup>43</sup> This had not happened in the case at issue.

Under these circumstances the ruling of the Court offers no answer to the question whether the Council was, as for the merits, mistaken to refuse access in all the 16 cases.<sup>44</sup> It should be noted that this implies the issue of whether the disclosure by the Swedish authorities had been illegal. The Council explicitly contended in the proceedings before the CFI that the release of the documents in question by the Swedish authorities to the applicant constituted a breach of Community law, since no decision had been taken to authorise such a disclosure.<sup>45</sup> The Swedish government objected by arguing that there "is no implied Community rule based on a common legal tradition whereby only the author of a document may decide whether a document is to be released or not"<sup>46</sup>.

However, if provisions to secure secrecy in the Council should make sense at all, the question might not be whether there is a common legal tradition of the kind referred to by the Swedish government, but rather whether supremacy of Union law requires the setting aside of conflicting national provisions, even fundamental rights, and even those granting access to the documents in question. If the representatives of the Member states in the Council could grant such access irrespective of the Council rules of procedure, this might amount to the reduction of those rules' binding force to the Council

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<sup>40</sup> It would also go beyond the purpose of this contribution to go into the details of the more recent jurisprudence. Of specific importance certainly are Joined Cases C 39/05 P and C 52/05 P, *Turco*, 1 July 2008, para 68, where the Court concluded that that Regulation No 1049/2001 imposes, "in principle, an obligation to disclose the opinions of the Council's legal service relating to a legislative process". Compare, for closer analysis, e.g. *Sobotta* (2001) esp at 278 ff.

<sup>41</sup> Case T-174/95, *Svenska Journalistförbundet*, [1998] ECR, II-2289, para 112.

<sup>42</sup> Case T-174/95, *Svenska Journalistförbundet*, [1998] ECR, II-2289, para 113.

<sup>43</sup> Case T-174/95, *Svenska Journalistförbundet*, [1998] ECR, II-2289, para 117.

<sup>44</sup> It remains to be seen whether Article 15 para 3 TEU, and Article 42 Fundamental Rights Charter of the EU, both guaranteeing a right of access to documents of the Union's institutions, bodies, offices and agencies, will tilt the balance remarkably into the direction of enhanced access to documents.

<sup>45</sup> Case T-174/95, *Svenska Journalistförbundet*, [1998] ECR, II-2289, para 56.

<sup>46</sup> Case T-174/95, *Svenska Journalistförbundet*, [1998] ECR, II-2289, para 61.

as such, not including its members – the result being somewhat absurd by exempting the major addressees from the application of the secrecy rules. By contrast, if those rules are binding on the members, they might not ignore their Union duty of secrecy by referring to conflicting national law. Against this background, the relation of the Union rules on secrecy and the Swedish constitutional “right to procure information on any subject whatsoever”<sup>47</sup>, and the right to “free access to official documents”<sup>48</sup> becomes crucial.

According to the Swedish constitution, this right may be restricted – subject to specification in a special act of law – only if restriction is necessary having regard to certain aspects of public interest, such as the security of the Realm or the prevention or prosecution of crime.<sup>49</sup> It is not very difficult in general, if not even in the case at issue, to imagine such a conflict between the Union rules eager to provide for secrecy, and the Swedish constitution with its tradition of far-reaching access to documents.<sup>50</sup> On the grounds of Chapter 10 Article 5 IG such a conflict is not easy to resolve. Most likely is that the Swedish right to access to documents would prevail, given that 10:5 IG does not allow for derogations from that right without a specific amendment of the constitution. In this respect, the new regulation regarding public access to European Parliament, Council and Commission documents somewhat eased the previous restrictions on the European level<sup>51</sup>. Without going into details, its new Article 4 separates the aforementioned mandatory exceptions into a first more narrow group and a second group, prone to public interest override. Those rights which benefit of the strongest protection are now exhaustively enumerated.<sup>52</sup> The institution’s discretionary power to refuse access to preparatory documents aimed at internal use, is now put under condition that their disclosure would “seriously” undermine the decision-making process and is also prone to public-interest override.<sup>53</sup> This put pressure on the Council to release more information relating to the Council’s legislative activities and lead the Council to take the necessary steps allowing for greater access to documents as soon as they have been circulated within the Council.<sup>54</sup> On the other hand, if information is attributed to a Member state, the relevant institution is only bound to refuse access to it, if the relevant state had explicitly required that it be withheld from dissemination.<sup>55</sup> According to the ECJ’s narrow interpretation of exceptions, institutions have to apply a rigorous test of proportionality

<sup>47</sup> Chapter 2, Article 2 Fundamental Law on Freedom of Expression.

