

PRINCIPLES
OF EUROPEAN
CONSTITUTIONAL
LAW

REVISED SECOND EDITION

Edited by
Armin von Bogdandy
and Jürgen Bast

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Principles of European Constitutional Law

Second Revised Edition

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and
Jürgen Bast



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Multilevel Constitutional Jurisdiction

FRANZ C MAYER*

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‘In Europe, the judge has never been merely *la bouche qui prononce les paroles de la loi*’, as the German constitutional court, the Bundesverfassungsgericht (BVerfG) exclaimed in 1987.¹ This statement applies to European constitutional law as well, regardless of the distinct legal traditions of its Member States. Therefore, there are two aspects to the issues of European constitutional adjudication: ultimate decision-making in the multilevel EU system and the relationship between the European Court of Justice (ECJ, the Court) and the national courts. The interplay of the respective courts is not only the subject of the study of European constitutional law doctrine, but the courts themselves actively participate in the shaping of this same European constitutional law.

In the following, the analysis of the relationship between the two levels of courts will be at the forefront of the issue of European constitutional adjudication, rather than a description of the system of legal protection.² Such an approach necessarily has to begin with a comparative assessment of the European and national courts’ jurisprudence (I), followed by a theoretical

* I wish to thank Imke Stanik and Miriam Söhne for their invaluable help in preparing the second edition of this text.

¹ *Entscheidungen des Bundesverfassungsgerichts* 75, 223, 243 (*Kloppenburg*), referring to the famous sentence by Montesquieu (English translations in [1988] 3 CMLR 1; A Oppenheimer (ed), *The Relationship between European Community Law and National Law* (1994) 496); see also I Pernice, ‘Die Dritte Gewalt im europäischen Verfassungsverbund’ [1996] *Europarecht* 27, 35. The Bundesverfassungsgericht’s case law is available at www.bverfg.de or in the DFR database at www.servat.unibe.ch/dfr/index.html.

² For different approaches, see eg M Claes, *The National Courts' Mandate in the European Constitution* (2006); S Oeter and F Merli, ‘Rechtsprechungskonkurrenz zwischen nationalen Verfassungsgerichten, Europäischem Gerichtshof und Europäischem Gerichtshof für Menschenrechte’ (2007) 66 *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* 361 and 392, with further references.

breakdown of the case law (II). I will conclude with observations on the latest developments in the relationship of European and national courts (III).

I. Taking Stock: The ECJ and the Highest National Courts— Conflict or Co-operation?

The highest court at the European level is the European Court of Justice (ECJ) in Luxembourg.³ The situation is less clear at the national level. Therefore, the first step is to identify the national adjudicating bodies that function as the ECJ's interlocutors.

The relevant adjudicating entities in the present context are constitutional courts and supreme courts.⁴ Special constitutional courts exist, alongside specialised high courts in Austria (Verfassungsgerichtshof), Germany (BVerfG), Italy (Corte Costituzionale), Portugal (Tribunal Constitucional), Spain (Tribunal Constitucional) and, since 1996, Luxembourg (Cour constitutionnelle). Most of the states who joined the EU in 2004 and 2007 have a constitutional court: Latvia (Satversmes tiesa), Lithuania (Konstitucinio Teismo), Malta (Qorti Kostituzzjonali), Poland (Trybunał Konstytucyjny), Czech Republic (Ústavní soud), Slovakia (Ústavný súd), Slovenia (Ustavno sodišče), Hungary (Alkotmánybíróság), Bulgaria (КОНСТИТУЦИОНЕН СЪД НА РЕПУБЛИКА БЪЛГАРИЯ) and Romania (Curtea Constitutionale). The accession candidates Turkey and Croatia also have constitutional courts: the Anayasa Mahkemesi and the Ustavni sud Republike Hrvatske, respectively.

Ireland (Supreme Court) and Denmark (Højesteret) have supreme courts that are also constitutional courts. Supreme Courts exist in Estonia (Riigikohus) and Cyprus (Anotato Dikastirio tis Dimokratias⁵). In Great Britain, it is the second chamber of Parliament, the House of Lords, that exercises the functions of a constitutional and supreme court (as of September 2009, there is a Supreme Court). In the Netherlands, there are a number of specialised courts of equal rank, inter alia the Raad van State and the Hoge Raad. The situation is similar in Sweden, where the highest (specialised) courts are the Supreme Court (Högsta domstolen) and the Supreme Administrative Court (Regeringsrätten), as well as in Finland (Korkein oikeus, Supreme Court, and Korkein hallinto-oikeus, Supreme Administrative Court). Swedish judges of the two supreme courts also form a Council (Lagrådet) to exercise a non-binding review of draft legislation, whereas Finland has a Constitutional Committee of Parliament (Perustuslakivaliokunta) to control its draft legislation.

In France, there is no formal constitutional court aside from the highest courts for administrative law (Conseil d'Etat⁶) and for civil and criminal law (Cour de cassation). The Conseil constitutionnel, originally limited to the review of draft legislation, increasingly exercises the role of a constitutional court.

Finally, Belgium has specialised supreme courts (Conseil d'Etat and Cour de cassation), and since 1983 a constitutional court that specialised in, but was also limited to, controlling the

³ Art 19 TEU-Lis clarifies that it is necessary to distinguish between the European Court of Justice as a collective term for all European courts and as a term for the highest of these courts.

⁴ For the supreme and constitutional courts in the respective Member States, see FC Mayer, *Kompetenzüberschreitung und Letztentscheidung* (2000) 71ff; C Tomuschat, 'Das Bundesverfassungsgericht im Kreise anderer nationaler Verfassungsgerichte' in P Badura and H Dreier (eds), *Verfassungsgerichtsbarkeit—Verfassungsprozess* (2001) vol I, 245.

⁵ *Ανωτάτο Δικαστήριο της Δημοκρατίας*.

⁶ Institutions modelled on the structure of the French Council of State (Conseil d'Etat) in Belgium, Netherlands, Greece, and until 1996 also in Luxembourg typically have specialised adjudication-sections which exercise the functions of a supreme administrative court, while other sections have advisory functions. The specific names of the adjudication-section, eg in France *Section du Contentieux*, in the Netherlands (since 1994) *Afdeling Bestuursrechtspraak*, are omitted here.

exercise of competences, the Cour d'arbitrage. In 2007 the Cour d'arbitrage was renamed Cour constitutionnelle and can now be considered a constitutional court. In Greece, there are several supreme specialised courts, the Symvoulío Epikrateias⁷ (Council of State), the Elegktiko Synedrio⁸ (Court of Auditors) and the Areios Pagos⁹ (Supreme Court). Beyond that, there is a Special Supreme Court, the Anotato Eidiko Dikastirio,¹⁰ which is composed of judges from the highest specialised courts.

To solve conflicts between these courts as well as inconsistencies in their jurisprudence, similar institutions can typically be found in systems with specialised high courts of equal rank. In France, there is a Tribunal des Conflits between Cour de cassation and Conseil d'Etat, and in Germany, there is a Gemeinsamer Senat der obersten Bundesgerichte (Joint Chamber of the Highest Federal Courts).

This summary overview of the highest courts of the Member States leaves us with a rather heterogeneous picture.¹¹ There are, of course, parallels and commonalities, or even cognate relationships, eg concerning the Austrian VfGH as role model for the German, Italian, Spanish and Polish constitutional courts or the French administrative judiciary as blue print for the councils of state of Belgium, the Netherlands, Greece and Luxembourg. Contrasts seem to prevail: traditional and venerable institutions (such as the House of Lords in Great Britain or the Conseil d'Etat in France) can be found alongside newly created institutions (in Belgium, Luxembourg and Poland). Courts with comprehensive powers (the BVerfG in Germany, the VfGH in Austria) operate side by side with less powerful tribunals. Sometimes, there are no specific constitutional courts at all (Denmark, Ireland); sometimes, it is the mere idea of constitutional adjudication or judicial review that is not compatible with the constitutional traditions of a Member State (eg in France, Finland and the Netherlands).

One way to improve the understanding of the relationship between the ECJ and the respective supreme national courts is to examine the procedural link between the court levels as foreseen by the Treaties: the preliminary reference procedure under Article 234 EC (Article 267 of the Treaty on the Functioning of the European Union (TFEU)) (1). Apart from this, there are areas of substantive constitutional law that have shaped the relationship between the courts. These include the issue of fundamental rights protection as well as the question of who controls the limits of the EU's competences (2).

1. Adopting a Procedural Perspective: The Duty to Make Preliminary References under Article 234(3) EC (Article 267(3) TFEU)

European law imposes a duty on national courts to make preliminary references, that is, to request certification, to the ECJ in two situations. Any court or tribunal of a Member State that has doubts about the validity of European law has to make a reference, as the ECJ claims a monopoly as regards deciding upon the validity of European law.¹² Then, there is the duty to make references to the ECJ under Article 234(3) EC (Article 267(3) TFEU), which requires that 'a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law' shall also bring questions of mere interpretation of European law before the ECJ.¹³

⁷ Συμβούλιο της Επικρατείας.

⁸ Ελεγκτικό Συνέδριο.

⁹ Αρείος Πάγος.

¹⁰ Ανώτατο Ειδικό Δικαστήριο.

¹¹ Of course, this heterogeneity extends to the role of the judge in the different legal cultures; in this context, see P Perenthaler, 'Die Herrschaft der Richter im Recht ohne Staat' [2000] *Juristische Blätter* 691.

¹² Case 314/85 *Foto-Frost* [1987] ECR 4199.

¹³ In this context, see Case C-99/00 *Lyckeskog* [2002] ECR I-4839, paras 10ff; see also Art 35 EU and Art 369 CT.

Thus, there are specific obligations for supreme national courts flowing from primary law as interpreted by the ECJ (a). The national courts' obedience to these duties, however, will be scrutinised on an empirical basis (b).

a) Supreme National Courts and the Duty to Make References from the Perspective of European Law

Following attempts of national courts, in particular¹⁴ the French Conseil d'Etat,¹⁵ to establish a category of clear and obvious interpretation (*acte clair*¹⁶) in interpreting EC law, the ECJ decided the matter by means of its own EC law doctrine of *acte clair* which establishes an extremely strict standard.¹⁷ According to this standard, courts are not obliged to make a reference only if the question of interpretation is not relevant to the judgment, if it has already been decided, or if the interpretation is clear and obvious.¹⁸ From the perspective of European law, a national court decision that violates this standard is a breach of the Treaty in the sense of Articles 226 and 227 EC (Articles 258, 259 TFEU). A court or tribunal of last instance that disregards its duties to make a preliminary reference violates Article 234(3) EC (Article 267(3) TFEU). The principle of the independence of the judiciary¹⁹ notwithstanding, acts of courts or tribunals are attributed to the respective Member State.²⁰ According to Article 228 EC (Article 260 TFEU), the ECJ, on application of the Commission, can impose a lump sum or penalty payment if the violation continues.

¹⁴ See also the German *Bundesfinanzhof* [1985] *Europarecht* 191 (*Kloppenburg*). The European Court of Human Rights (ECtHR) took sides with the ECJ in these cases: see App No 36677/97 *Dangeville v France* ECHR 2002-III.

¹⁵ CE 9 January 1970, *Sieur Cohn-Bendit*, Rec 15; CE Ass 22 December 1978, *Ministre de l'Intérieur c Sieur Cohn-Bendit*, Rec 524, Concl Genevois (1979) 15 *Revue Trimestrielle de Droit Européen* 157; [1979] *Europarecht* 292 (German translation); [1980] 1 CMLR 543 (English translation); see also Oppenheimer, above n 1, 317.

¹⁶ For the notion, see E Laferrière, *Traité de la juridiction administrative et des recours contentieux* (1887) vol I, 449ff; B Pacteau, 'Note' [1979] *Recueil Dalloz Sirey* 64; for more recent cases related to this concept, see, in France, Cour de cassation, chambre sociale, 16 January 2003, *Madame X v CMSA*, and in Spain, Tribunal Supremo, 7 March 2002, Sentencia del Tribunal Supremo, Sala de lo Contencioso-Administrativo, sección 2.^a, recurso de casación n° 9156/1996; Tribunal Supremo, 15 July 2002, Sala de lo Contencioso-Administrativo, sección 2.^a, recurso de casación n° 4517/1997.

¹⁷ Case 283/81 *CILFIT* [1982] ECR 3415, paras 18ff; for recent objections to the strict *CILFIT* standard from a Member State perspective (Denmark) see Case C-99/00, above n 13 (see also AG Tizzano, *ibid*, No 51ff).

¹⁸ According to the *CILFIT* decision, the only cases in which it is safe to assume that there is no duty to refer a question to the ECJ is either when the question is not relevant for the national court's decision or when the interpretation of EC law is obvious. This is the case only when the correct application of Community law is so obvious as to leave no room for any reasonable doubt. Under the *CILFIT* criteria, the national court or tribunal has to be convinced that the matter is equally obvious to the courts of the other Member States and to the ECJ. 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.', Case 283/81, above n 17, para 21. The ECJ will normally not make a statement on the relevance of the reference for the national court's judgment, Case C-369/89 *Piagemme* [1991] ECR I-2971. It does not have jurisdiction, though, to reply to questions which are submitted to it within the framework of procedural devices arranged by the parties in order to induce the Court to give its views on certain problems of community law which do not correspond to an objective requirement inherent in the resolution of a dispute: Case 244/80 *Foglia* [1981] ECR 3045, para 18.

¹⁹ See for example Art 97(1) of the German Constitution; Art 6(1) ECHR; Art 47(2) of the EU Charter of Fundamental Rights.

²⁰ In this respect, European law adopts a public international law approach towards the Member States; see *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory*, PCIJ Series A/B No 44, 24.

To date, there have been no Treaty infringement proceedings against Member States resulting from decisions of the national courts.²¹ To the extent that the Commission has entered into the preliminary procedure foreseen in Article 226 EC (Article 258 TFEU),²² it has confined itself to ensuring that its view be made clear to the non-complying courts, thus acknowledging the principle of judicial independence, and only admonishing the respective national government to take legislative action in cases of continued or repeated violations.²³

This seems to indicate the limits of a perspective that explains the relationship between the ECJ and the national courts exclusively in terms of legal arguments.²⁴

b) The Preliminary Reference Practice of Supreme National Courts²⁵

The German BVerfG has so far not made any reference to the ECJ.²⁶ It has stated in the *Solange I* decision of 1974 and in the *Vielleicht* decision of 1979 that it is in principle bound by Article 234 EC (Article 267 TFEU).²⁷ However, the BVerfG has not reviewed the issue of its own obligations under Article 234 EC following the ECJ's *CILFIT* decision of 1982.²⁸ It has limited itself to specifying the conditions under which the highest specialised German courts are obliged to make references.²⁹ The BVerfG's reluctance to use Article 234 EC or even to clarify its own position on

²¹ For preliminary proceedings against Sweden, though, see E Lenski and FC Mayer, 'Vertragsverletzung wegen Nichtvorlage durch oberste Gerichte?' [2005] *Europäische Zeitschrift für Wirtschaftsrecht* 225; see ibid for the ECHR-aspect of non-references.

²² See G Meier, 'Zur Einwirkung des Gemeinschaftsrechts auf nationales Verfahrensrecht im Falle höchstrichterlicher Vertragsverletzungen' [1991] *Europäische Zeitschrift für Wirtschaftsrecht* 11; J Sack, 'Verstoßverfahren und höchstrichterliche Vertragsverletzungen' [1991] *Europäische Zeitschrift für Wirtschaftsrecht* 246; Editorial Comments, 'Use of the Preliminary Procedure' (1991) 28 *CML Rev* 241, 243.

