

Xavier Groussot

# **The Role of the National Courts in the European Union:**

A Future Perspective

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## **FOREWORD**

The Swedish Institute for European Policy Studies, SIEPS, conducts and promotes research, evaluations, analyses and studies of European policy issues, with a focus primarily in the areas of political science, law and economics. SIEPS strives to act as a link between the academic word and policy-makers at various levels. SIEPS considers it important to broaden and intensify research into matters that are significant for the future development of the European Union.

This report concerns the role of the national courts in the application and enforcement of Community law. According to the author the European Union is, at this time, under a “constitutional momentum”. Even if the text of the Treaty will not be ratified the Constitutional Treaty will probably affect the role of national courts in the near future. The Constitutional Treaty has, in fact, reopened the debate on many controversial constitutional issues such as supremacy, attribution of competences and judicial kompetenz-kompetenz. All those questions are closely linked to the role of the national courts. Furthermore, the European Court of Justice has developed a solid case-law relating to the mandate and duties of the national courts. This report shows that this jurisprudence is still developing and that it has been marked by important judicial activity of the Court in recent years.

Stockholm, November 2005

Annika Ström Melin  
Director  
SIEPS

## **ABOUT THE AUTHOR**

Xavier Groussot is assistant professor at the Lund University, Faculty of Law. His main field of research is EU institutional issues.

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# THE ROLE OF THE NATIONAL COURTS IN THE EUROPEAN UNION: A FUTURE PERSPECTIVE

## INTRODUCTION

### Questions

What is the future role of national courts? What is their role now? Will that role drastically change?

In providing an answer to those questions, three factors must be taken into consideration. First of all, it should be kept in mind that the role of the national courts in the application and enforcement of Community law has always been of crucial importance. As AG Tesouro noted, the national courts are the *natural forum* for EC law.<sup>1</sup> Secondly, the European Union is, at this time, under a “*constitutional momentum*”. Indeed, the Treaty establishing a Constitution for Europe (the Constitutional Treaty or CT) has been signed by the twenty-five Member States in October 2004. This new Treaty may affect the role of the national courts in the near future, even if the text of the Treaty will not be ratified. The CT has, in fact, reopened the debate on many controversial constitutional issues such as supremacy, attribution of competences and judicial *kompetenz-kompetenz*.<sup>2</sup> All those questions are closely linked to the role of the national courts. Thirdly, the European Court of Justice has developed solid case-law relating to the mandate and duties of the national courts. This jurisprudence is obviously still developing and in recent years has been marked by the important judicial activity of the Court in this field.

### Outline

This report proposes to look at the recent case-law of the European Court of Justice and the new provisions of the Constitutional Treaty in order to assess the future role of the national courts. The report is divided into three parts. The first part deals with the issues of judicial *kompetenz-kompetenz* and supremacy appearing both in the ECJ and national case-law. It exam-

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<sup>1</sup> Tesouro, “The Effectiveness of Judicial Protection and Cooperation between the Court of Justice and National Court”, in *Festschrift til Ole Due, Liber Amicorum 1994*, Gad, Copenhagen, pp. 355 *et seq.*, at p. 373.

<sup>2</sup> See e.g. Lenaerts and Gerard, “The Structure of the Union according to the Constitution for Europe: The Emperor is getting Dressed”, *ELRev.2004*, pp.289–322, Albi and van Elsuwege, “The EU Constitution, National Constitutions and Sovereignty: An Assessment of European Constitutional Order”, *ELRev. 2004*, pp.741–765, at pp.761–762, Dyevre, “The Constitutionalisation of the European Union: Discourse, Present, Future and Facts”, *ELRev.2005*, pp.165–189.

ines the differing views between the ECJ and some of the national courts regarding those questions. The second part focuses on the provisions of the Constitutional Treaty relevant to the future of the national courts. This concerns mainly the provisions relating to supremacy, national constitutional autonomy and the listing of competences. It is argued that the Constitutional Treaty transpires legal pluralism. The third part analyzes, in light of the Constitutional Treaty, the mandate of the national courts, their role in the application of the Charter of Fundamental Rights (CFR) and the current jurisprudential development in the context of the preliminary ruling procedure. It demonstrates, *inter alia*, that the ECJ, through its case-law, has been extremely active in the recent years in order to ensure more effectiveness.

Before entering into the substantive issues of this report, I find it appropriate to briefly comment on the nature of the Treaty establishing the Constitution. Through this report, I qualify this Treaty as a *Constitutional Treaty*.<sup>3</sup> That may seem paradoxical, let me try explaining it. Different types of definitions can be provided in order to determine the elementary components of a Constitution. A minimalist definition consists in focusing on the attribution of competences between the respective entities of the State (or institutions) and on the existence of a bill of fundamental rights for the individuals which ensures their protection.<sup>4</sup> Subsequently, in light of the above definition, it seems convincing to contend that the Treaty of October 2004 is a Constitution. By contrast, a maximalist definition may also be proposed. Piriš has considered that a Constitution can be divided into six elements: a Constitution organises the government of the entity to which it applies, a Constitution prescribes the extent and manner of the exercise of sovereign powers, a Constitution is the absolute rule of law: any official act in breach of it is illegal (this presupposes a constitutional or supreme court), a Constitution frequently lists rights of the individual and guarantees their protection, a Constitution derives its authority from the governed

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<sup>3</sup> The use of this terminology reflects the existence of a *sui generis* Constitution (substantively and procedurally).

<sup>4</sup> Van Gerven, "Toward a Coherent Constitutional System within the European Union", EPL 1996, pp.81–101, at p.82. To quote van Gerven, "*in a constitution basic principles and rules are to be found which, on the one hand, recognise fundamental rights and freedoms of individuals...and, on the other hand, establish institutions and organs through which public authority is exercised, and define competencies belonging to each of them*".

and is agreed upon by the people, a Constitution is the fundamental law of a Nation or State.<sup>5</sup> The last criterion has led to much debate.<sup>6</sup> It is argued here that it is not imperative for a Constitution to be tied with the concept of State. In other words, the Constitutional Treaty does need to resemble *trait pour trait* to the Constitution of a State and thus should be perceived as a *sui generis* Constitution.<sup>7</sup>

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<sup>5</sup> Piris, “Does the European Union have a Constitution? Does it need one?”, ELRev. 1999, pp.557–585, at p.558.

<sup>6</sup> Ibid., at p.569. This traditional view can be summarised by the famous sentence of Kirchhof, “*wo kein Staat, da keine Verfassung, und wo kein Staatsvolk, da kein Staat*” (“[t]here is no Constitution without state, and no state without state people”). According to Piris, “*an important criterion in the law dictionary of a Constitution refers to “a Nation or State”. On this point, the answer is clear and straightforward. The EU, although it has some attributes of a State, is clearly not a State.* One of the basic elements, which lack, is that the authority is not received directly from the citizen. It is worth noticing that the last requirement has been the object of a tremendous debate. Indeed, one finds a part of the doctrine, which appraises the concept of European Constitution as necessary inter-linked to the notion of State. The author (at p.583) came to the conclusion that “*the EU does not have and does not need a Constitution like a State’s, simply because it is not a State*”. Similarly, van Gerven (supra, at pp.83-84) argued that he is in profound disagreement with Kirchhof’s opinion. The author contemplates the concept as deficient in order to cope with the existence of the modern States and particularly the multicultural States (such as Belgium).

<sup>7</sup> At the end, this Constitution should be called a Constitutional Treaty since it has been adopted under Article 48 TEU. Thus, it constitutes a *sui generis* Constitution both as to its substance and adoption.

## SUMMARY AND CONCLUSIONS

This report stresses that the role of national courts, as to the enforcement and application of EC/Union law, will not only remain central, but will arguably increase. This conclusion is based on the analysis of the relevant provisions of the Constitutional Treaty (Part Two) and the recent jurisprudence of the ECJ (Part Three). As to the former, it will be demonstrated in Part Two that the Constitutional Treaty provisions reflect legal pluralism. This “philosophy” is, indeed, achieved in practice by an extensive and healthy dialogue between the national courts and the ECJ. Such a finding appears correct by reading Article I-5 CT (national constitutional autonomy) in conjunction with Article I-6 CT (principle of supremacy), but also in examining the important place, in the text of the CT, of the principle of conferred powers in relation to both the primacy clause and the listing of competences (Articles I-12 to I-18 CT). This approach implies a non-hierarchical relationship between Union law and national constitutional law. In other words, the two legal orders are coexisting. A serene coexistence can only survive through a stalwart cooperation between the national courts and the Court of Justice.

As to the latter, the case-law of the ECJ regarding the role of the national courts has substantially been developed in recent years (Part Three). This is of particular importance seeing that the Constitutional Treaty will not adversely affect the nature of the preliminary ruling procedure.<sup>8</sup> By consequence, the new ECJ cases (will) clearly have an influence on the future role of the national courts. This jurisprudence, studied below, points towards a more effective enforcement of Community law and also leads to an “empowerment” of the mandate of the national courts. This increase of power is followed by an increased responsibility in applying Community law and, especially, the *acte clair* doctrine. This current trend is not so surprising since the number of national courts has more or less doubled in May 2004 with the accession of ten new Member States. These national judicial authorities do not boast yet a sufficient maturity to apply Community law. In that sense, detailed and strict guidelines must be provided through the ECJ jurisprudence. The *Intermodal* case, given by the ECJ in September 2005, offers an interesting illustration of tidy guidelines.<sup>9</sup> In addition, it is essential that the national courts from the older Member States provide “examples” to the new comers and thus show their interest and

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<sup>8</sup> Article III-369 CT is *quasi* similar to Article 234 EC.

<sup>9</sup> Case C-495/03 *Intermodal* [2005] n.y.r.

willingness to apply Community law in good faith, e.g. by relying parsimoniously on the *acte clair* doctrine.

Finally, it should always be kept in mind that the coexistence between the national courts and the ECJ implies a complete deference to the respective jurisdiction of each court. In that regard, the text and effectiveness of the EC Treaty necessitate the Court to be the final arbiter of the boundaries of the Union's competences and of the validity of its acts. As seen in Part I, it must be made clear once again that the national courts do not contest the competence of the ECJ to control the validity of Community law, but its exclusive jurisdiction to declare it invalid. Though in theory some national constitutional courts have put into question the exclusive jurisdiction of the ECJ, in practice they have never invalidated a Community act. Indeed, national courts would think, rethink and cogitate at length before coming to such conclusions that would result in a crisis endangering the uniformity of Community law and lead to the assured destruction of the relationship between the two legal orders. Furthermore, this type of extreme situation has, fortunately, been avoided by the ECJ in taking very seriously the protection of fundamental rights, the preliminary questions on validity and also in establishing a healthy judicial dialogue with the national courts.

Importantly, the entire analysis will not diverge in the situation where the Constitutional Treaty is not ratified. First of all, the development of the role of the national courts is more or less independent of the final ratification of the Constitutional Treaty. Indeed, this development mainly takes place in the ECJ case-law. In addition, the controversial constitutional issues addressed in this report such as supremacy, attribution of competences and judicial *kompetenz-kompetenz* have existed before the Constitutional Treaty and will continue to exist even if the CT is not ratified. Also, it is worth remarking that the Constitutional Treaty has partly codified the case-law of the ECJ in relation to matters such as supremacy, listing of competences and fundamental rights. In that sense, in the event of non-ratification, it might be extrapolated that the future Treaty, replacing the Constitutional Treaty, would not radically differ from the existing text. One might thus assist to the rebirth of many of the CT provisions.<sup>10</sup>

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<sup>10</sup> On 13 October 2005, Commission Vice-President Wallström presented the so-called plan D (Democracy, Dialogue and Debate) urging the Member States to engage with citizens in a debate on the future of Europe. According to Article IV-447 CT, the Treaty shall enter into force on 1 November 2006 provided that all the instruments of ratification have been deposited. However, Article IV-443(4) CT states that “[i]f, two years after the signature of the treaty amending this Treaty, four fifths of the Member States have ratified it and one or more Member States have encountered difficulties in proceeding with ratification, the matter shall be referred to the European Council”.

# 1 KOMPETENZ-KOMPETENZ, SUPREMACY AND (NATIONAL) COURTS

This part focuses on the definitional issues of *kompetenz-kompetenz* as well as its relationship with the principle of supremacy (1.1.). Then, it will provide an overview of the ECJ case-law as to the scope of the principle of supremacy. In that regard, the obligations for the national courts resulting from supremacy will be scrutinized (1.2.). The last section will demonstrate that some national courts do not agree with the ECJ jurisprudence regarding supremacy and judicial *kompetenz-kompetenz* (1.3.).

## 1.1 The Problem

### 1.1.1 Defining *Kompetenz-Kompetenz*

The issue of *kompetenz-kompetenz* and supremacy are closely interrelated and it is often difficult to dissociate them. Before assessing the role of the national courts, it appears thus important to define the scope of these concepts as well as their overlap.

As to the concept of *kompetenz-kompetenz* (*La compétence de la compétence*), which means bluntly the competence to decide on the competence, it is important to draw a distinction between legislative and judicial *kompetenz-kompetenz*. Legislative *kompetenz-kompetenz*, which may also be called constitutional competence-competence,<sup>11</sup> has been described more precisely as follows:

The power to determine the legitimate scope of competence.<sup>12</sup>

The power to determine and extend its own jurisdiction.<sup>13</sup>

The power to decide independently and freely on the attribution of competences to a public authority.<sup>14</sup>

The ultimate authority to distribute competence in a division of power structure.<sup>15</sup>

The legislative *kompetenz-komptenz* is intricately related to the existence of an autonomous European legal order and to the question whether the EU institutions boast legislative competence-competence. It seems accepted by

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<sup>11</sup> According to the author, better reflects the fundamental nature of the issue and the level at which these decisions are made.

<sup>12</sup> Shaw, "Europe's Constitutional Future", PL 2005, pp.132–151, at p.142.

<sup>13</sup> Weiler, "The Autonomy of the Community Legal Order Through the Looking Glass", in *The Constitution of Europe*, Cambridge, 1999, pp. 286 et seq., at p.312.

<sup>14</sup> Pernice, "Multilevel Constitutionalism in the European Union", ELRev. 2002, pp.511–529, at p.519.

<sup>15</sup> Claes, *The National Courts' Mandate in the European Constitution*, thesis 10 June 2004, Maastricht, at p.512.

the major part of the doctrine that the Union does not have this power since whatever the powers attributed by the Treaties they are derived from the Member States' delegation.<sup>16</sup> This is the principle of attributed powers. Also it is worth noting that the Federal Constitutional Court in the *Maas-tricht* case made clear that the Member States remain the masters of the Treaty.<sup>17</sup> In a similar vein, during the accession of Sweden, the Government Bill made clear that it is the Member States, not the EC institutions, which decide in the Union how far the cooperation shall extend and what competence the EC institutions shall be given.<sup>18</sup>

### 1.1.2 Judicial *Kompetenz-Kompetenz*

By contrast, *judicial kompetenz-kompetenz*, according to Craig, raises the issue of who is to decide the limits of Community competence.<sup>19</sup> More precisely, which court, from the ECJ or the national court, has the final say to decide on the scope of these competences and to determine whether the Community has acted *ultra vires*. In other words, who is the final arbiter of the validity of Community legislation? At first blush, it appears that the EC Treaty confers exclusive jurisdiction to the ECJ. In that sense, Article 230 EC states expressly that a direct action before the ECJ can be based on the lack of competence. This situation is illustrated by the *Tobacco Directive* case, where the ECJ found that the Directive was invalid due to the choice of a wrong legal basis.<sup>20</sup> Also, Article 234 EC empowers the national courts to make a preliminary ruling on the validity of Community acts. As stated in the *Foto-Frost* case, the effectiveness and uniformity of Community would be put into jeopardy if the national courts were authorized to decide on the validity of Community legislation. However, this paper will emphasize that the exclusive jurisdiction of the ECJ has been contested by the national courts, though avoiding a direct altercation.

As to the principle of supremacy, one may also consider that it constitutes a dual concept regarding the type of obligations (for the national courts)

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<sup>16</sup> See Dashwood, "The Relationship between the Member States and the European Union/Community", CMLRev. 2004, pp-335-381. Weiler and Haltern, "The Autonomy of the Community Legal Order through the Looking Glass", HILJ 1996, 411.

<sup>17</sup> See Hassemer, "Case-law of the Federal Constitutional Court of Germany regarding the Position of Constitutional Courts Following Integration into the European Union", in the *Position of Constitutional Courts Following Integration into the European Union*, Conference September-October 2004, Bled, Slovenia, pp.106-118.

<sup>18</sup> Government Bill, 1994/1995: 19 part 1, at p.524 (proposing the constitutional amendment).

<sup>19</sup> Craig, "Report on the United Kingdom", in *The European Courts and National Courts*, pp.195-224, at p.206.

<sup>20</sup> Case C-376/98 *Germany v. Parliament and Council* [2000] ECR I-8419.

resulting from its application.<sup>21</sup> Indeed, the principle of supremacy entails both positive and negative obligations for the national courts. Concerning the former, the national courts are under an obligation to set aside any domestic legislation that conflict with EC law (positive supremacy). This obligation is mostly undertaken by ordinary courts and exists even in the circumstances of constitutional legislation. Concerning the latter, the national courts are under an obligation not to uphold domestic constitutional law in order to invalidate EC legislation (negative supremacy). This obligation is mostly undertaken by constitutional courts and results from the exclusive jurisdiction of the ECJ. The non-respect of this obligation would create what Craig has called a *nuclear problem* or what Weiler and Haltern have denominated a *Mutual Assured Destruction*.<sup>22</sup>

At the end of the day, it appears clearly that the issues of judicial *kompetenz-kompetenz* and (negative) supremacy are closely related. The obligation for the national court not to uphold national constitutional norms gives the answer to who is the final arbiter of the validity of Community law, that is to say the ECJ.<sup>23</sup> From the perspective of European law, the answer is easy to give. However, there is another view voiced by some national supreme/constitutional courts that do not agree with the exclusive jurisdiction of the ECJ and claim jurisdiction to apply their own Constitutions.

## 1.2 The ECJ View

The ECJ case-law regarding the scope of the principle of supremacy must be scrutinized. As seen previously, the principle of supremacy entails two types of obligations for the national courts, that is to say an obligation to set aside conflicting national norms and an obligation not to uphold constitutional provisions in order to invalidate Community measures or oppose the enforcement of Community legislation. The positive obligation comes

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<sup>21</sup> Claes, *supra*, at p.475. The author considers the principle of supremacy as dual. She makes a distinction between ordinary and ultimate supremacy.

<sup>22</sup> Weiler and Haltern, "Constitutional or International? The Foundations of the Community Legal Order and the Question of Judicial Kompetenz-Kompetenz", in Slaughter, Stone Sweet and Weiler (eds.), *The European Courts and the National Courts*, 1997, pp.331–364, at p.362.

<sup>23</sup> In addition, it is worth noting that the principle of supremacy is strongly connected with the more general issue of competence. Indeed, if the EU institutions take an act but lack the appropriate competence, this act must be declared *ultra vires*. In this situation, the principle of supremacy is evidently not applicable. Furthermore, the effects of supremacy are different according to the competence at issue. For instance, exclusive competence leads to a strict application of the pre-emption principle. In that sense, it may be said that pre-emption precedes supremacy.

very close from the monist theory and the hierarchy of the norms in the European legal order. The negative obligation is clearly associated with the validity and enforcement of Community law.

### 1.2.1 Supremacy and the Hierarchy of Community Law

The Founding Treaties do not explicitly refer to the supremacy of the Community legal order over the domestic orders. As is well known, the ECJ in *Costa v. Enel* strongly established the *lex superior* principle.<sup>24</sup> In this respect, the Court argued that “by creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity of representation on the international plane, and more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves”. It results from the jurisprudence that Community law prevails over all types of national law (even constitutional law). The application of the principle of supremacy has consequences especially for the national courts.

In *Simmenthal*, the ECJ established obligations for both the Member States (legislature) and the national courts which are justified by the need to ensure the effectiveness of Community law.<sup>25</sup> As to the former, the Court established the pre-emptive effect of Community law which precludes the adoption of national legislative measures that would be incompatible with Community provisions. Arguably, pre-emption precedes supremacy. As to the latter, the Court considered that the principle of precedence (supremacy) renders inapplicable any provision of national law conflicting with Community law.<sup>26</sup> In other words, the national courts, which must apply

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<sup>24</sup> Case 6/64 *Costa v. Enel* [1964] ECR 585.

<sup>25</sup> Case 106/77 *Simmenthal II* [1978] ECR 629.

<sup>26</sup> *Ibid.*, paras 17-18. The pre-emptive effect can be illustrated by the *Simmenthal II* jurisprudence, where the ECJ ruled that, “[i]n accordance with the principle of the precedence of Community law, the relationship between provisions of the Treaty and directly applicable measures of the institutions on the one hand and national law on the other is such that those provisions and measures not only by their entry into force render automatically inapplicable any conflicting provision of current national law but – in so far as they are an integral part of, and take precedence in, the legal order applicable in the territory of each of the member States – also preclude the valid adoption of new national legislative measures to the extent to which they would be incompatible with Community provisions. Indeed any recognition that national legislative measures which encroach upon the field within which the Community exercises its legislative powers or which are otherwise incompatible with the provisions of Community law had any legal effect would amount to a corresponding denial of the effectiveness of the obligations undertaken unconditionally and irrevocably by Member States pursuant to the Treaty and would thus imperil the very foundations of the Community”.

Community law in its entirety and protect rights conferred on individuals, are under an obligation to set aside domestic legislation (prior or subsequent to the Community rule) contrary to Community law.<sup>27</sup> It is not only for the constitutional courts to set aside, but also the ordinary courts must fulfill this obligation resulting from the principle of supremacy.<sup>28</sup>

Importantly, the obligation to set aside conflicting national norms does not necessarily lead to the abrogation (void) of the national legislation.<sup>29</sup> This interpretation is confirmed by the *IN.CO.GE* case, where the ECJ favored the inapplicability of the national measure.<sup>30</sup> In contrast, in *Factortame*, the ECJ was confronted with the question whether it should set aside a rule preventing a national court seized of a dispute falling within the scope of Community law from granting interim relief. The Court, referring to the *Simmenthal* judgment, stated that, “[a]ny provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of Community law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions...are incompatible”.<sup>31</sup> The Court found an obligation for the national court to set aside obstructive national rules which prohibit the conferral of a suitable remedy. Accordingly, this obligation stems not only from the principle of effectiveness, but also from the application of the principle of loyalty (Article 10 EC) in order to ensure the legal protection which derives from the direct effect of Community law.<sup>32</sup> At the end, the House of Lords abrogated the national rule prohibiting the granting of interim injunctions against the Crown.

### 1.2.2 Supremacy and the Validity/Enforcement of Community Law

Also, it should be stressed that the supremacy of Community law applies to the constitutions of the Member States. The Court, in *Internationale*

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<sup>27</sup> *Ibid.*, paras 20–21.

<sup>28</sup> Jacobs, “The Evolution of the European Legal Order”, CMLRev. 2004, pp.303–316, at p.315.

<sup>29</sup> Dashwood, “The Relationship between the Member States and the European Union/Community”, CMLRev. 2004, pp-335–381, at p.378, “I always read the *Simmenthal* judgment as authority for the further point that the principle of primacy of Community law does not render a national provision, which is in conflict with Community law, automatically null and void: it merely requires a national judge to refrain from applying the national provision and to give the Community provisions full intended effect”.

<sup>30</sup> Joined Cases 10 and 22/97 *IN.CO.GE* [1998] ECR I-6307. *See also*, Case C-198/01 *Consorzio Industrie Fiammiferi* (CIF) [2003] ECR I-8055, para 53.

<sup>31</sup> Case C-213/89 *Factortame* [1990] ECR I-2433, para 20.

<sup>32</sup> *Ibid.*, para 19.

*Handelsgesellschaft*, stressed the need to ensure the uniformity and efficacy of Community law in all the Member States. Indeed, it would be a tremendous step-back if the States were allowed to use their domestic constitutions in order to circumvent the Community obligations.<sup>33</sup> The Court ruled that “the validity of a Community measure or its effect within the Member States 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>34</sup> To put it in a nutshell, there is an obligation for the national court and the Member States not to invoke constitutional provisions against the enforcement of Community law or the validity of Community legislation.