<sup>48</sup> Chapter 2 Article 1 Freedom of the Press Act.

<sup>49</sup> Chapter 2 Article 2 Freedom of the Press Act.

<sup>50</sup> See also *Bernitz* (2000) 439 ff; *Cottier* (1999) 253 f; *Österdahl* (1999) 1033 ff, *Bernitz* (2002) 36 ff.

However, it should also be said that Chapter 2 Article 2 No 1 of the Freedom of the Press Act allows for restrictions having regard to the relations of the Realm “with another state or international organisation”. Arguably the issue raised in the above text might come under this clause. The matter shall not be deepened here – suffice it to say that that 2:1:1 Freedom of the Press Act requires that any restriction of the right of access to official documents to be “scrupulously specified in the provisions of a special act of law”. The Secrecy Act, which is to be seen as such an act of law, provides that secrecy “shall apply to any information concerning Sweden’s relations to another state, or otherwise concerning another state, an international organisation ..., if it can be assumed that disclosure of the information would disturb Sweden’s international relations or would otherwise cause damage to the country.” However, although in a number of cases the Swedish government reveals to be particularly sensitive regarding possible damage to international relations, the national courts have repeatedly held, that the international character of a requested document is not in itself a sufficient condition to refuse access to information.

<sup>51</sup> Council Regulation (EC) 1049/2001 of 30.05.2001 regarding public access to European Parliament, Council and Commission documents, OJ L 145, 3105.2001. For a more detailed analysis see *Maes* (2002).

<sup>52</sup> They now encompass “public security, defence and military matters, international relations, the financial, monetary or economic policy of the Community or a Member State”.

<sup>53</sup> Article 4 para 3 of Council Regulation (EC) 1049/2001. Compare in this regard also the ECJ in *Turco* (above fn 40).

<sup>54</sup> Council Decision (2001/320/EC) of 09.04. 2001 on making certain categories of Council documents available to the public, consequently the identical wording has been adopted in Article 11 of Annex III to the Council’s Rules of Procedure, introduced by Council Decision (2001/840/EC) of 29.11.2001, OJ L 313, 31.11.2001, 40.

<sup>55</sup> Article 4 para 5 of Council Regulation (EC) 1049/2001.

when denying access to information.<sup>56</sup> They equally have to consider whether partial access of documents may be granted<sup>57</sup>.

### 8.3.2. Gender Equality

Another example of some persistent importance might be the issue of gender equality. It touches at the same time on eventual conflicts between a constitutional permission and a Union law prohibition<sup>58</sup>.

In *Abrahamsson*,<sup>59</sup> the ECJ stated that Article 2(1) and (4) of Directive 76/207/EEC<sup>60</sup> and Article 141 IV TEC<sup>61</sup> "preclude national legislation under which a candidate for a public post who belongs to the under-represented sex and possesses sufficient qualifications for that post must be chosen in preference to a candidate of the opposite sex who would otherwise have been appointed, where this is necessary to secure the appointment of a candidate of the under-represented sex and the difference between the respective merits of the candidates is not so great as to give rise to a breach of the requirement of objectivity in making appointments<sup>62</sup>".

At stake was a Swedish regulation<sup>63</sup> which, for a limited number of 30 posts of university professors, and in an effort to push forward towards a fairer allocation of teaching posts between the sexes, called for a rather far-reaching form of "positive discrimination". "A candidate belonging to an under-represented sex who possesses sufficient qualifications ... must be granted preference over a candidate of the opposite sex who would otherwise have been chosen (positive discrimination) where it proves necessary to do so in order for a candidate of the under-represented sex to be appointed... Positive discrimination must, however, not be applied where the difference between the candidates' qualifications is so great that such application would give rise to a breach of the requirement of objectivity in the making of appointments<sup>64</sup>".