²³ Case *Hendrix (Pingo-Hähnchen)*, Preliminary procedure under Art 169 EC Treaty (now Art 226 EC, Art 258 TFEU), A/90/0406, Reasoned opinion of the Commission SG (90)/D/25672 of 3 August 1990, pt V (dealing with a non-reference by the Bundesgerichtshof (BGH), the German Supreme Court); see Meier, above n 22, 11. Answering a written question from a member of the European Parliament, the Commission stated in 1983 that infringement proceedings do not constitute an appropriate basis for co-operation between the ECJ and the national courts. According to the Commission, the procedure was not designed as a blanket means to review national court decisions but, rather, for use only in cases of systematic and intentional disregard of courts' duty to make preliminary references, [1983] OJ C268, 25. Note that the Commission establishes special criteria for infringements of EC law by the courts that are not foreseen in the Treaties.

²⁴ With state liability for decisions of courts of last instance, the ECJ has created an alternative legal sanction for non-references, though, where once again the individuals help to enforce European law: see Case C-224/01 *Köbler* [2003] ECR I-10239; Case C-173/03 *Traghetti del Mediterraneo* [2006] ECR I-5177.

²⁵ The preliminary reference practice of national courts is documented by the Commission in its Annual Report on Monitoring the Application of Community Law: see, eg 24th Annual Report 2006, COM(2007) 398; 25th Annual Report 2007, COM(2008) 777.

²⁶ The highest German courts started to make references relatively early: the Bundessozialgericht in 1967 (Case 14/67 *Welchmer* [1967] ECR 331); the Bundesfinanzhof also in 1967 (Case 17/67 *Neumann* [1967] ECR 441); the Bundesarbeitsgericht in 1969 (Case 15/69 *Südmilch* [1969] ECR 363 (German edn, no English translation available)); the Bundesverwaltungsgericht in 1970 (Case 36/70 *Getreide-Import* [1970] ECR 1107); and the Bundesgerichtshof in 1974 (Case 32/74 *Haaga* [1974] ECR 1201). These courts have continued to use the preliminary reference procedure on a regular basis. For an example of *Länder* (state) constitutional courts, see the reference from Hessischer Staatsgerichtshof, [1997] *Europäische Grundrechte-Zeitschrift* 213.

²⁷ *Entscheidungen des Bundesverfassungsgerichts* 37, 271, 282 (*Solange I*) (English translation in Federal Constitutional Court (ed), *Decisions of the Bundesverfassungsgericht* (1992) vol 1 pt II, 270, and in Oppenheimer, above n 1, 440; [1974] 2 *CMLR* 540); *Entscheidungen des Bundesverfassungsgerichts* 52, 187, 202 (*Vielleicht*).

²⁸ Above n 17.

²⁹ See, eg *Bundesverfassungsgericht* [2001] *Europäische Zeitschrift für Wirtschaftsrecht* 255 (*Non-reference by the BVerfG*) (Case C-25/02 *Rinke* [2003] ECR I-8349); see also *Entscheidungen des Bundesverwaltungsgerichts* 108, 289; The Bundesverfassungsgericht asks whether non-reference by a specialised court violates a fundamental right 'to have access to the lawful judge' (Art 101(1) of the German

Article 234 EC was particularly noteworthy in the *Maastricht* decision of 1993, in which the BVerfG reserved for itself the right to review the exercise of competences of European institutions in light of the German Constitution.³⁰ During the proceedings, the BVerfG utilised a rather original solution in solving questions of EC law interpretation by hearing the Director General of the Commission Legal Service as a witness, instead of making a reference to the ECJ.³¹ Furthermore, in the *NPD* proceedings of 2001, the BVerfG had the unique opportunity to make a principal statement on its obligations under Article 234 EC in a case where it was unquestionably the court of first and last instance (the proceedings to declare a political party unconstitutional under Article 21 of the German Constitution). The BVerfG also did not use this opportunity.³²

The German court is not alone, however. Other supreme courts have also avoided making references to the ECJ, although their number is shrinking. The Italian Corte Costituzionale in its *Giampaoli* decision of 1991³³ admitted the possibility, albeit not the obligation, of making references under Article 234 EC, only to reverse its decision at a later date. Pointing to the fact that it is not a court in the sense of Article 234 EC and thus unable to enter into direct contact with the ECJ by means of a preliminary reference, the Corte Costituzionale declared in the *Messaggero Servizi*³⁴ decision of 1995 that it did not consider itself bound by Article 234 EC. Instead, the Corte Costituzionale ordered the court of the previous instance to make a reference to the ECJ. In April 2008, the Corte Costituzionale submitted its very first reference to the ECJ.³⁵ Explanations for this change include the examples of other constitutional courts submitting references and a modification of the Italian constitution in 2001. The modification introduced European law as limits to legislative power (Article 117). In the context of direct proceedings, with no ordinary courts involved, the Italian constitutional court seems to be prepared to submit preliminary references now.³⁶

The Spanish Tribunal Constitucional (TC) has also not made any references yet, and is even reluctant to become involved in cases of non-reference of the other Spanish courts.³⁷ According to the TC, the application of European law is not an issue of constitutional law, and thus not part of the TC's jurisdiction. Legal protection against Spanish acts that violate European law,

Constitution). In addition to the *CILFIT* criteria, the German constitutional law question depends on whether the court acted arbitrarily (*willkürlich*) in not making a reference. For more detail, see FC Mayer, 'Das Bundesverfassungsgericht und die Verpflichtung zur Vorlage an den Europäischen Gerichtshof' [2002] *Europarecht* 239; on how one may construe an individual right to have a court make a reference, see C Grabenwarter, 'Die Europäische Union und die Gerichtsbarkeit öffentlichen Rechts' in *Verhandlungen des Vierzehnten Österreichischen Juristentages* (2001) vol I/2, 15, 55.

³⁰ *Entscheidungen des Bundesverfassungsgerichts* 89, 155, 188 (*Maastricht*). For English translations of the *Maastricht* decision, see Oppenheimer, above n 1, 526; idem (1994) 22 *International Legal Materials* 388; I Winkelmann, *Das Maastricht-Urteil des Bundesverfassungsgerichts vom 12. Oktober 1993* (1994) 751, this book also includes French and Spanish translations.

³¹ See M Zuleeg, 'The European Constitution under Constitutional Constraints' (1997) 22 *European Law Review* 19.

³² *Entscheidungen des Bundesverfassungsgerichts* 104, 214 (*NPD-Verbot*); on this decision, see Mayer, above n 29; see also *Entscheidungen des Bundesverfassungsgerichts* 110, 141, 154ff (*Fighting Dogs*).

³³ Decision No 168/91 (*Giampaoli*), *Foro italiano* I (1992) 660 paras 5ff.

³⁴ Decision No 536/95 (*Messaggero Servizi*), *Gazzetta Ufficiale* n 1 I, 3 January 1996; see also Decision No 319/96 (*Spa Zerfin*), *Gazzetta Ufficiale* n 34 I, 21 August 1996.

³⁵ Decision No 103/2008 (*Legge della Regione Sardegna 11 maggio 2006/29 maggio 2007*).

³⁶ For more details, see F Fontanelli and G Martinico, 'Cooperative Antagonists: The Italian Constitutional Court and the Preliminary Reference', Eric Stein Working Paper No 5 (2008) esp 13, available at www.ericsteinpapers.eu; M Dani, 'Tracking Judicial Dialogue: The Scope for Preliminary Rulings from the Italian Constitutional Court', Jean Monnet Working Paper No 10 (2008), available at www.jeanmonnetprogram.org.

³⁷ TC Decision 111/1993, 25 March 1993, *Boletín Oficial del Estado*, 27 April 1993; TC Decision 180/1993, 31 May 1993, *Boletín Oficial del Estado*, 5 July 1993—FOGASA; TC Decision 372/1993, 13 December 1993, *Boletín Oficial del Estado*, 19 January 1994 (*Lao*).

the TC holds, is provided by the regular Spanish courts and the ECJ.³⁸ The Portuguese Tribunal Constitucional considers itself bound under Article 234(3) EC,³⁹ but has so far not made a reference.

The French Conseil d'Etat has made references to the ECJ both before and after the *Cohn-Bendit* case, dating back to 1970.⁴⁰ Still, the Conseil d'Etat issued decisions not compatible with ECJ jurisprudence and in disregard of Article 234(3) EC, even after the ECJ's *CILFIT* decision.⁴¹ The Cour de cassation made its first reference in 1967,⁴² while the Conseil constitutionnel in 2006 emphasised that there is no possibility for preliminary references in cases that it has to decide within a 60 day period.⁴³

The highest Belgian courts, the Conseil d'Etat⁴⁴ and the Cour de cassation⁴⁵ began to make references early, in 1967 and in 1968. The Cour d'arbitrage, which was created in 1983 and is now the Cour constitutionnelle, first made a reference in 1997.⁴⁶ The highest Dutch courts started making references in the early seventies (the Raad van State in 1973,⁴⁷ the Hoge Raad in 1974⁴⁸) and have continued doing so on a regular basis. The Luxembourg Cour de cassation made its first reference in 1967,⁴⁹ and the Luxembourg Conseil d'Etat joined in only in 1981.⁵⁰ The Cour constitutionnel has not made any references yet.

The British House of Lords made a first reference in 1979. Further references have followed on a regular basis.⁵¹ The Danish Højesteret may be one of the more sceptical courts as far as European integration is concerned, but it has nonetheless made numerous references to the ECJ, the first one in 1978.⁵² The Irish Supreme Court began to make references in 1983⁵³ and has continued this practice regularly since then. The highest Greek courts are also on record with references. The Symvoulío Epikrateias (Council of State) has made references on a regular basis, starting early in 1983.⁵⁴ Occasional references have been made by the Elegktiko Synedrio (Court of Auditors) since 1993,⁵⁵ and since 1996, there are also references every now and then from the Areios Pagos (Supreme Court).⁵⁶ The Supreme Special Court (Anotato Eidiko Dikastirio) has not made any references yet.

³⁸ TC Decision 28/1991, 14 February 1991, *Boletín Oficial del Estado*, 15 March 1991 (*EP-elections*) (English translation in Oppenheimer, above n 1, 702); TC Decision 64/1991, 22 March 1991, *Boletín Oficial del Estado*, 24 April 1991 (*APESCO*) (English translation in Oppenheimer, above n 1, 705).

³⁹ TC Decision 163/90, 23 May 1990, *Moreira da Costa e Mulher, Diário da República*, 2 No 240, 18 October 1990.

⁴⁰ The first reference 1970: Case 34/70, *Syndicat national du commerce extérieur des céréales* [1970] ECR 1233.

⁴¹ For the (still) diverging approach of the Conseil d'Etat on Art 249(3) EC (Art 288ff TFEU) and the timely limitations of the effect of ECJ decisions, see Commissaire du gouvernement Savoie in his Conclusions in the *Tête* case (CE Ass 6 February 1998, *Tête*, Rec 30, Concl 32); P Cassia, 'Le juge administratif français et la validité des actes communautaires' (1999) 35 *Revue Trimestrielle de Droit Européen* 409.

⁴² Case 22/67 *Goffart* [1967] ECR 321.

⁴³ CC 27 June 2006, *Loi relative au droit d'auteur et aux droits voisins dans la société de l'information*, Rec 88; see, with further references, FC Mayer et al, 'Der Vorrang des Europarechts in Frankreich' [2008] *Europarecht* 63.

⁴⁴ Since 1967, Case 6/67 *Guerra* [1967] ECR 219.

⁴⁵ Since 1968, Case 5/68 *Sayag* [1968] ECR 395.

⁴⁶ Case C-93/97 *Fédération belge des chambres syndicales de médecins* [1998] ECR I-4837.

⁴⁷ Case 36/73 *Nederlandse Spoorwegen* [1973] ECR 1299.

⁴⁸ Case 15/74 *Centrafarm* [1974] ECR 1147.

⁴⁹ Case 2/67 *De Moor* [1967] ECR 197.

⁵⁰ Case 76/81 *Transporoute* [1982] ECR 417.

⁵¹ Case 34/79 *Henn and Darby* [1979] ECR 3795; the House of Lords is on the record with around 30 references.

⁵² Case 151/78 *Sukkerfabriken Nykøbing* [1979] ECR 1.

⁵³ Case 182/83 *Fearon* [1984] ECR 3677.

⁵⁴ Case 142/83 *Nexas* [1983] ECR 2969.

⁵⁵ Case C-443/93 *Vougioukas* [1995] ECR I-4033.

⁵⁶ Case C-348/96 *Calfa* [1999] ECR I-11; in the following case of 1998, Case C-235/98 *Pafitis* [2000] OJ C63, 21, the proceedings were not continued.

The Swedish Högsta domstolen made a first reference almost immediately after Swedish accession in 1995.⁵⁷ The Swedish Regeringsrätten followed just two years later, in 1997.⁵⁸ The Lagrådet, which takes non-binding control of draft legislation, has not made any references to date. The Supreme Finnish Administrative Court, Korkein hallinto-oikeus, has been making references on a regular basis since 1996.⁵⁹ The Supreme Court, Korkein oikeus, is on record with its first question stemming from 1999.⁶⁰ The Constitutional Committee of Parliament (Perustuslakivaliokunta) has not made any references so far, while the Austrian Constitutional Court, the VfGH, early on acknowledged the option to submit references under Article 234 EC,⁶¹ and made its first reference to the ECJ in 1999.⁶²

The states that joined the EU in 2004 and 2007 have had very limited opportunities for preliminary references. It is therefore not yet possible to draw reliable conclusions on their inclination or disinclination to make preliminary references. It is precarious, however, that some national courts have not seized opportunities to make references where they did in fact arise. In May 2004, for example, the Hungarian Constitutional Court (Alkotmánybíróság) declared a law concerning the stockpiling of agricultural overproduction, which implemented a Commission regulation, to be incompatible with the Hungarian constitution without making a preliminary reference to the ECJ.⁶³ Note that the provisions of the law which it held to be in conflict with the constitution were predetermined by the regulation. The court argued that the subject matter of its decision was solely the constitutionality of the Hungarian law, not the validity or interpretation of European law.⁶⁴

In a number of proceedings, the Estonian Supreme Court Riigikohus declared a national law implementing the same EU regulation to be inapplicable because it violated European law.⁶⁵ It did not consider it necessary to make a preliminary reference to the ECJ, because the legal situation allegedly was sufficiently clear. Neither did the Polish Trybunał Konstytucyjny, like the German BVerfG, make a preliminary reference to the ECJ in the context of its 2005 decision on the compatibility of the European arrest warrant with Polish law.⁶⁶

However, the Czech Constitutional Court at least declared its general willingness to make preliminary references to the ECJ in a decision in 2006.⁶⁷

c) The National Supreme Courts' Reference Practices—A Mixed Bag?

This brief assessment of the national courts' reference practices reveals several contradictory points. On the one hand, the strict standard imposed by the ECJ's *CILFIT* formula is cushioned by a Commission practice that does not sanction non-certification as an infringement under the treaty infringement proceedings. On the other hand, there are important courts and tribunals at the Member State level that do not make references to the ECJ. A similar approach to the BVerfG's non-reference practice, which is arguably incompatible with the German Constitu-

⁵⁷ Case C-43/95 *Data Delecta* [1996] ECR I-4661.

⁵⁸ Case C-241/97 *Försäkringsaktiebolaget Skandia* [1999] ECR I-1879.