First, there is a duty for the Member States not to use constitutional provisions to justify the non-respect of the obligations resulting from primary and secondary Community law. As to primary law, *Commission v Luxembourg*, a case concerning Article 48 EC and the national requirement for posts in the public service involving the exercise of powers, provides a good example.<sup>35</sup> The Grand Duchy of Luxembourg invoked Article 11 of the national Constitution, according to which only Luxembourg national may occupy civil and military posts, in order to discard the application of Community law. It argued that it constitutes a supreme rule of domestic law that precludes the breach of obligations alleged by the Commission. The Court stated with force that “recourse to provisions of the domestic level systems to restrict the scope of the provisions of Community law would have the effect of impairing the unity and efficacy of that law”.<sup>36</sup> The same type of reasoning is applicable to the implementation of secondary law, e.g. Directive.<sup>37</sup>

Second, there is an obligation not to uphold national (constitutional) provisions against the acts of institutions in order to declare their invalidity. The ECJ, as seems to follow from the *Internationale Handelsgesellschaft* or the *Hauer* cases, was thus concerned by the fact that the national courts may review EC law in light of their own constitutional law. In the words of the Court, “recourse to the legal rules or concepts of national law in order to

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<sup>33</sup> Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125.

<sup>34</sup> *Ibid.*, para 3.

<sup>35</sup> Case C-473/93 *Commission v. Luxembourg* [1996] ECR I-3207. *See also* Case 149/79 *Commission v. Belgium* [1980] ECR 3881.

<sup>36</sup> *Ibid.*, paras 37–38.

<sup>37</sup> *See* Case C-285/98 *Kreil* [2000] ECR I-69, For instance in *Kreil*, Article 12 A of the Basic Law barred women from serving in military positions involving the use of arms and was thus contrary to Directive 76/201 which is declared applicable to employment in the public service.

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. 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 into questions”.<sup>38</sup>

In the wake of this ruling, the ECJ made clear in *Foto-Frost* that it had exclusive jurisdiction to rule on the validity of Community acts. It appears important to look at the reasoning of the Court in more detail.<sup>39</sup> Before entering into the reasoning, it is worth noting that Article 234(1)(b) EC provides the individual applicant with an indirect action to challenge the validity of Community acts. According to the said Article, the national courts can refer questions to the ECJ concerning the validity and interpretation of acts of the institutions of the Community. In that regard, the Court remarked that Article 234 EC (ex 177) does not settle the question whether national courts may declare invalid the acts of the institutions.<sup>40</sup>

Then it considers two situations. On the one hand, the national courts may consider the validity of Community acts, that is to say that if they consider that the grounds put forward are unfounded they may reject them and concluded that the measure is valid.<sup>41</sup> On the other hand, the national courts do not have the power to declare acts of the Community institutions invalid. In that regard, the Court assessed the purpose of the preliminary ruling procedure and stressed that the powers conferred by Article 234 EC are to ensure that Community law is applied uniformly by national courts. According to the Court, “[t]hat requirement of uniformity is particularly imperative when the validity of a Community act is in question. Divergences between courts in the Member States as to the validity of Community acts would be liable to place in jeopardy the very unity of the Community legal order and detract from the fundamental requirement of legal certainty”.<sup>42</sup>

Thus, in the second situation, the ECJ has the exclusive jurisdiction to declare acts of the Community invalid.<sup>43</sup> This is primarily justified by the

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<sup>38</sup> *Ibid.*, para. 3.

<sup>39</sup> Case 314/85 *Foto-Frost* [1987] ECR 4199.

<sup>40</sup> *Ibid.*, para 13.

<sup>41</sup> *Ibid.*, para 14.

<sup>42</sup> *Ibid.*, para 15.

<sup>43</sup> *Ibid.*, para 19. National court and application for interim measures, see case C-465/93 *Atlanta* [1995] ECR I-3761. The national court can grant interim relief. Must have serious doubts as to the validity of the Community measure and must have referred the measure for a preliminary ruling.

need to avoid divergences between the (supreme/constitutional) national courts which would have the effect of impairing the unity of the Community legal order. Then, the ECJ, in analyzing the text of Article 234 EC and the place of the ECJ in the preliminary ruling procedure, resorts to the argument of effectiveness. According to the Court, the coherence of the system requires that the power to declare act invalid must be reserved to the Court of Justice since Article 234 EC gives exclusive jurisdiction to the ECJ. By referring to Articles 20 and 21 of the Statute of the Court of Justice (concerning the participation of the Community institutions in the proceedings, supply of information by the institutions and Member States not participating in the proceedings), the Court is considered to be in the best position to decide the validity of Community acts.<sup>44</sup>

The *Foto-Frost* case is a strong ruling. It is clear, simple, persuasive as well as pedagogical. Interestingly, the argument of effectiveness, used in the *Simmenthal* case, is now completed by the argument of uniformity.<sup>45</sup> This judgment thus provides as a sound integrating element for effectiveness and uniformity. It is without doubt that the ECJ has judicial *kompetenz-kompetenz*. However, this approach has been challenged and there has, in certain circumstances, been problem in some Member States in reconciling Community law with the provisions of their national constitutions. Arguably, in a Europe composed of twenty-five Member States the risk of divergences is higher and thus the necessity to have one single Court (the ECJ) to decide on the validity of Community acts is vital.

The Community legal order would be undermined if provisions of national constitutional law could be used, by the national courts, to invalidate Community measures or as exceptions to the enforcement of Community law.<sup>46</sup>

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<sup>44</sup> *Ibid.*, paras 17-18.

<sup>45</sup> See, House of Lords, "The Future Role of the European Court of Justice", 6<sup>th</sup> report, 2004, para 63. Koeck referred to the principle of workability (International law), "[i]nternational or supranational organisations, as federal states, will not be able to function if each member state, as each component part, would be able to decide for itself whether a power claimed by the organisation, as by the federation, may or may not be exercised in a given case. ... If applied to the future Union, the principle of workability demands that it is the Union itself, and not the individual Member State, that is to have the power to decide disputes over its competences. And since, in contrast to many international organisations, the future Union will have, as the present Union and, more particularly, the European Community, does have, at its disposal a special organ for deciding legal questions, *viz.* the European Court of Justice, it is most proper to invest the Court with the power to decide questions of competence with binding effect both for the Union and the Member States".

<sup>46</sup> Skouris, "The Position of the European Court of Justice in the EU Legal Order and its relationship with National Constitutional Courts", in *The Position of Constitutional Courts Following Integration into the European Union*, Conference September-October 2004, Bled, Slovenia, pp.37-47.

In certain occasions, the national courts have been reluctant to recognize the exclusive jurisdiction of the ECJ regarding the validity of Community acts and the supremacy of Community law over national constitutional law.

### 1.3 The Views of the National Courts

The national courts have reacted differently to the ultimate judicial *kompetenz-kompetenz* of the ECJ. Importantly, most of the national courts do not see any objection to the exclusive jurisdiction of the ECJ.<sup>47</sup> However, some national courts have claimed jurisdiction to review Community acts. Indeed, domestic constitutions of some Member States have been framed in such a way that the final constitutional, legislative and judicial authority lies in the Member State. Consequently, as rightly put by Denza, “[n]ational courts have made clear that their own mandate is ultimately based on their own constitution, that the supremacy of European Community law is accepted because it has been given effect by national constitutional modalities, and that national constitutions may under extreme circumstances impose limits on it”.<sup>48</sup> A good illustration is provided by the Maastricht decision of 12 October 1993. The litigation before the German Constitutional Court (the *Bundesverfassungsgericht*) is perhaps the most often quoted, but is not unique. There have been other landmark cases in the Constitutional/Supreme courts of other Member States, including France, Italy, Spain and Denmark.<sup>49</sup>

#### 1.3.1 The Constitutional Court in Germany

The Federal Constitutional Court (FCC) in Germany provides a good illustration as to the reactions of the national court against the principle of supremacy and the related issue of the exclusive jurisdiction (judicial *kompetenz-kompetenz*) of the ECJ. Those issues have arisen mainly in the context of fundamental rights and the division of competences. The assertion by the ECJ, in *Internationale Handelsgesellschaft*, that Community law is superior to the national law of the Member States, even their constitutional

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<sup>47</sup> See House of Lords, “The Future Role of the European Court of Justice”, 6<sup>th</sup> report, 2004, para 65. Craig stated that “[n]ational courts have not in general accepted that the European Court of Justice has the ultimate *Kompetenz-Kompetenz*... I do not know of any constitutional court which has unequivocally ever said that they admit that the ECJ has the ultimate *Kompetenz-Kompetenz*. The Belgian court is probably the one that has come closest to it, but I do not think even the Belgian court has accepted that an unequivocal *Kompetenz-Kompetenz* resides within the ECJ”.

<sup>48</sup> *Ibid.*, para 67.

<sup>49</sup> See in this respect, Oppenheimer (eds.), *The Relationship between European Community law and National Law: The Cases*, Cambridge, 1994. This book provides a compilation of the cases from the Member States.

law, triggered the national court's rebellion, which reacted against the evident lack of human rights within EC law.<sup>50</sup> Notably, the possibility to control the compatibility of Community law in the light of fundamental rights guaranteed by national constitutional law was already invoked by the Federal Constitutional Court (FCC) in 1967.<sup>51</sup>

The German Constitutional Court, in *Internationale Handelsgesellschaft* (1974),<sup>52</sup> did not accept the ruling of the ECJ. The national court considered that the European standard of protection of fundamental rights was not sufficient even if, *in casu*, the Community legislation did not infringe German fundamental rights. Therefore, the ECJ started to build an unwritten bill of rights with the help of general principles of Community law. Significantly, one can see here the clear link between the construction of an effective Community legal order and the need to ensure the legitimacy of the system with the help of general principles.

It may be argued that the Community was, apparently, in search of legitimacy in order to penetrate the domestic legal orders. The interaction between Community law and national law is salient in this context. Arguably, the German and Italian constitutional courts have "forced" the ECJ to adapt its case-law and create an "unwritten constitution". The ECJ in 1974, in the *Nold* case, restated its formulation established in *Stauder* and in *Internationale Handelsgesellschaft*, where fundamental rights are considered as forming an integral part of the general principles of law, the observance of which is ensured by the Court.<sup>53</sup>

Also, the Court clarified the importance of the national constitutions. The ECJ ruled that it is bound to draw inspiration from constitutional traditions common to the Member States and cannot therefore uphold measures that are incompatible with fundamental rights recognized and protected by the constitutions of those States.<sup>54</sup> Furthermore, the Court similarly ruled that international treaties, for the protection of human rights, could supply guidelines, which would be followed within the framework of Community

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<sup>50</sup> See for an overview of the debate, Dallen, "An Overview of European Community Protection of Human Rights with some Special References to the UK", CMLRev. 1990, pp. 766–772. De Witte, "The Past and Future Role of the European Court of Justice in the Protection of Human Rights", in Alston (eds.), *The EU and Human Rights*, pp.859–897, at pp. 863–864.

<sup>51</sup> *Bundesverfassungsgericht*, 18<sup>th</sup> October 1967, BVerfGE 22, 233.

<sup>52</sup> Decision of 29 May 1974, *Internationale Handelsgesellschaft*, BVerfGE 37, 271 [1974] CMLR 540.

<sup>53</sup> Case 4/73 *Nold* [1974] ECR 491, at p. 507.

<sup>54</sup> This part constitutes the clarification and adopts a similar reasoning to that in *Internationale Handelsgesellschaft*.

law. In national law, constitutional provisions and principles protect human rights whether written or unwritten, whereas in international law wide network of conventions has been adopted for this purpose. In Community law, the basic Treaties contained no specific provision for the protection of human rights as such (partly due to the economic character of the Union, which makes such encroachment very unlikely).

Relying on the general principles of law derived from the constitutions of the Member States and on relevant international treaties, the Court, between 1974 and 1986, set up a range of fundamental rights recognized and protected in the Community law order, these being (in chronological order): the right to property, freedom of trade union activity and the right to join an association, the principle of limitation of State prerogative in a “democratic society”, freedom of religion, the prohibition of discrimination based on gender, the right to respect for private and family life, home and correspondence, the right to carry on an economic activity, non-retroactivity of penal provisions and the right to effective judicial protection.

Finally, the German Federal Constitutional Court (1986), in *Wünsche Handelsgesellschaft* (Solange II), considered that the protection of fundamental rights in the EC order was adequate.<sup>55</sup> In other words, the Federal Constitutional Court would not exercise its jurisdiction as long as the Community level of protection is equivalent to the national rights standard.<sup>56</sup> In the “*Banana case*” (2000), it confirmed that the protection of fundamental rights was sufficient, and that it will not automatically adjudicate a complaint concerning the validity of a Community act in the light of the Basic Law (German Constitution).<sup>57</sup> Thus, it may be concluded that the supremacy of EC law over the national constitutional law was ultimately recognized with the help of the general principles of law and the legitimacy flowing from their very nature.

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<sup>55</sup> Decision of the 22 October 1986, BVerfGE 73, 339 [1987] 3 CMLR 225.

<sup>56</sup> Kumm, “Who is the Final Arbitrator of Constitutionality in Europe?: Three Conceptions of the Relationship between the German Federal Constitutional Court and the European Court of Justice”, CMLRev. 1999, pp.351-386, at p. 364. The author stated that, “[a]ccording to the doctrine enunciated in its *solange II* decision and restated in the *Maastricht judgment*, the FCC will not exercise its jurisdiction concerning basic rights so long as rights protections existing at the Community level are essentially equivalent to those protections present in the German Constitution. He also considered (at p. 369) that, “[t]he *Maastricht judgment* modified the no jurisdiction so long as formula of the *Solange II* decision to become jurisdiction, but exercised in a relationship of co-operation with the ECJ”.

<sup>57</sup> See, BVerfGE 102, 147.

As to the German FCC, in *Internationale Handelsgesellschaft* (1974),<sup>58</sup> it declared that “as long as” (*Solange I*) Community law had not developed a standard of fundamental rights protection equivalent to the *Grundgesetz*, the German constitutional provisions would prevail over Community law. However, the FCC did not invalidate the Community act by having recourse to the national constitutional provisions. Also, it must be noted that the *Nold* case of the ECJ, was given and transmitted to the FCC less than two weeks before the ruling in *Solange I*. Consequently, it may be said that the ECJ seemed to be extremely preoccupied by the reactions of the national court. In other words, these reactions had to be taken seriously. Arguably, in the wake of the FCC decision, the ECJ started to elaborate an “unwritten Bill of Rights” founded on the constitutional traditions common to the Member States, but also the international human rights treaties (particularly the ECHR as will be stressed further on).

At the end of the day, the reaction of the Karlsruhe judges was a harsh but positive one. At the Community level, one might consider that a national reaction lead to either positive or negative effects. In that sense, the positive effect largely depends on how the Community institutions (*in casu* the Court) are able to answer and absorb the national backlash. The Community response to the national laments may be deemed effective and forcefully persuasive. Twelve years after the *Solange I* decision, which might have imperilled the very foundations of the European legal order, i.e. by undermining seriously the principle of supremacy, the FCC gave a clear sign of relaxation.

The German judges in *Wünsche Handelsgesellschaft* (1986)<sup>59</sup> stated that “as long as” the level of fundamental rights protection in the Community legal order remains adequate to the German standard, there is no need to examine the compatibility of the Community legislation in the light of the *Grundgesetz* (*Solange II*). The FCC, in *Solange II*, undertook a profound analysis of the ECJ jurisprudence in the human rights field and pointed out the various principles elaborated by the European Court.<sup>60</sup> The German court came to the conclusion that the ECJ increased and stiffened the level of human rights protection.<sup>61</sup> The FCC, thus, recognized that the level of

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<sup>58</sup> *Bundesverfassungsgericht*, 29 May 1974, BVerfGE 37, 271 at p. 280.

<sup>59</sup> *Bundesverfassungsgericht*, 22 October 1986, *Wünsche Handelsgesellschaft*, BVerfGE 73, 339 at p. 386.

<sup>60</sup> The FCC referred to the right to property, the right to freedom of activity, freedom of association, the principle of equality, the protection of the family, freedom of religion, the principle of proportionality, the principle of legal certainty, non-retroactivity, *non bis in idem*, the right to a fair trial and the right to an effective judicial protection.

<sup>61</sup> *Wünsche Handelsgesellschaft*, *supra* n.59, BVerfGE 73, 339 at pp. 379–382.

fundamental protection was sufficiently ensured. Nevertheless, the German Basic Law remains like a Damocles sword over the European judges, who have to furnish a high standard of protection, i.e., a standard *quasi*-similar or at least not incompatible with the *Grundgesetz*.

The “spectre” of the lack of fundamental rights’ protection resurrected in the wake of the Maastricht Treaty. The *Maastricht decision* of the FCC, also known as the *Brunner* case,<sup>62</sup> exemplifies the persistent interest of the German constitutional court regarding the issue of basic rights. This decision, however, did not focus essentially on the human rights problematic, but mainly concerned the question of legislative competence and democratic legitimacy.<sup>63</sup> The FCC reviewed the Treaty of Maastricht in light of the Basic Law and found that it was not contrary to the democratic principles since the German Parliament preserved competences of substantial importances. In that respect, the German Court stressed that the Member States are the masters of the Treaties.<sup>64</sup>

Boom has undertaken a detailed comparison of the *Maastricht* decision with the decision of the United States Supreme Court (USSC) in *Martin v.*

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<sup>62</sup> *Bundesverfassungsgericht*, 12 October 1993, *Brunner*; BVerfGE 89, 155, in 1 CMLR [1994] pp. 57–109.

<sup>63</sup> Kumm, “Who is the Final Arbiter of Constitutionality in Europe?: Three Conceptions of the Relationship between the German Federal Constitutional Court and the European Court of Justice”, CMLRev. 1999, pp. 351–386. See also Schmid, “The Neglected Conciliation Approach to the Final Arbiter Conflict: A Critical Comment on Kumm”, CMLRev. 1999, pp. 509–514. For a critical analysis of the Maastricht Decision, see Weiler, “The State ‘über alles’: Demos, Telos and the German Maastricht Decision”, 1995, [www.law.harvard.edu](http://www.law.harvard.edu), see also, Kokott, “German Constitutional Jurisprudence and European Integration II”, EPL 1996, pp. 413 et seq. Herdegen, “Maastricht and the Constitutional Court: constitutional restraints for an Ever Closer Union”, CMLRev. 1994, pp. 235 et seq. Everling, “The Maastricht Judgment of the German Federal Constitutional Court and its Significance for the Development of the European Union”, YEL 1994, Wieland, “Germany in the European Union – The Maastricht Decision of the Bundesverfassungsgericht”, EJIL 1994, pp. 259 et seq.

<sup>64</sup> *Brunner*, supra, “The exercise of sovereign power through a system of states such as the European Union is based on authorisations from states which remain sovereign ... If European institutions and bodies were to treat or develop the Union Treaty in a way that was no longer covered by the Treaty in the form that is the basis for the Law on Accession, the resulting legislative instruments would not be legally binding within the sphere of German sovereignty. The German state bodies would be prevented, for constitutional reasons, from applying them in Germany. Accordingly the Federal Constitutional Court reviews legal instruments of European institutions and bodies to see whether they remain within the limits of the sovereign rights conferred on them or whether they transgress those limits.” See also, Hassemer, “Case-Law of the Federal Constitutional Court of Germany Regarding: The Position of Constitutional Courts Following Integration into the European Union”, in “The Position of Constitutional Courts Following Integration into the European Union”, Conference September–October 2004, Bled, Slovenia, pp.106–118.

*Hunter* (1816)<sup>65</sup>, where the Supreme Court of Virginia refused to follow the mandate of the USSC, considering that the USSC had exceeded its jurisdiction and acted *ultra vires*.<sup>66</sup> According to the same author, “[t]he *Maastricht* decision is the latest and strongest, since *Solange I*, challenge to the ECJ. It is this steady opposition that leads to Germany’s appellation of the *Virginia of Europe*”.<sup>67</sup> More importantly, the FCC, in recital 13 of the *Maastricht* case, stated that, “[t]he Federal Constitutional Court by its jurisdiction guarantees (citing expressly *Solange I* and *II*) 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 . . . Acts done under a special power, separate from national powers of the Member States, exercised by a supra-national organization also affects the holder of basic rights in Germany. They therefore affect the guarantees of the Constitution and the duties of the constitutional Court, the object of which is the protection of constitutional rights in Germany . . . However, the Court exercises its jurisdiction on the applicability of secondary Community legislation in Germany in a relationship of cooperation with the European Court, under which that Court guarantees protection of basic rights in any particular case for the whole area of the European Communities, and the Constitutional Court can therefore restrict itself to a general guarantee of the constitutional standard that cannot be dispensed with”.<sup>68</sup>

The *Maastricht* case may be interpreted as a mere restatement of the *Solange II* case. In other words, the German court does not exercise its jurisdiction regarding fundamental rights so long as the Community protection is essentially equivalent to the German Constitution. Another interpretation might be that the *Solange II* formula (no jurisdiction as long as..) is replaced in order to become jurisdiction exercised in a relationship of co-operation with the ECJ in the field of legislative competence. One may, subsequently, argue that the “jurisdictional extension could conceivably lead, despite the Court’s affirmation of the *Solange II* formula, to instances where the Federal Constitutional Court challenges individual decisions of the ECJ, instead of merely safeguarding a general level of fundamental rights protection and stepping in only when that level fell below German

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<sup>65</sup> *Martin v. Hunter’s Lessee*, 14 U.S. 304 (1816).

<sup>66</sup> Boom, “The European Union after the *Maastricht* Decision: Is Germany the ‘Virginia of Europe’”, 1995, in [www.law.harvard.edu](http://www.law.harvard.edu), pp. 8–37.

<sup>67</sup> *Ibid.*, at p. 37.

<sup>68</sup> See, *supra*, *CMLR* [1994] at p. 79. The FCC has made an explicit reference to *Solange II* in fn. 16.

requirements”.<sup>69</sup> Limbach (the former President of the FCC) pointed out that the possibility to control the acts of the European Community stemming from the *Solange II* does not constitute a danger to Luxembourg jurisprudence. The former President of the FCC considered that such a reading of the decision was erroneous and not conformity with Article 23 of the Fundamental Law.<sup>70</sup> This Article allows a difference of standard between Community and German law and, thus, authorizes a lower level of fundamental rights protection by the Community in certain areas. It would be a sign that all types of public authorities must respect fundamental rights in a modern democratic society.<sup>71</sup> Finally, the respect of the ECJ competence and the idea of cooperation render superfluous the case-by-case control by the national constitutional court acting as a watchdog.<sup>72</sup> This reasoning, particularly concerning the standard, seems to be confirmed by two judgments (*Alcan* and the “*Banana case*”) given in 2000 by the FCC.

As to the first case, a German undertaking (*Alcan*) obtained a subsidy from the State without notification to the Commission pursuant to Article 88(3) EC. The Commission declared the aid to be incompatible with EC law and ordered the national authorities to repay the aid. The German authorities refused to do so and the ECJ ruled in 1989 that Germany had committed a breach of the Treaty.<sup>73</sup> Subsequently, the government of the Land Rheinland-Pfalz claimed the sum from the undertaking. *Alcan* maintained that the order of recovery was in breach of the principle of legitimate expectations. The national court of first instance found the appellant’s argument convincing and invalidated this order. However, the Federal Administrative Court referred a question for preliminary ruling to the ECJ,<sup>74</sup> which found no breach of the mentioned principle. Finally, *Alcan* introduced a constitutional claim alleging breaches of Articles 2 (right to

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<sup>69</sup> Boom, *supra*, at p. 7.

<sup>70</sup> Inserted by the law of the 21 December 1992, BGBl I p. 2086. Article 23 is generally interpreted by the German doctrine as the consecration of *Solange II*. Article 23 of the Fundamental Law corresponds to the consecration of *Solange II* and states that Germany participates to the realization of an unified Europe by developing a European Union which is bound to respect the democratic principles, judicial, social and federal as well as the principle of subsidiarity and which guarantees a level of protection of fundamental rights “*substantially comparable*” to the German Fundamental law.

<sup>71</sup> Limbach, “Die Kooperation der Gerichte in der zukünftigen Grundrechtsarchitektur. Ein Beitrag zur Neubestimmung des Verhältnisses von Bundesverfassungsgericht, Gerichtsof der Europäischen Gemeinschaften und Europäischem Gerichtshof für Menschenrechte”, EUGRZ 2000, pp. 417–420, at pp. 419–420. Traduced in French by Grewe, in RTDE 2001.

<sup>72</sup> *Ibid.*, at p. 420.

<sup>73</sup> Case 94/87 *Alcan I* [1989] ECR 175.

<sup>74</sup> Case C-24/95 *Alcan II* [1997] ECR I-1591.

freedom) and 14 (right to property) of the Fundamental Law. The appellant also made reference to the *ultra vires* doctrine, according to which the ECJ had exceeded its jurisdiction. The FCC refused to assess the complaint in regard to the breach of fundamental rights and held that the constitutional principle of legitimate expectations was not endangered by the human rights standard established by Community law.<sup>75</sup> Moreover, it considered that the ECJ did not embark upon judge made-law by requiring the reimbursement of the illegal subsidies and consequently did not act *ultra vires*.<sup>76</sup>

As to the *banana* case, which dealt with the Banana Regulation 404/93, German undertakings alleged breaches of Articles 12 and 14 of the Fundamental Law, concerning the right to property, the right to freely exercise a professional activity and the principle of equality.<sup>77</sup> The Administrative Court of Frankfurt asked the FCC, in October 1996, to determine the constitutionality of the Community Regulation. Three and a half years after having received the question, the Constitutional Court unanimously declared the application inadmissible. The Court explicitly relied on the *Solange II* formula and linked it with the *Maastricht* decision.<sup>78</sup> The inter-

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<sup>75</sup> Hoffmeister, “German Bundesverfassungsgericht: Alcan, Decision of 17 February 2000; Constitutional Review of EC regulation on Bananas, Decision of 7 June 2000”, CML-Rev.2001, pp. 791 *et seq.*, at p. 793.