The ECJ first reconfirmed its earlier jurisprudence allowing for "positive and negative criteria to be taken into account which, although formulated in terms which are neutral as regards sex and thus capable of benefiting men too, in general favour women"<sup>65</sup>. But the Court also emphasised that the application of such criteria "must be transparent and

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<sup>56</sup> Case T-174/95, *Svenska Journalistförbundet*, [1998] ECR, II-2289, para 113.

<sup>57</sup> Case C-353/99, *Heidi Hautala*, [2001], ECR, I-09565, para 8 (86).

<sup>58</sup> Which leads, by definition, to a "one sided conflict of norms": making use of the permission leads to a violation of the prohibition, while complying with the prohibition is no violation of the permission. Consequently, precedence of Union law would require to disapply the permission as well as the provisions enacted on the grounds of the permission.

<sup>59</sup> Case C-407/98, *Abrahamsson*, [2000] ECR I-5539.

<sup>60</sup> Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ 1976 L 39, p 40.

Article 2(1) reads: "For the purposes of the following provisions, the principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status." Article 3(4) reads: "This Directive shall be without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities in the areas referred to in Article 1(1)."

<sup>61</sup> As amended by the Amsterdam Treaty: "With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers." Today, compare Article 157 para 4 TFEU, and Article 23 Fundamental Rights Charter.

<sup>62</sup> Case C-407/98, *Abrahamsson*, [2000] ECR I-5539, para 56.

<sup>63</sup> Förordningen (1995:936) om vissa anställningar som professor och forskarassistent vilka inrättas i jämställdhetssyfte (Swedish Regulation concerning certain professors' and research assistants' posts created with a view to promoting equality, 1995:936).

<sup>64</sup> Article 3 Regulation 1995:936.

<sup>65</sup> Case C-407/98, *Abrahamsson*, [2000] ECR I-5539, para 47.

amenable to review in order to obviate any arbitrary assessment of the qualifications of candidates"<sup>66</sup>, and it found that requirement violated in the Swedish case.

At first glance the issue does not involve constitutional aspects. The provision which was found in conflict with Community law was a regulation enacted by the government. However, the ECJ also mentions that the reference in the regulation to the "requirement of objectivity", limiting the authorization for "positive discrimination", was included in the regulation "in deference to Article 9 of Chapter 11 of the Swedish Constitution, according to which, for the purpose of appointments to state posts, only objective criteria are to be taken into account, such as merits (length of previous periods of service) and abilities (aptitude for the post, evidenced by theoretical and practical training and previous experience)".<sup>67</sup> What the Court did not mention, though, is Chapter 2 Article 16 IG, which reads as follows: "No Act of law or other statutory instrument may entail the discrimination of any citizen on grounds of sex, unless the relevant provision forms part of efforts to bring about equality between men and women or relates to compulsory military service or any corresponding compulsory national service."

Let us – if only for the sake of argument – assume that, taken altogether, the Swedish constitution would allow for the enactment of the regulation cited. Supremacy of Union law would then make that authorization inapplicable.<sup>68</sup> Given that the constitutional provision involved is included in Chapter 2 of the Instrument of Government, supremacy in this case would be covered by Chapter 10 Article 5 IG.

### 8.3.3. Right to Collective Action

A hotly debated case involves a conflict between the constitutionally guaranteed right to strike ("industrial action") and the EU freedom to provide services, as emerged in *Laval*<sup>69</sup>.