⁵⁹ Case C-412/96 *Kainuun Liikenne* [1998] ECR I-5141.

⁶⁰ Case C-172/99 *Liikenne* [2001] ECR I-745.

⁶¹ Österreichischer Verfassungsgerichtshof (1996) 23 *Österreichische Zeitschrift für Wirtschaftsrecht* 24 (*Bundesvergabeamt*); see also K Heller and F Sinnl-Piazza, 'Verfassungsrechtliche Aspekte der Anwendung des Gemeinschaftsrechts in den Mitgliedstaaten der EU' [1995] *Juristische Blätter* 636 and 700, 711.

⁶² Case C-143/99 *Adria-Wien Pipeline* [2001] ECR I-8365.

⁶³ Decision 17/2004 (V25) AB, 25 May 2004.

⁶⁴ *Ibid.*, 6.

⁶⁵ Decision No 3-3-1-33-06, 5 October 2006, *Hadleri Toidulisandite AS*.

⁶⁶ Decision K 18/04 of 11 May 2005; see also *Entscheidungen des Bundesverfassungsgerichts* 113, 273 (*European arrest warrant*). That there was indeed a need for clarification is demonstrated by the preliminary reference of the Belgian Cour d'arbitrage, Judgment No 124/2005 of 13 July 2005; see now ECJ, Case C-303/05 *Advocaten voor de Wereld* [2007] ECR I-3633.

⁶⁷ Decision Pl ÜS 50/04 of 8 March 2006 (*sugar quotas*).

tion's fundamental right of 'access to the lawful judge' (Recht auf den gesetzlichen Richter, Article 101(1)) and with Article 23 of the German Constitution, existed in Italy and exists in Spain. Thus, nations that established particularly strong constitutional courts in the aftermath of dictatorial regimes follow a different path in their dealings with the ECJ. These courts remain a minority, however, when compared to other courts in the EU. References are made by both the ancient British House of Lords and the rather Euro-sceptical Danish Højesteret, as well as by the Austrian VfGH, a genuinely specialised constitutional court in a similar position as the Spanish, Italian and German constitutional courts.

A closer look at the courts that have not yet made references reveals several motivations, ranging from the way these courts see themselves, to constraints imposed by their respective national constitutions, to a simple lack of opportunities to make references. Of these motivations, the hypothesis of the courts' self-conception as guardians of their (respective) constitutions⁶⁸ seems to have the greatest weight. This self-conception also explains the Polish and Hungarian positions, where young institutions and constitutions are still in the process of consolidation. Another explanation for national courts' scepticism⁶⁹ could be that they do not always seem to trust the ECJ's alleged self-restraint in dealing with matters of European law—as opposed to directly commenting on national law.⁷⁰

In any case, an analysis of the national courts' procedural points of contact with the ECJ suggests that there are open questions. The binary empirical question of reference or non-reference alone is too simple, though, to explain what exactly the constitutional law patterns are that define the relationship between the national courts and the ECJ. In order to answer this question, it is necessary to turn to an analysis of substantive legal issues.

2. The Courts' Relationship from the Perspective of Substantive Law

a) The Perspective of the ECJ

The ECJ claims the monopoly on invalidating (secondary⁷¹) European law.⁷² In 1987, the ECJ held in the *Foto-Frost* case⁷³ that national courts are entitled to consider the validity of

⁶⁸ See the divergent opinions of H Kelsen, 'Wer soll Hüter der Verfassung sein?' [1931] *Die Justiz* 5, in favour of a constitutional court as the guardian of the constitution, and C Schmitt, *Der Hüter der Verfassung* (1931) 12ff, in favour of the head of the executive (the *Reichspräsident*) as the guardian of the constitution; Schmitt's position is severely weakened by the pathetic role President Hindenburg played in the final days of the Weimar Republic in Germany.

⁶⁹ In this context, see the *Arsenal* case in Great Britain, where the High Court even decided to ignore a preliminary ruling of the ECJ (Case C-206/01 *Arsenal* [2002] ECR I-10273), stating that the ECJ had no jurisdiction to make findings of fact or reverse the national court on its findings of fact, [2002] EWHC 2695 (Ch); 1 All ER (2003) 137. This decision was overruled by the Court of Appeal, Court of Appeal (Civil Division), 21 May 2003, *Arsenal Football Club v Matthew Reed* (2003) EWCA Civ 96. The German Bundesverfassungsgericht considers non-references as violating the German Constitution (see above n 29) only when it is clear that there is a question of interpretation, as opposed to applying European law to a specific case: see Bundesverfassungsgericht [2002] *Neue Juristische Wochenschrift* 1486; see also *Entscheidungen des Bundesverfassungsgerichts* 82, 159 (*Absatzfonds*); Bundesverfassungsgericht [2004] *Neue Zeitschrift für Baurecht und Vergaberecht* 164.

⁷⁰ See more on this in K Alter, *Establishing the Supremacy of European Law* (2001) 10, referring to ECJ judge Mancini.

⁷¹ On the issue of primary law being incompatible with the Treaties, see J da Cruz Vilaca and N Picarra, 'Y a-t-il des limites matérielles à la révision des Traités instituant les Communautés européennes?' (1993) 29 *Cahiers de Droit Européen* 3; U Everling, 'Zur Stellung der Mitgliedstaaten der Europäischen Union als "Herren der Verträge"' in U Beyerlin et al (eds), *Recht zwischen Umbruch und Bewahrung* (1995) 1169.

⁷² The ECJ reviews European acts under Art 230 EC (Art 63 TFEU), either as incidental questions under Art 241 EC (Art 277 TFEU) or in the context of a reference under Art 234 EC. See also Art 35 EU; Member State administrations can only make references to the ECJ if they fall under the ECJ's European law

Community acts and to conclude that a Community act is completely valid, as ‘by taking that action they are not calling into question the existence of the Community measure’.⁷⁴ Yet the ECJ also made it very clear that national courts do not have the power to declare acts of Community institutions invalid,⁷⁵ pointing to the need to preserve the unity of the Community legal order and to the need for legal certainty. The Court points to the ‘necessary coherence of the system of judicial protection established by the Treaty’ that gives the ECJ ‘the exclusive jurisdiction to declare void an act of a Community institution’. The ECJ emphasises that it is in the best position to decide on the validity of Community acts, as all Community institutions whose acts are challenged are entitled to participate in the ECJ proceedings and can therefore supply information that the ECJ considers necessary for the purposes of the case before it. The proceedings outlined derive their conclusiveness from Article 292 EC (Article 344 TFEU), according to which the Member States commit themselves to not solving disputes over the interpretation or implementation of the Treaty in any other way than provided in the Treaty.⁷⁶ Moreover, the obligation of national courts to respect the interpretation of European law as established by the ECJ could also be justified as an obligation arising under Article 10 EC (Article 4(3) TFEU).⁷⁷

In addition to arguments provided by the ECJ in its relevant decisions, another possible explanation for the ECJ’s restrictive approach lies in the Court’s image of itself as the ‘driving force’ behind European integration. If this really was the court’s own perception, conflicts of interest with national courts would be unavoidable. The cautious attitude of the ECJ may also be explained by a certain distrust the ECJ harbours against national courts, which—given a wide latitude in their decision-making—could well try to resist increasing integration through jurisprudence.

The real argument behind the ECJ’s reluctance to give national courts more control, however, probably lies in the principle of the primacy or supremacy⁷⁸ of European law in

definition of a court (for Public Procurement Awards Supervisory Boards, see Case C-54/96 *Dorsch Consult* [1997] ECR I-4961); see also Case C-431/92 *Commission v Germany* [1995] ECR I-2189, on the duties of administrations to respect European law. See also the discussion on the right of national administrations to declare national law to be in conflict with European law in the context of debate on the Doc Morris pharmacy.

⁷³ Case 314/85, above n 12, paras 11ff.

⁷⁴ *Ibid*, para 14.

⁷⁵ *Ibid*, para 15.

⁷⁶ See Opinion 1/91 *EEA I* [1991] ECR I-6079, paras 35ff.

⁷⁷ As far as interim measures are concerned, the ECJ has given national courts some leeway to make statements on the validity of European law, all the while insisting on its exclusive powers to determine the validity of these acts as well; Cases C-143/88 and C-92/89 *Süderdithmarschen* [1991] ECR I-415, paras 14ff; C-465/93 *Atlanta* [1995] ECR I-3761. Apparently, the ECJ is not even willing to give national courts the right to decide upon legally non-existent acts: for this concept, see Cases 1/57 and 14/57 *Société des usines à tubes de la Sarre v High Authority* [1957] ECR 105.

⁷⁸ The fact that European law prevails over national law in case of conflict may be conceptualised as ‘supremacy’ or as ‘primacy’. Unlike European law textbooks and doctrinal writings, the ECJ has used the term ‘supremacy’ only once in a judgment so far (Case 14/68 *Walt Wilhelm* [1969] ECR 1, para 5). The term appears as a keyword in a 1972 decision (Case 93/71 *Leonesio* [1972] ECR 287) and occasionally in Advocate General Opinions (AG Jacobs in Case C-112/00 *Schmidberger* [2003] ECR 5659, No 5, played it safe: ‘by virtue of the primacy or supremacy of Community law, they prevail over any conflicting national law’). ‘Primacy’ can be found much more frequently in ECJ decisions, albeit often enough the Court just refers to what was said by parties or the national court. For an example of the ECJ clearly using ‘precedence’, see Case C-256/01 *Allonby* [2004] ECR I-873, para 77. The Constitutional Treaty uses ‘primacy’ (Art I-10 CT-Conv; Art 6 CT). It is hard to say for a non-native speaker to what extent there is a difference between primacy and supremacy, whether this difference is related to British v American English or whether the term supremacy implies more of a hierarchy or of the German concept of *Geltungsvorrang*.

the case of a conflict of laws as it was developed⁷⁹ by the ECJ. The ECJ's core justifications for the primacy of European law are independence, uniformity and efficacy of Community law.⁸⁰ In this perspective, Community law is 'an integral part of . . . the legal order applicable in the territory of each of the Member States'; provisions of Community law 'by their entry into force render automatically inapplicable any conflicting provision of current national law'.⁸¹ This concept of primacy in application, *Anwendungsvorrang* (as opposed to primacy in validity, *Geltungsvorrang*), also applies to the Member States' constitutional law provisions:

The validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that state or the principles of a national constitutional structure.⁸²

The critics of the Court's primacy concept are numerous.⁸³ Among other things, they have pointed out a structural parallel between supreme European law and the law of (military) occupation⁸⁴ (!) and have criticised the 'rigorous simplicity' of the concept of primacy.⁸⁵ The absoluteness of the ECJ's vision of European law primacy over each and every norm of municipal law—including any provision of the municipal constitutions—has raised the question of whether the ECJ might have overstepped its competences by establishing such an absolute concept of primacy.⁸⁶ According to this view, the ECJ's role is to interpret European law; but the question of how the Member States' legal orders handle conflicts between themselves and European law, so the critics say, goes beyond a mere question of interpretation.⁸⁷

Admittedly, the ECJ has remained oddly unclear in its statements on the exact source of primacy and of European law itself, even relative to the limited language the ECJ normally utilises in its decisions,⁸⁸ merely alluding to what kind of organisation the EC/EU is. The formula used by the Court, however, has evolved over the years, from a new 'legal order of international law' (1963),⁸⁹ followed by the formula 'own legal system' (1964),⁹⁰ and the concept of the Treaty as 'the basic constitutional charter' (1986)⁹¹ or 'the constitutional charter of a Community based on the rule of law' (1991).⁹² This constitutional dimension of the

⁷⁹ Case 6/64 *Costa v ENEL* [1964] ECR 585. For the definition and the typology of the conflict of laws see S Kadelbach, *Allgemeines Verwaltungsrecht unter europäischem Einfluß* (1999) 23ff.

⁸⁰ Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125, para 3.

⁸¹ Case 106/77 *Simmmenthal* [1978] ECR 629, paras 3 and 21ff; see also Case C-213/89 *Factortame* [1990] ECR I-2433, paras 20ff.

⁸² Case 11/70, above n 80, para 3; Case C-473/93 *Commission v Luxembourg* [1996] ECR I-3207, para 38; see also Case C-285/98 *Kreil* [2000] ECR I-69.

⁸³ See, eg H-H Rupp, 'Die Grundrechte und das Europäische Gemeinschaftsrecht' [1970] *Neue Juristische Wochenschrift* 953; see Alter, above n 70, 88ff, for an account of how this article may have triggered subsequent developments such as the ECJ decision in Case 11/70, above n 80, which openly claimed primacy of European law over national constitutions, and the Bundesverfassungsgerichts' fierce reaction to this decision in 1974, *Entscheidungen des Bundesverfassungsgerichts* 37, 271 (*Solange I*). Rupp actually remains unconvinced: see H-H Rupp, 'Anmerkungen zu einer Europäischen Verfassung' [2003] *Juristenzeitung* 18; see also the references in HP Ipsen, *Europäisches Gemeinschaftsrecht* (1972) 267ff; another example of critique may be found in T Schilling, 'Zu den Grenzen des Vorrangs des Gemeinschaftsrechts' [1994] *Der Staat* 555; Alter, above n 70, 19, explains why the Italian Constitutional Court could not refute the initial primacy claim in the *Costa* case.

⁸⁴ See the references in Pernthaler, above n 11, 700.

⁸⁵ R Abraham, *L'application des normes internationales en droit interne* (1986) 155.

⁸⁶ *Ibid.*, 154ff.

⁸⁷ *Ibid.*

⁸⁸ For a critique and an explanation of the ECJ's style see, eg Pernthaler, above n 11, 694.

⁸⁹ Case 26/62 *van Gend en Loos* [1963] ECR 1.

⁹⁰ Case 6/64, above n 79.

⁹¹ Case 294/83 *Les Verts v Parlement* [1986] ECR 1339, para 23. The French language version is 'Charte constitutionnelle de base' in German 'Verfassungsurkunde der Gemeinschaft'.

⁹² Opinion 1/91, above n 76, para 1.

European legal order does emphasise the autonomy of European law, but does not clearly state a separation between EU law and the legal order of the Member States. Rather, this interpretation holds out European law as the overarching legal order within a community of law, which at the same time is taken up and complemented by the Member States' respective legal orders.

The primacy principle would have been codified for the first time in the Constitutional Treaty.⁹³ The Treaty of Lisbon, however, only mentions the primacy principle in a declaration whose purpose is not entirely clear. It intends either to confirm the rather far-reaching jurisprudence of the ECJ or to affirm that the status quo of the question of primacy is not to be changed. This status quo, of course, is much more complex than the jurisprudence of the ECJ, due to Member States' resistance to primacy of European law over national constitutions.

b) The Perspective of the Highest National Courts

aa) *The German BVerfG*

In its decision of 5 July 1967,⁹⁴ its first to discuss Community law in detail, the BVerfG emphasised the central role of the 'act of assent' to the founding Treaties.⁹⁵ Later commentators likened this central role to that of a bridge⁹⁶ between EC law and national law, in that—in the German view—the act of assent functions as the decisive 'order to give legal effect' (*Rechtsanwendungsbefehl*) to European law. That very same year, the BVerfG expressed its view of the Community as a distinct public authority in a distinct legal order (*Gemeinschaft als eigenständige Hoheitsgewalt in einer eigenständigen Rechtsordnung*). This view is still held today. The BVerfG qualified the EEC Treaty as a 'constitution, as it were, of this Community' (*gewissermaßen die Verfassung dieser Gemeinschaft*) and Community law as a 'distinct legal order, whose norms neither belong to public international law nor belong to the national law of the Member States'.⁹⁷ The BVerfG hinted, though, at constitutional limitations on the transfer of public authority rights (*Übertragung von Hoheitsrechten*) to the EC in the context of the German Constitution's guarantee of fundamental rights. An answer to this question, however, was not forthcoming at this stage.⁹⁸ Not yet.