<sup>76</sup> *Ibid.*, at p. 804. Hoffmeister rephrased the *Solange* wording as meaning that, “as long as the Bundesverfassungsgericht and the European Court of Justice keep their mutual trust, they will cooperate by respecting the division of sovereignty entrusted by the people in the contemporary Union to their respective States and the Union together”. See *Banana* case, *supra*, para. 54.

<sup>77</sup> BVerfGE 102, 147.

<sup>78</sup> Grewe, “Le traité de paix avec la Cour de Luxembourg: L’arrêt de la Cour constitutionnelle allemande du 7 juin 2000 relatif au règlement du marché de la banane”, RTDE 2001, pp. 1 *et seq.*, at pp. 11-12. According to the author, “il n’est donc pas question ici d’une compétence de surveillance de la Cour allemande mais d’une harmonisation spontanée du droit sur initiative européenne. Le ton est ainsi donné: il s’agit de prendre au sérieux la jurisprudence européenne et de minimiser ce que la Cour avait déclaré en 1993 quant à sa propre compétence. C’est ainsi que la décision du 7 juin 2000 déclare que l’arrêt de Maastricht se teint aussi à cette irrecevabilité des recours fondés sur l’article 100 LF, même si la démonstration n’en est pas toujours convaincante. L’arrêt rappelle le considérant selon lequel la Cour garantit par sa compétence et en coopération avec la Cour de justice une protection efficace des droits fondamentaux. Il décrit ensuite cette coopération en constatant que l’arrêt Maastricht admet la compétence de la CJCE pour la protection des droits fondamentaux à l’encontre du droit communautaire dérivé; ce qu’omet de mentionner l’arrêt de juin 2000, c’est qu’en 1993, cette compétence n’apparaissait pas comme un monopole de la CJCE. L’arrêt conclut par une reprise pure et simple de *Solange II* qu’il met dans la bouche de l’arrêt Maastricht . . . On est donc entré ici dans le domaine de la relecture et du toilettage de la jurisprudence Maastricht”. Whereas in the *Maastricht* Case, Judge Kirchhof (the reporting judge) underlined the central role of the nation-state and perceived the EU as an association of States, the decision of 2000 does not embed into an analysis of the European and German systems.

esting part of the judgment lies in the interpretation of the requirements for constitutional complaints regarding secondary Community law. In that respect, the control of constitutionality of secondary Community law, in conformity with Article 100 of the Fundamental Law, is granted only if detailed motivations prove that the Community law measure does not guarantee the minimum level of protection of fundamental rights.<sup>79</sup> Consequently, the applicant must demonstrate that the general human rights standard afforded at the EC level is insufficient in relation to the particular interest. This requires an extensive analysis of the human rights protection afforded by the European institutions. The applicant cannot limit himself to establishing an inconsistency between the European and national level of protection.<sup>80</sup> To put it differently, it is extremely difficult to fulfil the conditions of admissibility.<sup>81</sup>

To conclude, it is worth noting that the FCC in 2005, for the first time, made an explicit reference to a provision of the Constitutional Treaty in the *European Arrest Warrant* case.<sup>82</sup> More precisely, the FCC declared void measures implementing the European Warrant Act on the ground that they violate Article 16.2 of the Basic Law. This provision ensures the protection of German citizen from extradition since there exists a special association to the legal system with the citizen and, in principle, the citizen may not be excluded from this democratic association. It is in the light of this Article that the FCC mentioned the citizenship provision enshrined in the Constitutional Treaty (Article I-10 CT) and, in that regard, reaffirmed the place of the Basic Law vis-à-vis the CT.

### 1.3.2 The Conseil d'Etat and the Conseil Constitutionnel in France

It may be said that Article 55 of the Constitution establishes a hierarchy of norms between international law and the French national legal order. Article 55 states that, “[t]reaties and international agreements which have been lawfully ratified or approved shall, as from the date on which they are published, take precedence over Laws, subject to the requirement that the other contracting parties apply the treaties or agreements in question”.

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<sup>79</sup> See Lavranos, *Decisions in International Organizations in the European and Domestic Legal Orders of selected EU Member States, 2004*, PhD submitted 4 June 2004 at the ACIL.

<sup>80</sup> Von Bogdandy, “The European Union as a Human Rights Organization? Human Rights and the Core of the European Union”, *CMLRev.* 2000, 1307-1338, at p. 1323.

<sup>81</sup> It seems plausible to argue that the elaboration (whom initiative was German) and the signature of the Charter of Fundamental Rights in Nice (December 2000) pushed the delivery of the “*Banana* case”. (*Ibid.*, Grewe at p. 17).

<sup>82</sup> BVerfGE 2236/04, 18 July 2005.

In a nutshell, the international agreement must be ratified, published and subjected to the principle of reciprocity. According to Vedel, the direct content of Article 55 concerns the resolution of conflicting norms. In other words, it means that a judge confronted with such a conflict must remove the internal statute contrary to the international treaty.<sup>83</sup> In 1975, the Court of Cassation recognized the primacy of Community law over a posterior French statute.<sup>84</sup> The reasoning was based on Article 55 of the French Constitution. Touffait, in his conclusions, advised not to base the reasoning on Article 55 in order to assert the primacy of Community law over national law, since it would imply that the position of Community law in the national legal order depends solely on the Constitution.<sup>85</sup> In that sense, it might be contended that the general prosecutor had already determined the potential normative conflict between Community law and the wording of Article 55 of the Constitution. Very late, in 1989, the *Conseil d'Etat* (CE) in *Nicolo*, following the *Commissaire du Gouvernement* (CG) Frydman,<sup>86</sup> affirmed the primacy of the international convention over a prior domestic statute (*loi postérieure*),<sup>87</sup> thus abolishing the so-called theory of the “*loi-écran*” (veil-statute). It is worth noticing here that the theory of “veil-statute” leads to affording supremacy to the domestic statute over international conventions by impeding the ordinary judge from discarding the domestic law. The said theory was established, in the late sixties, by the “*Semoules case*”.<sup>88</sup> Next, the CE considered in *Boisdet* that a Community Regulation prevailed over the French Law.<sup>89</sup> In *Rothmans* (1992), the administrative judge considered that the refusal by the French ministry, based

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<sup>83</sup> Vedel cited in Potvin-Solis, *l'effet des jurisprudences européennes sur la jurisprudence du conseil d'Etat Français*, LGDJ, 1999, at p.422. It seems plausible to argue that the elaboration (whom initiative was German) and the signature of the Charter of Fundamental Rights in Nice (December 2000) pushed the delivery of the “*Banana case*”. (*Ibid.*, Grewe at p. 17).

<sup>84</sup> Cass. Ch.mixte, 24 May 1975, *Sté des Cafés Jacques Vabre* [1975] 2 CMLR 336.

<sup>85</sup> The *Procureur Général* Touffait stressed that the Court should base its decision on the very nature of the Community legal order. In that regard, he considered that the transfer made by the Member States in those areas regulated by the Treaty must constitute a definitive limitation of their sovereign rights. Also, he referred to the decisions of the Belgium (*Le Ski decision*, 1971), German (*Lütticke*, 1971) and Italian (*Frontini*, 1973) Courts, which have recognized the supremacy of Community law over national law.

<sup>86</sup> CG Frydman assessed that the CE should reconsider its approach regarding Article 55 of the Constitution and thus review the compatibility of statutes with treaties. In this respect, the CE would bring into line its case-law with not only the Court of Cassation but also with the German and Italian Constitutional Councils.

<sup>87</sup> CE Ass, 20 October 1989, *Nicolo*, RFDA 1989, pp.813 *et seq.* See Dutheil De La Rochère, “The Attitude of French Courts Towards ECJ Case Law”, in O’Keefe and Bavasso, *Judicial Review in European Union Law*, 2000, pp.417–431, at pp.420–422.

<sup>88</sup> CE, 1 March 1968, *Syndicat General des Fabricants de Semoules de France* [1970] CMLR 395.

<sup>89</sup> CE, 24 September 1990, *Boisdet*, AJDA 1990, pp.906 *et seq.*

on a decree<sup>90</sup> and a statute,<sup>91</sup> to allow cigarette manufacturers to increase the price of their products was contrary to the “tobacco Directive” of 19 December 1992.<sup>92</sup> Consequently, it annulled the decision of the French Minister.<sup>93</sup> In light of the administrative jurisprudence, the hierarchy between the Constitution and the international treaties remains to be determined. However, this difficult issue appears to be tackled by the CE in the *Sarran* case.<sup>94</sup>

Firstly, Article 55 of the French Constitution asserts the superiority of international treaties over domestic statutes. It does not, however, refer explicitly to the Constitution. Arguably, the wording of this provision seems to indicate a hierarchy favourable to the French Constitution. Secondly, the administrative jurisprudence has confirmed such a view. In *Koné*, a principle of constitutional law prevailed over international law.<sup>95</sup> Further, in *Aquarone*, the *Conseil d’Etat* refused to make internal custom prevail over domestic constitutional law.<sup>96</sup> Notably, in the *Sarran* case, the CE made clear that the domestic Constitution takes precedence over the International Treaty. It appears, thus, important to analyze such a case in more detail and, particularly, in the light of Community law. *In casu*, the applicant brought an action before the Council of State invoking the illegality of a decree that had been adopted on the basis of Article 76 of the French Constitution providing for consultation of the population of New Caledonia. Sarran and Levacher argued that Article 3 and 8 of the decree were contrary to Articles 2, 25 and 26 of the ICCPR and Article 14 of the ECHR. The Council of State held that: “[c]onsidérant que si l’article 55 de la constitution dispose que 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 s’applique pas, dans l’ordre interne, aux dispositions de nature constitutionnelle, qu’ainsi, le moyen tiré de ce que, le décret attaqué, en ce qu’il méconnaîtrait les stipulations d’engagements internationaux réguliè-

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<sup>90</sup> Decree of the 10th of December 1976.

<sup>91</sup> Statute of the 24th of May 1976.

<sup>92</sup> CE, 28 February 1992, *SA Rothmans International France and SA Phillip Morris France*, AJDA 1992, pp.210 *et seq.*, CMLRev. 1993, pp.187-198.

<sup>93</sup> *Infra.*, *Meyet* and *SNIP* cases. In the second case, the CE explicitly considered the position of the general principles of Community in the national legal order. The general principle of Community is superior, in the hierarchy of norms, to the Law (statute). The Constitution still appears to prevail.

<sup>94</sup> CE Ass., 30 October 1998, *Sarran et Levacher et autres*, AJDA 1998, pp.1039 *et seq.*

<sup>95</sup> CE Ass, 3 July 1996, *Koné*, Recueil Lebon, pp. 255 *et seq.*

<sup>96</sup> CE Ass, 6 June 1997, *Aquarone*, RGDIP 1997, pp. 1053 *et seq.*

*rement introduits dans l'ordre interne, serait par le même contraire à l'article 55 de la constitution, ne peut lui aussi qu'être écarté*".<sup>97</sup>

On the one hand this paragraph ( "*considérant*") has been appraised as *obiter dictum* since the *Conseil d'Etat* could have invoked its incompetence to disregard the application of the French Constitution.<sup>98</sup> On the other hand, it has been assessed that such a very clear statement constituted the *ratio decidendi* of the judgment.<sup>99</sup> Regardless, it is clear from the case that the *Conseil d'Etat* emphasized the superiority of the constitutional dispositions over the international treaties. These dispositions of a constitutional nature include the written Constitution but also the constitutional principles developed by the Constitutional Council. Further, it might be argued that all the international conventions are concerned since, *in casu*, the CE found that the Constitution prevailed over the ICCPR and the ECHR.<sup>100</sup> The *Conseil d'Etat* asserted the superiority of the Constitution over international norms. The supremacy conferred by Article 55 of the Constitution to international conventions does not apply, in internal law, to dispositions of a constitutional nature. In practice, this means that it is impossible to plead before an administrative court that a constitutional disposition is contrary to an international convention.

This case clearly illustrates the conflict between the legal orders.<sup>101</sup> The Supreme Administrative court clearly established a theory of "Constitution écran" ("veil-constitution"). In other words, being hierarchically superior, the Constitution appears immune from judicial review by an international norm (more particularly a Community norm). Rephrasing Flauss, to give an absolute character to the supremacy of the constitutional norm over the conventional norm constitutes, without doubt, an eminent dogmatic option which is apparently excessive.<sup>102</sup> By contrast, the other solution would have allowed the ordinary judge to review the Constitution in light of an international norm ("*contrôle de conventionnalité de la Constitution*").

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<sup>97</sup> "Considering that Article 55 of the Constitution states that the treaties and international agreements which have been lawfully ratified or approved shall, as from the date on which they are published, take precedence over Laws, subject to the requirement that the other contracting parties apply the treaties or agreements in question. The supremacy conferred to international agreements does not apply, in internal matters, in relation to constitutional provisions. Consequently, the plea as to the violation of an international agreement by the internal decree of constitutional nature can only be rejected".

<sup>98</sup> Chaltiel, "Droit constitutionnel et droit communautaire", RTDE 1999, pp. 395-408, at p.404.

<sup>99</sup> Flauss, "Contrôle de conventionnalité et contrôle de constitutionnalité devant le juge administratif", RDP 1999, pp.919-945.

<sup>100</sup> *Ibid.*, at p.931.

<sup>101</sup> Chaltiel, *supra*, at p.404.

<sup>102</sup> Flauss, *supra*, at p.927.

The *Sarran* case might lead to serious problems, especially, in relation to Community law. In other words, there is a risk of conflict between Constitutional and Community norms. Indeed, according to the Community jurisprudence,<sup>103</sup> Community law prevails over national law even constitutional law. Yet, the *Conseil d'Etat* has never been directly confronted with such a conflict. In practise, such a conflict is highly hypothetical. Moreover, the CE might abandon such an approach. In that regard, it is worth underlining that the *Conseil d'Etat* discarded its theory of “loi-écran” in the *Nicolo* case (French legislation superior to the international norm).<sup>104</sup> Importantly, the CE always has this possibility in relation to the theory of “Constitution-écran”. The *Conseil d'Etat* might also recognize the specificity of the Community legal order. In that sense, the CE established a distinction, regarding their hierarchy, between general principles of international law and general principles of European law. Arguably, the inexistence, at this stage, of a formal European Constitution might constitute a strong element impeding the recognition of the predominance of the European judicial order over the constitutional domestic order. At the end of the day, how can we assess the reaction of the *Conseil d'Etat*? Is it a positive or negative reaction towards Community law? This decision appears to me *prima facie* negative since it goes against Community (case) law. Drawing a parallel, the same reasoning might have been applied to the *Solange I* of the German Federal Constitutional Court. However, as demonstrated previously, the consequences of *Solange I* have been extremely positive for the Community legal order, though the reaction of the national jurisdiction was deemed *prima facie* negative. As to the reaction of the *Conseil d'Etat*, it may be too early to give a precise answer. Furthermore, it is worth emphasising that the *Sarran* case does not explicitly apply to the Community legal order. Extrapolating on a positive consequence, one might say that this type of ruling enhances the necessity to adopt a European Constitution. Finally, it seems to me that the *Conseil d'Etat* in the *Sarran* case reasserts its utmost interest and role in protecting the French Constitution and, thus, appears as its guardian.<sup>105</sup> In that regard, the decision might conflict, to a certain extent, with the position of the *Conseil Constitutionnel*.

In that respect, the Decisions of the *Conseil Constitutionnel* (CC) given during the summer 2004 (10 June, 1 July and 29 July 2004) are of particu-

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<sup>103</sup> Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125.

<sup>104</sup> Chaltiel, *supra*, at p.403.

<sup>105</sup> Richards, “Sarran et Levacher: Ranking Legal Norms in the French Republic”, *ELRev.* 2000, pp192-199, at p.192. The *Sarran* case was confirmed in 2001 in *Syndicat National des Industries Pharmaceutiques*.

lar importance.<sup>106</sup> In the last decision (Decision 2004-498), the CC had to assess whether Article 17 of the bioethical legislation, which implements an EU Directive, was contrary to a constitutional provision (Article 11 of the Declaration of Article 1789). In the end, it found that the freedom of expression is both guaranteed at the national level by Article 11 of the Declaration of 1789 and at the Community level by a general principle of Community law on the basis of Article 10 ECHR (paragraph 6). By consequence, the implementation of the Directive does not constitute an obstacle to an express and specific constitutional provision.

The CC implicitly recognizes that the principle of supremacy of Community law applies in the internal legal order (this is based on Article 88-1 of the Constitution) unless there are contrary and specific constitutional provisions. This is the so-called “*réserve de constitutionnalité*”. Put differently, in the absence of an explicit and contrary constitutional provision, the CC recognizes the application of the *Foto-Frost* doctrine in the sense that only the ECJ, through preliminary ruling, may declare Community law invalid in light of the competences defined by the Treaty and the fundamental rights guaranteed by Article 6 TEU.<sup>107</sup> At first glance, the ECJ appears thus as the final arbiter of Community law in the context of competences and fundamental rights. This decision, however, constitutes a limited exception to the exclusive jurisdiction of the ECJ to control the (in)validity of Community acts.<sup>108</sup>

### 1.3.3 An Isolated Problem?

The reactions from the national courts regarding the principle of supremacy and judicial *kompetez-kompetenz* are not only limited to France and Germany. For instance, the *Carlssen* case of the Danish Supreme court has followed the same line of reasoning as the FCC in the *Maastricht* case.<sup>109</sup> The Court seems to consider that it is the duty of the Danish Supreme Court to act as the ultimate watchdog of the Danish Constitution. According to Rasmussen, national courts have “the final say” under Danish constitutional law. In a situation, where the Supreme Court disagrees

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<sup>106</sup> Decision no 2004-496 DC, 10 June 2004, *loi pour la confiance dans l'économie numérique*, Decision no 2004-669, 1 July 2004, *loi relative aux communications numériques et aux services de communication audiovisuelle*, Decision no 2004-498, 29 July 2004, *loi relative à la bioéthique*.

<sup>107</sup> See paragraph 4 DC 2004-498 and paragraph 7 DC 2004-496.

<sup>108</sup> See *infra* 2.3.2, this approach was confirmed by the Decision of the CC in November 2004 regarding the ratification of the Constitutional Treaty.

<sup>109</sup> *Carlssen v Prime Minister*, judgment of 6 April 1998 [1999] 3 CMLR 854.

with the ruling of the ECJ as to the validity of a Community act, it would have to say so.<sup>110</sup>

Also, it is worth remarking that the Italian Constitutional Court has reacted to the principle of supremacy due the low fundamental rights standard. Indeed, the *Corte Costituzionale* in *Frontini and Pozzani* (1973) accepted the supremacy of Community law with the reservation that Community institutions may never violate one of the fundamental principles of the Italian Constitution.<sup>111</sup> The national judges reiterated their reservation in the *Granital* case (1984),<sup>112</sup> when they renounced their privilege to declare the national constitutional law incompatible with Community law in light of the *Simmenthal II* jurisprudence (1978).

In the UK, the debate has, essentially, focused on the question of Parliamentary sovereignty and the extent to which Parliament may, by the terms of the European Community Act (ECA), have abrogated its authority. The adoption of the European Community Act led, generally, to profound modifications in the UK domestic legal order, e.g. concerning interpretation and remedies.<sup>113</sup> To quote, Lord Denning, “*when we come to matters with a European element, the Treaty is like an incoming tide. It flows into the estuaries and up our rivers. It cannot be held back. Parliament has decreed that the Treaty is henceforth to be part of our law. It is equal in force to any statute*”.<sup>114</sup> The traditional approach of Parliamentary sovereignty has recently been reaffirmed by Lord Justice Laws in *Thoburn*.<sup>115</sup> Lord Justice Laws emphasized that the foundation for all Community competence was English law, since the supremacy of EU law is conditioned by the Parliament which may explicitly repeal the ECA 1972 (constitutional statute which cannot be impliedly repealed). In other words, the relation-

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<sup>110</sup>House of Lords, “The Future Role of the European Court of Justice”, 6<sup>th</sup> report, 2004, para 68.

<sup>111</sup>*Corte Costituzionale*, 27 December 1973, No 183, in 18 *Giur.cost* (1973) 2401, *see also* in 10 *RTDE* 1974, pp. 148 *et seq.*

<sup>112</sup>*Corte Costituzionale*, 8 June 1984, No 170, in 29 *Giur.cost* (1984) 1098, *see also* in 21 *RTDE* 1985, pp. 414 *et seq.*

<sup>113</sup>*See*, concerning interpretation, Arnall, “Interpretation and Precedent in European Community law”, in *European Community Law in the English Courts*, Oxford, 1998, pp.115–136, Usher, *General Principles of EC Law*, 1998, at pp.140–144, Concerning remedies, *see* Boch, *EC Law in the UK*, Longman, 2000, pp.127–149.

<sup>114</sup>*Bulmer v. Bollinger* [1974] 2 All ER 1226.

<sup>115</sup>Lord Justice Laws in *Thoburn v. Sunderland City Council* [2002] 1 CMLR 1461, para. 59 (*Metric Martyrs* Case). For comments on the *Metric Martyrs* case. *See*, Anthony “Clustered Convergence? European Fundamental Rights Standards in Irish and UK Public Law”, *PL* 2004, pp. 283–304. O’Neill, “Fundamental Rights and the Constitutional Supremacy of Community Law in the United Kingdom after Devolution and the Human Rights Acts”, *PL* 2002 pp.724 *et seq.*

ship between the EU and UK legal orders rests within the domestic law/legislature/Parliament.

This view appears to be confirmed in a report of the House of Lords. Accordingly, “[t]he issue of the primacy of Community law was addressed in the context of the European Communities Act 1972 (the ECA). Section 2(1) of the Act provides for Community law to be directly applicable in the United Kingdom. Section 3(1) requires any question as to the meaning or effect of any of the Treaties, to be determined in accordance with the principles laid down by and any relevant decision of the European Court of Justice. Our courts should therefore respect the principle of the primacy of Community law... Giving effect to the doctrine of the primacy of Community law nevertheless presents a serious constitutional issue, namely the compatibility of the primacy rule with the constitutional principle that Parliament is supreme and cannot bind itself or its successors. The potential problem of Parliament inadvertently overriding Community law in future legislation is dealt with in section 2(4) of the ECA which provides that any enactment passed or to be passed shall be construed and have effect subject to the foregoing provisions of this section. Parliamentary sovereignty is maintained—Parliament could expressly enact that a provision should take effect notwithstanding section 2 of the ECA”.<sup>116</sup> To summarize, the UK courts must respect the principle of supremacy. This is based on Section 2 of the ECA. It is stressed however, that this principle may conflict to a certain extent with the principle of Parliamentary sovereignty. The Parliament could explicitly adopt a provision that should take effect in spite of section 2 of the ECA.

These findings prompt a number of conclusions as to supremacy and judicial *kompetenz-kompetenz*. Regarding the former, many national courts of the Member States have clearly reacted to the primacy of Community law over the national constitutions. The countries reacting the most strongly are the founding members (Germany, Italy, France) and the countries from the first wave of enlargement (Denmark and UK). In that sense, it seems that to be a member of the Union for a long period gives, wrongly, a kind of license to disagree. Also, it must be pointed that the challenge to the principle of supremacy (and exclusive jurisdiction of the ECJ) has mainly taken place in the context of fundamental rights (Germany, Italy and France) and legislative competences (Denmark, Germany and UK). To recapitulate, the national courts have said that in the event of a conflict between EC law and a national constitutional provision, the national con-

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<sup>116</sup> House of Lords, “The Future Role of the European Court of Justice”, 6<sup>th</sup> report, 2004, paras 83–84.

stitutional provision would prevail. However, such a risk in practice is quasi-inexistent since the national constitutions are usually modified before the adoption of each new Treaty. In other words, the national constitutions are *prima facie* in conformity with EU law. Furthermore, in light of the Charter of Fundamental Rights, which represents a high standard of protection, and was suggested to be included in Part II of the Constitutional Treaty, it appears doubtful that fundamental rights could nowadays constitute an area where the principle of supremacy might be stalwartly put into question. At the end of the day, it may be argued that the reactions of the national courts in the field of fundamental rights have influenced to a large extent the ECJ jurisprudence. The *modus operandi* is closer from a cooperative dialogue between the national and the ECJ than a frontal confrontation.<sup>117</sup>

Regarding the latter, it must be made clear that the national judicial authorities do not contest the competence of the ECJ to control the validity of Community law, but its exclusive jurisdiction to declare it invalid. Though in theory some national constitutional courts, e.g. Germany and France, put a *bémol* to the exclusive jurisdiction of the ECJ, in practice they have never invalidated a Community act. Indeed, national courts would think, rethink and contemplate at length before coming to such conclusions that would result in a crisis endangering the uniformity of Community law and lead to the assured destruction of the relationship between the two legal orders. This type of extreme situation has, fortunately, been avoided by the ECJ in taking very seriously the preliminary questions on validity and also in establishing a healthy judicial dialogue with the national courts. In that respect, the provisions of the Constitutional Treaty reflect the importance of this dialogue through legal pluralism. The provisions concerning the role of the national courts into Union law will now be examined in detail.

