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Introduction

The bluntest criticism of French constitutional practice in the first years of functioning of the 5th Republic was summarised in the succinctly-formulated title of François Mitterand's book *Le Coup d'État permanent* (1964). One can hardly resist a temptation to apply a similarly expressive term when describing the relations between the European Union law and the constitutional law of the Member States, i.e. a situation of permanent confrontation.

The primary reason for this state of affairs is the fact of conferring onto the European Union the competences for establishing legal norms directly binding within the legal orders of the Member States. Admittedly, this competence is indispensable for attaining the integration objectives within the EU; yet, the fact remains that the norms are expected to conform to the Treaties establishing the basis of the EU, irrespectively of the fact that the Treaties remain silent as to the problem of relation to national constitutions.

In contrast, a constitution is as a rule the legal act occupying the superior position in the system of sources of law in the EU Member States. The constitution is the utmost expression of the will of a sovereign nation, defines the principles of the State's political system and guarantees fundamental rights to its citizens. Its exceptional significance entails supreme legal force of the norms which it contains and consequently prohibits establishing and applying the norms contradicting the constitution.

Vesting constitutional norms with supreme legal force is tantamount to imposing an obligation of observing constitutional premises on all bodies establishing law. A problem arises when the legal norms binding in the national legal order were not established by the State bodies but originated outside the State apparatus.

In the case of norms of international law, both their status in the national order and the manner of resolving a possible conflict between them and the national norms are usually either determined in the constitution or

may at least be inferred from it[1]. The constitution remains the primary norm of reference for a constitutional court or common courts of law. Obviously, *ex post* questioning of constitutionality of an international obligation defined in a treaty may result in serious consequences for the State's international relations, but it has no direct impact on the validity of the agreement understood as a commitment between the parties involved.

In a federal State, despite dividing legislative competences between the federation and its constituents, the system remains cohesive because the constitution is the supreme national law, while its primacy is guaranteed by the federal court.

The federal model has not been adopted at the current stage of European integration. The evident and direct reason for that is the fact that the Member States have no uniform vision of integration. It seems, however, that the reasons are more profound, resulting from the absence of political mandate to create a European federation. Such a mandate can not be conferred by the European *demos* as objectively no subject can be attributed with the features of a European sovereign. It is thus hardly surprising that Article 1 of the Treaty on European Union (TEU)[2] tentatively defines the current stage of integration as the on-going process of creating an ever closer union among the peoples of Europe.

As a result one is confronted with a construction created by means of law, which, however, does not meet the basic requirement of systemic cohesion. One reason for that is that the fundamental norm has not been unambiguously defined, i.e. the norm with which all other norms should comply, irrespectively

[1] On this point see W. Czapliński, A. Wyrozumska, *Prawo międzynarodowe publiczne*, 2nd ed. Warszawa 2004, p. 531 *ff*.; with reference to Poland see A. Wyrozumska, *Prawo międzynarodowe oraz prawo Unii Europejskiej a konstytucyjny system źródeł prawa*, [in:] *Otwarcie Konstytucji RP na prawo międzynarodowe i procesy integracyjne*, (K. Wójtowicz ed.) Wydawnictwo Sejmowe, Warszawa 2006, p. 31 *ff*.

[2] Consolidated version of the Treaty on European Union, OJ 2012/C 326/01.

of their source, while the other is that no court ruling conclusively on the compliance of the norms binding in the system has been appointed.

Such a mechanism would not be able to function effectively and, primarily, would not serve the purpose of attaining the integration objectives for which it has been created. Therefore, instead of the Member States the role of *pouvoir constituant* has been in a sense taken over by a European Union court – the Court of Justice of the European Union, determining the principles enabling the application of law in a cohesive and uniform manner within the whole multilevel system[3]. The basis for determining a uniform interpretation of EU law is constituted by Article 19 section 1 TEU, according to which the Court of Justice of the European Union ensures that while interpreting and applying the Treaty, the law is respected. This generally formulated competence enabled the Court of Justice to develop the concept of *communauté de droit*, which includes the principles not quoted explicitly in the Treaties: the primacy of EU law, its direct effect, interpretation of national law in compliance with EU law and the principle of State's liability for damage to individuals caused by a breach of UE law for which a State is responsible.

Since this integrative activity of the Court of Justice of the EU does not result from deliberate activity of the Member States legitimised by their constitutions, an inevitable question arises whether the results of the activity in question do not collide with the constitutional courts' basic task, i.e. ensuring cohesive and uniform application of law, but within the national legal order and, primarily, in compliance with the constitution.

[3] A variety of terms is used in order to describe that particular system. According to E. Łętowska it is a "multi-center" legal system (*multicentryczny*), E. Łętowska, *Między Scyllą i Charybdą – sędzia polski między Strasburgiem i Luksemburgiem*, Europejski Przegląd Sądowy, nr 1/2005, p. 4. I. Pernice in the English language publications uses the term: "*multilevel constitutionalism*" and in French language „*constitution composée*", see respectively: I. Pernice, *Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited*?, Common Market Law Review 4 (1999). p. 703 and I. Pernice, F.C. Mayer, *De la constitution composée de l'Europe*, (2000) Revue Trimestrielle de Droit Européen, p. 623.

In view of the above, it is even more apparent that the binding legal provisions fail to name unambiguously a body (court) competent to rule conclusively in the cases of conflict between EU law and constitutional norms.

The most common form of protecting the principle of primacy of the constitution is the institutionalised review of constitutionality of law, where the standard in examining the compliance of norms is the norm placed hierarchically higher, thus ultimately a constitutional norm.

Depending on the adopted solution, the compliance is reviewed by a special constitutional court or another body whose competences include this type of review. Determining incompliance of a legal norm with the constitution may take place before an act comes into effect (preventive review); it may also result in eliminating an unconstitutional norm from the system or in declaring its invalidity in a concrete case (ex-post review).

Judicial review of constitutionality of law evidently restricts the freedom of the legislative body representing the sovereign. Contemporary democratic constitutionalism has accepted this construction in order to make it more difficult for the political majority to revise fundamental principles of the political system and fundamental rights of an individual protected by the constitution.

This study does not aim at comprehensive discussion of the case-law of constitutional courts concerning European Union law[4]. Rather, it focuses on judicial constructs which on the one hand are representative for the constitutional judiciary's approach to the systemic aspects of European integration and which, on the other hand, constitute original and juridically sound proposals that may contribute to the creation of a model for resolving conflicting situations arising in the area between the constitution and EU law.

[4] On this point see e.g. *Europe's Constitutional Challenges in the Light of the Recent Case Law of National Constitutional Courts. Lisbon and Beyond*, J. M. Beneyto, I. Pernice eds., Baden-Baden 2011; W. Sadurski, *Solange, chapter 3: Constitutional Courts in Central Europe- Democracy – European Union*, European Law Journal vol. 14 issue 1, January 2008.

Despite the evident overlapping of concepts presented by individual courts, the impact of constitutions and practice in individual Member States varies to such an extent that emergence of such a model in the near future may hardly be expected. Yet, this specific dialogue between constitutional courts may inspire an introduction of amendments to the EU Treaties and national constitutions, which would increase a sense of certainty of law in the European legal area.

When quoting the provisions of EU law, the Treaties in force and the nomenclature which they use concerning the institutional system and sources of law have been adopted as a point of reference. By principle the term "EU law" is used instead of "Community law". The old nomenclature has been preserved when quoting case-law or views of the doctrine formulated on the basis of the previous legal provisions.

Case-law of the Court of Justice of the European Union is quoted after the *European Court Report* (ECR).

References were also made to the discussion of the case-law of constitutional courts published in the monograph *Relacje między prawem konstytucyjnym a prawem unijnym w orzecznictwie sądów konstytucyjnych państw Unii Europejskiej. Omówienie 108 wybranych orzeczeń sądów konstytucyjnych Austrii, Belgii, Republiki Cypru, Republiki Czeskiej, Danii, Francji, Hiszpanii, Niemiec, Słowacji, Słowenii, Węgier i Włoch (1964-2011) (The Relations between Constitutional Law and EU law in the Case-Law of Constitutional Courts of the EU States. Comments to 108 Selected Judicial Decisions of Constitutional Courts from Austria, Belgium, the Republic of Cyprus, the Czech Republic, Denmark, France, Spain, Germany, Slovakia, Slovenia, Hungary and Italy)*, K. Zaradkiewicz (ed.), M. Nowak, P. Puchta, A. Pudło, M. Zieliński, Biuro Trybunału Konstytucyjnego ZOiS, September 2011.

This publication is the updated and translated version of the book *Sądy konstytucyjne wobec prawa Unii Europejskiej,* Biuro Trybunału Konstytucyjnego, Warszawa 2012. Bartłomiej Madejski translated most of the text, while it's final version was agreed upon consultation with Krzysztof Wójtowicz.

Chapter I

The European Union law as an autonomous legal order

1. Sources of the European Union law

The law of the European Union is based on an original system of sources, differing from the system of sources of public international law and the systems of sources of law in the Member States.

There is no Treaty provision which would systematise sources of EU law even indirectly, as Article 38 of the Statute of the International Court of Justice (ICJ) does in the case of international law, or explicitly and directly as is the case of the constitutions defining the sources of national law.

For this reason the doctrine attempts to systematise the sources of EU law on the basis of the (founding) Treaties, the case-law of the Court of Justice of the European Union (further on referred to as CJEU or ECJ)[5] and the practices of the EU institutions. Various criteria are applied here[6], distinguishing *sensu stricto* sources, i.e. written, and *sensu largo* sources, i.e. unwritten. The former include the Treaties and legal acts of the institutions, while the latter include the principles resulting from the case-law of the Court of Justice of the European Union.

While not challenging the reasonability of this division, from the point of view of application of EU law the classification which uses the criterion of legal force seems more useful, thus creating the grounds for determining a certain hierarchy of sources of EU law[7], independently of the fact whether

[5] According to Article 19 section 1 of the Treaty on European Union the Court of Justice of the European Union includes the Court of Justice, the General Court and specialised courts, Consolidated version of the Treaty on European Union, O. J. 2012/C 326/01.

[6] See eg D. Simon, *Le système juridique communautaire*, PUF, Paris 1998, p. 203 *ff.*

[7] See K. Lenaerts and P. van Nuffel, *Constitutional Law of the European Union*, Sweet & Maxwell, London 1999, p. 530 *ff.*

the norm originated from States or institutions or it results from the practice of EU case-law.

The consequence of adopting this criterion is placing the so-called primary law, first of all the provisions adopted directly by the Member States in the Treaties, at the top of the hierarchy of sources of law. It should be noted here that since the Treaty of Lisbon came into force the Charter of Fundamental Rights of the EU has had the same legal force as the Treaties.

The guarantee of respecting the highest legal force of the norms comprised in the Treaties is the procedures resulting in the annulment of EU norms contradictory to the Treaties (Article 263, Article 267 of the Treaty on the Functioning of the European Union – further on referred to as TFEU)[8] or permitting preventive review (Article 218 TFEU). Treaty norms may be amended pursuant to special procedures – primarily a revision procedure regulated by Article 48 of the Treaty on European Union (further on referred to as TEU).

Beside written primary law there are unwritten general principles of law, constituting a specific link between national law and EU law. Their significance consists not only in enabling the Court of Justice of the EU to redress loopholes in the Treaty provisions but primarily in the fact that thanks to the general principles EU law reflects the values constituting the basis of legal systems of the Member States[9]. It should be noted here that this specific source is surrounded by a great deal of ambiguity or even controversy, resulting from the dispute concerning the legislative role of the Court of Justice of the EU.

The controversy is not restricted solely to the European Union, as there was a great deal of debate concerning the interpretation of general principles of international law. Reference to general principles of law is especially important in international law, where loopholes (i.e. absence of a legal regulation or

[8] Consolidated version of the Treaty on the Functioning of the European Union, O. J. 2012/C 326/01.

[9] See A. Arnull, *The European Union and its Court of Justice*, 2nd ed., Oxford 2006, p. 335.

precedential judicial decision concerning a particular issue) occur much more frequently than in the systems of domestic law.

Reference to general principles of law as the direct source in international law has had a long history. Beginning from 1794 British-American joint arbitration committees, formed on the basis of the so-called Jay Treaty, based their decisions on general principles of law. Later arbitration tribunals ruling on the legal matters followed the same principles, while the States – parties to the dispute never questioned the decisions[10].

We usually refer to Article 38 para. 1(c) of the Statute of the International Court of Justice (ICJ) of 1945. However, it is worth to notice, that although this provision resembles the content of Article 38 para. 3 of the Statute of the Permanent Court of International Justice of 1920, the text adopted in 1945 is more precise. It does not begin, as formerly, from the brief statement "The Court *shall apply*: […] international conventions […], international custom […], the general principles of law recognized by civilized nations […]", but its meaning was developed by using formula "The Court, *whose function is to decide in accordance with international law* such disputes as are submitted to it, shall apply: […] international conventions […], international custom […], the general principles of law recognized by civilized nations […]".

Thus, general principles of law had been identified as an autonomous and direct source of international law, distinct from international agreements and custom[11].

Taking above into account, the question may be posed, where lie the roots of general principles of law, if not in international agreements or in international custom. They are not created by the international court, because according to Article 38 of the ICJ Statute, the general principles are *already recognized by civilized nations*. It seems that the opinion prevails, supported

[10] See N. Q. Dinh, P. Daillier, A. Pellet, *Droit international public*, 4e édition, Paris 1992, p. 336.

[11] See S. E. Nahlik, *Wstęp do nauki prawa międzynarodowego*, Warszawa 1967, p. 96.

by explanations of the Committee of Jurists of 1920, which prepared the draft text of Article 38, that the general principles are derived from domestic legal orders[12]. In the broader sense they belong to all legal systems, but it will suffice that they are recognized by the main legal systems of the world, and not just by one group of States. Similar position took ICJ in the *South West Africa* case[13].

While in principle an international court does not create general principles of law, it decides whether a principle is sufficiently "common" to be considered a general principle and assesses the principle's usefulness in settling a dispute.

Since only the principles common to different national legal orders may become the element of an international legal order, the principles characteristic of a particular country will be rejected, similarly as the principles applied only by "some systems of domestic law"[14].

General principles of law thus understood should be distinguished from these principles of international law which are accepted by all States. As such they are referred to in the Declaration on Principles of International Law in Resolution 2625 (XXV) of the United Nations General Assembly of 24 October 1970, including the obligation of peaceful settlement of international disputes, non-intervention in domestic and foreign matters of other States, the obligation of co-operation between States, sovereign equality of States and fulfilling international obligations in good faith[15].

Another stage may consist in distinguishing increasingly narrower scopes: e.g. general principles of international administrative law, such as

[12] According to the commentary on Article 38, the general principles of law are unwritten legal norms of a wide-ranging character, recognized in the municipal laws of States, and moreover, they must be transposable at the international level, *The Statute of the International Court of Justice. A Commentary,* A. Zimmermann, C. Tomuschat, K. Oellers-Frahm eds, Oxford 2006, p. 768-769.

[13] *South West* Africa, ICJ Reports (1966), p. 47, quoted in: Dinh et al. (note 10), p. 339.

[14] *Ibidem*.

[15] See Czapliński, Wyrozumska (note 1), p. 109.

prohibition of abuse of discretionary powers and of arbitrariness or the obligation to compensate an employee for damages suffered in the workplace even if the fault does not remain with the organisation[16].

Within EU legal order the Court of Justice of the EU may also base its decisions on the general principles of law, even though it has not been as unambiguously authorised to do so as the ICJ is by Article 38 of its Statute.

Reconstruction of the authorisation to apply general principles of law in the EU legal order necessitates a reference to several Treaty provisions. Article 340 TFEU stipulates that in the case of non-contractual liability, the Union, "in accordance with the general principles common to the laws of the Member States", should make good any damage caused by its institutions or by its servants. The Court of Justice of the European Union does not restrict the application of general principles to the area of non-contractual liability, because the interpretation of other Treaty provisions argue for overriding this type of restriction. First of all, Article 19 section 1 TEU, the most important for determining the functions of the Court of Justice of the EU, stipulates that "the Court of Justice of the European Union shall ensure that in the interpretation and application of the Treaties the law is observed". The use of the word "law" without any quantifier proves that what is meant is something more than the provisions of the Treaties themselves or the provisions enacted on their basis. Moreover, among the reasons for invalidating an EU act, Article 263 TFEU mentions an infringement of "the Treaties or of any rule of law relating to their application […]"[17].

Absence of an unambiguous definition of the notion of general principles entails difficulties in their classification and in distinguishing them from the (general) principles of EU law[18].

[16] See M. Zieliński, *Międzynarodowe decyzje administracyjne*, Katowice 2011, pp. 47-48.
[17] See Arnull, (note 9), p. 191.
[18] On this point see T. Dubowski, *Zasada równowagi instytucjonalnej w prawie Unii Europejskiej*, Warszawa 2010, pp. 23-95.

The most convincing seems to be the classification proposed by T. Tridimas. In his widely appreciated monograph he distinguishes two types of general principles. The first are principles which derive from the rule of law. In this category belong, for example, the protection of fundamental rights, equality, proportionality, legal certainty, the protection of legitimate expectations, and the rights of defence. Being typical for public law they, have been derived by the ECJ primarily from the laws of Member States. The second type are systemic principles which underlie the constitutional structure of the European Union and define EU legal order. As such they refer to the relationship between the Union and Member States (primacy, attribution of competences, subsidiarity, the duty of cooperation), to the legal position of individual (direct effect) or to relations between the institutions of the Union (the principle of institutional balance). In addition to those categories there may be distinguished principles of substantive Union law, such as those underlying the fundamental freedoms or specific Union policies (e. g. competition or environmental law)[19].

Existence of the general principle of law as the source of EU law is confirmed by the Court of Justice of the EU if it concludes that it is a principle common to legal orders of the Member States[20]. The CJEU enjoys considerable freedom in this area and is guided not so much by the frequency of occurrence of the principle in national legal orders but by its usefulness for implementing complex EU objectives[21].

General principles of law may be referred to not only as the grounds for an action concerning compensation or invalidation but also when interpreting provisions of the EU law. The principles are binding both for the EU institutions and the Member States when they act within the premises of EU law and especially when they apply it[22].

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[19] See, T. Tridimas, *The General Principles of EU Law*, 2nd ed., Oxford 2007, pp. 4-5.

[20] Joined cases 46/87 and 227/88 *Hoechst* [1989] ECR 2859.

[21] See J. P. Jacqué, *Droit institutionnel de l'Union européenne*, 2e édition, Paris 2003, p. 491.

[22] See G. Isaac, M. Blanquet, *Droit général de l'Union européenne,* 9e édition, Paris 2006, p. 248.

International agreements concluded by the EU are placed below the primary written law and general principles. Lower legal force of the agreements is substantiated by Article 218 section 11 TFEU, which stipulates that concluding an international agreement by the EU which is incompatible with the Treaties is inadmissible unless the agreement envisaged is amended or the Treaties are revised.

A unique feature of the system of EU law is the so-called secondary law, i.e. the acts enacted by EU institutions. In accordance with Article 288 TFEU, to exercise the Union's competences, the institutions adopt provisions, directives and decisions as binding acts pursuant to a normal or special legislative procedure. Even though EU institutions were able to enact acts of this type earlier, only after the Treaty of Lisbon came into force are all the acts adopted pursuant to legislative procedure included within the general notion of legislative acts. The doctrine defines the legal acts enacted by EU institutions as secondary law as distinct from primary law, in principle adopted by the Member States.

In a situation when none of the acts listed by Article 288 TFEU may be used, *sui generis* acts are enacted, which usually are concerned with internal matters.

Recommendations and opinions listed by Article 288 TFUE do not have a binding character and strictly speaking are not sources of law. However, in practice the recommendations issued by the Commission and the Council encourage the adoption of a certain norm of conduct[23].

There are also the so-called complementary sources, which comprise the legal norms established in the agreements concluded between the Member

[23] See V. Constantinesco, R. Kovar, J-P. Jacqué, D. Simon, *Traité instituant la CEE. Commentaire atrticle par article*, Paris 1992, p. 1185. National courts may make a reference to the ECJ for preliminary ruling concerning the validity or interpretation of such acts, case C-322/88 *Grimaldi v Fonds des Maladies Professionnelles* [1989] ECR 4407, quoted in: P. Craig, G. de Burca, *EU Law. Text, Cases and Materials*, 5th ed., Oxford 2011, p. 116.

States concerning the matters remaining within their competences. Such agreements may be considered as "complementary" EU law as long as their object remains within the objectives set in the Treaties.

Following this principle, on the basis of former Article 293 TEEC, Member States concluded a number of conventions in the area of international private law and as a result of which their provisions became the law "common" to the Member States. The initiative to conclude this type of conventions usually remains with the Council and the Commission; the Commission supports the negotiations, the Council and the Commission submit their opinions, the signatures are put by the representatives of the states during the Council's session, while ratification documents are submitted to the Council's general secretariat. To ensure uniform interpretation of the conventions' provisions the CJEU may be authorised to give preliminary rulings[24].

EU law may also be complemented by conventional acts of international character enacted by the representatives of the Member States present in the Council. In this case the procedure is less formalised and instead of the usual ratification procedure the acts are signed by the representatives of the States which are bound by the acts of this type[25].

2. Autonomy of the European Union law with regard to international law

The European Union is the subject of international law and similarly as the Communities earlier has the capacity for concluding international agreements[26]. In accordance with 216 section 2 TFEU, international agreements

[24] See Isaac, Blanquet, (note 22), p. 239.

[25] *Ibidem*, p. 242.

[26] It was explicitly provided for in Article 216 section 1 TFEU: "The Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope".

concluded by the EU are "binding upon the institutions of the Union and on its Member States", which confirms the prevailing concept seen in the case-law adopted earlier by the Court of Justice[27].

As the subject of international law the EU is obliged to abide by its principles[28], with the reservation that application of the principles of international law is reviewed by the Court of Justice in the light of their compliance with EU law. For instance, during a dispute between the Member States neither party may invoke the principle of international law according to which the party aggrieved by the fact of not fulfilling the obligation by the other party may absolve itself of fulfilling its obligations concerning the other. The CJEU decided that the Treaty is not limited to creating reciprocal obligations between the different natural and legal persons to whom it is applicable, but establishes a new legal order. Therefore, except where otherwise expressly provided, the basic concept of the Treaty requires that the Member States are prohibited from taking the law into their own hands[29].

However, the Court of Justice recognised as binding in the EU a principle of international law according to which a State may not deny its citizen the right of admission to and residence in its territory[30]. In one of the recent judicial decisions the CJEU emphasised that a number of provisions of the Vienna Convention on the Law of Treaties[31] reflect the principles of customary international law, which as such are binding for EU institutions and fall within the scope of EU legal order. They include a principle of the general international law stipulating relative effectiveness of Treaties, according to

[27] Case 181/73 *Haegeman* [1974] ECR 449, para 5 and Opinion 1/91 [1991] ECR 6079.

[28] More on his subject Craig, de Burca (note 23) pp. 338-351 and J. Rideau, *Droit institutionnel de l'Union européenne,* 6e édition. Paris 2010, p. 246-247.

[29] Joint cases 90-91/63 *Commission v Luxemburg and Belgium* [1963] ECR 625, summary para 1.

[30] Case 41/74 *Van Duyn* [1974] ECR 1337, see also Simon (note 6), p. 248.

[31] Vienna Convention on the Law of Treaties 1969, United Nations *Treaty Series* vol. 1155, p. 331.

which Treaties may neither harm nor benefit third parties (*pacta tertiis nec nocent nec prosunt*)[32].

The concept of the autonomous character of the EU legal order has been significantly challenged by the issue of fulfilling the obligations resting on the EU Member States resulting from the Charter of the United Nations, by means of the EU legal acts.

As it is commonly known, according to Article 103 of the United Nations Charter, the obligations imposed by the Charter have a primacy over other international commitments. The European Union is not a party to the Charter but according to Article 3 section 5 TEU "[…] it shall contribute to peace, security, […] as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter". The primacy resulting from Article 103 of the Charter also applies to the acts enacted by the UN bodies (such as resolutions of the Security Council adopted on the basis of the Charter's chapter VII) and the norms established in multilateral agreements concluded under the auspices of the UN (e.g. the International Covenant on Civil and Political Rights).

The body authorised to undertake appropriate measures aiming at maintaining international peace and security is the United Nations Security Council. According to Article 25 and Article 41 of the UN Charter the resolutions of the Security Council adopted on the basis of chapter VII are binding. However, it can not be ruled out that their side effects may constitute an infringement of human rights protected within the scope of the regional system (and possibly the *iuris cogentis* norms). The resolutions are addressed to the Member States but sanctions undertaken in order to combat terrorism affect directly individuals suspected of such an activity. Implementing a resolution results in restrictions in exercising the right of ownership, conducting business activity, etc.

[32] Case C-386/08 *Firma Brita*, [2010] ECR I-01289, para 44.

The European Union is in many instances competent to enact appropriate legal acts executing the resolutions of the Security Council, as it has been authorised to do so by its Member States.

The problem became acute when the action was brought before the then Court of First Instance of the European Community for annulment of the Community provisions designed to give effect to sanctions concerning the persons named by the (UN) Committee on Sanctions[33]. Strictly speaking, in the primary EU law only Article 215 section 2 TFEU introduced by the Treaty of Lisbon explicitly authorises the [EU] Council to adopt the so-called restrictive measures concerning physical or legal persons, groups or subjects other than states. However, the [EU] Council decided that such authorisation indirectly resulted from Article 60, Article 301 and Article 308 of the former Treaty establishing the European Community[34].

The Court of First Instance in its judgments in *Kadi*[35] and *Yusuf*[36] held that with particular regard to Article 307 EC and to Article 103 of the Charter of the United Nations, reference to infringements either of fundamental rights as protected by the legal order or of the principles of that legal order cannot affect the validity of a Security Council measure or its effect in the territory of the Community. Therefore, the Court said, the resolutions of the Security Council at issue fall, in principle, outside the ambit of the Court's judicial review and the Court has no authority to call in question, even indirectly, their lawfulness in the light of law.

The French Republic, the Netherlands, the United Kingdom and the Council approved in their statements, the analysis made by the Court of First Instance and endorsed the conclusion drawn therefrom that, so far as concerns

[33] More on this point see Zieliński (note 16), pp. 99-114.

[34] *Ibidem*, p. 117.

[35] Case T-315/01 *Kadi and Al Barakaat v Council and Commission*, 21 September 2005 [2005] ECR II-3649, para 224.

[36] Case T-306/01 *Yusuf and Al. Barakaat v Council and Commission*, 21 September 2005 [2005] ECR II-3533, paras 275, 276.

the internal lawfulness of the contested regulation, the latter, inasmuch as it puts into effect resolutions adopted by the Security Council pursuant to Chapter VII of the Charter of the United Nations, in principle escapes all review by the judicature, even concerning the observance of fundamental rights, and so for that reason enjoys immunity from jurisdiction[37].

Adjudicating on appeal in *Kadi*, the European Court of Justice set aside the judgment of the Court of First Instance. The ECJ asserted that "review by it of the validity of any measure in the light of fundamental rights must be considered to be the expression, in a based on the rule of law, of a constitutional guarantee stemming from the EC Treaty as an autonomous legal system which was not to be prejudiced by an international agreement – namely, in the case in question, the Charter of the United Nations".

In addition, according to settled case-law, fundamental rights form an integral part of the general principles of law whose observance the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international instruments for the protection of human rights on which the Member States have collaborated or to which they are signatories. The ECJ held that the judicature must, in accordance with the powers conferred on it by the EC Treaty, ensure the review, in principle the full review, of the lawfulness of all acts in the light of the fundamental rights forming an internal part of the general principles of law, including review of measure which are designed to give effect to the resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations. The ECJ, did not attach to the principles governing the international legal order under the United Nations such a consequence that any judicial review of the internal lawfulness of the contested regulation in the light of fundamental freedoms is excluded by virtue of the fact that that measure is intended to give effect to

[37] Joined Cases C-402/05 P and 415/05 P, *Kadi and Al Barakaat* 3 September 2008 [2008] ECR I-6351, para 262.

a resolution of the Security Council adopted under Chapter VII of the Charter of the United Nations[38].

Some commentators indicate that this new-found judicial pluralism may have potentially significant implications for the long cultivated image of the EU as an actor which is committed to effective multilateralism[39]. Others warn against building of the "fortress Europe" in the name of the protection of human rights[40].

However, it would be difficult not to agree with AG M. Poiares Maduro that, had there been a genuine and effective mechanism of judicial control by an independent tribunal at the level of the United Nations, then this might have released the EU from the obligation to provide for judicial control of implementing measures that apply within the Union legal order[41]. As no such mechanism currently exists, EU institutions cannot dispense with proper judicial review proceedings when implementing the Security Council resolutions in question within the Union legal order. The claim that a measure is necessary for the maintenance of international peace and security cannot operate so as to silence the general principles of EU law and deprive individuals of effective protection of their fundamental rights[42].

The argument that a more effective, thus "better" system of protection of fundamental rights is, however, a double-edged sword. It may be used by

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38 *Ibidem*, paras 283, 299.

39 See G. de Burca, *The European Court of Justice and the International Legal Order after Kadi,* Jean Monnet Working Paper 01/09, p. 55. In the editorial in European Journal of International Law No 5/2008 a biting remark has been made that ECJ's decision in *Kadi* looks very much like the European cousin of *Medellin*.

40 See C. Tomuschat, *The Kadi Case: What Relationship is there between the Universal Legal Order under the Auspices of the United Nations and the EU Legal Order?,* Yearbook of European Law, Oxford 2009, p. 663.

41 See the opinion of AG M. Poiares Maduro delivered on 16 January 2008 in the case C-402/05P, para 54.

42 See N. Lavranos, *The Impact of the Kadi Judgment on the International Obligations of the EC Member States and the EC*, Yearbook of European Law, Oxford 2009, p. 624. „For once – the Author aptly remarks – European 'value imperialism' may serve a good cause, which is to increase the overall level of fundamental rights protection in the world".

national constitutional courts to challenge the principle of primacy of EU law in the cases when the courts decide that the law of the Member State is more effective in protecting individual rights.

The EU legal order also maintains its autonomous character in the case of international obligations of regional dimension adopted on the basis of multilateral agreements concluded by the Member States. This is illustrated by the CJEU's attitude to the issue of the application of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). Article 6 section 2 TEU stipulates that the European Union "accedes" to the ECHR, but this fact has not been yet accomplished. On the other hand, Article 1 of Protocol (8) attached to the Treaty of Lisbon stipulates that the agreement relating to the accession of the EU to the ECHR "shall make provision for preserving the specific characteristics of the Union and EU law […]". Undoubtedly, a reservation of this type should be interpreted in the light of the CJEU's hitherto case-law concerning the status of the ECHR in the EU, and earlier in the Community legal order[43].

When constructing the concept of fundamental rights, the Court of Justice emphasised that "international agreements aiming at the protection of human rights which were created with the cooperation with the Member States or to which they are signatories" may offer the guidelines for the development of the law. However the CJEU did not equate it with simple and direct reception of the Convention's provisions or the protocols attached to it, but referred to a certain form of fundamental rights, recognised and protected in the legal order, taking into consideration the objectives which the Community (Union) aspires to attain and its general interest[44].

[43] Future accession agreement, predicts Jacqué, will have to preserve the autonomy of Union law and consequently the exclusive competence of the CJEU to ensure compliance with the law in the interpretation and application of Treaties, J-P. Jacqué, *The Accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms*, Common Market Law Review 48/2011, p. 1012.

[44] Case 44/79 *Hauer* [1979] ECR 3727.

In recent years the CJEU's reserve towards the rulings of the Court in Strasbourg seems to wane, allowing for wide consideration of the ECHR's decisions[45].

In the current legal status the Charter of Fundamental Rights of the European Union stipulates in Article 52 section 3 that within the scope in which it includes the rights corresponding to the rights guaranteed in the ECHR, "the meaning and scope of those rights shall be the same as those laid down by the said Convention". In the opinion of some commentators, such a construction permits a thesis that the material content of the Convention has been incorporated in EU law[46]. It appears from the "explanations" relating to the Charter that it has had no adverse effect on the autonomy of EU law and the Court of Justice of the European Union[47].

The ECJ is making efforts in order to prevent EU law from loosing its autonomous character as a result of concluding by the Union (earlier Communities) an international agreement setting up bodies whose powers could conflict with competencies of the Union institutions, the Court of Justice in particular[48].

This view was taken by the ECJ in the Opinion 1/91 relating to the creation of the European Economic Area (EEA). The ECJ stated that to confer on the Court of the European Economic Area jurisdiction in relation to the interpretation and the application of the agreement creating the EEA

[45] In case C-465/07 *Elgafaji* [2009] ECR I-921 para 28 the ECJ held that: "while the fundamental right guaranteed under Article 3 of the ECHR forms part of the general principles of Community law, observance of which is ensured by the Court, and while the case-law of the European Court of Human Rights is taken into consideration in interpreting the scope of that right in the Community legal order, it is, however, Article 15(b) of the Directive which corresponds, in essence, to Article 3 of the ECHR. By contrast, Article 15(c) of the Directive is a provision, the content of which is different from that of Article 3 of the ECHR, and the interpretation of which must, therefore, be carried out independently, although with due regard for fundamental rights, as they are guaranteed under the ECHR".

[46] See Jacqué (note 43), p. 1000.

[47] Explanation on Article 52 para 3, *Explanations relating to the Charter of Fundamental Rights*, OJ 2007/C 303/02.

[48] See Craig, de Burca (note 23), p. 339.

is incompatible with Community law, since it is likely to adversely affect the allocation of responsibilities defined in the Treaties and the autonomy of the Community legal order, respect for which must be assured exclusively by the ECJ. The fact, added the ECJ, that the provisions of the agreement relating to the creation of the EEA and the corresponding Community provisions are identically worded, does not mean that they must be necessarily interpreted identically. An international Treaty must be interpreted not only on the basis of its wording, but also in the light of its objectives[49].

Similarly in the Opinion 1/92 the ECJ has made it clear that the Joint Committee may not disregard the binding nature of decisions of the ECJ within the Community legal order, if the autonomy of this order is to be preserved[50].

In the Opinion 1/00 on the proposed agreement between the European Community and non-Member States on the establishment of a European Common Aviation Area (ECAE) the ECJ has underlined that the preservation of the autonomy of the Community legal order requires, that the essential character of the powers of the Community and its institutions as conceived in the Treaty remain unaltered. The autonomy of the Community legal order would not be safeguarded if mechanisms set up in the proposed agreement for ensuring uniform interpretation of the rules of the ECAA Agreement and the resolution of disputes have the effect of binding the Community and its institutions, in the exercise of their internal powers, to a particular interpretation of the rules of Community law referred to in the ECAA Agreement[51].

Also in the judgment of 30 May 2006 *Commission v Ireland* the ECJ pointed out that an international agreement cannot affect the allocation of responsibilities defined in the Treaties and, consequently, the autonomy of the Community legal system, compliance with which the Court ensures under Article 220 EC (Article 19 TEU). That exclusive jurisdiction of the Court

[49] Opinion 1/91 of 14 December 1991, [1991] ECR I-06079, paras 35, 36.
[50] Opinion 1/92 of 10 April 1992, [1992] ECR I-0282, paras 29, 30.
[51] Opinion 1/00 of 18 April 2002, [2002] ECR I-3493, para 27.

is confirmed by Article 292 EC (Article 344 TFEU), by which Member States undertake not to submit a dispute concerning the interpretation or application of the EC Treaty to any method of settlement other than those provided for therein. In consequence the ECJ declared that institution and pursuit of proceedings by Ireland against the United Kingdom before the Arbitral Tribunal under the United Nations Convention on the Law of the Sea, constituted a manifest risk that the jurisdictional order laid down in the Treaties and, consequently, the autonomy of the Community legal system might be adversely affected. As a result, the ECJ concluded, Ireland has failed to fulfill its obligations under the Community law[52].

3. Autonomy of the European Union law with regard to the internal law of the Member States

The Treaties establishing the basis of the European Union, similarly as the founding Treaties of the Communities, do not determine the relationship between EU law and domestic law of the Member States. Revisions of the Treaties intensified and broadened the subjective and objective scope of the integration, but did not address this loophole, delegating the task to the practice.

The practice in question has been primarily defined by the case-law of the Court of Justice of the European Union, which evidently perceived the danger in the conviction still quite common in the 1960s that the law enacted on the basis of international agreements is simply international law.

The problem of the status of Community law already emerged when the Treaty establishing the European Coal and Steel Community (TECSC) was applied. One of the legal advisors of the High Authority argued that the obligation of loyal cooperation imposed on the Member States by Article 82 of the TECSC and the very essence of the preliminary ruling procedure stipulated by Article 42 of the TECSC are in fact tantamount to the autonomous

[52] Case C- 459/03 *Commission v Ireland*, [2006] ECR I-4535, paras 123, 154.

character of the status of Community law, independent of the Member States, and, consequently, its primacy over the national law[53].

According to R. Barents, despite the fact that the case-law of the ECJ concerned with the application of the TECSC does not explicitly refer to the notion of autonomy, the court recognised the fact that general decisions of the High Authority were normative acts, whose legislative character had its source in public authority. Thus, even then the TECSC was not regarded as an "ordinary" international agreement[54], while constitutional law could not constitute an independent point of reference in interpreting the law[55]. In its opinion on the effects of law on the domestic order of the Member States, the ECJ accorded primacy to the obligations resulting from the TECSC (and the attached protocol) over the national law[56].

For the ECJ it has become self-evident that the recourse to the national constitutional rules or concepts determining the domestic effect of international law would differentiate the application of the Union law in Member States' legal orders, rendering impossible the attainment of the integration aims[57].

This line of jurisprudence, unequivocally confirming the autonomy of Community law was announced in *van Gend en Loos* in 1963, where the ECJ made an effort to find the convincing argument justifying the thesis that: "independently of the legislation of Member States, Community law not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty but also by reason of obligations which the Treaty imposes in a clearly defined way

[53] This argument was put forward by G. Bebr in the late fifties, see R. Barents, *The Autonomy of Community Law*, The Hague 2004, p. 241.

[54] See remarks about case 8/55 *Belgische Steenkolenfederatie v High Authority* [1955-56] ECR 215, 239, Barents (note 53), p. 241.

[55] Case 1/58 *Stork v High Authority* [1958-59] ECR 49, 66.

[56] Case 6/60 *Humblet v Belgium* [1960] ECR 1129, 1188.

[57] Opinion 1/91 [1991] ECR I-6079 para 35.

upon individuals as well as upon the Member States and upon the institutions of the Community"[58].

The ECJ substantiated this statement, arguing that: "The EEC constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only the Member States but also their nationals"[59].

The separation of the effects of the founding Treaties from the "original intent" of the States which concluded them, was by no means obvious for the governments of those States. In their observations submitted in *Van Gend en Loos* the Dutch and Belgian governments argued that the reference made by the Dutch court did not call for an interpretation of the EEC Treaty but concerned the application of Netherlands custom legislation in the context of the constitutional law of the Netherlands, which was outside the jurisdiction of the ECJ. In particular, the governments claimed, the ECJ had no jurisdiction to decide whether the provisions of the EEC Treaty prevailed over Netherlands legislation or over other agreements entered into by the Netherlands and incorporated into Dutch national law. For governments, mentioned above, the solution of that kind of a problem fell within the exclusive jurisdiction of national courts, notwithstanding an action brought against the State in accordance with (former) Articles 169 and 170 of the EEC Treaty (an action against Member States for failure to fulfil obligations)[60].

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[58] Case 26/62 *Van Gend en Loos* [1963] ECR 1.

[59] *Ibidem*.

[60] The point was, as governments claimed, that the EEC Treaty was an international agreement which merely created mutual obligations between the contracting states. According to text of the *Van Gend en Loos* judgment in French: « [...] le gouvernement néerlandais fait valoir que le traité C.E.E. ne diffère pas d'un traité international classique quant aux conditions requises pour qu'il puisse avoir un effet direct. Les éléments décisifs en cette matière sont l'intention des parties et les termes du traité. Or, la question de savoir si, en vertu du droit constitutionnel néerlandais, l'article 12 est directement applicable, ressortit à l'interprétation du droit néerlandais et n'entre pas dans les compétences de la Cour de justice. [...] Le gouvernement allemand pour sa part, sans en faire formellement une

In *Van Gend en Loos* the ECJ referred still to a new legal order of international law, but one year later in the 1964 *Costa v ENEL* case the ECJ took a more explicit stand on his matter, stating that: "By contrast with ordinary international Treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply"[61]. A thesis that the founding Treaties have created their own legal system became a point of departure for formulating and advancing the principle of the autonomy of Community/EU law vis-a-vis both international and domestic law.

The effects of applying this principle were primarily concerned with the manner of resolving conflict between Community/EU law and the norms of national law. From the very beginning the CJEU has consistently rejected the possibility of determining the status of autonomous EU order by constitutional or other norms enacted by Member States. It also does not consider this law as "external" in terms of a dualistic concept, as EU law is integrated with the Member States' legal system, which obliges their courts to apply EU law.

The CJEU assumes that EU law would not be able to exist as a binding normative system if it was deprived of it effectiveness by national norms; moreover, integration would become unattainable if the law was not uniformly applied by the Member States. If courts or other national bodies could decide as to the validity of the EU legal norms, its effects would vary in individual states and, consequently, it would not be possible to attain the integration objectives.

Yet, autonomy is understood as a reciprocal relationship. Therefore EU courts can not invalidate the norms of the domestic law and EU institutions can not enact law where national legislative bodies have retained exclusive competences.

exception d'irrecevabilité, soutient que l'article 12 ne fonde qu'une obligation internationale à charge des États... », p. 11-13.

[61] Case 6/64 *Flaminio Costa v ENEL* [1964] ECR 585, 593.

At present the general Treaty provision which constitutes the grounds for the Court of Justice of the EU to infer the obligation of appropriate application of EU law is Article 4 section 3 TEU, which introduces the principle of sincere cooperation, according to which "the Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union".

EU courts ensure "respect for the law in interpretation and implementation of the Treaties" and have at their disposal instruments protecting both the very principle of EU law autonomy and its consequences, because on the basis of Article 263 TFEU they review the legality of EU acts and pursuant to the procedure of preliminary rulings they decide, among others, on the validity of such acts in accordance with Article 267 TFEU.