⁹³ Art 6 CT: '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.'

⁹⁴ *Entscheidungen des Bundesverfassungsgerichts* 22, 134, 142.

⁹⁵ The Zustimmungsgesetz, a federally enacted law under Art 24 (now Art 23) of the German Constitution. The Art 23 provision dealing specifically with European integration was introduced in December 1992, replacing the old Art 23, which had served as the legal basis for German reunification. Both Art 23 and Art 24 foresee an act of assent for the transfer of public powers. Art 23 establishes two sets of limits: on the one hand, it institutes limits concerning the European construct, which for example has to guarantee a standard of fundamental rights protection essentially equal to that guaranteed by the German Constitution; on the other hand, Art 23(1) points to the limits of how European integration can affect Germany, as the principles mentioned in Art 79(3) are inalienable.

⁹⁶ This *Brückentheorie* is based on the metaphor suggested by P Kirchhof, eg in idem, 'Die Gewaltenbalance zwischen staatlichen und europäischen Organen' [1998] *Juristenzeitung* 965, 966. On the European Communities Act as the British 'bridge', see N Bamforth, 'Courts in a Multi-layered Constitution' in idem and P Leyland (eds), *Public Law in a Multi-Layered Constitution* (2003) 277, 288.

⁹⁷ 'eigene Rechtsordnung, deren Normen weder Völkerrecht noch nationales Recht der Mitgliedstaaten sind', *Entscheidungen des Bundesverfassungsgerichts* 22, 293, 296 (*EWG-Verordnungen*) (English translation in Oppenheimer, above n 1, 410). The reference to the EEC Treaty's 'distinct legal order' can already be found in *Entscheidungen des Bundesverfassungsgerichts* 29, 198, 210 (*Abschöpfung*), although it is accompanied by a reference to the 'numerous intertwinements of Community and national law'. On autonomy, see also *Entscheidungen des Bundesverfassungsgerichts* 31, 145, 174 (*Lütticke*) (English translation in Oppenheimer, above n 1, 415). Indeed, the formula is reminiscent of Alfred Verdross' formula of an internal law of a community of States, based on public international law: A Verdross, 'Règles générales du droit international de la paix' (1929-V) 30 *Recueil des Cours de l'Académie de Droit International* 311, as Pernthaler, above n 11, 692, indicates.

⁹⁸ *Entscheidungen des Bundesverfassungsgerichts* 22, 293, 298ff (*EWG-Verordnungen*).

(1) Fundamental Rights: The *Solange I* and *Solange II* Decisions (1974/1986)

In the *Solange I* decision of 29 May 1974, the BVerfG stipulated constitutional limits on the primacy of European law and reserved a right of judicial review in order to safeguard the fundamental rights guaranteed by the German Constitution.⁹⁹

In a dissenting opinion,¹⁰⁰ three of the second senate's eight judges adopted a different position on the relationship between national constitutional law and European law, which comes closer to the ECJ's position than the majority opinion. The position adopted by the dissenting minority went much further than even the BVerfG's *Solange II* decision¹⁰¹ 12 years later, as the minority considers the BVerfG's reservation of a constitutional check on EC law—a reservation that the *Solange II* decision maintains—to be illegal.¹⁰² While it also stipulates a limit on the transfer of sovereign rights to the EC, the minority does not consider this limit to necessitate the reservation of a constitutional check.

After indicating a change of its *Solange I* jurisprudence in July 1979,¹⁰³ twice in 1981¹⁰⁴ and then again in February 1983,¹⁰⁵ the *Solange II* decision of 22 October 1986¹⁰⁶ brought the long-expected supplement to the *Solange I* decision, which—without renouncing the principle of a constitutional law check—defused the fundamental rights issue 'in a pragmatic sense'.¹⁰⁷ The BVerfG insisted that the transfer of public authority to supranational institutions be subject to constitutional limits: there is no authorisation, it held, to give up the identity of the German constitutional order by means of transferring competences to supranational institutions with the result of an 'intrusion into the fundamental architecture, the constituting structures' of the Constitution.¹⁰⁸ Nevertheless, after an extensive assessment of the development of EC law, the BVerfG held that, 'as long as' (*solange*) an effective protection of fundamental rights is guaranteed at the European level, with a level of protection that is substantially equivalent¹⁰⁹ to the inalienable minimum level of protection of fundamental rights under the German Constitution, including a general guarantee of the essential substance (*Wesensgehalt*) of the fundamental rights, the BVerfG 'will no longer exercise its jurisdiction to decide on the applicability of derived Community law, that may constitute the legal basis for acts of German courts or authorities in the Federal Republic'.¹¹⁰

The fundamental rights section of the 1993 *Maastricht* decision¹¹¹ and the 2000 *Banana* decision¹¹² have basically confirmed the BVerfG's statement of principle in *Solange II*.¹¹³ The

⁹⁹ *Entscheidungen des Bundesverfassungsgerichts* 37, 271 (*Solange I*).

¹⁰⁰ *Ibid.* The dissenting opinion starts at p 291.

¹⁰¹ *Entscheidungen des Bundesverfassungsgerichts* 73, 339 (*Solange II*) (English translation in Federal Constitutional Court (ed), *Decisions of the Bundesverfassungsgericht* (1992) vol 1, pt II, 613; also in Oppenheimer, above n 1, 461 and [1987] 3 CMLR 225).

¹⁰² For details, see the first edition.

¹⁰³ *Entscheidungen des Bundesverfassungsgerichts* 52, 187, 202ff (*Vielleicht*).

¹⁰⁴ *Entscheidungen des Bundesverfassungsgerichts* 58, 1 (*Eurocontrol I*); 59, 63 (*Eurocontrol II*).

¹⁰⁵ Bundesverfassungsgericht, [1983] *Neue Juristische Wochenschrift* 1258 (*Mittlerweile*).

¹⁰⁶ *Entscheidungen des Bundesverfassungsgerichts* 73, 339 (*Solange II*).

¹⁰⁷ G Hirsch, 'Kompetenzverteilung zwischen EuGH und nationaler Gerichtsbarkeit' [1998] *Neue Zeitschrift für Verwaltungsrecht* 907, 909.

¹⁰⁸ 'durch Einbruch in ihr Grundgefüge, in die sie konstituierenden Strukturen', *Entscheidungen des Bundesverfassungsgerichts* 73, 339, 375ff (*Solange II*); Here, the Court refers to the jurisprudence of the Italian Constitutional Court.

¹⁰⁹ 'im Wesentlichen gleichzuachten'.

¹¹⁰ *Entscheidungen des Bundesverfassungsgerichts* 73, 339, 387 (*Solange II*); Since 1992, the two sets of constitutional limits are explicitly mentioned in Art 23 of the German Constitution, including the *Solange II* formula.

¹¹¹ *Entscheidungen des Bundesverfassungsgerichts* 89, 155, 175 as well as the 3rd, 6th and 7th sentences of summary No 5 (*Maastricht*).

¹¹² *Entscheidungen des Bundesverfassungsgerichts* 102, 147 (*Banana case*).

¹¹³ This is also the view of R Hofmann, 'Zurück zu Solange III!' in H-J Cremer et al (eds), *Tradition und Weltoffenheit des Rechts* (2002) 1207. Interestingly, the formula developed in the *Solange II* decision was also

BVerfG jurisprudence shows that the court considers the standard of fundamental rights protection required by the German Constitution to be safeguarded at the European level.¹¹⁴ Although the BVerfG does not contribute to the protection of European fundamental rights directly by making references to the ECJ, it does contribute indirectly by supervising the duty of the regular German courts to make references.

(2) Powers and Competences: The German *Maastricht* Decision (1993)

With the *Maastricht* decision of 12 October 1993,¹¹⁵ the BVerfG established a constitutional law reserve of power over the exercise of competences by the EC/EU. Accordingly, the BVerfG may examine whether acts at the European level conform to the boundaries set for the transfer of public powers to the EU.¹¹⁶ The Court justifies its right of control over ultra vires acts (in the decision, the Court says *ausbrechende Rechtsakte*,¹¹⁷ literally ‘acts breaking out’) by pointing to the constraints of German constitutional law. What the Court actually does within the concept of *ausbrechende Rechtsakte* amounts to an independent interpretation of European law: according to the BVerfG, the plan of integration¹¹⁸ outlined in the act of assent (*Zustimmungsgesetz*) and in the EU Treaty cannot be substantially altered later on by means of European ultra vires acts without losing the cover provided by the act of assent. Taking a closer look at this argument, one realises that this amounts to a doubling of the relevant standards. European acts have to be compatible with the guarantees of the German Constitution and, of course, with European law. This is the case because the BVerfG actually reviews the act of assent to the extent that it covers a given European act. This European act is thus reviewed by the standard of a ‘German version’ of European law (the ‘Constitutional law version’ of EU law). The alleged limitation on scrutinising the act of assent under a German constitutional law standard thus only seems to be a trick: in actuality, the compatibility of a European act with German constitutional law depends on its compatibility with European law—that is, the way the BVerfG interprets European law.

As far as ECJ ‘acts’ are concerned, the *Maastricht* decision remains unclear about how, in practice, to draw the line between the (permitted) development of the law by European judges

introduced into the 1975 Swedish Constitution (in 1994, ch 10(5)): see O Ruin, ‘Suède’ in J Rideau (ed), *Les Etats membres de l’Union européenne* (1997) 440. Any doubts the *Maastricht* decision may have raised are resolved by the *Banana* decision: the Court emphasised that an individual’s constitutional complaint under Art 93(1) or a national court’s reference under Art 100 of the German Constitution will simply be held to be inadmissible unless the individual/the referring court proves a complete erosion of fundamental rights in accordance with *Solange II*.

¹¹⁴ Bundesverfassungsgericht [2001] *Europäische Zeitschrift für Wirtschaftsrecht* 255 (Non-reference by the Bundesverwaltungsgericht); see also *Entscheidungen des Bundesverwaltungsgerichts* 108, 289; for a recent case, see the interim decision of the Bundesverfassungsgericht concerning the implementation of the data-retention directive, [2008] *Europäische Grundrechte-Zeitschrift* 257.

¹¹⁵ *Entscheidungen des Bundesverfassungsgerichts* 89, 155 (*Maastricht*); the decision and the proceedings are well documented in Winkelmann, above n 30; further references are given in Mayer, above n 4, 98ff.

¹¹⁶ *Entscheidungen des Bundesverfassungsgerichts* 89, 155, 188 (*Maastricht*), literally ‘acts that break out’.

¹¹⁷ For the terminology, see the earlier decision *Entscheidungen des Bundesverfassungsgerichts* 75, 223, 242 (*Kloppenburg*). On the distinction between ultra vires acts in both a narrow sense (ie overstepping competences defined according to area) and a broad sense (ie the general illegality of an act), see Mayer, above n 4, 24ff.

¹¹⁸ Strangely enough, the Bundesverfassungsgericht also used the idea of an underlying ‘integration programme’ in the context of the NATO Treaty, *Entscheidungen des Bundesverfassungsgerichts* 104, 151 (*NATO-Strategiekonzept*); see M Rau, ‘NATO’s New Strategic Concept’ (2001) 44 *German Yearbook of International Law* 545, 570.

and the (prohibited) development of judge-made European law, or between substantial alterations of the European competence provisions and still acceptable alterations.¹¹⁹

The legal consequences of deeming a European act *ultra vires* would be that this act would not be binding on Germany. This amounts to a German constitutional law-based reserve of power over European acts that restricts the primacy of European law. In such a situation, the BVerfG takes on the role of the guardian.

All things considered, one may well say that the *Maastricht* decision is within a certain continuity of the BVerfG's prior jurisprudence on fundamental rights, as far as the concept of a constitutional law reserve of control that restricts the European law claim for primacy is concerned. What is striking, though, is the aggressive tone of the decision when compared to previous decisions.¹²⁰

One should also note a crucial difference between the fundamental rights issue (*Solange II*) and the competence issue (*Maastricht*): as for the competence issue, the reproach with which the European level is confronted in case of an *ultra vires* act goes beyond the bipolar relationship between the German constitutional order and the European legal order. The categories of an *ultra vires* act on the one hand and an act infringing upon the fundamental rights laid down in the German Constitution on the other hand are utterly different: the absence of a certain aspect of fundamental rights protection in the jurisprudence of the ECJ can already occur either for procedural reasons or because the range of a given fundamental right is defined differently at the European and national levels. In such cases, the BVerfG's formula for a co-operative relationship (*Kooperationsverhältnis*) between (*zwischen*¹²¹) the BVerfG and ECJ in the sense of a spare or reserve guarantee in line with the *Solange II* jurisprudence appears entirely plausible. To uphold, in principle, the standard of fundamental rights protection guaranteed by the German Constitution does not necessarily imply a reproach against the European level; it does not go beyond the bipolar relationship between German and European legal orders.

This is different in the case of a reproach of an *ultra vires* act: there is no leeway for a relationship of co-operation between the BVerfG and ECJ where the question of the limits of European competences is concerned.¹²² Declaring an act to be *ultra vires* always implies a defect in the act. It would also imply a reproach towards the European level and especially to the ECJ. Moreover, the reproach of an *ultra vires* act would also concern the validity and/or application of European law in all other Member States, as an act cannot be *ultra vires* only in the bipolar relationship between one Member State and the EU.

Imposing the strict standard implicitly suggested by the BVerfG on the principles of interpretation of European law as developed by the ECJ would significantly reduce the ECJ's latitude. This kind of constraint reaches beyond the EU Treaty, the actual subject of the *Maastricht* decision,¹²³ and extends to European law in general. This is therefore a frontal attack on judge-made European law.¹²⁴

¹¹⁹ See M Zuleeg, 'Die Rolle der rechtsprechenden Gewalt in der europäischen Integration' [1994] *Juristenzeitung* 1, 3; C Tomuschat, 'Die Europäische Union unter der Aufsicht des Bundesverfassungsgerichts' [1993] *Europäische Grundrechte-Zeitschrift* 489, 494.

¹²⁰ This view is also adopted by U Everling, 'BVerfG und Gerichtshof der Europäischen Gemeinschaften' in A Randelzhofer et al (eds), *Gedächtnisschrift für Eberhard Grabitz* (1995) 72.

¹²¹ The actual wording in the decision is 'Kooperationsverhältnis zum EuGH' (to), *Entscheidungen des Bundesverfassungsgerichts* 89, 155, 175 and summary No 7 (*Maastricht*).

¹²² A different view is adopted by R Scholz, 'Zum Verhältnis von europäischem Gemeinschaftsrecht und nationalem Verwaltungsverfahrenrecht' [1998] *Die Öffentliche Verwaltung* 261, 267; in fact, Scholz establishes a relationship of competition, not co-operation, between the ECJ and BVerfG.

¹²³ Zuleeg, above n 119, 7.

¹²⁴ See U Everling, 'Richterliche Rechtsfortbildung in der Europäischen Gemeinschaft' [2000] *Juristenzeitung* 217, 227.

By implying a duty of the ECJ to police the principle of subsidiarity and proportionality at the European level in a specific way, the BVerfG claims the power to scrutinise¹²⁵ difficult balancing decisions undertaken by the ECJ as well as the development of European law influenced by the ECJ.