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<sup>117</sup> See Weatherill, “The Modern Role of the Court in Constitutional Law”, in *Law and Integration in the European Union*, Oxford, 1995, at pp. 210-221. The author considers that there is “[a] dialogue (although indirect) between the national court and the ECJ”.

## **2 SUPREMACY, NATIONAL CONSTITUTIONALISM AND LEGAL PLURALISM IN THE CONSTITUTIONAL TREATY**

This second part focuses on the principle of supremacy in Article I-6 of the Constitutional Treaty. This question has further relevance, independent of whether the Constitutional Treaty will enter into force, as it concentrates on the difficulty to codify the principle of supremacy. First, the scope and value of such an Article will be examined (2.1). Then, the principle of supremacy in light of the principle of conferred powers and the listing of competences will be analyzed (2.2). Finally, the relationship between Article I-6 CT and Article I-(5) CT, which concerns, *inter alia*, the national constitutional autonomy of the Member States, will be assessed. This part will emphasize that the Constitutional Treaty is imbued with legal pluralism (3.3.).

### **2.1 The Codification of the Principle of Supremacy (Article I-6)**

#### **2.1.1 The Scope of Article I-6 CT**

Whereas the principle of supremacy stems from the jurisprudence of the ECJ and has never been explicitly mentioned in the Treaties, the Constitutional Treaty refers to this principle in an opening provision. Article I-6 CT states:

“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”.

Importantly, it is complemented by Declaration 1 on Article I-6 CT, which makes clear that, “[t]he 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”. First of all, it appears that Article I-6 of the constitutional Treaty clarifies that primacy only applies to the Constitution and to Union law that has been adopted in the exercise of the competences assigned to the Union’s institutions. Thus, the principle of supremacy is expressly linked to the principle of conferred powers and the provision makes clear that it only applies in relation to competence attributed by the Member States. Arguably, the principle is (limited) by the principle of conferred powers and reflects to a certain extent the view that the Union does not possess legislative *kompetenz-kompetenz*.

Then, the second part of the provision states that Union Law “shall have primacy over the law of the Member States”. This formulation is not so clear since it does not expressly refer to the primacy of Union law over na-

tional constitutional norms. This type of “ultimate” supremacy is confirmed by a settled jurisprudence, studied above, of the ECJ. It may be said that this Article does not change the present situation and simply confirms the existing case-law. By contrast, this view has been challenged by Claes, who stated that, “[t]o include supremacy in the text of the Constitutional Treaty does more than simply codify an existing principle. It changes the current situation to the extent that it removes the limitations (or conditions for its acceptance) on the part of national constitutional law and the national courts, and makes it one dimensional”.<sup>118</sup> I disagree with the assertion that the codification makes the situation one dimensional. Article I-6 CT should be read in conjunction with Article I-5 CT which provides for national constitutional autonomy and thus reflects legal pluralism. The Constitutional Treaty and its Article I-6 CT should not be seen as a sheer expression of a monist view and hierarchical (Kelsenian) approach as to the relationship between Union Law and national legal orders.

As to the declaration attached to the Article I-6 CT, it merely refers to the case-law of the ECJ regarding supremacy. It does not put forward that Article I-6 CT constitutes a codification and takes for granted that there is no ambiguity as to the recognition and application of the principle of supremacy by the national courts. For example, the President of the Federal Constitutional Court, did not think that Article I-6, could take precedence over “the inviolable basic structure” of the Basic Law.<sup>119</sup> In other words, it appears that the constitutional provision only reflects the European perspective on the scope and extent of the doctrine of primacy.

Also, it is worth noting that the opening provisions do not refer to the principle of direct effect. It is common knowledge that the principles of supremacy and direct effect are intricately associated. It may even be stated that the principle of supremacy acquires a practical significance through the use of the principle of direct effect before the national courts. To ensure the efficiency of Community law, the national courts have been assigned the

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<sup>118</sup> Claes, *supra*, at pp.572–573.

<sup>119</sup> House of Lords, “The Future Role of the European Court of Justice”, 6<sup>th</sup> report, 2004, para 43. Papier remarked that “[i]n Germany the transfer of sovereign rights to international institutions, and also the European Union, is restricted by a guarantee of identity (Article 23.1 sentence 3 and Article 79.3 of the Basic Law (Grundgesetz)). A violation of this core of constitutional provisions, which also include, for instance, democracy and respect for human dignity, could therefore be identified by the Federal Constitutional Court as an exercise of supranational sovereign power that is not covered by the Community Treaties and be declared inapplicable in Germany”. The same view is taken by Rasmussen. Furthermore, according to Biernat, EU law had no formal primacy over the Constitution of Poland, the Polish authorities, including the Constitutional Court, should refrain from stressing the supremacy of the Polish Constitution.

task of protecting the rights of the individuals at the domestic level. In this sense, the post-*Van Gend en Loos* jurisprudence,<sup>120</sup> emphasized the role of the national courts in providing effective protection for those rights.<sup>121</sup> It is for the national courts, as authorities of the Member States, to ensure the protection of the rights conferred by Community law. It may be said that the principle of direct effect (justiciability) permits individuals to enforce uniformly their Community rights in the twenty-five Member States. In other words, the national courts in each of the Member States, whether in *Skâne*, *Euskadi* or *Latgale*, must protect in the same manner the rights arising from Community law. The principle of justifiability enables individuals to invoke before the national courts any directly effective provision of Community law. In doing so, the national courts favor the application and extension of the doctrine of primacy (precedence), e.g. the national court will have to set aside the conflicting national norm. Surprisingly, direct effect is not mentioned by the Constitutional Treaty. Claes has explained that such a stance may be explained by the complexity of the notion of direct effect.<sup>122</sup> One may regret the inexistence of such a provision that might have clarified and confirmed the ECJ case-law.

### 2.1.2 The Value of Article I-6 CT

Finally, one must assess whether the codification of the doctrine of primacy is beneficial. In that regard, much criticism has been launched. This criticism is articulated around three main ideas. First, it is clear that Article I-6 CT does not solve the issue of judicial *kompetenz-kompetenz*. Indeed, there is always uncertainty as to whether the ECJ or the national courts are the final arbiter regarding the validity of Union law. Second, the inclusion of the principle has been considered as increasing the risk of conflict between the ECJ and the national courts and as undermining the acceptance of Union law.<sup>123</sup> Some authors qualified such a codification as a “*provoca-*

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<sup>120</sup> Case 26/62 *Van Gend en Loos* [1963] ECR 1, Case 106/77 *Simmenthal* [1978] ECR 629, para. 16. Case 811/79 *Ariete* [1980] ECR 2545, Case C-213/89 *Factortame* [1990] ECR I-2433, para. 19, Case T-114/92 *Bemim v. Commission* [1995] ECR II-147, para. 62.

<sup>121</sup> In some cases, the reasoning was closely associated to the principle of co-operation stemming from Article 10 EC.

<sup>122</sup> Claes, *The National Courts' Mandate in the European Constitution*, thesis 10 June 2004, Maastricht, at pp.70-75. For an overview of the various meanings of direct effect in the Member States, See Hettne and Otken Eriksson (eds.), *EU-rättslig metod*, Norstedts, 2005, at pp.115-117.

<sup>123</sup> House of Lords, “The Future Role of the European Court of Justice”, 6<sup>th</sup> report, 2004, para 49. Besselink criticized the inclusion of primacy since it might lead to a concept of the supremacy of EU law over all national law (including constitutional values of the legal orders of the Member States) and might undermine the acceptance of EU law rather than promote it.

tion”, others as a “brutal way”.<sup>124</sup> The ambiguous wording of the provision, stressed above, has also been considered pointing into the direction of a “nuclear problem”.<sup>125</sup> Third, the very codification of the principle of supremacy may lead one to consider the principle as not inherent to the European legal order but flowing from an agreement between Member States and the subsequent ratification process.<sup>126</sup>

Personally, I view this insertion as a positive phenomenon, which as the merit to render visible and confirm one of the most fundamental principle of EC law. It also precludes the ECJ from modifying its present jurisprudential stance. Furthermore, there is no risk of conflict since the principle of supremacy is, arguably, counterbalanced by the provision on national constitutional autonomy (Article I-5 CT), which is notably placed just before the clause on supremacy.<sup>127</sup> In addition, the incorporation of the principle of supremacy does not merely constitute a simple emanation from the ECJ case-law but is clearly accepted – and thus legitimized- by the Member States. In the end, I consider that the codification of the principle of supremacy could be accompanied by a similar provision at the national level. The consequence of this inclusion would have various interesting effects: a reinforcement of the respect of the principle by the national courts, a clear acceptance of the precedence of Union law over domestic law and, more important, it would provide a solution to the issue of judicial *kompetenz-kompetenz* by implicitly acknowledging the ECJ case-law and thus the exclusive jurisdiction of the ECJ.

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<sup>124</sup> Ibid., para 48 (Dutheil de la Rochère, Iliopoulou and Errera).

<sup>125</sup> Ibid., para 47. Craig stated that “[t]he problem with an Article 10 [Article I-6 CT] of Part I is that once you write it down in a constitution and you deliberately leave the scope of primacy ambiguous as to whether it is primacy against constitution as well as national laws, apart from constitutions, you are going to get a nuclear problem which is going to have to be resolved either prior to ... or post ratification”.

<sup>126</sup> Craig, “The Hierarchy of Norms”, in Tridimas and Nebbia, *European Union Law for the Twenty-first Century*, Hart, 2004, pp.75–93, at pp.91. Craig remarked that “[i]nsofar as Article 10(1) [Article I-6] confers supremacy on Union law the conceptual foundation will almost certainly be treated by Member State courts as continuing to flow from their own constitutional provisions rather than the more communautaire reasoning of the ECJ. Supremacy of Union law will be held to exist because the Member States have agreed to this by their ratification of the Constitution. It will not necessarily be treated as inherent in the Community legal order”.

<sup>127</sup> This view will be developed and is confirmed by the views of the French Constitutional Council on Article I-6 in its decision as to the adoption of the Constitutional Treaty. Acceptance of the Constitutional Treaty is the result of a reading of Article I-6 CT in light of Article I-5 CT.

## **2.2 Article I-6 and the Principle of Conferred Power**

As seen previously, the principle of supremacy is expressly linked to the principle of conferred power in Article I-6 CT. The provision makes clear that it only applies in relation to competence attributed by the Member States. In that sense, it may be said that an EC measure taken outside the sphere of conferred powers cannot take precedence over national law. In other words, supremacy is conditioned by the principle of conferred powers. Furthermore, it seems unambiguous to me that the Member States must respect the principle of supremacy in all the fields where they have conferred competences to the Union. Therefore, it appears necessary to look more thoroughly at the principle of attributed powers (principle of conferral).

### **2.2.1 The Principle of Conferred Powers (Article I-11 CT)**

The principle of conferred powers is re-stated in very clear and detailed terms in Article I-11 CT. It is worth quoting this provision:

#### **Article I-11 CT**

1. The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.

2. Under the principle of conferral, the Union shall act within the limits of the competences conferred upon it by the Member States in the Constitution to attain the objectives set out in the Constitution. Competences not conferred upon the Union in the Constitution remain with the Member States.

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

The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments shall ensure compliance with that principle in accordance with the procedure set out in that Protocol.

4. Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Constitution.

The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality.

This Article, which is divided into four paragraphs, succeeds Articles 1 and 2 TEU and Article 5 EC. The first paragraph states the three main principles governing the limits and use of Union competences, i.e. the principles of conferral, subsidiarity and proportionality. It is clear that the

principle of conferral is closely connected with the principles of subsidiarity and proportionality. Paragraph 2 corresponds to Article 5(1) EC and states explicitly that the Union's powers have been conferred by the Member States. By contrast, Article 5(1) EC declares that "[t]he Community shall act within the limits of the powers conferred on it by the Treaty and of the objectives assigned to it therein". The major difference is thus that the Constitutional Treaty highlights that the Member States constitute the source of the attribution of competences, whereas it is merely implied in the EC Treaty.

Then, in the form of a negative and tautological formulation, the second limb stresses that in the situation where the Union has not been empowered to act under the Treaty, the competences remain within the Member States. This paragraph emphasizes the fundamental place of the Member States in the attribution of the competences and vests residual powers within them.<sup>128</sup> In other words, reading paragraphs 1 and 2 together, the competences are limited by the powers conferred upon by the Member States. And the scope of the principle of conferral seems thus to be determined by the Member States. In the end, it appears that the Union do not have legislative *kompetenz-kompetenz* (distribution of competence is controlled by the Member States and no independent sovereignty for the Union).<sup>129</sup> Arguably, this provision also reinforces the power of the national courts. It gives more weight to the argumentation that the ECJ has no exclusive jurisdiction to determine the scope of competence and, thus, that the national courts boast judicial *kompetenz-kompetenz*.

The last two paragraphs concern the principles of subsidiarity and proportionality, which governed the use of Union competences. The paragraph 3 corresponds to Article 5(2) EC and gives a definition of the principle of subsidiarity. This principle only applies where the Union does not have an exclusive competence. Before the Constitutional Treaty, the scope of exclusive competence was defined by the ECJ case-law. Importantly, the Constitutional Treaty in Article I-12 CT expressly defines those exclusive competences. Also, there is a new protocol annexed to the Constitution, which establishes a specific control of the respect of the principle of subsidiarity. This protocol has the same judicial force as the Constitution and fixes the conditions of intervention regarding the national parliaments. Notably, the national parliaments, for the first time, have a role to play in the legislative process of the European Union. Finally, paragraph 4 makes clear that the content and form of the Union action must respect the principle of pro-

<sup>128</sup> See also Article 30 of the German Basic Law and 10th Amendment of the US Constitution.

<sup>129</sup> Dashwood, *supra*, at p.357.

portionality. This is implicit in the present legislation in force (Article 5(3) EC).

## 2.2.2 Classification and Conflicts of Competences (Articles I-12 to I-18 CT)

The main question at stake here is to determine whether the classification would lead to fewer conflicts of competences? First of all, it may be said that the Constitutional Treaty is amenable to more clarity since it newly lists the competences of the Union.<sup>130</sup> This listing (classification) has been clearly influenced by the case-law of the ECJ.<sup>131</sup> However, Craig has stressed that the divide between these categories was the subject of intense debates within the Convention.<sup>132</sup> The discussion resulted in Article I-12 CT, which categorizes the competences of the Union according to the respective powers of the Union and the Member States. Three categories of competences are mainly distinguished: the exclusive competences, the shared competences and the supporting competences.

As to the first category, the CT (Article I-12(1)) states that, “[w]hen the Constitution confers on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts”. This provision constitutes a codification of the *ERTA* case.<sup>133</sup> The Member State has no more autonomous legislative competence and thus cannot adopt any legally binding act.<sup>134</sup>

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<sup>130</sup> I-12 (6): the classification of competences have essentially a function of clarification.

The exact scope of competences and their use remains fixed by the provisions of Part III concerning the common policies.

<sup>131</sup> Case C-84/94 *United Kingdom v. Council* [1996] ECR I-5755. In the *Working Time Directive* case, which concerned the challenge by the UK of a Directive related to the organisation of working time, the ECJ considered that Article 118a (health and safety) was an area of shared competence. The Court found no breach of subsidiarity as enshrined in the ex Article 3B. I-12 (6): the classification of competences have essentially a function of clarification. The exact scope of competences and their use remains fixed by the provisions of Part III concerning the common policies.

<sup>132</sup> Craig, “Competence: Clarity, Containment and Consideration”, in Pernice and Maduro (eds.), *A Constitution for the European Union: First Comments on the 2003-Draft of the European Convention*, pp.75–93, at p.77. See also Craig, “The Hierarchy of Norms”, Tridimas and Nebbia, *European Union Law for the Twenty-First Century*, volume 1, Hart, 2004, pp.75–93. This is understandable due to the lack of agreement between the AG and the Court in internal market.

<sup>133</sup> Case 22/70 *Commission v. Council* [1971] ECR 263, at p.276. According to the ECJ, “the existence of Community powers exclude the possibility of concurrent powers on the part of the Member States”.

<sup>134</sup> One can draw a parallel with the pre-emptive effect of EC law as resulting from the *Simmenthal* case (paras 17–18). This provision can thus be easily connected with the principle of supremacy.

According to the CT, the Union shall have exclusive competence in the following areas: customs union, the establishing of the competition rules necessary for the functioning of the internal market, monetary policy for the Member States whose currency is the euro, the conservation of marine biological resources under the common fisheries policy, common commercial policy.<sup>135</sup> This exhaustive listing corresponds to the areas, where the Court has generally ruled that the Community must be able to act as a unit,<sup>136</sup> or to policies explicitly providing for a phasing out of the Member States' competences.<sup>137</sup> It is worth emphasizing that the classification of a power as exclusive will automatically exclude the application of the principle of subsidiarity.<sup>138</sup>

As to the second category, the Article 12(2) CT states that, “[w]hen the Constitution confers on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised, or has decided to cease exercising, its competence”. This residual and large category includes e.g., internal market, social policy, agriculture, the area of freedom, justice and security, environment, consumer protection, transports, energy and research.<sup>139</sup> As to the third category, the Union would be limited to taking supporting, coordinating or complementary action.<sup>140</sup>

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<sup>135</sup> See also Article 13(2) CT, [t]he Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or insofar as its conclusion may affect common rules or alter their scope.

<sup>136</sup> Temple Lang, “What powers should the European Community have?”, EPL 1995, pp.97–115, at p.112.

<sup>137</sup> Shilling, “Subsidiarity as a Rule and as a Principle: Taking Subsidiarity Seriously”, Jean Monnet Working Paper, 1995, pp. 1–26, at p.14. This author stressed that the common commercial policy and the common custom tariffs provided for a phasing out of the Member States' competences in specific areas, i.e. exclusive competence became effective at the end of the transitional period.

<sup>138</sup> This is exemplified by the Opinion of AG Fennelly in the Tobacco Directive case. AG Fennelly in the *Tobacco Directive* case, supra. “[t]he application of the principle in the present cases turns on the question whether harmonising action pursuant to Articles 57(2) and 100A of the Treaty falls within the exclusive competence of the Community. If that is the case, the principle does not apply. On the other hand, the applicants in both cases appear to presuppose that the legal basis upon which the Directive was adopted did not fall within the exclusive competence of the Community. If that assumption is incorrect, as I think it is, it is unnecessary to consider whether the principle was, in fact, respected”.

<sup>139</sup> It is a residual category since according to Article 14 (1) CT, The Union shall share competence with the Member States where the Constitution confers on it a competence which does not relate to the areas referred to in Articles I-13 and I-17 CT.

<sup>140</sup> According to Article I-17 CT, The areas of such action shall, at European level, be: (a) protection and improvement of human health; (b) industry; (c) culture; (d) tourism; (e) education, youth, sport and vocational training; (f) civil protection; (g) administrative cooperation.

Finally, it appears that the aim of the CT, by listing the competences is obviously to clarify the division of competences between the Member States and the Union. This clarification is not an easy task,<sup>141</sup> but is necessary in order to improve the legitimacy of the Union and its democratic supervision. As rightly put by Lenaerts, a “*clear division of competences is also essential to ensure that citizens can identify and understand the role of each political entity*”. Going further, the author considered that this unified system of division of competences strengthens the Union as a political authority in its own right, “with the Court of Justice as the ultimate umpire to ensure, through the examination of *kompetenz-kompetenz*, that each level of the European constitutional order does not encroach upon the domain of the others”.<sup>142</sup>

At the end of the day, the listing of competence must be welcome. However, it is always important to keep in mind that it is impossible to draft a document clearly listing all the types of competence. In other words, the overlap between competences cannot be excluded and some grey areas will always remain as to the determination of the competences’ boundaries. The question of the divide of competences leads, *in fine*, to the issue of judicial *kompetenz-kompetenz*. To put it differently, who is the final arbiter of the divide of competences listed in Article I-12 CT? Thus, one may also wonder whether the listing of competences would lead to a non-conflicting situation between the ECJ and the national courts as to their determination in grey areas.

*Prima facie*, one may think that the clarification and division of competences would render less likely conflicts regarding their scope and overlap. Another important reason is that there is less necessity to have recourse to Article 308 (ex 235) EC as the legal basis for measures.<sup>143</sup> As put by Craig, “*because of the exercise of legislative power under what was Article 235 and then became 308, the general reserve legislative power, and the courts’ interpretation of 308, it was really “anger” at the expansive teleological interpretation given by the European Court of Justice to Article 308 that caused the German courts to do what they did in Brunner. One thing*

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<sup>141</sup> House of Lords, “The Future Role of the European Court of Justice”, 6<sup>th</sup> report, 2004, para 71. This is not an unequivocal issue. As put by Errera, the very notion of shared competences, of subsidiarity, means the main colour is grey and not black.

<sup>142</sup> Lenaerts, “The Structure of the Union according to the Draft Constitution for Europe”, in De Zwaan, Jans, Nelissen (eds.), *The European Union: An Ongoing Process of Integration*, Liber Amicorum Alfred Kellermann, Asser, 2004, pp.3–21, at pp.13–14.

<sup>143</sup> In the EC, the use of Article 308 EC is justified by the indetermination of competences. In the CT, it constitutes a limitation to the principle of conferral.

that the new Constitution does is to accord the EU specific legislative capacity in the main areas—energy, development cooperation and the like—in which hitherto they had had to fall back on 308, so 308 would be used less and in that sense at least one of the causes of the *Kompetenz-Kompetenz* problem will be alleviated”. By consequences, it is of interest to look at Article I-18 CT, which replaces and modifies Article 308 EC and constitutes the flexibility clause in the CT. Article I-18 CT bring new procedural and substantive requirements for bringing into play the flexibility clause. As to procedural requirements, there is a new need to get the assent from the Parliament<sup>144</sup> and the Commission is obliged to draw the attention of the national parliaments.<sup>145</sup> As to substantive requirements, it is impossible to use the flexibility clause when the CT excludes harmonization, i.e. in the field of supporting, co-ordinating or complementary actions.<sup>146</sup> At the end of the day, it is much more complicated to use Article I-18 CT than Article 308 EC, which merely requires a unanimity vote from the Council.

Conversely, it may be argued that the conflicts to determine the competence are more likely to happen. As stressed by Craig, “[t]he very fact that Union competences have been divided into categories renders this type of challenge even more likely than before. This is especially so in relation to the divide between shared competence and competence that only allows supporting and coordinating action by the Union, or in relation to the divide between shared competence and the competence over economic and employment policy”.<sup>147</sup> More precisely, an individual may plead before the national courts that ECJ interpreted an Article of the CT regarding the listing of competences in an erroneous way or that measures have been taken by the EU institutions on a wrong legal basis, e.g. Article I-17 CT should have been used instead of Article I-13 CT. This issue of delimitation of competences, irremediably, brings us to a more fundamental matter concerning judicial *kompetenz-kompetenz*. Indeed, can one say that the na-

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<sup>144</sup> Article 17 (1) CT, If action by the Union should prove necessary, within the framework of the policies defined in Part III, to attain one of the objectives set out in the Constitution, and the Constitution has not provided the necessary powers, the Council of Ministers, acting unanimously on a proposal from the European Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures

<sup>145</sup> Article 17(2) CT, “[u]sing the procedure for monitoring the subsidiarity principle referred to in Article I-11(3), the European Commission shall draw national Parliaments’ attention to proposals based on this Article”.

<sup>146</sup> Article 17(3) CT, “Measures based on this Article shall not entail harmonisation of Member States’ laws or regulations in cases where the Constitution excludes such harmonization”.

<sup>147</sup> Craig, “The Hierarchy of Norms”, in Tridimas and Nebbia, *European Union Law for the Twenty-First Century*, volume 1, Hart, 2004, pp.75–93, at p.92.

tional courts may be able to interpret the divide of competences? Or is it the exclusive jurisdiction of the ECJ?