Those courts have had such competences before, which enabled the Court of Justice of the EU to enhance the principle of autonomy and the effectiveness of EU law with the help of the concept of *communauté de droit* with its key principles: primacy of EU law over the national law, the direct effect of EU law, consistent interpretation and the principle of state's liability for damage to individuals caused by a breach of EU law for which a state is responsible.

Chapter II

Resolving conflicts between the European Union law and domestic law of the Member States in the light of the case-law of the Court of Justice of the European Union

1. Justification for the primacy of the European Union law

The Treaties establishing the basis of the European Union do not determine the principles for the procedures of resolving conflicts between the rules of EU law and the norms of domestic law of individual Member States. This function was probably to be performed by Article I-6 of the Treaty establishing a Constitution for Europe[62] (the so-called Constitutional Treaty), which never came into force. The article stipulates that "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"[63].

As aptly remarked by S. Biernat, when the Treaty of Lisbon came into force, new, comprehensive Treaty basis were created and the principle of primacy should be inferred from the Treaties as generalisation of their various provisions[64].

In the current legal status the principle of primacy is mentioned outside the Treaties, i.e. in Declaration no. 17 annexed to the Final Act of the Conference

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[62] Treaty establishing a Constitution for Europe, OJ C 310 16/12/ 2004.

[63] It may be interesting to cite in this context the supremacy clause of the US Constitution which provides in Article VI (clause 2) that: "Constitution, and the Laws of the United States […] shall be the supreme Law of the Land […]; and the judges in every State shall be bound thereby […]".

[64] See S. Biernat, *Zasada pierwszeństwa prawa unijnego po Traktacie z Lizbony*, Gdańskie Studia Prawnicze, Tom XXV, 2011, p. 58.

of the Representatives of the Governments of the Member States[65], which goes as follows:

"The Conference recalls that, in accordance with well settled case-law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law.

The Conference has also decided to attach as an Annex to this Final Act the Opinion of the Council Legal Service on the primacy of EC law as set out in 11197/07 (JUR 260):

It results from the case-law of the Court of Justice that primacy of EC law is a cornerstone principle of Community law. According to the Court, this principle is inherent to the specific nature of the European Community. At the time of the first judgment of this established case law (Costa/ENEL, 15 July 1964, Case 6/6411) there was no mention of primacy in the Treaty. It is still the case today. The fact that the principle of primacy will not be included in the future Treaty shall not in any way change the existence of the principle and the existing case-law of the Court of Justice".

Inevitably, a question arises concerning the consequences resulting from Declaration no. 17. In general terms the declaration's legal character must be assessed in the light of the provisions of the Treaty which it is attached to. According to Article 51 of the Treaty on European Union "the Protocols and Annexes to the Treaties shall form an integral part thereof". *A contrario* interpretation leads to the conclusion that declarations included in the concluding acts of intergovernmental conferences are not a part of Treaties establishing the basis of the EU and do not have the legal force which equals that of the Treaties in question.

However, the conclusion above can not result in an assumption that the declarations should be considered as acts of no importance; especially the

[65] Declaration 17 concerning primacy annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, 13 December 2007.

declarations recognised by all Member States are taken into consideration (e.g. by the Court of Justice of the European Union) when interpreting the provisions of the primary law, because they express the intentions of the parties involved[66]. Opinions of the Council Legal Service are considered as acts of internal character, but the opinions included in the Declaration may have an external effect so far as they are part of the Declaration in question[67].

From the perspective of international law a Declaration recognised by all the states – parties to a Treaty participating in a conference – expresses their common stance on a given matter. It may thus be considered an element of the context of the Treaty of Lisbon as stipulated by Article 31 section 2 of the Vienna Convention on the Law of Treaties (VCLT) of 1969[68] and may be of assistance in interpreting the Treaties establishing the basis of the EU.

The elements of the context defined in the VCLT may be divided into a "close" context, which is constituted by a Treaty as such (all its integral constituent parts) and a remote context, comprising agreements and document which remain outside the immediate scope of the Treaty[69].

Article 31 section 2 VCLT formulates three requirements which, if met jointly, become a prerequisite for recognition of the existing agreements (and documents) as the element of the context sought after: the agreements (documents) were made between all the parties, they relate to the Treaty and were made in connection with the conclusion of the Treaty. The elements of the "remote" ("external") context, i.e. the "agreements" and "documents" (Article 31 section 2 point (a) and (b) VCLT), in accordance with the context's

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66 See P. Manin, *Les Communautés européennes. L'Union européenne. Droit institutionnel*, 3e édition, Paris 1997, p. 288. CJEU accepts the fact that EU institutions take into account the standpoint of the Member States expressed in declarations, see Isaac, Blanquet (note 22), p. 189.

67 See L.S. Rossi, *How Fundamental are Fundamental Principles? Primacy and Fundamental Rights after Lisbon*, Yearbook of European Law Oxford 2008, p. 76.

68 Vienna Convention (note 31).

69 See A. Kozłowski, *Interpretacja traktatu międzynarodowego w świetle jego kontekstu*, Warszawa 2002, p. 83.

fundamental objective, only serve the purpose of interpreting the Treaty's provisions and the resulting norms[70].

It is important to note here that after the Treaty of Lisbon came into force, the content of the Treaties establishing the basis of the European Union changed to the extent that it significantly affects the interpretation of the principle of primacy mentioned in Declaration no. 17. It enhances the thesis represented primarily by national constitutional courts that the principle of primacy can not have an absolute character and is restricted by the constitutions of the Member States.

Strictly speaking, the content of Declaration no. 17 changes nothing in the current normative status concerning the matter of primacy of application of the EU law over the national law and binding for all Member States. In its Lisbon decision French Constitutional Council totally ignored Declaration no. 17. There was no need to reconsider the question yet again, because when deciding on the compliance of the Treaty establishing a Constitution for Europe (TECE) with the French Constitution, the Constitutional Council already took a stand on that matter. It stated that it does not result from Declaration no. 1 attached to the TECE that Article I-6 confers on the principle of primacy a different scope than it has had hitherto[71].

The German Federal Constitutional Court (FCC) in its (*Lisbon*) judgment of 30 June 2009[72] stated that the FCC's reserve competence is not affected by Declaration no. 17 which is annexed to the Final Act of he Treaty of Lisbon. As far as the question of primacy is concerned the FCC held that the primacy of application first of all requires the direct applicability of European law in the Member States and the Treaty does not provide any sovereign powers to the

[70] *Ibidem*, p. 128; see also M. E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, Leiden – Boston 2009, p. 430.

[71] Decision no 2007-560 DC of 20 December 2007.

[72] *Lisbon Case*, 2BvE 2/08, BVerfG, English translation (preliminary version), Judgment of the Second Senate of 30 June 2009, http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html.

Union that would permit supranational "access" to the Members States' legal orders. The foundation and the limit of the applicability of European Union law in the Federal Republic of Germany is the order to apply the law which is contained in the [German] Act Approving the Treaty of Lisbon. In particular it means that the primacy of Union law only applies by virtue of the order to apply the law issued by the Act approving the Treaties and this order can only be given within the limits of the current German constitutional law. That is why, for the FCC it is insignificant whether the primacy of application is provided for in the Treaties themselves or in Declaration 17[73].

The ECJ draws a conclusion from the principle of sincere cooperation set out in Article 10 EC [Article 4 section 3 TEU], that any national court, hearing a case within its jurisdiction, has, as an organ of a Member State, the obligation "to apply the directly applicable law of the Union and to protect the rights which the latter confers upon individuals, disapplying any provision of national law which may be to the contrary […]"[74].

2. The effects of primacy of application of the European Union law

For absence of explicit Treaty provisions the principles determining the application of the European Union law in the legal orders of the Member States have been formed by the case-law of the Court of Justice of the EU from the beginning of functioning of European Communities.

The CJEU was forced to adopt a stance on this matter in its preliminary rulings answering the preliminary references from the Member States as they were the first to have been confronted with the situations when the same matter was subject to contradictory provisions – those of the EU law and national

[73] See *Lisbon Case* (note 72), paras 341-343.

[74] Case C-409/06 *Winner Wetten*, 8 September 2010, [2010] ECR I-8015, para 55. The ECJ relied here on the concept of the precedence of Union law elaborated among others in *Simmenthal.*

legal order. The matter to be decided on, first of all, was whether Community law maintains the character of international law and, consequently, is subject to national principles of application in the internal order.

The fact that the European Communities and the European Union were established on the basis of international Treaties might suggest that the principles of application of Treaties should be derived from the rules of international law and appropriate constitutional provisions of the States which concluded the Treaties. This view would be supported by the fact that the first States – founders of the Communities in 1951 and 1957 – resorted to classic procedures when concluding the Treaties.

However, as it was mentioned above, the Court of Justice ruled in *Costa v. ENEL* that in contrast to ordinary international agreements the Treaty establishing the EEC has created its own legal order, which became an integral part of the legal systems of the Member States after it came into force and which their courts are bound to apply. The CJEU argued that the binding character of Community law can not differ in individual Member States depending on their subsequent national legislation, which causes that "the law stemming from the Treaty, an independent source of law, could not because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question".

The basis for this reasoning was the argument that the Member States "have limited their sovereign rights and have thus created a body of law which binds both their nationals and themselves"[75].

This concept, revolutionary at the time, had to be specified more precisely because it raised doubts, especially on the part of judges of national courts, both in the context of their obligation to apply the constitution and statutes and their relations with national constitutional courts.

[75] Case 6/64 *Costa v ENEL* (note 61), Summary, para 3.

The precedence of the Community law before provisions of national constitutions was explicitly confirmed by the ECJ in the *Internationale Handelsgesellschaft* case. According to this judgment: "[…] the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter either fundamental rights as formulated by the constitution of that State or the principles of a national constitutional structure"[76].

The most complex and far reaching consequences of the principle of primacy of EU law were emphasized by the ECJ in the *Simmenthal* judgment. Conclusions established in this judgment are constantly referred to by the ECJ whenever doubts occur as to how to resolve the conflict between the European Union law and provisions of domestic law. Responding to the preliminary reference submitted by an Italian court the ECJ stated that: "a national court which is called upon, within limits of its jurisdiction, to apply provisions of Community law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or to await the prior setting aside of such provisions by legislative or other constitutional means"[77].

Setting aside of the national provision being in conflict with the EU law does not mean that the national court invalidates or removes this provision from the domestic legal system. Such interpretation of the principle of primacy, suggested by the Commission, was rejected in the *IN.CO.GE* judgment. The ECJ explained that it cannot be inferred from the *Simmenthal* judgment that the incompatibility with Community law of a subsequently adopted rule of national law has the effect of rendering that rule of national law non-existent. The national court is only obliged to disapply that rule, provided that this obligation does not restrict the power of the competent

[76] Case 11/70 *Internationale Handelsgesellschaf GmbH* [1970] ECR 1125, para 3.
[77] Case 106/77 *Simmenthal* [1978] ECR 629, para 24.

national courts to apply, from among the various procedures available under national law, those which are appropriate for protecting the individual rights conferred by Community law[78]. However, if the national constitutional court has jurisdiction to annul national legislation for unconstitutionality, it should also have jurisdiction to annul such legislation for violation of EU law[79].

The ECJ did not confine itself to indicating the main effect of the principle of primacy but in order to dispel doubts raised in connection with its content, it decided to ponder all consequences stemming from this principle.

One of the most fundamental decisions laying down the rules of solving conflicts between EU law and national constitutional rules was the preliminary ruling in the *Factortame* case. The reason for the preliminary question submitted by the House of Lords was the dispute concerning the extent of the power of national courts to grant interim relief where rights claimed under Community (now EU) law are at issue.

The laws of the United Kingdom (the *Merchant Shipping Act 1988* which entered into force on 1 December 1988) were challenged as incompatible with the prohibition of discrimination based on nationality. The House of Lords found that the claims that the appellants would suffer irreparable damage if the interim relief which they sought were not granted were well-grounded, providing that it was successfully established in the main proceedings that provisions of the *Merchant Shipping Act 1988* were inconsistent with the principle of non-discrimination. However, under national law, as the House of Lords held, the grant of interim relief was precluded by the old common-law rule (in fact, equivalent to constitutional rule in continental systems) that an interim injunction may not be granted against the Crown (that is government).

[78] Joined cases C-10/97 to C-22/97 IN.CO.GE.'90 et al. [1998] ECR I-6307, para 21.

[79] See M. Claes, *The National Courts' Mandate in the European Constitution*, Hart Publishing, Oxford and Portland 2006, p. 110.

The ECJ did not accept this argument and stated that "[…] the full effectiveness of Community law would be just as much impaired if a rule of national law could prevent a court seized of a dispute governed by Community law from granting interim relief in order to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed under Community law. It follows that a court which in those circumstances would grant interim relief, if it were not for a rule of national law, is obliged to set aside that rule. That interpretation is reinforced by the system established by Article 177 of the EEC Treaty whose effectiveness would be impaired if a national court, having stayed proceedings pending the reply by the Court of Justice to the question referred to it for a preliminary ruling, were not able to grant interim relief until it delivered its judgment following the reply given by the Court of Justice. Consequently […] Community law must be interpreted as meaning that a national court which, in a case before it concerning Community law, considers that the sole obstacle which precludes it from granting interim relief is a rule of national law must set aside that rule"[80].

In the British scholarly literature the opinion was expressed that this judgment signified "the quiet death of Parliamentary sovereignty"[81]. The author of this opinion inferred from the logic of the British constitutional system that if the House of Lords had followed the doctrine of Parliamentary sovereignty, it would have applied the *Merchant Shipping Act* of 1988 as subsequent to the *European Communities Act* of 1972, incorporating Community law to the UK legal order[82].

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[80] Case C-213/89 *Factortame Ltd and Others* [1990] ECR I-2433, paras 21-23.

[81] See N. W. Barber, *The afterlife of Parliamentary sovereignty*, International Journal of Constitutional Law, No 1, January 2011, p. 149.

[82] In the report submitted by the House of Commons European Scrutiny Committee we find the postulate that the expression „Parliamentary sovereignty" should be replaced with the term „legislative supremacy of Parliament". The authors of the report argue that: "Dicey's Law of the Constitution made famous the phrase 'the sovereignty of Parliament', but a more exact term for the legal doctrine is 'legislative supremacy', whereby the power of the Queen-in-Parliament to legislate is subject to no legal limitations, and the courts have no power to review the validity of Acts of Parliament. This doctrine is always considered

In the context of the principle of primacy there may emerge a problem of competence of constitutional courts for adjudicating on constitutional compliance of the provisions instead of which a judge should apply a EU provision. Since, as it was stated in the case of *Simmenthal*, it is not necessary for a national judge to request or await the prior setting aside conflicting provisions of national legislation by legislative or other constitutional means, a judge *a quo* may apply the principle of primacy of the EU law independently of the stance adopted by the constitutional court.

The CJEU's competence to adjudicate in the procedure of preliminary rulings on the interpretation of Treaties and acts adopted by EU institutions, bodies or (organisational) units as well as the validity of these acts prompted the Court to formulate the thesis that even if there is a rule of national law whereby a court sitting at first instance is bound on points of law by the rulings of a superior court, the former can not be deprived of the right to submit a request for a preliminary ruling to the Court of Justice[83]. The courts of lower instance must remain unrestricted in exercising their right to submit requests to the Court of Justice, especially when the opinion issued by the higher instance might result in a ruling contradicting the EU law[84].

This stance of the CJEU affects the manner of applying national provisions concerning the procedure of reviewing the constitutionality of national law when the adjudicating court is in essence convinced that a national provision in a given case does not only contradict the EU law but also the national constitution.

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to be subject to the limitation that Parliament is unable to bind its successors [...]. An advantage of using the term supremacy rather than sovereignty is that it enables the supremacy of EU law to be balanced against the supremacy of national law", see House of Commons European Scrutiny Committee, *The EU Bill and Parliamentary sovereignty*, Tenth Report of Session 2010-11, HC 633-1, 7 December 2010, p. 10.

[83] Case C-210/06 *Cartesio* [2008] ECR I-9641 para 94.

[84] Case C-378/08 *ERG* [2010] ECR I-01919 para 32.

This issue was in fact raised by the Advocate General M. Poiares Maduro in his opinion presented in the case of *Arcelor*, when he asked: "how to protect the Constitution within the domestic legal order without breaching the primordial requirement of the primacy of Community law?"[85].

When phrasing his opinion, the Advocate General assumed that the concurrent claims to legal sovereignty are a manifestation of the legal pluralism, outlining an original character of the process of European integration. The key provision preventing the conflict is Article 6 TEU, which expresses the respect due to national constitutional values, in particular anchoring the constitutional foundations of the EU in the constitutional principles common to the Member States. Thus, according to the Advocate General, constitutions are safe despite the fact that they can not be used as a legal point of reference to assess the congruity of EU acts with the national law. In P. Maduro's opinion, this congruity may be ensured only systemically, with the use of the mechanisms stipulated by the Treaties. While national courts are obliged to guarantee the observance of basic legal values in the scope in which their constitutions are applied, the Court of Justice is responsible for the same within the scope of the EU legal order. The appropriate tool for conducting the CJEU's dialogue with national courts, and especially with the courts responsible for authentic interpretation of national constitutions, is the reference for a preliminary ruling[86].

The problem is, however, complex, also in its procedural aspect, because the convergence of the object of provision by Union and constitutional law is more probable after the Treaty of Lisbon came into force than ever before. The normative grounds for this convergence are primarily the fundamental rights. On the one hand, the Charter of Fundamental Rights of the European Union has according to Article 6 section 1 TEU the same legal value as the Treaties, while the requirements connected with the protection

[85] Case C-127/07 *Arcelor* [2008] ECR I-09895, opinion of AG M. P. Maduro, para. 15.
[86] *Ibidem,* para 17.

of fundamental rights are binding for the Member States in each instance when they apply EU law[87]. On the other hand, national constitutions in principle include catalogues of fundamental rights and determine the procedures guaranteeing their protection, while within the scope in which the Charter recognises fundamental rights resulting from common constitutional traditions of the Member States these rights are according to Article 52 section 4 of the Charter "interpreted in accordance with these traditions".

Fundamental rights are also present in the area regulated by the European Convention for the Protection of Human Rights and Fundamental Freedoms ratified by all Member States, while at the same time fundamental rights guaranteed in the Convention constitute a part of the EU law as general principles of law (Article 6 section 2 TEU). Moreover, within the scope in which the Charter of Fundamental Rights of the EU includes the rights which correspond to the rights guaranteed in the Convention "the meaning and scope of those rights shall be the same as those laid down by the said Convention" (Article 52 section 3 of the Charter). On the basis of Article 6 section 2 TEU the European Union undertook to accede to the Convention.

This situation will certainly favour the "dialogue" of judges in the European legal area[88] but even now it causes doubts and tensions of jurisdictional character. The doubts reverberate with the CJEU in the form of preliminary references, forcing it to create constructions which should respect the status of the courts engaged in the "dialogue" without weakening the effectiveness of instruments serving the purpose of protecting individual rights.

[87] Case C-339/10 *Asparuhov Estov and others,* [2010] I-11465 Order of the Court para 13.

[88] See comment T. Moonen, *Joined Cases C-188/10 and C-189/10, Proceedings Against Aziz Melki and Selim Abdeli or How the Last Shall Be the First: the Court of Justice Rules on Priority Constitutional Law Review*, The Columbia Journal of European Law, Vol. 17 Winter 2010/2011. No 1, p. 132.

In the *Mecanarte* judgment of 1991[89] the ECJ, continuing previous case-law initiated by the *Rheinmühlen- Düsseldorf*[90] judgment of 1974, confirmed its principled view in this regard, subsequently developed in the *Melki/Abdeli* case of 2010.

In *Mecanarte*, the Portuguese *Tribunal Fiscal Aduaneiro* inquired whether, having found the national provisions at issue to be not only contrary to Community (now EU) law but also unconstitutional, it had jurisdiction to seek a preliminary ruling. The *Tribunal* justified its doubts by the fact that by virtue of Article 280(3) of the Portuguese Constitution[91], a finding of unconstitutionality of a rule of domestic law is subject to an appeal to the Portuguese Constitutional Court and consequently only that court may seek a preliminary ruling in such cases. The *Tribunal* also suggested that a reference for a preliminary ruling might be superfluous since any defects of a national provision can be remedied within the national legal system, e.g. making use of the procedure of review of constitutionality.

The ECJ cleared up those doubts stating that a national court which in a case concerning Community (now EU) law declares a provision of law unconstitutional does not lose the right or escape the obligation under Article 177 of the EEC Treaty (now Article 267 TFEU) to refer questions to the Court of Justice on the interpretation or validity of Community (EU) law by reason of the fact that such a declaration is subject to a mandatory reference to the constitutional court[92]. The ECJ explained that the effectiveness of Community (EU) law would be in jeopardy if the existence of an

[89] Case C-348/89 *Mecanarte,* [1991] ECR I-3277.

[90] Case C-146/73 *Rheinmühlen-Düsseldorf* [1974] ECR 139. The ECJ stated in this judgment that the existence of a rule of national law whereby a court is bound on points of law by the ruling of a superior court cannot on this ground alone deprive inferior courts of their power to refer question to the Court of Justice for the preliminary ruling.

[91] Article 280 (3) of the Constitution of the Portuguese Republic of 2 April 1976 provides for that in the event that the rule, the application of which has been refused, is contained in an international agreement, legislation or a regulatory order, the Public Prosecutors' Office shall obligatorily appeal to the Constitutional Court.

[92] *Mecanarte* (note 89), para 46.

obligation to refer a matter to a constitutional court could prevent a national court hearing a case governed by Community (EU) law from exercising the right to refer to the Court of Justice questions concerning the interpretation or validity of Community (EU) law in order to enable it to decide whether or not a provision of domestic law was compatible with Community (EU) law[93].

Opportunity to confirm and to specify more precisely this position, occurred when French *Cour de cassation* requested in April 2010 a preliminary ruling in connection with the proceedings conducted in France against A. Melki and S. Abdeli. *Cour de cassation* decided to refer the question to the ECJ because of the particular situation which took place in France after the introduction to the French constitution, the institution of "Priority Questions on Constitutionality" (*Question Prioritaire de Constitutionnalité – QPC*)[94]. According to Article 61-1 of the French Constitution, "[if] in the course of proceedings before court or tribunal, it is claimed that a legislative provision prejudices the rights and freedoms which the Constitution guarantees, the matter may be brought before the *Conseil Constitutionnel* [Constitutional Council] further to a reference from the *Conseil d'Etat* [Council of State] or the *Cour de Cassation* [Court of Cassation], which shall rule within a fixed period". And Article 62 stipulates that "[A] provision declared

[93] *Ibidem*, para 45.

[94] More on this point see e.g. J. Dutheil de la Rochère, *La question prioritaire de constitutionnalité et le droit européen. La porte étroite*, Revue trimestrielle de droit européen 46 (3) juillet-septembre 2010, p. 577 *ff*; D. Sarmiento, *L'arrêt Melki: esquisse d'un dialogue des juges constitutionnels et européen sur le toile de fond française*, TTD eur. 46 (3), juill. – sept. 2010, p. 588 *ff*; M. Jarosz, *Pierwszeństwo kontroli konstytucyjności a prawo UE – uwagi na tle wyroku TS w sprawach Melki i Abdeli*, Europejski Przegląd Sądowy sierpień 2011, p. 24 *ff*; K. Kubuj, *Europeizacja konstytucji w świetle zmian Konstytucji V Republiki Francuskiej*, [in:] *Europeizacja konstytucji państw Unii Europejskiej*, K. Kubuj i J. Wawrzyniak eds., Warszawa 2011, p. 109. In the documents of the Constitutional Council the term *question prioritaire de constitutionnalité* is translated as "a priority preliminary ruling on the issue of constitutionality", see the homepage www.conseil-constitutionnel.fr.

unconstitutional on the basis of article 61-1 shall be repealed as of the publication of the said decision of the Constitutional Council or as of a subsequent date determined by said decision. The Constitutional Council shall determine the conditions and the limits according to which the effects produced by the provision shall be liable to challenge. No appeal shall lie from the decisions of the Constitutional Council. They shall be binding on public authorities and on all administrative authorities and all courts"[95].

The procedure is such that if a case of constitutionality is raised by a party, it is a court's priority to investigate whether three conditions justifying submitting the question are met: the questioned legal provision is applicable in the case, its compliance with the constitution has not yet been investigated and the raised issue is serious in its character. When satisfied that the conditions above have been met, the judge does not submit the question directly to the Constitutional Council but to the Court of Cassation (in the case of common courts of law) or to the Council of State (administrative courts). The judge does not decide on the case until the ruling of the Constitutional Council or the decision refusing to submit the question to the Council arrive. The Court of Cassation or the Council of State decide within three months on submitting the question to the Council, taking into consideration the three criteria mentioned above. They do not consider whether the questioned provision is compliant with Treaty obligations of France. The Constitutional Council, also within three months, decides whether the questioned provision is compliant with the constitution. The Council's decision is effective *erga omnes*. If the Council decides that the provision is unconstitutional, it loses its validity on the day when the Council's decision is published or on the date quoted in the ruling. If no infringement of constitutionality is found, the judge submitting

[95] Constitution of 4 October 1958, as amended by Constitutional Law No 2008-724 of 23 July 2008 on the modernisation of the institutions of the Fifth Republic (JORF of 24 July 2008, p. 11890), referred to in joined cases C-188/10 and C-189/10, *Proceedings Against Aziz Melki and Selim Abdeli* [2010] ECR I-5669, para 11.

the question retains the right to investigate whether the provision is compliant with Treaty obligations[96].

In accordance with the stance of the Court of Cassation, which was identical with the arguments quoted by the complainers, the obligations of France resulting from the Treaty of Lisbon have, in the light of Article 88-1 of the French Constitution, a constitutional character[97]. Article 88-1 states that "the Republic shall participate in the European Union constituted by States which have freely chosen to exercise some of their powers in common by virtue of the Treaty on European Union and of the Treaty on the Functioning of the European Union, as they result from the Treaty signed in Lisbon on 13 December, 2007".

If the complainers claim that the provisions of the code of penal procedure prejudice the freedom of movement for persons guaranteed by the Treaty of Lisbon, this – according to the Court of Cassation – raises the issue of the infringement of both the EU law and the constitution by the provisions mentioned above[98].

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[96] See M. Bossuyt, W. Verrijdt, *The Full Effects of EU Law and of Constitutional Review in Belgium and France after Melki Judgment,* European Constitutional Law Review, no 3/2011, p. 361-362 and p. 388.

[97] Let us remind that in its Decision of 10 June 2004 no 2004-496 DC French Constitutional Council held that the obligation to transpose EC (now EU) secondary law (first of all directives) into national law is the result of a constitutional obligation stemming from Article 88-1 of the Constitution and not an autonomous Community (EU) legal order. Such obligation should be performed unless there is an express contradiction with a precise provision of the Constitution; more on this point see J. Dutheil de la Rochère, *French Conseil Constitutionnel: Recent Developments* [in:] *Europe's...* (note 4), p. 23.

[98] Melki and Abdeli claimed that Article 78-2, fourth paragraph, of the Code of Criminal Procedure is contrary to the Constitution, given that the French Republic's commitments resulting from the Treaty of Lisbon have constitutional value in the light of Article 88-1 of the Constitution, and that that provision of the Code of Criminal Procedure, in so far as it authorises border controls at the borders with other Member States, is contrary to the principle of freedom of movement for persons set out in Article 67(2) TFEU, which provides that the European Union is to ensure the absence of internal border controls for persons, Case *Melki* (note 95), para 19.

The Court of Cassation did not submit the priority question on constitutionality to the Constitutional Council but chose to refer a question to the Court of Justice of the EU for a preliminary ruling (through an accelerated procedure) as it had doubts as to the compliance of the whole construction of the priority question on constitutionality with EU law and especially with the institution of preliminary rulings. Because during their inquiry into the question of compliance with the constitution, which raises the issue of non-compliance of a legislation in question with EU law, the Constitutional Council also investigates this legislation's compliance with EU law, the consequence of applying the procedure of priority question on constitutionality may be the fact that the court ruling on the substance, and which also submits the priority question on constitutionality, would not be able to decide on the matter of compliance of this legislation with EU law nor would it be able to submit a preliminary reference concerning this act to the Court of Justice prior to submitting the question.

Moreover, if the Constitutional Council were to hold that the legislation in question is consistent with EU law, the court ruling on the substance would also not be able, after the Constitutional Council issued a decision binding on all judicial authorities, to submit a preliminary reference to the Court of Justice. The situation would be similar if the plea alleging that a legislative provision is unconstitutional was raised during proceedings before the Council of State or the Court of Cassation[99].

[99] Case *Melki* (note 95), para 46. The reasoning of the Court of Cassation was criticized in the legal doctrine because the Court too extensively interpreted Article 88-1 of the Constitution as if constitutional review absorbed all treaty review, while the Constitutional Council is stressing that its judgments do not limit the ordinary and administrative judges' competence to make France's international obligations prevail, see Bossuyt (note 96), p. 374. However, opinion is also expressed that the Cassation Court sought to clarify an important problem of compliance of the priority question on constitutionality with the principle of immediate application (*application immediate*) of the EU law, see Dutheil de la Rochère, *La question…* (note 94), p. 579.

The ECJ pointed out that under that interpretation, the national legislation at issue in the main proceedings would result in the ordinary and administrative national courts being prevented, both before submitting a question on constitutionality and, as the case may be, after the decision of the Constitutional Council on that question, from exercising their right or fulfilling their obligation, provided for in Article 267 TFEU, to refer questions to the Court of Justice for a preliminary ruling. Certainly, as clearly follows from the principles set out in the ECJ case-law, reminded in the *Melki/Abdeli* judgment, article 267 TFEU precludes such an understanding of the institution of the priority questions on constitutionality[100].

However, another interpretation of the priority questions on constitutionality is also possible. It was submitted by the French government during the proceedings before the ECJ. The Government invoked the decision of the Constitutional Council 2010-605 DC of 12 May 2010 and the decision of the Council of State (*Conseil d'Etat*) no 312305 of 14 May 2010. Both decisions were adopted subsequent to the submission of the orders for reference by the Court of Cassation (*Cour de cassation*) to the Court of Justice. In the light of those decisions, the French legislation at issue does not alter or affect the role and the jurisdiction of the national courts in applying EU law, which means that national legislation does not collide with the EU law.

First of all, it is not for the Constitutional Council, but for the ordinary and administrative courts to examine whether legislation is consistent with EU law, to apply EU law themselves on the basis of their own assessment, and to refer questions to the Court of Justice for a preliminary ruling at the same time as, or subsequent to, the submission of a priority question on constitutionality. It is excluded then that the purpose of a priority question on constitutionality would be to refer to the Constitutional Council a question on the compatibility of national legislation with EU law.

[100] Case *Melki* (note 95), para 47.

The French government also contended that, according to the national legislation at issue in the main proceedings, the national court can either rule, under certain conditions, on the substance of the case without awaiting the decision of the Court of Cassation, the Council of State or the Constitutional Council on the priority question on constitutionality, or take the interim or protective measures necessary to ensure the immediate protection of the rights granted to individuals under EU law.

Apparently the ECJ decided to follow this suggestion and reiterated that it is for the national court to interpret the national law which it has to apply, as far as is at all possible, in a manner which accords with the requirements of EU law. That is why, the ECJ stated, in the light of the aforementioned decisions of the Constitutional Council and the Council of State, such an interpretation of the national provisions which introduced the mechanism for review of constitutionality at issue in the main proceedings cannot be ruled out[101].

At the same time the ECJ emphasized that in order to ensure the primacy of EU law, the functioning of that system of cooperation requires the national court to be free to refer to the Court of Justice for a preliminary ruling any question that it considers necessary, at whatever stage of the proceedings it considers appropriate, even at the end of an interlocutory procedure for the review of constitutionality.

Besides, as the ECJ added, in so far as national law lays down an obligation to initiate an interlocutory procedure for the review of constitutionality, which would prevent the national court from immediately disapplying a national legislative provision which it considers to be contrary to EU law, the functioning of the system established by Article 267 TFEU requires that that court be free, first, to adopt any measure necessary to ensure the provisional judicial protection of the rights conferred under the European Union's legal order and, second, to disapply, at the end of such an interlocutory procedure, that national legislative provision if that court holds it to be contrary to EU law[102].

[101] *Ibidem*, para 50.
[102] *Ibidem*, paras 52-53.

The ECJ commented also upon the situation where an interlocutory procedure for the review of constitutionality would involve a national law which merely transposes the mandatory provisions of a European Union directive. As a result of such procedure, the exclusive competence of the ECJ to declare the EU legal act invalid could be infringed upon. This could happen if the priority nature of an interlocutory procedure for the review of constitutionality lead to the repeal of such national law on the basis that that law is contrary to the national constitution. In this instance the ECJ Court could, in practice, be denied the possibility, at the request of the courts ruling on the substance of cases in the Member State concerned, of reviewing the validity of that directive in relation to the same grounds relating to the requirements of primary law, and in particular the rights recognised by the Charter of Fundamental Rights of the European Union, to which Article 6 TEU accords the same legal value as that accorded to the Treaties.

The ECJ pointed out, that in order to avoid such a consequence it is necessary to accept the view that it is not the question of the constitutionality of a national law, the content of which merely transposes the mandatory provisions of a European Union directive, that takes priority but the question of whether the directive is valid, in the light of the obligation to transpose that directive.

It means that before the interlocutory review of the constitutionality of a law – the content of which merely transposes the mandatory provisions of a European Union directive – can be carried out in relation to the same grounds which cast doubt on the validity of the directive, national courts against whose decisions there is no judicial remedy under national law are, as a rule, required – under the third paragraph of Article 267 TFEU – to refer to the Court of Justice a question on the validity of that directive and, thereafter, to draw the appropriate conclusions resulting from the preliminary ruling given by the Court, unless the court which initiates the interlocutory

review of constitutionality has itself referred that question to the Court pursuant to the second paragraph of Article 267 TFEU[103].

If by national courts against whose decisions there is no judicial remedy under national law we mean also constitutional courts, the fulfilling of the obligation to refer to the ECJ the preliminary question on the validity of the directive, may turn out to be problematic if on a national constitutional court a strict time-limit is imposed as far as the ruling on constitutionality of law is concerned. For example, the French *Constitutional Council* stated in the decision 2006-540 DC of 27 July 2006 that insofar as it is required to give a ruling before the promulgation of the statute in the time (that is one month as a rule) allotted by Article 61 of the Constitution, the *Conseil* cannot request a preliminary ruling from the European Court of Justice[104].

The ECJ considered the solution proposed in *Melki/Abdeli* to be a condition of compatibility of the institution of a priority question on constitutionality with the EU law and held that imposing a strict time-limit on the examination by the national courts cannot prevent the reference for a preliminary ruling on the validity of the directive in question.

In consequence the ECJ drew up three conditions of the compatibility of the institution of a priority question on constitutionality with the EU law.

First, the priority nature of an interlocutory procedure for the review of the constitutionality of national laws cannot prevent – both before the submission of a question on constitutionality to the national court responsible for reviewing the constitutionality of laws and, as the case may be, after the decision of that court on that question – all the other national courts or tribunals from exercising their right or fulfilling their obligation to refer questions to the Court of Justice for a preliminary ruling.

[103] *Ibidem*, paras 55-56.
[104] Decision no 2006-540 DC of 27 July 2006, considérant 20.

Second, national courts or tribunals remain free to adopt any measure necessary to ensure provisional judicial protection of the rights conferred under the European Union legal order.

Third, national courts or tribunals remain free to disapply, at the end of such an interlocutory procedure, the national legislative provision at issue if they consider it to be contrary to EU law[105].

If those requirements are not met, a national court, acting in accordance with the principle of primacy of EU law, will have to refuse of its own motion to apply national provisions regarding the institution of a priority question on constitutionality, in so as far as they are contrary to Article 267 TFUE.

Consequences of the *Melki/Abdeli* judgment are not limited to the French legal order. In Belgium too, such an interlocutory procedure was introduced to the national legal system and became subject of the question referred to the ECJ in the *Chartry* case[106].

In accordance with Article 26 of the Belgian Special Law on the Constitutional Court (formerly Arbitration Court) in the version amended by the Special Law of 12 July 2009, the Constitutional Court gives a preliminary ruling on matters relating to, among others, the infringement by a statute, a decree or another rule of fundamental rights protected by the constitution. If a question of this kind is raised before a Belgian court, the court is obliged to request the Constitutional Court to give a ruling on that question.

When it is alleged before a court of law that a statute, a decree or another norm determined in the constitution infringes a fundamental right guaranteed in a wholly or partly similar manner by a constitutional provision and by a provision of EU or international law, a Belgian court is first of all obliged to refer the question of compatibility with the constitution to the Constitutional Court for a preliminary ruling.

[105] Case *Melki* (note 95), para 57.
[106] Case C-457/09 *Chartry*, [2011] ECR I-00819.

According to Article 28 of the Special Law mentioned above, the court of law that referred the question, and any other court of law called upon to adjudicate in the same case, should comply with the judgment given by the Constitutional Court in the settlement of the case in which the questions determined in Article 26 were referred[107].

The Belgian court was of an opinion that the provision of the Programme Law of 9 July 2004, having regard to its retroactive character constitutes the legislature's intervention in the pending judicial proceedings, which, considering the special situation of the complainer, is not justified by a fair balance between the requirements of general interest and the protection of fundamental rights of the interested party. The national court considered also that Article 26 of the Special Law of 6 January 1989 prevents drawing conclusions from such a constatation. In principle this provision obliges the court examining the case that a given norm infringes a fundamental right guaranteed both by a provision of the Belgian constitution and by a provision EU law or international law first to refer the constitutionality of the rule in question to the Constitutional Court for a preliminary ruling.

Obviously, on the basis of the Special Law mentioned above, this obligation would not in this case be binding on that national court, because the Constitutional Court has twice confirmed the compliance of the questioned Programme Law of 9 July 2004 with the Belgian constitution[108]. As a result, these decisions of the Constitutional Court prevent a national court from conducting a specific review, tailored to the circumstances of a case under consideration.

[107] *Ibidem,* paras 3 and 4.

[108] Indeed, by judgments of 7 December 2005 and 1 February 2006, the Constitutional Court (*Cour d'arbitrage*) held that Article 49 of the Programme Law of 9 July 2004 has retroactive effect prejudicing the judicial safeguards enjoyed by citizens, but that it is justified by exceptional circumstances and dictated by overriding reasons relating to the public interest, quoted in *Chartry, ibidem,* para 12.

The essence of the circumstances is that a national court finding that the Belgian legislation deprives a citizen taxpayer of the effective judicial protection guaranteed by Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, as incorporated into Community law, is obliged to turn first to the Constitutional Court without a possibility to ensure immediately the direct effect of Community law in the proceedings before it or to carry out the review of compatibility with the ECHR when the Constitutional Court has recognised the compatibility of the national legislation with the fundamental rights guaranteed in the Belgian constitution.

In this case a Belgian court requested the Court of Justice to give a preliminary ruling in order to establish whether it is contrary to Article 267 TFEU (ex Article 234 EC) for legislation of a Member State to require the courts of that Member State to refer a question beforehand on whether a provision of national law is consistent with a fundamental right guaranteed by the Constitution when, at the same time, the conflict of that provision with a fundamental right guaranteed in full or in part by Union law is at issue, on the one hand, and to bind the courts of that Member State with regard to the findings of law made by the national court responsible for reviewing the constitutionality of laws, on the other[109].

In *Chartry* the ECJ examined the reference for a preliminary ruling made by the Belgian court and found that it did not have jurisdiction to answer the question, because the order for reference did not contain any specific information enabling the subject-matter of the dispute in the main proceedings to be considered to be connected with EU law[110].

Nevertheless the ECJ suggested in its order that if it had jurisdiction to give preliminary ruling, the *Melki/Abdeli* pattern of reasoning would have been followed. The ECJ reminded in this context that Article 267 TFUE (ex Article 234 EC) "precludes Member State legislation which establishes an

[109] *Ibidem*, para 18.
[110] *Ibidem*, para 25.

interlocutory procedure for the review of the constitutionality of national laws, in so far as the priority nature of that procedure prevents – both before the submission of a question on constitutionality to the national court responsible for reviewing the constitutionality of laws and, as the case may be, after the decision of that court on that question – all the other national courts or tribunals from exercising their right or fulfilling their obligation to refer questions to the Court of Justice for a preliminary ruling"[111].

This *obiter dictum* suggests more general conclusion that an interlocutory procedure for the review of the constitutionality of national laws should meet the requirements established in the *Melki/Abdeli* judgment if this procedure is to be consistent with EU law.

Another problem which national courts found unclear is the question whether it is possible not to comply with the principle of the primacy of EU law over conflicting provisions of national law, if the constitutional court holding the provisions of national legislation to be unconstitutional, defers the date on which the provisions at issue (which national court finds also contrary to EU law) will lose their binding force. In consequence, unconstitutional and at the same time contrary to EU law provisions could still be applied for certain period of time. This problem was addressed by the ECJ in *Filipiak*[112] and *Winner Wetten*[113] cases respectively.

The first of those cases concerned the decision of the Polish constitutional Court to defer the date on which the provisions of the Polish law held to be unconstitutional would lose all binding force, to a date other than that of publication of the judgment. The ECJ, however, held in *Filipiak* that "in a situation such as that of the applicant in the main proceedings, the deferral by the *Trybunał Konstytucyjny* of the date on which the provisions at issue will lose their binding force does not prevent the referring court from respecting

[111] *Ibidem*, para 20.
[112] Case C-314/08 *Filipiak*, [2009] ECR I- 11049.
[113] *Winner Wetten* (note 74).

the principle of the primacy of Community law and from declining to apply those provisions in the proceedings before it, if the court holds those provisions to be contrary to Community law".

Generalizing this statement the ECJ emphasized that "the primacy of Community law obliges the national court to apply Community law and to refuse to apply the conflicting provisions of national law, irrespective of the judgment of the national constitutional court which has deferred the date on which those provisions, held to be unconstitutional, are to lose their binding force"[114].

In *Winner Wetten*, the German *Bundesverfassungsgericht*, after having established that the legislation for the public monopoly on bets on sporting competitions existing in the Land of Bavaria infringed the Basic Law, maintained that legislation in force during a transitional period designed to allow it to be brought into conformity with the Basic Law.