*Laval*, as Latvian company registered in Riga, posted around 35 workers to Sweden to work on building sites operated by L&P Baltic Bygg AB ('Baltic'), a Swedish company entirely owned by *Laval*, inter alia, for the purposes of the construction of school premises in Vaxholm. *Laval* had signed collective agreements with the Latvian building sector's trade union, but refused, after lengthy negotiations, to sign an agreement with the Swedish workers union which arguably would have resulted in better working conditions for the Latvian workers, especially higher wages. As a consequence of the failure, collective action was taken against *Laval*. It consisted in blockading ('blockad') of the Vaxholm building site by, inter alia, preventing the delivery of goods onto the site, placing pickets and prohibiting Latvian workers and vehicles from entering the site. *Laval* asked for police assistance which was denied on the grounds of the explanation that since the collective action was lawful under national law police was not allowed to intervene. The case was brought before the ECJ by a preliminary ruling request filed by a Swedish court which had to deal with proceedings *Laval* had commenced, seeking a declaration that both the collective action had been illegal and an order that the trade unions pay compensation for the damage suffered.

During the proceedings before the ECJ, the Swedish Government pointed to Chapter 2 Article 17 IG which entitles a trade union "to take industrial action unless otherwise provided in an act of law or under an agreement", which arguably includes the blockade

<sup>66</sup> Case C-407/98, *Abrahamsson*, [2000] ECR I-5539, para 49.

<sup>67</sup> Case C-407/98, *Abrahamsson*, [2000] ECR I-5539, para 15.

Compare Chapter 11, Article 9, para 1, sentence 2 IG: "When making appointments to posts within the State administration attention shall be directed only to objective factors such as merit and competence."

<sup>68</sup> Assuming that nothing is preventing direct effect of the Union law provisions involved.

<sup>69</sup> Case C-341/05, *Laval*, [2007] ECR I-11767.

of worksites. The ECJ, however, reconfirmed its previous jurisprudence that the exercise of the fundamental rights at issue (freedom of expression and freedom of assembly and respect for human dignity) does not fall outside the scope of the provisions of the Treaty. "Such exercise must be reconciled with the requirements relating to rights protected under the Treaty and in accordance with the principle of proportionality..."<sup>70</sup> In this respect, the Court also confirmed that a restriction on the freedom to provide services "is warranted only if it pursues a legitimate objective compatible with the Treaty and is justified by overriding reasons of public interest; if that is the case, it must be suitable for securing the attainment of the objective which it pursues and not go beyond what is necessary in order to attain it"<sup>71</sup>.

In the case at issue, the contention was that the right to collective action had been used in order to protect workers. However, the ECJ found that the means employed had not been proportional, and that, under the concrete circumstances, a trade union was, in order to save minimum rates of pay, precluded "from attempting, by means of collective action in the form of a blockade ('blockad') of sites such as that at issue ..., to force a provider of services established in another Member state to enter into negotiations with it on the rates of pay for posted workers and to sign a collective agreement the terms of which lay down, as regards some of those matters, more favourable conditions than those resulting from the relevant legislative provisions", while other terms relate to matters not referred to in the directive on the posting of workers<sup>72</sup>.

Furthermore, the ECJ held that, that, where there is – like in Sweden – a prohibition in a Member state against trade unions undertaking collective action with the aim of having a collective agreement between *other parties* set aside or amended, the freedom to provide services (now Articles 56 and 57 TFEU) precludes that prohibition "from being subject to the condition that such action must relate to terms and conditions of employment to which the national law applies directly".<sup>73</sup> In other words, it is not justifiable making it impossible for an undertaking from another Member state which posts workers and in this respect is bound by a collective agreement *in its home country* to enforce that prohibition to obstruct other collective agreements vis-à-vis the trade unions in the host country.

The essence of this ECJ judgement in relation to possible national limits to European integration is quickly spelt out: in balancing national constitutional guarantees and EU fundamental freedoms it is the ECJ which claims to have the last word, and the result may be that European freedoms prevail over national guarantees. Both national legislators and courts have to live with that, and even if the judgement has been heavily criticised,<sup>74</sup> the message seems to be accepted in Sweden.

## 8.4. The Resulting Relationship between EU Law and National Law

At the occasion of Sweden's joining the EU, the Swedish constitution – to be precise: the Instrument of Government (IG – in Swedish: Regeringsformen), mainly its Chapter 10 Article 5 – was amended aiming at the opening up for EC, today: EU law including supremacy of EU law. However, this was done by at the same time imposing limits to the transfer of powers to the EU. After an amendment which entered into force in 2003, these limits are twofold:

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<sup>70</sup> Case C-341/05, *Laval*, [2007] ECR I-11767, para 94.