Put bluntly, the national courts would think twice before determining the scope of Union boundaries under Articles I-11 and I-12 CT.<sup>148</sup> This attitude would clearly go against the text of the Constitutional Treaty (Article III-369 CT) and the established case-law. Indeed, in *Foto-Frost* case, the ECJ made very clear that it has exclusive competence to determine the validity of Community law and thus to check whether an institution had the competence to adopt a measure. Importantly, there is an obligation for the highest national courts and the lower courts with no right to appeal to make a preliminary ruling on validity to the ECJ. This mechanism is urged by the necessity to ensure the uniformity and effectiveness of Community (Union) law. As stressed previously, the question of judicial *kompetenz-kompetenz* remains unanswered by the Constitutional Treaty. This is not so strange given the divergences voiced by the national courts.<sup>149</sup> The issue of who has the ultimate authority to decide on the extent of particular categories of competences listed in Article I-12 CT may be no more probable to occur in future than in the past.

Thus, if a problem arises as to the determination of the divide of competences, the ECJ and the national courts, in the same way as the fundamental rights dilemma was resolved, should cooperate in good faith and install a healthy and respectful judicial dialogue in order to avoid another “*nuclear problem*”. At the end, however, the effective functioning of the Union necessitates the Court to be the final arbiter of the boundaries of the Union’s competences and of the validity of its acts.

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<sup>148</sup> House of Lords, “The Future Role of the European Court of Justice”, 6<sup>th</sup> report, 2004, para 73. According to Craig, the presumption that the national courts have *kompetenz-kompetenz* is even stronger in the Treaty. His reasoning is based on the provision concerning the principle of conferral and competences.

<sup>149</sup> See Dashwood, *supra*, at p.380. The author stated that, “would the enshrining of the primacy principle...make it legally impossible for a national court to defy the claim of the Court of Justice to have the sole right of deciding whether a measure counts as valid Community law, and refuse to give effect to an act of the institutions which it regards as falling outside the grant of competences made to the Union by the Member State whose constitution it is called uphold? The authorities – political and judicial – of most Member States would surely answer “No” to all or some those questions, but there are others who would cry “Yes”, “Yes”, “Yes” and “Yes”. See Bermann, “Competences of the Union”, in Tridimas and Nebbia, *European Union Law for the Twenty-first Century*, Hart 2004. US Constitution has never furnished a clear answer, at p.72.

## 2.3 Article I-6 and National Constitutional Autonomy (Article I-5 CT)

### 2.3.1 Relationship between Articles I-5 and I-6 CT

A new and significant provision, concerning *inter alia* the relations between the Union and the Member States has been included in the Constitutional Treaty. Article I-5 states:

1. The Union shall respect the equality of Member States before the constitution 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, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security.
2. Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Constitution.

The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Constitution or resulting from the acts of the institutions of the Union.

The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.

Article I-5 CT is divided into two paragraphs. The first paragraph is quite new and essentially requires the Union to respect the national identities, inherent in their fundamental structures, political and constitutional. Paragraph two corresponds exactly with Article 10 EC. It has the same scope as the previous principle of loyalty and its attached case-law. As to the second paragraph, it is suffice to recall that the principle of loyalty applies both in relation to the institutions and the national authorities.<sup>150</sup>

At the end of the day, the principle of effective judicial protection appears to include the rights developed through Article 10 EC. In this respect, the work of Temple Lang,<sup>151</sup> has been of utmost importance. It flows from his work that Article 10 EC enshrines a duty to cooperate in good faith

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<sup>150</sup> See, concerning the duty for the institutions, Case C-2/88 *Zwartveld* [1990] ECR I-3365.

<sup>151</sup> Temple Lang, "The Core of the Constitutional Law of the Community-Article 5 EC Treaty", 1995, at p. 9, [europa.eu.int/comm/dg04](http://europa.eu.int/comm/dg04). See also Temple Lang, "Community Constitutional Law: Article 5 EEC Treaty", CMLRev. 1990, pp. 645-681, Temple Lang, "The Duties of Cooperation of National Authorities and Courts under Article 10 EC: Two More Reflections", ELRev. 2001, pp.84-93, XIX Congress of FIDE, Helsinki, 2000, volume I, the duties of cooperation of national authorities and courts and the Community institutions under Article 10 EC, and a section of volume 4, on the same subject, Temple Lang, "Developments, issues and new remedies – the duties of national authorities and courts under Article 10 of the EC Treaty", FILJ 2004, pp. 1904-1939.

which, according to the ECJ case-law, is incumbent both on the judicial authorities of the Member States acting within the scope of their jurisdiction<sup>152</sup> and on the Community institutions, which have a reciprocal obligation to afford such cooperation to the Member States.<sup>153</sup>

Also, it is worth remarking that it includes a list of duties for the national courts established by the jurisprudence of the ECJ. A non-exhaustive listing of the most important duties can also be established in the context of the Constitutional Treaty and Union law.<sup>154</sup>

- Duty for the national courts to set aside conflicting national law (*Simmenthal II*)
- Duty for the national courts to give complete remedies to individuals (*AFDS*)
- Duty for the national courts to interpret Union law in the light and objectives of the Constitutional Treaty (*Von Colson*)
- Duty for the national courts to process a claim for compensation against the Member States (*Francovich*).
- Duty for the national courts to raise issues of Union law *ex officio* (*Peterbroeck*)
- Duty for the national courts to refer a question for preliminary ruling to the ECJ (*Köbler*)
- Duty for the national courts to use the doctrine of *act clair* in good faith (*Köbler*)

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<sup>152</sup> Case 14/83 *Von Colson and Kamann* [1984] ECR 1891, para. 26, Case 80/86 *Kolpinghuis Nijmegen* [1987] ECR 3969, para. 12, Case C-453/00 *Kühne & Heitz NV* [2004] ECR I-837, para. 27.

<sup>153</sup> Case 230/81 *Luxembourg v. Parliament* [1983] ECR 255, para. 38, Case C-2/88 *Zwartveld and Others* [1990] ECR I-3365, para. 17. The extensive use of Article 10 EC by the ECJ began in the late 1980s. It is worth noting that the principle of co-operation is often used by the ECJ in its reasoning in cases involving the efficiency of the Community system. This is particularly true in cases where the Court needs to ensure the effective protection of individuals *vis-à-vis* Member States acting in the Community law sphere. Notably, the activity of the Court of Justice in the late 1980s gave a tremendous ambit to this Article. In that regard, it may be said that the use and interpretation of the Article by the ECJ is of equal importance to the early case-law (*Van Gend en Loos* and *Costa v Enel*). The principle of loyalty (Article 10 EC) appears, thus, closely linked to the concept of supremacy and justiciability. In other words, it ensures the efficiency of the EC legal order, when it comes to its implementation and enforcement, and appears necessary in order to ensure a proper application of the principles of direct effect and supremacy. Article 10 EC establishes a duty of loyalty on the national authorities. Indeed, it is the national courts that are entrusted with ensuring the legal protection that citizens derive from the direct effect of Community law.

<sup>154</sup> See Temple Lang, for a more complete listing.

– Duty for the national courts to make respect the general principle of Union law in matters falling within the scope of Union law (*Wachauf/ERT*)

This section will focus on the new limb of Article I-5 (1) CT regarding the establishment of the principle of constitutional autonomy for the Member States. Before entering into this issue, it appears necessary to analyze Article I-5 CT in more detail. First, it introduces a new concept: the principle of equality of the Member States before the Constitution. Then it refers to the principle of respect of the national identity enshrined in Article 6(3) TEU. In that regard, it goes further than the cited Article by clarifying its content. Indeed, it is added that this principle includes the respect of the basic political and constitutional structures. Finally, it restates the principle of respect of the essential functions of the State (Article 33 TEU), and adds to these functions the maintenance of the territorial integrity.

As to the principle of national constitutional autonomy, it may appear problematic to reconcile it with the principle of supremacy of EU law over the national constitutions. In other words, how can we respect the constitutional autonomy of the Member States in a Kelsenian (hierarchical) model elaborated by the ECJ jurisprudence concerning supremacy and its inclusion in the Constitutional Treaty? Is that possible? First, the decision of the French Constitutional Council gives us a piquant example as to the relationship and reconciliation between the supremacy clause and Article I-5(1) CT. Second, it will be demonstrated that the Constitutional Treaty does not impose a hierarchical model, but reflects instead legal pluralism. To conclude, it will be stressed that there is a need of establishing a healthy judicial dialogue between the ECJ and the national courts.

### 2.3.2 The Decision of the Conseil Constitutionnel on the Constitutional Treaty [primacy clause]

The Decision of the French CC on 19 November 2004 proposes an extensive reasoning as to the scope of Article I-6 of the Constitutional Treaty and its relationship with Article I-5.<sup>155</sup> The main question at stake is whether the French Constitution should be amended in order to ratify the Constitutional Treaty. The CC analyzed, *inter alia*, the scope and object of the primacy clause in Union law. First, the CC focused on the nature and

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<sup>155</sup> See reasoning of the French CC in Decision n 2004–505 DC of 19 November 2004.

denomination of the Constitutional Treaty as well as its relationship with the national Constitution. In this respect, it stressed that the CT remains an international Treaty and pointed out that the label (designation) of this new Treaty does not modify the position of the French Constitution, which remains at the apex of the internal judicial order, in the hierarchy of norms. Interestingly, this finding is expressly based on Article I-5 CT.<sup>156</sup>

Then, regarding more specifically the reach of the supremacy principle, the CC emphasized once again the specificity of the Community legal order vis-à-vis the international legal order.<sup>157</sup> The CC referred to the principle of primacy which is enshrined in Article I-6 CT and considered that it stems from a declaration annexed to the Treaty that the principle of supremacy has the same scope as before. Notably, the CC made reference, once again, to Article I-5 CT, according to which the national identity of the Member States inherent to their basic political and constitutional structures should be respected.<sup>158</sup> To conclude, the CC stressed that it results from all the provisions of the Constitutional Treaty and notably from Article I-5 and I-6, that the CT does not modify the nature of the European Union and the scope of the principle of supremacy. Consequently, the inclusion of Article I-6 of the Constitutional Treaty shall not lead to an amendment of the French Constitution.<sup>159</sup>

At the end of the day, it appears that the principle of supremacy, which is for the first time expressly included in a Treaty, is not contrary to the French Constitution. A strict application of Article I-6 CT (principle of supremacy) would oblige all the administrative and judicial authorities to set aside any national provision, even constitutional, contrary to the application and implementation of Union law. Furthermore, it would preclude all national courts from having recourse to national constitutional provisions in order to determine the validity of a Community measure. Understood in that sense, the admission of the constitutionality of Article I-6 would contradict the decisions of the CC made during the summer 2004 and should have led to the amendment of the Constitution. As seen before, the CC has

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<sup>156</sup> Ibid., paras 9–10. Considérant, en particulier, que n'appelle pas de remarque de constitutionnalité la dénomination de ce nouveau traité ; qu'en effet, il résulte notamment de son article I-5, relatif aux relations entre l'Union et les Etats membres, que cette dénomination est sans incidence sur l'existence de la Constitution française et sa place au sommet de l'ordre juridique interne.

<sup>157</sup> Ibid., para 11.

<sup>158</sup> Ibid., para 12.

<sup>159</sup> Ibid., para 13.

implicitly recognized that the principle of supremacy of Community law applies in the internal legal order (this is based on Article 88-1 of the Constitution) unless there are contrary and specific constitutional provisions. This is the so-called “*r serve de constitutionnalit *”.<sup>160</sup>

However, the CC does not seem to consider that an extensive interpretation of Article I-6 CT would conflict with the French Constitution since the primacy clause must be read in conjunction with other provisions of the Constitutional Treaty. In this respect, it results from Article I-5 CT and the common intention of the parties reflected by the *travaux pr paratoires* at the signature, that this Treaty does not modify the nature of the European Union.<sup>161</sup> In particular, Article I-5 CT ensures the respect of the national judicial traditions. More precisely, it states that the Union must respect the identity of the Member States inherent to their basic political and constitutional structures. Thus, it may be said that the scope of Article I-6 CT appears to be limited by the preceding provision concerning national constitutional autonomy (Article I-5 CT).

### 2.3.3 Legal Pluralism and Judicial Dialogue

As seen previously, it may be said that the inclusion of the principle of supremacy in the CT makes it a one-dimensional principle. In other words, it leads to a monist (hierarchical) relationship between the national (constitutions) and Union legal orders, with Union law, obviously, at the apex of the ladder. I strongly disagree with this assertion. It is argued, conversely, that the Constitutional Treaty is imbued with legal pluralistic philosophy. It is worth stressing that legal pluralism implies a non-hierarchical relationship between Union law and national constitutional law. The two legal orders are indeed co-existing. Nowadays, this view seems rather

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<sup>160</sup> In the absence of an explicit and contrary constitutional provision, the CC recognizes the application of the *Foto-Frost* doctrine in the sense that only the ECJ, through preliminary ruling, must control the validity of Community law in the light of the competences defined by the Treaty and the fundamental rights guaranteed by Article 6 TEU.<sup>161</sup> This decision constitutes a limited exception to the exclusive jurisdiction of the ECJ to control the validity of Community acts. The disadvantages of this “*reserve de constitutionnalit *” are negligible since they touch upon only very few areas (*laicit ,  galit  d’acc s aux emplois publics*). Extrapolating on a possible conflict, it is doubtful that the EU legislator would adopt measures that jeopardized, say the principle of secularity (*laicit *).

<sup>161</sup> The principle of supremacy is also considered as already included in Article 88(1) of the Constitution.

accepted in the doctrine.<sup>162</sup> Already in 2002, Pernice put forward the theory of multilevel constitutionalism.<sup>163</sup> This theory is closely related to legal pluralism. According to this author, “[b]oth legal orders are co-existing, but they are part, however, of one system which must produce ultimately one legal answer to each case. This system is, from its origin and construction, necessarily non-hierarchical”.<sup>164</sup> Thus, the relationship between the two legal orders is not hierarchical, but functional.

Looking at the text of the Constitutional Treaty, it seems clear to me that the opening provisions (Article I-5, I-6 and I-11) corroborate the legal pluralistic thesis. First, a reading in the light of the principle of conferral (Article I-11), appears to confirm that the Union does not boast any legislative *kompetenz-kompetenz*. Second, the primacy clause (Article I-6 CT) does not explicitly say that Union law is superior to national constitutional law. Third, and this is the last and strongest argument, Article I-5(1) CT recognizes with strength a new principle, that of national constitutional autonomy. Notably, this principle is connected with the principle of loyalty (Article I-5(2) CT and is even placed before the supremacy clause. Reading together Article I-5 and I-6 CT, clearly reflects, in my view, the theory of legal pluralism.<sup>165</sup>

Also, this theory is confirmed by the case-law from the national constitutional courts and the ECJ, establishing a judicial dialogue between the two legal orders. Arguably, this judicial dialogue, fostered by the preliminary ruling procedure, constitutes the practical counterpart of the theory of legal

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<sup>162</sup> Lenaerts and Gerard, “The Structure of the Union according to the Constitution for Europe: The Emperor is getting Dressed”, *ELRev.*2004, pp.289-322. At p.301, “[n]o general subordination of the Member States’ constitutional order is thus at stake. On the contrary, the Union’s Constitution co-exists with the constitutions of the Member States...it constitutes a complementary constitutional instrument at the Union’s level that European citizens can precisely identify as the supreme law that they have in common”. See also Albi and Van Elsuwege, “The EU Constitution, National Constitutions and Sovereignty: An Assessment of European Constitutional Order”, *ELRev.* 2004, 29(6), pp.741–765, at pp.761–762, Dashwood, “The Relationship between the Member States and the European Union/Community”, *CMLRev.* 2004, pp-335–381, at p.379.

<sup>163</sup> Pernice, “Multilevel Constitutionalism in the European Union”, *ELRev.*2002, pp.511–529. According to Pernice (at p.514), “The European Constitution, thus, is one legal system, composed of two complementary constitutional layers, the European and the national, which are closely interwoven and interdependent”. Going further (at p.520), “The multilevel structure of the European Union implies that there is no competence-competence of the Member States nor of the Union”. Peoples are the real sovereign entrusting specific powers and competences to the institutions.

<sup>164</sup> *Ibid.*, at p. 520.

<sup>165</sup> This is confirmed by the position of the French Constitutional Council as to the adoption of the Constitutional Treaty and its views on Article I-6 and its relationship with Article I-5.

pluralism. As seen previously, the *Solange* cases of the German FCC responded to the lack of fundamental rights protection in the Community legal order. The ECJ answered by providing extensive protection of fundamental rights through its case-law. In addition, the FCC in the *Maastricht* case referred explicitly, to the need of establishing judicial cooperation between the national court and the ECJ. Furthermore, it is worth remarking that the ECJ has, recently, been very cautious in cases dealing with competences and fundamental rights. Those cases were conveyed by the preliminary ruling procedure. Undoubtedly the national supreme courts were watching with great interest the final results. As to preliminary ruling on validity, the ECJ in the *Tobacco Directive* case annulled the EU legislative act on the ground of lack of competence. As to preliminary ruling on interpretation, the ECJ *Schmidberger* and *Omega*, balanced the free movement provision with freedom of expression and the fundamental right to dignity, respectively. And found, in the circumstances of both cases, that the fundamental rights, also strongly enshrined in the national constitutions, should prevail over free movement.<sup>166</sup>

At the end of the day, it is crystal clear that the juridical dialogue is instilled with a “*spirit of compromise*”,<sup>167</sup> others would call it a need of “*accommodation between the Court and national courts*”.<sup>168</sup> Interestingly, AG Jacobs, draws a distinction between the areas of fundamental rights and competences. The accommodation is considered possible in the former case, whereas, in the context of competences, he lucidly stressed the danger of allowing national courts the possibility to determine the competences of the Union.<sup>169</sup>

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<sup>166</sup>Case C-112/00 *Schmidberger* [2003] ECR I-5659, C-36/02 *Omega* [2004] ECR I-837.

The ECJ gave important discretion to the national judicial authorities regarding a conflict between free movement provision and fundamental rights clearly demonstrate such a stance.

<sup>167</sup>House of Lords, “The Future Role of the European Court of Justice”, 6<sup>th</sup> report, 2004, para 69. Arnall has also considered that, “[t]his underlying tension between the court of Justice and the supreme courts of the Member States is not unhealthy and shows the extent to which the Court of Justice relies on their cooperation. The position would not change under the proposed Constitution”.

<sup>168</sup>*Ibid.*, para 70.

<sup>169</sup>*Ibid.*, according to Jacobs, “provisions of a perhaps more fundamental nature, such as the provisions for the protection of fundamental rights, and it is not easy to see how those provisions can be overridden by Union law without creating serious conflicts. So there some accommodation has to be found between the national constitutions on the one hand and Community law on the other and that has been done, successfully I think so far, by accommodation between the Court of Justice and the jurisprudence of the national constitutional courts, each respecting the position of the other. As regards competences, it does not seem to me that it is possible simply to have an accommodation of that kind. One cannot say that competences of the Union are to be determined unilaterally by each of the constitutional or supreme courts of the Member States. That does not seem a workable hypothesis at all”.

As to fundamental rights, one might imagine a conflict concerning a national measure falling within the scope of Union law in the context of fundamental rights. For instance, a national from a Member State working in France in the public administration, could be impeded, according to domestic legislation (law on religious signs), from working because he/she is wearing an ostensible religious sign, e.g. Sikh man or Muslim woman. This conflict might be the object of a preliminary ruling to the ECJ on the interpretation of free movement of workers and freedom of religion/expression. The ECJ would have to solve a conflict between a very strong constitutional principle (principle of secularity [*laïcité*]) and fundamental rights enshrined in the Union legal order. The Court in this situation would certainly use a wide margin of appreciation, and perhaps, Article I-5 CT in order to reconcile national constitutional law with EC law. In that sense, Article I-5 CT might be perceived as an instrument to defuse constitutional conflicts and ensure the peaceful coexistence of the two interdependent legal orders.

As to competences, it may be argued that the listing of competences (Articles I-11 to I-17 CT) would lead to an increase of demarcation issues before the national courts. Are the national courts competent to determine the scope of Union competences? It is important that the ECJ remain the final arbiter of the Union competences. In other words, it should have exclusive jurisdiction to control the validity of Union acts, as it is now established under the *Foto-Frost* doctrine. Any other conclusion would irremediably endanger the uniformity and effectiveness of Union law. This view is supported by the wording of Article III-369 of the Constitutional Treaty concerning preliminary ruling. It is also clear to me that the ECJ would take the matter of competences very seriously since it evidently constitutes the Achilles heel of the European Constitution vis-à-vis national courts.<sup>170</sup>

To conclude, many provisions of the Constitutional Treaty are marked by legal pluralism. This approach is also reflected by the national and ECJ jurisprudence. The judicial dialogue is mainly ensured by the use of the preliminary ruling procedure (Article 234 EC/ III-369 CT). It is worth noticing that many interesting cases have been given by the ECJ in the recent years as to the scope of application of the preliminary ruling procedure. Thus, it is now necessary to look at the recent case-law of the ECJ in this matter. In that respect, it is worth keeping in mind that even if the Constitutional Treaty enters into force, the ECJ jurisprudence will always have to be respected.

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<sup>170</sup> By contrast, fundamental rights as seen previously are really well protected.

### 3 THE ROLE OF THE NATIONAL COURTS IN THE CONSTITUTIONAL TREATY

The third part of this report will look at the provisions of the Constitutional Treaty which may influence the role of the national Courts. First, it will focus on Part I of the Constitutional Treaty and Article I-29 CT (3.1.). Second, it will look at the Charter of Fundamental Rights and Part II CT [Articles II-111 to II-113 CT] (3.2.). Finally, it will consider the preliminary ruling procedure in the light of the recent ECJ jurisprudence and Part III of the Constitutional Treaty [Article III-369] (3.3.). It will follow from this analysis that the development of the role of the national courts is more or less independent of the final ratification of the Constitutional Treaty. This development mainly takes place in the case-law of the ECJ.

#### 3.1 Article I-29 of the Constitutional Treaty and Effective Legal Protection (Part I CT)

##### 3.1.1 A Hidden Mandate for National Courts (Article I-29 CT)

Before the drafting of the Constitutional Treaty, the national courts have always appear as “*the allies*”<sup>171</sup> of the European Court of Justice. In the *Zwartveld* case,<sup>172</sup> the ECJ stated that the national courts are “responsible for ensuring that Community Law is applied and respected in the national legal systems”. Thus, it could be stated that the national courts are the guardians of the effectiveness of EC law.

Unfortunately, Article I-29 CT incorporates the mandate of the national courts in an indirect manner. It is important to analyze the scope of this provision in more detail.

**Article I-29 (1) CT states:**

1. The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Constitution the law is observed.

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<sup>171</sup> Temple Lang, “The Duties of National Courts under EC Constitutional Law”, speech at the Institute of European Law, Cambridge, 1996, at <http://europa.eu.int/comm/competition/speeches/text/sp1996>. See also ELRev. 1997, pp. 3 et seq. Ziller and Lotarski, “Institutions et organes judiciaires”, in *Ten Reflections on the Constitutional Treaty for Europe*, EUI 2003, pp.67 et seq, at p. 40. Ziller and Lotarski proposed to include an explicit provision compelling the national courts to apply Union law in the Constitutional Treaty. The national courts should be seen as the “associates” of the Court of Justice.

<sup>172</sup> Case C-2/88 *Zwartveld* [1990] ECR I-3365. See also Case T-51/89 *Tetrapak* [1990] ECR II-364, where the CFI ruled that, “when applying Article 86, the national Courts are acting as Community courts of general jurisdiction”.

Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.

The first limb of Article I-29 is similar to Article 220 EC in the sense that it empowers the Court of Justice as to the interpretation and application of Union law. It is worth remarking that the Court of First Instance is now referred as the General Court and that the Article also expressly includes the specialized courts, e.g. Civil Service Tribunal.<sup>173</sup> The second limb of this provision is more interesting regarding the role of the national courts in the Constitution since it newly incorporates a duty for the Member States to provide for effective judicial protection. This duty is clearly inspired from the case-law of the ECJ and Article 10 EC (Article I-5 CT). Indeed, the ECJ in *UPA*, stated that, “*it is for the Member States to establish a system of legal remedies and procedures which ensure respect for the right to effective judicial protection*”.<sup>174</sup>

The final wording of this provision differs from the Draft Constitutional Treaty (DCT), which said that the Member States shall provide rights of appeal sufficient to ensure effective judicial protection.<sup>175</sup> The final wording appears broader and, by consequence must be welcomed. Furthermore, by referring to the Member States, the duty encompasses not only the national authorities, but also the legislature. As to national authorities, it must be highlighted that, though the national court appear as the primary target, it also applies to other non-judicial authorities. This assertion is confirmed by the ECJ case-law.<sup>176</sup> Finally, one may regret the absence of an explicit reference to the national courts in relation to this provision in order to make clear that those national courts are the common courts of Union law.