Answering the preliminary reference from the German administrative court the ECJ, making analogy with *Filipiak*, held that such a circumstance cannot prevent a national court, which finds that the same legislation infringes directly effective provisions of Union law, from deciding, in accordance with principle of the primacy of Union law, not to apply that legislation in the context of the dispute before it. Rules of national law, even of a constitutional rank – emphasized the ECJ, referring to the *Internationale Handelsgesellschaft* landmark decision – cannot be allowed to undermine the unity and effectiveness of Union law.

The ECJ took the opportunity to remind that "it follows from the settled case-law that any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of Union 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 which might prevent directly

[114] *Filipiak* (note 112), paras 84 and 85.

applicable Union rules from having full force and effect are incompatible with the requirements which are the very essence of Union law"[115].

In consequence, as the ECJ concluded, "by reason of the primacy of directly-applicable Union law, national legislation concerning a public monopoly on bets on sporting competitions which, according to the findings of a national court, comprises restrictions that are incompatible with the freedom of establishment and the freedom to provide services, because those restrictions do not contribute to limiting betting activities in a consistent and systematic manner, cannot continue to apply during a transitional period"[116].

The ECJ backed up the primacy of EU law by the principle of effective judicial protection which, being a general principle of Community law, has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and has also been reaffirmed by Article 47 of the Charter of fundamental rights of the European Union.

Under those principles, as well as under the principle of sincere cooperation laid down in Article 4 para. 3 TUE (ex Article 10 EC), it is for the Member States to ensure judicial protection of an individual's rights under EU law[117]. As B. Bertrand notes, the EU Treaty after Lisbon reform, strengthens this line of reasoning because according to Article 19 para. 1 TUE, Member States should provide remedies sufficient to ensure effective legal protection in the field covered by Union law[118].

In the light of the above, an individual has a right to expect that a national judge hearing a dispute has a full capacity to assess the question of conformity of domestic provisions with EU law and to draw necessary conclusions from

[115] *Winner Wetten* (note 74), para 59.
[116] *Ibidem*, para 69.
[117] Case C-432/05 *Unibet* [2007] ECR I-02271, paras 37 and 38.
[118] See B. Bertrand, *La jurisprudence Simmenthal dans la force de l'âge. Vers une complétude des competences du juge national?*, Revue française de droit administrative, mars-avril 2011, p. 368.

this assessment, without being limited in this capacity by provisions of national law[119].

That interpretation is shared by the ECJ, as illustrates the *Kücükdeveci* judgment[120]. The reference for the preliminary ruling was submitted by the German *Landesarbeitsgericht* which asked the ECJ whether an obligation is imposed the national court, hearing proceedings between individuals, refer to the ECJ for a preliminary ruling on the interpretation of European Union law, before it can disapply a national provision which it considers to be contrary to that law, if under national law, the referring court cannot decline to apply a national provision in force unless that provision has first been declared unconstitutional by the *Bundesverfassungsgericht* (Federal Constitutional Court)[121].

The ECJ based its judgment on the assumption that it is for the national court hearing a case to provide the legal protection which individuals derive from the rules of European Union law and to ensure that those rules are fully effective. If necessary, the national court must decline to apply national provisions incompatible with European Union law without, however, being either compelled to make or prevented from making a reference to the ECJ for a preliminary ruling before doing so[122].

As regards national rules governing constitutional review, the ECJ emphasized that the optional nature of a reference to the ECJ is not affected by the conditions of national law under which a court may disapply a national provision which it considers to be contrary to the constitution[123].

The ruling prompts the conclusion that a national judge obliged to ensure full effectiveness of EU law refuses to apply a national provision contradicting

[119] See A. Barav, *La plénitude de compétence du juge national en sa qualité de juge communautaire*, [in:] *L'Europe et le droit. Mélanges en l'honneur de Jean Boulouis*, Dalloz 1992, p. 15.

[120] Case C-555/07 *Kücükdeveci* [2010] ECR I-00365.

[121] *Ibidem*, para 52.

[122] *Ibidem*, para 53.

[123] *Ibidem*, para 55.

this law, thus not observing a possible decision of the constitutional court recognising the compatibility of such a provision with the constitution[124].

The stance adopted by the CJEU in the cases discussed above may thus be interpreted in such a way that the principle of ensuring full effectiveness of EU law results from the very nature of this law, while apart from Article 267 TFEU there is no Treaty provision which might be indicated as the source of this principle. The principle means that each loophole in broad discretionary powers concerning the right to submit a preliminary reference to the CJEU may be overridden by a national judge, who should refuse to apply the contradicting provisions of the national law, including the provisions obliging him or her to observe the ruling of the court of higher instance. The same principle obliges a national judge not to apply the provision which requires that he or she requests permission from the constitutional court before examining whether a national norm infringes EU law even if it constitutes only a temporary obstacle in ensuring full effectiveness of EU law. A national judge also can not be obliged to observe a ruling of the constitutional court concerning restriction of his or her right to submit a preliminary reference to the CJEU. This construction is justified by the need to guarantee national judges the access to the CJEU in the preliminary ruling procedure, among others, to examine the validity of the EU secondary legislation[125].

The matter consists not only in specific "emancipation" of a national judge within the area of national law, but also in enhancing the judge's position when deciding in a dispute concerning the relations with courts of higher instance. This weakening of the authority of higher national courts is considered one of the consequences of the principle of primacy[126].

The Court of Justice constructed the concept of primacy of EU law in relation to these provisions which may be attributed with the direct effect. It

[124] Cf Bossuyt (note 96), p. 385.
[125] *Ibidem*, p. 375-376.
[126] See Bertrand (note 118), p. 368.

repeatedly emphasised this in such important rulings as *Simmenthal*. This is the most evident situation in which the choice between the conflicting rules is made. In principle, however, primacy concerns the whole EU law. If a provision does not have a direct effect, national courts are obliged to interpret a national norm in accordance with EU law, as far as it is possible.

Chapter III

Jurisdiction of constitutional courts over the European Union law

1. Preventive review of constitutionality of the EU primary law

The original Treaties establishing European Communities were concluded by six States – Belgium, France, The Netherlands, Luxemburg, Germany (The Federal Republic of) and Italy – as international agreements. Ratification clauses included in the Treaties made their coming into force conditional on their ratification by all Member States, in accordance with their respective constitutional requirements[127]. At the same time no possibility of formulating reservations was provided for, which most of the doctrine considered as tantamount to their inadmissibility[128].

Thus each State had to apply the procedure required by the national law. Some had doubts as to the compliance of the new international obligations with constitutional provisions[129], but preventive review of constitutionality was never carried out.

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[127] Article 99 - Treaty establishing the European Coal and Steel Community (1951), Article 247 - Treaty establishing the European Economic Community (1957), Article 204 - Treaty establishing the European Atomic Energy Community (1957).

[128] Treaty concerning accession of Denmark, Ireland, Norway and the United Kingdom (1972) could, according to its Article 2, enter into force notwithstanding the lack of ratification in one of the States, which actually happened (Norway did not ratify it), see *Traité instituant…* (note 23), p. 1589-1590.

[129] E.g. in Belgium the ratification of the Treaty establishing the European Coal and Steel Community was challenged as infringing the principle of national sovereignty. Belgian Council of State, in the decision of 15 January 1953 concerning another Treaty, i. e. European Defense Community Treaty held that „dans la mesure où un traité international transfère à des autorités supranationales l'exercice de prérogatives essentielles reconnues aux diverses autorités nationales, ce traité est contraire à la norme constitutionnelle",

Doctrinal commentaries criticised, e.g. Belgium for the fact that Article 25 bis (now replaced by Article 34), which on 20 July 1970, that is *ex post*, legalised Belgian membership in the Communities on the constitutional level, was not introduced into the Belgian constitution binding at the time of ratification of the founding Treaties[130]. A different procedure was adopted in Luxemburg, where the debate preceding the signing of the Treaty of Rome resulted in the decision to create constitutional basis for vesting the exercise of certain powers in institutions governed by international law and consequently Article 49 bis was added to the constitution in 1956[131].

The revision clause included in Article 48 of the Treaty on European Union signed on 7 February 1992 in Maastricht also made the adoption of amendments in the Treaties conditional on meeting the constitutional requirements, which caused certain problems. Let us remember that only after the second referendum carried out in Denmark did the Maastricht Treaty come into force, similarly as the second referendum in Ireland enabled the Treaty of Nice to come into force, preparing, among others, the structures of the EU for the enlargement.

Consequently, a question arose whether the requirement of the agreement by all Member States for the revision of the Treaties may be sustained when their number has increased as a result of several enlargements.

The misgivings, justified as it later turned out, intensified in connection with the fact of subjecting the Treaty establishing a Constitution for Europe to the process of ratification. Conclusions from the session of the European

cited in: J. Barcz, *Stosowanie prawa Wspólnot zachodnioeuropejskich w państwach członkowskich*, Warszawa 1991, p. 6 footnote 6.

[130] Article 34 of the Belgian Constitution provides that the exercising of specific powers can be assigned by a treaty or by law to the institutions of public international law. This provision not only "legalised" *a posteriori* the ratification of the founding Treaties but also served later as a legal basis for the ratification by Belgium of the Single European Act (1986) and the Treaty on the European Union (1992), see Rideau (note 28), p. 1162.

[131] According to Article 49*bis* of the Constitution of Luxemburg currently in force "the exercise of the powers reserved by the Constitution to legislature, executive and judiciary may be temporarily vested by treaty in institutions governed by international law".

Council in Copenhagen in December 2002 stated explicitly that the rigorous requirements to date would be sustained and the adoption of a future "Constitutional Treaty" would be decided by all the States which would be the EU members on 1 May 2004.

This perspective caused heated debate, which included such statements as: "it is inadmissible that the work of such fundamental significance for the future of Europe should be consigned to the 'dustbin of history' just because a parliament of one country or another will change their mind at the very last minute or because the Labour Party will be back in power in Malta"[132].

Attempts were made at constructing "reserve" procedures, which would enable accommodating the lack of agreement of a small number of States, but as it was correctly remarked by B. de Witte, the EU Treaties remain international agreements as in the meaning of the Vienna Convention on the Law of Treaties of 1969. According to its Article 41 section 1b, two or more parties to an international agreement may decide to modify the treaty obligations as between themselves alone and without any participation of other parties to the agreement, but it is only possible when the modification is not prohibited by the treaty and at the same time it does not affect the enjoyment by the other parties of their rights under the treaty. This exceptional solution could by no means be applied in the situation when the conclusion of the Treaty establishing a Constitution for Europe would result in the revision of the founding Treaties and therefore the draft of the "Constitutional" Treaty adopted the "classic" procedure of ratification[133].

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[132] F. Riccardi, Bulletin Quotidien Europe, 8329 – 28/10/2002 & 29/10/2002: «qu'il est impensable que le projet essentiel de l'Europe future, et deux années de négociations, puissent finir dans les «poubelles de l'histoire» parce qu'à la dernière minute le Parlement d'un petit pays changerait d'avis ou parce que le parti travailliste reviendrait au pouvoir à Malte et retirerait la demande d'adhésion (comme il le fait régulièrement)», quoted by B. De Witte, *The European Constitutional Treaty: towards an Exit Strategy for Recalcitrant Member States?,* Maastricht Journal of European and Comparative Law, 2003, vol. 10 no 1, p. 4.

[133] *Ibidem,* p. 6.

The Treaty of Lisbon was to come into force on 1 January 2009 after submitting the ratification documents by all Member States but yet again the negative outcome of the referendum in Ireland postponed the conclusion of the ratification procedure. Finally, after the second – this time concluded positively – referendum in Ireland and clarification of issues of compliance of the Treaty with the provisions of the constitution in Germany and the Czech Republic it came into force on 1 December 2009.

Currently, in accordance with Article 48 section 1 TEU, the Treaties may be amended following an ordinary revision procedure or simplified revision procedures.

When the ordinary procedure is applied, after the proposal for the amendment has gone through the stages stipulated by Article 48 sections 2-4, "the amendments shall enter into force after being ratified by all the Member States in accordance with their respective constitutional requirements".

The simplified procedure stipulated by Article 48 section 6 TEU may be applied to revise the provisions of part three of the TFEU, relating to the internal policies and action of the EU. The amendment comes into force following the unanimous decision of the European Council. The Council's decision can not increase the competences conferred onto the EU in the Treaties and does not enter into force „until it is approved by the Member States in accordance with their respective constitutional requirements".

Accession into the European Union takes place on the basis of the international agreement (accession Treaty). According to Article 49 TEU "[…] the conditions of admission and the adjustments to the Treaties on which the Union is founded, which such admission entails, shall be the subject of an agreement between the Member States and the applicant State. This agreement shall be submitted for ratification by all the contracting States in accordance with their respective constitutional requirements".

The ratification clauses quoted above unequivocally set a condition that amendments to the Treaties come into force after all respective constitutional

requirements are met. It thus depends on the constitutional provisions whether the Treaty is subject to the procedure of reviewing the compliance with the constitution before it is concluded[134].

Such an option is provided for by the constitutions of Poland (Article 133 section 2), Bulgaria (Article 149 section 4), the Czech Republic (Article 87 section 2 in connection with Article 10a and Article 49), France (Article 54), Spain (Article 95 section 2), Portugal (Article 279 sections 1 and 4), Romania (Article 147 section 3), Slovakia (Article 125a) and Slovenia (Article 160).

Beside the direct review of constitutionality of an international agreement, some States provide for the option of referring to the general procedure of reviewing the compliance of legal acts with the constitution, applying it to the act authorising the ratification of an agreement. Despite the fact that the object of the review is the act expressing consent for the ratification, the substantive point of reference in the process of reviewing constitutionality is the content of the very international agreement[135].

In Poland the President may, before signing a bill, refer it to the Constitutional Tribunal for an adjudication upon its conformity to the Constitution. The President can not refuse to sign a bill which has been judged by the Constitutional Tribunal as conforming to the Constitution (art 122 section 3 of the Constitution). In France the President and other authorised bodies may refer Acts of Parliament to the Constitutional Council before their promulgation (Article 61 paragraph 2 of the Constitution of 1958). In Hungary this may be done by the National Assembly or the President (Article 6 sections 2 and 6 of the Constitution of 2011).

[134] Usually the compatibility of material provisions of an international agreement with the constitution is at issue but the procedure of ratification may also be reviewed by the constitutional court, see P. M. Eisemann, *La conclusion des traités,* [in:] *L'intégration du droit international et communautaire dans l'ordre juridique national. Étude de la pratique en Europe*, P. M. Eisemann ed., Kluwer Law International, 1996, p. 5-7.

[135] See J. A. Frowein, K. Oellers-Frahm, *Allemagne,* [in:] *L'intégration..., ibidem,* p. 72.

In Germany the Federal Constitutional Court does not adjudicate directly on the constitutionality of international agreements, but it may examine whether a federal legal act expressing consent for ratification of a treaty by the President is compliant with the Constitution. Until the verdict is passed, the president suspends the ratification procedure, even though he or she is not formally obliged to do so[136]. Ratification on the basis of the consent expressed in the act is tantamount to incorporating the treaty's norms into the system of national law and as a result the treaty may be applied directly[137].

In the Republic of Ireland the preventive review of constitutionality of international agreements is not explicitly provided for in the Constitution, but proceedings on the compatibility of domestic legal acts with the Constitution may be carried out before the *High Court* or the *Supreme Court*, which occupy the highest place in the judicial system of the Republic[138]. Two ways are possible. The first may be used when the *Dáil* passes legislation harmonizing domestic law with provisions of an international agreement before its ratification. President of the Republic may, under Article 26.1 of the Constitution, after consultation with the Council of State, refer this legislation to the Supreme Court for a decision on the question as to whether such legislation is repugnant to the Constitution. The second way is open for an individual citizen, who may start the judicial proceedings in order to block the ratification. This solution was accepted by Irish courts which confirmed to have an implied power to review an international agreement for constitutionality prior to ratification at the instance of an individual citizen[139].

In the United Kingdom courts may not interfere with the power of the Crown to negotiate, sign and ratify international agreements, just as – in

[136] See Claes (note 79), p. 468.
[137] See Czapliński, Wyrozumska, (note 1), p. 528-529.
[138] See Rideau (note 28), p. 1288.
[139] See C. R. Symmons [in:] *L'intégration…*, (note 134), p. 320. The Author refers in particular to *Crotty v. An Taioseach* [1987] I.L.R.M. 400, 467.

accordance with the principle of parliamentary sovereignty – they may not test constitutionality of the parliamentary legislation[140].

The French Constitutional Council is the most active in exercising direct, preventive review of constitutionality of the EU Treaties. In accordance with Article 54 of the Constitution of 1958 the proceedings may be initiated by the President, Prime Minister, president of either house of the Parliament, sixty deputies or sixty senators. If the Council decides that an international agreement contains a clause contrary to the constitution, authorisation to ratify or approve the agreement can not be given before the constitution is amended.

The procedure has been repeatedly applied after 1970[141], and beginning with signing the Maastricht Treaty on 7 February 1992, each consecutive revision of the Treaty primary law has been subject to preventive review by the Constitutional Council[142]. As a result constitutional provisions have been amended if the obligations resulting from a Treaty infringed the "essential conditions of the national sovereignty" (*les conditions essentielles de la souveraineté nationale*).

The procedure of ratification of the Maastricht Treaty in France is an interesting example of an attempt at a "cascade" preventive review of constitutionality of an international agreement. In accordance with the provisions of Article 54 of the Constitution, the President of the Republic submitted a motion to the Constitutional Council to examine whether the ratification of the Treaty should be preceded by an amendment of the Constitution. The

[140] See more on this point Claes (note 79), p. 488-489. Nevertheless an opinion is expressed that the judicial control of conformity of the parliamentary legislation with the European Union law would be advisable, see E. Popławska, *Zmiany ustrojowe w związku z członkostwem we Wspólnocie Europejskiej i Unii Europejskiej. Zjednoczone Królestwo Wielkiej Brytanii i Irlandii Północnej*, [in:] *Europeizacja*…, (note 94), p. 325.

[141] See E. Decaux, P. M. Eisemann, V. Goesel – Le Bihan, B. Stern, *France* [in:] *L'intégration*... (note 134), p. 245-247.

[142] More on his point see Dutheil de la Rochère, *French Conseil Constitutionnel* (note 97), p. 17.

Council indicated three such cases[143], and consequently the Constitution was amended respectively. On 1 July 1992 the President ordered that a referendum should take place on 20 September 1992. However, in the meantime a group of 70 senators took advantage of the new right conferred onto the deputies and senators by the provision of Article 54 of the Constitution, as amended on 23 June 1992 and submitted a motion to re-examine the Treaty, this time in the light of constitutional provisions introduced after the Council's previous decision. Logically, it can not be ruled out that the revision of the Constitution might have appeared insufficient or that it would have resulted in a new instance of incompliance with the Treaty. In its ruling Maastricht II of 2 September 1992[144] the Constitutional Council did not find any non-compliance and the Treaty could be ratified. Yet, on 20 September 1992 a group of 63 deputies, this time on the basis of Article 61 of the Constitution, referred to the Constitutional Council against the act (*loi référendaire*) authorising the President to ratify the Treaty. However, the Council, consistently with its previous stance, declined jurisdiction to review the constitutionality of an act adopted by means of referendum and directly expressing the sovereign's will[145]. Yet, if the matter had been concerned with the authorisation expressed in the act passed by the Parliament, another review of constitutionality in the preventive procedure would have been possible before the Treaty was finally ratified[146].

In the Czech Republic the constitutional act of 18 October 2001 added section 2 to Article 87 of the Constitution, according to which before the ratification of an international agreement as stipulated by Article 10a[147] and

[143] Decision no 92-308 DC (*Traité de Maastricht I*).
[144] Decision no 92-312 DC (*Traité de Maastricht II*).
[145] Decision no 92-313 DC (*Traité de Maastricht III*).
[146] See Claes (note 79) p. 470-471.
[147] According to Article 10a (1): "An international agreement may provide for a transfer of certain powers of bodies of the Czech Republic to an international organization or institution. (2). An approval of the Parliament is required to ratify an international agreement

Article 9[148], the Constitutional Court decides on its compliance with the constitutional order. Until the Constitutional Court pronounces its decision, the agreement can not be ratified. Review of compliance of such an agreement with the Czech constitutional order after its ratification is inadmissible[149].

Examining an agreement before its ratification, the Court, as it was emphasised by its president P. Rychtelsky, has at its disposal "gigantic" competence and should act cautiously and objectively, which is supported by § 71e of the Act on the Constitutional Court, where a reservation is made that if an international agreement is pronounced as non-compliant with the constitutional order, the Court must indicate with which legal norm of this order the agreement does not comply[150].

On 26 November 2008, acting in the procedure of preventive review initiated by the Senate, the Constitutional Court of the Czech Republic pronounced the Treaty of Lisbon as compliant with the constitution[151]. Interestingly, the ruling was only concerned with those provisions of the Treaty which were questioned by the petitioner. In less than a year another motion was submitted, also concerned with the preventive review of the Treaty of Lisbon. Yet again, the Court found no grounds to question the constitutionality of the Treaty, but this time it set certain ultimate conditions to prevent abuse of the preventive review procedure; quoting the principles of international

stipulated in Subsection 1 unless a constitutional law requires an approval from a referendum."

[148] Article 49 enumerates instances where an approval of both Chambers of Parliament is required to ratify international agreements.

[149] M. Kruk observes that quick ratification procedure makes it difficult for members of parliament to actively participate in this procedure, see M. Kruk, *Zmiany Konstytucji Republiki Czeskiej a europeizacja jej zasad*, [in:] *Europeizacja*… (note 94), p. 79.

[150] See M. Czyżniewski, K. Witkowska-Chrzczonowicz, *Prezydencja Republiki Czeskiej w Radzie Unii Europejskiej. Studium prawno-politologiczne*, Warszawa 2011, p. 121.

[151] Case no Pl. US 19/08, 2008/11/26 *Treaty of Lisbon I,* www.usoud.cz/en/decisions. See more on this point J. Zemanek, *The Two Lisbon Judgments of the Czech Constitutional Court* [in:] *Europe's...* (note 4) page 45*ff* and M. Wendel, *Lisbon before the Courts: Comparative Perspectives*, [in:] *Europe's...* (note 4) p. 74.

and constitutional law, the Court stated that the petitioner requesting preventive review of constitutionality is obliged to submit the relevant motion "without undue delay"[152].

Moreover, the Court stated that the President of the Republic is obliged to ratify, also without undue delay, an international agreement negotiated by the executive power and approved by the democratically authorised legislator. The obligation is even stronger if the agreement for ratification was obtained in a qualified way, as stipulated by Article 10a of the Constitution[153].

In the Federal Republic of Germany, when examining a federal act granting consent for ratification of a treaty by the president, the Federal Constitutional Court subjects the provisions of the treaty to a detailed analysis, which is substantiated by the rulings concerning the Maastricht Treaty[154] and the Treaty of Lisbon[155].

Preventive review of compliance of the EU Treaty primary law with the constitution seems the most desirable way of avoiding possible conflicting situations between EU law and national law in future. It is even more legitimate because frequent amendments of the Treaty primary law are concerned with the *par excellence* constitutional matter, consisting in, e.g. conferring new competences onto the EU or changes in the rights and obligations of an individual.

Polish Constitutional Tribunal finds it perfectly logical that "the accession to the Union itself as well as particular subsequent changes in the procedures (mechanisms) for enacting EU law cause the Member States to commence constitutional review in the light of the national constitutions. The relation between the EU law and the national law is a mechanism, within

[152] Case no Pl. US 29/09, 2009/11/03 *Treaty of Lisbon II*, www.usoud.cz/en/decisions, para 121.

[153] *Ibidem*, para 116.

[154] Case 2 BvR 2134 and 2159/92 of 12 October 1993 reprinted in: *The Relationship between European Community Law and National Law: The Cases*, A. Oppenheimer ed., Cambridge University Press 1994.

[155] *Lisbon Case* (note 72).

which the authorities of the Member States operate (in different ways and at different stages), by formulating the future EU law, on the one hand, and by taking decisions on enforcement of the said law, on the other. Hence, at the EU level, on the one hand, and in the national order, on the other hand, what emerges are bases for competences, mechanisms and procedures which ensure involvement in creating EU law and, at the same time, provide guarantees of maintaining the desirable balance. Each change of an EU mechanism requires checking the system of mechanisms and guarantees in the national law, which is correlated therewith. Review of constitutionality provides such verification which is confirmed by the jurisprudence of European constitutional courts and tribunals"[156].

Referring to the requirement that the statute authorizing ratification of the treaty should be passed in accordance with Article 90 of the Constitution, the Constitutional Tribunal emphasized that the President of the Republic is obliged to initiate the preventive control of the constitutionality of the statute which he considers to be not conform to the Constitution[157].

In Spain, according to Article 95(1) of the Constitution "[t]he conclusion of an international treaty which contains stipulations contrary to the Constitution shall require a prior constitutional revision". In principle, the conformity of the treaty provisions with the constitution may be reviewed by the Constitutional Court without a time-limit. However, if on the request of the Government or either of the Chambers the Constitutional Court declares that such a contradiction exists (Article 95(2) of the Constitution), this verdict acquires *erga omnes* and *res iudicata* effect.

The first international treaty brought to review following this procedure was the Treaty of Maastricht. In the Declaration of July 1, 1992, the Constitutional Court held that Treaty provisions attributing to European Union citizens

[156] Case K 32/09 *Constitutionality of the Lisbon Treaty* para 2.3 (version in English), [reprinted in] *Selected rulings of the Polish Constitutional Tribunal concerning the law of the European Union (2003-2014),* Warszawa 2014.

[157] Case K 3/95, OTK of 1995, part 1, item 5.

who were not Spaniards the right to stand as candidates in municipal elections were contrary to Article 13.2 of the Constitution in force at that time. Because the Treaty could not be ratified without a prior amendment of the Constitution, Article 13.2 was amended accordingly on August 27, 1992. In the Declaration of December 13, 2004 the Constitutional Court held that there was no contradiction between the Spanish Constitution and Article I-6 of the Treaty establishing a Constitution for Europe, in which the principle of primacy of EU law was confirmed[158].

The acceptance of preventive control of constitutionality of international agreements makes justified the question whether the principles of legal certainty and *res iudicata* exclude *ex post* control of constitutionality.

In France, until the introduction of the priority question on constitutionality, a ratified treaty could not be subject to the ex-post review of constitutionality by the Constitutional Council. It should be noted here, however, that in the specific French system of judicial review of constitutionality of law the Council of State may examine the compliance with the constitution of the treaty already in force. It may thus appear that the decision of the Council of State will prevent the application of a treaty in the French legal order, even though the Constitutional Council has not previously stated that the treaty is not compliant with the constitution[159].

Resigning from ex-post review would seem beneficial both in terms of the obligation to fulfil the commitments undertaken by a Member State and the stability of law. However, we can not disregard the specific character of the EU legal order, based on the Treaties "creatively" interpreted by the Court of Justice of the EU. The fact that the CJEU applies the purposive and functional criteria in its interpretation, refers to the construction of *effet utile* or attributes the EU or its institutions with implied powers, causes a suspicion that some of the Treaty provisions will assume a different meaning than that

[158] See Rideau (note 28), p. 1196.
[159] See Claes (note 79), p. 476.

which they seemed to have at the moment of ratification[160]. The case-law to-date of the Court of Justice of the EU as well as the experience of creating the *living constitution* by the Supreme Court in the USA prompt a conclusion that this type of practice will become a permanent element of the EU legal order.

2. Ex post review of constitutionality of the EU primary law

In the light of the established rules of international law, *ex post* questioning of international obligations accepted by the State would be contrary to the principle *pacta sunt servanda*. This principle was unequivocally confirmed by Article 26 of the *Vienna convention on the law of treaties* of May 23, 1969[161], where it was provided for that "Every treaty in force is binding upon the parties to it and must be performed by them in good faith". A state concluding an agreement does not, as a rule, check the constitutional provisions of the other party from the point of view of its capacity to undertake the obligation and does not verify whether domestic law of that party makes possible a fulfillment of an obligation imposed by the agreement.

"A State – according to Article 46 (paras 1 and 2) of the Convention – may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith".

Besides, Article 27 of the Vienna Convention stipulates that "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty". This rule is consistent with an earlier international

[160] „No constitutional court has the ability to see what the future will bring, and it is difficult to foresee all possible frictions between the constitutional principles and the treaties beforehand" rightly observes M.Claes, *ibidem*, p. 468.

[161] Vienna Convention (note 31).

practice, expressed in the Geneva award in *Alabama* claims (1872) and in particular in the advisory opinion of the Permanent Court of International Justice (February 4, 1932). PCIJ held in that opinion that: "a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force"[162].

Obviously, international law can not prevent the review of constitutionality of international agreements by the State. Yet, if as a result of such review it will not be possible to apply the agreement's provisions in the national legal order, the State is internationally liable for the consequences of this situation.

The Court of Justice of the European Union, which does not consider the EU Treaties as "classic" international agreements, is much more insistent in restricting the freedom of the States. Let us remember that in accordance with the interpretation presented in *Costa v. ENEL*, the Treaty [EEC] created its own legal order, which after the Treaty came into force became an integral part of legal systems of the Member States and which the courts of these States are obliged to apply. In the light of this interpretation, which is a part of the EU *acquis*, the whole law of the European Union, including the primary law comprising, among others, founding and accession Treaties, is no longer international law enjoying the national status determined by constitutional rules.

The Netherlands is the most consistent in fulfilling its international obligations. In accordance with Article 94 of the Dutch Constitution, the statutory provisions in force in the Netherlands are not applicable if such application is in conflict with the universally binding provisions of treaties and of acts of international law institutions. Moreover, Article 91 section 3 stipulates that if a treaty includes provisions conflicting with the constitution or which may

[162] PCIJ 1932 Series A/B No. 44, advisory opinion of February 4th, 1932 *Treatment of Polish nationals and other persons of Polish origin or speech in the Danzig territory*, see also a comment in Czapliński, Wyrozumska (note 1), p. 516.

result in such a conflict, the chamber of the Parliament may only give consent to conclude the treaty with the majority of at least two thirds of votes. This means that the State's constitutional order may be amended due to the refusal to apply the constitutional norms remaining in conflict with the treaty which was concluded despite its non-compliance with the constitution[163].

Constitutional provisions in certain other Member States of the European Union differ substantially from this approach, thus admitting ex- post review of compliance of treaties with the constitution.

Polish Constitutional Tribunal, invoking Article 188.1 of the Polish Constitution in the K 18/04 (*Accession Treaty*) judgment of 11 May 2005, acknowledged its competence to adjudicate upon matters concerning the conformity of international agreements with the Constitution and stated that when reviewing the constitutionality of the Accession Treaty, including the Act concerning the conditions of accession, it was also permissible to review the Treaties founding and modifying the Communities and the European Union, "although only insofar as the latter are inextricably connected with application of the Accession Treaty"[164].

Similarly, in the K 32/09 (*Lisbon Treaty*) judgment of 24 November 2010, the Constitutional Tribunal confirmed its jurisdiction to adjudicate regarding the conformity of the Treaty of Lisbon to the Constitution. According to the Constitutional Tribunal, the Treaty of Lisbon ratified by the President of Poland, upon consent granted by statute enacted in accordance with the requirements specified in Article 90 of the Constitution enjoys a special presumption of constitutionality. The Constitutional Tribunal supported this statement with the following arguments. The Tribunal emphasized that enacting the statute granting consent to the ratification of the Treaty of Lisbon occurred after

[163] More on that point see M. Ziółkowski, *Anonimowa konstytucja. Dyskretna europeizacja (uwagi na tle procedury zmian Konstytucji Królestwa Niderlandów*), [in:] *Europeizacja*… (note 94), p. 120-121.

[164] Case K 18/04 of 11 May 2005 (*Constitutionality of the Accession Treaty*), paras 3 and 4 of the principal reasons for the ruling, (version in English), [reprinted in] *Selected*… (note 156).

meeting the requirements which were more stringent than those concerning amendments to the Constitution. Both chambers of the Parliament – the Sejm and the Senate – acted under the conviction that the Treaty was consistent with the Constitution. The President of the Republic, who is responsible for ensuring observance of the Constitution (Article 126.1 of the Constitution), ratified the Treaty, without referring it to the Constitutional Tribunal with a request to adjudicate upon its conformity to the Constitution (Article 133.2 of the Constitution). As follows from the previous jurisprudence of the Constitutional Tribunal, the President of the Republic is obliged to commence the procedure for preventive review with regard to the statute which he considers to be inconsistent with the Constitution.

The President of the Republic, acts within the scope and in accordance with the law, and ensures observance of the Constitution, which obliges him to undertake all possible actions in his regard. Ratifying the Treaty manifested his conviction that the ratified legal act was consistent with the Constitution.

Basing on the above grounds, the Tribunal held that the presumption of constitutionality of the Treaty may only be ruled out after determining that there is no such interpretation of the Treaty and no such interpretation of the Constitution which allow to state the conformity of the provisions of the Treaty to the Constitution[165].

German Federal Constitutional Court partly expressed its view regarding the question of *a posteriori* review of constitutionality of ratified international agreements in the judgment of 25 July 1979 (*Vielleicht*)[166]. Answering the question referred to it by the German Financial Court, the FCC stated that the question whether rules of German law or constitutional principles preclude the

[165] Case K 32/09 para 1.1.2 (note 156).

[166] Case 2 BvL 6/77, BVerfGE 52, [in:] *Relacje między prawem konstytucyjnym a prawem unijnym w orzecznictwie sądów konstytucyjnych państw Unii Europejskiej*, K. Zaradkiewicz red., Biuro Trybunału Konstytucyjnego, Zespół orzecznictwa i studiów, wrzesień 2011. p. 109.

application of the EEC Treaty provisions would be admissible insofar only as a subject of the review of the constitutionality would be the German Act of assent. As a general rule the FCC exercises great restraint when it comes to the constitutionality of international treaties[167].

Constitutional courts can review national legal acts which were the basis for granting consent to ratification of a treaty after it came into force following a general procedure. This type of review is provided for in, e.g. the Belgian Statute on the Arbitration Court (now Constitutional Court). Justifying its jurisdiction, the Court emphasised that no organ deriving its authority from the Constitution, including the Parliament, may infringe constitutional provisions, including the procedure of granting consent to conclude the Treaty. It repeatedly examined the acts of this type, each time confirming their constitutionality[168].

In Denmark the Supreme Court considered as admissible a complaint of a group of citizens against the act granting consent to ratify the Maastricht Treaty. The Court did not require that the applicants prove that the ruling concerning the constitutionality of the act must affect concretely and presently their individual interests[169]. The Supreme Court assumed that accession to the Treaty on European Union implies conferring legislative competences in fundamental areas of life and therefore it entails far-reaching consequences for the Danish population in general. For this reason the applicants are not required to prove that the act affected him or her individually[170]. Eventually, nearly five years after the Maastricht Treaty came into force, the Supreme Court did not find any grounds for questioning the constitutionality of the

[167] See Claes (note 79) p. 504.

[168] *Ibidem*, p. 506-507.

[169] The Eastern Provincial Court (*Østre Landsret*) held that the application to determine the constitutional validity of the implementing law was inadmissible because the law in question did not sufficiently affect the applicants in a concrete and immediate manner, see *The Relationship between European Community Law and National Law: The Cases*, A. Oppenheimer ed., volume 2 Cambridge University Press 2003, p. 175.

[170] *Ibidem*, p. 180.

contested act. However, the verdict included a number of guidelines for the State bodies to be followed while negotiating the Treaties requiring conferring competences, during the process of ratification and later, when applying the Treaties. Ultimately, Danish courts are competent to decide whether the EU acts adopted on the basis of the Treaties do not exceed the competences conferred onto the EU by Denmark[171].

The opinion expressed in the doctrine seems correct when it states that undermining the constitutionality of the act granting consent to the ratification, i.e. impairing the Treaty's effectiveness in the national legal order, is highly improbable due to dramatic consequences which it might have in the legal and political spheres. However, if such an act is reviewed, a constitutional court may use this opportunity to present its stance on the relations between the EU and constitutional law and possibly determine the constitutional limits to integration in the future[172].

3. Review of constitutionality of EU legal acts

In the light of the provisions of the Treaties the competence to review legality of acts adopted by the institutions of the European Union belongs to the Court of Justice of the European Union. According to Article 263 TFUE: "The Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-á-vis third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-á-vis third parties". If the action is well founded the ECJ declares the act concerned to be void, but in accordance with Article 264 TFUE the ECJ may

[171] Case No I-361/1997 reprinted in *ibidem*, p. 175-192.
[172] See Claes (note 79), p. 533.

state which of the effects of the act which it has declared void should be considered as definitive.

Besides, the CJEU has jurisdiction to give preliminary rulings concerning the interpretation of the EU Treaties or the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union (Article 267 TFUE). Actions for review of legality may be brought on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers.

The review of legality exercised by the ECJ resembles the review of constitutionality in Member States' legal orders with the difference that the reference point for review of legality of the secondary EU law is not a constitution but the founding Treaties, general principles of law and international law binding upon EU. This model of the review of legality should, on one hand, protect the will of the Member States expressed in the Treaties and on the other hand, ensure the coherence based on the idea of a hierarchy of norms, with the supremacy of the primary EU law over the secondary law.

As the ECJ emphasized in the *UPA* judgment of 25 July 2002, the EU Treaties have established a complete system of legal remedies and procedures designed to ensure judicial review of the legality of acts of the institutions, and have entrusted such review to the Community (now EU) courts[173].

The problem becomes complex when the norms of the EU law, being part of the national legal orders of the Member States, are applied in those orders in accordance with the principle of direct effect and prevail over all norms of national law, including constitution. That is what happened in the European Union as a result of the interpretation developed over the years by the ECJ in its case law. The ECJ in the first landmark decisions in *Van Gend en Loos* and *Costa v. ENEL* took the view that the EU law (earlier Community law), although integrated with the legal systems of the Member States,

[173] Case C-50/00 P *Unión de Pequeños Agricultores v. Council* [2002] ECR I-6677, para 40.

constitutes the autonomous legal order, stemming from an independent source of law.

As it was already mentioned, the ECJ in *Foto-Frost* explicitly held that the national courts have no jurisdiction themselves to declare that measures taken by Community (now EU) institutions are invalid[174]. It is necessary, argued the ECJ, to avoid divergences between national courts (certainly including constitutional courts) as to the validity of EU acts. Those divergences would be liable to place in jeopardy the very unity of the EU legal order and detract from the requirement of legal certainty. Besides, according to the ECJ, since Article 263 TFUE (formerly 230 TEEC) gives the ECJ exclusive jurisdiction to declare void an act of an EU institution, the coherence of the system requires that where the validity of an EU act is challenged before a national court the power to declare the act invalid must also be reserved to the ECJ[175].

In this context, it should be remembered that according to the principle of primacy of EU law established by the ECJ, competent State organs (national courts or administrative authorities) are under a duty to set aside any provision of national law which conflicts with EU law. Therefore, if in the proceedings before the national court the judge has doubts about the legality of the EU act, the national court should refer to the ECJ for the preliminary ruling on the validity of that act.

In the light of this coherent and logical construction the legal acts enacted by the institutions of the European Union are exempt from the review of constitutionality exercised by national courts.

[174] Case 314/85 *Foto-Frost* [1987] ECR 4199, para 20.

[175] *Ibidem*, paras 15 and 17. However in the light of the judgments of the ECJ in joint cases C-143/88 and C-92/89 *Zuckerfabrik* [1991] ECR I-415, Article 288 TEU (ex-Article 189 TEEC) does not preclude the power of national courts to suspend enforcement of an administrative measure based on a Community (EU) regulation. This interpretation was confirmed e.g. in case C-465/93 *Atlanta* [1995] ECR I-376.

From the perspective of national constitutional courts coherent implementation of EU law is an accepted value, which is expressed in the adoption of the principle of favourable interpretation of EU law.

For the Polish Constitutional Tribunal the fact that autonomous legal orders based on their own internal hierarchical principles are binding in the European Union is an objective situation resulting from the very concept and model of European law[176]. The Constitutional Tribunal is of an opinion that interpretation of the binding legislation should take into account the constitutional principle of sympathetic predisposition towards the process of European integration and cooperation between States[177]. The Constitutional Tribunal inferred this from the principle of loyal cooperation stipulated in Article 4 section 3 TEU (ex Article 10 TEEC) and Article 91 section 1 of the Constitution of the Republic of Poland, the preamble to the Constitution, which stipulates the "need for cooperation with all countries" and Article 9 of the Constitution[178].

A similar view is expressed in the decisions of other constitutional courts. The Constitutional Court of the Czech Republic decided that due to the fact that the accession of the Czech Republic to the EU caused a substantial change in the Czech constitutional order, it must "interpret Czech constitutional law in the context of the principles of the Community [EU] law"[179]. In the ruling Pl. ÙS 66/04, the Court inferred from Article 1 section 2 of the Constitution of the Czech Republic and in connection with Article 10 TEEC a constitutional principle according to which the "domestic legal enactments, including the constitution, should be interpreted in conformity with the principles of European integration and cooperation between Community and

[176] Case K 18/04, para 6.3 (note 164).

[177] Case K 11/03 of 27 V 2003, para 1 of the principal reasons for the ruling, (version in English), [reprinted in] *Selected*… (note 156).

[178] See K. Działocha, *Komentarz do art. 8 Konstytucji RP*, Konstytucja Rzeczypospolitej Polskiej, Komentarz t. V, Warszawa 2007, p. 31.

[179] Case Pl ÚS 50/04 of 8 March 2006, quoted in: I. Slosarcik, *Czech Republic and the European Union Law in 2004-2006*, European Public Law vol. 13 issue 3/2007.

Member State organs. If the Constitution, of which the Charter of Fundamental Rights and Basic Freedoms forms a part, can be interpreted in several manners, only certain of which lead to the attainment of an obligation which the Czech Republic undertook in connection with its membership in the EU, then an interpretation must be selected which supports carrying out of that obligation, and not an interpretation which precludes it"[180].

The German Constitutional Court admits that EU law may develop effectively only when it supplants the law of the Member States which contradicts it. It also agrees with the Court of Justice of the EU that if Member States were able to decide through their own courts on the validity of EU legal acts, it would be tantamount to evading the principle of primacy of EU law and consequently its uniform application would be placed at risk[181].