<sup>71</sup> Case C-341/05, *Laval*, [2007] ECR I-11767, para 101.

<sup>72</sup> Case C-341/05, *Laval*, [2007] ECR I-11767, para 111.

<sup>73</sup> Case C-341/05, *Laval*, [2007] ECR I-11767, para 120.

<sup>74</sup> Compare only *Eklund* (2008), and *Joerges / Rödl* (2009), with further references.

- The transfer of decision-making powers to the EU must “not affect the principles of the form of government”; and
- Such transfer presupposes “that protection for rights and freedoms in the field of cooperation to which the transfer relates corresponds to that afforded under this Instrument of Government and the European Convention for the Protection of Human Rights and Fundamental Freedoms”.

Both of these limits are inspired by the jurisprudence of the German Constitutional Court under the German Basic Law (Bonner Grundgesetz).

These constitutional limits are relevant both for the transfer of powers through the Treaties and for the scrutiny of secondary EU law. However, the concrete consequences are far from being clarified. This is not the least due to the fact that the Swedish legal system is not equipped with a constitutional court which might concretise the legal implications by rulings which would be binding erga omnes. So far, Swedish courts and legal practice cope well with EU membership obligations. In principle, and also in several controversial cases, primacy of EU law has been accepted even in instances of tensions with constitutional legal traditions in Sweden.

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## 9. COMPARING THE ESSENTIAL CONSTITUTIONAL CONDITIONS FOR EU MEMBERSHIP

### 9.1. Constitutional Core Values and Core Competences

At first glance, there appears to be a decisive difference between Member states which enacted, either as a preparation or at the occasion of EU accession, or at a later stage, *specific* constitutional provisions authorising EU membership, and others which did not do so (partly because they could not find sufficient parliamentary majorities for specific provisions), and consequently dealt with EU accession on the grounds of general provisions on international obligations. The difference at first sight is that countries with specific constitutional authorisations – in our study especially Austria, France, Germany, and Sweden, – can point to explicit wording of the constitution regularly specifying not only the requirements for the transfer of powers, but also possible limits. In countries without *specific* constitutional provisions – in our study especially the Czech Republic, Finland, Italy, and Poland – such limits are often not mentioned, one could even speculate on their very existence.

A second glance, however, reveals that the divide between the two groups is less decisive. The reason is that, first, explicit constitutional provisions may be blurry and also informed by their systematic context in the constitution, which makes the conditions for EU accession and EU membership a matter of thorough interpretation of the entire constitution. This is so in Germany and Sweden despite the explicit clauses in their constitutions. Even explicit “EU provisions” might not explicitly mention concrete constitutional limits to EU membership or to the further transfer of powers (like in Austria), or they might refer to such limits only indirectly through specific authorisations of treaty amendments (like in France), thereby pointing to underlying constitutional concepts like sovereignty. Also here, the content of the constitutional authorisation and its possible limits can only be explained by systematic interpretation of the entire constitution, and not only by pointing to the concrete provisions authorising EU membership. Second, countries without specific authorisations may have to observe similar or even stricter requirements which can be inferred from the systematic interpretation of the constitutional norms governing international obligations in general (like in Finland). It may be that the lack of specific provisions is due to the dissent on the interpretation of existing constitutional limits and the desirability of changing them, like, arguably, in the Czech Republic, and to a certain extent also in Poland. In other countries, like Italy, the flexibility of existing constitutional provisions on international obligations was welcome at the beginning, and only later supplemented by constitutional amendments.

As a result, core values of the national constitutions establishing limits to European integration can be shown in all countries irrespective of the existence or nonexistence of specific constitutional provisions governing EU membership, and those limits can only be specified by thorough interpretation of the entire national constitution. It goes without saying that nevertheless, explicit provisions have the potential to clarify issues which otherwise remain controversial.