To conclude, it is worth noting that Article I-29 CT codifies the general principle of effective judicial protection. Though the principle has often been connected with Article 10 EC, it is the first time that the principle of effective judicial protection is explicitly mentioned in one the Treaties. By consequence, it appears of interest to look at the evolution of the case-law in order to determine the scope of the principle of effective judicial protection for the national judicial authorities in EU/Union law.

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<sup>173</sup> See Council Decision of 2 November 2005 establishing the European Union the Civil Service Tribunal (CST). See Council Decision 22 July 2005 appointing seven judges at the CST.

<sup>174</sup> C-50/00 P *Unión de Pequeños Agricultores v. Council* [2002] ECR I-6677, para 41.

<sup>175</sup> Claes, *supra*, at p.579. According to Claes, in the light of the DCT, the mandate of the national court is hidden in a cryptic and ill-drafted provision.

<sup>176</sup> See *Heylens*, Case C-453/00 *Kühne & Heitz* [2004] ECR I-10239.

### 3.1.2 The Scope of the Principle of Effective Judicial Protection

Already in *Johnston*,<sup>177</sup> the Court analysed the prerequisites of judicial control under Article 6 of Directive 76/207. In the circumstances of the case, Article 53(2) of the sex discrimination order allowed the authority to prevent an individual from asserting rights by judicial process conferred by the Directive. More precisely, Article 6 of the Directive 76/207 on equal treatment on men and women requires the Member States to introduce in their national legislation, all the necessary measures in order to permit individuals to “pursue their claim by judicial process”.<sup>178</sup> According to the ECJ, this requirement of judicial control reflects the general principles of law, which underlines the constitutional traditions common to the Member States and that principle is also laid down in Article 6 and 13 of the European Convention on Human Rights.<sup>179</sup> Consequently, Article 6 of Directive 76/207 interpreted in the light of the general principle confers a right for the individuals to obtain an effective remedy in a national court against measures, which they consider contrary to the principle enshrined in the Directive.

In *UNECTEF v. Heylens*,<sup>180</sup> in a reference for a preliminary ruling by the TGI of Lille, a Belgium football trainer tried to obtain the equivalence of his national diploma by a French special committee. The ECJ was asked to consider whether Article 48 [new Article 39 ] of the EC Treaty on the freedom of movement of workers could be violated in the case of a decision, in which the Committee rejected his application without giving any reasons in the decision and without providing any specific legal remedy. The ECJ ruled that the Belgian trainer was entitled to judicial redress when the fundamental right to free access to employment is endangered by a national public authority.<sup>181</sup> Significantly, the ECJ gave a definition of the right to effective judicial review in the light of the duty to give reasons. It went on saying, “the effective judicial review presupposes in general that the court to which the matter is referred may require the competent authority to notify its reasons”. However, the Court considered that in the present situation this was not the case, and ruled that the competent national

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<sup>177</sup> Case 222/84 *Johnston* [1986] ECR 165.

<sup>178</sup> It follows from that provision that the Member States must take measures, which are sufficiently effective to achieve the aim of the Directive, and that they must ensure that the rights thus conferred may be effectively relied upon before the national courts by the persons concerned.

<sup>179</sup> *Johnston*, *supra*, para. 18, *see also infra Heylens*, para. 14 and *Borelli* para. 14.

<sup>180</sup> Case 222/86 *Heylens* [1987] ECR 4097.

<sup>181</sup> *Ibid.*, para. 14.

authority has a duty to inform the applicant derived from the obligation to secure the effective protection of a fundamental right.<sup>182</sup>

Arguably, it seems that the ECJ assimilated the duty to give reasons, (enshrined already in Article 190 [new Article 253] EC in relation to the institutions) with the right to an effective remedy. The duty to give reasons constitutes, indeed, a corollary right. In *Sodemare*,<sup>183</sup> the Court ruled that the obligation to state reasons in Article 190 concerned only the act of the institutions. It went on to say that the *Heylens* jurisprudence concerns only adversary individual decisions and not the national measures of general scope.<sup>184</sup> Hence, in the instance of a decision refusing the equivalence of a diploma to a worker of another Member State, it must be possible to contest the validity under Community law of such a decision by a judicial proceeding where the person concerned would be able to ascertain the reasons.<sup>185</sup> Nevertheless, the existence of a judicial remedy and the duty to give reasons are limited to final decisions and do not extend to opinions and other measures occurring in the preparation and investigation stage.<sup>186</sup>

In the words of AG Jacobs in *UPA*, the case-law on the principle of effective judicial protection is evolving. The AG considered that, “[w]hile that principle was enunciated in 1986, in the case of *Johnston*, its implications have only gradually been spelt out in the Court’s case-law in the subsequent period”.<sup>187</sup> In this sense, in *Borelli*,<sup>188</sup> the Court stated the traditional formula and ruled that effective judicial control must be observed by the Member States regarding an opinion given by the national authorities (the region of Lombardia) concerning an application for aid from the Agricultural Guidance and Guarantee Fund. More recently, in Case C-424/99 *Commission v Austria*,<sup>189</sup> regarding domestic appeal procedures against decisions concerning applications for inclusion of medical products on the register, the Commission argued that the Austrian legislation did not provide for any genuine judicial protection and constituted an infringement of Article 6(2) of the Directive. This Directive provides that, “the applicant shall be informed of the remedies available to him under the laws in force

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<sup>182</sup> *Ibid.*, para. 15.

<sup>183</sup> Case C-70/95 *Sodemare* [1997] 3 CMLR 591.

<sup>184</sup> *Ibid.*, paras. 19–20.

<sup>185</sup> *Heylens*, *supra* n.180, para. 17.

<sup>186</sup> *Ibid.*, para. 16.

<sup>187</sup> AG Jacobs in Case C-50/00 P *Unión de Pequeños Agricultores v. Council* [2002] 3 CMLR 1 para. 97.

<sup>188</sup> Case C-97/91 *Borelli* ECR [1992] I-6313.

<sup>189</sup> Case C-424/99 *Commission v. Austria* [2001] ECR I-9285.

and of the time-limits allowed for applying for such remedies”.<sup>190</sup> According to the Commission, neither the complaint against the first recommendation of the small technical advisory board nor against the opinion of that board if it is again negative, could be described as appeals since that remedy lies not before the courts but before the administrative authorities.<sup>191</sup> The ECJ stated that, “[t]he requirement of judicial review reflects a general principle of Community law stemming from the constitutional traditions common to the Member States and enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms”.<sup>192</sup> It then ruled that the Commission’s action should be held well founded on that point and the failure to comply with the provisions of the Directive was confirmed.<sup>193</sup>

In addition, it may be argued, as AG Jacobs did,<sup>194</sup> that the principle of effective judicial protection requires the domestic court to review the national legislative measures, to grant interim relief and to grant individuals standing to bring proceedings.<sup>195</sup> In my view, this assertion prompts an interesting conclusion. The principle of effective judicial protection with a wide meaning enshrines the rights developed by the Court with the help of Article 10 EC [ex Article 5]. In light of the foregoing, it may be said that there exists a strong relationship between the principle of effective protection and other principles developed by the Court in the light of Article 10 EC (such as the principle of State liability). To ensure effectiveness, the national courts have been bestowed with the task of protecting individual rights at the domestic level. The subsequent case-law such as *Simmenthal II*,<sup>196</sup> *Ariete*,<sup>197</sup> *Mirecco*,<sup>198</sup> *Factortame I*,<sup>199</sup> *Francovich*,<sup>200</sup> or for the CFI in *Bemim*<sup>201</sup> has emphasized the role of national courts to provide effective protection for those rights. To recapitulate, the reasoning has normally been based on the principle of co-operation stemming from Article 10 EC.

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<sup>190</sup> *Ibid.*, para. 39.

<sup>191</sup> *Ibid.*, para. 40.

<sup>192</sup> *Ibid.*, para. 45. Interestingly, the ECJ referred to the following case-law, Case 224/84 *Johnston* [1986] ECR 1651, para. 18, Case C-97/91 *Oleificio Borelli v. Commission* [1992] ECR I-6313, para. 14, Case C-1/99 *Kofisa Italia* [2001] ECR I-207, para. 46, and Case C-226/99 *Siples* [2001] ECR I-277, para. 17.

<sup>193</sup> *Commission v. Austria*, *supra*, para. 46.

<sup>194</sup> AG Jacobs in *UPA*, *supra*, para. 97.

<sup>195</sup> Case C-213/89 *Factortame* [1990] ECR I-2433, paras. 19-22. *See also* Joined Cases C-87/90, C-88/90 and C-89/90 *Verholen* [1991] ECR I-3757, paras. 23–24.

<sup>196</sup> Case 106/77 *Simmenthal* [1978] ECR 629 para. 16.

<sup>197</sup> Case 811/79 *Ariete* [1980] ECR 2545.

<sup>198</sup> Case 826/79 *Mirecco* [1980] ECR 2559.

<sup>199</sup> Case C-213/89 *Factortame* [1990] ECR I-2433, para. 19.

<sup>200</sup> Case C-6/90 and 9/90 *Francovich* [1991] ECR I-5357.

### 3.1.3 Effective Judicial Protection and Locus Standi

In recent years, applicants have tended to argue that the lack of an effective remedy at the national level permits circumvention of the difficult test of individual concern. In other words, a deficient domestic judicial protection entails *locu standi* before the ECJ. The *Greenpeace* case<sup>202</sup> exemplifies this strategy. More precisely, it concerned the grant of Community funding by a Commission decision in order to construct two power plants in the Canary Islands. Environmental organizations, *inter alia* Greenpeace and other local environmental organizations, as well as individuals (farmers, fishermen and residents) brought an action against this decision. Notably, the applicants argued that the CFI should accord *locus standi* on the basis that the Community measure had a serious effect on the environment. However, this action was dismissed by the CFI, which assessed that the applicants were not individually concerned by the contested decision. An interesting argument put forward by the applicant was that where there is no legal remedy under national law an application for annulment under the fourth paragraph of Article 173 [new 234 EC] of the Treaty must be held admissible. The Court rejected that argument by considering that the domestic jurisdiction can always refer a question for preliminary ruling under Article 234 of the Treaty.<sup>203</sup> It might be stated that the mere existence of such a mechanism constitutes a ground for establishing the existence of an effective judicial protection. However, one might also read those paragraphs as implying that the impossibility of challenging a measure in a domestic court, which would thus constitute a denial of effective judicial protection, opens the door to *locus standi* before the CFI in a 230 proceeding. In that regard, AG Jacobs stated that, “*the Greenpeace judgment does not exclude the possibility that standing might be granted, in a particular instance, where the application of the fourth paragraph of Article 230 EC as interpreted in the case-law would entail a denial of effective judicial protection*”.<sup>204</sup> The issue of a lack of effective judicial protection at the national level was also raised in front of the CFI.

In *Salamanca*,<sup>205</sup> individuals challenged the validity of Directive 98/43 of the Parliament and Council banning the advertising and the sponsorship of tobacco products in the Community. More precisely, the applicants argued that they could not be afforded effective judicial protection regarding ac-

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<sup>201</sup> Case T-114/92 *Bemim v. Commission* [1995] ECR II 147, para. 62.

<sup>202</sup> Case C-321/95 P *Greenpeace Council and Others v Commission* [1998] ECR I-1651.

<sup>203</sup> *Ibid.*, *Greenpeace*, paras 32–33.

<sup>204</sup> AG Jacobs in *UPA*, para 35.

<sup>205</sup> Joined Cases T-172 /98 and T-175 /98 to T-177/98 *Salamanca v. Parliament and Council* [2000] 2 CMLR 1099, paras 72–77.

tions brought against the domestic measures transposing the Directive in the situation where their applications would be declared inadmissible. The complaint was articulated around two main pleas. First, Salamander contended that the domestic legal system does not possess effective actions to challenge the measures transposing directives. Second, the applicant considered that the procedure for obtaining a preliminary ruling is not an adequate alternative to a 230 proceeding. In addition, it considered that the important delay generally attributed to the preliminary ruling mechanism constitutes a violation of the principle of effective judicial protection. The second plea seems to have been launched in order to counter the line of reasoning used by the Court in *Greenpeace*.

Concerning the first argument, the CFI noted that the Member States are under a duty to ensure a comprehensive system of legal remedy under the principle of cooperation which stems from Article 5 [new Article 10 EC]. However, it held that departure from the wording of Article 234 EC exceeds its jurisdiction. Similarly, concerning the second argument, it considered that, even if it could be proved that a preliminary ruling is less effective than a direct action, it cannot be used to modify the system of legal remedies without usurping the function of the founding authority. Finally, it concluded that the general principle of effective protection was satisfied in the present case. In that regard, it remarked that a preliminary ruling on the validity of the directive was pending before the Court of Justice. Moreover, in any event, the CFI noted that the applicant can always have recourse to an action for damages.

Interestingly, the CFI considered that the mechanism of preliminary ruling could be assessed as less effective than a direct action. However, it rejected the idea to modify the system of legal remedies in the name of judicial self-restraint. In other words, it seems to consider that the wording of Article 230 cannot be altered by the Community judicature. In the above example, the CFI significantly emphasized that the contested measure has been the object of preliminary ruling in a UK court. In others words, the system of legal remedies in the case at issue was effective. However, one might wonder whether the stance of the ECJ would be the same in the situation where the individual applicant is unable to benefit from a preliminary ruling. This situation might happen whenever a Community act does not require any implementing measures. This situation precisely occurred in the famous *Jégo-Quéré* case decided by the CFI in 2002 and also in *Unión de Pequeños Agricultores* (UPA).<sup>206</sup>

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<sup>206</sup> Case T-177/01 *Jégo-Quéré* [2002] 2 CMLR 44, Case C-263/02 P *Jégo-Quéré* [2004] ECR I-3425.

In 1998, *Unión de Pequeños Agricultores* (UPA), a Spanish trade association which represents and acts in the interests of small farmers brought an action for annulment before the CFI regarding the regulation reforming the common organization of the olive oil markets. The Council raised an objection of inadmissibility, which was upheld by the CFI.<sup>207</sup> Interestingly, the Court of First Instance examined whether the situation entails a risk that UPA will not receive effective judicial protection. First, the CFI remarked that there was no legal remedy available in domestic law to review the legality of the Community act through a preliminary ruling procedure. Second, it observed that the Member States must, in accordance with the principle of sincere cooperation (Article 10 EC), implement the system of judicial review framed by the EC Treaty. Finally, the CFI concluded that, “these factors do not provide the Court of First Instance with a reason for departing from the system of remedies established by the fourth paragraph of Article 173 (Article 230 EC) of the Treaty, as interpreted by case-law, and exceeding the limits imposed on its powers by that provision”.<sup>208</sup>

Consequently, the trade association appealed against the order of the CFI and put forward four arguments that can be summarized as follows: First, a declaration of inadmissibility would not in the present case meet the requirement of effectiveness attaching to the fundamental right relied upon. Second, the order did not address the arguments of fact and of law put forward in its application and in its observations on the objection of inadmissibility. Third, the principle of sincere cooperation requires the creation of a remedy under national law enabling, where necessary, a reference to be made for a preliminary ruling on the question of the validity of a Community measure. Fourth, the contested order infringed the fundamental right to effective judicial protection by failing to examine the fact of declaring the application inadmissible.<sup>209</sup> The central element in the appellant’s defense is based on the denial of justice arising at the national level due to the nature of the disputed measure. In that regard, according to the appellant, the impugned provisions do not require any national implementing legislation and do not occasion the taking of any measures by the Spanish authorities. Consequently, the appellant cannot, under the Spanish legal system, seek annulment of a national measure relating to the disputed provisions. Therefore, a reference for a preliminary ruling to assess their validity was impossible without breaking the law.

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<sup>207</sup> Case T-173/98 *Unión de Pequeños Agricultores v Council* [1999] ECR II-3357.

<sup>208</sup> *Ibid.*, paras 61–63.

<sup>209</sup> Case C-50/00 *UPA* [2002] ECR I-6677, para 18.

Relying on an extensive interpretation of the *Greenpeace* judgment,<sup>210</sup> UPA submitted that, “*a right cannot be truly effective unless consideration is given to its effectiveness in practice. In reality, such an examination necessarily entails an inquiry into whether, in the particular case, there is an alternative legal remedy*”.<sup>211</sup> In other words, the absence of remedy at the domestic level to review the Community act authorizes *locus standi* before Community Courts. Conversely, the Council and the Commission stressed that the breach of the principle of effective judicial protection by a national court cannot be remedied by twisting the wording of Article 230 paragraph 4. The Court observed the necessity to examine whether, in the absence of any legal remedy, the right to effective judicial protection necessitates the individual to have standing in order to bring an action for annulment. The Court noted that the Community is based on the rule of law and thus the acts of the institutions are subjected to judicial review in the light of the Treaty and the general principles of Community law. Using the traditional formula, it emphasized that the principle of effective judicial protection constitutes a general principle of Community law which derives from the common constitutional traditions and the ECHR.<sup>212</sup> Then, it stressed that the system of legal remedies is comprehensive and affords a protection both before the Community Courts (direct action and plea of illegality) and the national courts (preliminary ruling on validity). Concerning the latter protection, it stated that “*it is for the Member States to establish a system of legal remedies and procedures which ensure respect for the right to effective judicial protection... in accordance with the principle of sincere cooperation laid down in Article 5 of the Treaty, national courts are required, so far as possible, to interpret and apply national procedural rules governing the exercise of rights of action in a way that enables natural and legal persons to challenge before the courts the legality of any decision or other national measure relative to the application to them of a Community act of general application, by pleading the invalidity of such an act*”.<sup>213</sup>

Subsequently, it rejected the applicant’s arguments according to which a direct action will be available where it can be proved that domestic procedural rules do not permit the individual to bring proceedings to dispute the validity of the Community measure. According to the Court, such reasoning is in line with the Opinion of AG Jacobs. The rejection is based

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<sup>210</sup> *Greenpeace*, supra, paras 32–33.

<sup>211</sup> *UPA*, supra, para 28.

<sup>212</sup> *Ibid.*, *UPA*, para 30–39.

<sup>213</sup> *Ibid.*, *UPA*, paras 41–42.

on two arguments. First, such an interpretation would require the Community Court, in each individual case, to examine and interpret national procedural law. That would go beyond its jurisdiction when reviewing the legality of Community measures". Second, though the requirement of direct and individual concern must be interpreted in the light of the principle of effective judicial protection, such an interpretation cannot have the effect of setting aside the conditions laid down in the Treaty without going beyond the jurisdiction conferred by the Treaty on the Community courts. As stated by the Court, it is for the Member States to reform the system of judicial review presently in force.<sup>214</sup> Finally, the Court found that the Court of First Instance did not err in law and dismissed the appeal.<sup>215</sup>

In a recent Article by Temple Lang, the author interestingly argued that there is no gap in the judicial protection provided under Community law and thus no need to regret the rejection of the re-interpretation of Article 230 EC.<sup>216</sup> His reasoning was mainly founded on the *Omega Air* case.<sup>217</sup> To summarize, it is possible to challenge the validity of a Regulation which has not been implemented by national measures by pleading the inapplicability of the said Community measure before the national court. Therefore, it seems plausible to argue that this reasoning applies to self-executing regulations. And it would be for the national courts to ensure that these rights can be exercised effectively. In other words, there is a duty of the national court to use a 234 proceeding whenever there is a presumption of invalidity regarding the Community measure. The cooperation between the ECJ and the national courts must remain of central importance. The approach taken by the ECJ in *UPA* or the CFI in *Salamander* precisely reflects such a concern. Using the words of Tesauro and Temple Lang, the national courts constitute the natural forum for Community law and must be perceived as the allies of the ECJ.

The choice of the *UPA* formulation is thus very symbolic as to the duty of the national court in the enforcement of Community law. In this respect, the task of the domestic jurisdictions in providing access to justice to challenge the validity of Community acts through a preliminary ruling appears crucial. Though in a cryptic manner, this formulation is now included in Article I-29 CT. This Article, even if it does not expressly refer to the

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<sup>214</sup> *Ibid.*, *UPA*, paras 43–45.

<sup>215</sup> *Ibid.*, *UPA*, paras 46–47.

<sup>216</sup> Temple Lang, "Actions for Declarations that Community Regulations are Invalid: The Duties of National Courts under Article 10 EC", *ELRev.* 2003, pp. 102–111, at p.111. *See, for more development*, Groussot, "The EC System of Legal Remedies and Effective Judicial Protection: Does the System Really Need Reform?", *LIEI* 2003, pp. 221–248.

<sup>217</sup> Cases C-27/00 and C-122/00 *Omega Air* [2002] 2 CMLR 9.

national court, must be read in light of the ECJ jurisprudence and stresses that the system of judicial protection must linger closely related to the national courts which are under a duty of sincere cooperation.<sup>218</sup>

## **3.2 National Courts and the Charter of Fundamental Rights (Part II CT)**

The Charter of Fundamental Rights (CFR) has been incorporated, with some drafting adjustments, in Part II of the Constitutional Treaty.<sup>219</sup> The so-called horizontal provisions of the Charter of Fundamental Rights (Articles 51 to 54 CFR) correspond to Articles II-111 to II-114 of Constitutional Treaty.

### **3.2.1 The Duty of Interpretation: Recital 5 of the Preamble of the CFR and Article II-112(7) CT<sup>220</sup>**

The CFR codifies the case-law of the ECJ regarding the general principles of Community law. The national courts have always played a crucial role as to their application at the domestic level. This role remains the same in the framework of the Constitutional Treaty as to the need for respecting the provisions of the CFR included in Part II CT. Interestingly, Recital 5 of the preamble of the CFR states:

This Charter reaffirms, with due regard for the powers and tasks of the Union and the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Union and by the Council of Europe and the case-law of the Court of Justice of the European Union and of the European Court of Human Rights. In this context the Charter will be interpreted by the courts of the Union and the Member States with due regard to the explanations prepared under the authority of the Praesidium of the Convention which drafted the Charter and updated under the responsibility of the Praesidium of the European Convention.

This recital reaffirms the sources of the rights enshrined in the Charter of Fundamental Rights, i.e. constitutional traditions of the Member States, international human rights instruments and the ECJ/ECHR jurisprudence. In doing so, it emphasizes the need to respect the principle of subsidiarity.

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<sup>218</sup> It is important to notice that Article III-360 CT includes the possibility to challenge a self-executing Regulation .

<sup>219</sup> The incorporation was recommended by Working Group II of the Convention. Some recommendations. IGC 2003 follows or not.

<sup>220</sup> Articles II-112 (3) and 52(3) CFR concern the equivalent scope of protection, II-112 (4) stresses the importance of the national constitutions (see also II-113). II-112 (5) and 52(5) CFR concern the distinction between rights and principles (new).

In this context, it may be said, on the one hand, that such a reference stresses the importance of the national courts in applying the CFR at the “lower” (domestic) level. In other words, the national courts are placed in the front line for ensuring the enforcement of Union fundamental rights. On the other hand, this recital reiterates the co-existence of the CFR provisions with the national case-law regarding fundamental rights.

The role of the national courts in interpreting the CFR is further specified in the last sentence of the recital. Indeed, the last sentence of Recital 5 incorporates a duty for the national courts to interpret the CFR in light of the *Praesidium* explanations.<sup>221</sup> It is worth remarking here that the text of the Constitution differs from the original preamble of the CFR, which does not include such a duty. One may wonder whether this incorporation gives a legal value to those explanations. If this is so, it might be argued that this inclusion constitutes a judicial paradox since the explanations do not boast the status of law (binding force). Furthermore, the IGC 2003, added a new paragraph 7 to Article 52 (Article II-112 (7) CT) which states, “[t]he explanations drawn up as a way of providing guidance in the interpretation of the Charter of Fundamental Rights shall be given due regard by the courts of the Union and of the Member States”. By using the formulation “shall be given due regard”, the wording appears stronger than in the preamble. Once again, the national courts shall have recourse to the *Praesidium* explanations, which are incorporated in Declaration 12 of the CT, to interpret the provisions of the Charter.<sup>222</sup> It is now necessary to analyze when the national courts should have recourse to the CFR. The answer is given by Article II-111 of the Constitutional Treaty.

### 3.2.2 The Field of Application: Article II-111 CT {Article 51 CFR}:

**Article II-111 CT states:**

1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the

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<sup>221</sup> These explanations have no legal value and were submitted on 11 October 2000 in order to clarify the scope of the CFR provisions.

<sup>222</sup> According to Declaration 12, “[t]hese explanations were originally prepared under the authority of the Praesidium of the Convention which drafted the Charter of Fundamental Rights of the European Union. They have been updated under the responsibility of the Praesidium of the European Convention, in the light of the drafting adjustments made to the text of the Charter by that Convention (notably to Articles 51 and 52) and of further developments of Union law. Although they do not as such have the status of law, they are a valuable tool of interpretation intended to clarify the provisions of the Charter”.

limits of the powers of the Union as conferred on it in the other Parts of the Constitution.