Still, the original source of fulfilling the EU obligations for constitutional courts, including the obligation to apply the acts of EU law, are not the Treaties but the constitution, on the basis of which competences to enact legal acts and deciding on their interpretation are conferred onto an external subject.

According to the Polish Constitutional Tribunal, the process of European integration connected with the delegation of competences in relation to certain areas to EU organs, has its basis in the Constitution[182]. The German Federal Constitutional Court emphasised that "the validity and application European law in Germany depend on the implementing order contained in the Law Approving the Treaty Act of Consent"[183].

Moreover, if legal acts enacted by the European Union can be a direct source of rights and obligations of individuals binding for courts and

[180] Quoted in Pl. ÚS 5/12 of 31 January 2012, VII para 2, available in English at www.usoud.cz.
[181] Case 2BvR 2661/06 *Honewywell*, the order of the Second Senate of 6 July 2010, para 54b, for an English translation see http://www.bverfg.de/entscheidungen/rs20100706_2bvr266106en.html.
[182] Case K 18/04 para 2 of the principal reasons for the ruling (version in English) (note 164).
[183] Case 2BvR 2134… (note 154), p. 557.

administrative bodies, this may result in an objection that application of EU provisions infringes the rights guaranteed by the constitution[184].

Preventive review of constitutionality of such acts is out of the question, because the procedure of their adoption is exhaustively described in the EU Treaties. Instead, a question was raised whether it would be possible to review the compliance of the drafts of EU acts submitted to the Member States and analysed by appropriate national bodies.

The Protocol (no 1) on the role of national parliaments in the European Union attached to the Treaty of Lisbon stipulates that draft legislative acts sent to the European Parliament and to the Council are forwarded to the national parliaments independently of the fact what subject they come from. This solution complemented the ex-post control conducted to date by the Court of Justice of the European Union as a result of an action for judicial review brought by the Member States, among others. Under the so-called early-warning mechanism any national parliament or any chamber of national parliament may, within eight weeks from the date of transmission of a draft legislative act, send to the Presidents of the European Parliament, the Council and the Commission a reasoned opinion stating why it considers that the draft in question does not comply with the principle of subsidiarity.

Thus, there is no room here for judicial review of compliance of the drafts of legislative acts with the national constitution, but in this context it is worth noting the conclusions drawn by the participants of a three-year scientific project carried out in the Netherlands focusing on the role of national parliaments in the European Union[185]. They see a parallel between the nature

[184] Doubts of that kind had e.g. German administrative court which, first, has obtained the preliminary ruling in the case 11/70 *Internationale Handelsgesellschaft* and then requested the ruling from the Federal Constitutional Court as to whether rules of Community law in question were incompatible with the Constitution even in the interpretation given them by the ECJ, see Case 2 BvL 52/71 of 29 May 1974 (*Solange I*), reprinted in: *The Relationship* (note 154), p. 443.

[185] See P. Kiiver, *The Early-Warning System for the Principle of Subsidiarity: The National Parliament as a Conseil d'Etat for Europe*, European Law Review no 36/2011, p. 98 *ff.*

of participation of national parliaments in the EU legislation and the role played by councils of State, and especially the French *Conseil d'Etat* in national legislative procedures, within which they pronounce opinions on government drafts of legal acts before they are submitted for parliamentary procedures (France, Belgium, the Netherlands, Luxemburg, Italy, Spain). They indicate that the early-warning system is an institutionalised form of pronouncing opinions, and the practice proves that parliaments' opinions are concerned with the compliance of drafts with law and not their political reasonability. Here they see the analogy with the nature of the procedure of pronouncing opinions by councils of State.

Indeed, a certain rudimental idea of review of drafts of acts, at that time Community acts, could be seen in the procedure adopted in France in the early 1990s. The circulars issued by the Prime Minister of the French government on 31 July 1992 and 21 April 1993 entrusted the Council of State with the task of taking a stance on the drafts of Community acts before submitting them to both chambers of the parliament. It was then that the advisory assemblies of the Council of State could raise the question of compliance of the draft with the constitution[186].

However, these concepts were not reflected in the rules concerning the review of constitutionality adopted by the Member States.

Nevertheless, some constitutional courts reserved the right of ultimate decision on the conflicts between the EU (Community) acts and the constitution in such areas as infringement of rights and freedoms, basic principles of the political system, etc. protected by the constitution.

The earliest to do so were the constitutional courts of the States which were the founders of the European Communities and have a similar legal culture.

[186] See O. B. Dord, *Contrôle de constitutionnalité des actes communautaires dérivés: de la nécessité d'un dialogue entre les juridictions suprèmes de l'Union européenne*, Les cahiers du Conseil Constitutionnel, no 4/1998, p. 163.

In Italy, the Constitutional Court (*Corte Costituzionale*) in the judgment of April 21, 1989 *Fragd* did not exclude its competence to verify whether or not a Treaty norm, as interpreted and applied by the institutions and organs of the EEC (now EU), is in conflict with the fundamental principles of Italian Constitution or violates the inalienable rights of man. At the same time the Constitutional Court emphasized that "it cannot be stated absolutely that all the fundamental principles of the Italian constitutional order are to be found amongst the principles which are common to the legal orders of the other Member States and are therefore included in the Community legal order"[187].

The German Federal Constitutional Court in the judgment of May 29, 1974 (*Solange I*), stated that the European Court of Justice cannot with binding effect rule on whether a rule of Community (now EU) law is compatible with the Constitution. Only Federal Constitutional Court is entitled to protect rights guaranteed by the Constitution and, although it can never give a ruling on the validity of a norm of Community (EU) law, it can conclude that such a norm cannot be applied by the authorities of the Federal Republic in so far as it conflicts with a rule of the Constitution concerning fundamental rights[188].

The *Lisbon Treaty* judgment of June 30, 2009 proves that the FCC did not change its mind asserting, as D. Thym observes, "its position as the ultimate arbiter of European law"[189]. The FCC held that if legal protection cannot be obtained at the Union level, the Federal Constitutional Court reviews whether legal instruments of the European institutions and bodies, keep within the boundaries of the sovereign powers accorded to them by way of

[187] See Case No 232/1989 *Fragd v. Amministrazione delle Finanse dello Stato*, [in:] *The Relationship…* [1994] (note 154), p. 657. By this judgment the Constitutional Court continued the line of jurisprudence commenced by the *Frontini* judgment of December 27, 1973, case no 183/1973, in which it held that the organs of the EEC (now EU) were not endowed with "an unacceptable power to violate the fundamental principles of our [Italian] constitutional order or the inalienable rights of man", [in:] *The Relationship…*, p. 640.

[188] See case No 2 BvL 52/71 [in:] *The Relationship…*, (note 184), p. 423.

[189] See D. Thym, *In the name of sovereign statehood: a critical introduction to the Lisbon judgment of the German Constitutional Court*, Common Market Law Review 46: 1795-1822, 2009, p. 1795.

conferred powers" („*Ultra-vires-Kontrolle*") or whether those instruments violate national constitutional identity („*Identitätskontrolle"*)[190].

As far as *ultra vires* review is concerned the FCC referred to its previous jurisprudence, in particular to the *Maastricht* judgment. Later, in the judgment of July 6, 2010 (*Honeywell*) the FCC specified more precisely that "*ultra vires* review by the Federal Constitutional Court can only be considered if a breach of competences on the part of the European bodies is sufficiently qualified. This is contingent on the act of the authority of the European Union being manifestly in breach of competences and the impugned act leading to a structurally significant shift to the detriment of the Member States in the structure of competences"[191].

Decisions of the French Constitutional Council since mid 1970 have been interpreted as implying a denial of jurisdiction on the part of the Council to review constitutionality of secondary Community law, which seemed to sanction the "constitutional immunity" of Community law[192]. The Constitutional Council took a position that Article 55 of the French Constitution of 1958 which directly refers to international agreements[193], encompasses also Community treaties, and similarly, their constitutionality cannot be controlled after introduction to domestic legal order, with possible use of the procedure prescribed in Article 54 of the Constitution[194]. As a consequence,

[190] The *Lisbon Case*, paras 240 and 241 (note 72); see also F. Schorkopf, *The European Union as an Association of Sovereign States: Karlsruhe's Ruling on the Treaty of Lisbon*, German Law Journal, vol. 10 No. 08, 2009, p. 1231-1233.

[191] Case 2 BvR 2661/06 (note 181), headnote 1a (version in English).

[192] See Claes (note 79), p. 628.

[193] According to Article 55 of the French Constitution: "Treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, with respect to each agreement or treaty, to its application by the other party".

[194] Article 54 of the French Constitution stipulates that: "If the Constitutional Council, on a referral from the President of the Republic, from the Prime Minister, from the President of one or the other Houses, or from sixty Members of the National Assembly or sixty Senators, has held that an international undertaking contains a clause contrary to the Constitution, authorization to ratify or approve the international undertaking involved may be given only after amending the Constitution".

acts adopted on the basis of international agreements (Community treaties) were not subject to control of constitutionality.

A profound change of the Constitutional Council's approach to the relationship between constitutional law and Community secondary law is usually associated with a decision of June 10, 2004[195] and series of subsequent decisions. The Constitutional Council recognized the specificity of the EU law, as an autonomous legal order, but at the same time, referring to procedural requirements of the control of constitutionality of domestic implementing measures, indirectly acknowledged, that in case of conflict between the secondary EU law with the Constitution, the latter prevails.

According to the Constitutional Council the scope of primacy of EU law derives from Article 88-1 of the Constitution[196] which means that the implementation of EC (now EU) directives is a constitutional requirement, except where this would go against an express provision of the Constitution. As a result, in the French legal order EU norms will have unconditional and immediate precedence, unless they come into conflict with certain fundamental principles protected by the French Constitution[197].

This interpretation was confirmed, with some modification, in the decision of 27 July 2006, where the Constitutional Council held, referring to the Directive of 22 May 2001, that "the transposition of a directive cannot

[195] Décision no 2004-496 DC, *Loi pour la confiance dans l'économie numérique*, see J. Duthheil de la Rochère, *French Conseil Constitutionnel: Recent Developments* [in:] *Europe's...* (note 4), p. 22.

[196] Article 88-1 of the French constitution stipulates that "The Republic shall participate in the European Union constituted by States which have freely chosen to exercise some of their powers in common by virtue of the Treaty on European Union and of the Treaty on the Functioning of the European Union, as they result from the treaty signed in Lisbon on 13 December, 2007.

[197] See L. Azoulai, F. R. Agerbeek, *Conseil Constitutionnel (French Constitutional Court), Decision No. 2004 505 DC of 19 November 2004, on the Treaty establishing a Constitution for Europe*, Common Market Law Review 42, (2005/3), p. 877.

contravene a rule or principle inherent to the French constitutional identity, unless the constitutional authorities have agreed to"[198].

Polish Constitutional Tribunal for the first time confirmed its jurisdiction to review constitutionality of the secondary EU law in the judgment SK 45/09 of 16 November 2011, where it adjudicated upon conformity of the provisions of the EU (Community) legislation with the Polish Constitution[199]. Formerly, the Tribunal examined the conformity with the Constitution of EU (Community) primary law[200] and of the Polish legislation implementing EU (Community) law[201].

In SK 45/09 the Constitutional Tribunal began with clarification of the meaning of its *obiter dicta* view expressed in the U 6/08 case[202], that the constitutional review of norms of EU secondary legislation was inadmissible. The Tribunal indicated that the situation in SK 45/09 was different because in U 6/08 case the proceedings were instituted by an application submitted by a group of Sejm Deputies, and those proceedings constituted an abstract review of norms. In such context, the scope of jurisdiction of the Tribunal is exhaustively specified in Article 188(1)-(3) of the Constitution.

In SK 45/09 review proceedings were commenced by way of constitutional complaint. In that case, the scope *ratione materiae* of normative acts which might be subject to the review of their conformity to the Constitution,

[198] Decision 2006-540 DC, para 28: « [...] la directive du 22 mai 2001 susvisée, qui n'est contraire á aucune règle ni á aucune principe inhérent á l'identité constitutionnelle de la France » see also O. Pollicino, *The Conseil d'Etat and the relationship between French internal law after Arcelor: Has something really changed?,* Common Market Law Review 45, 2008, p. 1524. J. Dutheil de la Rochère draws a conclusion from this decision that « French CC abstains to control the compatibility with the French Constitution of the substance of the transposed directive unless such substance contradicts rule or principles 'inherent to French constitutional identity' » see J, Dutheil de la Rochère (note 97), p. 23.

[199] Case SK 45/09 of 16 November 2011 (version in English) [reprinted in] *Selected…* (note 156).

[200] See case K 18/04 (note 164) and case K 32/09 (note 156).

[201] See case P 1/05 of 27 April 2005 and case SK 26/08 of 5 October 2010.

[202] Decision U 6/08 of 17 December 2009 (*Fisheries – National Legal Acts that Implement EU Law)* (version in English), [reprinted in] *Selected…* (note 156).

had been set out in Article 79(1)[203] of the Constitution autonomously and independently from Article 188(1)-(3). The examination of constitutional complaints constitutes a separate type of proceedings.

Not only the systematics of the Constitution or the distinguishing between two types of proceedings – an adjudication based on Article 188 (1)-(3) and the constitutional complaint – are worthy of interest. Particularly legitimate is the special importance given to the specific function of the constitutional complaint – protection of constitutional rights and freedoms of individuals or legal entities. The need to render this function effective justifies the view of the Constitutional Tribunal that a normative act, within the meaning of Article 79(1) of the Constitution, may be not only a normative act issued by one of the organs of the Polish state, but also – after fulfilling further requirements – a legal act issued by an organ of an international organization. As the Tribunal rightly stated, "this primarily concerns the acts of the EU law, enacted by the institutions of that organization. Such legal acts constitute part of the legal system which is binding in Poland and they shape the legal situation of an individual"[204].

In principle, the conclusion of the Constitutional Tribunal leaves no doubts: "EU provisions, as normative acts, may be subject to constitutional review in the course of review proceedings commenced by the way of constitutional complaint"[205]. Nevertheless, the fact that those provisions are acts of EU law, results in a special character of a review conducted in such a case by the Constitutional Tribunal.

[203] Pursuant to Article 79(1): "In accordance with principles specified by statute, everyone whose constitutional freedoms or rights have been infringed, shall have the right to appeal to the Constitutional Tribunal for its judgment on the conformity to the Constitution of a statute or another normative act upon which basis a court or organ of public administration has made a final decision on his freedoms or rights or on his obligations specified in the Constitution".

[204] Case SK 45/09 (note 199), para 1.3.

[205] *Ibidem*, para 1.5.

It means that not only the constitutional principle of favourable predisposition of the Republic of Poland towards the process of European integration and the Treaty's principle of loyalty of Member States towards the Union should be respected, but also the complaint itself should fulfill specific requirements. In the opinion of Constitutional Tribunal, in the case of filing a constitutional complaint which challenges the conformity of an act of EU law to the Constitution, a given complainant should be required to make probable that the challenged act of EU secondary legislation causes "considerable decline in the standard of protection of rights and freedoms in comparison with the standard of protection guaranteed by the Constitution. Making this probable is an essential element of the requirement to indicate the manner in which their rights or freedoms have been infringed"[206].

Conditions of admissibility of the constitutional complaint were strengthened by the reservation that "when the indicated requirements are not fulfilled by the complainant, the Tribunal concludes that the constitutional and statutory requirements of a constitutional complaint have not been met and, consequently, issues a decision in which it refuses to proceed with further action (Article 36(3) in conjunction with Article 49 of the Constitutional Tribunal Act) or in which it discontinues proceedings, on the grounds that issuing a ruling is inadmissible (Article 39(1)(1) of the Constitutional Tribunal Act)"[207].

If, however, the review proceedings are commenced, the Constitutional Tribunal reminds that the review of conformity of a provision with the Constitution conducted by the Constitutional Tribunal should be regarded as subsidiary in relation to the jurisdiction of the Court of Justice. When acceding to the European Union, the Republic of Poland accepted the division of powers with regard to the review of legal acts. The result of that division is the jurisdiction of the Court of Justice to provide the final interpretation of EU

[206] *Ibidem*, para 8.5.
[207] *Ibidem*.

law and to ensure that the interpretation is observed consistently in all Member States. That is why, stated the Constitutional Tribunal, before adjudicating on the non-conformity of an act of EU secondary legislation to the Constitution, one should make sure as to the content of the norms of EU secondary legislation which are subject to review. The Constitutional Tribunal found, similarly to the German Federal Constitutional Court, that this may be achieved by referring questions to the Court of Justice for a preliminary ruling, as to the interpretation or validity of provisions that raise doubts. As a result of the ruling of the Court of Justice, it may turn out that the content of the challenged EU norm is consistent with the Constitution. Another possibility is that the Court of Justice adjudicates on the non-conformity of the challenged provision to the EU primary law. In those instances, issuing a ruling by the Constitutional Tribunal would be superfluous[208].

Finally, the issue that remains to be settled, are the effects of a judgment of the Constitutional Tribunal in case of possible adjudication that the norms of the EU secondary legislation were inconsistent with the Constitution. The Constitutional Tribunal held, that the consequence of such a judgment would be to rule out the possibility that the acts of the EU secondary legislation would be applied by the organs of the Polish state and would have any legal effects in Poland. Therefore, the ruling would result in suspending the application of the unconstitutional norms of EU law in the territory of Poland. Certainly, the Constitutional Tribunal may not declare EU act to be no longer legally binding, as this competence belongs to the European Court of Justice only.

The Constitutional Tribunal takes into consideration that its ruling could lead to an action brought by the European Commission against Poland before European Court of Justice for the infringement of obligations under the Treaties. In this context the Constitutional Tribunal reminded that there are three possible reactions in Poland to the occurrence of non-conformity between the Constitution and the EU law: a/ amending the Constitution,

[208] *Ibidem*, para 2.6.

b/ taking up measures aimed at amending the EU provisions, or c/ taking a decision to withdraw from the European Union[209]. In order to make the first two possibilities more realistic, the Constitutional Tribunal held that the constitutional principle of favourable predisposition of the Republic of Poland towards the process of European integration and the Treaty's principle of loyalty of the Member States towards the Union require that the effects of the Tribunal's ruling be deferred in time, pursuant to Article 190(3) of the Constitution. The Constitutional Tribunal has already used this provision in the judgment of 27 April 2005 concerning the European Arrest Warrant[210].

The Rubicon was crossed by the Constitutional Court of the Czech Republic, which in its judgment of 31 January 2012, referring to the effects of the ECJ judgment of 22 June 2011 in *Landtova*, declared that "a situation occurred in which an act by a European Union body exceeded the powers that the Czech Republic transferred to the European Union under Article 10a of the Constitution; this exceeded the scope of the transferred power, and was *ultra vires*"[211]. Let us remind that ECJ held in *Landtova* that relevant judgments of the Czech Constitutional Court concerning "Slovak pensions" involved both a direct and indirect discrimination based on nationality[212].

Already in its earlier judgments Pl. ÚS 19/08 and Pl. ÚS 29/09 the Constitutional Court emphasized that it remains "the supreme protector of Czech constitutionality, including against possible excesses by Union bodies or European law. […] If European bodies interpreted or developed EU law in a manner

[209] K 18/04 para 6.4 (note 164).

[210] Case P 1/05, quoted in SK 45/09, part III para 2.7. The Constitutional Tribunal deferred the date on which a statute implementing certain provisions of EU law was to lose its binding force, mentioning the constitutional obligation of the Republic of Poland to respect international law binding upon it, and also due to the fact that Poland and other EU Member States are bound by shared systemic principles aimed at ensuring the proper administration of justice.

[211] Case Pl. ÚS 5/12 (note 180). For the deeper analysis of the problem see M. Bobek, *Landtová, Holubec, and the Problem of an Uncooperative Court: Implications for the Preliminary Rulings Procedure*, European Constitutional Law Review, no 10/2014, p. 54-89.

[212] Case C-399/09 *Landtova v České správě sociálního zabezpečení,* [2011] ECR I-5573.

that would jeopardize the foundations of materially understood constitutionality and the essential requirements of a democratic, law-based state that are, under the Constitution of the Czech Republic, seen as inviolable (Article 9 par. 2 of the Constitution) such legal acts could not be binding in the Czech Republic"[213].

Taking into account the stance of several constitutional courts mentioned above on the admissibility of constitutional review of EU secondary law, the conclusion seems to be justified that in principle those courts do not exclude such a review.

At the same time however, the case-law of the Polish and German constitutional courts proves, that even the most explicit confirmation of the jurisdiction of constitutional court over the acts adopted by the EU institutions does not necessarily lead to an open conflict with the European Court of Justice. It is because the conditions required by constitutional courts in order to make acts of EU secondary law ineffective in domestic legal order are very difficult to meet and need additional interpretation. Such a restrictive approach to the constitutional review is justified on one hand, by the constitutional principle of sympathetic attitude towards European integration and, on the other hand, by the Treaty principle of the loyal cooperation of Member States with the European Union.

It seems that the test for the endurance of the European legal area will be the long-term consequences of the Czech constitutional court's judgment or similar decisions of other constitutional courts in future. According to the established case-law of the European Court of Justice, it is its interpretation of EU law and not the stance of constitutional courts which is binding for national courts. That is why the conflict may appear not only in relations between Member States and the European Union but also inside the national judicial system. In France, as we saw, the controversy between the Court of Cassation and the Constitutional Council assumed relatively soft

[213] Case Pl. ÚS 5/12 (note 180).

form. Recent developments show that greater potential for conflict seems to exist between the Czech administrative courts and Constitutional Court after the latter called in question (Pl. ÚS 5/12) the scope of application of EU law. On 24 May 2012 the Supreme Administrative Court (SAC) of the Czech Republic lodged the reference for a preliminary ruling with the European Court for Justice asking i.a.: "Does European Union law prevent the national court, which is the highest court in the State in the field of administrative law and against whose decision there is no right of appeal, from being, in accordance with national law, bound by the legal assessment of the Constitutional Court of the Czech Republic where that assessment seems not to be in accordance with Union law as interpreted by the Court of Justice of the European Union?"[214]. Later the SAC withdrew its reference and the case C-253/12 was removed from the register of the Court[215] but all that proves how deeply the Czech courts are divided in their attitude towards the EU law.

Despite of the withdrawal of the reference by the SAC one can guess what would be the answer from the ECJ. Recently, in *Križan,* the ECJ held that a national court "is obliged to make, of its own motion, a request for a preliminary ruling to the Court of Justice even though it is ruling on a referral back to it after its first decision was set aside by the constitutional court of the Member State concerned and even though a national rule obliges it to resolve the dispute by following the legal opinion of that latter court"[216].

D. Leczykiewicz deduced from the ECJ's judgment in *Foto-Frost* that there exists clear distinction between "review" and "invalidation" that leads to the conclusion that national courts are precluded from declaring acts of EU institutions invalid but not from reviewing them[217]. The Author presents

[214] Official Journal of the European Union (2012/C 273/2), Case C-253/12 pending.

[215] Ordonnance du Président de la Première Chambre de la Cour dans l'affaire C-253/12, 27 mars 2013: « L'affarire C-253/12 est radiée du registre de la Cour ».

[216] Judgment (Grand Chamber) of 15 January 2013 in case C-416/10 *Križan*, not yet published, para, 73.

[217] D. Leczykiewicz, *„Effective Judicial Protection" of Human Rights After Lisbon: Should National Courts be Empowered to Review EU Secondary Law?*, European Law Review

an interesting view that, "before a national court can legitimately review EU secondary law, the following conditions should be satisfied: (1) the case pending before a national court concerns a dispute between an individual and a Member State; (2) it is the individual who is adversely affected by an EU measure; (3) the possibility to refer the question of validity to the ECJ is not available, the question will be regarded as inadmissible because it falls outside the scope of Court's jurisdiction, or the substantive review of the measure is excluded; (4) the application of the EU act would jeopardize the individual's human rights as granted or recognized by EU law; and (5) the individual has no direct action and is not able to obtain compensation for damage resulting from the violation of his rights or the damage which he or he is likely to suffer if he EU measure is applied is irreparable"[218].

Her argumentation is based on the assumption that uniformity of application is incapable of overriding such obligations as respect for human rights and effective judicial protection, but any exceptions to the principle of uniform application should be made only to the extent that they are absolutely necessary[219].

One should bear in mind that the premises for the emergence of a jurisdictional conflict between the Court of Justice of the EU and constitutional courts in relation to the acts of the European Union do not concern, strictly speaking, domestic acts applying EU law. In this case the principle of the autonomy of both systems proclaimed by the CJEU presupposes that the assessment of legality (constitutionality) of a domestic provisions is conducted by a national (constitutional) court. EU courts have no competences in this area.

This absolutely legitimate thesis may be put to the test when a ruling of unconstitutionality results in repealing national provisions implementing European Union law, and primarily the directive requiring incorporation into

35/2010, p. 339.

[218] *Ibidem*, p. 347.

[219] *Ibidem*.

the national law. As a consequence, the directive may be deprived of its effectiveness, though this does not necessarily has to take place if its provisions meet the criteria of direct effect[220]. If these criteria were not met, a national court might try to interpret national law in accordance with the directive's purpose, yet in the situation discussed above it would be very difficult if a court does not resort to the interpretation *contra legem fundamentalem*.

The special nature of review of constitutionality of law in France resulted in the fact that both the Constitutional Council and the Council of State had to confront this problem. The case-law of these institutions seems valuable not only as an example of interesting legal reasoning but may also become an inspiration for the discussion in the Member States which have the judicial system of reviewing constitutionality of law.

More precise specification of the principles of review of implementing legislation by the Constitutional Council has occurred gradually, in stages. The ruling of 10 June 2004 on the compliance of the act concerning digital economy[221] had a very important if not crucial significance, stating that the source of the obligation to transpose the EU (formerly Community) secondary law (primarily directives) into the French legal order is not the autonomous system of the European Union but Article 88-1 of the Constitution.

In the ruling on the digital economy mentioned above the Constitutional Council made a reservation that even though national provisions, which would be limited to drawing "necessary conclusions from the unconditional and precise provisions of the directive", are equipped with a "constitutional *quasi*-immunity", fulfilling the obligation resulting from Article 88-1 may be prevented by "an express, contrary provision of the Constitution"[222].

[220] In a broad sense the notion of "direct effect" means that provisions of binding EU law which are sufficiently clear, precise and unconditional to be considered justiciable can be invoked and relied on by individuals before national courts, see Craig, de Burca 5th ed. (note 23) p. 180.

[221] Decision 2004-496 DC (note 195).

[222] *Ibidem*, para 7.

The Constitutional Council specified this criterion more precisely in the ruling of 27 July 2006, which stated that transposing a directive into the national law can not infringe "a rule or principle inseparably tied with France's constitutional identity unless the legislator grants consent to this"[223].

In practical terms, Article 88-1 of the Constitution may become the basis for double-track review of constitutionality of national acts implementing EU law. In its classic form the review of such an act is directly concerned with its compliance with a definite material norm of a constitutional rank. In another configuration the reference standard for the review is another EU act (primarily a directive), while reference to the constitution is indirect in the sense that inappropriate implementation constitutes an infringement of the constitutional obligation imposed by Article 88-1.

In the case of direct review, as may be inferred from the case-law of the Constitutional Council, there are three variants of deciding on the claim of unconstitutionality of an implementing act[224].

In the first variant the Council states that a national act is not contrary to the Constitution of the Republic of France and as a result EU law is implemented both in accordance with Article 88-1 of the Constitution and the provisions of the Treaties, especially Article 4 section 3 TEU and Article 288 TFEU.

The remaining two variants are concerned with the situation when a national act, constituting an inevitable consequence of unconditional and precise provisions of an EU act (directive), includes the provisions infringing the principles covered by the notion of constitutional identity of France, including fundamental rights guaranteed by French constitutional order. In such a case

[223] „[...] la transposition d'une directive ne saurait aller á l'encontre d'une règle ou d'un principe inherent á l'identité constitutionnelle de la France, sauf á ce que le constitutant y ait consenti", Decision 2006-540 DC, para 19 (note 104).

[224] More on the question of the "immunity" of the EU secondary law see S. Pinon, *L'effectivité de la primauté du droit communautaire sur la Constituion. Regard sur la jurisprudence récente du Conseil constitutionnel et du Conseil d'Etat*, Revue trimestriel du droit européen, 44 (2), avr.-juin 2008, p. 275 – 276.

the Council decides if a concrete fundamental right is protected also within the legal order of the European Union[225].

If in the EU legal order there is an equivalent protection of a definite fundamental right (principle), review of legality of an EU act, especially in the light of its compliance with general principles, should be conducted by the Court of Justice of the EU within the Treaty procedures. Stating the non-compliance of such an act with EU law would constitute the grounds for invalidating the implementing act by a national court.

The Constitutional Council did not state it explicitly, but a conclusion[226] may be inferred from the reasoning presented in the decision 2004-498 DC that if there is no equivalent protection in EU law, review of constitutionality is conducted by an appropriate French body. Obviously, absence of equivalent review is the case when the implementing act infringes a principle covered by the notion of constitutional identity of France and at the same time is specific for this identity to the extent that it is not stipulated by EU law[227].

It may thus be concluded that the Constitutional Council will decide depending on a concrete case and does not formulate a general thesis concerning the existence of equivalent protection in EU law[228].

Considering the other aspect of infringement of an obligation resulting from Article 88-1 of the Constitution, i.e. inappropriate implementation of EU secondary law, the Constitutional Council determined the procedure to be applied in the case of infringing the directive's purpose. If the infringement is

[225] According to Decision 2004-498 DC, (*Loi relative á la bioéthique*): « …cette liberté [la libre communication des pensées et des opinions] est également protégée en tant que principe général du droit communautaire sur le fondement de l'article 10 de la Convention européenne de sauvegarde des droits de l'homme et; des libertés fondamentales ».

[226] See *Commentaire de la décision no 2004 - 498 DC,* Les cahiers du Conseil Constitutionnel no 17/2004, p. 5.

[227] P. Blachèr, G. Protière *Le Conseil constitutionnel, gardien de la Constitution face aux directives communautaires*, Revue française de droit constitutionnel, 2007/1 no 69, p. 130 ff.

[228] See M.-P. Granger, *France is 'already' back in Europe: the europeanization of French courts and the influence of France in the EU,* European Public Law, vol. 14, issue 3, 2008, p. 357.

evident, the Council states, also on its own initiative, an infringement of the constitutional obligation imposed by Article 88-1 of the Constitution and issues an appropriate decision. When there is no evident infringement, the competences lie with common courts of law, which may request a preliminary ruling as stipulated by Article 267 of the TFEU.

The model outlined above also comprises the case-law of the French Council of State. The competence to enact the provisions implementing the provisions of the directives in the French law is divided between the Parliament and the government as stipulated by Article 34 and Article 37 of the Constitution. In practice only 10% directives are implemented by means of statutes. The remaining 90% are implemented by means of the acts remaining within the government's regulating competence – decrees and ordinances[229]. Hence the competence of the Council of State in the latter case.

In the decision of 8 February 2007 (*Arcelor Atlantique et Lorraine*)[230] concerning the complaint against the decree implementing (virtually word for word) an EU directive, the Council of State set out two hypotheses.

The first hypothesis stated that the constitutional principle, which according to the complaint was infringed by the decree, has its equivalent in EU law in the sense that a right or freedom in question are effectively protected by primary law (i.e. Treaties and general principles of EU law) as interpreted by the Court of Justice of the EU. The claim that the decree is non-compliant with the constitution means in fact that the directive transposed by the decree is non-compliant with the primary law. A judge of a national court may reject the complaint or, if he or she had doubts or tended to accept the objection, may submit a preliminary reference to the CJEU. If the CJEU states that the directive infringes EU law, the judge should invalidate the decree implementing an illegal directive.

[229] See S. Monnier, *Droit constitutionnel et droit communautaire. La répartition des compétences et la hiérarchie des normes nationales á l'épreuve de l'application du droit communautaire*, Revue française de Droit constitutionnel, 68, 2006, p. 856.

[230] CE Ass. 8 fev. 2007, *Société Arcelor Atlantique et Lorraine et autres*, req. No 287110.

The other hypothesis assumes that a judge of a national court can not find in EU law an equivalent for the constitutional principle constituting the basis for the complaint against the decree implementing the directive. Thus the principle is specific for the French constitution. If it is found that a constitutional principle is infringed, the judge invalidates the decree, which is a signal for the French authorities that either the constitution should be amended or the act of secondary law indirectly considered as non-compliant with the constitution should be renegotiated.

In Germany, the Federal Constitutional Court held in the order of 4 October 2011 that "a domestic legal provision which transposes a directive or a decision into German law is not examined for compatibility with the fundamental rights of the Basic Law if Union law fails to lave to the German legislature any latitude in such transposition, but makes binding stipulations. […] A [German] court has hence to clarify prior to submitting the statute to the Federal Constitutional Court whether the German legislature was left with latitude in transposing Union law. In order to do so, if there is a lack of clarity regarding the implications of Union law, it must initiate preliminary ruling proceedings before the European Court of Justice, regardless of whether it is a court of final instance or not"[231].

In the judgment of 2 March 2010 on the constitutionality of the German law implementing the Data Retention Directive, the German Federal Constitutional Court held that as far as the admissibility is concerned, the constitutional complaints are not inadmissible where the challenged provisions were promulgated in implementation of Directive. Then the FCC analyzed the material contents of the directive and did not request a preliminary ruling from the ECJ since the validity of Directive and a priority of Community (EU) law over German fundamental rights which might possibly result from this were not relevant to the decision, because the contents of the Directive

[231] Order of 4 October 2011, 1 BvL 3/08, Press release no. 65/2011 0f 26 October 2011, para 1, http://www.bverfg.de/pressemitteilungen/bvg11-065en.html.

gave Germany a broad discretion. With these contents the Directive could be implemented in German law without violating the fundamental rights of the Basic Law but, since the German legislator used its discretion in an unconstitutional manner, that is contrary to Article 10 of the Basic Law, the FCC declared challenged German data retention provisions void[232].

[232] Judgment of 2 March 2010, 1 BvR 256/08, 1 BvR 263/08, 1 BvR 586/08, Press release no. 11/2010 of 2 March 2010, see also A. B. Kaiser, *German Data Retention Provisions Unconstitutional in Their Present Form; Decision of 2 March 2010,* European Constitutional Law Review, no 6/2010, p. 503-517.

Chapter IV

Formal premises for questioning the primacy of the European Union law by constitutional courts

1. The principle of supremacy of constitution

Contemporary constitutionalism recognises the constitution as the act of written law of supreme legal force, which means that the constitution occupies the highest position in the legal system of the State and all other normative acts must be compliant and coherent with it[233]. In the model of legal protection of the constitution prevailing in the States of the European Union the review of compliance of statutes and other legal norms with the constitution is centralised and is the task of the constitutional court (tribunal). It may be conducted upon the motion of authorised subjects, without any connection with a concrete case (abstract review) or on initiative of courts when they examine individual cases (concrete review)[234]. One of the consequences of the principle of supremacy of the constitution is the prohibition to conclude international agreements non-compliant with its provisions and admissibility of preventive or ex post review, depending on the system, of constitutionality of international agreements.

As it was mentioned above, according to the established case-law of the Court of Justice of the European Union, EU law is not international law of which domestic status is determined by definite constitutional rules, but at the same time it is not identical with national law of a Member State, created by State bodies and subject to State procedures of review of compliance of

[233] See L. Garlicki, *Polskie prawo konstytucyjne. Zarys wykładu*, Warszawa 2010, p. 34-39; see also P. Ardant, *Institutions politiques & droit constitutionnel*, Paris 2005, p. 90-92.
[234] Garlicki, *ibidem*, p. 46.

norms. The constitutional court in particular is not competent to invalidate or suspend any norms of EU law.

In some Member States the question of primacy of EU norms in the case of their conflict with statutes is regulated by national constitutions[235]. In other the primacy of EU law over the statues is accepted by both constitutional courts and common courts of law[236].

However, no constitutional court has recognised the primacy of EU law over the constitution, which seems logical since the constitution does not provide for this type of primacy and the constitutional court by definition guards observance of the constitution.

Constitutional courts do not often elaborate on their justification of supremacy of the constitution. Especially in the case of preventive review of compliance of primary EU law with the constitution they state that an EU Treaty can not be ratified without previously amending the constitution.

This approach is typified by the formula applied by the French Constitutional Council. In its ruling issued in connection with the procedure of ratification of the Maastricht Treaty initiated by the president of the Republic the Constitutional Council made a reservation that if an international agreement included a clause non-compliant with the Constitution or infringing the "essential conditions of the national sovereignty" (*les conditions essentielles de la souveraineté nationale*), the consent to ratification requires amendments of the Constitution[237].

Another approach was adopted by the Italian Constitutional Court, which was the first to confront the principle of primacy of Community law. It determined the limits inferred from the constitution which may never be

[235] E.g. Article 91 section 3 of the Polish constitution provides that: "If an agreement, ratified by the Republic of Poland, establishing an international organization so provides, the laws established by it shall be applied directly and have precedence in the event of a conflict of laws".

[236] See *The Relationship* [1994] (note 154), p. 4-5 and p. 246 *ff.*

[237] See Decisions 92-308 DC of 9 April 1992 (*Maastricht I*); 2004-505 DC of 19 November 2004 (*Constitutional Treaty*); 2008-560 DC of 20 December 2007 (*Treaty of Lisbon*).

exceeded as a result of joining the Communities by Italy. It decided that while Article 11 of the Constitution allows restricting sovereignty to the extent which is indispensable for attaining the objectives determined in the Treaty establishing the European Economic Community, under no circumstances does it authorise the Community institutions to infringe the basic principles of Italian constitutional order and the inalienable human rights[238].

The German Federal Constitutional Court essentially implements the *contro limiti* doctrine. In its rulings in the cases of *Solange I* and *Solange II* the Court decided that the authorisation resulting from Article 24(1) of the Basic Law is restricted to the extent that conferring sovereign rights onto international institutions can not infringe the constitutional order of the Federal Republic of Germany. It confirmed this stance in the ruling on the Treaty of Lisbon stating that the foundation and the limit of the applicability of EU law in Germany is the order to apply the law which is contained in the Act Approving the Treaty of Lisbon, which can only be given within the limits of the current constitutional order[239].

When ruling on 6 April 1998 in *Carlsen*, the Danish Supreme Court held that Article 20 of the Constitution does not permit an international organization to be entrusted with the promulgation of legal acts or the making of decisions which are contrary to provisions in the Constitutions, including its rights and freedoms[240].

In its ruling on the Treaty of Lisbon the Constitutional Court of the Czech Republic stated that the Constitution remains the supreme law in the State and the Constitutional Court is the highest body appointed to interpret the constitutional provisions, which have the highest legal force in the territory of the

[238] Case 183/1973 of 27 December 1973 *Frontini c. Ministero delle Finanze* reprinted in: *The Relationship* [1994] (note 154) p. 630, confirmed by decisions no 170/1984 of 8 June 1984 *Granital* and no 232/1989 of 21 April 1989 *Fragd.*

[239] *Lisbon Case* 2 BvE 2/08… (note 72), para 343.

[240] Case *Carlsen et al vs Prime Minister Rasmussen* reprinted in: *Relations…* [2003] (note 169) p. 187.

Czech Republic. It was the first ruling in which the Constitutional Court examined the substantive aspect of compliance of an international agreement with the constitutional order of the Czech Republic[241]. If European bodies interpreted or developed EU law in a manner that would jeopardize the foundations of materially understood constitutionality and the essential requirements of a democratic law-based State, that are, under the Constitution of the Czech Republic seen as inviolable, such legal acts could not be binding in the Czech Republic[242].

More elaborated theoretical approach to the issue of primacy of EU law from the perspective of the principle of supremacy of the constitution is also seen in the Declaration 1/2004 of the Spanish constitutional court and in the ruling K 18/04 of the Polish Constitutional Tribunal.

Expressing its opinion in the Declaration of the 13 December 2004 concerning the issue of the constitutionality of the Treaty establishing a Constitution for Europe[243], the Spanish Constitutional Tribunal reinterpreted – in view of its earlier decisions – Article 93 of the Spanish Constitution. Following a motion submitted by the government, the Tribunal had to consider whether the provision of Article I-6 of the Treaty, according to which "the Constitution (of the Union – *note by the Author*) 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", is compliant with the Constitution of Spain.

The Tribunal recognised that Article 93 is the basic instrument of integration and enables introduction of other legal orders into the Spanish constitutional system, which results from the conferral of exercising the competences determined by the constitution of the State and thus other legal orders coexist with the Spanish order. The conferral of exercising the competences

[241] See Czyżniewski (note 150), p. 137.

[242] Case PL. US 19/08... (note 151), para 216.

[243] Case 1/2004 *Constitutional Treaty* Declaration of 13 December 2004. See A. del Valle Galvez, *Constitution espagnole et traité constitutionnel européen – la Déclaration du Tribunal Constitutional du 13 décembre 2004*, Cahiers de droit européen 2005/5-6, p. 704 *ff.*

results in the conferral of the instruments indispensable for guaranteeing the effectiveness of the law created by international bodies. Primacy of Union law within the exercised competences conferred onto European institution thus serves the purpose of ensuring uniform application of Union law in all Member States. The Tribunal interprets this as the "existential requirement" of this law, but not as a hierarchical supremacy.

In the Tribunal's view, the principle of supremacy of the constitution can be reconciled with the systems granting primacy of application of norms from the legal order other than national one on condition that it is stipulated by the constitution itself. In the case of Spain, Article 93 of the Constitution performs the function of the appropriate authorisation.

According to the Tribunal "the proclamation of the primacy of Union legislation by Article I-6 of the Treaty does not contradict the supremacy of the Constitution. Supremacy (*supremacia*) and primacy (*primacia*) are categories which are developed in differentiated orders. The former, is referred to the notion of validity, and to the interaction between the Constitution and domestic legislation. Primacy is referred to the notion of applicability, and to the interaction between EU law an domestic legislation. The conflict between domestic law and EU law would make domestic law inapplicable, but not invalid, since the criteria for validity are set out in the Constitution[244].

However, the legal order accepted in the accession act must be compliant with the basic principles and values of the Spanish constitution, i.e. those of a social and democratic State subject to the rule by law, which is tantamount to the fact that there exist limits for conferring competences and, consequently, limits for the primacy of Union law.