Having said that, the following core values and competences can be identified which would be relevant for any future transfer of powers to the EU. However, it must be stressed that the identification of common elements in the various countries is to be handled with caution: identical words might convey diverging meaning in the context of the respective constitution, and in the reading of national authorities including courts. "Relevance" means that the respective transfer of powers would trigger constitutional consequences like

amendments requiring qualified majorities in parliament. In some instances, those majorities might be difficult to obtain. Some issues, especially relating to the "sovereignty" of the country, are specifically sensitive and partially claimed to be insurmountable as long as the national constitution remains respected.

- The *protection of fundamental rights and freedoms*, namely safeguarding the standard of protection of the national constitution, is an issue for all countries. In some (like Germany) the constitution requires a standard of protection at EU level that is "essentially comparable" to that afforded by the national constitution. In some countries (like Sweden), such a compromise seems available for some fundamental rights, but not for all, while in other countries (like Finland and Poland), such compromise is not in sight or at least not yet accepted.
- A specific case is Article 23 of the German Basic Law. Apart from fundamental rights protection, as already mentioned, it specifies explicit barriers: the democratic, social, federal and subsidiarity principles, and the rule of law. These principles have to be respected, by German organs, in their decisions about transfers of competences to the EU level, in their participation in the EU legislature, and in the implementation of EU law. These requirements take on a "European" meaning, id est standards that are commensurate to the status and the function of the Union.
- Among the aforementioned principles, the *democratic principle* is of specific weight. First and foremost, this is true for Germany, where the Constitutional Court most recently introduced a new twofold *Solange* formula in its *Lisbon* ruling, in which the principle of conferral and the maintenance of a "well-balanced equilibrium" in the distribution of competences between the member states and the EU assume a primary role. The German parliament (*Bundestag*) must retain functions and powers of substantial importance, and the German legislature must only consent to transfers of competences and treaty amendments whose effects are foreseeable. Even if this approach received severe criticism in German academic writing, it is crucial for the further transfer of powers through Treaty amendments. Second, even if the constitutional text or the respective rulings of the (constitutional) courts might be less detailed and less far-reaching in other countries, preserving democracy, and including the balancing with the controversial concept of compensating the loss of decision-making power for national parliaments by enhancing parliamentarism at EU level, is of constitutional relevance everywhere. It is not decisive whether or not the constitutional texts allowing for the transfer of powers to the EU include an explicit reference to the preservation of democracy (like in Finland) or not (like in Austria, the Czech Republic or Poland), or refer in a more general manner to constitutional principles including democracy (like in Sweden).
- It shall be mentioned that in some countries the preservation of democratic decision taking at national level is further specified and thereby closely intertwined with another substantive barrier: the preservation of *national statehood* or sovereignty in the sense that the creation of a European federation at the expense of national statehood would be unconstitutional. This is so in Germany where the constitutional court not only identified "essential areas of democratic formative action" (such as the civil and military monopoly on the use of force) which would be exempt from the transfer of powers to the EU, but is also the Guardian of core elements of the constitution such as the democratic principle, the social state principle, the federal state principle, and the rule of law principle. These substantive principles are commonly regarded as the German "constitutional identity". Due to the eternity

guarantee of the German Basic Law, it is even out of the hands of the constitution-amending legislature. Again, even if this might be spelt out less detailed in other constitutions, the preservation of national statehood is certainly a crucial barrier for all countries. For some, this is included in the notion of "sovereignty" (like in the Czech Republic, France, Finland, Germany, Italy or Poland), for others, the same is true even if the term is avoided (like in Austria, or in Sweden).

- It goes without saying that the *transfer of further competences* to the EU is always touching on the issue of a possible impact on sovereignty, even if this is partly avoided in the debate by using different expressions: competences are not "transferred" but "shared", or sovereignty is not "transferred" but "shared" with other EU member states. In France, eg, further amendments of the constitution will be required for any transfer of competences which jeopardizes the "fundamental conditions of the exercising of sovereignty" either because these transfers (i) do not relate to those already permitted in the constitution or because (ii) there are modifications of the exercise of competences already transferred (e.g., replacing unanimity in the Council by qualified majority voting). A transfer of competences, by contrast, appears to be beyond the reach of "normal" constitutional amendments. In other countries, however, and irrespective of the constitutional dimension at stake, the constitutions allow the further transfer of powers without an *explicit* amendment of the constitutional text. Mostly, qualified majorities modelled after requirements foreseen for constitutional revision, are needed. This is the case e.g. in Austria, Finland and Poland.