2. This Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks defined in the other Parts of the Constitution.

The aim of Article II-111 (1) CT is to establish the scope of application of the Charter. Firstly, it is established with strength that the Charter of Fundamental Rights applies to the Union institutions. In that sense, it is clearly inspired from Article 6(2) TEU, which requires the institutions to respect fundamental rights. Secondly, the provision considers that the provisions of the Charter are also addressed to the Member States (national courts). Before looking at the provision of the Constitutional Treaty, it is worth recalling the case-law of the ECJ as to scope of application of EC fundamental rights. According to the jurisprudence, the Member States are bound to comply with fundamental rights, and the national courts must ensure their respect, in three main circumstances:

- When the Member States implement Community Law (*Wachauf*)<sup>223</sup>
- When the Member States derogate from Community Law (*ERT*)<sup>224</sup>
- When EC fundamental rights are enshrined in the Community legislation (*Baumbast*)<sup>225</sup>

It appears now interesting to verify whether the case-law of the ECJ is applicable to Union Law. In that regard, the wording of Article II-111 CT (Article 51 CFR) raises certain problems.<sup>226</sup> According to this Article II-111(1), “[t]he provisions of this Charter are addressed to the institutions and bodies of the union with regard for the principle of subsidiarity and to the Member States only when they are implementing Union law”. Surprisingly, the Charter refers to the obligations of the Member States to respect the provisions of the Charter only when they are implementing Union law. What is the sense of “only when they are implementing Union law”? Does this mean that Member States attempting to derogate from one of the freedoms would not fall under the scope of the Charter? The wording of this

<sup>223</sup> Cases C-20/00 and C-64/00 *Booker Aquaculture* [2003] 3 CMLR 6.

<sup>224</sup> Case C-60/00 *Carpenter* [2002] ECR I-6279, Case C-112/00 *Schmidberger* [2003] ECR I-5659, C-36/02 *Omega* [2004] ECR I-837.

<sup>225</sup> See Case C-413/99 *Baumbast* [2002] ECR I-7091, Case C-148/02 *Garcia Avello* [2003] ECR I-11613, Case C-138/02 [2004] ECR I-2703, Case C-200/02 *Chen* [2004] n.y.r.

<sup>226</sup> Besselink, “The Member States, the National Constitutions, and the Scope of the Charter”, MJ 2001, pp.68-80, at pp. 76-79. See also De Witte, “The Legal Status of the Charter: vital question or non-issue?”, MJ 2001, pp. 81-89, at p.85, Dutheil de la Rochère, “Droits de l’homme, la Charte des droits fondamentaux et au delà”, Jean Monnet Working Paper No 10/01, 2001, [www.jeanmonnetprogramm.org](http://www.jeanmonnetprogramm.org), at p. 16, Lenaerts and de Smijter, CML Rev., 2001, at pp.286–287, fn 75.

provision appears at odd with the clear and abundant case-law of the ECJ.<sup>227</sup> In this sense, former judge Wathelet noted that, “*on s’étonnera d’abord que les auteurs de la Charte n’aient pas repris la formule plus large utilisée par la jurisprudence de la Cour de justice en matière de droits de l’homme, à savoir, les règles nationales entrant dans le champ d’application du droit communautaire*”.<sup>228</sup> As put by several commentators, the wording of the Charter is much more restrictive than the jurisprudence of the Court of Justice.<sup>229</sup>

Less surprising, but even more puzzling in light of the CFR, are the explanations given in Declaration 12. In this document, it is declared that, “[a]s regards Member States, it follows unambiguously from the case law of the Court of Justice that the requirement to respect fundamental rights defined in a Union context is only binding on the Member States when they act in the context of Union law”.<sup>230</sup> According to the views expressed, the wording “implementation of Union law” includes also the *ERT*-style of review or more generally any types of national measure falling within the scope of Community law, *e.g.* through a citizenship provision. By consequence, Article II-111(1) CT must be interpreted broadly. One can only agree with such an assertion though the wide interpretation of implementation of Union law might be perceived as misleading or at least confusing.<sup>231</sup> As put

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<sup>227</sup> See for instance, Case C-260/89 *ERT* [1991] ECR I-2925, para 43.

<sup>228</sup> Wathelet, “La Charte des droits fondamentaux: un bon pas dans une course qui reste longue”, CDE 2001, pp.585–593, at p.589. The author stated that, “it is surprising that the drafters of the CFR did not use the wider formulation enshrined in the ECJ case-law” [my translation]. See also, Lenaerts and de Smijter, “A Bill of Rights for the European Union”, CMLRev. 2001, pp.273–300, Lenaerts, “Fundamental Rights in the European Union”, ELRev. 2000, pp.575–600, at p.600.

<sup>229</sup> Besselink, *supra*, at pp. 76–79, De Witte, *supra*, at pp. 85–86.

<sup>230</sup> Interestingly, the *Wachauf* and *ERT* cases are expressly cited. For the time being, one may say that the wording of the Charter is not so preoccupying since the Charter is not binding yet. Nevertheless, in the hypothesis of a binding document, it might lead to a critical situation in which the rights of the Charter would be limited to the “implementation of Union law”. And this even if the explanations give an extensive interpretation to such a wording. Of course, it might be said that the case law of the ECJ, concerning the scope of application of the general principles on the Member States, would remain applicable. At the end, it might be possible to clarify the text of the Charter through “legislative” amendments. Nevertheless, the ECJ could also safely interpret and elucidate such an ambiguous wording.

<sup>231</sup> De Búrca, “Human Rights: The Charter and Beyond”, Jean Monnet Working Paper No 10/01, 2001, [www.jeanmonnetprogramm.org](http://www.jeanmonnetprogramm.org), at pp. 4–5, Conversely, the author also considers that it might dilute the constitutional status of the CFR. In fact, it might be advocated, as de Búrca did, that this last option corresponds to the most simple and consistent alternative. Evidently, it is the simplest option, as it would circumvent the recourse to a risky amendment process. It is also the most consistent option, as it would continue allowing to the ECJ a crucial role in the discovery, interpretation and development of the fundamental rights. The role of the ECJ in the elaboration of the fundamental rights protection through the unwritten general principles should not be minimized.

by AG Jacobs, one might see the wording of the Charter of Fundamental Rights as an “*inadvertent omission*”.<sup>232</sup> However, in light of the *travaux préparatoires*, it has also been stressed that the wording was not accidental. It was matter of constant attention during the drafting process.<sup>233</sup> The conclusion to which we are inescapably drawn is that the text of the CT should have been modified for the sake of legal certainty.<sup>234</sup>

### 3.2.3 Supremacy, the CFR and National Courts:

#### Article II-113 CT (Article 53 CFR)

It may be argued that Article II-113 CT could pose a threat to the supremacy of Union law over domestic constitutions. More precisely, there might be a risk of multiplication of conflicts between domestic constitutional norms and Union law that would, consequently, increase the proclivity of the national courts to review the acts of the Union. Article II-113 CT makes explicit reference to the constitutions of the Member States. This provision states that “*nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental, and by the Member States’ constitutions*”. Declaration 12 explains that “[t]his provision is intended to maintain the level of protection currently afforded within their respective scope by Union law, national law and international law”. In others words, the CFR does not endanger the level of protection afforded, for instance, by the national constitutions.

Such a reference is not a surprise. In fact, the relationship between the constitutions of the Member States (and their constitutional courts) and the fundamental rights jurisprudence of the ECJ constitutes an old and endemic debate. As seen previously, in the case 11/70 *Internationale Handelsgesellschaft*,<sup>235</sup> the ECJ ruled that in the elaboration of the general principles of law, the ECJ is inspired by the constitutional traditions common to the Member States. The Federal Constitutional Court (FCC) considered in *Solange I (Internationale Handelsgesellschaft)*<sup>236</sup> that the level of protection of the fundamental rights was abnormally low in comparison

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<sup>232</sup> Jacobs, “Human Rights in the European Union: The Role of the Court of Justice”, ELRev. 2001, pp.331–441, at pp.338–339.

<sup>233</sup> De Witte, *supra*, at p.86, fn.15

<sup>234</sup> Unfortunately, the Working Group II did not propose such an amendment.

<sup>235</sup> Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125.

<sup>236</sup> BVerGE 37, 271.

with the German constitution. The FCC refused to accept the doctrine of supremacy of Community law so long as the fundamental rights in the EC would remain at such level of protection. In the wake of the decision of the German Constitutional Court, the ECJ started to develop a rather comprehensive jurisprudence on the fundamental rights drawing inspiration from the international instruments (such as the ECHR) and the constitutions of the Member States. In this sense, the *Hauer* case<sup>237</sup> (1979) represents an interesting example of the Court's comparative methodology in the formulation of the right to property.<sup>238</sup> In *Solange II*,<sup>239</sup> the FCC took account of the evolution of the ECJ case-law and recognized that so long as the level of protection was adequate, the FCC would respect the supremacy of Community law. According to the FCC, the national constitutional protection is applicable in order to ensure that the protection afforded by Community law is appropriate (*Solange II* and the *banana* cases).<sup>240</sup> The FCC will examine the compatibility of European acts or their national implementing measures only if the necessary protection is not generally given.<sup>241</sup>

In light of those cases, an important part of the German doctrine asserted that the development of fundamental rights in the EC (through the debate on supremacy) was grandly due to the reaction of the FCC, which stimulated, in turn, the ECJ jurisprudence. The "opened conflict" between the FCC and the ECJ on the supremacy of Community law resulted in the elaboration of an "unwritten bill of rights". At the end of the day, it may be argued that fundamental rights were construed in order to permit an effective application of the supremacy principle. By consequence, it would be extremely odd that Article 53 (II-113 CT) could be interpreted as a potential threat to the principle of precedence.<sup>242</sup> However, according to some

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<sup>237</sup> Case 44/79 *Hauer* [1979] ECR 3727.

<sup>238</sup> The ECJ made explicit reference to the constitutional provisions of most of the Member States.

<sup>239</sup> BVerfGE 73, 339.

<sup>240</sup> BVerfGE, 7 June 2000, (2000) EuZW, 702. The "banana case" might mark another step towards an increased degree of cooperation between the ECJ and the FCC and the willingness of the latter to accept the European constitutional order.

<sup>241</sup> Von Bogdandy, "The European Union as a Human Right Organization? Human Rights and the Core of the European Union, CMLRev. 2000, pp.1307-1338, at p.1323.

<sup>242</sup> Liisberg, "Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law?", CML. Rev., 2001, pp. 1171-1199, at p.1193. The mere reference to the constitutions and not to the common constitutional traditions is explained as being a compromise between Member States who wanted a reference to the national law and the others who desired a reference to the common constitutional traditions. According to Liisberg, "Article 53 is a kind of general ratification of the Court's current and future case law. The Court pays attention to common agreements and draws inspiration from the constitutional traditions common to the Member States".

commentators<sup>243</sup> and some Member States,<sup>244</sup> Article 53 (II-113 CT) could pose a threat to the supremacy of Community law over domestic constitutions and amplify the tendency of the national courts to affirm a right to review and invalidate Union measures.<sup>245</sup> Put differently, a national court could argue that the standard of protection afforded by the CFR is lower than the one provided by the domestic constitutional norms. Consequently, Union law could not take precedence over national constitutional law.

This “terror thesis” was rightly set aside by Liisberg. The author has undertaken a wide analysis of the drafting history of Article 53 CFR as well as a detailed comparison of similar provisions in international and US federal instruments (Article 53 ECHR<sup>246</sup> entitled “safeguard for existing human rights”, Article 27 of the declaration of Fundamental Rights and Freedoms<sup>247</sup> entitled “degree of protection”,<sup>248</sup> and the Ninth Amendment of the US Constitution).<sup>249</sup> The conclusion taken by the author pointed towards a limited legal significance for Article 53 CFR (II-113 CT).<sup>250</sup>

First, the author stressed that a “*fumbling approach*” marked the drafting of Article 53 CFR and thus reflected a political compromise.<sup>251</sup> Second, his approach seems justified in light of the case-law of the EctHR concerning Article 53 ECHR. For instance, the Irish government in the *Open Door Counselling* case<sup>252</sup> resorted to Article 53 ECHR so as to contend that

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<sup>243</sup> See, *inter alia*, Besselink, “The Member States, the National Constitutions, and the Scope of the Charter”, MJ 2001, pp.68–80, at pp. 74–75.

<sup>244</sup> Germany and Netherlands stressed the potential threat to the supremacy of Community law.

<sup>245</sup> Dutheil de la Rochère, “Droits de l’homme, la Charte des droits fondamentaux et au delà”, Jean Monnet Working Paper No 10/01, 2001, [www.jeanmonnetprogramm.org](http://www.jeanmonnetprogramm.org), at p.19. It has been stressed that the formulation of Article 53 (II-113 CT) would favour such confrontations. Accordingly, this Article does not contain either the principle of primacy of Union law over the national constitutional law or the views expressed by the FCC in *Solange II* and *banana* cases.

<sup>246</sup> “[n]othing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party”.

<sup>247</sup> “[n]o provisions in this declaration shall be interpreted as restricting the protection afforded by Community law, the law of the Member States, international law and international conventions and accords on fundamental rights and freedoms or as standing in the way of its development”.

<sup>248</sup> Interestingly, Article 27 refers to the laws of the Member States and not merely to the constitutions. The scope of such a provision is thus wider.

<sup>249</sup> “[t]he enumeration in the constitution of certain rights, shall not be construed to deny or disparage others retained by people”.

<sup>250</sup> Liisberg, “Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law?”, CML. Rev. 2001, at p.1198.

<sup>251</sup> In the first draft (entitled Article Z, level of protection), the only concern was on the ECHR.

<sup>252</sup> *Open Door. v. Ireland* (1992), A-246, paras 78–79.

Article 10 ECHR (freedom of expression) should not be construed to circumscribe the right to life of the unborn as enshrined in the national Constitution. The EctHR jettisoned the argument and found an infringement of Article 10 ECHR by a vote of fifteen to eight. Third, the US case-law does not indicate that the Ninth Amendment has been used to challenge the supremacy of the federal law with the provisions of the domestic constitutions. Finally, the author submitted that the legal significance of Article 53 CFR is identical to that of Article 53 ECHR.<sup>253</sup> At the end of the day, it must be made clear that Article II-113 does not pose a threat to the principle of supremacy. Its aim is to clarify that the CFR does not replace national constitutions and does not jeopardize the existence of higher standards of protection at the domestic level.<sup>254</sup>

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<sup>253</sup> Ibid. Liisberg, in CMLRev. 2001, at p.1198. The author considers it as a “politically useful inkblot meant to serve as an assurance to Member States, and eventually the electorate, that the Charter does not replace national constitutions and that it does not, by itself, threaten higher level of protection. The legal significance of Article 53 of the Charter is identical to that of Article 53 ECHR. And by its political nature and purpose, it is similar to e.g Article 17(1) EC which provides that Citizenship of the Union does not replace national citizenship”.

<sup>254</sup> Going beyond the scope of this report, it may be contended that Article II-113 could be used, in the future, as a “*fountain of law*” by the ECJ (this formulation is also used by Liisberg). Article II-113 CT might be used by the ECJ in order to elaborate the fundamental rights (as general principles of Union law) not enshrined in the Charter. In the words of Black, writing on the Ninth Amendment, it could be used as a “*fountain of law.*” Indeed, as any written text, the Charter constitutes an imperfect document in the sense that it is impossible to codify all the fundamental rights in a single document. The fundamental rights are subject to evolution and reflect the need and the characteristics of a particular society. Consequently, in the future, it is certain that the ECJ would have to recourse to the general principles in order to fill the potential gaps of the judicial system established by a binding Charter. However, it could be highlighted that the very existence of a Charter goes stably against the creative role of the ECJ. In other words, the existence of a written document freezes the hypothetical application of the principles. One might foresee such a type of reasoning as partially wrong. On the one hand, it seems clear that the reality of a Charter (particularly if the Charter does not constitute a simple crystallization of the case law) limits instantly the role of the Court in the elaboration of principles. On the other hand, in the light of a binding charter, it is alleged that the ECJ could refer to Article II-113 CT (Article 53 CFR) in order to elaborate principles not included in it. A parallel can be drawn with Lenaerts’s comments on Article 27 of the Declaration of Fundamental Rights. According to him, such an Article could have permitted the ECJ to construe further rights. As stressed previously, Article 53 CFR corresponds to an equivalent to Article 27 DFR. Subsequently, it might be asserted that such reasoning is applicable to Article II-113 CT (53 CFR). In conclusion, Article II-113 CT might support the protection of unenumerated rights. Such a stance goes perfectly in the sense of the Charter’s words, which hails the development of common constitutional values.

### 3.3 Preliminary Rulings and the Constitutional Treaty (Part III CT)

The procedure laid down in Article 234 EC constitutes an instrument of cooperation between the Court of Justice and the national courts. It has strengthened the judicial dialogue between the two systems of law and has led to the elaboration of the most important constitutional principles, e.g. supremacy and direct effect. This procedure is a success and has been, in a way, victim of it. For instance, in *Pafitis*, the EctHR had to consider whether the ECJ had infringed Article 6 ECHR by taking thirty three months to give an answer to a preliminary ruling. It is worth remarking, in this respect, that Article 104(3) ECJ rules of procedure has been modified in July 2000 to provide a fast-track procedure in preliminary ruling.<sup>255</sup> Many other types of reforms have been proposed in order to increase the effectiveness of the preliminary procedure. However, the Constitutional Treaty does not deeply modify the text of the preliminary procedure (Article III-369 CT). Indeed, unsurprisingly, it seems that the evolution of this procedure passes mostly through the jurisprudence of the ECJ.

#### 3.3.1 Extension of the Scope of Preliminary Rulings

In recent years, the scope of application concerning the preliminary ruling procedure has extended through both the impulsion of the case-law and Treaty amendments (Amsterdam and Nice Treaties). This extension has serious implications not only for the ECJ, but also for the national courts.

#### Treaty Amendments

The Amsterdam and Nice Treaties reformed the preliminary ruling procedure in order to ensure more effectiveness.<sup>256</sup> Article 68(1) EC, permits the highest judicial authority to make a preliminary ruling in the context of Title IV of the EC Treaty. According to Article 68(1) EC (ex Article 73p):

Article 234 shall apply to this Title under the following circumstances and conditions: where a question on the interpretation of this Title or on the validity or interpretation of acts of the institutions of the Community based on this Title is raised in a case pending before a court or a tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.

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<sup>255</sup> It authorizes the Court of Justice to use an order, in certain circumstances, without the presentation of oral arguments and the AG Opinion.

<sup>256</sup> See, Tridimas, "Knocking on Heaven's Door: Fragmentation, Efficiency and Defiance in the Preliminary Reference Procedure", CMLRev.2003, pp. 9–50. See also Article 225(3) EC, amended by the Treaty of Nice, grants competence to the CFI as to preliminary ruling in specific areas.

This provision concerns all the matters falling within Article IV of the EC Treaty, i.e. visas, asylum, immigration and other policies related to the free movement of persons. Importantly, the jurisdiction of the court can only be activated by the national court of last resort. Consequently, the jurisdiction of the ECJ is no more universal and the lowest national courts cannot make a preliminary ruling. Furthermore, under Article 35 TEU, the jurisdiction of the ECJ has been extended to third pillar issues (justice and home affairs). The ECJ may rule on the validity and interpretation of framework decisions and decisions, on the interpretation of conventions established under this Title and on the validity and interpretation of measures implementing them. It is worth remarking that references for preliminary rulings may only be made by courts or tribunals of Member States which have made a declaration accepting the jurisdiction of the ECJ (Article 35(2) TEU). For instance Sweden has accepted the jurisdiction whereas France has not. Consequently the jurisdiction of the ECJ, is no more compulsory, but instead optional.

#### “The *Dzodzi* Line of Cases”

The scope of the preliminary ruling procedure has also been extended in “the *Dzodzi* line of cases”. The Court asserts jurisdiction to interpret Community law in cases in which the national legislature has decided to rely on Community provisions in order to regulate matters which lie within the scope of domestic law. The Court has constantly held that it has jurisdiction to give preliminary rulings on questions concerning Community provisions in situations where the facts of the cases being considered by the national courts were outside the scope of Community law but where those provisions had been rendered applicable either by domestic law or merely by virtue of terms in a contract.<sup>257</sup> Though really unclear in the early nineties, it was clearly confirmed by the ECJ in *Leur Bloem* and *Giloy*.<sup>258</sup>

<sup>257</sup> Joined Cases C-297/88 and 197/89 *Dzodzi* [1990] ECR I-3763, Case 166/84 *Thomasdünger* [1985] ECR 3001; Case C-384/89 *Tomatis and Fulchiron* [1991] ECR I-127, Case C-1/99 *Kofisa Italia* [2001] ECR I-207. The last case concerns the interpretation of the custom code to solve a question related to the Italian legislation on VAT. As regards the application of Community law by the effect of contractual provisions, Case C-88/91 *Federconsorzi* [1992] ECR I-4035 and Case C-73/89 *Fournier* [1992] ECR I-5621. Case C-346/93 *Kleinwort Benson* [1995] ECR I-615, the Court held that it had no jurisdiction to give a preliminary ruling on the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.

<sup>258</sup> Case C-28/95 *Leur-Bloem* [1997] ECR I-4161. The Court was asked to interpret the term exchange of shares in Article 2(d) of the Merger Directive. The purpose of that directive is to remove tax obstacles to intra-Community mergers, divisions, transfers of assets and share exchanges. See also Case C-130/95 *Giloy* [1997] ECR I-4291. In *Giloy*, the Court was asked to interpret a provision of the Customs Code. The main proceedings however were concerned not with import duties but with VAT, to which the Code was made applicable by the German Turnover Tax Law, which laid down a general rule that the provisions on customs duties were to apply *mutatis mutandis* to VAT on imports.

The ECJ justified its jurisdiction in cases of this kind by using three essential arguments:

Firstly, Article 234 EC (177) provides a cooperation procedure, where it is only the national court which determines the need for a preliminary ruling and the relevance of the questions submitted.<sup>259</sup> Secondly, there is no rule to the contrary in the text or aim of Article 234 EC. As to the text, the authors of the Treaty did not have the intention to exclude from the ECJ jurisdiction the interpretation regarding the application of Community law by domestic law.<sup>260</sup> As to the aim, the Court is obliged to give a ruling unless it appears that the procedure used has been misused and a ruling from the Court elicited by means of a contrived dispute, or it is obvious that Community law cannot apply, either directly or indirectly, to the circumstances of the case referred to the Court.<sup>261</sup> Thirdly, this is necessary in order to preclude potential divergences of interpretation. In other words, provisions or concepts taken from Community law should be interpreted uniformly, irrespective of the circumstances in which they are to apply.

This case-law has always been taken with a lot of circumspection by the Advocates General. Their Opinions opposed with strength the *Dzodzi* line of case-law.<sup>262</sup> Advocate General Darmon opined in the *Dzodzi* and *Gmurzynska-Bscher* cases, that the purpose of the preliminary ruling procedure, which is to ensure the uniformity of Community law, applies only

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<sup>259</sup> See, in particular, the judgments in *Dzodzi*, supra, paras 33 and 34, Case C-231/89 *Gmurzynska-Bscher* [1990] ECR I-4003, para 18, and *Leur Bloem*, supra, para 24. According to settled case-law, the procedure provided for in Article 177 of the Treaty [Article 234 EC] is a means of cooperation between the Court of Justice and national courts. It follows that it is for the national courts alone which are seized of the case and are responsible for the judgment to be delivered to determine, in view of the special features of each case, both the need for a preliminary ruling in order to enable them to give their judgment and the relevance of the questions which they put to the Court.

<sup>260</sup> See supra *Dzodzi* para 36, *Gmurzynska-Bscher*, para 25, *Leur Bloem*, para 25, “[c]onsequently, where questions submitted by national courts concern the interpretation of a provision of Community law, the Court is, in principle, obliged to give a ruling (see *Dzodzi* and *Gmurzynska-Bscher*, cited above, paragraphs 35 and 20 respectively). Neither the wording of Article 177 nor the aim of the procedure established by that article indicates that the Treaty makers intended to exclude from the jurisdiction of the Court requests for a preliminary ruling on a Community provision where the domestic law of a Member State refers to that Community provision in order to determine the rules applicable to a situation which is purely internal to that State”.

<sup>261</sup> Supra, *Dzodzi*, para 40, *Gmurzynska-Bscher*, para 23, *Leur Bloem*, para 26.