The concept presented above enabled the Tribunal to declare that Article I-6 of the Treaty establishing a Constitution for Europe is not contrary to

[244] See A. Torres Pérez, *The Judicial Impact of European Law in Spain: ECHR and EU Law Compared*, Yearbook of European Law, Vol. 30, No 1. (2011) p. 167. Author, however, considers the distinction between primacy and supremacy to be a formalistic way out of the potential conflict between EU law and the Constitution.

the Spanish constitution, even though three judges submitted their dissenting opinions (*votos particulares*)[245].

The issue of the relationship between the principle of primacy of Union law and the principle of supremacy of the constitution was also considered by the Polish Constitutional Tribunal. In its ruling of 11 May 2005[246] (K 18/04) the Tribunal adopted an assumption that when introducing Article 9[247] into the Constitution, the constitution-maker defined the legal system binding in the territory of the Republic of Poland as allowing for many constituent elements, i.e. thus determining that both the norms (provisions) established by the national legislator and the provisions established outside the system of Polish legislative bodies are binding in the Polish legal order.

The Tribunal concurrently emphasised that the Polish constitution-maker ensures the uniformity of the legal system regardless of the fact whether the legal acts constituting it result from the activity of the national legislator or whether they have originated as international provisions set out in the constitutional catalogue of sources of law.

Conferral of competences may in no circumstances be understood as a premise for admitting *ad hoc* revision of the Constitution, which means that the act of conferral must not result in admitting a possibility of ignoring the requirements formulated in Article 90 section 1 of the Constitution.

The Constitutional Tribunal indicated the areas where supremacy of the Constitution "over the whole legal order in the territory subject to sovereignty of the Republic of Poland" is manifested. Firstly, the process of European integration involving conferral of competences in certain matters onto Community (Union) bodies is based on the Constitution itself. Secondly, the supremacy of the Constitution is confirmed by the constitutionally determined mechanism of review of constitutionality of the Accession Treaty and

[245] See Valle Galvez (note 243), p. 719.

[246] See note 164.

[247] Pursuant to Article 9 "The Republic of Poland shall respect international law binding upon it".

the acts constituting its integral components. Thirdly, the provisions (norms) of the Constitution as the supreme legal act constituting an expression of the sovereign will of the people can not lose their binding force or be amended due to a very fact of emergence of an irreconcilable conflict between certain Community (now Union) provisions (acts) and the Constitution. In such a situation a sovereign Polish constitutional legislator retains the right of independent decision on the manner of resolving the conflict, including the advisability of possible amendment of the Constitution[248].

In the ruling of 24 November 2010[249] the Constitutional Tribunal once more emphasised that the conferral of competences can not infringe the provisions of the Constitution, including the principle of the Constitution's primacy in the system of sources of law. It also upheld the view expressed in the statement of reasons for the judgment K 18/04 that the Constitution remains – due to its exceptional power – "the supreme law of the Republic of Poland" in relation to all the international agreements binding for the Republic of Poland, which also applies to ratified international agreements concerning the conferral of competences "in certain matters". Due to the primacy of the binding force of the Constitution which arises from its Article 8 section 1, the Constitution enjoys precedence as to the binding force and application in the territory of Poland.

The Constitutional Tribunal is of an opinion that neither Article 90 section 1 nor Article 91 section 3 of the Constitution may constitute the grounds for conferring onto the Union/Communities the authorisation to enact legal acts or make decisions which would be incompliant with the Constitution of the Republic of Poland. Under no circumstances can an interpretation be adopted which would lead to the results incompliant with the precise wording

[248] Case K 18/04 (note 164) *passim*.
[249] Case K 32/09 (note 156), para 2.6.

of the constitutional norms and contradicting the minimum guarantee functions implemented by the Constitution[250].

If an irreconcilable inconsistency appeared between a constitutional norm and a Community norm, the Polish legislator would be faced with the decision on three options: amending the Constitution, or causing modifications within Community/EU provisions or ultimately on Poland's withdrawal from the European Union. According to the Constitutional Tribunal, under no circumstances can the Polish legal system resolve such an incompliance by recognising the supremacy of a Union norm over a constitutional norm; neither can it lead to the loss of the constitutional norm's binding force, replacement by a Union norm or restriction of the norm's application to the area remaining outside the jurisdiction of the Union law provisions[251].

2. Absence of authorisation of the European Union for *ultra vires* action[252]

One of the fundamental systemic principles of the European Union is the principle of conferral[253], which means that "the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein […]" (Article 5 section 2 TEU), while "competences not conferred upon the Union in the Treaties remain with the Member States" (Article 4 section 1). Moreover, "each institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in

[250] *Ibidem*.

[251] Case K 18/04 (note 164) para 13 (version in English).

[252] On this point see K. Wójtowicz, *Kontrola konstytucyjności aktów Unii Europejskiej podjętych ultra vires – między pryncypiami a lojalną współpracą,* [in:] *W służbie dobru wspólnemu*, R. Balicki, M. Masternak-Kubiak eds., Warszawa 2012, p. 515 *ff.*

[253] More on his point see T. Konstadinides, *Division of Powers in European Union Law. The Delimitation of Internal Competence between the EU and the Member States,* Wolters Kluwer 2009; P. Saganek, *Podział kompetencji pomiędzy Wspólnoty Europejskie a państwa członkowskie*, Warszawa 2002.

them […]" (Article 13 section 2 TEU). Increasing or reducing of the competences conferred upon the EU may follow the ordinary procedure of amending the Treaties (Article 48 sections 2-5 TEU). The solutions included in the provisions above have been confirmed and explained in Declaration no. 18 attached to the Final Act of the Conference of the Representatives of the Governments of the Member States, which adopted the Treaty of Lisbon.

From the point of view of Member States the principle of conferring competences guarantees these States the status of "Masters of the Treaties". Where constitutional courts control constitutionality of international agreements, each instance of increasing or reducing the competences of the EU resulting from an accession of a State (Article 49 TEU), revision of a Treaty (Article 48 TEU) or withdrawal of a State (Article 50 TEU) may be subject to assessment from the point of view of compliance with the constitution.

Ratification procedures, in which a representative body – the Parliament or directly the sovereign nation play as a rule a key role, provide democratic legitimacy both to the very process of conferring competences and the exercising of the attributes of sovereign authority by the EU[254].

Previously European Communities were also obligated by the principle of conferral (sometimes referred to by the doctrine as the "rule of limited, attributed competence"[255]), but due to absence of elaboration in the form of actual division of competences between the organisation and the Member States, determining with whom a competence remained in a concrete case, required joint interpretation of a number of Treaty provisions, the secondary legislation and the case-law of Community courts[256]. Yet, even then there was

[254] More on this point see G. Beck, *The Lisbon Judgment of the German Constitutional Court, the Primacy of EU Law and the Problem of Kompetenz-Kompetenz: A Conflict between Right and Right in Which There is No Praetor*, European Law Journal, July 2011, vol 17, no 4, p. 478-479. As the Author remarks (referring to P. Kirchhof), the principle of conferral, ensures that by accession to the European Union the Member States do not submit to a self-propelling automatism of irreversible integration.

[255] See S. Weatherhill, *Law and Integration in the European Union*, Oxford 1996, p. 38.

[256] See Craig, de Burca..., 5th ed. (note 23), p. 73.

no absolute certainty as to which areas remain within the sole competences of the Communities/European Union and which remain with the Member States. The matter was made more complicated by the difference of opinions on this issue between the European Commission and the Court of Justice[257].

The shortcomings of the previous Treaty provisions were evident, so it is hardly surprising that Member States adopted a more elaborate manner of determining EU competences in the Treaty of Lisbon. Categories and areas of competences remaining exclusively with the EU or shared with the Member States were determined (Article 2-6 TFEU). Article 3 TFEU enumerates the areas of competences remaining exclusively with the EU, with a provision that "the scope of and arrangements for exercising the Union's competences shall be determined by the provisions of the Treaties relating to each area" (Article 2 section 6 TFEU).

Independently of the issue of exclusive and shared competences "in certain areas and under the conditions laid down in the Treaties, the Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States, without thereby superseding their competence in these areas. Legally binding acts of the Union adopted on the basis of the provisions of the Treaties relating to these areas shall not entail harmonisation of Member States' laws or provisions" (Article 2 section 5 TFEU).

The Treaties also determine the manner of exercising the competences. In accordance with Article 5 sections 3 and 4 TEU, the EU and its institutions must in their actions respect the principles of subsidiarity and proportionality. Declaration no. 18 clarifies that if the Treaties confer onto the EU competences in a certain area shared with Member States, they exercise their competences within the scope in which the EU has not exercised its competences or decided to resign from exercising them. The latter takes place when the

[257] See Rideau (note 28), p. 634 ; A. von Bogdandy, J. Bast, *The Federal Order of Competences,* [in:] *Principles of European Constitutional Law,* 2nd ed., A. von Bogdandy, J. Bast editors, Oxford 2010, p. 289.

competent EU institutions decide to invalidate a given legislative act, especially to provide a better guarantee for permanent observance of principles of subsidiarity and proportionality.

A problem frequently raised by national parliaments in connection with the assessment of compliance of drafts of EU legislative acts with the principle of subsidiarity is the difficulty in distinguishing between a potential infringement of the principle of legality, especially due to absence of legal basis to enact an act by EU institutions, and an actual infringement of the principle of subsidiarity. According to the Commission, the lack of appropriate legal basis results in illegality. On the other hand, reasoned opinions issued by national parliaments include the thesis that when the Treaties do not provide for legal basis to enact an act, leaving an issue to be regulated by Member States, the assessment should refer to the principle of subsidiarity[258].

It should be noted that a new Treaty institution regulated by Article 290 TFEU – delegating to the Commission the power to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act – already causes a great deal of doubts. They are especially concerned with an excessively wide scope of competence provisions authorising the Commission to enact delegated acts in the matters essential in a given area, where regulatory competences have so far been exercised by Member States and not the Commission[259].

In this context it seems justified to conclude that the current Treaty formula of determining the competences of the EU creates greater potential for

[258] See A. Grzelak, *Realizacja uprawnień parlamentów państw członkowskich Unii Europejskiej w zakresie przestrzegania zasady pomocniczości – pierwsze doświadczenia*, BAS-WAPEiM-1947/11, Warszawa, 29 August 2011, p. 3-4. *E.g.* Polish Sejm in the reasoned opinion of 27 May 2011 declared that the proposal of the act infringes the principle of subsidiarity as the EU lacks competence to adopt legal acts on substantive family law (annexed to the resolution of the Sejm on declaring the proposal for the Council Regulation – COM/2011/ 127 final – incompatible with the principle of subsidiarity).

[259] See J. Łacny, *Opinia dotycząca sprawozdania Komisji w sprawie pomocniczości i proporcjonalności (XVIII sprawozdanie w sprawie lepszego stanowienia prawa za 2010 r.)*, BAS-WAPEiM-1631/11, Warszawa 12 August 2011, p. 16.

claims accusing EU legislative institutions of acting outside the scope of the conferred competences or infringing the principles of their exercising. Even the very selection of categories of competences in connection with the action undertaken by the EU may be challenged since it is difficult to divide them unambiguously[260].

Within the scope of conferred competences the European Union is authorised not only to enact legal acts but also to interpret, through the agency of EU courts, the Treaties constituting the basis of the EU and the law created by EU institutions.

The Court of Justice of the EU is also bound by the principle of conferral, therefore it may also be charged with transgressing its competences, e.g. for imposing on the EU norms the interpretation non-compliant with the Treaties. In the case of the Court of Justice it is not possible to verify this charge within the EU judicial system due to absence of appropriate procedures and the principle of *nemo iudex in causa sua*.

If it is assumed, as is usually done by constitutional courts[261], that competences are conferred on the basis of the constitution, using these competences involving constitutional provisions would also require special constitutional basis, because, as a rule, conferring competences is not tantamount to the implied revision of the constitution.

The consequence of such an assumption is the stance represented by the Polish Constitutional Tribunal that the Polish State has not conferred onto the EU the authorisation to enact legal acts or make decisions which would be non-compliant with the Constitution of the Republic of Poland. The Constitution only allows conferring the competences on the basis of an international agreement, which means that the object of the conferral may only be the competences indicated in the agreement. The process of European integration

[260] See examples: P. Craig, *The ECJ and Ultra Vires Action: A Conceptual Analysis*, Common Market Law Review 48/2011, p. 424 - 425.

[261] E.g. German FCC judgment in the *Lisbon case* (note 72), para 231.

requires respect for constitutional limits of conferring competences, because this is required by the principle of maintaining sovereignty. Even though the Constitutional Tribunal realistically admits that limits of conferred competences are not and can not be clear-cut, it also states categorically that conferring competences to create competences is inadmissible and each instance of widening the catalogue of competences requires appropriate basis in the content of an international agreement and the consent stipulated by Article 90 section 1 of the Constitution[262].

The stance of the German Constitutional Court is also unambiguous. According to the Court, the German Constitution does not authorise the bodies of the German State to confer sovereign rights in such a way that their exercise can independently establish other competences for the European Union. In other words the Constitution (Basic Law)prohibits the transfer of competence to decide on its own competences (*Kompetenz-Kompetenz*)[263].

It is thus clearly seen that from the perspective of constitutional courts the principle of conferring competences is not solely a Treaty principle but it is firmly rooted in constitutions. This causes considerable problems of jurisdictional nature, because while the Court of Justice of the EU ensures the observance of the Treaties, protection of the supreme legal force of the constitution remains with constitutional courts.

The notion of transgressing competences by the EU may be understood widely and may comprise all activities for which there is no legitimisation in the Treaties. It could be, especially in the early stages of integration, interference in the sphere of constitutionally protected individual rights while now it could be the infringement of constitutional identity of a Member State.

It seems that the practice will develop towards a narrower notion – that of *ultra vires* acts – i.e. in connection with enacting an act of secondary law without any legal basis or when an EU court, which in accordance with Article 19

[262] Case K 32/09 (note 156), para 2.6.
[263] German FCC judgment in the *Lisbon case* (note 72), para 233.

section 1 TEU ensures "that in the interpretation and application of the Treaties the law is observed", uses "inadmissible" interpretation of the provisions of the Treaties or acts enacted on their basis[264].

In terms of generally understood question of jurisdiction, it would be difficult for constitutional courts to yield to EU courts because in their opinion, which was also mentioned earlier, conferring competences is based on the constitution, excluding the possibility of independent creation of new competences by the EU.

The Polish Constitutional Tribunal adopted the rule that Members States maintain the right to assess whether Union legislative bodies, when enacting a legal act (legal provision), acted within the conferred competences and whether they exercised their rights in compliance with the principles of subsidiarity and proportionality[265]. Transgressing against these limitations results in the fact that the legal acts enacted outside their scope of competences are not covered by the principle of primacy of Union law. In ruling K 32/09 on the Treaty of Lisbon the Constitutional Tribunal addressed the allegations concerning the possibility of applying the provisions of the Treaty in a way that broadens the scope of competences that have already been conferred and stated that is not competent to assess hypothetical way of applying the Treaty of Lisbon. However, the Tribunal did not rule out the situation when it might recognise its competences in this area, which might take place if the practice of widening of the conferred competences manifested itself "in the form of concrete provisions subject to review by the Constitutional Tribunal, pursuant to Article 188 of the Constitution"[266].

The Constitutional Court of the Czech Republic generally recognises the functional capacity of the Union's institutional structure for ensuring review of the scope of the exercise of conferred competences. It warned, however,

[264] See P. Craig, *The ECJ and Ultra Vires Action* (note 260), p. 395.
[265] Case K 18/04 (note 164), para 15 (version in English).
[266] Case K 32/09 (note 156) para 2.6.

that its position may change in the future if it appears that this framework is demonstrably non-functional. In such a case, the court, acting *ultima ratio*, might review whether any act of Union bodies exceeded the powers that the Czech Republic transferred to the European Union under Art. 10a of the Constitution[267].

The German Constitutional Court has verified the concept of the *ultra vires* acts in the context of a concrete dispute.

In Germany the claim charging CJEU with infringement of the principle of conferral of competences was brought up in a constitutional complaint submitted to the German Federal Constitutional Court (FCC)[268]. The claim contested the decision of the Federal Labour Court (FLC), which complied with the CJEU's ruling in the case of *Mangold*[269]. The complainant (a legal person) maintained that by establishing the principle of non-discrimination due to age, which did not exist at that time in the Community law, the CJEU acted *ultra vires* and infringed the constitutionally guaranteed principle of contractual freedom (i.e. Article 2.1 and Article 12.1 in conjunction with Article 20.3 of the Constitution). Moreover, in the opinion of the complainant, the right to trial to which they were entitled on the basis of Article 101 (section 1 – sentence 2) of the Constitution (right to lawful judge) was infringed, because the Federal Constitutional Court did not refer a question to the CJEU for a preliminary ruling to establish whether the principle proclaimed in the *Mangold* ruling should also be applied to the contracts concluded before it was passed. Application of the ruling with retroactive effect would be incompliant with the principle of protection of legitimate expectations.

[267] Case Pl. ÚS 19/08: Treaty of Lisbon I (note 242), para 120. See also K. Witkowska-Chrzczonowicz, *Wyrok Sądu Konstytucyjnego z dnia 26 listopada 2008 r. w sprawie zgodności z porządkiem konstytucyjnym Republiki Czeskiej Traktatu z Lizbony (Ref. No PL Us 19/08*), [in:] Przegląd Sejmowy nr 2/2009, p. 279.

[268] Case No. 2 BvR 2661/06 (note 181).

[269] Case C-144/04 *Mangold* [2005] ECR I-9981.

As remarked by one of the commentators, the complaint offered the first opportunity to clarify the standards of assessment, determined by the Federal Constitutional Court in the ruling on the Treaty of Lisbon, whether legal instruments used by the European Union institutions do not transgress the limits of the competences conferred onto the Union and whether they do not infringe German constitutional identity[270].

It is interesting that the Federal Constitutional Court recognises the CJEU's right to develop EU law, and especially its general principles, and therefore it restrictively interprets its own right to review constitutionality. However, it stated that the principle of conferral established in the TEU results in the fact that "the Federal Constitutional Court is hence empowered and obliged to review acts on the part of the European bodies and institutions with regard to whether they take place on the basis of manifest transgressions of competence or on the basis of the exercise of competence in the area of constitutional identity which is not assignable (Article 79.3 in conjunction with Article 1 and Article 20 of the Basic Law), and where appropriate to declare the inapplicability of acts for the German legal system which exceed competences"[271].

However, this entitlement must be, according to the FCC, exercised in such a way as to take into consideration the CJEU's obligation to interpret and apply the Treaties respecting the principles of primacy, uniformity and unity of Union law. If every national court had the right to decide independently on the validity of legal acts of the Union, stated the FCC, "the primacy of application could be circumvented in practice, and the uniform application of Union law would be placed at risk".

[270] See M. Mahlmann, *The Politics of Constitutional Identity and its Legal Frame – the Ultra Vires Decision of the German Federal Constitutional Court*, German Law Journal vol 11 No. 12, p. 1409; M. Payandeh, *Constitutional Review of EU Law after Honeywell Contextualizing the Relationship between the German Constitutional Court and the EU Court of Justice,* Common Market Law Review, 1 (2011), p. 12 *ff.*

[271] Case No. 2 BvR 2661/06 (note 181), para 55.

For this reason the *ultra vires* review by the FCC can only be considered if a breach of competences on the part of the EU institutions (bodies) is sufficiently qualified. As it was mentioned earlier, this notion is interpreted by the FCC as a situation when the act of the authority of the EU is manifestly in breach of competences and leads to a structurally significant shift in the structure of competences to the detriment of the Member States[272].

A comparison of a clearly stated principle in the Lisbon ruling and the restrictive attitude to the possibility of its application in a concrete case is similar to the mitigation in the ruling concerning the banana market of the standard of protection of fundamental rights enacted in the ruling on the Maastricht Treaty[273].

[272] *Ibidem* Headnote 1 a).

[273] See C. Möllers, *Constitutional Ultra Vires Review of European Acts Only Under Exceptional Circumstances; Decision of 6 July 2010, 2 BvR 2661/06 Honeywell*, European Constitutional Law Review, no 7/ 2011, p. 165-166.

Chapter V

Normative anchors of judicial protection of constitutional basis of the State[274]

1. Sovereignty

Effect of membership in the Communities, and now in the European Union, on the interpretation and actual meaning of the principle of sovereignty in Member States has become not only the object of political dispute but also forced the doctrine of law to undertake a more detailed and multi-aspect discussion, which resulted in a significant number of publications devoted to this issue[275].

While considering the question of sovereignty, constitutional courts very frequently refer to these publications, but the point of reference for their judicial constructions is primarily the provisions of the constitution and frequently the content of the EU Treaties. However, the problem consists in the fact that the concept of sovereignty reflected in the constitutions uses the instruments of the technique of determining the political system developed by democratic constitutionalism, which, first of all, indicates the subject of sovereign authority, manner of expressing the subject's will and, frequently through interpretation, assigns the attributes of authority to the sovereign. On the other hand, neither the first Treaties establishing the Communities nor the currently binding Treaties establishing the basis of the European Union include any concrete guidelines as to how the principle of sovereignty in general should

[274] The expression "normative anchors" was used by the Polish Constitutional Tribunal in the Case K 32/09 (note 156), para 2.2.

[275] See e.g. *Sovereignty in Transition*, N. Walker ed., Oxford 2003; A. Kustra, *Przepisy i normy integracyjne w konstytucjach wybranych państw członkowskich UE*, Toruń 2009, p. 341 *ff.*

be understood, not to mention the subjects or the attributes of sovereignty of Member States.

To clarify the issue it is no longer sufficient to quote the ruling of the Permanent Court of International Justice (PCIJ) in the case of the ship "Wimbledon" (1923). The Court undertook to answer the question whether a state maintains its sovereign status when the fact of assuming international obligations results in restricting the freedom to exercise certain rights. The PCIJ stated that "[…] any convention creating an obligation of this kind places a restriction upon the exercise of the sovereign rights of the State, in the sense that it requires to be exercised in a certain way. But the right of entering into international engagement is an attribute of state sovereignty"[276].

The thesis formulated above is still valid, because concluding a treaty resulting in the accession to the EU or a revision Treaty is a consequence of a voluntary decision made by interested states, which as a rule – especially recently – is preceded by expression of will by a sovereign nation in a referendum.

Difficulty in qualifying the membership in the EU from the point of view of the principle of sovereignty results from the fact that as a consequence of conferring competences onto the EU the states lose entirely the possibility or exclusivity to exercise the rights constituting the attributes of sovereign authority, such as enacting legislation, its judicial application or deciding on the state's finances.

This new systemic phenomenon was referred to by the Court of Justice of European Communities in the first years of functioning of the Communities, which was most explicitly formulated in the ruling quoted earlier in the case of *Costa v ENEL* stating that "[…] by creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or

[276] PCIJ, Serie A, 1923, no 1, p. 25.

a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields"[277].

In a sense the thesis of the Court of Justice harmonised with the fact that some Member States accepted in their constitutions the possibility of restricting sovereignty[278]. However, the provisions were included for purposes other than integration, and moreover, their vague character is of no assistance in clarifying the essence and extent of contemporary integration. Besides, most constitutions of Member States include authorisation to confer competences without explicit permission for restricting sovereignty.

Faced with doubts concerning the principles of political system of such great significance, constitutional courts presented arguments which advocate maintaining the principle of sovereignty in the conditions of membership of the European Union. It seems that the constructions presented by constitutional courts of Poland, Germany and the Czech Republic are especially explicit in this matter, naturally, from the perspective of national constitutional circumstances.

The Polish Constitutional Tribunal is of an opinion that the notion of sovereignty as the supreme and unrestricted authority, both in the state's domestic and foreign relations, is subject to changes, while the freedom of states is subject to limitations imposed by international law. The membership in the European Union is especially responsible for the fact that "as regards the conferred competences, the states have renounced their powers to take autonomous legislative actions in internal and foreign relations". However,

[277] Case 6/64 *Costa v ENEL*, (note 61).

[278] In the Preamble to the French Constitution of 1946, in force when France signed the Treaties establishing the European Communities, it was provided that: "Subject to reciprocity, France shall consent to the limitations upon its sovereignty necessary to the organization and preservation of peace", para 15. According to Article 11 of the Italian Constitution of 1947: "Italy agrees, on conditions of equality with other states, to the limitations of sovereignty necessary for an order that ensures peace and justice among Nations; it promotes and encourages international organizations having such ends in view". Pursuant to Article 24 of the German Constitution (Basic Law) of 1949: "The Federation may by a law transfer sovereign powers to international organizations".

the Tribunal emphasises that the phenomenon does not lead to permanent limitations of a state's sovereignty, because, firstly, conferral of competences is not irrevocable; secondly, a result of conferring competences is joint exercising of state functions in the areas subject to cooperation within the Union. According to the Tribunal, Member States remain sovereign subjects "as long as they maintain full ability to specify the forms of conducting state duties, which is concurrent with the competence to "determine competences"[279].

Assessing the sovereignty of Poland following the accession to the European Union, the Constitutional Tribunal emphasises that the basis for the membership in the EU is the act of the nation's sovereign will, specified in an international agreement ratified upon consent granted in a nationwide referendum. It also emphasises the prohibition resulting from Article 90 of the Constitution of conferring all competences of a given organ of the State, conferring competences in relation to all matters in a given area and conferring competences which in their essence determine the remit of a given State organ.

Having made these reservations, the Tribunal formulated the conditions of preserving the sovereignty of the Republic of Poland, which include maintaining separateness of Poland's statehood identity within its present borders, determining the principles of Union membership in the Constitution and the primacy of the Polish Nation to determine its own fate.

In the light of this concept the Constitution, and especially the provisions of its preamble, Article 2, Article 4, Article 5, Article 8, Article 90, Article 104 section 2 and Article 126 section 1 are normative manifestation of the principle of sovereignty. Interpretation of these provisions prompts the Tribunal to put forward the thesis that "sovereignty of the Republic of Poland is expressed in inalienable competences of the organs of the State, constituting the constitutional identity of the State". Defining its political system by means of its own constitution, Poland must remain a democratic State ruled by law, where the supreme power is vested in the Nation and can not be

[279] Case K 32/09 (note 156), para 2.2.1.

conferred onto another entity. The Republic of Poland is obliged to guard its independence and inviolability of its territory and to safeguard human rights and freedoms of persons and citizens[280].

While being in favour of respecting the constitutional limits of conferring competences, the Constitutional Tribunal also maintains that the decisive rights concerning the competences defining the essence of sovereignty must remain with the competent authorities of the Republic of Poland, which especially concerns the enactment constitutional rules and the control of observance thereof, the judiciary, the power over the State's own territory, armed forces and the forces guaranteeing security and public order[281].

In Germany the constitutional context of the Federal Constitutional Court's (FCC) activity changed in 1992. Until the Maastricht Treaty signed on 7 February 1992[282], which created the European Union, Germany acceded to consecutive founding or revision Treaties on the basis of the integration clause from Article 24 section 1, which allows transferring sovereign powers to international organisations.

On 21 December 1992 new Article 23[283] was introduced to the Constitution. Its section 1 provides that "With a view to establishing a united Europe, the Federal Republic of Germany shall participate in the development of the European Union that is committed to democratic, social and federal principles, to the rule of law, and to the principle of subsidiarity, and that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law. To this end the Federation may transfer sovereign powers by a law with the consent of the Bundesrat. The establishment of the European

[280] *Ibidem*.

[281] *Ibidem*, para 2.2.

[282] The Maastricht Treaty entered into force on 1 November 1993, with Germany being the last Member State to deposit the ratification instrument.

[283] The original Article 23 was repealed by Article 4 section 2 of the Unification Treaty (31 August, 1990), more on this point see *Ustawa Zasadnicza Republiki Federalnej Niemiec*, translation B. Banaszak, A. Malicka [in:] *Konstytucje państw Unii Europejskiej*, W. Staśkiewicz ed., Warszawa 2011, p. 526, footnote 20.

Union, as well as changes in its Treaty foundations and comparable provisions that amend or supplement this Basic Law, or make such amendments or supplements possible, shall be subject to paragraphs (2) and (3) of Article 79"[284]. The preamble of the German Constitution speaks of the German People inspired by the determination to promote world peace as "an equal partner in a united Europe". In accordance with the German doctrine of constitutional law, the preamble is binding and can not be considered as a mere solemn declaration.

In the FCC's interpretation Article 23 section 1 of the Constitution and the preamble is tantamount to imposing onto the German constitutional bodies an obligation to contribute to the accomplishment of the task of uniting Europe. The Constitution expresses the will to participate in the European integration, which results in openness towards both international and European law[285].

The FCC adopted an unusual pro-integration stance in *Lütticke*, stating in the grounds for the judgment, that Article 24 section 1 of the Basic Law implies not only that the transfer of sovereign rights to inter-State institutions is permissible, but also that sovereign acts of Community institutions, including the Court of Justice, must be recognized by the German courts, as deriving from an original and exclusive sovereign authority[286].

The same year saw a significant change in the FCC's case-law concerning the manner of understanding constitutional conditions of Germany's participation in the construction of the united Europe. The interpretation of Article 24

[284] Article 79 provides that: „(1) This Basic Law may be amended only by a law expressly amending or supplementing its text. […] (2) Any such law shall be carried by two thirds of the Members of the *Bundestag* and two thirds of the votes of the *Bundesrat*. (3) Amendments to this Basic Law affecting the division of the Federation into *Länder*, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible".

[285] *Lisbon Case* 2 BvE 2/08 (note 72), para 225.

[286] Case No 2 BvR 225/69 *Alfons Lütticke GmbH*, 9 June 1971 [in:] *The Relationship…* 1994, (note 154), p. 418.

section 1 and Article 23 especially in conjunction with Article 79 section 3 of the Constitution presented in a few key rulings concerns numerous aspects of the participation, including the issue of sovereignty.

More profound characteristics of Germany's participation in the integration process within the European Community/European Union was presented in the ruling of 12 October 1993 (*Maastricht Urteil*)[287] passed in the final stage of ratification of the Maastricht Treaty by the Federal Republic of Germany. The Treaty amended the Community Treaties, but it first of all established the European Union, within which the "supranational" community order was supplemented with new areas of international cooperation in the domains of foreign policy, security and the system of justice.

According to the FCC, the Treaty on European Union established the union of states (*Staatenverbund*), but did not establish one State based on a European people. Consequently, the Federal Republic of Germany remains a member of the union of states, which derives its authority from the Member States and may act in the territory subject to German authority only by virtue of the German implementing order. Germany is one of the "masters of the Treaties" and is bound by the Union Treaty concluded for an unlimited period. Although the Member States' intention is to remain in long-term membership, they can in the last resort revoke that membership by adopting an act with the opposite effect. Thus, the Federal Republic of Germany retains the quality of a sovereign State in its own right and the status of sovereign equality with other States[288].

Confirming this line of reasoning in the ruling on the Treaty of Lisbon, the FCC emphasised the thesis that the Constitution (Basic Law) not only assumes the sovereign statehood but also guarantees it[289]. Thus transferring sovereign rights onto the Union does not result in the absorption of state

[287] Case 2 BvR 2134… (note 154).
[288] *Ibidem*, p. 557.
[289] *Lisbon Case* 2 BvE 2/08 (note 72), para 216.

sovereignty by a new subject, which would in this way take over all rights of the original sovereign. Thus, the act of transfer must have its limits and, in principle is revocable[290].

Moreover, the Constitution (Basic Law) does not grant the bodies acting on behalf of Germany powers to join a federal state and does not require the German people to resign from the right to self-determination, manifested in sovereignty of Germany and confirmed under international law. This step is reserved to the directly declared will of the German people alone[291].

According to certain authors, enumerating a series of requirements which the European Union must meet in Article 23 section 1 of the German Constitution is tantamount to imposing "structural guarantees" onto the European Union, subject of assessment by Member States, and primarily by their constitutional courts[292].

The Czech Constitutional Court elaborated on its manner of understanding sovereignty in the conditions of globalisation and integration in the ruling of 26 November 2008 on the Treaty of Lisbon[293].

First and foremost, the Constitutional Court stated that "the transfer of certain state competences, that arises from the free will of the sovereign, and will continue to be exercised with the sovereign's participation in a manner that is agreed on in advance and that is reviewable, is not a conceptual weakening of the sovereignty of the state, but, on the contrary, can lead to strengthening it

[290] *Ibidem,* paras 231 and 233.

[291] *Ibidem,* para 228.

[292] See C. Grabenwarter, *National Constitutional Law Relating to the European Union* [in:] *Pinciples of European Constitutional Law*, 2nd ed., A. von Bogdandy, J. Bast eds, Hart Publishing 2010, p. 100.

[293] Case Pl. US 19/08 *Treaty of Lisbon I…* (note 151). See also *Wyrok Sądu Konstytucyjnego z dnia 26 listopada 2008 r. w sprawie zgodności z porządkiem konstytucyjnym Republiki Czeskiej Traktatu z* Lizbony, przekład i opracowanie: K. Witkowska-Chrzczonowicz, Przegląd Sejmowy 2009, nr 2, p. 271-290; P. Briza, *The Czech Republic. The Constitutional Court on the Lisbon Treaty. Decision of 26 November 2008*, European Constitutional Law Review no 5/2009, p. 149-164.

within the joint actions of an integrated whole"[294]. It is thus not a case of the "loss of sovereignty" but the case of its common exercising (in accordance with the concept of "*pooled sovereignty*)[295].

The Court observed, however, quoting the ruling of the Polish Constitutional Tribunal of 11 May 2005, that it is not possible to confer onto the European Union such competences whose conferral would result in the fact that the Czech Republic would cease to be a sovereign state. It referred to two constitutional provisions. The authorisation included in Article 10a to transfer by means of an international agreement certain competences of the bodies of the Czech Republic to an international organisation or institution was restricted with a provision that conferral of competences incompliant with Article 1 section 1 of the Constitution is inadmissible. This provision states that "the Czech Republic is a sovereign, unitary and democratic state governed by the rule of law, founded on respect for the rights and freedoms of the human being and of citizens".

It is interesting that according to the Court this intransgressible limitation of the transfer of competences should be specified primarily by the legislature, because this is *a priori* a political question, which provides the legislature wide discretion. The Constitutional Court should only intervene as *ultima ratio*, in a situation where the scope of discretion was clearly exceeded, infringing Article 1 section 1 of the Constitution, or if competences are transferred transgressing the limits determined in Article 10a of the Constitution[296].

The Constitutional Court also defined the material core of the Constitution, which should be respected and constitutes the model of review of admissible transfer of competences from the Czech Republic to an international organisation. It is expressed in Article 9 section 2 of the Constitution, according to which a change in the essential requirements for a democratic state

[294] Case no Pl. US 19/08 *ibidem*, para 108.
[295] *Ibidem*, para 109.
[296] *Ibidem*.

governed by the rule of law is not permissible. In the Court's opinion the above is tantamount to the protection of fundamental human rights and freedoms in such a way as they are enshrined in the Charter of fundamental rights and freedoms, Convention for the protection of human rights and fundamental freedoms, in other international agreements concerning this matter and in the settled case-law of the Constitutional Court of the Czech Republic and the European Court of Human Rights[297].

Constitutional courts in Poland, Federal Republic of Germany and the Czech Republic have adopted the stance that maintaining sovereignty requires retaining a certain scope of competences by the EU Member States, which might be defined as an inviolable "core of sovereignty". The quoted rulings present the guidelines as to which competences constitute this "core of sovereignty" and determine the limits of conferring or transferring competences.

This is not the only approach to the question of sovereignty, which is substantiated by the concept adopted by the French Constitutional Council.

Initially, the Constitutional Council, which began functioning in 1958 when the Constitution of the Fifth Republic came into force, attempted to interpret the clause from the Preamble of the Constitution of 1946 – very general and unsuited to the needs of "Community" integration. The result of these efforts was a strongly criticised, if not derided, attempt to distinguish between limitations of sovereignty and its transfer. In the ruling of 29-30 December 1976 the Council decided that the Preamble allows introducing "limitations to national sovereignty", but does not authorise "transferring the whole or part of national sovereignty to any international organisation"[298]. In its comments

[297] *Ibidem*, para 110.

[298] « Si le préambule de la Constitution de 1946, confirmé par celui de la Constitution de 1958, dispose que, sous réserve de réciprocité, la France consent aux limitations de souveraineté nécessaires à l'organisation et à la défense de la paix, aucune disposition de nature constitutionnelle n'autorise des transferts de tout ou partie de la souveraineté nationale à quelque organisation internationale que ce soit », Décision no 76-71 DC du 30 décembre 1976, considérant 2.

to the ruling the doctrine raised the issue that limitation of sovereignty is nothing else but a result of transferring its part to another subject[299].

With time the Council resigned from the method of distinguishing the limitation of sovereignty from its transfer and began to examine whether international obligations which France was going to assume "affect the essential conditions of the exercise of national sovereignty". It follows from the Council's ruling on the constitutional compliance of Protocol no. 6 attached to the European Convention on Human Rights (ECHR) that the Council seems to interpret this formulation as obligations "non-compliant with the State's duty to ensure the respect for the institutions of the Republic, national continuity and the guarantee of citizens' rights and freedoms"[300].

When examining the constitutionality of EU treaties, the Constitutional Council does not distinguish the inviolable "core of sovereignty" and uses the above criterion in a way similar to a suspending veto, i.e. in a different way than constitutional courts mentioned above. If it is found that Treaty provisions are non-compliant with the Constitution, ratification of the Treaty is admissible after the constitution is amended[301]. Consequently, the sovereign People may, either directly in a referendum or indirectly through the agency

[299] See F. Luchaire, *Le Conseil constitutionnel et la souveraineté nationale*, Revue du Droit Public, no 6/1991, p. 1504 ; also see K. Wójtowicz, *Prawo Wspólnot Europejskich a zasada suwerenności w prawie konstytucyjnym państw członkowskich,* [in:] *Wspólnoty Europejskie. Wybrane problemy prawne*, part. I, J. Kolasa ed., Wrocław 1994, p. 17.

[300] Decision no 85-188 DC of 22 May 1985: « Considérant que cet engagement international n'est pas incompatible avec le devoir pour l'Etat d'assurer le respect des institutions de la République, la continuité de la vie de la nation et la garantie des droits et libertés des citoyens; Considérant, dès lors, que le protocole n° 6 ne porte pas atteinte aux conditions essentielles de l'exercice de la souveraineté nationale et qu'il ne contient aucune clause contraire à la Constitution, », considérant 2 i 3.

[301] See J. Roux, *Konstytucje narodowe a konstytucja europejska – czy zmiany konstytucji są naprawdę konieczne? Francuski punkt widzenia,* [in:] *Stosowanie prawa Unii i Wspólnot w wewnętrznym porządku prawnym Francji i Polski*, Warszawa 2007, p. 179 *ff.*

of a representative body, gradually confer all the attributes of sovereignty onto the European Union by fragmentary amendments of the constitution[302].

In this spirit, in the ruling on the ratification of the Treaty of Lisbon, the Constitutional Council summarised its line of interpretation, stating that if the provisions of the Treaty determining the obligations resulting from participation in the process of European integration include the provisions non-compliant with the Constitution, negate constitutionally guaranteed rights and freedoms or affect the essential conditions of the exercise of national sovereignty, granting authorisation for ratification must be preceded by amending the Constitution" [303].

2. Fundamental rights

When the founding Treaties were negotiated and in the first years of functioning of European Communities, the issue of protection of human rights seemed so remote from the dominating economic aims of integration that taking these rights into consideration in the content of Treaties was recognised as unnecessary[304]. Yet, as the integration processes intensified, the possibility of infringing individual rights within Community law became quite realistic, which might lead to a confrontation with constitutional courts, because European democratic constitutionalism placed particular emphasis on protection of human rights.

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[302] Commenting this method B. Mathieu remarked that „la souverenaité française était <exsangue>" [in:] Ardant, *Institutions*... (note 233), p. 445.

[303] Decision no 2007-560 DC (note 71), considérant 9: „[…] lorsque des engagements souscrits à cette fin contiennent une clause contraire à la Constitution, remettent en cause les droits et libertés constitutionnellement garantis ou portent atteinte aux conditions essentielles d'exercice de la souveraineté nationale, l'autorisation de les ratifier appelle une révision constitutionnelle ».

[304] See more on his point e.g. *Ochrona praw podstawowych w Unii Europejskiej*, J. Barcz ed., Warszawa 2008; K. Wójtowicz, *Ochrona praw człowieka w Unii Europejskiej*, [in:] *System ochrony praw człowieka*, B. Banaszak, A. Bisztyga, K. Complak, M. Jabłoński, R. Wieruszewski, K. Wojtowicz, Zakamycze 2005, p. 205 *ff*.

The issue was especially acute in Italy and Federal Republic of Germany, where great significance was attached to the fundamental rights guaranteed by the constitution due to the infringement of these rights in the period of fascism and Nazism.

When the Court of Justice formulated the principle of primacy of Community law over national law, a question arose who and in what way will adjudicate on the infringement of human rights by Community institutions, as national courts were not able to do this while the Court of Justice had no Treaty catalogue of these rights.

In conjunction with the above the Italian Constitutional Court observed that in case, however hypothetical, of infringement of inalienable human rights (and the constitutional basis of the Italian legal order) by Community provisions, the Constitutional Court remains competent to review constitutionality of these provisions and to decide what rule should prevail[305].

The German Federal Constitutional Court was even more radical when it emphasised in the first of its decisions important for this issue (the so-called *Solange I*) that guarantees of fundamental rights are an inalienable feature of the Constitution of the Federal Republic of Germany. Since the Community lacked a catalogue of fundamental rights comparable to the catalogue of such rights contained in the Constitution, so long as the Community does not achieve this level of legal certainty, the FCC may review whether Article 24 of the Constitution is not infringed by the Community[306].

In reaction to this stance adopted by the constitutional court, beginning with the ruling in the case of *Stauder*[307], the European Court of Justice argued that effective protection of fundamental rights can be ensured within the

[305] Cases 183/1973 *Frontini v. Ministerio delle Finanze*; 170/1984 *Spa Granital v. Amministrazione delle Finanze dello Stato*; 232/1989 *Fragd v. Amministrazione delle Finanze dello Stato* [in:] *The Relationship* …1994 (note 154), pp. 629-662. See also Rossi (note 67), p. 67.