The immediate effects of the *Maastricht* decision have been limited. Still, at least one court, a Financial Court of the first instance (the Finanzgericht Rheinland-Pfalz¹²⁶) has declared an EC act to be ultra vires. Other courts (the Bundesgerichtshof, the Oberverwaltungsgericht Münster, the Bundesfinanzhof and also the Verwaltungsgericht Frankfurt¹²⁷) have been extremely liberal in making use of the concept of EC ultra vires acts without actually declaring any act to be ultra vires. These decisions have revealed quite different understandings of what an ultra vires act may be, extending to an understanding that would make any illicit European act an ultra vires act, no matter what nature the legal defect of the act in question actually is.

In doctrinal writings, the BVerfG's concept of ultra vires acts has been severely criticised by some,¹²⁸ but welcomed by others, to the extent that it has been used as an argument against all kinds of alleged ultra vires acts stemming from the EC, in particular from the ECJ (the ECJ decisions in the *Süderdithmarschen*, *Alcan* and *Kreil* cases).¹²⁹ In any case, the Federal Administrative Court—the BVerwG—and even the BVerfG itself have clearly rejected any attempt to depict the ECJ's *Alcan* decision as an invalid and, thus, irrelevant ultra vires act.¹³⁰

One may ask, though, what the concept of competences is behind the ultra vires accusations concerning the ECJ's decisions in the *Süderdithmarschen* and *Alcan* cases. The argument that the ECJ does not have the 'competences to regulate' in the sense of legislative powers suggests erroneously that the ECJ decisions in question contain some kind of quasi-legislative regulation of a competence area, such as a court procedure or administrative procedure; what the ECJ does in the *Alcan* case is simply enforcing the European control of state aids (subsidies).

Moreover, it is also doubtful whether the *Maastricht* decision's initial concept of ultra vires acts actually covers this kind of reasoning in the first place, as there is no doubt that, for example, the control of state aids (subsidies) is in the realm of European competences. The wording of the *Maastricht* decision seems to indicate that the BVerfG was aiming at ultra vires acts in a narrow sense, as acts beyond the scope of European competences—in other words, as

¹²⁵ Winkelmann, above n 30, 52.

¹²⁶ Finanzgericht Rheinland-Pfalz, [1995] *Entscheidungen der Finanzgerichte* 378; see also *Entscheidungen des Bundesfinanzhofs* 180, 231, 236.

¹²⁷ Further references are given in Mayer, above n 4, 120ff.

¹²⁸ JA Frowein, 'Kritische Bemerkungen zur Lage des deutschen Staatsrechts aus rechtsvergleichender Sicht' [1998] *Die Öffentliche Verwaltung* 806, 807ff. What is striking is the fierceness of the debate, at least among some German scholars in the past. See first the news magazine article 'Sprengkraft der Banane' *Focus* 7/1999, 13 February 1999, 11; then by former ECJ judge U Everling, 'Richterliche Unbefangenheit?' [1999] *Europäische Zeitschrift für Wirtschaftsrecht* 225, followed by the answer of the reporting judge in the German *Maastricht* case, P Kirchhof, 'Der Weg Europas ist der Dialog' [1999] *Europäische Zeitschrift für Wirtschaftsrecht* 353.

¹²⁹ The term *ausbrechender Rechtsakt* is used, for example, in *Sondergutachten 28* of the *Monopolkommission* [Opinion on a Commission White paper] in 1999, para 72 (against changing the system of European competition law); in that context, see W Möschel, 'Systemwechsel im Europäischen Wettbewerbsrecht' [2000] *Juristenzeitung* 61, 52, with further references; Scholz, above n 122, 267 (against the *Alcan* decision as an *ausbrechender Rechtsakt*); R Scholz, in T Maunz and G Dürig, *Kommentar zum Grundgesetz* (looseleaf, last update June 2007) Art 12a, paras 189ff (against the ECJ's *Kreil* decision as an *ausbrechender Rechtsakt*); F Schoch, in idem et al, *Verwaltungsgerichtsordnung* (looseleaf, last update Jan 2008) § 80, paras 270ff (against the ECJ's *Süderdithmarschen* decision as an *ausbrechender Rechtsakt*); In 2007, the 2005 *Mangold* decision of the ECJ (C-144/04 *Mangold* [2005] ECR I-9981) has similarly been criticised as an ultra vires-act in proceedings before the Bundesverfassungsgericht (2 BvR 1661/06 [*Honeywell*]), pending).

¹³⁰ Bundesverwaltungsgericht [1998] *Deutsche Zeitschrift für Wirtschafts- und Insolvenzrecht* 503; Bundesverfassungsgericht [2000] *Europäische Zeitschrift für Wirtschaftsrecht* 445; The Bundesverfassungsgericht has also refused to declare the Banana-regulation (*Entscheidungen des Bundesverfassungsgerichts* 102, 147) or the Broadcasting Directive (*Entscheidungen des Bundesverfassungsgerichts* 92, 203) ultra vires.

acts that transcend the realm of European jurisdiction. It did not seem to aim at the question of separation of powers, ie which institution has what kind of power at what level. Surely, the BVerfG did not want to introduce some kind of general legality check on European law, to consider any kind of formal or substantial legal defect of European acts.

(3) The Consistency of the BVerfG's Case law: Controlling the Bridge

In summary, in spite of the BVerfG's recognition of the autonomy of the Community legal order, the BVerfG has always seen the acts of assent to the respective Treaties, based on the German Constitution, as the link between European law and national law, with the Member States remaining the 'Masters of the Treaties'.¹³¹ Moreover, this is a linear, continuous link, and not a one-time link that becomes irrelevant once the German legal order has been 'opened up' to European law. Policing this link, or, to revisit Kirchhof's metaphor, controlling this bridge, enables the BVerfG to effectuate far-reaching indirect control over the application of European law by applying the standard of German constitutional law under the guise of interpreting and controlling the act of assent to it.

The alleged 'autolimitation' policy of the BVerfG, according to which the BVerfG and ECJ adjudicate in spheres independent of each other, merely acts to blur the fact that policing the constitutional limits imposed on transfers of public authority under Articles 23/24 of the German Constitution amounts to an indirect control of European law. Indeed, the BVerfG consistently imposes constitutional law limits on the primacy of European law. These limits justify the BVerfG's claim of entitlement to control European law as the guardian of the German Constitution. In its *Görgülü* decision concerning the rank of the European Convention on Human Rights in Germany, the BVerfG revealed in passing the underlying reason for its claim of a right to control European law when it spoke of a 'reservation of sovereignty'.¹³² The clinical and distanced attitude towards European integration, which is evident in the latent and more or less gradual equalisation of European law with other public international law, has been criticised even from within the BVerfG.¹³³

The BVerfG has never relinquished its claim to a right to decide the point at which it would leverage its constitutional control; it merely modified this threshold. This is especially visible in the *Solange I/Solange II* shift, where the Court reversed what it considered to be the principle and what the exception. Only the dissenting opinion in the *Solange I* case indicated a willingness to completely abandon a right of judicial review over the constitutionality of European law, albeit insisting on constitutional law limits. Finally, the difference between the fundamental rights issue and the ultra vires issue should be stressed, as 'ultra vires acts' and 'acts violating fundamental rights as accorded by the German Constitution' are different categories.

bb) Other High Courts of the EU 15¹³⁴

Claims of some form of last instance reserve of power over the legality of European law can be found in Italy (in the Corte Costituzionale's decisions in the *Frontini*¹³⁵ and *Fragd* cases¹³⁶),

¹³¹ *Entscheidungen des Bundesverfassungsgerichts* 75, 223 (*Kloppenburg*).

¹³² *Entscheidungen des Bundesverfassungsgerichts* 111, 307, 319 (*Görgülü*).

¹³³ See the separate opinion of Judge Gerhardt in *Entscheidungen des Bundesverfassungsgerichts* 113, 173 (*European arrest warrant*), who accuses the senate majority of refusing to participate constructively in the development of European solutions.

¹³⁴ For a more detailed account of the jurisprudence of the different courts see Mayer, above n 4, 143–271.

¹³⁵ Decision No 183/73 (*Frontini*), *Foro italiano* I (1974) 314 (English translation in Oppenheimer, above n 1, 629; [1974] 2 CMLR 372).

¹³⁶ Decision No 232/89 (*Fragd*), *Foro italiano* I (1990) 1855 (English translation in Oppenheimer, above n 1, 653).

Ireland (in the Supreme Court cases on abortion¹³⁷), Denmark (in the Højesteret's Rasmussen decision of 1998, the Danish *Maastricht* case¹³⁸), Greece (in the Council of State's *DIKATSA* decision 1998¹³⁹), Spain (in the Tribunal Constitucional's *Maastricht* opinion of 1992¹⁴⁰) as well as France (the Conseil constitutionnel's decision of 2006 concerning the *Droit de l'auteur* and the Conseil d'Etat *Arcelor* decision of 2007¹⁴¹).

Jurisprudential developments that may turn into similar claims of the right to judicial review over European law can be detected in Belgium (in the Cour d'arbitrage's jurisprudence on treaty law¹⁴²). Similar indications, which point at least to the remote possibility of courts claiming a reserve of power over European law, can be found in extrajudicial avenues in Sweden (in a statement from the highest court on the constitutional amendments in the context of accession to the EU¹⁴³) and in Austria (in the Official Government Statement on accession¹⁴⁴).

Other Member States have not fully developed a standard of national constitutional law control over European law, but such a possibility remains open. Portugal's constitutional law includes limits on European integration.¹⁴⁵ In addition, because of the primacy of parliamentary decisions in Great Britain, the British constitutional reserve of power over European law—which exists in principle with the claim to have retained parliamentary sovereignty—is unlikely to be activated by the courts alone.¹⁴⁶

Both the structural circumstances of the constitutional law and the general trend of the jurisprudence in regard to the European law/national law relationship make it highly improbable that a reserve of power will be claimed in Luxembourg (no possibility for national courts to control European law plus Community-friendly courts) and the Netherlands (no constitutional court, no judicial review of international agreements and unconditional precedence of international obligations, even over the constitution). For Finland, court claims of reserve of power over European law are equally unlikely because of the constitutional order (no possibility for courts to review European law compatibility with the constitution).

¹³⁷ SC *SPUC (Ireland) Ltd v Grogan* [1989] IR 753.

¹³⁸ Højesteret, Decision of 6 April 1998, *Carlsen et al v Rasmussen*, I 361/1997, *Ugeskrift for Retsvæsen* (1998) 800 (German translation [1999] *Europäische Grundrechte-Zeitschrift* 49).

¹³⁹ Council of State No 3457/98 *Katsarou v DIKATSA*; see in this context also the Opinion Council of State No 194/2000.

¹⁴⁰ TC Declaration 108/1992 1 July 1992 (*Maastricht* Opinion), [1992] *Revista de Instituciones Europeas* 633 (English translation in Oppenheimer, above n 1, 712).

¹⁴¹ CC 27 June 2006, *Loi relative au droit d'auteur et aux droits voisins dans la société de l'information*, Rec 88; CE No 287110 Ass 8 February 2007, *Arcelor* (see Mayer et al, above n 43); see also CE 30 October 1998, *Sarran* (1998) 14 *Revue française de droit administratif* 1081; Cass 2 June 2000, *Fraisse*; CE 3 December 2001, *SNIP* as well as CE *Cohn-Bendit*, above n 15.

¹⁴² Decision 26/91, 16 October 1991 (*Commune de Lanaken*); (Dutch Belgian double taxation treaty) (1992) 111 *Journal des Tribunaux* 6670; see also Decision 12/94, 3 February 1994, *Ecole européenne* (school fees at European schools), *Moniteur Belge*, 11 March 1994, 6142; Decision 33/94, 26 April 1994 (*ECHR*), *Moniteur Belge*, 22 June 1994.

¹⁴³ 'EG och grundlagarna—sammanställning av remissyttranden över betänkandet' SOU 1993:14 och departementspromemorian Ds 1993:36, *Departementsserien* 1993:71.

¹⁴⁴ 'Erläuterungen zur Regierungsvorlage über das Bundesverfassungsgesetz über den Beitritt Österreichs zur Europäischen Union', 1546 *der Beilagen zu den Stenographischen Protokollen des Nationalrates der Republik Österreich*, XVIIIth GP.

¹⁴⁵ Art 7(6) of the Portuguese Constitution; according to this provision, Portugal may—under the condition of reciprocity—enter into agreements for the joint exercise of the powers necessary to establish the European Union, in ways that have due regard for the principle of subsidiarity and the objective of economic and social cohesion.

¹⁴⁶ House of Lords, *Factortame v Secretary of State* [1991] 1 AC 603; see also House of Lords, *Macarthy v Smith (No 1)* [1979] 1 All ER 325 (329) and the 'metric martyrs' case, High Court QBD, *Thoburn v Sunderland City Council* et al [2002] 4 All ER 156; in this context, see Bamforth, above n 96.

In most Member States where a power to control European law is either being claimed or merely discussed, this power is justified on constitutional law grounds. In other words, in these Member States, the primacy of European law over national law does not automatically extend to constitutional law. The Netherlands is a special case: not only do the Dutch courts lack the authority to judicially review European law, but there are also no constitutional constraints on European law at all, as the Dutch constitutional order recognises the primacy of Community law without reservation.

In contrast, German and Italian jurisprudence establishes a link between a national court's finding a European act *ultra vires* and the violation of core constitutional law. In Germany the argument centres on the German Constitution's principle of democracy,¹⁴⁷ in Italy on the fundamental principles of the Italian Constitution known as counter-limits, or *controlimiti*.¹⁴⁸ The jurisprudence of the Højesteret in Denmark points to a privileged position for constitutional provisions on liberties and on national independence. The French Conseil constitutionnel has recently expressly referred to the constitutional identity of France as a limit for European law.¹⁴⁹

What appears to be particularly threatening for legal unity and the uniform interpretation of European law in the case law of the highest courts and tribunals is the phenomenon of interpreting European law from the perspective of the national constitutional order, generating a parallel version of European law (a constitutional law version of European law). Such power to engage in an autonomous interpretation of European law on its compatibility with the respective constitutions (thus doubling the standard of scrutiny) is claimed by the BVerfG in Germany (see above), the Corte Costituzionale in Italy (in the *Frontini* case¹⁵⁰), the Supreme Court in Ireland (inter alia in the *Campus Oil* decision¹⁵¹), the Højesteret in Denmark (in the *Maastricht* decision *Carlsen/Rasmussen*¹⁵²) and recently the French Conseil constitutionnel and Conseil d'Etat.

Overall, there is a certain tendency in the jurisprudence of a not entirely insignificant number of Member States. This tendency is characterised by an emphasis of elements of the national constitutional order that are unalterable, thus 'primacy-proof', by the constitutional limitation of the primacy principle and by an autonomous interpretation of European law by national courts, which could lead to results that diverge from the ECJ's findings. This autonomous interpretation of European law from a Member State perspective could be coined 'parallel interpretation' of European law, establishing Member State constitutional law versions of European law.¹⁵³ In this respect, former German ECJ judge Ulrich Everling's assessment of a 'potential for conflict'¹⁵⁴ existing at the level of the Member States appears to be confirmed.

¹⁴⁷ *Entscheidungen des Bundesverfassungsgerichts* 89, 155 (*Maastricht*).

¹⁴⁸ M Cartabia, *Principi inviolabili e integrazione europea* (1995) 8 and 95ff; on the *controlimiti*, see the decision of the Italian *Consiglio di Stato* 4207/05 of 19 April 2005, *Admenta et al v Federfarma* [2006] 2 CMLR 47.