## 9.2. Constitutional Conditions for the Further Transfer of Powers

Clearly, the core values and core competences identifiable within national constitutional law at the same time can be seen as barriers to further integration. Several possibilities have to be differentiated.

First, there is a margin of discretion for the further transfer of powers – this may not only consist in opening up new fields of activity for the EU, but also the transfer of matters from unanimity to qualified majority voting in the Council<sup>1</sup> – to the European Union which could be enacted on the grounds of the existing national constitutional bases without any (explicit) amendments to the constitution. This is to a certain extent possible, the national requirements differing considerably.

To give just one example: while it appears to be fully constitutional in Germany to amend the EU Treaties and transfer additional powers to the EU within certain less "sensitive" fields by a "simple" law (*Zustimmungsgesetz*), there is a range of further restrictions in other cases. The possibility to use a "simple" law for the transfer of powers is specifically remarkable insofar as such transfer might affect the division of competences as foreseen by the German Basic Law. Nevertheless, no explicit amendment of the text of the Basic Law is required. By contrast, making use of, e.g. simplified treaty amendments, the general bridging clause or specific bridging clauses would require the approval of parliament not only after, but even before the draft decision by the European Council can be taken. The parliamentary decision, however, could still be taken by simple majority. Further transfers in other fields might require previous amendments of the constitution, and several transfers would, according to the jurisprudence of the German Constitutional Court, be entirely excluded, as mentioned above.

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<sup>1</sup> E.g. on the basis of Article 48 para 7 TEU, the so called general bridging clause.

The situation is, in its complexity, comparable in most other countries, yet different in detail. In France, e.g., the mentioned additional transfer of competences will require further amendments of the constitution. Abandoning national sovereignty by further transferring competences is not even a topic in the debate. By contrast, it is simply beyond the main aspects of the debate. In Austria and Finland, a qualified (two thirds) majority is required for further transfer of powers, but no formal amendment of the constitution.

### 9.3. Ultra-vires-acts

Ultra-vires-acts of the EU are a traditional topic not only in the academic debate on the EU, but also in the jurisprudence of several national courts. Even if until today the implicit "threat" to (permanently) disapply secondary Union legislation within the legal orders of a Member state did not materialise, it exerts a certain preventive function which might influence and certainly indeed influences daily practice.

*Ultra-vires-acts* may have different characteristics. They may range from the severely flawed use of conferred competences without specific repercussions for the national "constitutional identity" to violations of national constitutional provisions, e.g. in cases where the EU allegedly or in fact violates human rights guarantees. Clearly, it is specifically in those latter cases where the constitutional barriers to integration are of crucial importance, sometimes inseparably interwoven with the competence issue, even if the two can and have to be discerned.

Also here, the landscape is full of different flowers, not only between the member states, but sometimes also within one country. Specifically with respect to *Ultra-vires-acts*, the difference between countries equipped with a constitutional court empowered with ex-post-review of subordinated law against the yardstick of the constitution, and countries without such a mechanism, it appears to be very influential. The spelling out and concretisation of constitutional barriers is more explicit and visible in countries with a constitutional court such as the Czech Republic, (nowadays also) France, Italy, and Poland, if compared to countries like Finland and Sweden. This is not to say that the topic is less important for the latter. However, judicial ex-post review in these countries is decentralised, and traditionally limited to the correction of "manifest" or "obvious" errors. In addition, it is often dubious whether EU law might come under the reviewable provisions as specified by the national constitution. This makes an open conflict less likely.