[306] Case no 2 BvL 52/71 *Internationale Handelsgesellschaft* (note 184) [in:] *The Relationship*… 1994, *ibidem* p. 423.

[307] Case 29/69 *Stauder v Ulm* [1969] ECR 419.

Community legal order. However, unable to find distinct Treaty basis, it referred to general principles of Community law, the integral part of which are fundamental (human rights). It also indicated that the whole system of protection of fundamental rights is inspired by constitutional traditions common to the Member States with a reservation being made that the protection of such rights should be ensured within the framework of the structure and the objectives of the Community[308]. The Court distinctly emphasised that "introduction of special criteria for assessment stemming from the legislation or constitutional law of a particular Member State would, by damaging the substantive unity and efficacy of Community law, lead inevitably to the destruction of unity of the common market and the jeopardising of the cohesion of the Community"[309]. However, in *Nold*[310] it stated that respect for constitutional traditions common to the Member States consists in the fact that the Court "can not uphold measures which are incompatible with fundamental rights recognised and protected by the constitutions of those States".

In *Solange II* the FCC appreciated the achievements of the Community in the area of the protection of fundamental rights by adopting the position stating that so long as Community law and, in particular, the case-law of the Court of Justice generally ensured an effective protection of fundamental rights, the FCC would no longer exercise its powers of jurisdiction to decide on applicability of secondary Community law or review such legislation by the standard of the fundamental rights contained in the Constitution[311].

A slight probability of executing such review is substantiated by the ruling of 7 June 2000 (concerning the banana market). The FCC held that constitutional complaints and references from courts alleging the infringement of

[308] Case 11/70 *Internationale Handelsgesellschaft GmbH*, [1970] ECR 1125, para 4.
[309] Case 44/79 *L. Hauer v. Land Rheinland-Pfalz* [1979] ECR 3727, para 3 of the summary of the judgment.
[310] Case 4/73 *J. Nold v Commission* [1974] ECR 491, para 13.
[311] Case No 2 BvR 197/83 of 22 October 1986 *Wünsche Handelsgesellschaft* (Solange II) [in:] *The Relationship*... 1994, (note 154), p. 466.

fundamental rights enshrined in the German Constitution by secondary Community law were inadmissible *ab initio* if their grounds failed to show that the development of European law, and in particular the jurisprudence of the Court of Justice since the *Solange II* judgment of the FCC, had fallen below the required standard of fundamental rights protection determined by the German Constitution[312]. In each case this requires a confrontation of the protection of a given fundamental right on the national and Community levels. As stated by the president of the FCC Andreas Vosskuhle, it is improbable that the threshold set in such a manner could be exceeded[313].

Constitutionalism of the States from Central and Eastern Europe which joined the European Union also does not accept infringement of rights and freedoms of an individual protected by the provisions of the democratically enacted constitutions. Confirming this principle in relation to European Union law, constitutional courts, similarly as the German FCC, approve the level of protection of these rights in the European Union, as exemplified by the positions adopted by the Constitutional Court of the Czech Republic and the Polish Constitutional Tribunal.

In the ruling of 3 May 2005 on European Arrest Warrant the Czech Constitutional Court stated that Article 1 section 2 of the Constitution of the Czech Republic, interpreted in conjunction with the principle of loyal cooperation set forth in Article 10 TEEC, gives rise to constitutional principle under which the provisions of national law, including the Constitution, are to be interpreted in accordance with the principles of European integration and the cooperation between Community bodies and the bodies of Member States. In the Court's opinion this means that if there are several interpretations of the constitutional order, which includes the Charter of fundamental rights and freedoms[314],

[312] Case No 2 BvL 1/97 of 7 June 2000 *Banana Market Organization* [in:] *The Relationship…* 2003 (note 169), p. 272 and 283.

[313] See A. Voskuhle, *Multilevel Cooperation of the European Constitutional Courts,* European Constitutional Law Review no 6/2010, p. 192.

[314] *Listina základních práv a svobod*, adopted in 1991.

and only some of them lead to fulfilling the obligation that the Czech Republic assumed in connection with its membership in the European Union, that interpretation must be selected which supports the fulfilment of that obligation, and not an interpretation that prevents such fulfilment[315].

It upheld this stance in the ruling of 8 March 2006 concerning sugar quotas, stating that there are no grounds for assuming that the current standard for protection of fundamental rights within the Community, as manifested in the case-law of the CJEU, is of a lower quality than the protection accorded in the Czech Republic, or that the standard for protection markedly diverges from the standard up till now provided in the domestic setting by the Constitutional Court[316].

The Polish Constitutional Court in its ruling of 11 May 2005 on the Treaty of Accession emphasised that the Constitution of the Republic of Poland and Community law are based on the same set of common values determining the nature of a democratic state ruled by law and the catalogue and nature of fundamental rights. The consequence of axiology of legal systems common for all Member States is also the fact that the rights guaranteed in the European Convention for the protection of human rights and fundamental freedoms and resulting from constitutional traditions common for the Member States create general principles of Community law. According to the Constitutional Tribunal, this circumstance "significantly facilitates co-application and mutually sympathetic interpretation of national and Community law"[317].

The Tribunal stated however, that interpreting domestic law in a manner "sympathetic to European law" must have its limits and can not lead to the results contradicting the explicit wording of constitutional norms or being irreconcilable with the minimum of guarantee functions realised by the Constitution, which concerns, in particular, the constitutional norms in the

[315] Case Pl. US 66/04, quoted in Case Pl. US 19/08 (note 151) para 114.
[316] Case Pl. US 50/04, part A-3, www.usoud.cz/en/.
[317] Case K 18/04 para 8.3 (original text in Polish) [reprinted in] *Wybrane orzeczenia Trybunału Konstytucyjnego związane z prawem Unii Europejskiej (2003-2014)*, Warszawa 2014.

field of rights and freedoms of an individual. They determine the threshold which can not be lowered or questioned due to the introduction of Community (EU) provisions[318].

Coming into force of the Treaty of Lisbon strengthened the legal status of fundamental rights in the EU, because in accordance with Article 6 section 1 TEU the Charter of fundamental rights has the same legal force as the EU Treaties. At the same time section 3 of the same Article maintains the clause that the rights guaranteed by the ECHR and the rights resulting from constitutional traditions common to all Member States constitute part of EU law as general principles; moreover, section 2 stipulates that the EU will join the ECHR. In the light of these new provisions, the view that the EU is inevitably heading towards acquiring general competence in the area of human rights does not seem exaggerated[319]. At any rate, the presumption of appropriate level of protection of fundamental rights by EU institutions is more justified now than in the previous legal order.

Constitutional courts express this in their latest case-law, attempting to find the balance between the principle of inviolability of individual rights and freedoms protected by the constitution and the EU system of guaranteeing fundamental rights.

In its order of 4 October 2011 the German Federal Constitutional Court stated that as long as the European Union generally ensures effective protection of fundamental rights as against the sovereign powers of the Union, which in essence is to be regarded as being substantially similar to the protection of fundamental rights provided by the Basic Law, the FCC no longer exercises its jurisdiction to decide on the applicability of EU law in Germany cited as the legal basis for any acts on the part of German courts or authorities, and hence no longer reviews such legislation by the standard of fundamental

[318] Case K 18/04 (note 164), para 14.

[319] See R. White, *A New Era for Human Rights in the European Union?*, Yearbook of European Law, Oxford 2011, p. 100.

rights. Similarly, a domestic legal provision which transposes a directive or a decision into German law is not examined for compatibility with the fundamental rights of the Basic Law if EU law fails to leave the German legislature any latitude in such transposition, but makes binding stipulations[320].

Referring to the views expressed in the Polish legal doctrine, the Polish Constitutional Tribunal in its ruling of 16 November 2011 stated that: "[T]he scope of the powers of an international organisation a member of which is the Republic of Poland should be delineated in such a way so that the protection of human rights could be guaranteed to a comparable extent as in the Polish Constitution. The comparability concerns the catalogue of the rights, on the one hand, and the scope of admissible interference with the rights, on the other. The requirement of appropriate protection of human rights pertains to their general standard, and does not imply the necessity to guarantee identical protection of each of the rights analysed separately" [321].

However, the Tribunal's conclusions include a reservation. While the Charter of Fundamental Rights of the European Union, the ECHR and constitutional traditions of the Member States set a high level of protection of fundamental rights (human rights) in the European Union, that does not mean that legal solutions in the two (Polish and EU) legal orders are identical. In the case of filing a constitutional complaint the complainant should be required to make probable that the said EU secondary legislation act undermines the level of protection of rights and freedoms, in comparison with the level of protection guaranteed by the Constitution. This is not and additional requirement arising from Article 79 (1) of the Constitution but more specific rendering of the requirement to indicate in what manner given rights and freedoms have been infringed[322].

[320] Order of 4 October 2011, 1 BvL 3/08, Federal Constitutional Court, Press release no. 65/2011 of 26 October 2011, para 1.

[321] Case SK 45/09 (note 199), para 2.9.

[322] *Ibidem*, para 8.5 and the press release SK 45/09 para 4.

The stance adopted by the Court of Justice of the EU and constitutional courts prove that protection of rights and freedoms of an individual in his or her relations with public authority remains an important task of agencies of legal protection in the European Union[323] and in the Member States. It is absolutely understandable and justified by the fact that functioning of institutions exercising this authority makes sense when it serves the interests of an individual[324].

3. Constitutional identity

The Treaties establishing the basis of the European Union do not mention constitutional identity but only national identity[325]. This notion appeared in the primary law relatively late. Article 5 of the Treaty establishing the European Community was complemented by the Maastricht Treaty with the principle of subsidiarity and an additional provision that "the Union respects national identity of the Member States" was introduced to Article 6 section 3 of the new Treaty on European Union.

The notion of "national identity", unclear in legal terms, caused doubts as to its effectiveness in protecting the rights of Member States against unjustified interference of the Communities/European Union. Yet, since the notion has been introduced to the legally binding Treaty, attempts were made to define it to the extent that it could be attributed with normative consequences.

Thus, not only the specific character of culture, language, customs or religion but also maintaining basic functions of the state indispensable for the existence of a state as a separate identity were distinguished as the constituents

[323] More on this point see T. T. Koncewicz, *Aksjologia unijnego kodeksu proceduralnego,* Warszawa 2010, p. 33 *ff.*

[324] J. Trzciński, *Sądownictwo administracyjne jako gwarant ochrony wolności i praw jednostki,* [in:] *Trzecia władza. Sądy i trybunały w Polsce*, A. Szmyt ed., Gdańsk 2008, p. 127-128; R. Alexy, *Teoria praw podstawowych*, translation B. Kwiatkowska, J. Zajadło, Warszawa 2010, p. 406.

[325] More on this point see K. Wójtowicz, *Poszanowanie tożsamości konstytucyjnej państw członkowskich Unii Europejskiej*, Przegląd Sejmowy 4(99)/2010, p. 9 *ff.*

of national identity. In a wider perspective preservation of national identity in the EU also involves the obligation to respect the continuity of existence of the Member States as sovereign subjects, respect for national cultures, norms of family law, provisions defining the relations between the state and the churches, (official) languages, ways of ensuring access to the state social security system and the principles of the state's social and economic system[326].

According to Leonard Besselink, a society's culture can not be separated from its national identity, especially that the structures of many political and constitutional arrangements adopted by states quite frequently reflect cultural phenomena[327].

Similar ideas were expressed by Polish authors in their commentaries to the Treaty on European Union. According to Cezary Mik, Article 6 section 3 TEU does not only refer to national identity understood as the specific character of its culture, language, customs, religion, etc., but also to state identity (Fr. *état-nation*), i.e. state's separateness and maintaining basic functions of the state[328]. Paweł Filipek linked the notion of national identity with the concept of the "Europe of homelands", which resulted from the intention to assuage fear that individual states might disappear in the European Union. Therefore, primarily the statehood and sovereignty of states, including their constitutional systems, were to be protected[329].

The case-law of the Court of Justice of the EU does not elaborate on the issue of respecting national identity. If it ever touched on the subject, it tried to balance the need of respecting the freedoms guaranteed by the treaties and other basic values for the EU with the obligation to respect national identity.

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[326] See J-H. Reestman, *The Franco-German Constitutional Divide. Reflections on National and Constitutional Identity*, European Constitutional Law Review no 5/2009, p. 376.

[327] See L. Besselink, *National and constitutional identity before and after Lisbon,* Utrecht Law Review, vol. 6, issue 3 (November) 2010, p. 44.

[328] See *Traktat o Unii Europejskiej. Komentarz*, C. Mik, W. Czapliński eds., Dom Wydawniczy ABC, 2005, p. 91.

[329] See P. Filipek, Article 6 [in:] *Traktat o Unii Europejskiej. Komentarz*, K. Lankosz ed., Warszawa 2003, p. 136-137.

Ruling on case C-379/87, the CJEU stated that the national language (in this case Irish) may express national identity and culture, even if it is not spoken by the whole population of the State. The Treaties do not object to the policy of protection and support of a language which is both a national and the first official language. However, this policy can not infringe the fundamental freedom of movement of persons. Therefore, the requirements resulting from the means aiming at implementing the policy of protection of the national language can in no circumstances be unproportional to the adopted aim, while their implementation can not result in discrimination of citizens of other Member States[330].

The issue of protection of national identity emerged also in case C-473/93, where Luxembourg justified restrictions for citizens of other Member States in their access to the profession of teacher, requiring teachers to hold the citizenship of Luxembourg so that they are able to pass on national values. Due to the country's size and its specific demographic situation, the government of Luxembourg maintained that the requirement of the state citizenship was an indispensable condition for maintaining its national identity. The identity would be jeopardised if most teachers came from other Member States. The CJEU rejected this argument, but it recognised that maintaining national identity is a legitimate aim respected by Union law. However, according to the Court, attaining this aim can not justify denying the citizens of other Member States access to all positions in the area such as education. The access may only be limited in the case of positions entailing direct or indirect participation in exercising the rights resulting from public law and performing tasks aiming at the protection of general interests of the State or other public institutions[331].

[330] Case C-379/87 *Anita Groener v Minister for Education and the City of Dublin Vocational Educational Committee*, [1989] ECR 3967, paras 18-19.

[331] Case C-473/93 *Commission v Luxembourg* [1996] ECR I-3207, paras 32-36.

Article 4 section 2 TEU, binding after the Treaty of Lisbon came into force, stipulates that "the Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government […]". It is evident that the clause concerning national identity has been extended in comparison with the text adopted in 1992 in Maastricht.

This provision is tightly connected with the division of competences between the Union and Member States, which is substantiated by the fact that the same Article 4 in section 1 stipulates a reservation that "the competences not conferred upon the Union in the Treaties remain with the Member States". This reservation was supported by the stipulation from Article 5 section 2 TEU that "under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein […]".

The preamble to the Charter of fundamental rights of the European Union[332] includes the stipulation that the Union contributes to the preservation and to the development of common values while respecting the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States and the organisation of their public authorities at national, regional and local levels.

The manner of phrasing Article 4 TEU suggests that Member States are responsible for interpreting the notion of "national identity", since it mentions the competences remaining with the states not only in general terms, but also with reference to individually identifiable political and constitutional structures characteristic for each state.

The Court of Justice of the EU had an opportunity to conduct a profound analysis of the notion of national identity stipulated in Article 4 section

[332] According to Article 6 section 1 TEU the Charter of Fundamental Rights has the same legal value as the Treaties.

2 TEU in the ruling of 22 December 2010 in the case of *Ilonka Sayn-Wittgenstein*, but refrained from doing this.

The opportunity was constituted by the fact that the Member State involved in the case strongly emphasised the issue of protecting constitutional identity in the context of possible infringement of freedoms guaranteed by EU law. The case concerned Austria and the Austrian Government raised the issue that the reviewed provisions of the Law on the abolition of the nobility are intended to protect the constitutional identity of the Republic of Austria. Even if the said Law is not an element of the republican principle which underlies the Federal Constitutional Law, it constitutes a fundamental decision in favour of the formal equality of treatment of all citizens before the law, in the sense that no Austrian citizen may be singled out by additional elements of a name in the form of appellations pertaining to nobility, titles or ranks, the only function of which is to distinguish their bearer from other persons and which have no connection with his profession or education. According to the Austrian government, any restrictions on the rights of free movement which would result for Austrian citizens from the application of the provisions at issue in the main proceedings are justified in the light of the history and fundamental values of the Republic of Austria. In addition, those provisions do not restrict the exercise of the rights of free movement more than is necessary in order to achieve the abovementioned objective[333].

Also the Commission observed, that in the context of Austrian constitutional history it is necessary to take into account the Law on the abolition of the nobility as an element of national identity. In order to assess whether the objectives pursued by that Law can justify restriction on the freedom of movement of persons in a case such as that which is the subject of the main proceedings, a balance must be struck between, first, the constitutional interest in removing the noble elements of the name of the applicant in the main

[333] Case C-208/09 *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien* [2010] ECR I-13693, paras 74-75.

proceedings and, second, the interest in preserving that name which was entered in the Austrian register of civil status for 15 years[334].

The Court of Justice of the EU referred to Article 4 section 2 TEU emphasising that the obligation to respect national identities of Member States also comprises the State's republican system. In the context of Austria's constitutional history, the Law on the abolition of the nobility, as an element of national identity, may be taken into consideration when a balance is struck between legitimate interests and the right of free movement of persons recognised under European Union law[335].

However, the Court's crucial line of reasoning was not directly concerned with national identity, but with the question whether the interest of the State may be justified in the light of the notion of public policy analysed in case-law earlier[336] and whether it is connected with implementing the principle of equal treatment, which is a general principle of EU law and the basic constitutional objective of the State[337].

These arguments may be indirectly referred to the individualised concept of national identity, because the Court of Justice of the EU decided that the specific circumstances which might justify recourse to the concept of public policy might vary from one Member State to another and from one era to another. Therefore, the competent state authorities must be allowed a margin of discretion within the limits determined by the Treaty[338]. Moreover, "it is not indispensable for the restrictive measure issued by the authorities of a Member State to correspond to a conception shared by all Member States as regards the precise way in which the fundamental right or legitimate interest in question is to be protected and that, on the contrary, the need for, and proportionality of, the provisions adopted are not excluded merely because

[334] *Ibidem*, para 80.
[335] *Ibidem*, paras 83 and 92.
[336] In particular see C-36/02 *Omega* [1969] ECR I-9609, paras 30-31.
[337] Case C-208/09 (note 333), paras 84-87 and 89-93.
[338] *Ibidem*, para 87.

one Member State has chosen a system of protection different from that adopted by another State"[339].

In the conclusion of the ruling the principle of equal treatment has also been ignored, even though the Court of Justice of the EU was quite cautious in referring to it in the reasons for the judgment. It stated that in the examined case it does not seem disproportionate when a Member State seeks to attain the objective of protecting the principle of equal treatment by prohibiting any acquisition, possession or use, by its nationals, of titles of nobility or noble elements which may create the impression that the bearer of the name is holder of such a rank. Thus it seems that Austrian authorities responsible for civil status matters did not exceed what is necessary in order to ensure the attainment of the fundamental constitutional objective pursued by them[340].

Despite modest contribution of the Court of Justice of the EU to the explanation of the content of the obligation to respect the national identity of the Member States, while commenting on the ruling above, L. Besselink interprets it as an intention of searching for a new equilibrium between the constitutional orders the European Union and the Member States, in which mutual respect and constructive inclusion of norms fundamental to the other's legal order prevail over the previous strictly hierarchical conception of these relations. It may be understood as a recognition of significance of national constitutional orders as they are interpreted by constitutional courts, while the Court of Justice of the EU would be responsible for preventing the abuse of the category of "national identity"[341].

The doctrine points out yet another aspect of the issue, interpreting the recognition of institutional autonomy of Member States by the Court of Justice of the EU as its intention of imposing onto the European Union the obligation

[339] *Ibidem*, para 91.
[340] *Ibidem*, para 93.
[341] See *Case C-208/09, Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien*, with annotation by L. F. M. Besselink, Common Market Law Review no 2/2012, p. 687-689.

to respect their national (constitutional) identities. The CJEU consistently adopts the stance that fulfilling EU obligations involves constitutional division of competences, decided upon by the Member States themselves without any interference of EU institutions[342]. Moreover, the CJEU at the same time emphasises the existence of counterbalance to institutional autonomy as the prohibition from referring to the principle of constitutional division of competences to exempt from the obligation of fulfilling EU obligations[343].

Incorporating constitutional structures of State into the notion of national identity (in Article 4 section 2 TEU) seems to transfer the obligation, or rather a privilege, of interpretation of the notion from the Court of Justice of the European Union to national constitutional courts. It is thus hardly surprising that some of them transformed the "Treaty" national identity into the constitutional identity[344] to support the thesis of the constitutional court's right to review the scope of the competences conferred onto the EU or even examining whether EU acts respect this identity[345].

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[342] Case C-344/01 *Germany v. Commision* [2004] ECR I-02081, para 60: "Therefore, just as it is not for the Commission to rule on the allocation of powers by the institutional rules proper to each Member State, or on the obligations which may be imposed on the Federal Republic of Germany and Länder authorities respectively, that allocation cannot constitute a sufficient reason to restructure the Member States' obligations towards the Community in connection with the apportionment of the burden of proof of an infringement of the rules on the common organisation of the agricultural markets". See also R. Grzeszczak, *Władza wykonawcza w systemie Unii Europejskiej*, Warszawa 2011, p. 66.

[343] Case C-87/02 *Commission v. Italy* [2004] ECR I-05975, para 38: "[a] Member State cannot plead conditions existing within its own legal system in order to justify its failure to comply with obligations and time-limits resulting from Community directives. While each Member State may freely allocate internal legislative powers as it sees fit, the fact remains that it alone is responsible towards the Community under Article 226 EC for compliance with obligations arising under Community law".

[344] The notion of "constitutional identity" is referred to also outside the specific context of relations between the European Union and its Member States, see G. J. Jacobsohn, *Constitutional Identity*, Harvard University Press 2010.

[345] This approach is present in the German FCC's *Lisbon Case* judgment, see A. Pliakos, G. Anagnostaras, *Who is the Ultimate Arbiter? The Battle over Judicial Supremacy in EU Law*, 36 European Law Review, no 1/2011, p. 110.

Since the early 1970s constitutional courts have emphasised the need to respect constitutional structures of state, constitutional order and constitution's identity by the Community/EU law[346].

In the conceptual sense the pioneering role was also played by the Advocate General Luiz M. Poiares Maduro. In his opinion presented in case C-213/07 he adopted the stance that national identity includes the Member State's constitutional identity, while respecting it constitutes the obligation of the European Union. The obligation forms part of the very essence of the European project initiated in the early 1950s, i.e. following the path of integration while maintaining political existence of the States. Consequently, a Member State may demand that its national identity is protected, while the required respect for the Member States' constitutional identity may constitute a legitimate interest, which may in principle justify restricting the obligations imposed by Union law. In its turn a State may rely on this interest to justify its own assessment of constitutional measures, which must supplement Union legislation in order to ensure observance on its territory of the principles and rules laid down by or underlying that legislation.

The Advocate General pointed out, however, that respect owed to the constitutional identity of the Member States can not be understood as an absolute obligation to defer to all national constitutional rules. If this were the case, national constitutions might become instruments enabling the Member States to free themselves from Union law in given fields[347].

The French Constitutional Council may be credited with popularising the notion of constitutional identity in the European legal space. In its decision of 27 July 2006 the Council stated that transposition of a directive into

[346] The German FCC referred to the "basic structure of the Constitution, on which its identity rests" in Case 2 BvL 52/71 *Solange I* (note 184), p. 458, para 62 or to the "identity of the prevailing constitutional order" in Case 2 BvR 197/83 *Solange II* (note 311), p. 485, para 32.

[347] Opinion of AG Maduro of 8 October 2008 in Case C-213/07 *Michaniki* [2008] ECR I-9999, paras 31-33.

national law "cannot run counter a rule or principle inherent to the constitutional identity of France, except when the constituting power consents thereto[348]". According to some authors, this formula narrowed down[349] the scope of application of reservation of constitutionality in the sense that the specific character of constitutional provisions may be expressed in its crucial or even fundamental character. The Constitutional Council implemented this construction to a certain degree in decision 2006-543 DC of 30 November 2006 recognising that the guarantee of existence of national public service formulated in paragraph 9 of the preamble of the French Constitution of 1946 does not constitute a principle inseparably connected with France's constitutional identity and does not prevent a transposition of the directive concerning privatisation of the energy sector[350].

In the doctrine of French constitutional law the view was expressed that the notion of French constitutional identity comprises: specific features of the French statehood – indivisibility of the State, its republican, secular, democratic and social character; equal rights of all citizens irrespectively of their ethnicity, race or religion; respect for various religious denominations; decentralisation[351].

The German FCC imparted distinctive, substantive meaning to the notion of constitutional identity in its ruling on the Treaty of Lisbon. The Tribunal's

[348] Décision no 2006-540 DC (note 104), considérant 19. More on this point see C. Grewe, J. Rideau, *L'identité constitutionnelle des États membres de l'Union européenne: flash back sur le coming-out d'un concept ambigu*, Chemins d'Europe. Mélanges en l'honneur de Jean-Paul Jacqué, Dalloz, Paris, 2010, p. 319 - 345; J.-P. Derosier, *Le noyau constitutionnel identitaire, frein á l'intégration européenne*, VIIIème Congrès de l'AFDC (Nancy), Juin 2011, p. 1-27.

[349] Opposite view see F. Chaltiel, *Nouvelle précision sur le rapport entre le droit constitutionnel et le droit communautaire. La décision du Conseil constitutionnel du 27 juillet 2006 sur la loi relative aux droits d'auteurs,* Revue française de Droit constitutionnel, no 68/2006, p. 843.

[350] See C. Charpy, *Le statut constitutionnel du droit communautire dans la jurisprudence (récente) du Conseil Constitutionnel et du Conseil d'Etat*, Revue française de Droit constitutionnel, no 79/2009, p. 638-639.

[351] See Chaltiel..., (note 349), p. 844.

point of departure was the need to grant sufficient space to the states participating in the process of integration so that they could create economic, cultural and social living conditions for the citizens with the use of political methods.

According to the FCC, German constitutional identity consists of the right to decide on such issues as: citizenship, the civil and the military monopoly on the use of force, public revenues and expenditures, inference in exercising fundamental rights, especially in the form of deprivation of liberty in the administration of criminal law. These should be complemented with the rights of cultural character, such as the disposition of language, influencing the conditions of family life, education, exercising freedom of the press, assembly, opinion and the dealing with the profession of faith or ideology. The manner of understanding these elements of identity is influenced by historical, cultural and linguistic experience.

Political decisions are to be made during an unrestricted discourse in the space controlled by political parties and parliamentary mechanism[352].

Deciding in case K 32/09, the Polish Constitutional Tribunal named constitutional identity one of the matters covered by an absolute prohibition of conferral on the basis of Article 90 of the Constitution, which also include the provisions specifying the fundamental principles of the Constitution and the decisions concerning the rights of an individual determining the state's identity, and especially the requirement of protection of human dignity and constitutional rights, the principle of statehood, the principle of democratic governance, the principle of a state ruled by law, the principle of social justice, the principle of subsidiarity. Moreover, referring to scientific views, the Tribunal emphasised the significance of the requirement of ensuring better implementation of constitutional values and prohibition to confer the power to amend Constitution and the competence to determine competences[353].

[352] *Lisbon Case* 2 BvE 2/08… (note 72), para 249.

[353] K 32/09 (note 156) para 2.1. More on this point see K. Wojtyczek, *Przekazywanie kompetencji państwa organizacjom międzynarodowym*, Kraków 2007, p. 284 *ff.*

The attempts made by constitutional courts to define the notion of constitutional identity are tightly connected with the function which this normative category is to perform in *par excellence* political relations between the European Union and Member States.

Indicating the matters which are decisive for maintaining constitutional identity by Member States of the Union is to serve the purpose of clarifying the limits of Union's competences and, consequently, the limits within which all future revisions of Treaties and the activity of Union institutions, especially in the area of law-making should be confined.

According to the German FCC the principle of conferral of competences and the obligation of respecting the identity are manifestations of basing the power of the European Union on constitutional law of Member States, which corresponds to the notion of non-transferable identity of the constitution[354]. The constitutional basis on which the FCC constructed its concept is Article 79 section 3 of the Basic Law. It guarantees a minimum standard which must be respected even when Germany is integrated into supranational structures. Constitutional identity (*unverfügbare Verfassungsidentität*) expressed by this provision is not subject to conferral and within its competences the FCC will examine whether the principle is observed. As a result of the review (*Identitätskontrolle*) the FCC may prohibit the application of a questioned norm of Union law in the legal order of the Federal Republic of Germany.

For the sake of equilibrium let us quote the view expressed in German doctrine, which maintains that the obligation to contribute to the progress of integration in Europe inferred from the preamble and Article 23 section 1 of the German Basic Law may also be considered as part of constitutional identity of the Basic Law[355].

[354] 2 BvE 2/08… (note 72), paras 234 and 235.

[355] See J. Kokott, *The Basic Law at 60 – From 1949 to 2009: The Basic Law And Supranational Integration*, German Law Journal, vol. 11 no. 01/2010, p. 102-103.

Similarly as the German FCC, the Polish Constitutional Tribunal in its ruling K 32/09 of 24 November 2010 perceives an absolute limit of conferring competences onto the Union as an element of constitutional identity, which in consequence is tantamount to the fact that Union institutions have no competences for enacting legal acts infringing Polish constitutional identity. Without the "eternity clause" at its disposal the Constitutional Tribunal links the identity primarily to the principle of sovereignty supported by a wide spectrum of constitutional provisions, including the provisions from the preamble. Thus, sovereignty is manifested in non-conferrable competences of bodies of State authority, decisive for the State's constitutional identity[356].

The quoted legal constructions of the case-law of constitutional courts prove that they used the chance created by a strong connection of national identity of Member States with their basic political and constitutional structures in Article 4 section 2 TEU. Consequently, not only do they interpret the notion of constitutional identity but also while transforming the "Treaty" national identity into constitutional identity they justify their right to supervise both the scope of competences conferred onto the EU and manner of using them. In the latter case it might even consist in checking whether the acts enacted by the EU respect constitutional identity of the state.

Protecting constitutional foundations of the State, constitutional courts refer to the anchors mentioned above with changeable insistency in different periods of time. The principle of sovereignty and respect for fundamental rights certainly remain a point of reference for every court which has been entrusted with the obligation of reviewing the observance of the constitution. However, it seems that due to great interpretation capacity of the category of "constitutional identity", it stands the greatest chance of becoming the most general reference principle for constitutional courts, enabling identification of the systemic essence of an EU Member State.

[356] Case K 32/09 (note 156) para 2.1.

Chapter VI

Cooperation of courts as a condition of effective resolving conflicts of norms in the European constitutional area

1. Cooperation between constitutional courts and the Court of Justice of the EU within the framework of the preliminary reference procedure

The institution of preliminary rulings was introduced into the Treaties establishing the European Communities for fear of divergent interpretations and disparate application of the same Community provisions in the Member States, differing not only in terms of legal tradition and culture but also using different constitutional solutions concerning relations between external (international) law and domestic law[357].

The fact that the number of preliminary references submitted by national courts to the Court of Justice of the European Union is growing every year[358] and crucial significance of these rulings for the relations between EU law and national law confirm great importance of cooperation between courts for the emerging European legal area. This prompts the question whether the

[357] The CJUE held in *Foto- Frost* that: "the main purpose of the powers accorded to the court by Article 177 [Article 267 TFEU] is to ensure that Community law is applied uniformly by national courts. That 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", Case C-314/85 *Foto-Frost* [1987] ECR 4199, para 15.

[358] *Court of Justice of the European Union. Annual Report 2012*. Luxembourg 2013, p. 90. According to statistics presented in the Report, in the year 2009 there were 302 new references for a preliminary ruling, in 2010 – 385, in 2011 – 423, in 2012 – 404 and, according to the provisional version of *Report 2013*, in 2013 – 450.

subjects entitled or obliged to submit preliminary references include national constitutional courts.

In accordance with Article 267 TFEU, crucial for the institution of preliminary rulings, courts or tribunals of the Member States request interpretation of primary EU law or validity and interpretation of acts enacted by the EU institutions. Depending on whether the national court rules conclusively or there is a judicial remedy against its decisions under national law, the court should or may submit a preliminary reference to the CJEU in order to clarify the question of interpretation or validity of EU law raised before the national court. It is important that clarification of the question by the Court of Justice of the EU is necessary to enable the national court to give judgment.

Article 267 TFEU did not define the notion of a court. The definition was provided by the Court of Justice of the European Union, which primarily took into account the functional aspect[359], in conjunction with the purpose of cooperation between courts. It is thus immaterial whether a certain body is a court in the light of national law. The CJEU stated that: "in order to determine whether the institution making a reference is a court for the purposes of Article 234 TEEC (now Article 267 TFEU), the Court takes into account a number of factors, such as whether the body is established by law alone, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent"[360]. The CJEU is of an opinion that the requirement that the procedure be *inter partes* should not have an absolute character[361]. While Article 267 TFEU does not make a preliminary reference conditional on the *inter partes* character of the procedure during which a national court makes

[359] See D. Kornobis-Romanowska, *Sąd krajowy w prawie wspólnotowym*, Kraków 2007, p. 121.

[360] Joint cases C-110/98 to C-147/98 *Gabalfrisa SL* [2000] ECR I-1577, para 33; see also C-125/04 *Guy Denuit and Betty Cordenier v Transorient - Mosaïque Voyages et Culture SA.*, [2005] ECR I-00923, para 12.

[361] Case C-54/96 *Dorsch Consult*, [1997] ECR I-4961, para 31; case C-18/93 *Corsica Ferries*, [1994] ECR I-1783, para 12.

a reference, it follows from this provision that national courts may make a preliminary reference only if they adjudicate in the proceedings leading to the decision of judicial character[362].

The CJEU never stated unambiguously whether a constitutional court is a court in the light of Union law[363]. In the ruling of 26 June 2007 it stated that according to settled case-law, the procedure established in Article 234 EC rests on a clear separation of functions between the national courts and the Court of Justice, with the result that it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court[364].

The Court observed in *Intermodal Transports* that the obligation to refer a question to the Court for a preliminary ruling laid down by the third paragraph of Article 234 EC (now Article 267 TFEU) in respect of national courts or tribunals against whose decisions there is no judicial remedy is intended in particular to prevent a body of national case-law that is not in accordance with the rules of Community law from being established in a Member State. This objective is secured when, subject to the limits accepted by the Court[365], supreme courts are bound by that obligation to refer as is any other national court or tribunal against whose decisions there is no judicial remedy.

If a question of Community law is raised before a court against whose decisions there is no judicial remedy under national law, such courts or tribunals must comply with their obligation to make a reference, unless they have

[362] Case C-96/04 *Standesamt Stadt Niebüll*, [2006] ECR I-3561, para 13.

[363] See Claes..., (note 79), p. 437.

[364] Case C-305/05, *Ordre des barreaux francophones et germanophone and others v Conseil des Ministres*, [2007] ECR I-5305, para 18.

[365] Those limits were indicated in the case 283/81 *Cilfit v Ministero della Sanitá*, [1982] ECR 3415, paras 12-16.

established that the question raised is irrelevant or that the Community provision in question has already been interpreted by the Court or that the correct application of Community law is so obvious as to leave no scope for any reasonable 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 divergences in judicial decisions within the Community[366].

The Advocate General Cruz Villalon observed in the opinion to case C-173/09 that the special role of courts of last instance results in the fact that they have responsibility for complying with and enforcing European Union law. Therefore, it is especially important whether the courts made a reference and in what circumstances the *CILFIT* case-law has been applied[367].

The report on the activity of the CJEU in 1998 drawn by the president and judge of the Court expresses the opinion that there are numerous arguments for recognising admissibility of preliminary references made by constitutional courts if they admit such a need[368].

This view was upheld by the authors of another report from 2002, who added that a constitutional court is bound by the obligation remaining with national courts whose decisions can not be appealed against. In their view no distinction should be made between the proceedings involving procedures of review of constitutionality, i.e. direct motions (complaints) and legal questions submitted by courts[369]. The argument against such a differentiation

[366] Case C-495/03 *Intermodal Transports BV*, [2005] ECR I-8151, paras 29 i 33.

[367] Opinion delivered on 10 June 2010 to case C-173/09 *Elczinow v Nacionalna zdrawnoosiguritelna kasa*, [2010] ECR I-8889, para 24.

[368] GC.Rodriguez Iglesias, J-P.Puissochet, *Droit comunautaire derivé et droit constitutionnel*, (Dossier: Droit communautaire - droit constitutionnel), Les cahiers du Conseil Constitutionnel no 4/1998, p. 2 www.conseil-constitutionnel.fr.

[369] M.Wathelet, S.Van Raepenbusch, *Les relations entre les Cours constitutionnelles et les autres juridictions nationales, y compris l'interférence en cette matière, de l'action des juricictions européennes,* Rapport de la Cour de justice des Communautés européennes, Conférence des Cours constitutionelles européennes, XIIème Congrès, Bruxelles 14-16 mai 2002, p. 10.

would be the fact of granting the status of a court (as understood by Article 234 third paragraph TEEC) to the Benelux Court of Justice, which – being a common court for three states – answers legal questions from national courts from the Benelux states in order to ensure uniform application of common Benelux legal rules[370].

Moreover, the authors argue, if such a differentiation were to be accepted, a constitutional court faced with a problem of interpreting Union law would first have to request the court which submitted the legal question to refer it to the CJEU for a preliminary ruling. Only after the doubts concerning interpretation of Union law are clarified, would it be able to decide as to the constitutionality of national provisions. This would excessively extend the procedures to the detriment of an individual expecting possibly the fastest settlement of the case[371].

The Advocate General J. Kokott observed in her opinion of 2 July 2009 submitted in case C-169/08 that questions concerning Community (Union) law may arise in the proceedings before national constitutional courts, which may be decisive for settling a given constitutional dispute, e.g. when the constitution (in this case Article 117 of Italian Constitution) imposes an obligation on the legislative authority to observe the limitations resulting from Community law[372].

Moreover, according to J. Kokott, Community law may be crucial in settling constitutional disputes also without such express incorporation, e.g. where the purported effects of a Community law measure are at issue in constitutional law proceedings or where the scope left by a Community law measure for the national legislature is open to review by a constitutional court[373].

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[370] Case C-337/95 *Parfums Christian Dior v Evra*, [1997] ECR I-6013, para 20 *ff,* referred to by Authors *ibidem.*

[371] See Wathelet, van Raepenbusch… (note 369), p. 11.

[372] Opinion of AG Kokott delivered on 2 July 2009 to case C-169/08 *Presidente del Consiglio dei Ministri v Regione autonoma della Sardegna*, [2009] ECR 10821, para 22.

[373] *Ibidem,* para 23.

The same Advocate General in her opinion of 12 June 2008 submitted in case C-239/07 commented on the character of the proceedings before a constitutional court, in this case from Lithuania. J. Kokott emphasised that in the main proceedings before a national court, Lithuanian constitutional court (*Konstitucinis Teismas*) was called upon to make a decision of a judicial nature. In this respect it is immaterial whether the procedure for reviewing the constitutionality of laws on the application of a group of Members of Seimas involves an *inter partes* hearing. The decisive premises in this scope are on the one hand the fact that the proceedings should not be administrative proceedings, confronting an individual with a court acting as an authority, and on the other the fact that the court should not act as a merely advisory body. The object of the main proceedings is the review of a statute which has already come into force. Therefore the main proceedings do not concern a constitutional court hearing during the legislative process. On the contrary, as the Lithuanian court explained in the reference for a preliminary ruling, in the procedure for reviewing the constitutionality of laws the constitutional court is empowered to declare the national law to be inapplicable with effect *erga omnes*[374].

The constitutional courts which decided to make a reference to the CJEU for a preliminary ruling present various arguments for granting them a status of a court as stipulated by Article 267 TFEU.

The first to resort to the preliminary ruling procedure was the Belgian Arbitration Court (*Cour d'arbitrage*) authorised to review constitutionality. Since 7 May 2007 it has acted as the Constitutional Court (*Cour constitutionnelle*).

While still the Arbitration Court it submitted a preliminary reference on 19 February 1997 (judgment no 6/97) to the CJEU concerning interpretation of directive 93/16/EEC regulating the free movement of doctors and the

[374] Opinion of AG Kokott delivered on 12 June 2008 to case 283/81 *Cilfit v Ministero della Sanitá*, [1982] ECR 3415, paras 15-18.

mutual recognition of their diplomas. It considered the interpretation essential for a complaint concerning invalidation of a national decree regulating this matter but did not refer to the question of admissibility of submitting a preliminary reference. The issue was also ignored by the CJEU when presenting the interpretation of the provisions of the directive in the ruling of the case C-93/97 *Fédération belge des Chambres Syndicales de Médecins ASBL*[375]. The issue was also ignored by the Arbitration Court when on 29 October 2003 (judgment no 139/2003) it submitted a preliminary reference to the CJEU concerning interpretation of Council directive 79/409/EEC of 2 April 1979 on the conservation of wild birds and by the CJEU when it decided on 1 October 2004 on its interpretation[376].

On 13 July 2005 (judgment no 124/2005) the Arbitration Court submitted a preliminary reference to the CJEU in connection with received complaints concerning invalidation of a number of provisions of the act of 12 January 2004 aiming at transposing the provisions of directive 2001/97[377] to the Belgian legal order. The objections concerned infringement of the right to a fair trial and the right of defence, especially through interference with the principles of independence and professional secret of counsel of defence. The doubts were caused by the fact that the persons and institutions determined in the directive were obliged to inform authorities competent in combating money laundering about every fact which might substantiate that money laundering had taken place.

Justifying the preliminary reference the Arbitration Court emphasised that the Community legislator is, similarly as the Belgian legislator, obliged to respect the right of defence and the right to a fair trial. Consequently, prior

[375] Case C-93/97 *Fédération belge des Chambres Syndicales de Médecins ASBL v Gouvernement flamand and others* [1998] ECR I-4837.

[376] Order in C-480/03 *Hugo Clerens*, not published.