¹⁴⁹ CC 27 June 2006, *Loi relative au droit d'auteur et aux droits voisins dans la société de l'information*, Rec 88; see Mayer et al, above n 43.

¹⁵⁰ Above n 135.

¹⁵¹ SC, *Campus Oil v Minister for Industry and Energy* [1983] IR 82, an example for the SC being 'plus communautaire que les Communautés' (DR Phelan and A Whelan, 'Ireland' in: 17. *FIDE Kongress* (1996) vol I, 292, 302) though.

¹⁵² Above n 138.

¹⁵³ In this context, see O Dubos, *Les juridictions nationales, juge communautaire* (2001) 857ff, who openly suggests giving Member State courts EC law jurisdiction.

¹⁵⁴ Everling, above n 120, 68; see also R Streinz, 'Verfassungsvorbehalte gegenüber Gemeinschaftsrecht' in Cremer et al (eds), above n 113, 1437.

cc) *The Highest Courts of the Youngest Members of the EU 27 and Prospective Member States*

From 2004 to 2007, the EU was enlarged by 12 Member States from Central and Eastern Europe, and it has commenced accession negotiations with Turkey and Croatia. Therefore, the role of the highest courts in these states in relation to the ECJ deserves closer attention.¹⁵⁵

In Poland, where the Constitution takes precedence over international law obligations (Article 90), it is the Constitutional Tribunal that decides inter alia on the compatibility of international treaties with the Constitution. When the Constitutional Tribunal declared the law on the implementation of the framework decision concerning the European arrest warrant to be incompatible with Article 55 of the Polish Constitution,¹⁵⁶ it did not expressly address the question of primacy. Only a few days later, however, the Tribunal explained in its decision on the constitutional compatibility of the Accession Treaty that the Polish Constitution enjoys primacy in application and in validity above any other law.¹⁵⁷

In Hungary, the Constitutional Court has already made explicit reference to the German BVerfG's *Maastricht* decision. After accession, the court declared a Hungarian law on the stock-piling of agricultural overproduction to be invalid,¹⁵⁸ even though the law implemented a Community regulation and despite that fact that such a direct confrontation between European and Hungarian law could have been avoided.¹⁵⁹

Article 1(2) of the Czech Constitution stipulates that the Czech Republic has to respect its duties under international law. According to Article 10 of the Constitution, public international law enjoys primacy over national law, though not over constitutional law. In a decision of 8 March 2006, the Constitutional Court explicitly referred to the jurisprudence of the BVerfG (*Solange II*) and the Italian Corte Costituzionale. It held that the Czech Republic had transferred sovereign rights to the EU, as allowed by Article 10a of the Constitution, but that this transfer of competences had taken place under the caveat that the EU would use these competences in a manner compatible with Czech sovereignty and the rule of law.¹⁶⁰ The court confirmed its position in the decision on the Treaty of Lisbon in November 2008.¹⁶¹ What the court achieves here is to balance the European integration clause of the constitution (Article 10a) with the sovereignty clause (Article 1) and the clause prohibiting certain modifications of the constitution (Article 9(2)).

The case law of Estonia's Supreme Court on the association agreement with the EU already indicated a willingness to bring the interpretation of the Constitution and the duties flowing from European law into line.¹⁶² In its 2006 *Hadleri* decision the court consequently avoided controlling an Estonian law implementing a regulation according to the standards of the Estonian Constitution. Instead, it declared the law inapplicable solely on the basis of its incompatibility with European law.¹⁶³ The debate about the Constitutional amendment in 2006,

¹⁵⁵ For the following overview, see the contributions in AE Kellermann et al (eds), *EU Enlargement: The Constitutional Impact at EU and National Level* (2001) by J Justynski (Poland), 279, 283ff; A Harmathy (Hungary), 315, 325; V Balaš (Czech Republic), 267, 273ff; T Kerikmäe (Estonia), 291, 299ff; A Usacka (Latvia), 337; V Vadapalas (Lithuania), 347, 349ff; P Vehar (Slovenia) 367, 371ff; PG Xuereb (Malta), 229, 239ff; N Emiliou (Cyprus), 243, 246ff; V Kunová (Slovakia), 327, 335; E Tanchev (Bulgaria), 301, 306; A Ciobanu-Dordea (Romania), 311, 312; M Soysal (Turkey), 259, 262ff.

¹⁵⁶ Decision P 1/05 of 27 April 2005.

¹⁵⁷ Decision K 18/04 of 11 May 2005.

¹⁵⁸ Decision 17/2004 (V 25) AB, available at www.mkab.hu/content/en/en3/03780404.htm (3 July 2008).

¹⁵⁹ See A Sajó, 'Learning Co-operative Constitutionalism the Hard Way' [2004] *Zeitschrift für Staats- und Europawissenschaften* 351.

¹⁶⁰ Decision Pl ÚS 50/04 of 8 March 2006 (*sugar quotas*); see also Pl ÚS 66/04 of 3 May 2006 (*European arrest warrant*), [2007] 3 CMLR 24.

¹⁶¹ Decision Pl ÚS 19/08 of 26 November 2008 (*Treaty of Lisbon*).

¹⁶² Decision No 3-4-1-11-03 of 24 September 2003, *Vilu and Estonian Voters Union*; Decision Nr 3-4-1-12-03 of 29 September 2003, *Kulbok*.

¹⁶³ Decision No 3-3-1-33-06 of 5 October 2006, *Hadleri Toidulisandite AS*.

which should already have been implemented upon Estonia's accession, gave the Supreme Court the opportunity to position itself. In a statement on 11 May 2006, it stipulated a nearly unconditional primacy of European law. It held that any part of the Estonian Constitution that is not compatible with European law must not be applied.¹⁶⁴

Latvia has had a Constitutional Court since 1996. The statute on Latvia's international agreements of 1994 stipulates that international obligations take precedence over statutes, but not over the Constitution. Yet the Latvian Constitutional Court also seems to adopt an integration-friendly attitude in its case law.¹⁶⁵

The Lithuanian Constitution is complemented by a constitutional addendum on Lithuania's membership in the EU, which states that European law enjoys primacy over national law, but not over national constitutional law. The Constitutional Court adhered to the literal meaning of the rule in its fundamental decision on the question of primacy of 14 March 2006¹⁶⁶ and has not changed its opinion since.¹⁶⁷

In Slovenia, the Constitution also claims precedence over international obligations. The Slovenian Constitutional Court has confirmed this in several decisions.¹⁶⁸ The constitutional provision on Slovenia's membership in the EU, Article 3a, does not provide any further information on the question of primacy.

As for Malta, the Maltese Constitutional Court seems to have concerns about the relationship with the European Convention on Human Rights.

According to the jurisprudence of the Supreme Court in Cyprus, international agreements take precedence over statutes, but not over the Constitution. Article 148(2) of the Cypriot Constitution answers the question of primacy in favour of European law, yet without mentioning constitutional law. The Supreme Court managed to avoid the question of primacy over the domestic constitution in its judgment on the implementation of the European arrest warrant—just like the German and Polish courts—with the argument that it was only controlling national law that implemented a framework decision of the third EU pillar. In doing so, it explicitly mentioned the relevant German, Polish, Greek and French decisions.¹⁶⁹ Overall, the court seems to be open-minded about European integration.¹⁷⁰

In Slovakia, the constitutional amendment of February 2001 has introduced a specific, detailed provision dealing with European integration (Article 7), which provides for the primacy of European law over domestic statutes. It is unclear, though, whether the Slovak Constitutional Court would also extend this provision to constitutional law. Note that the court suspended the process of ratification of the Constitutional Treaty until further constitutional review had taken place.¹⁷¹

In Bulgaria, the 1991 Constitution attributes international agreements a rank superior to statutes but inferior to the Constitution,¹⁷² which would bind the Constitutional Court on this question.

¹⁶⁴ Comment No 3-4-1-3-06 of 11 May 2006.

¹⁶⁵ Decisions 119-123/2003.

¹⁶⁶ Decision No 13/2000-14/2000-20/2000-21/2000-22/2000-25/2000-31/2000-35/2000-39/2000-8/01-31/01 of 14 March 2006.

¹⁶⁷ Decisions 30/03 of 21 December 2006 and 47/04 of 8 May 2007.

¹⁶⁸ See decision Rm-1/97, 7.

¹⁶⁹ See Decision No 133(1)/04 of 7 November 2005, with an English summary available at www.supremecourt.gov.cy; see also among the multitude of decisions on the European arrest warrant *Entscheidungen des Bundesverfassungsgerichts* 113, 273; Polish Constitutional Court, decision K 18/04 of 11 May 2005; Greek Supreme Court, decision 504/2005; French Conseil d'Etat, CE 368282 of 26 September 2002.

¹⁷⁰ See the speech by C Artemides, 'Supreme Court of Cyprus, in A Mavric (ed), *The Position of Constitutional Courts Following Integration into the European Union* (2005) 159; also available at <http://www.us-rs.si/media/zbornik.pdf> (7 January 2009).

¹⁷¹ Decision of 18 January 2006, *Dostal et al.*

¹⁷² Art 5(4) of the Bulgarian Constitution.

The situation has become much clearer for Romania and the Romanian Constitutional Court after a comprehensive constitutional amendment was passed in 2003. The new Title VI now regulates the transfer of sovereign rights as well as the questions of direct applicability and primacy—at least over national statutory law.

In Croatia, another country with a Constitutional Court, international agreements become part of the internal legal order. Finally, in Turkey, it is expected that, in the case of accession, the Turkish Constitutional Court would explicitly follow the lead of the *Solange I* and *Solange II* jurisprudence of the BVerfG and the *Frontini* and *Fragd* decisions of the Italian Corte Costituzionale.

This summary indicates that almost all new Member States, as well as Turkey and Croatia, have a constitutional court and that, in a number of cases, unconditional primacy of European law over the constitution is not compatible with the current constitutions of these countries. Some of the guardians of the constitutions are developing pragmatic solutions to the problem.¹⁷³ Nevertheless, it seems safe to say that most of the highest courts and tribunals of the youngest Member States may be reluctant to unconditionally accept the ECJ's claim to be the final arbiter on European law. This is especially apparent in the decision of the Polish Constitutional Tribunal on Polish EU membership of May 2005, which is exceptionally drastic in terms of content and style.¹⁷⁴

3. Interim Summary

One must not get carried away with the results of the analysis of the case law: after all, there is no open conflict in the relationship between the ECJ and the highest national courts. Still, the lack of willingness to engage in a conversation with the ECJ by means of preliminary references points to the potential for disobedience. It indicates the extent to which national courts could be willing to insist on an original position vis-à-vis the ECJ. In this respect, the German BVerfG and the Spanish Tribunal Constitucional, but also courts in younger Member States, like the Hungarian Alkotmánybíróság, stand out.

Even without crossing the threshold to open conflict, there are still some worrying tendencies in the case law of the highest courts and tribunals of the Member States. These tendencies may be coined 'frictional phenomena'. They include the insistence on primacy-proof elements of the national constitutional order (eg fundamental rights, fundamental principles, national constitutional identity) and the autonomous interpretation of European law by Member State courts (in the context of competences), which may lead to an interpretation distinct from the ECJ's interpretation (a parallel interpretation, generating national constitutional law versions of EU law).¹⁷⁵

Another tendency is the apparent connection between the existence of specialised constitutional tribunals and a debate on the limits of European law (Germany, Italy and Spain). From the perspective of European law, therefore, the absence of central national constitutional courts acting as guardians of their constitutions against European law appears advantageous.¹⁷⁶ From a Member State perspective, the recent establishment of constitutional courts in some

¹⁷³ See A Albi, 'Supremacy of EC Law in the New Member States' (2007) 3 *European Constitutional Law Review* 25, 28ff.

¹⁷⁴ See above n 157.

¹⁷⁵ The relevant statements of the national courts are often made outside an actual legal question, as obiter dicta or in the context of a mere legal opinion. A plausible explanation for this is that the courts are emitting signals here that are also meant to be received by the ECJ, having an anticipatory effect on the ECJ: see Alter, above n 70, 118, referring to E Blankenburg on European policy-making.

¹⁷⁶ A similar view is adopted by M Claes and B de Witte, 'Report on the Netherlands' in A-M Slaughter et al (eds), *Constitutional Courts in the Member States of the European Union* (1995) 190.

long-standing (see eg Belgium) and almost all younger Member States is therefore only consequential. Still, as the Danish example illustrates, even the absence of a central constitutional court cannot prevent national claims to a final say over European law.

II. Adopting an Analytical and a Theoretical Perspective

Although the frictional phenomena between the ECJ and the highest courts of the Member States detected in part I have not yet crossed the threshold to open conflict, one may still reflect upon how to resolve the friction (1) and how to put these frictional phenomena into a theoretical perspective (2).

1. Dealing with the Question of Ultimate Jurisdiction

One way to approach the potential for conflict inherent in the question of ultimate jurisdiction is to identify a set of legal tools or instruments which may help shape the legal context or the legal basis of the respective courts, with a view to clarifying the respective positions, in order to rationalise and, along that line, resolve the conflict.¹⁷⁷

Differences of opinion between the European and the national legal orders on the location of the ultimate control competence on European law could be defused by modifying the attribution of competences (in the broadest sense) or standards applied by a court. The 'Irish solution' bears testimony to this: a primary law protocol annexed to the *Maastricht* Treaty stipulates that nothing in the European treaties shall affect the application in Ireland of Article 40.3.3 of the Constitution of Ireland (prohibition of abortion). Similar attempts to limit EU competences are Britain's and Poland's so called 'opt-outs' of the EU Charter of Fundamental Rights in the 2007 Treaty of Lisbon. There is a need for differentiation, though: actual or potential competence conflicts may be solved by way of the 'Irish solution' for individual and specific subject matters. Where competence for ultimate decision-making on questions of ultra vires acts is concerned, however, competing judicial claims cannot be prevented by even the most detailed substantial provisions on the attribution of competence. The most straightforward explanation for the limited problem-solving capacity of the 'Irish solution' is that a certain margin of interpretation can never be ruled out where rules of law are concerned.

One could also consider adopting an institutional approach, by establishing a judicial or political mode of competence control. Judicial control (courts of competence) would mean the establishment of special courts for resolving competence conflicts.¹⁷⁸ Comparable proposals have repeatedly been made for the EU,¹⁷⁹ even by acting judges of the German BVerfG (eg a proposal of a special Treaty Arbitration Court composed of 15 representatives of national courts and one ECJ representative,¹⁸⁰ or a 'Common Constitutional Court' bringing together

¹⁷⁷ See in more detail FC Mayer, 'The European Constitution and the Courts', Jean Monnet Working Paper No 9 (2003), available at www.jeanmonnetprogram.org.

¹⁷⁸ This is something that was suggested early on in the history of the US federal system, but without success. The most recent suggestion to establish a Court of the Union dates from 1962. For the details, see Mayer, above n 4, 308.

¹⁷⁹ See the references in A Schwartze, 'Kompetenzverteilung und Entscheidungsverfahren in einer Europäischen Verfassung' in ME Streit and S Voigt (eds), *Europa reformieren* (1996) 136ff; M Hilf, 'Ungeschriebene EG-Kompetenzen im Außenwirtschaftsrecht' [1997] *Zeitschrift für Verwaltung* 295.