Against this background, the two aspects of the *Ultra-vires*-debate shall be kept apart:

- In Germany, the *human rights barrier* is currently especially defined by the German Constitutional Court's *Bananas* ruling. Accordingly, constitutional complaints and submissions by courts which challenge EU secondary law on the basis of German human rights are inadmissible from the outset, if their grounds do not state that the evolution of European law, including relevant rulings of the ECJ, has resulted in a decline below the indispensable standard of fundamental rights protection. This implies that the Court still claims a reserve competence. The hurdles for its activation are, however, quite unanimously regarded as being insurmountable. Human rights protection is also a core feature in all the other member states, even if the difference between treaty amendments and secondary legislation remains sometimes unaddressed. This is different especially when constitutional a difference whenever constitutional courts are involved, which prompted respective rulings especially in France and Italy, but also in Poland and Austria. In Finland and Sweden, similar deliberations can be found mainly in opinions of parliamentary

committees entrusted with, inter alia, the ex-ante-scrutiny of implementing secondary EU legislation.

- The *competence barrier*, again starting with Germany, is derived from the requirement that the use of transferred competences must be predictable. This means that the Court regards itself to be competent for deciding whether an act of secondary law is *ultra vires*, which has caused an intense academic discussion on whether the ECJ or national courts are competent to act as the “final arbiter of constitutionality” in Europe. Arguably, the reasoning in the *Lisbon* ruling, where the German Constitutional Court announced that in the future it will also scrutinize the exercise of EU competences by means of an “identity review” in order to preserve the inviolable core content of the Basic Law’s constitutional identity, may be seen as a specific feature of this lag of “*ultra vires* review”. The German Court underlined that this type of review is restricted to “obvious transgressions” of EU competences and applies only “exceptionally, and under special and narrow conditions”. Also in other countries, specifically France, recent jurisprudence specified constitutional restrictions for implementing secondary law: implementing a directive must not run counter to a rule or principle that is inherent to the *constitutional identity* of France. The constituting power could, however, consent to necessary amendments of French constitutional law.

#### 9.4. Dissemination of Constitutional Principles throughout the EU?

The creation, shaping and interpretation of national constitutional barriers to European integration happens – certainly not at the beginning of European integration in the 1950s, but increasingly during the last decades – in a sort of indirect and partly implicit dialogue between the national legislators, the national constitutional courts, the ECJ, and also the Member states as the “Masters of the Treaties”<sup>2</sup> – one might even qualify it as an emerging system of informal cooperation between the various actors at national and European level.<sup>3</sup> This is in itself a remarkable effect of European integration. However, it is very seldom that this dialogue is made transparent in the sense that explicit reference is made to a concrete piece of foreign legislation, or decision of another court – with the natural exception of preliminary references and infringement procedures before the ECJ and the respective reaction of national legislators or courts. Consequently, it is more the concurring or conflicting reasoning of courts and/or national legislators reflecting developments in different areas of the emerging “common constitutional space” with an ever increasing body of “constitutional traditions common to the Member states”.<sup>4</sup> However, important exceptions can be identified, where the reciprocal influence can be identified.

This shall be illustrated by a few remarks:

- The jurisprudence of the German Constitutional Court with its reservation vis-à-vis unconditional supremacy of EC law as long as (Solange) fundamental rights protection would not be sufficiently guaranteed by the ECJ doubtlessly influenced the ECJ in its respective subsequent jurisprudence. The resulting development of a more or less fully fledged system of protection by the ECJ in return motivated the German Constitutional Court, but certainly also courts in other countries to redefine

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<sup>2</sup> The mentioned Articles 4 and 5 TEU as amended by the Treaty of Lisbon are an example for the latter, equally not openly revealing the constitutional debate surrounding them.

<sup>3</sup> Compare also *Grabenwarter* (2009), especially at 125 ff, with further references.

<sup>4</sup> Article 6 para 3 TEU as amended by the Treaty of Lisbon.

the scrutiny of EU law, and to abandon detailed scrutiny as long as the ECJ guarantees a sufficient standard of protection.

- The Swedish constitutional requirement that the transfer of decision-making powers to the EU is restricted in the sense that the level of fundamental rights protection within the EU “corresponds” to that afforded under the Swedish constitution and the European Convention for the Protection of Human Rights and Fundamental Freedoms, was clearly inspired by the mentioned *Solange* jurisprudence of the German Constitutional Court, and the subsequent “codification” of this jurisprudence by the German legislator.
- Close attention was also paid to the Lisbon ruling of again the German Constitutional Court, especially in the subsequent proceedings before the Polish and the Czech constitutional courts.

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