[377] Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering, as amended by Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001.

to the decision on the compliance of the act with the Belgian constitution, it was necessary to decide on the validity of the directive on which the act is based. Thus, the Court requested the CJEU to decide whether provisions of directive 2001/97 infringe the right to a fair trial, guaranteed in Article 6 ECHR and Article 6 section 2 TEU (now Article 6 section 3 TEU).

In its preliminary ruling the CJEU decided that only the information collected outside the scope of necessary activities performed by the counsel of defence, representation in the legal proceedings and legal advice as determined by the act may be subject to the obligation of being disclosed to public authorities. In consequence provisions of the directive in question do not infringe the right to a fair trial as guaranteed by Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms and Article 6(2) EU[378]. The Constitutional Court applied this interpretation in such a way that in its ruling of 23 January 2008 it annulled the provision which allowed any employee or representative of a lawyer personally to forward information to appropriate bodies[379].

On 13 July 2005 (judgment no 124/2005) the Belgian Arbitration Court submitted another preliminary reference to the CJEU, this time on the basis of ex Article 35 TEU[380]. It should be remembered here that only the courts of the state which declared recognition of CJEU's competences on the basis of Article 35 TEU could submit preliminary references to the CJEU concerning validity and interpretation of framework decisions and decisions, interpretation of conventions concluded on the basis of ex Title VI TEU and executory measures for these conventions. It should be emphasised here that as opposed to the conditions stipulated in ex Article 234 TEEC the courts whose decisions can not be appealed against in the national law are not obliged by the

[378] Case C-305/05 (note 364), paras 33-37.
[379] Judgment of the (Belgian) Constitutional Court no 10/2008 of 23 January 2008.
[380] Case C-303/05 *Advocaten voor de Wereld*, [2007] ERC I-3633.

Treaty to submit a preliminary reference; however, such an obligation might result from the provision of the national law[381].

The Court's doubts were concerned with the legality of the framework decision on the European Arrest Warrant and possible infringement of constitutionally guaranteed competences for concluding international agreements, and, secondly, with the compliance of the provisions of the framework decision with the principles of legality in criminal law as well as equality and non-discrimination guaranteed both by EU law (Article 6 section 2 TEU) and the respective provisions of the constitution (i.e. Article 14, Article 10 and Article 11 of the Constitution of Belgium)[382].

The Arbitration Court submitted another preliminary reference to the CJEU on 19 April 2006 (judgment no 51/2006), which in principle concerned the relation between Community law and the principles of political system of the State stipulated in the constitution. Belgian federal system is based on autonomous units which possess exclusive regulatory competences in certain matters[383]. For instance, the Flemish Community has no competences in the matter with which the request was concerned with, i.e. social insurance

[381] See M. Domańska, M. Wąsek-Wiadere, E. Wojtaszek-Mik, A. Zielony, *Pytanie prejudycjalne do Trybunału Sprawiedliwości Wspólnot Europejskich*, Warszawa 2007, p. 32-33.

[382] T. Vandamme, *Prochain Arrêt: La Belgique ! Explaining Recent Preliminary References of the Belgian Constitutional Court,* European Constitutional Law Review, no 4/2008), p. 140-141.

[383] According to Article 128 of the Constitution of Belgium: « § 1er. Les Parlements de la Communauté française et de la Communauté flamande règlent par décret, chacun en ce qui le concerne, les matières personnalisables, de même qu'en ces matières, la coopération entre les communautés et la coopération internationale, y compris la conclusion de traités. Une loi adoptée à la majorité prévue à l'article 4, dernier alinéa, arrête ces matières personnalisables, ainsi que les formes de coopération et les modalités de conclusion de traités. § 2. Ces décrets ont force de loi respectivement dans la région de langue française et dans la région de langue néerlandaise, ainsi que, sauf si une loi adoptée à la majorité prévue à l'article 4, dernier alinéa, en dispose autrement, à l'égard des institutions établies dans la région bilingue de Bruxelles-Capitale qui, en raison de leur organisation, doivent être considérées comme appartenant exclusivement à l'une ou à l'autre communauté ».

of persons residing in the territory of other language communities in the Kingdom of Belgium.

The Arbitration Court was not certain whether Community law concerning the system of social security prevents an independent Community of a federal state, in this case the Flemish Community, from adopting in the execution of its constitutional competence the provisions according to which solely the persons residing in the territory which remains with the competences of this Community, and in the case of EU citizens, the persons employed in their territory but residing in another member state are eligible for insurance and the benefits resulting from the system of social insurance.

The problem was serious, because respecting constitutional restrictions of competences resulted in depriving of certain benefits the persons who independently of their state affiliation resided in this part of the territory of the federal state which was subject to the competences of another independent Community.

In its preliminary ruling of 1 April 2008 the CJEU decided that Community law requires that an exception from the constitutional principles of competence divisions is made in relation to the citizens of other Member States or Belgians who have exercised the right of freedom of movement within the European Community. In the light of established case-law a Member State cannot plead provisions, practices or situations prevailing in its domestic legal order, including those resulting from the constitutional organisation of that State, to justify the failure to observe obligations arising under Community law[384].

The doctrine commented that this interpretation, even though logical from the point of view of the concept of the "purely internal situation" adopted in Community/Union law, in certain situations results in reverse discrimination, which in this case consists in less favourable treatment of the

[384] Case C-212/06 *Government of the French Community and Waloon Government v Flemish Government* [2008] ECR I-01683, para 58.

Belgians who have not exercised the right of freedom of movement than the citizens of other Member States.

In its ruling of 21 January 2009 (judgment no 11/2009) the Belgian Constitutional Court applied the ruling of the CJEU in such a way that it accepted the existence of an exception to the constitutional provision that the Flemish Community does not possess competences to determine the status of persons residing in other regions of the country. The exception results from Community law and concerns the EU citizens who are not Belgians and the Belgians who have exercised the Community right of freedom of movement. In this situation the only way of preventing inequality is adopting the provisions similar as the Flemish ones by the other Belgian communities.

Currently the Belgian legal order has adopted the principle that if the question of compliance of a parliamentary act with the constitution is brought before a court, it must submit the question to the Constitutional Court, except for the *acte clair* and *acte eclairé* cases. If the question of compliance with the constitution brought before a court includes an element of EU law, the court may also submit a preliminary reference to the CJEU. In such a situation the doctrine calls for the Constitutional Court to wait for the interpretation presented by the CJEU in order to avoid the problem of conflicting interpretations[385].

On 21 October 2011 the Court of Justice ruled on case C-306/09 concerning – on the basis of Article 35 TEU – a preliminary reference made by the Belgian Constitutional Court pursuant to the judgment no 128/2009 of 24 July 2009, which was submitted to the CJEU on 31 July 2009 in the proceedings on the execution of the European arrest warrant concerning I. B.

The CJEU decided that Article 4 section 6 and Article 5 section 3 of the Council Framework Decision 2002/584/JHA of 13 June 2002 on the European

[385] See P. Elsuwege, S. Adam, *The Limits of Constitutional Dialogue for the Prevention of Reverse Discrimination. Constitutional Court, Judgment 11/2009 of January 2009*, European Constitutional Law Review, no 5/2009, p. 332.

arrest warrant and the surrender procedures between Member States should be interpreted in such a way that if a Member State executing the arrest warrant has transposed Article 5 sections 1 and 3 of the framework decision in question into the national legal order, execution of the European arrest warrant issued in order to execute a sentence imposed by a decision rendered in absentia as stipulated by Article 5 section 1 may be subject to the condition that the person who is the subject of a European arrest warrant, being a national or resident of the executing Member State, will be returned to the executing member state in order to serve the sentence in the member state issuing the warrant after the retrial at which he or she will be present.

The commentaries on the references to the CJEU for preliminary rulings submitted by the Belgian Court of Arbitration/Constitutional Court emphasise that including Community, Union and international law into the set of norms constituting the model for review resulted from broad interpretation of Article 10 and 11 of the Belgian Constitution by the Court in question. It is expected that once Union law is included in the notion of *bloc de constitutionnalité* in conjunction with broad accessibility to the Constitutional Court resulting from a liberal interpretation of the category of "interest" will cause that the Court will intensively cooperate with the CJEU[386].

The Austrian Constitutional Court (*Verfassungsgerichtshof – VGH*) felt obliged to make a reference to the CJEU for a preliminary ruling because by virtue of the national law the judicial decisions of the Constitutional Court are final[387].

Thus the Constitutional Court was not only convinced that it was a "court" as stipulated by Article 177 TEEC (now Article 267 TFEU) but also assumed that it was a court "obliged" to make preliminary references on the basis of section 3 of former Article 177 TEEC. The nature of the obligation

[386] See Vandamme… (note 382), p. 146.

[387] Case C-143/99 *Adria-Wien Pipeline GmbH v Finanzlandesdirektion für Kärnten* [2001] ECR I-8365.

was clarified by the CJEU, which emphasised that the aim of the obligation imposed on national courts by section 3 of former Article 177 TEEC is to prevent introduction of judicial decisions incompliant in their content with Community law into legal orders of Member States[388]. Due to the binding force of the principle of *res iudicata* considerable divergences in application of Community law in individual states might become a fact. In the ruling in the case of *Christian Dior* the CJEU imposed the obligation to make preliminary references directly onto supreme courts[389], though it should be emphasised here that judicial decisions of constitutional courts can not be appealed against either.

The Austrian Constitutional court also examined whether it may apply the doctrine of *acte clair* presented in the CJEU ruling on the case of *CILFIT*[390]. Let us remember that in accordance with the doctrine of *acte clair* a national court is not obliged to make a preliminary reference if appropriate application of Community/Union law is sufficiently evident to prevent reasonable doubts as to how the matter should be adjudicated. The Constitutional Court decided that there were no premises for the application of the doctrine and the CJEU accepted the preliminary reference.

The Court of Justice decided in the procedure of preliminary ruling on further references made by the Austrian Constitutional Court concerning case C-171/01[391] and other cases[392].

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388 Case C-337/95 (note 370), para 25.

389 "[…]there is no question that such a national supreme court, against whose decisions likewise no appeal lies under national law, may not give judgment without first making a reference to this Court under the third paragraph of Article 177 of the Treaty when a question relating to the interpretation of Community law is raised before it", case C-337/95 *ibidem*, para 27.

390 More on this point see Claes… (note 79), p. 444.

391 Case C-171/01 *Wählergruppe „Gemeinsam Zajedno/Birlikte Alternative und Grüne GewerkschafterInnen/UG"*, [2003] ECR I-04301. The *Verfassungsgerichtshof* referred to the ECJ for a preliminary ruling by order of 2 March 2001.

392 E. g. Austrian Constiutional judgments of: 13 December 2001 (VfSlg. 15.450); 28 November 2003 (VfSlg. 17.065); 3 December 2003 (VfSlg. 17.075). More on this point see

The commentaries to this practice in the Austrian doctrine present a view that if the Constitutional Court considers a question of constitutionality and has reason to believe that the provisions of Austrian law in question conflict with the law of the European Union, the Constitutional Court makes a reference to the CJEU for a preliminary ruling. However, there are cases that when the Court – realising obvious incompliance of Austrian provisions with Union law – has come to the conclusion that national provisions can not be applied, i.e. they can not be the object of the proceedings concerning compliance with the constitution. In other cases, when a court of lower instance did not make a reference to the CJEU for a preliminary ruling even though it should have done so, the Constitutional Court determined that the constitutional right to a lawful judge has been violated. In consequence the Constitutional Court reversed and remanded the case, without referring it to the ECJ[393].

In Italy the Constitutional Court for years treated the possibility of making references to the CJEU for preliminary rulings with reserve. In the ruling in the case of *Giampaoli*[394] it stated that while it is not obliged to do so, it may exercise this option. Later, in the case of *Messagero Servizi*, it did not consider itself a court or tribunal in the sense of Article 234 TEC (now Article 267 TFEU), because of its peculiar function and position in the Italian judicial system[395].

The situation changed after the constitutional reform from 2001, which resulted in introduction of Article 117 into the Italian Constitution, in accordance with which state or regional authority must respect not only the

U. Jedliczka, *The Austrian Constitutional Court and the European Court of Justice*, www.icl-journal.com, vol 2, 4/2008, p. 301 *ff.*

[393] *Ibidem*, p. 304.

[394] *Corte Costituzionale*, case No 168/91, www.giurcost.org referred to in: Claes… (note 79) p. 447.

[395] *Corte Costituzionale*, case No 536/95, www.giurcost.org referred to in: M. Dani, *Tracking Judicial Dialogue – The Scope for Preliminary Rulings from the Italian Constitutional Court*, 16 Maastricht Journal 2 (2009), p. 156. The Constitutional Court referred back the case to the Tax Court in order to have the question submitted to the ECJ by that Court.

provisions of the constitution but also the premises resulting from Community (Union) law and international law[396]. This means that not only the Republic but also the regions are directly bound by Union law and must respect it[397].

Following the decision of 13 February 2008 the Italian Constitutional Court – on the basis of Article 234 EC (now Article 267 TFEU) – made a reference to the CJEU for a preliminary ruling. In its decision it argued for the admissibility of such a reference, quoting especially the notion of the court. It stated that the notion of the court as stipulated by Article 234 TEEC should result from Community law and not from the qualification by a body making a reference in national law, and that the *Corte Costituzionale* meets all the requirements of a body entitled to make a preliminary reference.

The Constitutional Court emphasised that in the procedure of direct constitutional complaints the provisions of Community/Union law attribute such general stipulations of the Constitution as Article 11 or Article 117 with concrete meaning and content. Article 117 was used by the Constitutional Court as the basis for deciding on invalidity of statutory provisions enacted with the infringement of Article 11 of the Constitution[398]. The criterion stipulated in Article 117 authorises the Constitutional Court to decide on the incompliance with the constitution of a regional provision considered incompliant with Community (Union) law[399].

However, the Italian Constitutional Court made a reservation that it will not resort to making preliminary references if a common court of law or an administrative court submits a legal question, as it assumed that a distinction

[396] According to Article 117: "Legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from EU legislation and international obligations […]".

[397] See G. Cananea, *The Italian Constitutional Court and the European Court of Justice: From Separation to Interaction. Comment on Constitutional Court Order n. 103 of 16 April 2008 – Presidente del Consiglio dei ministri v. Regione Sardegna*, European Public Law, vol. 14, issue 4, 2008, p. 528.

[398] See Claes… (note 79), p. 440.

[399] See Cannanea… (note 397), p. 528.

should be made between indirect and direct jurisdiction. Indirect jurisdiction concerns complaints submitted by individuals to national courts. If the judge *a quo* is convinced that the decision on the matter depends on adjudicating the issue of constitutionality, the matter is referred to the Constitutional Court. Direct jurisdiction of the Constitutional Court concerns complaints submitted by the State against regions or one or more regions against the State. It is thus a dispute between institutions and, which should be emphasised, is subject to exclusive jurisdiction of the Constitutional Court. For this reason the Constitutional Court decided that it may resort to the procedure of preliminary ruling only when it exercises direct jurisdiction (*giudizio in via pripncipale*)[400].

Five years later this reservation was removed in the judgment of 18 July 2013, when the Constitutional Court, considering a reference from two district courts (i.e. in the framework of *in via incidentale* proceedings), decided to seek a preliminary ruling from the ECJ[401]. As O. Pollicino remarks, the Constitutional Court has realised that by playing active role as a referring judge also in indirect proceedings it "can inject a pluralistic view in the EU fundamental rights narrative together with other Member State Constitutional Courts"[402].

In its preliminary reference of 8 May 2007 the Lithuanian Constitutional Court emphasised that in accordance with Article 102 of the Lithuanian Constitution it reviews the compliance of statutes with the constitution, especially upon the motion submitted by a group of deputies. Reviewing compliance of a statute with the constitution, the court decides on a dispute between a person or persons who submitted the motion and the body which

[400] *Ibidem*, p. 526.

[401] Order no 207 of 3 July 2013, www.cortecostituzionale.it English version.

[402] O. Pollicino, *From Partial to Full Dialogue with Luxembourg: The Last Cooperative Step of the Italian Constitutional Court*, European Constitutional Law Review, no 10/2014, p. 153.

adopted the questioned statute, i.e. the Lithuanian parliament. Decisions of the Constitutional Court can not be appealed against.

The court also stated that in accordance with the constitution, provisions of the European Union law constitute a part of the legal order of the Republic of Lithuania and that in cases when a European provision results from the treaties constituting the basis of the Union, it is applied directly; if there is a conflict between norms, it has precedence over national norms.

The court decided that absence of distinct basis in the act on Constitutional Court for making a preliminary reference does not preclude the option of making such a reference to the Court of Justice of the EU. The constitutional right (obligation) to make a preliminary reference was inferred from section 2 of the *Constitutional Act* of 13 July 2004 (i.e. a constitutional act concerning the membership of the Republic of Lithuania in the European Union), which may be applied for the Constitutional Court and other national courts[403].

Lithuanian constitutional doctrine noted this decision. Irmantas Jarukaitis observed that proceedings before constitutional courts do not concern traditional disputes *inter partes* but abstract review of constitutionality of national law. In the case of a preliminary reference it may be argued that there was a dispute between the parliamentary minority which submitted the motion to the Constitutional Court and the majority, i.e. the parliament (Sejm). During the procedure both the motioner and the representatives of the Sejm were able to present their opinions, while it was evident that the Constitutional Court would pass a judgment of a judicial character. There was no other way of making a preliminary reference, as the decisions of the Constitutional Court are final[404].

[403] See K. Budziło, *Europeizacja Konstytucji Republiki Litewskiej*, [in:] *Europeizacja…* (note 94) p. 172.

[404] See I. Jarukaitis, *Lithuania's Membership in the European Union and Application of EU Law at National Level*, [in:] *The Application of EU Law in the New Member States* (A. Lazowski ed.) Asser Press, the Hague 2010, p. 228-234.

On 9 October 2008 the Court of Justice passed a judgement in case C-239/07 in the preliminary ruling procedure pursuant to the motion of the Lithuanian Constitutional Court mentioned above[405]. Considering the reference made by the Court, the CJEU did not consider the issue of admissibility but passed a judgement concerning the substance of the matter.

The Spanish Constitutional Court (*Tribunal Constitucional*) for years refused to make preliminary references to the Court of Justice[406]. Yet, on 9 June 2011 (case ATC 86/2011) it made a preliminary reference received at the CJEU on 28 July 2011 and registered as C-399/11 *Stefano Melloni v Ministerio Fiscal* (not yet published).

The reference concerned interpretation of the Framework Decision on the European arrest warrant, the right to a fair trial and the application of the principle of mutual recognition of judicial decisions passed in absentia. In particular the Constitutional Court asked whether Article 53 of the Charter of fundamental rights of the European Union must be interpreted as allowing the executing Member State to make the surrender of a person convicted *in absentia* conditional upon the conviction being open to review in the issuing Member State, in order to avoid an adverse effect on the right to a fair trial and the rights of the defence guaranteed by its constitution. The interpretation envisaged by the Constitutional Court attributed these rights with a higher level of protection than that resulting from European Union law in order to avoid the interpretation restricting or infringing a fundamental right recognised by the constitution of Spain.

In France, the Constitutional Council for the first time in its history made a request for a preliminary ruling by decision of 4 April 2013. The reference has been made in the context of the priority question on constitutionality raised by the Court of Cassation in connection with the European

[405] Case C-239/07 *Julius Sabatauskas and Others*, [2008] ECR I-07523.

[406] See P. Tenorio, *A Contribution from the Spanish Constitutional Court to the European Construction process: Requesting Preliminary Ruling*, Creighton International and Comparative Journal, vol. 1 No 1, Spring 2011, p. 33.

arrest warrant issued against British national (Mr F) and surrender procedures between Member States.

Earlier, as it was explained in the decision 2006-540 DC of 27 July 2006, the Constitutional Council could not request a preliminary ruling from the European Court of Justice because it was required to give a ruling on constitutionality of the statute before its promulgation (that is within one-month period as a rule). The situation has changed after the procedure of the priority question on constitutionality has been introduced to the French legal system. In the framework of this procedure the Constitutional Council is required to rule within the three-month period. By a separate application of 4 April 2013 the Council applied for the request for a preliminary ruling to be dealt with under the urgent procedure and the Court of Justice handed out its judgment on 30 May 2013[407].

Having regard to this judgment the Constitutional Council held in the decision of 14 June 2013 that the challenged provision of the Code of Criminal Procedure aimed to transpose relevant provisions of the Framework Decision on the European arrest warrant into French law is unconstitutional[408].

The German FCC also changed recently its position towards preliminary rulings procedure. In its rulings *Solange I* (1974) and *Villeicht* (*Maybe*) (1979) it stated that in principle it is bound by Article 234 TEC, but it makes no preliminary references, limiting itself to specifying conditions under which the highest specialised German courts are obliged to make such references[409].

The case of possible delegalisation of the NPD, on which the FCC decided in the first and last instance, became for the Court an opportunity to adopt a distinct stance.

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[407] See case C-168/13 PPU *Jeremy F v Premier ministre,* not yet published. For the comment see A. Dyevre, *If You Can't Beat Them, Join Them. The French Constitutional Council's First Reference to the Court of Justice*, European Constitutional Law Review, no 10/2014, p. 154-161.

[408] Decision no. 2013-314 QPC of 14 June 2013, Article 1.

[409] See F. Mayer, *Multilevel Constitutional Jurisdiction,* [in:] *Principles…* (note 292), p. 403-404.

During the proceedings before the FCC the party motioned on the basis of Article 21 of the German Constitution that the proceedings are suspended and a preliminary reference is submitted to the CJEU whether Community law prevents a Member State from prohibiting activities of a political party which participated in national elections and the elections to the European Parliament. The motion stated that that the FCC acted as the court of last instance, which might result in the conclusion that it is obliged to submit a preliminary reference to the CJEU.

The FCC replied that there were no grounds to make a reference under Article 234 section 1 TEC and that it does not consider itself bound by the stipulation of Article 234 section 3 TEC, as the Community has no competence to make rules on political parties. Complaints concerning observance of principles of a state ruled by law, democracy and protection of fundamental rights would not lead to a different conclusion, as these Community principles applied only where the Community itself or the Member States had acted in the scope of application of Community law. Outside this scope Member States are not bound by the Union's constitutional principles and Community law, which follows from the CJEU's *ERT* decision and Article 51 of the Charter of fundamental rights. A preliminary reference concerning validity on the basis of Article 234 section 1 paragraph b would not be admissible because relevant decisions in this context would not constitute acts of the Community institutions but agreements in public international law within the field of application of Community law as was stated by the ECHR in its ruling in *Matthews*.

The FCC also rejected the possibility of application of Article 68 section 1 EU because it was not the case of freedom of movement for workers. The CJEU would lack jurisdiction due to absence of a Community act, while Article 46 section d and Article 6 section 2 EU in conjunction with Article 234 EC would not be applicable. It is a fact that by virtue of German law the decision of the FCC prohibiting activity of a political party can not

be appealed against. It is thus hard to assume that the FCC is not bound by the obligation resulting from Article 234 section 3 EC[410].

On 18 March 2014, for the first time, the FCC decided to refer several questions to Court of Justice[411]. The subject of the questions referred for a preliminary ruling was in particular whether the OMT (*Technical features of Outright Monetary Transactions*) Decision of the Governing Council of the European Central Bank of 6 September 2012 was compatible with the primary law of the European Union. In the view of the FCC, there were important reasons to assume that it exceeded the European Central Bank's monetary policy mandate and thus infringed the powers of the Member States, and that it violated the prohibition of monetary financing of the budget.

The way the FCC framed its reference is particularly interesting. The FCC was inclined to regard the OMT Decision as an *ultra vires* act, but considered it also possible that if the said Decision were interpreted restrictively in the light of the Treaties, conformity with primary law could be achieved. It means that the OMT Decision might not be objectionable if it could be interpreted or limited in its validity in conformity with primary law in such a way that it would not undermine the conditionality of the assistance programmes of the EFSF (*European Financial Stability Facility*) and the ESM (*European Stability Mechanism*), and would indeed only be of a supportive nature with regard to the economic policies in the Union[412].

The opinions of constitutional courts which up to now have not submitted preliminary references to the Court of Justice of the European Union are also interesting.

The Polish Constitutional Tribunal observed in the ruling on the Accession Treaty that if it were to decide to request a preliminary ruling from the CJEU concerning the validity or content of Community/Union law, it would

[410] See Claes… (note 79), p. 446.

[411] Case C-62/14 *Gauweiler and Others*, request for a preliminary ruling from the Bundesverfassungsgericht (Germany) lodged on 10 February 2014.

[412] Federal Constitutional Court. Press release no. 9/2014 of 7 February 2014.

undertake it within the framework for exercising its adjudicative competences, as stipulated in Article 188 of the Constitution, and only where, in accordance with the Constitution, the Tribunal ought to apply Community/Union law[413].

In the ruling SK 45/09 of 16 November 2011 the Constitutional Tribunal observed that due to the division of powers with regard to the review of legal acts, the Court of Justice of the European Union is competent to provide the final interpretation of Union law and to ensure that the interpretation is observed consistently in all Member States, as well as it has an exclusive power to determine the conformity of the acts of EU secondary legislation to the Treaties and the general principles of EU law.

The Constitutional Tribunal stated in this context that before an act of EU secondary legislation is declared incompliant with the Constitution, it is necessary to examine the content of the norms of EU secondary legislation, which are subject to review. This may be achieved by referring questions to the CJEU for a preliminary ruling, on the basis of Article 267 TFEU, as to the interpretation or validity of provisions that raise doubts. The Tribunal referred here directly to the view expressed by the German Federal Constitutional Court in the ruling of 6 July 2010 *Honeywell*.

As a result of the CJEU's ruling it may turn out that the content of the questioned EU norm is consistent with the Constitution. The Tribunal indicated yet another possibility, i.e. that the CJEU declares the challenged provision incompliant with Union primary law. In these situations it considers adjudicating by the Constitutional Tribunal unnecessary. It emphasises that while both courts have different scopes of jurisdiction, due to the similarity of the values enshrined in the Constitution and the Treaties, there is a consider-

[413] Case K 18/04 (note 164) version in English, para 18. The Tribunal added that "the direct review of the conformity with the Constitution of particular decisions of the ECJ, as well as the 'permanent jurisprudential line' derived from these decisions, does not fall within the Constitutional Tribunal's scope of jurisdiction", para 19.

able likelihood that the assessment of the Court of Justice will be analogical to the assessment of the Constitutional Tribunal[414].

It is very logical to argue for eliminating the provisions of Union secondary legislation infringing the Treaties constituting the basis of the Union. The preliminary ruling provides such a possibility.

In the examined case the Constitutional Tribunal had no doubts as to the conformity of the challenged Council Regulation (EC) No. 44/2001 to the EU primary law, and hence – in accordance with the *Foto-Frost* doctrine – decided that there was no need to submit a preliminary reference to the CJEU.

In a broader constitutional context, submitting a preliminary reference by the Constitutional Tribunal would in a sense be a contribution to the process of combining constitutional traditions with the common values establishing the basis of EU law.

Obviously, it can not be ruled out that the Court of Justice of the EU would not find infringement of e.g. constitutional identity of the Polish State by an EU act, which for exactly this reason became the object of a preliminary reference submitted by the Constitutional Tribunal. Thus a hypothesis presented in the ruling of the Constitutional Tribunal on the Accession Treaty would be fulfilled, because an irreconcilable inconsistency would occur between a constitutional norm and a norm of EU law. As it was mentioned earlier, the Constitutional Tribunal suggested that in such a situation the Nation as the sovereign, or the State authority organ authorised by the Constitution to represent the Nation would need to decide on: amending the Constitution; or causing modifications with EU provisions; or, ultimately, on Poland's withdrawal from the European Union.

Due to a small number of preliminary references submitted to-date by national constitutional courts to the Court of Justice of European Union, it is not possible to generalise on the status of the remaining constitutional courts in this procedure. Yet, if the European legal area is to observe the principles

[414] Case SK 45/09 (note 199), para 2.6.

of the state ruled by law, it seems rational that access to the CJEU should be facilitated for the possibly widest circle of bodies exercising judiciary functions in the Member States, and thus applying EU law.

Since constitutional courts are established on legal basis, they are permanent and they apply legal provisions, it seems feasible that while deciding on compliance of law with the constitution they use the possibility of submitting preliminary references concerning interpretation or validity of EU law. This would be justified especially in the systems where by virtue of the constitution itself EU law constitutes part of the national legal order.

2. Responsibility of a State for the infringement of EU law by a constitutional court

The question of State's responsibility for infringement of EU law by a constitutional court has not so far been the object of the proceedings either before an EU or national court. It thus remains a hypothesis but it is worth considering in the light of the construction adopted by the CJEU concerning a Member State's responsibility for incorrect application of EU law by national courts adjudicating in the last instance.

In accordance with international law the State as an entity is responsible for infringement of its obligations, even when the infringement was committed by the court of this State[415].

In the case of EU Member States this principle is specified in the provisions of the Treaties establishing the basis of the European Union. Article 4 section 3 TEU stipulates that "the Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union", while Articles 258 to 260 TFEU determine the procedure of bringing a Member State to justice before the CJEU for infringing such obligations.

[415] See Czapliński, Wyrozumska (note 1), p. 590.

The Court of Justice declares in the ruling that the Member State has failed to fulfil an obligation under the Treaty but it cannot order any Member State to undertake action or refrain from action, except when it orders to undertake temporary measures until the case is resolved. If the infringement consists in adopting national law conflicting with EU law or maintaining it in force, the CJEU has no competences for repealing national norms or obliging the State to award damages for the aggrieved third party. The obligation to comply with the CJEU's decision by the State results from the Treaty itself and it means that competent national bodies can not apply national provisions considered as conflicting with EU law and when the circumstances require that, the bodies will be obliged to undertake any necessary action enabling full implementation of EU law. As a result further application of such national provisions is illegal, which may be raised in the proceedings before national courts[416].

The state which does not enforce the decision is liable to further proceedings before the Court of Justice of the EU, which may be concluded with imposing a periodic pecuniary penalty payment[417], a payment of a lump sum or jointly the periodic penalty and a payment of a lump sum[418].

There are no obstacles for a Member State to be responsible in this procedure for action or inaction of courts[419]. The State summoned before the Court of Justice of the EU is represented by its government, but it can not plead that the principle of separation of powers prevents it from demanding that the other "powers" enact a legal act or fulfil an EU obligation in another way. The CJEU explicitly stated that the liability of a Member State as stipulated by Article 258 TFEU arises whatever the agency of the State whose

[416] More on this point see K.P.E. Lasok, T. Millett, A. Howard, *Judicial Control in the EU: procedures and principles*, London 2004, p. 41-42.

[417] See e.g. C-387/97 *Commission v Greece* [2000] ECR I-5047; C-278/01 *Commission v Spain* [2003] ECR I-14141.

[418] See C-304/02 *Commission v France* [2005] ECR I-06263.

[419] See T. C. Hartley, *The Foundations of European Community Law*, Oxford 2003, p. 309.

action or inaction is the cause of the failure to fulfil its obligations, even in the case of a "constitutionally independent institution"[420].

Obviously, this is not tantamount to challenging the principles of independence of courts and judiciary, deeply rooted in constitutional traditions of EU Member States, constructed, as stipulated by Article 2 TEU, on the basis of principles of freedom, democracy and state ruled by law, common for these States. It is thus understandable that the Commission approaches the issue cautiously even though it has the right to initiate proceedings against a State as stipulated by Article 258 TFEU[421].

On the other hand, national courts play a crucial role in enforcing EU law and if they commit serious mistakes in this area, such as refusing to recognise the principles of direct effect, primacy or refraining from submitting preliminary references, might be tantamount to the failure to fulfil EU obligations and should logically become a responsibility of a State as an entity[422].

It is also important how national courts interpret the provisions of national law which are relevant for correct implementation of EU law. This is seen, e.g. in the situation when national provisions have a "neutral content in relation to EU law", but it is their effect that is decisive, which in turn results from a certain interpretation adopted by national courts. According to the CJEU, isolated or numerically insignificant judicial decisions in the context

[420] See 77/69 *Commission v Belgium* [1970] ECR 237, para 15. The Belgian government argued that the required draft law was put before Parliament but was not passed owing to the dissolution of Parliament in the meanwhile. In these circumstances the Belgian government considered that the delay in enacting the law amounted to a "case of *force majeure*", para 14.

[421] See Hartley (note 419), p. 310.

[422] AG Warner in the opinion delivered in the case 30/77 *Regina v Bouchereau* [1977] ECR 1999, argued that "a Member State cannot be held to have failed to fulfil an obligation under the Treaty simply because one of its courts has reached the wrong decision. Judicial error, whether due to misapprehension of facts or to misapprehension of the law, is not a breach of the Treaty. In the judicial sphere, Article 169 [now Article 258 TFEU] could only come into play in the event of a court of a Member State deliberately ignoring or disregarding Community law".

of case-law taking a different direction, or still more a construction disowned by the national supreme court, cannot be taken into account. However, "that is not true of a widely-held judicial construction which has not been disowned by the supreme court, but rather confirmed by it" [423]. This in turn affects the assessment of appropriate fulfilment of EU obligations by the State and may become the basis for submitting a complaint by the Commission against the State, pursuant to Article 258 TFEU.

The Commission was ready to submit such a complaint during the proceedings in case C-154/08 against Spain concerning the failure to meet the obligations resulting from VI directive relating to VAT (77/388//EEC)[424]. Central bodies of Spanish administration were prepared to undertake activity in accordance with the directive but the Supreme Court (*Tribunal Supremo*) adopted the interpretation, which according to the Commission infringed the directive's provisions. It was, as observed by one of the commentators, a pure case of judicial infringement of Union law, because the ruling of the Supreme Court imposed the practice contradicting Union law onto courts of lower instance and administrative bodies[425]. Moreover, the Supreme Court decided on the case without submitting a preliminary reference to the Court of Justice. During preliminary proceedings the Commission raised the question of infringement of Article 234 TEEC (now Article 267 TFEU), but did not sustain it later[426].

In its ruling the Court of Justice did not refer to this issue, but indirectly expressed its opinion on the problem itself in the reasons for the judgment.

[423] See case C-129/00 *Commission v Italy* [2003] ECR I-14637, para 32. The CJEU stated that "where national legislation has been the subject of different relevant judicial constructions, some leading to the application of that legislation in compliance with Community law, others leading to the opposite application, it must be held that, at the very least, such legislation is not sufficiently clear to ensure its application in compliance with Community law", para 33.

[424] See case C-154/08 *Commission v Spain* [2009] ECR I-00187.

[425] See M. L. Escudero, Case C-154/08 *Commission v. Spain*, Common Market Law Review, 1/ 2011, p. 237.

[426] Case C-154/08 (note 424), paras 64-65.

Replying to the statement from the Government of Spain that it finds it difficult to remove the infringement of the Union obligations, because the source of the infringement results from the ruling of the Supreme Court, the CJEU reminded that the infringement of the obligations remaining with a Member State may be determined pursuant to (former) Article 226 TEEC, irrespectively of the fact which body is responsible for the infringement, even if it is a constitutionally independent body[427].

The "institutional" form of ensuring effectiveness of EU law[428], stipulated in Articles 258 to 260 TFEU, even if acute as it may be for the State budget, is only indirectly effective from the point of view of an individual.

Therefore, since the early years of its functioning the Court of Justice of the EU has aimed at providing more effective protection of individual rights, offering the possibilities of active and more "individualised" ways of exercising the rights resulting from Community law, even though they were not explicitly stipulated by the provisions of the Treaties. This, however, required a novel approach to the nature of the Treaties.

The CJEU decided that individuals are entitled to their rights not only when they are explicitly granted by the Treaty, but those rights arise also by virtue of obligations imposed in a clearly defined manner both on individuals, on the Member States and the Community institutions[429], despite the fact that individuals are not a party to the Treaties and that such acts of secondary legislation as directives or decisions directed to the States are not addressed to them.

This approach resulted in the possibility of demanding protection from a national court by an individual subject. This right is rooted in a EU provision,

[427] *Ibidem*, paras 124-125.

[428] With regard to the means of making the EU law effective, "institutional enforcement" is sometimes distinguished from "individual enforcement", see A. Tomkins, *Of Institutions and Individuals: The Enforcement of EC Law,* [in:] *Law and Administration in Europe*, P. Craig, R. Rawlings eds, Oxford 2003, p. 276.

[429] Joined cases C-6/90 and C-9/90 *Francovich and Bonifaci v Italy* [1999] ECR I-5357, para 31.

which is not addressed to this subject but which may be attributed with the so-called direct effect[430]. However, reducing the instruments of individual protection at the disposal of individuals solely to the direct effect would weaken full effectiveness of EU law, therefore, if such an effect can not be attributed to an EU norm, national courts are bound to interpret national law so far as possible in compliance with EU law[431].

Obviously, it is possible to ponder whether it is justified to impose the obligation to "rectify" the mistakes of the national legislator onto the bodies appointed to apply law[432], but the Court of Justice of the EU consistently maintains its stance, repeating that national courts are especially responsible for providing the legal protection which individuals derive from the rules of Community (EU) law and for ensuring their full effectiveness[433].

However, it should be noted here that for the CJEU the right of an individual to rely on a directly effective EU provisions is only a "minimum guarantee" and is not sufficient in itself to ensure full and complete implementation of EU law[434].

On the other hand, interpretation of national law in compliance with EU law has its limits. The obligation of consistent interpretation is restricted by general principles of law which form part of EU law, in particular the principle of legal certainty and non-retroactivity and prohibition of aggravating the liability in criminal law[435]. It would also be unacceptable if a judge acted

[430] See M. Szpunar, *Bezpośredni skutek prawa wspólnotowego – jego istota oraz próba uporządkowania terminologii*, Europejski Przegląd Sądowy, November 2005, p. 4 *ff.*

[431] See case 14/83 *S. von Colson and E. Kamann* [1984] ECR 1891 and case C-106/89 *Marleasing* [1990] ECR I-4135.

[432] See doubts expressed in the doctrine, quoted in: *Prawo Wspólnot Europejskich. Orzecznictwo. Wydanie nowe z Suplementem*, wybór i redakcja W. Czapliński, R. Ostrihansky, P. Saganek, A. Wyrozumska, Warszawa 2005, p. 173.

[433] See joined cases C-397/01 to C-403/01 *Pfeiffer and others v Deutsches Rotes Kreuz,* [2004] ECR I-8835, para 120.

[434] See joined cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029, para 20.

[435] See case 88/86 *Kolpinghuis Nijmegen B.V.* [1987] ECR 3969, para 13.

contra legem, i.e. interpreted a provision of national law not in conformity with its clearly defined meaning[436].

It was thus necessary to make another step towards making the subjectivity of individuals in Community/Union law a reality. The step consisted in recognising by the Court in *Francovich* that the principle of effectiveness requires compensating for damages caused to individuals by the infringement of Community law by Member States. This liability does not result directly from the Treaties but the CJEU assumed that it is inherent in the system of the Treaties and has its basis in former Article 5 TEEC[437].

Adjudicating later on the joined cases of *Brasserie du Pêcheur/Factortame III*, it solidified and extended its line of reasoning. First of all, independently of the arguments presented in *Francovich*, it justified the liability of Member States for damages with the fact that their own legal systems contain a general principle, in accordance with which an unlawful act or omission gives rise to an obligation to make good the damage caused.

In this context the CJEU reminded the principle stipulated in former Article 288 TEEC, according to which "in the case of non-contractual liability, the Community shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties". Elaborating on this principle, the Court of Justice stated that the basic premises for the liability of the Communities for the activity of non-legislative character are: incurring of the damage, illegal activity of the Communities and causality between the action and the damage[438].

[436] See case C-334/92 *Wagner Miret* v *Fondo de Garantira Salaria* [1993] ECR I-6911; see also a comment by J. Steiner, L. Woods, *Textbook on EC Law*, Oxford 2003, p. 110.

[437] See C-6/90… (note 429), paras 35 and 36.

[438] More on this point see N. Półtorak, *Odpowiedzialność odszkodowawcza państwa w prawie Wspólnot Europejskich*, Zakamycze 2002, p. 129.

The premises determining the liability of the Community in turn became the point of departure for the Court of Justice in formulating the conditions for State liability.

In the rulings mentioned above, first *Francovich and Bonifaci* and then *Brasserie du Pêcheur and Factortame*, the Court of Justice determined the conditions of State liability for damages to individuals for the infringement of Community/Union law by a national legislator and administrative bodies.

In accordance with the concept outlined in the latter of the rulings above, State liability for damages arises if: the rule of Community/Union law infringed is intended to confer rights onto individuals, the breach is sufficiently serious, there is direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties[439].

It was to be decided whether the same criteria are to be adopted if damage results from the breach of Union law by a national court.

From the perspective of the European Union the issue of involving national courts in the implementation of Union obligations is of fundamental character, because the main task of application of Union law on everyday basis remains with national courts, as they are attributed with general competence in this scope.

It is thus hardly surprising that, when a case of the breach of Community law resulting from a judicial decision eventually was submitted to the CJEU, it confirmed in the ruling of 30 September 2003 in the case of *Köbler v Austria*[440] that the situation when a State is liable for damages to an individual also arises when the damage was incurred by the breach of Community law by a national court adjudicating at last instance.

It is vital for this discussion that the matter was referred to the CJEU as a result of a preliminary reference submitted by an Austrian civil court examining a complaint after the Austrian Supreme Administrative Court

[439] See joined cases C-46/93 and C-48/93 (note 434), para 51.
[440] See C-224/01 *Köbler v Austria* [2003] ECR I-10239.

(*Verwaltungsgerichtshof*) withdrew a preliminary reference which it had submitted earlier and then adjudicated infringing Community law.

Specific nature of the judicial function, also seen in the obligation imposed on courts of last instance to request preliminary rulings from the CJEU, as stipulated by Article 267 TFEU results in the fact that the central issue is determining the conditions for an individual to claim damages for infringement of EU law by a court whose decision can not be appealed against in national law, i.e. supreme courts in most cases, but it cannot be excluded that also constitutional courts.

There may be certain doubts whether the construction created by the CJEU can be reconciled with the principle of legal certainty and more specifically the principle of *res iudicata*, the independence of the judiciary, whether it does not undermine the authority of highest courts whose judges possess the highest professional competences. Similar doubts were expressed by representatives of governments of some Member States, submitting their observations in *Köbler*.