¹⁸⁰ S Broß, 'Bundesverfassungsgericht—Europäischer Gerichtshof—Europäischer Gerichtshof für Kompetenzkonflikte' (2001) 92 *Verwaltungsarchiv* 425.

members of ‘the Member State constitutional courts’¹⁸¹). Other proposals in this context include suggestions to establish a European Supreme Court (*Europäischer Oberster Gerichtshof*) or a European Constitutional Tribunal (*Europäisches Verfassungsgericht*),¹⁸² a Union Court of Review,¹⁸³ a Constitutional Council¹⁸⁴ or a European Conflicts Tribunal.¹⁸⁵

A political control of competences could be assigned to existing institutions such as the Council of Ministers and the European Parliament, or to institutions that would have to be newly created, such as a special parliamentary committee.¹⁸⁶ A second thought could also be given to mechanisms that emphasise conflict prevention through special procedures and deliberation, like reports or ombudsman proceedings, rather than dispute settlement through decision-making.¹⁸⁷

Without entering into a detailed appraisal of the proposals, it seems fair to say that new institutions would have only a limited problem-solving capacity. First, it cannot be stressed enough that there already is a court of competence—the ECJ. ECJ Judge Colneric once presented a detailed account of the jurisprudence of the court in the field of competences.¹⁸⁸ Introducing an additional court with comprehensive powers would amount to a complete reshuffle of the institutional setting at the European level. As to the suggested ex ante control of competences, they would fail to catch ECJ decisions. Moreover, an institution composed of European members and national members on an equal basis would probably be unable to solve or prevent conflicts. In sum: new institutions would not prove effective in resolving all possible conflict scenarios. It seems to me that the crux of the competence issue in non-unitary systems is to ensure that all actors exercise a consistently high level of sensitivity in matters of competences. This can be achieved neither by the wording of competence provisions, however detailed they may be, nor by institutional arrangements alone.¹⁸⁹ This points to the importance of the ‘soft’ mechanisms mentioned above (procedures, reports, etc), which aim at a structurally different and cautious approach towards competences.

Nonetheless, a conceivable institution would be an additional forum for judicial dialogue¹⁹⁰ between courts of the different levels, but without the authority to take binding decisions. In the past, judicial dialogue, the continuous conversation between the courts of the different

¹⁸¹ U Di Fabio, ‘Ist die Staatswerdung Europas unausweichlich?’ *Frankfurter Allgemeine Zeitung* of 2 February 2001, 8.

¹⁸² K Friedrich, ‘Bundesfinanzhof contra Europäischen Gerichtshof’ [1985] *Recht der Internationalen Wirtschaft* 794; S Magiera, ‘Comment on T Stein und P Kirchhof’ in D Merten (ed), *Föderalismus und Europäische Gemeinschaften* (1990) 125, 127.

¹⁸³ European Constitutional Group, *A Proposal for a European Constitution* (1993) 13.

¹⁸⁴ JHH Weiler, ‘The European Union Belongs to its Citizens’ (1997) 22 *EL Rev* 150, 155; see also idem, UR Haltern and FC Mayer, ‘European Democracy and Its Critique’ (1995) 18 *West European Politics* 4, 38; Weiler et al, *Certain Rectangular Problems of European Integration* (1996) 14; idem, ‘In der Unterwelt der Ausschüsse’ *Die Zeit* of 22 October 1998, 9.

¹⁸⁵ P Lindseth, ‘Democratic Legitimacy and the Administrative Character of Supranationalism’ (1999) 99 *Columbia Law Review* 628, 731ff.

¹⁸⁶ I Pernice, ‘Kompetenzabgrenzung im europäischen Verfassungsverbund’ [2000] *Juristenzeitung* 866, 874 and 876, suggests the establishment of a Subsidiarity Committee (*Subsidiaritätsausschuss*). Similar to this is the proposal by J Schwarze, ‘Kompetenzverteilung in der Europäischen Union und föderales Gleichgewicht’ [1995] *Deutsches Verwaltungsblatt* 1265, 1267 (a *Subsidiaritätsausschuss* as a body that would take binding decisions, though); see also in this context the debates of Working Group I of the Convention, CONV 286/02 (<http://europeanconvention.eu.int>).

¹⁸⁷ For the details, see FC Mayer, ‘Die drei Dimensionen der Europäischen Kompetenzdebatte’ (2001) 61 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 577, 506ff (WHI-Paper 2 (2002), available at www.whi-berlin.de/kompetenzdebatte.htm (3 July 2008)).

¹⁸⁸ N Colneric, ‘Der Gerichtshof der Europäischen Gemeinschaften als Kompetenzgericht’ [2002] *Europäische Zeitschrift für Wirtschaftsrecht* 709.

¹⁸⁹ A different view—at least concerning the last point—is taken by A von Bogdandy and J Bast, above chapter 8, who emphasise the significance of the European institutional structure.

¹⁹⁰ On this notion, see Pernice, above n 1, 29.

levels by means of the Article 234 EC (Article 267 TFEU) procedure, has proven to be a fundamental element of the constitutionalisation of the Community legal order driven forward by the ECJ.¹⁹¹ Dialogue, discourse and conversation between the courts seem to bear a substantive problem-solving potential. In this sense, establishing a ‘Joint Senate of the Highest Courts and Tribunals of the European Union’ may be a good idea. This would mean that numerous already existing informal contacts¹⁹² between the courts were placed in a more formal setting.

Beyond new institutions, another overall approach would be to strengthen structural safeguards of Member States’ interests and specific safeguards of Member State courts that may play an indirect role in setting a threshold for national courts’ claims of ultimate jurisdiction in questions of European law. There are two approaches that have been developed in the US in order to elucidate the relationship between federal level and state level, which may aid a better understanding of the EU.

The theory of *political safeguards of federalism*¹⁹³ emphasises the safeguards of state interests by means of structural characteristics of the overarching (federal) level, which in turn allows courts to exercise self-restraint. It has been noted by Koen Lenaerts that this approach actually suits the EC/EU constellation even better than the US situation.¹⁹⁴ However, the Member State courts themselves need to be convinced that structural safeguards of Member State interests are adequate at the European level.

The basic concept behind *judicial federalism* in the US is the guarantee of autonomous and comprehensive powers for the state courts in a multilevel system. Some of the doctrines and mechanisms developed in the US in this context¹⁹⁵ may be of some interest for the EU. A procedure similar to the certification procedure (whereby federal courts submit references to state courts on questions of state law) could, for example, be helpful in all cases where provisions at the European level (eg Article 6(3) EU, see below) can be interpreted as referring to national law. Such a procedure would also emphasise the autonomy of Member State courts and counteract the impression of an existing hierarchy between the courts of the different levels.

Finally, reconceptualising primacy may help. Unconditionally accepting primacy of European law over any national law has been equated to the creation of federal statehood at the EU level.¹⁹⁶ The term that is used in the Swedish debate for the unconditional acceptance of primacy, *prostration*,¹⁹⁷ is even more graphic, as it symbolises the utmost kind of humble subordination. The surrender of possibilities of using constitutional law to fend off the primacy claim of European law is viewed as subordination under a ‘foreign’ power. Note, though, that such subordination is not merely a theoretical idea but, in the case of the Netherlands, for example, part of the constitutional law of the country.

The Irish solution of a protocol at the level of European primary law to preserve the sacrosanctity of national constitutional provisions on abortion could be regarded as simply being peculiar to the specific anti-abortion provision of the Irish Constitution. However, it may be read more broadly as a revocation of European law’s claim to primacy in respect of specific Member State interests, which are of particular importance in a given case. Consideration for

¹⁹¹ See also JHH Weiler, ‘The Autonomy of the Community Legal Order’ in idem, *The Constitution of Europe* (1999) 286, 287 and 322: ‘constitutional discourse’.

¹⁹² In this context, see www.confcoconsteu.org; www.uepcs.org; www.juradmin.eu.

¹⁹³ H Wechsler, ‘The Political Safeguards of Federalism’ (1943) 54 *Columbia Law Review* 543; D Shapiro, *Federalism* (1995) 116ff; see also US Supreme Court, *Garcia v San Antonio Metropolitan Transit Authority* 469 US 528 (1985).

¹⁹⁴ K Lenaerts, ‘Constitutionalism and the Many Faces of Federalism’ (1990) 38 *American Journal of Comparative Law* 205, 222.

¹⁹⁵ For a detailed account, see Mayer, above n 4, 310ff.

¹⁹⁶ M Herdegen, ‘Maastricht and the German Constitutional Court’ (1991) 31 *CML Rev* 235, 240.

¹⁹⁷ Ruin, above n 113, 440.

Member State matters is not such an unusual concept. Indeed, it may be found in the original Treaties. Examples include the public service (Article 39(4) EC, 45(4) TFEU) and official authority exceptions (Article 45 EC, 51 TFEU), and the exceptions from the fundamental freedoms in Articles 30, 46 and 55 EC (Articles 36, 52 and 62 TFEU),¹⁹⁸ all of which are uniform concepts of Community law. It is also conceivable, then, that a common set of fundamentals of national constitutional law could be established that could be declared exempt from the primacy of European law.¹⁹⁹

Article 6(3) EU (Article 4(2) of the EU Treaty of Lisbon (TEU-Lis)) goes beyond mere Union-wide exceptions to European law. According to this provision, the European Union shall respect the national identities of the Member States. Here, a uniform European concept of national identities would be meaningless. This provision clearly refers back to the Member States. Article 4(2) TEU-Lis, referring to ‘fundamental structures, political and constitutional’, now makes clear that national identity includes constitutional identity. Therefore, Article 6(3) EU or Article 4(2) TEU-Lis could be seen as a starting point on the European level to revoke the claim of primacy of European law over Member States’ constitutional identity. Article 6(3) EU is complemented by the principle of sincere cooperation (Article 10 EC, 4(3) TEU-Lis), which has been said to contain a duty of the EU to respect national constitutional structures.²⁰⁰

One may ask how the concept of national identity can be given meaning on the European level. One answer could be to include the Member States into the process of clarification of the concept: it is hardly surprising that it is an Irish academic contribution that develops the idea inherent to Article 6(3) EU (Article 4(2) TEU-Lis) of protecting fundamental (constitutional) national choices further into attributing to national courts of last instance the role of determining the content of such choices, as recognised and protected by European law.²⁰¹ This is where a European version of the American certification procedure mentioned earlier could be helpful. The core idea of considerations for constitutional principles of the Member States on the European level can also be detached from Article 6(3) EU: one proposal suggests a duty for the Community, in conjunction with Article 10 EC (Article 4(3) TEU-Lis), to consider and respect national constitutional structures when exercising European competences.²⁰² Article 4(2) TEU-Lis already takes a step into this direction.

Individual courts have begun to use the idea of national constitutional identity to build a bridge between European and national constitutional law. In this context, it is helpful to turn to

¹⁹⁸ For an overview, see DR Phelan, *Revolt or Revolution* (1997) 422ff.

¹⁹⁹ See B de Witte, ‘Droit communautaire et valeurs constitutionnelles nationales’ (1991) 14 *Droits* 87, who, attempting to define such a set of common fundamentals, acknowledges that the crucial problem of the respective Member States’ specific constitutional provisions which shape national constitutional identity remains (‘identité constitutionnelle nationale’, *ibid*, 95).

²⁰⁰ See A von Bogdandy, in E Grabitz and M Hilf, *Das Recht der EU* (looseleaf, last update Jan 2008) Art 10 EC, para 82ff; generally on Art 10 EC (previously Art 5 EEC Treaty) M Blanquet, *L'article 5 du Traité CEE* (1993).

²⁰¹ Phelan, above n 198, 416. In order to avoid a revolt or a (legal) revolution and to maintain the legitimacy of the national legal orders, Phelan suggests an amendment to the Treaties that would give primacy (over European law) to basic principles of the Member States’ constitutions relating to life, liberty, religion and the family, which are predicated on visions of personhood and morality (not of the market or the proper distribution of goods) peculiar to each Member State. The rights through which these principles find expression would be regarded as superior to European law within their sphere of application. The exact range of this reservation would be established by the respective national courts or other institutions of last resort (*ibid*, 416, 417ff). Critical of Phelan are MP Maduro, ‘The Heteronyms of European Law’ (1999) 5 *European Law Journal* 160, and N MacCormick, ‘Risking Constitutional Collision in Europe?’ (1998) 18 *Oxford Journal of Legal Studies* 517; in this context, see also DR Phelan, ‘The Right to Life of the Unborn v the Promotion of Trade in Services’ (1992) 55 *Modern Law Review* 670.

²⁰² On that proposal, see H-P Folz, *Demokratie und Integration* (1999) 387; in the German debate, the principle in Art 10 EC is typically referred to as Union loyalty (*Unionstreue*), a concept reminiscent of federal comity or loyalty (*Bundestreue*).

the remark of the French Conseil constitutionnel, which stated implicitly in 2004 and explicitly in 2006²⁰³ that national constitutional identity is a limit to the primacy of European law. A similar approach can also be found in the recent jurisprudence of the Spanish constitutional court.²⁰⁴

To sum up: there is indeed a set of tools and instruments that could be used to minimise the friction between the highest national courts and the ECJ. First, a modification of the law is a possibility, with a view to clarifying the scope of the primacy principle, particularly in relation to the national constitutions. Other, complementary, legal options include adopting a type of judicial federalism and relying on the courts' self-restraint on the condition of political structural safeguards of Member State interests. One may also consider institutional solutions with a view to the creation of juridical or political institutions that bring together the European and the Member State levels, or solving selected conflicts by modifying the allocation of competences.

2. Adopting a Theoretical Perspective

a) Existing Approaches

One way to approach differences between national courts and the ECJ is to reject either one or the other position by legal arguments. This approach was adopted, for example, by commentators on the *Maastricht* decision, who repeatedly attempted to prove either the BVerfG or the ECJ 'wrong' with arguments based either on constitutional law²⁰⁵ or on European law,²⁰⁶ and occasionally even on public international law.²⁰⁷ The efficacy of this kind of approach is rather limited, as the indications are that neither national courts, such as the BVerfG, nor the ECJ are willing to surrender ground to the respective counter position.

A position apparently inspired by this view touches the limits of legal reasoning. It considers this type of conflict to be unresolvable on a legal level. In terms of legal theory, this can be conceptualised as a conflict of *Grundnorms* in the Kelsenian sense, for which no further legal solution is available.²⁰⁸ From this point of view, the ECJ and the highest national courts and tribunals could be considered *Grenzorgane*, or borderline institutions, in the Verdrossian sense: that is, institutions bound by law, but not subject to any legal control, so that the resolution of a conflict is merely a political or sociological matter,²⁰⁹ and ultimately a 'question of power'.²¹⁰

²⁰³ CC 19 November 2004, *Traité établissant une Constitution pour l'Europe*; CC 27 June 2006, *Loi relative au droit d'auteur et aux droits voisins dans la société de l'information*; see Mayer et al, above n 43.

²⁰⁴ Tribunal Constitucional, judgment of 13 December 2004, DTC 1/2004.

²⁰⁵ Offering an interpretation of the position of the Bundesverfassungsgericht, see Kirchhof, above n 96, 965. G Hirsch, 'Europäischer Gerichtshof und Bundesverfassungsgericht' [1996] *Neue Juristische Wochenschrift* 2457, attempts to disprove the position of the Bundesverfassungsgericht with arguments taken from the German Constitution.

²⁰⁶ See eg Tomuschat, above n 119, 494ff; for further references, see Mayer, above n 4, 117.

²⁰⁷ T Schilling, 'The Autonomy of the Community Legal Order' (1996) 37 *Harvard International Law Journal* 389; for a critical view, see Weiler, above n 191, 286ff; see also A Paulus, 'Kompetenzüberschreitende Akte von Organen der Europäischen Union' in B Simma and C Schulte (eds), *Akten des 23. Österreichischen Völkerrechtstages* (1999) 49; for a conciliatory interpretation of the divergent positions, see eg I Pernice, 'Einheit und Kooperation' in Randelzhofer et al (eds), above n 120, 523, 534ff.