<sup>262</sup> AG Mancini in *Thomasdüniger*, AG Ruiz-Jarabo Colomer in *Kofisa*. and AG Jacobs in *Leur-Bloem and Giloy*, in *BIAO* (Case C-306/99 [2003] ECR I-1, paras 47 to 70). The last case concerns the interpretation of certain technical provisions of the Fourth Company Law Directive on company accounts. Those questions arise however in proceedings which concern the accounting treatment for tax purposes – not covered by the Directive – of a provision in the balance sheet of a trader which is outside the scope of the Directive.

within the scope of Community law, as defined by Community law itself and by itself alone. In his words, “there is no Community law outside its field of application”. AG Jacobs in his Opinion in the cases of *Leur-Bloem* and *Giloy* stressed, particularly, the importance of interpreting the Community provisions in their context. Indeed, there is no assurance that the Court’s ruling in a dispute arising in a non-Community context will be relevant to that dispute. Furthermore, the AG pointed out that it would undermine the binding effect of the Court’s judgments since the domestic courts could easily avoid applying the Court’s ruling by arguing that the contexts to which the rule of Community law applies differ. Also, there is no obligation to refer for the national courts against whose decisions there is no judicial remedy. Finally, it might lead to a significant upsurge of preliminary procedure.<sup>263</sup>

To conclude, though many arguments may be used against the *Dzodzi* line of case-law, it appears that it reflects another example of the judicial dialogue between the ECJ and the national courts. In that sense, it should be welcome. In the words of Tridimas, “the very purpose of the *Dzodzi* case law is not to compel but to empower”.<sup>264</sup>

### 3.3.2 Determining the National Courts making the Reference **The meaning and scope of “a court or tribunal”**

Article 234 EC provides that any court or tribunal may make a reference to the ECJ. In the early years, the ECJ has broadly interpreted whether a body making a reference is a court or tribunal for the purposes of Article 234 EC, in order to enhance the use and effect of the preliminary ruling procedure. The main factors, taken into consideration, have been, *inter alia*, whether the jurisdiction is compulsory, whether it involves the public authority, whether it is an adversarial procedure, whether the decision must be considered as final.<sup>265</sup> Independence as a new criteria appeared at the end of the eighties.<sup>266</sup> Notably, all those criteria have been finally listed by

<sup>263</sup> *Ibid.*, AG Jacobs, para 75.

<sup>264</sup> Tridimas, *supra*, at p.37. *See also*, for a discussion of the case-law, Lefevre, “Interpretation of Community Law by the Court of Justice in Areas of National Competence”, ELRev.2004, pp-84-93.

<sup>265</sup> *See* Case 61/65 *Vaasen* [1966] ECR 377. The Dutch Arbitral Tribunal reference was declared admissible by the ECJ using five criteria: statutory origin permanence, *inter partes* procedure, compulsory jurisdiction, and the application of rules of law. In *Broeckmeulen* (1981), concerning a Dutch registration appeal committee, the Court used three criterias: consent of the public authorities, adversarial procedure and final decisions. In Case *Nordsee* (1982), concerning commercial arbitration, the Court did not consider the preliminary ruling admissible since the jurisdiction was not compulsory.

<sup>266</sup> *See* Case 14/86 *Pretore di Salò* [1987] ECR 2545, Case C-24/92 *Corbiau* [1993] ECR I-1277. In the former case an Italian magistrate acting as an investigatory judge in the context of Community pollution legislation.

the Court in *Dorsch Consult*, which establishes the following non-exhaustive guidelines:<sup>267</sup>

- the body is established by law
- the body is permanent
- its jurisdiction is compulsory
- its procedure is *inter partes*
- the body applies rules of law
- the body is independent<sup>268</sup>

Problematically, not all the mentioned criteria constitute absolute requirements but mere guidelines.<sup>269</sup> One of the consequences is that the jurisprudence of the Court appears inconsistent. In 2001, AG Ruiz Jarabo Colomer, criticized with strength the lack of objective criteria to determine the national courts falling under the scope of Article 234 EC. Referring ironically to Cervantes and Don Quijote de la Mancha, the AG considered that, “[t]he case-law is casuistic, very elastic and not very scientific, with such vague outlines that a question referred for a preliminary ruling by Sancho Panza as governor of the island of Barataria would be accepted”.<sup>270</sup> He proposed, instead, a new test in light of the requirements deriving from the definition of “tribunal” in Article 6(1) ECHR and the substantive standards of justice. Accordingly, a body which does not form part of the domestic judicial system and which lack the competence to “state the law” in judicial proceedings must not be considered a court or a tribunal. In other words, the body must have exclusive jurisdiction to give judgment since this element reflects independence and submission to the law.<sup>271</sup> This interpretation is very restrictive and would obdurate the possibility to make a preliminary ruling for administrative bodies.<sup>272</sup> The ECJ, fortunately, did not follow the Opinion of the AG.<sup>273</sup>

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<sup>267</sup> Case C-54/96 *Dorsch Consult* [1997] ECR I-4961, para 23, Joined Cases C-110/98 to C-147/98 *Gabalfrisa and Others* [2000] ECR I-1577, para 33, Case C-17/00 *De Coster* [2001] para 10, Case C-195/98 *Österreichischer Gewerkschaftsbund* [2000] ECR I10497, para 24, and Case C-516/99 *Schmid* [2002] ECR I-4573, para 34.

<sup>268</sup> Case C-17/00 *De Coster* [2001] ECR I-9445. The preliminary ruling made by the *college juridictionnel* was declared admissible.

<sup>269</sup> In *Dorsch Consult*, for instance, the Court considered that the procedure *inter partes* was not necessary. This case concerns the German Federal Supervisory Board in cartel matters.

<sup>270</sup> *Ibid.*, para 14.

<sup>271</sup> *Ibid.*, paras 84–86.

<sup>272</sup> See *supra*, *Broekmeulen* and *infra*, *Abrahamsson*.

<sup>273</sup> I disagree with such an interpretation. In my view, the criteria must remain flexible (flexibility versus legal certainty) in order to be able to deal with the most important questions regarding the interpretation of EU law.

It appears that this area is marked by clear and numerous disagreements between the AGs and the Court of Justice as to the scope of application of the criteria.<sup>274</sup> Once again, in 2005, the ECJ refused to follow AG Jacobs in *SYFAIT*, who opined for allowing the national competition authorities the possibility to make a preliminary ruling to the ECJ.<sup>275</sup> In order to reject the AG argumentation, the ECJ has recourse to an additional criteria already used in the *Victoria Film* case.<sup>276</sup> According to the Court, “a national court may refer a question to the Court only if there is a case pending before it and if it is called upon to give judgment in proceedings intended to lead to a decision of a judicial nature”.<sup>277</sup> The Court remarked, in that regard, that the Commission may relieve a national competition authority such as the *Epitropi Antagonismou* of its competence. Consequently, the proceedings initiated before that authority will not lead to a decision of a judicial nature.<sup>278</sup> The reasoning of the ECJ is very similar to the Opinion of Ruiz-Jarabo Colomer in *De Coster* and the requirements derived from Article 6(1) ECHR. This type of analysis leads to a very restrictive definition of the term “body” and reflects again the lack of consistency of the ECJ case-law.

### **Article 234(3) EC and the Court of Last Resort**

At first blush, the courts of last resort are, for a large part, the Supreme Courts of the Member States. In that respect, it seems that most of the national courts have accepted that they are bound by the Treaty to make references to the Court of Justice when questions of EU law arise. However, in practice, the percentage of highest national courts making a reference is still low considering their obligation to refer under Article 234(3) EC. Indeed, only around twenty-five percent of the preliminary rulings are made by them.<sup>279</sup> In addition, it is worth noticing that certain constitutional courts either rebuff their Treaty obligations under Article 234(3) EC or maintain that they do not fall within the scope of that provision.<sup>280</sup>

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<sup>274</sup> See e.g. as to the criteria of independence, supra, *Dorsch Consult* and *De Coster*, Joined Cases C-110 and 147/98 *Gabalfria* [2000] ECR I-1577, Case C-407/98 *Abrahamsson* [2000] ECR I-5539. A University board made a preliminary ruling concerning positive discrimination.

<sup>275</sup> Case C-53/03 *Syfait* [2005] n.y.r.

<sup>276</sup> Case C134/97 *Victoria Film* [1998] ECR I-7023, para 14, Case C-195/98 *Österreichischer Gewerkschaftsbund* [2000] ECR I10497, para 25.

<sup>277</sup> *Syfait*, supra, paras 29 and 35.

<sup>278</sup> *Ibid.*, para 36.

<sup>279</sup> AG Tizzano, supra, in *Lyckeskog*.

<sup>280</sup> See Mayer, “The European Constitution and the Courts: Adjudicating European constitutional law in a multilevel system”, Jean Monnet Working Paper 9/03, Max Planck Institute for Comparative Public Law and International Law, February 2003. The following Constitutional Courts have never asked a question to the ECJ: French CC (not a court), German FCC, Italian CC, Spanish TC (EU law is not a constitutional issue) and Portuguese CC.

This is problematic in some countries, e.g. Sweden and UK, where decisions from the appeal courts can be appealed to the highest court, but only if the leave is granted. Already in *Costa v. ENEL*, using the so-called concrete theory, the Court stated that under Article 177 EEC (Article 234 EC), national courts against whose decisions there is no judicial remedy must refer the matter to the Court of Justice.<sup>281</sup> More recently, this thorny issue is illustrated by the *Lyckeskog* case.<sup>282</sup> Kenny Lyckeskog was stopped at the Swedish border on his way from Norway with 500 kg of rice. He was prosecuted for smuggling before the *Tingsrätt*. The defendant appealed against that judgment and asked for the conviction to be quashed and the decision to confiscate the rice to be annulled. The *Hovrätt* raised the question, in the order for reference, whether it should be regarded as a court of last instance and whether, it is required to refer a question to the Court of Justice for a preliminary ruling under Article 234(3) EC.

The *Hovrätt* determined that the response should be in the affirmative since, under Swedish law, leave to appeal to the Supreme Court is granted only on the conditions laid down in Chapter 54 paragraph 10 of the *Rättegångsbalk*, i.e. only where the point of law is so complex that there is an interest in establishing a precedent for the uniform interpretation of the law or where the *Hovrätt* makes an entirely erroneous determination on a point of law. According to the order for reference, an unimportant error in the interpretation or application of Community law does not in itself constitute grounds for leave to appeal. Having thus established that it should be described as a court of last instance within the meaning of the Article 234 (3) EC, the national court then raised an additional question, to be exact whether it was really indispensable to refer to the Court of Justice the questions that had arisen in the case pending before it.

Interestingly, the Swedish and UK governments both considered that the mere fact that leave to appeal is required in order for a case from the *Hovrätt* to be reviewed by the Supreme Court is sufficient to exclude the Courts of Appeal from the scope of the Article 234(3) EC. It is worth remarking that the Commission analyzed the two possible solutions. It pointed out that if in practice there is no effective right of appeal (difficulty to obtain review and subject to certain conditions), then the *Hovrätt* should be the court of last resort. On the other hand, if there is a real, though conditioned, possibility of obtaining leave to appeal, the Court of Appeal should fall outside the scope of Article 234(3) EC. In the end, it found that

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<sup>281</sup> Case 6/64 *Costa v. Enel* [1964] ECR 585. In the circumstances of the case, there was no right of appeal because the sum involved was too small.

<sup>282</sup> Case C-99/00 *Lyckeskog* [2002] ECR I-4839.

both solutions have advantages and disadvantages, but eventually chose the latter solution by using a procedural argument. Indeed, the Commission considered that the choice of the former solution would lead to an inordinate increase in the number of court falling under the obligation to refer.

The ECJ considered that the fact that examination of the merits of such appeals is subject to a prior declaration of admissibility by the Supreme Court does not have the effect of depriving the parties of a judicial remedy. In the case at issue, the parties always have the right to appeal to the *Högsta domstol* against the judgment of a *hovrätt*, which cannot therefore be classified as a court delivering a decision against which there is no judicial remedy.<sup>283</sup> The Court concluded that where the decisions of a national court or tribunal can be appealed to the Supreme Court under conditions such as those that apply to decisions of the referring court in the present case, that court or tribunal is not under the obligation referred to in Article 234(3) EC.<sup>284</sup>

Notably, the Commission has recently issued a reasoned opinion pointing out a breach of Article 234(3), due to the judicial practise of the Supreme Court regarding leave to appeal and its absence of motivation.<sup>285</sup> Thus, it may be said that the system of leave to appeal creates a situation where there is no effective right to appeal.<sup>286</sup> The Commission insists that the Supreme Court must provide reasons as to the decision not to provide leave so it will be possible for the Commission to examine the decision to

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<sup>283</sup> *Ibid.*, paras 16-17. Under Paragraph 10 of Chapter 54 of the *Rättegångsbalk*, the *Högsta domstol* may issue a declaration of admissibility if it is important for guidance as to the application of the law that the appeal be examined by that court. Thus, uncertainty as to the interpretation of the law applicable, including Community law, may give rise to review, at last instance, by the Supreme Court.

<sup>284</sup> *Ibid.*, para 19.

<sup>285</sup> 2003/2161, C (2004) 3899. See Bernitz, "No Need for Commission to be Heavy-Handed over Courts", *European Voice*, 25 November-1 December 2004, at p.8 and "Kommissionen ingriper mot svenska sistainstansers obenägenhet att begära förhansavgöranden", *ERT* 2005, pp.109-116.

<sup>286</sup> Going further, it may be argued that there is a breach of the principle of effective judicial protection. In that respect, it can also be contended that if the *Lyckeskog* case would have been decided today, the Commission (according to its line of argumentation in *Lyckeskog* and its reasoned opinion against Sweden) could have been obliged to consider that the court of last resort is the Court of Appeal and not the Supreme Court. Paradoxically, the decision of the ECJ, going in the sense of the Commission, the Swedish and UK governments paved the way to the reasoned opinion of the Commission and thus has led, involuntarily, to this Kafkaesque situation. It is also worth keeping in mind that only the *Hovrätt* (and the Danish Government) considered being a court of last resort in the circumstances of the *Lyckeskog* case. However, the Commission argued that this choice would lead to an increased number of preliminary references. Are the arguments of the Commission in *Lyckeskog* consistent with its line of reasoning in the reasoned opinion of October 2004?

protect the EU interests. Very interestingly, draft legislation is under discussion, which includes the obligation to state the reasons in the situation where the highest instance will reject the appeal.<sup>287</sup> Finally, in my view, to be consistent with this aggressive line of reasoning or “ultra-European” position, the Commission should start infringement proceedings against, *inter alia*, the attitude of the French, German, Italian, Spanish and Portuguese Constitutional Courts, which, for diverse reasons, have never made a preliminary ruling to the ECJ.

### 3.3.3 The Acte Clair Doctrine

#### **Relaxation of the *CILFIT* Criteria (*Acte Clair* Doctrine)?**

According to Article 234(3) EC, there is an obligation to refer for a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law. The Court of Justice in the *CILFIT* case has established three limited exceptions to this obligation to refer.<sup>288</sup> Those exceptions are known as the *CILFIT* criteria and can be summarized as follows:

- The question of EC law is irrelevant (para 10)
- The question has already been decided by the ECJ (paras 13–14)<sup>289</sup>
- The correct interpretation is so obvious as to leave no room for doubt (para 16)

The last and most problematic exception is the so-called *acte clair* doctrine. It is worth remarking that it is derived from French administrative law and that the French national courts abusively had recourse to this doctrine in order to circumvent the application of EC law.<sup>290</sup> By consequence, it was important for the ECJ to give meticulous guidelines so as to circumscribe the scope of the doctrine. The ECJ has always interpreted the *acte clair* doctrine restrictively in order to avoid abuses. In that respect, the ECJ ruled that a national court, using *acte clair*, must be convinced that the interpretation would not lead to divergences in other Member States’ courts and the Court of Justice. Importantly, the existence of this possibility must be assessed on the basis of the characteristic features of EC law regarding

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<sup>287</sup> See, *Förhandsavgörande från EG-Domstolen*, Justitiedepartementet, Ds 2005:25. The Law will enter into force 1 January 2006.

<sup>288</sup> Case 283/81 *CILFIT* [1982] ECR 3415.

<sup>289</sup> Cases 28–30/62 *Da Costa* [1963] ECR 61.

<sup>290</sup> Under the doctrine no question of interpretation arises from a provision where the meaning is clear. It was usually invoked in the context of international Treaties where, if the meaning was clear, there was no need for the *Conseil d’Etat* to refer a question of interpretation to the government.

interpretation, i.e. comparison of the different language versions, specificity of the Community law terminology and recourse to contextual/teleological interpretation.

In recent years, the restrictive interpretation of the *acte clair* doctrine has come under attack. For instance in 2000, a group of experts set up by the Commission to reflect on the future of the judicial system concluded that the national courts should be encouraged to apply Community law more regularly and that the courts of last resort should refer a question only if it is of sufficient interest.<sup>291</sup> Another notable proponent of the relaxation of the *acte clair* doctrine is AG Jacobs. In that regard, in its powerful Opinion in the *Wiener* case, the AG proposed the references to be limited to cases where there is a genuine need for uniform application of the law throughout the Community because the question is one of general interest.<sup>292</sup> In other words, the national court must refer only when the reference is truly appropriate to achieve the objectives of Article 177 (234 EC).<sup>293</sup> The main reason advanced for such relaxation is based on the need to preserve the effectiveness of the preliminary ruling procedure. Indeed, it may be argued that too many questions referred would prejudice the quality of the preliminary ruling procedure.<sup>294</sup> In addition, the national courts may appear mature enough to rightly apply the body of case-law developed by the ECJ.<sup>295</sup> At the end of the day, such a type of relaxation amounts, as lucidly put by Hettne and Öberg, to a “*de facto* regionalization”.<sup>296</sup>

The question of relaxation of the *acte clair* doctrine is a source of discordance, even between the AGs themselves. In that regard, AG Tizzano in *Lyckeskog* strongly rejected this proposition. Accordingly, “the third paragraph of Article 234 EC must be interpreted as meaning that, even where it considers that a question of Community law is clear, a national court or tribunal against whose decisions there is no judicial remedy under national law is required to bring the matter before the Court of Justice by way of a reference for a preliminary ruling unless it has established that the question raised is irrelevant or that the Community provision in question has already been interpreted by the Court of Justice or that the correct application of Community law is so obvious as to leave no scope for any reason-

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<sup>291</sup> Report of the reflection group on the future of the judicial system of the European Communities, January 2000.

<sup>292</sup> [1997] ECR I-6495, para 50.

<sup>293</sup> *Ibid.*, para 64.

<sup>294</sup> *Ibid.*, para 60.

<sup>295</sup> *Ibid.*, para 61.

<sup>296</sup> Hettne and Öberg, *Domstolarna i Europeiska unionens konstitution*, SIEPS, 2003:15, at p.33.

able doubt. The existence of such a possibility must be assessed in the light of the specific characteristics of Community law, the particular difficulties to which its interpretation gives rise and the risk of divergence in judicial decisions within the Community".<sup>297</sup> Thus AG Tizzano follows a very restrictive interpretation of the *acte clair* doctrine and recommends following very carefully the criteria of interpretation set up in *CILFIT*.

Does this restrictive approach constitute the best line of reasoning? *Prima facie*, it seems to me that the progressive line of reasoning followed by AG Jacobs is clearly the most interesting for ensuring an effective application of Community law. In other words, the future of European law definitely passes through a *de facto* regionalization and an empowerment of the national courts. However, the counter-arguments are not only *légions*, but also are substantively strong. Firstly, it should always be kept in mind that historically the *CILFIT* criteria were established to avoid the actual abuses of national courts applying the *acte clair* doctrine. Secondly, the number of preliminary rulings referred by the courts of last instance cannot be considered, at this time, as impairing the effectiveness of the preliminary procedure. AG Tizzano, in this respect, remarked that, from 1960 to 2000, 1173 preliminary rulings out of 4381 result from the national courts of last instance. Thirdly, the *CILFIT* criteria constitute an exception to the text of the Treaty. Thus, as any exception, they must be interpreted restrictively. Fourthly, the only possible solution, by consequence, should be to modify the text of the Treaty. Notably, Article III-369(3) CT does not alter the wording of Article 234(3) EC. Fifthly, there are still many examples where the national courts wrongly apply Community law. Finally, the national courts from the new Member States are not mature enough. The conclusion to which we are inescapably drawn is that the relaxation of the *acte clair* doctrine is unfortunately not applicable now nor will it be in the near future.

### ***Acte Clair* Doctrine and Responsibility: The *Köbler* Case**

It is worth noting that the restrictive interpretation and the abuse of *acte clair* can be effectively tackled by the recent jurisprudence of the ECJ in *Köbler* and *Kühne*.<sup>298</sup> As to the former, the Court established the possibility of engaging the Member State liability in the case where the national court of last instance (*in casu* the Supreme Administrative Court), using the *acte clair* doctrine, commits a manifest breach of Community law.<sup>299</sup> As to the

<sup>297</sup> AG Tizzano, *supra*, para 76.

<sup>298</sup> Case 224/01 *Köbler* [2003] ECR I-10139, Case C-453/00 *Kühne & Heitz* [2004] ECR I-10239.

<sup>299</sup> *Ibid.*, *Köbler*, paras. 118–120.

latter, the Court concluded that an administrative body is, in accordance with the principle of cooperation arising from Article 10 EC, under an obligation to review a decision in order to take into account the interpretation of the relevant Community law provision given in the interim by the Court.<sup>300</sup>

It is important to analyze in more details the *Köbler* case, which deals with a national court, and its consequences. Before engaging a discussion on this case, it is worth recalling the facts. Mr Köbler had been employed as an ordinary university professor in Austria and applied for the special length-of-service increment for university professors. According to Austrian law, this type of benefit is granted exclusively after 15 years of service in domestic universities. Though he had completed the requisite length of service, the duration of his service in universities of other Member States were also taken into consideration. His application was rejected and he, consequently, brought proceedings before the Austrian courts arguing that such a requirement constituted indirect discrimination contrary to Community law. The Supreme Administrative Court in 1998, applying the *acte clair* doctrine, found that the special length-of-service increment was a loyalty bonus which justified a derogation from the provisions on freedom of movement for workers. Consequently, Köbler brought an action for damages before the Regional Court on the ground that the judgment of the Supreme Administrative Court was contrary to Community law.

The Court found that the national court was not entitled to take the view that resolution of the point of law at issue was clear from the settled case-law of the Court or left no room for any reasonable doubt. It was therefore obliged under the third paragraph of Article 177 (234 EC) of the Treaty to maintain its request for a preliminary ruling. Then the Court established that the infringed Community law by its judgment of 1998. Going further, it examined whether that infringement of Community law was manifest in character having regard in particular to the factors to be taken into consideration in a *Francovich* action. Finally, the Court did not find that the infringement constituted a manifest breach of Community law.<sup>301</sup> At the end of the day, it seems difficult to establish whether a breach is manifest or not. In light of the circumstances of the case, it is argued that the Court could have found a manifest breach of Community law (obligation to refer

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<sup>300</sup> *Kühne & Heitz*, *supra*, para. 27. It concerned a decision regarding customs nomenclature given by a national administrative body (Board for poultry and eggs). The decision was confirmed by the administrative for Trade and Industry, using the *acte clair* doctrine.

Nevertheless, the decision appeared inconsistent with a subsequent ruling from the ECJ.

<sup>301</sup> *Köbler*, *supra*, paras 118–124.

under Article 234 (3) EC. In that sense, it may be said that the *Köbler* case constitutes a warning from the Court of Justice to the Supreme Court of the Member States abusing the *acte clair* doctrine.

This ruling has been criticized. Notably, Wattel pointed out that this case-law would result in “an avalanche of claims”.<sup>302</sup> Furthermore, one may regret that the Court simply applied the *Francovich* requirements without taking into consideration the specificity of the judicial function. In that regard, it is worth remarking that AG Léger in his Opinion in *Köbler* proposed, as the final test, to assess whether the breach of EC law is excusable or non-excusable. This additional criterion should be included. Finally, some may also argue that the *Köbler* case infringes a constitutional principle relating to the independence of the judiciary vis-à-vis the executive since the *Francovich* action is directed towards the Member States. At first blush, it appears to be a well-built argument. However, I disagree with it. Suffice it to recall here that the European Court of Human Rights may sanction (and has sanctioned for a long time now) Member States for breach of fundamental rights by their national courts.<sup>303</sup> As far as I know, this practice has never been criticized. In my view, the *Köbler* case should be welcome. Indeed, though it reflects a failure of the rigid *CILFIT* criteria, it constitutes another step towards a more effective enforcement of Community law.

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<sup>302</sup> Wattel “Köbler, CILFIT and Welthgrove: We can’t go on meeting like this”, CMLRev.2004, pp.177–190.

<sup>303</sup> See Article 50 ECHR (Case Zullo v. Italy, 10 November 2004). For application at the national level, *Högsta Domstolen*, mål T-72-04, 9 June 2005.

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Swedish Institute for European Policy Studies

Universitetsvägen 10 F  
SE-106 91 Stockholm  
Office: Stockholms universitet,  
Frescati, House F, 6th floor  
Tel: +46-(0)8-16 46 00  
Fax: +46-(0)8-16 46 66  
E-mail: [info@sieps.se](mailto:info@sieps.se)  
**[www.sieps.se](http://www.sieps.se)**