The CJEU dismissed these reservations, primarily aiming at ensuring full effectiveness of individual rights on the basis of EU law. If courts of last instance represent the last possibility for an individual to claim the rights granted by EU law, infringement of these rights should result in the possibility to establish the liability of State and receive appropriate damages. It is logically connected with the essence of the institution of preliminary rulings. The obligation to submit preliminary references was imposed on the courts whose decisions can not be appealed against in order to avoid infringements of the rights granted to an individual by EU law.

Moreover, the CJEU has decided that in this case the status of *res iudicata* of the judicial decision has not been invalidated, because the principle of State liability requires the reparation for the damage incurred but not revision of the judicial decision which was responsible for the damage.

The CJEU does not perceive the potential for infringing the principle of the independence of the judiciary, because the possibility of claiming compensation from the State for judicial decisions concerns not the personal liability of the judge but that of the State.

And finally, according to the CJEU, the existence of a right of action that affords, under certain conditions, reparation of the injurious effects of an erroneous judicial decision will contribute to enhancing the quality of a legal system, and in the long run the authority of the judiciary[441].

However, determining the conditions governing State liability for judicial decisions, the CJEU is aware of the specific nature of the judicial function. Therefore, to determine whether the infringement of EU law by a decision of a national court adjudicating at last instance is sufficiently serious (the second premise of liability), a competent national judge should examine whether this infringement is manifest. In particular the judge should take into consideration the degree of clarity and precision of the rule infringed, intentional character of the infringement, whether the error of law was excusable or inexcusable, the position taken in the case by an EU institution and failing to fulfil the obligation by the court in question to submit a preliminary reference to the CJEU. In any event, an infringement of EU law is sufficiently serious where the judicial decision concerned was made in manifest breach of the case-law of the CJEU in the matter[442].

Designating a court competent to examine and determine disputes concerning the compensation claim remains with the prerogatives of national law, in accordance with the principle of organisational and procedural autonomy of Member States.

Commenting on national provisions, the CJEU emphasised that the presented concept does not exclude recognition of less strict conditions of liability stipulated by domestic law. On the other hand, national provisions applied

[441] *Ibidem*, paras 39-43.
[442] *Ibidem*, paras 53-56.

in the case of reparation claims based on EU law must not be less favourable than those relating to similar domestic claims and must not be so framed as to make in practice impossible or excessively difficult to obtain reparation[443].

The CJEU referred the construction above to national courts adjudicating at last instance. In the case of constitutional courts the condition of a direct causal link between such court's decision and the loss or damages sustained by the injured individual seems the most difficult to meet. Still, decisions made in the procedure of constitutional complaint and made as replies to legal questions submitted by courts affect the legal status of individuals. It is thus an open question whether the Court of Justice of the EU will grant individual subjects with another instrument increasing effectiveness of protection of the rights granted by the law of the European Union.

Infringement of EU law by constitutional courts and failing to fulfil the obligations adopted by Member States are certainly the situations to be avoided. Therefore, there is a connection between the institution of preliminary rulings and prevention of infringement of law which result in State's liability.

The procedure of preliminary rulings, concerning concrete interpretation problems of constitutional character, should result in bringing together the stances adopted by the Court of Justice of the EU and constitutional courts, primarily due to the common nature of values constituting the basis of constitutional orders and EU law[444]. A direct dialogue facilitates determining interpretation acceptable for both parties, which respects EU law and basic principles of constitutional order.

[443] *Ibidem*, paras 57-58.

[444] On the Polish doctrine's approach to this question see Działocha (note 178) *passim*.

Conclusion

The initiative to launch the European integration project is owed to politicians, while the driving force behind it was and still is economy. The economy will probably determine whether the Europeans will seize the opportunity to overcome eternal divisions and strengthen their position in the new, global division of powers.

The law has provided the necessary framework for creating and functioning of internal market, but in the sphere of political system it failed to face up to the challenges posed by the integration. It could hardly be different since sovereign States were not legitimised by their societies to adopt the federal model and form the system meeting the requirements of the State ruled by law.

The Treaties establishing the basis of the European Union are not its constitution, which would subordinate all other norms binding in the EU territory, while the Court of Justice of the European Union is not a court conclusively adjudicating on the conflicts between EU and national norms. Moreover, constitutions remain legal acts of supreme legal force in the Member States and their observance is as a rule enforced by constitutional courts.

Thus a conflict is inherent in the system, but at the same time there are Treaty and constitutional provisions, thanks to which the Court of Justice of the European Union on the one hand and constitutional courts on the other can interpret and apply law to attain common objectives of the integration without undermining fundamental principles of a democratic State ruled by law.

We should primarily focus on axiological basis common to the EU and its Member States. It is such values as dignity of a person, freedom, democracy, equality, State ruled by law and human rights that the EU Treaties refer to. They are also protected by constitutional courts in the Member States.

Moreover, the Treaties determine the principles of division of competences and oblige the EU to act solely within the limits of the competences

conferred onto it by the Member States. On the other hand, most constitutions include authorisation to confer competences onto international organisations or the European Union explicitly referred to.

The obligation resulting from the Treaties to avoid conflicts concerning division of competences is rooted in the principle of sincere cooperation stipulated by Article 4 section 3 TEU. In accordance with this principle the European Union and the Member States respect and support each other in carrying out tasks which flow from the Treaties. The Member States, and thus their courts, are obliged to undertake any appropriate measure to ensure fulfilment of their obligations and refrain from any measure which could jeopardise the attainment of the EU's objectives, while the latter is obliged to respect national identities of the Member States, inherent in their fundamental political and constitutional structures, and to respect their essential State functions. It must also observe fundamental rights, which result from constitutional traditions common to the Member States, as general principles of law.

According to the Court of Justice, autonomy of EU law is a rationally justified and systemically indispensable feature. Consequently, only the Court of Justice may conclusively interpret EU law and decide on the validity of its acts. For a constitutional court the autonomy is a relative characteristics, which is tantamount to rejecting the principle of primacy of EU law over constitutional norms.

Thus, the possible area of conflict is of jurisdictional character. Only preventive review of compliance of EU primary law with constitutions does not cause any controversy. The review of this type even seems desirable, because it should decrease the potential for subsequent questioning of constitutionality of the obligations resulting from the Treaties. However, the possibility of requesting ex-post review of constitutionality can not be completely excluded, due to possible discrepancies between the interpretation of the Treaties presented in the case-law of the Court of Justice and the interpretation adopted by a constitutional court.

Jurisdictional conflict may be even more probable concerning EU legal acts, i.e. legal provisions enacted by EU institutions, and instances of interpretation of EU law by the Court of Justice. While there are procedures determined in the Treaties providing for review of legality of EU acts, from the perspective of a constitutional court there is no guarantee that the Court of Justice, an EU institution in itself, will appropriately interpret the limits of competences which the States conferred onto the EU and its bodies.

Since conferring competences was compliant with the constitution, the EU can not enact acts contrary to it and especially can not infringe sovereignty of the Member States, their constitutional identities and fundamental rights guaranteed in their constitutions. It seems that no constitutional court would be willing to resign from the role of the court of the "last word" in this respect.

All this is not tantamount to inevitable confrontation. Constitutional courts naturally accept the competence of the Court of Justice to give preliminary rulings as stipulated by the Treaty, while some use the right of preliminary reference. This is an appropriate way of avoiding a conflict of norms, because this stage should eliminate the EU provisions claimed to infringe constitutions and considered as contradictory to EU law.

The demand supported by the doctrine that the interested courts should conduct a specific "dialogue" by all means deserves praise. Since there is no ultimate mediator, this remains the only way of resolving conflicting situations. Together with the Court of Justice of the European Union constitutional courts should actively create the European legal area. On the one hand, they determine constitutional limits of integration, which should be considered an element of forming constitutional traditions to be taken into consideration by the Court of Justice of the European Union in its case-law; on the other hand, the stance adopted by these constitutional courts which base the relations with EU law on the presumption of compliance of EU law provisions and their interpretation conducted by the CJEU with the values and principles expressed in constitutional provisions should be propagated.

There is always a possibility that presumptions may fail and resolving a conflicting situation will require adopting only one of the contradictory solutions. In such a case, the "golden rule" should be the use of the criterion of effective protection of the interests of an individual, because it is an individual who the institutions of the integrating Europe should serve in the long run.

Bibliography

Alexy R., *Teoria praw podstawowych*, translation B. Kwiatkowska, J. Zajadło, Warszawa 2010.

Ardant P., *Institutions politiques & droit constitutionnel*, Paris 2005.

Arnull A., *The European Union and its Court of Justice*, 2nd ed., Oxford 2006.

Barav A., *La plénitude de compétence du juge national en sa qualité de juge communautaire*, [in:] *L'Europe et le droit. Mélanges en l'honneur de Jean Boulouis*, Dalloz 1992.

Barber N. W., *The afterlife of Parliamentary sovereignty*, International Journal of Constitutional Law, no 1, January 2011.

Barcz J., *Glosa do wyroku TK z dnia 11 maja 2005 r., K 18/04,* Kwartalnik Prawa Publicznego, nr 4/2005.

Barcz J., *Stosowanie prawa Wspólnot zachodnioeuropejskich w państwach członkowskich*, Warszawa 1991.

Barents R., *The Autonomy of Community Law*, The Hague 1964.

Beck G., *The Lisbon Judgment of the German Constitutional Court, the Primacy of EU Law and the Problem of Kompetenz-Kompetenz: A Conflict between Right and Right in Which There is No Praetor*, European Law Journal, July 2011, vol 17, no 4.

Bertrand B., *La jurisprudence Simmenthal dans la force de l'âge. Vers une complétude des competences du juge national?*, Revue française de droit administrative, mars-avril 2011.

Besselink L., *National and constitutional identity before and after Lisbon,* Utrecht Law Review, vol. 6, issue 3 (November) 2010.

Biernat S., *Glosa do wyroku TK z dnia 11 maja 2005 r., K 18/04,* Kwartalnik Prawa Publicznego, nr 4/2005.

Biernat S., *Zasada pierwszeństwa prawa unijnego po Traktacie z Lizbony*, Gdańskie Studia Prawnicze, Tom XXV, 2011.

Bobek M., *Landtová, Holubec, and the Problem of an Uncooperative Court: Implications for the Preliminary Rulings Procedure*, European Constitutional Law Review, no 10/2014.

Bogdandy J., Bast A. von, *The Federal Order of Competences*, [in:] *Principle of European Constitutional Law*, 2nd ed., A. von Bogdandy, J. Bast eds, Oxford 2010.

Bossuyt M., Verrijdt W., *The Full Effects of EU Law and of Constitutional Review in Belgium and France after Melki Judgment*, European Constitutional Law Review, no 3/2011.

Briza P., *The Czech Republic. The Constituional Court on the Lisbon Treaty. Decision of 26 November 2008*, European Constitutional Law Review, no 5/2009.

Budziło K., *Europeizacja Konstytucji Republiki Litewskiej*, [in:] *Europeizacja konstytucji państw Unii Europejskiej*, K. Kubuj i J. Wawrzyniak eds, Warszawa 2011.

Bùrca G. de, *The European Court of Justice and the International Legal Order after Kadi*, Jean Monnet Working Paper 01/09.

Cananea G., *The Italian Constitutional Court and the European Court of Justice: From Separation to Interaction. Comment on Constitutional Court Order n. 103 of 16 April 2008 – Presidente del Consiglio dei ministri v. Regione Sardegna*, European Public Law, vol. 14, issue 4, 2008.

Chaltiel F., *Nouvelle précision sur le rapport entre le droit constitutionnel et le droit communautaire. La decision du Conseil constitutionnel du 27 juillet 2006 sur la loi relative aux droits d'auteurs*, Revue française de droit constitutionnel, no 68/2006.

Claes M., *The National Courts' Mandate in the European Constitution*, Hart Publishing, Oxford and Portland 2006.

Commentaire de la décision no 2004-498 DC, Les cahiers du Conseil Constitutionnel, no 17/2004.

Constantinesco V., Kovar R., Jacqué J-P., Simon D., *Traité instituant la CEE. Commentaire atrticle par article*, Paris 1992.

Craig P., Burca G. de, *EU Law. Text, Cases and Materials*, 5th ed., Oxford 2011.

Craig P., *The ECJ and Ultra Vires Action: A Conceptual Analysis*, Common Market Law Review, 48/2011.

Czapliński W., *Glosa do wyroku TK z dnia 11 maja 2005 r., K 18/04,* Kwartalnik Prawa Publicznego, nr 4/2005.

Czapliński W., Wyrozumska A., *Prawo międzynarodowe publiczne. Zagadnienia systemowe*, wyd. 2, Warszawa 2004.

Czyżniewski M., Witkowska-Chrzczonowicz K., *Prezydencja Republiki Czeskiej w Radzie Unii Europejskiej. Studium prawno-politologiczne*, Warszawa 2011.

Dani M., *Tracking Judicial Dialogue – The Scope for Preliminary Rulings from the Italian Constitutional Court*, Jean Monnet Working Paper 10/08.

De Witte B., *The European Constitutional Treaty: towards and Exit Strategy for Recalcitrant Member States?,* Maastricht Journal of European and Comparative Law, 2003, vol. 10 no 1.

Decaux E., Eisemann P. M., Goesel-Le Bihan V., Stern B., *France* [in:] *L'intégration du droit international et communautaire dans l'ordre juridique national. Étude de la pratique en Europe*, P. M. Eisemann ed., Kluwer Law International, 1996.

Derosier J.-P., *Le noyau constitutionnel identitaire, frein á l'intégration européenne*, VIIIème Congrès de l'AFDC (Nancy), Juin 2011.

Dinh N. Q., Daillier P., Pellet A., *Droit international public*, 4e édition, Paris 1992.

Domańska M, Wąsek-Wiaderek M., Wojtaszek-Mik E., Zielony A., *Pytanie prejudycjalne do Trybunału Sprawiedliwości Wspólnot Europejskich*, Warszawa 2007.

Dord O. B., *Contrôle de constitutionnalité des actes communautaires dérivés: de la nécessité d'un dialogue entre les juridictions suprèmes de l'Union européenne*, Les cahiers du Conseil Constitutionnel, no 4/1998.

Drake S., *Twenty years after von Colson: the impact of „indirect effect" on the protection of the individual's Community rights,* European Law Review, (30) June 2005.

Dubowski T., *Zasada równowagi instytucjonalnej w prawie Unii Europejskiej*, Warszawa 2010.

Dutheil de la Rochère J., *La question prioritaire de constitutionnalité et le droit européen. La porte étroite,* Revue trimestrielle de droit européen, 46 (3) 2010.

Duthheil de la Rochère J., *French Conseil Constitutionnel: Recent Developments,* [in:] *Europe's Constitutional Challenges in the Light of the Recent Case Law of National Constitutional Courts. Lisbon and Beyond*, J. M. Beneyto, I. Pernice eds., Baden-Baden 2011.

Dyevre A., *If You Can't Beat Them, Join Them. The French Constitutional Council's First Reference to the Court of Justice,* European Constitutional Law Review, no 10/2014.

Działocha K., uwagi do art. 8, [in:] *Konstytucja Rzeczypospolitej Polskiej, Komentarz*, t. V, Garlicki L. ed., Warszawa 2007.

Eisemann P. M., *La conclusion des traités,* [in:] *L'intégration du droit international et communautaire dans l'ordre juridique national. Étude de la pratique en Europe*, P. M. Eisemann ed., Kluwer Law International 1996.

Elsuwege P., Adam S., *The Limits of Constitutional Dialogue for the Prevention of Reverse Discrimination. Constitutional Court, Judgment 11/2009 of January 2009*, European Constitutional Law Review, no 5/2009.

Escudero M. L., *Case C-154/08, Commission v. Spain,* Common Market Law Review, 1/2011.

Europe's Constitutional Challenges in the Light of the Recent Case Law of National Constitutional Courts. Lisbon and Beyond, J. M. Beneyto, I. Pernice eds., Baden-Baden 2011.

Filipek P., uwagi do art. 6, [in:] *Traktat o Unii Europejskiej. Komentarz,* K. Lankosz ed., Warszawa 2003.

Frowein J. A., Oellers-Frahm K., *Allemagne* [in:] *L'intégration du droit international et communautaire dans l'ordre juridique national. Étude de la pratique en Europe*, P. M. Eisemann ed., Kluwer Law International, 1996.

Garlicki L., *Polskie prawo konstytucyjne. Zarys wykładu*, Warszawa 2010.

Grabenwarter C., *National Constitutional Law Relating to the European Union* [in:] *Principles of European Constitutional Law*, A. von Bogdandy, J. Bast eds, Hart Publishing 2006.

Granger M.-P., *France is 'already' back in Europe: the europeanization of French courts and the influence of France in the EU,* European Public Law, vol. 14, issue 3, 2008.

Grewe C., Rideau J., *L'identité constitutionnelle des États membres de l'Union européenne: flash back sur le coming-out d'un concept ambigu, Chemins d'Europe. Mélanges en l'honneur de Jean-Paul Jacqué,* Dalloz, Paris, 2010.

Grzelak A., *Realizacja uprawnień parlamentów państw członkowskich Unii Europejskiej w zakresie przestrzegania zasady pomocniczości – pierwsze doświadczenia*, BAS-WAPEiM-1947/11, Warszawa, 29 sierpnia 2011 r.

Grzeszczak R., *Władza wykonawcza w systemie Unii Europejskiej*, Warszawa 2011.

Hartley T. C., *The Foundations of European Community Law*, Oxford 2003.

Isaac G., Blanquet M., *Droit général de l'Union européenne,* 9e édition, Paris 2006.

Isaac G., *Droit communautaire général*, 3e édition, Paris 1993.

Jacobsohn G. J., *Constitutional Identity*, Harvard University Press 2010.

Jacqué J. P., *Droit institutionnel de l'Union européenne,* 2e édition, Paris 2003.

Jacqué J.P., *The Accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms,* Common Market Law Review, 48/2011.

Jarosz M., *Pierwszeństwo kontroli konstytucyjności a prawo UE – uwagi na tle wyroku TS w sprawach Melki i Abdeli*, Europejski Przegląd Sądowy, sierpień 2011.

Jarukaitis I., *Lithuania's Membership in the European Union and Application of EU Law At National Level,* [in:] *The Application of EU Law in the New Member States*, A. Lazowski ed., Asser Press, Hague 2010.

Jedliczka U., *The Austrian Constitutional Court and the European Court of Justice*, www.icl-journal.com, vol 2, no 4/2008.

Kiiver P., *The Early-Warning System for the Principle of Subsidiarity: The National Parliament as a Conseil d'Etat for Europe*, European Law Review, no 36/2011.

Kokott J., *The Basic Law at 60 – From 1949 to 2009: The Basic Law And Supranational Integration*, German Law Journal, vol. 11, no 01/2010.

Koncewicz T. T., *Aksjologia unijnego kodeksu proceduralnego*, Warszawa 2010.

Konstadinides T., *Division of Powers in European Union Law. The Delimitation of Internal Competence between the EU and the Member States,* Wolters Kluwer 2009.

Kornobis-Romanowska D., *Sąd krajowy w prawie wspólnotowym*, Kraków 2007.

Kozłowski A., *Interpretacja traktatu międzynarodowego w świetle jego kontekstu*, Warszawa 2002.

Kruk M., *Zmiany Konstytucji Republiki Czeskiej a europeizacja jej zasad,* [in:] *Europeizacja konstytucji państw Unii Europejskiej*, K. Kubuj, J. Wawrzyniak eds, Warszawa 2011.

Kubuj K., *Europeizacja konstytucji w świetle zmian Konstyucji V Republiki Francuskiej,* [in:] *Europeizacja konstytucji państw Unii Europejskiej*, K. Kubuj, J. Wawrzyniak eds, Warszawa 2011.

Kustra A., *Przepisy i normy integracyjne w konstytucjach wybranych państw członkowskich UE*, Toruń 2009.

Kwiecień R., *Zgodność traktatu akcesyjnego z Konstytucją – glosa do wyroku TK z 11.05.2005 r. (K 18/04)*, Europejski Przegląd Sądowy, nr 1/2005.

Lasok K.P.E., T. Millett, A. Howard, *Judicial Control in the EU: procedures and principles*, London 2004.

Lavranos N., *The Impact of the Kadi Judgment on the International Obligations of the EC Member States and the EC*, Yearbook of European Law, Oxford 2009.

Leczykiewicz D., *„Effective Judicial Protection" of Human Rights After Lisbon: Should National Courts be Empowered to Review EU Secondary Law?*, European Law Review, 35/2010.

Lenaerts K., Nuffel P. van, *Constitutional Law of the European Union*, Sweet & Maxwell, London 1999.

Lisbon Case, BVerfG, 2BvE 2/08, English translation (preliminary version), Judgment of the Second Senate of 30 June 2009.

Luchaire F., *Le Conseil constitutionnel et la souveraineté nationale*, Revue du Droit Public, no 6/1991.

Łacny J., *Opinia dotycząca sprawozdania Komisji w sprawie pomocniczości i proporcjonalności (XVIII sprawozdanie w sprawie lepszego stanowienia prawa za 2010 r.)*, BAS-WAPEiM-1631/11, Warszawa 12 sierpnia 2011 r.

Łętowska E., *Między Scyllą i Charybdą – sędzia polski między Strasburgiem i Luksemburgiem*, Europejski Przegląd Sądowy, nr 1/2005.

Mahlmann M., *The Politics of Constitutional Identity and its Legal Frame – the Ultra Vires Decision of the German Federal Constitutional Court*, German Law Journal, vol 11, no 12.

Manin P., *Les Communautés européennes. L'Union européenne. Droit institutionnel*, 3e édition, Paris 1997.

Michałowska G., *Ochrona praw człowieka w Radzie Europy i w Unii Europejskiej*, Warszawa 2007.

Mik C., *Europejskie prawo wspólnotowe. Zagadnienia teorii i praktyki*, t. I, Warszawa 2000.

Miron A., *La jurisprudence du Tribunal de Première Instance á propos de l'nscription sur les listes terroristes*, Revue du Marché commun et de l'Union européenne, no 511/2007.

Möllers C., *Constituional Ultra Vires Review of European Acts Only Under Exceptional Circumstances; Decision of 6 July 2010, 2 BvR 2661/06 Honeywell*, European Constitutional Law Review, no 7/2011.

Monnier S., *Droit constitutionnel et droit communautaire. La répartition des compétences et la hiérarchie des normes nationales á l'épreuve de l'application du droit communautaire*, Revue française de Droit constitutionnel, 68 (2006).

Moonen T., *Joined Cases C-188/10 and C-189/10, Proceedings Against Aziz Melki and Selim Abdeli or How the Last Shall Be the First: the Court of Justice Rules on Priority Constitutional Law Review*, The Columbia Journal of European Law, vol. 17, Winter 2010/2011, no 1.

Nahlik S. E., *Wstęp do nauki prawa międzynarodowego*, Warszawa 1967.

Ochrona praw podstawowych w Unii Europejskiej, J. Barcz ed., Warszawa 2008.

Payandeh M., *Constitutional Review of EU Law after Honeywell Contextualizing the Relationship between the German Constitutional Court and the EU Court of Justice,* Common Market Law Review, 1 (2011).

Pernice I., Mayer F.C., *De la constitution composée de l'Europe*, Revue Trimestrielle de Droit Européen, 36 (4) 2000.

Pernice I., *Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited*?, Common Market Law Review, 4 (1999).

Pinon S., *L'effectivité de la primauté du droit communautaire sur la Constituion. Regard sur la jurisprudence récente du Conseil constitutionnel et du Conseil d'Etat*, Revue trimestriel du droit européen, 44 (2) 2008.

Pliakos A., Anagnostaras G., *Who is the Ultimate Arbiter? The Battle over Judicial Supremacy in EU Law*, European Law Review, 36 (2011).

Pollicino O., *From Partial to Full Dialogue with Luxembourg: The Last Cooperative Step of the Italian Constitutional Court*, European Constitutional Law Review, no 10/2014.

Pollicino O., *The Conseil d'Etat and the relationship between French internal law after Arcelor: Has something really changed?*, Common Market Law Review, 45 (2008).

Popławska E., *Zmiany ustrojowe w związku z członkostwem we Wspólnocie Europejskiej i Unii Europejskiej. Zjednoczone Królestwo Wielkiej Brytanii i Irlandii Północnej*, [in:] *Europeizacja konstytucji państw Unii Europejskiej*, K. Kubuj i J. Wawrzyniak eds, Warszawa 2011.

Półtorak N., *Odpowiedzialność odszkodowawcza państwa w prawie Wspólnot Europejskich*, Zakamycze 2002.

Prawo Wspólnot Europejskich. Orzecznictwo. Wydanie nowe z Suplementem, wybór i redakcja W. Czapliński, R. Ostrihansky, P. Saganek, A. Wyrozumska, Warszawa 2005.

Principles of European Constitutional Law, Bogdandy A., Bast J. eds., 2nd ed., Hart Publishing 2010.

Radziewicz P., *Europeizacja Konstytucji Irlandii*, [in:] *Europeizacja konstytucji państw Unii Europejskiej*, K. Kubuj, J. Wawrzyniak eds, Warszawa 2011.

Reestman J-H., *The Franco-German Constitutional Divide. Reflections on National and Constitutional Identity*, European Constitutional Law Review, no 5/2009.

Relacje między prawem konstytucyjnym a prawem unijnym w orzecznictwie sądów konstytucyjnych państw Unii Europejskiej, K. Zaradkiewicz ed., Biuro Trybunału Konstytucyjnego ZOiS, wrzesień 2011.

Rideau J., *Droit institutionnel de l'Union européenne,* 6e édition, Paris 2010.

Rodriguez Iglesias GC., Puissochet J-P., *Droit comunautaire derivé et droit constitutionnel*, (Dossier: Droit communautaire – droit constitutionnel), Les cahiers du Conseil Constitutionnel no 4/1998.

Rossi L.S., *How Fundamental are Fundamental Principles? Primacy and Fundamental Rights after Lisbon*, Yearbook of European Law, Oxford 2008.

Roux J., *Konstytucje narodowe a konstytucja europejska – czy zmiany konstytucji są naprawdę konieczne? Francuski punkt widzenia*, [in:] *Stosowanie prawa Unii i Wspólnot w wewnętrznym porządku prawnym Francji i Polski*, Warszawa 2007.

Sadurski W., *Solange, chapter 3: Constitutional Courts in Central Europe – Democracy – European Union*, European Law Journal, vol. 14, issue 1, January 2008.

Saganek P., *Podział kompetencji pomiędzy Wspólnoty Europejskie a państwa członkowskie*, Warszawa 2002.

Sarmiento D., *L'arrêt Melki: esquisse d'un dialogue des juges constitutionnels et européen sur le toile de fond française*, Revue trimestrielle de droit européen, 46 (3) 2010.

Schorkopf F., *The European Union as an Association of Sovereign States: Karlsruhe's Ruling on the Treaty of Lisbon*, German Law Journal, vol. 10, No. 08, 2009.

Simon D., *Le systeme juridique communautaire*, PUF, Paris 1998.

Slosarcik I., *Czech Republic and the European Union Law in 2004-2006*, European Public Law, vol. 13, issue 3/2007.

Sovereignty in Transition, N. Walker ed., Oxford 2003.

Symmons C. R., *Ireland*, [in:] *L'intégration du droit international et communautaire dans l'ordre juridique national. Étude de la pratique en Europe*, P. M. Eisemann ed., Kluwer Law International, 1996.

Szpunar M., *Bezpośredni skutek prawa wspólnotowego – jego istota oraz próba uporządkowania terminologii*, Europejski Przegląd Sądowy, listopad 2005.

Tenorio P., *A Contribution from the Spanish Constitutional Court to the European Construction process: Requesting Preliminary Ruling*, Creighton International and Comparative Journal, vol. 1, no 1, Spring 2011.

The EU Bill and Parliamentary sovereignty, House of Commons European Scrutiny Committee, Tenth Report of Session 2010-11, HC 633-1, 7 December 2010.

The Relationship between European Community Law and National Law: The Cases, A. Oppenheimer ed., Cambridge 1994.

The Relationship between European Community Law and National Law: The Cases, volume 2, A. Oppenheimer ed., Cambridge 2003.

Tomkins A., *Of Institutions and Individuals: The Enforcement of EC Law,* [in:] *Law and Administration in Europe*, P. Craig, R. Rawlings eds, Oxford 2003.

Tomuschat C., *The Kadi Case: What Relationship is there between the Universal Legal Order under the Auspices of the United Nations and the EU Legal Order?*, Yearbook of European Law, Oxford 2009.

Traité instituant CEE. Commentaire article par aticle, sous la dir. de V. Constantinesco, J.-P. Jacqué, R. Kovar, D. Simon, Paris 1992.

Traktat o Unii Europejskiej. Komentarz, C. Mik, W. Czapliński eds., Warszawa 2005.

Tridimas T., *The General Principles of EU Law*, 2nd ed., Oxford 2007.

Trybunał Sprawiedliwości Unii Europejskiej. Sprawozdanie roczne 2010, Luksemburg 2011.

Trzciński J., *Sądownictwo administracyjne jako gwarant ochrony wolności i praw jednostki*, [in:] *Trzecia władza. Sądy i trybunały w Polsce*, A. Szmyt ed., Gdańsk 2008.

Ustawa Zasadnicza Republiki Federalnej Niemiec, tłum. B. Banaszak, A. Malicka, [in:] *Konstytucje państw Unii Europejskiej*, W. Staśkiewicz ed., Warszawa 2011.

Valle Galvez A. del, *Constitution espagnole et traité constitutionnel européen – la Déclaration du Tribunal Constitutional du 13 décembre 2004*, Cahiers de droit européen, no 5-6/2005.

Vandamme T., *Prochain Arrêt: La Belgique ! Explaining Recent Preliminary References of the Belgian Constitutional Court,* European Constitutional Law Review, no 4/2008.

Villiger M. E., *Commentary on the 1969 Vienna Convention on the Law of Treaties,* Leiden – Boston 2009.

Voskuhle A., *Multilevel Cooperation of the European Constitutional Courts,* European Constitutional Law Review, no 6/2010.

Wathelet M., Van Raepenbusch S., *Les relations entre les Cours constitutionnelles et les autres juridictions nationales, y compris l'interférenceen cette matière, de l'action des juricictions européennes,* Rapport de la Cour de justice des Communautés européennes, Conférence des Cours constitutionelles européennes, XIIème Congrès, Bruxelles 14-16 mai 2002.

Weatherhill S., *Law and Integration in the European Union*, Oxford 1996.

Wendel M., *Lisbon before the Courts: Comparative Perspectives*, European Constitutional Law Review, no 7/2011.

White R., *A New Era for Human Rights in the European Union?*, Yearbook of European Law, Oxford 2011.

Witkowska-Chrzczonowicz K., *Konstytucyjnoprawne aspekty członkostwa Republiki Czeskiej w Unii Europejskie w świetle orzecznictwa czeskiego Sądu Konstytucyjnego*, Przegląd Sejmowy, nr 5/2008.

Witkowska-Chrzczonowicz K., *Wyrok Sądu Konstytucyjnego z dnia 26 listopada 2008 r. w sprawie zgodności z porządkiem konstytucyjnym Republiki Czeskiej Traktatu z Lizbony (sygn. PL Us 19/08*), Przegląd Sejmowy, nr 2/2009.

Wojtyczek K., *Przekazywanie kompetencji państwa organizacjom międzynarodowym*, Kraków 2007.

Wójtowicz K., *Francuski model kontroli konstytucyjności prawa krajowego implementującego prawo wspólnotowe*, [in:] *Prawa człowieka – społeczeństwo obywatelskie – państwo demokratyczne*, P. Tuleja, M. Florczak-Wątor, S. Kubas eds, Warszawa 2010.

Wójtowicz K., *Kontrola konstytucyjności aktów Unii Europejskiej podjętych ultra vires – między pryncypiami a lojalną współpracą*, [in:] *W służbie dobru wspólnemu*, R. Balicki, M. Masternak-Kubiak eds, Warszawa 2012.

Wójtowicz K., *Ochrona praw człowieka w Unii Europejskiej*, [in:] *System ochrony praw człowieka*, B. Banaszak, A. Bisztyga, K. Complak, M. Jabłoński, R. Wieruszewski, K. Wójtowicz, wyd. II, Kraków 2005.

Wójtowicz K., *Otwarcie systemu konstytucyjnego Niemiec na sprawy jedności Europy*, Przegląd Sejmowy, nr 6 (95)/2009.

Wójtowicz K., *Status krajowych sądów konstytucyjnych w procedurze odesłań prejudycjalnych do Trybunału Sprawiedliwości UE*, Wrocławsko-Lwowskie Zeszyty Prawnicze, A. Bojko, M. Marszał eds, nr 2/2011.

Wójtowicz K., *Glosa do wyroku Trybunału Konstytucyjnego z dnia 11 maja 2005 r. (sygn. akt K 18/04)*, Przegląd Sejmowy, nr 6/2005.

Wójtowicz K., *Konstytucja RP z 1997 r. a członkostwo Polski w Unii Europejskiej*, [in:] *Prawo Unii Europejskiej. Zagadnienia systemowe*, J. Barcz ed., Warszawa 2006.

Wójtowicz K., *Ochrona praw człowieka w Unii Europejskiej*, [in:] *System ochrony praw człowieka*, B. Banaszak, A. Bisztyga, K. Complak, M. Jabłoński, R. Wieruszewski, K. Wójtowicz, Zakamycze 2005.

Wójtowicz K., *Poszanowanie tożsamości konstytucyjnej państw członkowskich Unii Europejskiej*, Przegląd Sejmowy, 4(99)/2010.

Wójtowicz K., *Prawo międzynarodowe w systemie źródeł prawa RP*, [in:] *System źródeł prawa w Konstytucji Rzeczypospolitej Polskiej*, M. Granat ed., Lublin 2000.

Wójtowicz K., *Prawo Wspólnot Europejskich a zasada suwerenności w prawie konstytucyjnym państw członkowskich,* [in:] *Wspólnoty Europejskie. Wybrane problemy prawne*, cz. I, J. Kolasa ed., Wrocław 1994.

Wyjaśnienia dotyczące Karty Praw Podstawowych, tekst zaktualizowany, [in:] *Podstawy prawne Unii Europejskiej. Traktat z Lizbony*, wprowadzenie, wybór i opracowanie J. Barcz, Warszawa 2010.

Wyrok Sądu Konstytucyjnego z dnia 26 listopada 2008 r. w sprawie zgodności z porządkiem konstytucyjnym Republiki Czeskiej Traktatu z Lizbony, przekład i opracowanie: K. Witkowska-Chrzczonowicz, Przegląd Sejmowy, nr 2/2009.

Wyrozumska A., *Glosa do wyroku TK z dnia 11 maja 2005 r., K 18/04,* Kwartalnik Prawa Publicznego, nr 4/2005.

Wyrozumska A., *Prawo międzynarodowe oraz prawo Unii Europejskiej a konstytucyjny system źródeł prawa*, [in:] *Otwarcie Konstytucji RP na prawo międzynarodowe i procesy integracyjne*, K. Wójtowicz ed., Wydawnictwo Sejmowe, Warszawa 2006.

Zasada pierwszeństwa prawa wspólnotowego w krajowych porządkach prawnych według orzecznictwa ETS i Sądu Pierwszej Instancji. Omówienia wybranych orzeczeń(1963-2005), opr. P. Mikłaszewicz, Biuro Trybunału Konstytucyjnego ZOiS, Warszawa 2005.

Zieliński M., *Międzynarodowe decyzje administracyjne*, Katowice 2011.

Ziółkowski M., *Anonimowa konstytucja. Dyskretna europeizacja (uwagi na tle procedury zmian Konstytucji Królestwa Niderlandów*), [in:] *Europeizacja konstytucji państw Unii Europejskiej*, K. Kubuj, J. Wawrzyniak eds, Warszawa 2011.

Table of Cases

Court of Justice of the European Union

www.curia.europa.eu

8/55 *Belgische Steenkolenfederatie v High Authority* [1955-56] ECR 215
1/58 *Stork v High Authority* [1958-59] ECR 49
6/60 *Humblet v Belgium* [1960] ECR 1129
26/62 *Van Gend en Loos* [1963] ECR 1
6/64 *Flaminio Costa v ENEL* [1964] ECR 585
29/69 *Stauder v Ulm* [1969] ECR 419
77/69 *Commission v Belgium* [1970] ECR 237
11/70 *Internationale Handelsgesellschaf GmbH* [1970] ECR 1125
146/73 *Rheinmühlen-Düsseldorf* [1974] ECR 139
4/73 *J. Nold v Commission* [1974] ECR 491
181/73 *Haegeman* [1974] ECR 449
41/74 *Van Duyn* [1974] ECR 1337
30/77 *Regina v Bouchereau* [1977] ECR 1999
106/77 *Simmenthal* [1978] ECR 629
44/79 *L. Hauer v Land Rheinland-Pfalz* [1979] ECR 3727
283/81 *Cilfit v Ministero della Sanitá*, [1982] ECR 3415
14/83 *S. von Colson and E. Kamann* [1984] ECR 1891
314/85 *Foto-Frost* [1987] ECR 4199
88/86 *Kolpinghuis Nijmegen B.V.* [1987] ECR 3969
46/87 and 227/88 joined cases *Hoechst* [1989] ECR 2859
C-379/87 *Anita Groener v Minister for Education and the City of Dublin Vocational Educational Committee* [1989] ECR 3967
C-322/88 *Grimaldi v Fonds des Maladies Professionnelles* [1989] ECR 4407

C-143/88 and C-92/89 joined cases *Zuckerfabrik* [1991] ECR I-415
C-213/89 *Factortame Ltd and Others* [1990] ECR I-2433
C-106/89 *Marleasing* [1990] ECR I-4135
C-348/89 *Mecanarte* [1991] ECR I-3277
C-6/90 and C-9/90 joined cases *Francovich and Bonifaci v Italy* [1999] ECR I-5357
C-334/92 *Wagner Miret* v *Fondo de Garantira Salaria* [1993] ECR I-6911
C-473/93 *Commission v Luxembourg* [1996] ECR I-03207
C-18/93 *Corsica Ferries* [1994] ECR I-1783
C-46/93 and C-48/93 joined cases *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029
C-337/95 *Parfums Christian Dior v Evra* [1997] ECR I-6013
C-54/96 *Dorsch Consult* [1997] ECR I-4961
C-10/97 to C-22/97 joined cases *IN.CO.GE.'90 et al.* [1998] ECR I-6307
C-93/97 *Fédération belge des Chambres Syndicales de Médecins ASBL v Gouvernement flamand and others* [1998] ECR I-4837
C-387/97 *Commission v Greece* [2000] ECR I-5047
C-110/98 to C-147/98 *Gabalfrisa SL* [2000] ECR I-1577
C-143/99 *Adria-Wien Pipeline GmbH v Finanzlandesdirektion für Kärnten* [2001] ECR I-8365
C-50/00 P *Unión de Pequeños Agricultores v Council* [2002] ECR I-6677
C-129/00 *Commission v Italy* [2003] ECR I-14637
C-224/01 *Köbler v Austria* [2003] ECR I-10239
C-278/01 *Commission v Spain* [2003] ECR I-14141
C-344/01 *Germany v Commision* [2004] ECR I-02081
C-397/01 to C-403/01 *Pfeiffer and others v Deutsches Rotes Kreuz* [2004] ECR I-8835
C-36/02 *Omega* [1969] ECR I-9609
C-87/02 *Commission v Italy* [2004] ECR I-05975
C-304/02 *Commission v France* [2005] ECR I-06263

C-208/09 *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien* [2010] ECR I-13693

C-399/09 *Landtova v České správě sociálního zabezpečení* [2011] ECR I-5573

C-457/09 *Chartry* [2011] ECR I-819

C-188/10 and C-189/10 joined cases *Proceedings Against Aziz Melki and Selim Abdeli* [2010] ECR I-5669

C-339/10 *Asparuhov Estov and others* [2010] I-11465

C-416/10 *Križan*, not yet published

C-399/11 *Melloni*, not yet published

C-253/12 *JS* « radiée du registre de la Cour »

C-168/13 PPU *Jeremy F v Premier ministre*, not yet published

C-62/14 *Gauweiler and Others*, request for a preliminary ruling from the Bundesverfassungsgericht (Germany) lodged on 10 February 2014

T-306/01 *Yusuf and Al. Barakaat v Council and Commission* [2005] ECR II-3533

T-315/01 *Kadi and Al Barakaat v Council and Commission* [2005] ECR II-3649

Opinion 1/91 of 14 December 1991 [1991] ECR 6079.

Opinion 1/92 of 10 April 1992 [1992] ECR I-0282

Opinion 1/00 of 18 April 2002 [2002] ECR I-3493

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http://www.vfgh.gv.at

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Judgment VfSlg. 17.065 of 28 November 2003

Judgment VfSlg. 17.075 of 3 December 2003

Belgium (*Cour d'arbitrage/Cour constitutionnelle***)**
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Judgment no 126/2005 of 13 July 2005
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Judgment no 11/2009 of 21 January 2009
Judgment no 103/2009 of 18 June 2009
Judgment no 128/2009 of 24 July 2009

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Case no Pl. ÚS 5/12

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www.conseil-constitutionnel.fr

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Decision no 2004-498 DC
Decision no 2004-505 DC

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Decision no 2006-540 DC

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Case 1 BvL 3/08
Cases1 BvR 256/08, 1 BvR 263/08, 1 BvR 586/08

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www.cortecostituzionale.it

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Case SK 45/09

Spain (*Tribunal Constitucional***)**
www.tribunalconstitucional.es

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The bluntest criticism of French constitutional practice in the first years of functioning of the 5th Republic was summarised in the succinctly-formulated title of Françoise Mitterand's book *Le Coup d'État permanent* (1964). One can hardly resist a temptation to apply a similarly expressive term when describing the relations between the European Union law and the constitutional law of the Member States, i.e. a situation of permanent confrontation.

The primary reason for this state of affairs is the fact of conferring onto the European Union the competences for establishing legal norms directly binding within the legal orders of the Member States. Admittedly, this competence is indispensable for attaining the integration objectives within the EU; yet, the fact remains that the norms are expected to conform to the Treaties establishing the basis of the EU, irrespectively of the fact that the Treaties remain silent as to the problem of relation to national constitutions.

From Introduction

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