²⁰⁸ See M Heintzen, 'Die 'Herrschaft' über die Europäischen Gemeinschaftsverträge—Bundesverfassungsgericht und Europäischer Gerichtshof auf Konfliktkurs?' (1994) 119 *Archiv des öffentlichen Rechts* 564; N MacCormick, 'The Maastricht-Urteil: Sovereignty Now' (1995) 1 *ELJ* 259; W-D Grussmann, 'Grundnorm und Supranationalität' in T von Danwitz et al (eds), *Auf dem Wege zu einer europäischen Staatlichkeit* (1993) 47ff.

²⁰⁹ See A Verdross, *Völkerrecht* (1950) 24ff, referring to Hans Kelsen.

²¹⁰ J Isensee, 'Vorrang des Europarechts und deutsche Verfassungsvorbehalte' in J Burmeister (ed), *Verfassungsstaatlichkeit* (1997) 1265.

This is also the core of the argument of those who propose leaving the ‘ultimate umpire’ question open and unresolved.²¹¹ The attraction of these latter approaches is without doubt their level-headed pragmatism. It is likely that these approaches are inspired by some kind of calm confidence that the friction between the courts will not escalate into open conflict. Thus, it cannot be denied that the frictions between the courts are easier to overlook than open conflicts.

What remains a problem, however, is that these approaches—in particular when referring to a conflict of *Grundnorms*—are probably too hastily giving up on what law, and constitutional law in particular, is all about: legal certainty and the legal constraint of power. After all, there is also some evidence that the national courts’ positions have caused some harm in terms of legal certainty already. In Germany, some lower court judges can give a detailed account of how the BVerfG’s concept of ultra vires acts did induce resistance against European acts in national courts.

In search for concepts, one may also consider the ‘relationship of cooperation’ (*Kooperationsverhältnis*) invented by the German BVerfG in its case law to describe the relationship between the ECJ and the highest national courts of Member States. One should note, though, that the BVerfG refers to the relationship of co-operation in the *Maastricht* decision only in the context of the protection of fundamental rights.²¹² This leads back to the difference between the two categories ‘ultra vires acts’ and ‘acts violating fundamental rights as accorded by the German Constitution’,²¹³ Academic writings before the *Maastricht* decision also suggested co-operation between BVerfG and ECJ in the context of fundamental rights only, and not for ultra vires acts.²¹⁴ Although the BVerfG has used this concept of a relationship of co-operation since the *Maastricht* decision,²¹⁵ the nature and scope of this concept remain ill-defined and require further clarification.²¹⁶

b) Embedding the Problem into a Modern Concept of Constitutionalism

As previously shown, possibilities for dealing with the differences between the courts by shaping the legal environment do exist.²¹⁷ The fact that these possibilities are not followed through may indicate that the problem simply is not serious enough or not taken seriously enough to change the law. Another explanation is that national governments simply do not understand the

²¹¹ See JA Frowein, ‘Das Maastricht-Urteil und die Grenzen der Verfassungsgerichtsbarkeit’ (1994) 54 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 1, 7.

²¹² *Entscheidungen des Bundesverfassungsgerichts* 89, 155, 175 and summary No 7 (*Maastricht*).

²¹³ A different view seems to be adopted by R Scholz, ‘Zum Verhältnis von europäischem Gemeinschaftsrecht und nationalem Verwaltungsverfahrensrecht’ [1998] *Die Öffentliche Verwaltung* 261, 267. He transfers the concept of a ‘relationship of co-operation’ (*Kooperationsverhältnis*) from the realm of fundamental rights to the field of competences, assuming that a ‘similar relationship of co-operation’ exists there as well. In fact, Scholz establishes a relationship of court competition in the area of competences between the ECJ and the Bundesverfassungsgericht.

²¹⁴ See R Streinz, *Bundesverfassungsgerichtlicher Grundrechtsschutz und Europäisches Gemeinschaftsrecht* (1989) 304ff.

²¹⁵ Above nn 112 and 114.

²¹⁶ In this context, see M Zuleeg in E Denninger et al (eds), *Alternativkommentar zum Grundgesetz* (2001) Art 23, paras 32ff (‘Verhältnis der Zusammenarbeit’, a relationship of working together), and the recurring wording used by the ECJ since the Order concerning the admissibility of third party interventions, Case 6/64, above n 79, on the ‘cooperation between the Court of Justice and the national courts’ (in the German version ‘Zusammenarbeit des Gerichtshofes mit den staatlichen Gerichten’: 1307, 1309 of the German language edn of the ECR); see also ‘spirit of cooperation’ in Case 244/80, above n 18, para 20, or the obligation of the courts to promote ‘the principle of sincere cooperation’ (‘Grundsatz der loyalen Zusammenarbeit’) laid down in Art 10 EC (Art 4(3) TEU-Lis) as well, Case C-50/00 P, *UPA v Council* [2002] ECR I-6677, para 42.

²¹⁷ Art 35 EU and Art 68 EC, for example, suggest the possibility for the Member States to ‘clip the ECJ’s wings’; see Alter, above n 70, 197.

problem.²¹⁸ Or could it be that the conflict between the courts itself has a role to play in the relationship between the EU and the Member States—that of indirectly safeguarding Member States’ interests? On that reading, the claims of the Member States’ courts of ultimate jurisdiction would allow Member States to circumvent European law obligations that are not in line with their interests. Leaving the question of ultimate jurisdiction open thus appears to be in the interest of Member States, as reserving the right of Member State courts to claim ultimate jurisdiction could be considered a kind of compensation for the ever-decreasing influence of Member States on decision-making at the European level. Thus, national court claims of ultimate jurisdiction may even have some stabilising potential, as they may well lead to minority opinions among Member States, eg in a vote, to be taken into consideration at the European level,²¹⁹ contributing to maintaining the balance between the two levels.

The challenge for European constitutional legal science is to capture phenomena of European constitutional reality within a modern concept of constitutionalism. Friction between courts and the function of this friction are a part of this European constitutional reality.

aa) Clarification: What Constitution? Constitutions, Verfassungsverbund and Multilevel Constitutionalism

(1) Constitutions and the Concept of *Verfassungsverbund*

Whether it is accurate or desirable to speak of the existence of a European Constitution is subject to debate, to say the least. The introduction of the Constitutional Treaty would not have settled this debate either.²²⁰ Correspondingly, the fact that the Lisbon Treaty refrains from using the constitutional rhetoric has no relevance for the further clarification of the European constitutional dimensions.²²¹

The critics do not only query the decoupling of the concept of constitution from the concept of ‘State’.²²² They also point to the risk of weakening the national constitution, inherent in the idea of a European Constitution, since the structural security built into national constitutions is called into question. Thus, the argument continues, a constitution is the enactment of an existing legal culture that must be developed to some degree, and this level of development has not yet been achieved as regards the EU.²²³ Such an emphatic approach to the concept of constitution may have numerous advantages, not least the familiarity of the interpreters of the constitution with this concept.

In consideration of the developments at the supra-state level throughout the second half of the twentieth century, a different strand of constitutional thought has called for a ‘rethinking of the concept of constitution’.²²⁴ It seems to me that, under the changed circumstances of a

²¹⁸ See Alter, above n 70, 182ff, who points to the different time horizons and focuses of politicians and judges.

²¹⁹ For the exploitation of national constitutional courts’ positions, see M Hilf, ‘Solange II: Wie lange noch Solange?’ [1987] *Europäische Grundrechte-Zeitschrift* 1, 2: ‘In den politischen Beratungen vor allem des Rates wurde gelegentlich die Karte der Karlsruher Richter als letztes Mittel ausgespielt’ [‘In the political deliberations in particular in the Council, occasionally pointing to the judges in Karlsruhe was used as a last resort’].

²²⁰ Technically, the Constitutional Treaty was still a treaty of public international law.

²²¹ On the elimination of the constitutional rhetoric, see FC Mayer, ‘Die Rückkehr der europäischen Verfassung?’ (2007) 67 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 1141.

²²² See, eg J Isensee, ‘Staat und Verfassung’ in idem and P Kirchhof (eds), *Handbuch des Staatsrechts* (2004) vol II, § 15, paras 1, 3ff, and the references in C Grabenwarter, ‘Europäisches und nationales Verfassungsrecht’ (2000) 60 *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* 290, 292.

²²³ ‘Große Entwürfe und kleine Schritte’, *Handelsblatt*, 8 August 2001, 6.

²²⁴ P Badura, ‘Bewahrung und Veränderung demokratischer und rechtsstaatlicher Verfassungsstruktur in den internationalen Gemeinschaften’ (1966) 23 *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* 34, 95.

‘post-national constellation’ (Jürgen Habermas, Michael Zürn),²²⁵ a more pragmatic concept of constitutionalism, emphasising that there is no state or public power beyond that established by the constitution,²²⁶ is probably more helpful in explaining the phenomena relating to European integration.

As far as the European Union is concerned, there are two observations that seem to be relevant in the present context: first, European public authority or public power in the EU already exists, which affects the individual directly in his or her legal status;²²⁷ secondly, at least the German Constitution points beyond itself by referring to the objective of a unified Europe (*zur Verwirklichung eines vereinten Europas*) in the Preamble and in Article 23(1). With this in mind, one may answer the question of whether there is a constitutional dimension to European integration in the affirmative. One possible conceptualisation²²⁸ of this constitutional dimension is to depict ‘the’ European Constitution as a complementary structure of national and European constitutions. This concept is known as *Verfassungsverbund*.²²⁹ The closest literal translation of this term is ‘composite (or compound) of constitutions’, though the substance is better captured by ‘multilevel constitutionalism’. According to this concept, a European constitution already exists, and arises from both the national and European constitutional levels. European and national constitutional law form two levels of a unitary system in terms of substance, function and institutions.²³⁰ On this

²²⁵ J Habermas, *Die postnationale Konstellation* (1998) 91ff; see also M Zürn, ‘The State in the Post-National Constellation’, ARENA Working Paper 35 (1999), available at www.arena.uio.no; see also D Curtin, *Postnational Democracy* (1997) 5, 48ff, 51ff; J Shaw, ‘Postnational Constitutionalism in the European Union’ (1999) 18 *Journal of European Public Policy* 579, 586ff.

²²⁶ A Arndt, ‘Umwelt und Recht’ [1963] *Neue Juristische Wochenschrift* 24, 25: ‘In einer Demokratie gibt es an Staat nicht mehr, als seine Verfassung zum Entstehen bringt’ [‘In a democracy, there is no more to a “State” than established by the constitution’]; see also P Häberle, *Verfassungslehre als Kulturwissenschaft* (1998) 620.

²²⁷ The description of *Gemeinschaftsgewalt* as *Herrschaftsgewalt* is already suggested by Badura, above n 224, 59.

²²⁸ For other concepts, see eg the principle-approach by A von Bogdandy, above chapter 1, or the concept of a ‘dual-constitution’ (T Öhlinger, ‘Die Verfassung im Schmelztiegel der europäischen Integration: Österreichs neue Doppelverfassung’ in idem, *Verfassungsfragen einer Mitgliedschaft zur Europäischen Union* (1999) 165ff; P Pernthaler, ‘Die neue Doppelverfassung Österreichs’ in H Haller et al (eds), *Staat und Recht* (1997) 773); in this context, see the Austrian Verfassungsgerichtshof, Decision of 9 December 1999, [2001] *Europäische Zeitschrift für Wirtschaftsrecht* 219, 222 (*Reverse discrimination*); for more references on the debate, see A Peters, *Elemente einer Theorie der Verfassung Europas* (2001); P Craig, ‘Constitutions, Constitutionalism, and the European Union’ (2001) 7 *ELJ* 125; LS Rossi, ‘“Constitutionalisation” de l’Union européenne et des droits fondamentaux’ (2002) 38 *Revue Trimestrielle de Droit Européen* 27; D Blanchard, *La constitutionalisation de l’Union européenne* (2001).

²²⁹ The term was coined by I Pernice, ‘Bestandssicherung der Verfassungen’ in R Bieber and P Widmer (eds), *L’espace constitutionnel européen* (1995) 225, 261ff; see also idem, ‘Europäisches und nationales Verfassungsrecht’ (2001) 60 *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* 163ff, with further references; see also idem, *Das Verhältnis europäischer zu nationalen Gerichten im europäischen Verfassungsverbund* (2006). Conceived in 1995 as an alternative and counter concept to the *Staatenverbund* of the German Constitutional Court in the *Maastricht* decision, the notion is increasingly used detached from its original context, eg in PM Huber, ‘Europäisches und nationales Verfassungsrecht’ (2001) 60 *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* 194ff. On *Verbund* as a concept of order, see E Schmidt-Aßmann, ‘Europäische Verwaltung zwischen Kooperation und Hierarchie’ in Cremer et al (eds), above n 113, 1375, 1381ff. The term multilevel constitutionalism was introduced in I Pernice, ‘Constitutional Law Implications for a State Participating in a Process of Regional Integration’ in E Riedel (ed), *German Reports. XV. International Congress on Comparative Law* (1998) 40ff; for a French version of the concept as *constitution compose*, see I Pernice and FC Mayer, ‘De la constitution composée de l’Europe’ (2000) 36 *Revue Trimestrielle de Droit Européen* 623 (also WHI-Paper 1 (2001), available at www.whi-berlin.de/pernice-mayer.htm (accessed on 3 July 2008)); for an Italian version, see idem, ‘La Costituzione integrata dell’Europa’ in G Zagrebelsky (ed), *Diritti e Costituzione nell’Unione Europea* (2003) 43 (also WHI-Paper 7 (2003), available at www.whi-berlin.de/costituzione.htm (accessed on 3 July 2008)).

²³⁰ In this context, see A von Bogdandy and M Nettesheim, ‘Die Europäische Union: Ein einheitlicher Verband mit eigener Rechtsordnung’ [1996] *Europarecht* 1; Pernice, ‘Europäisches und nationales Verfassungsrecht’, *ibid.*, 173.

reading, the principle of primacy in application (*Anwendungsvorrang*) does not imply a hierarchy of norms in the sense of the general hierarchical superiority or inferiority of either European or national (constitutional) law:²³¹ ‘The hallmark of the *Verfassungsverbund* is its non-hierarchical structure.’²³² One may identify the individual as the deeper basis of validity for this European composite of constitutions, to whom the public powers allocated to both the national and European component constitutions may be traced back to.²³³ This is different from classical international law constructs, and this is also where a justification of the concept of primacy may be found.²³⁴

(2) Multilevel Systems

Beyond such concepts of European constitutionalism, Josef Isensee’s still valid comment that the EU is slipping away from established, traditional typologies of public international and constitutional law²³⁵ illustrates why one may have to try to go beyond the traditional typologies²³⁶—one of which is ‘constitution’—in an even more principled way, and establish new concepts such as ‘multilevel systems’.

The comparative law context which is inherent in European integration also speaks in favour of referring to an analytical concept as neutral as possible. The variety of legal and constitutional concepts in Europe arising from differences in language and legal culture (as may easily be illustrated by the different understandings of state, federalism, sovereignty and constitution) necessitates an enormous amount of conceptual and terminological clarification before one uses these terms and notions in the EU context. The mere translation of new terms and concepts such as *Staatenverbund* or *Verfassungsverbund*, for example into English, proves to be highly problematic: whereas ‘multilevel constitutionalism’ carries at least the idea behind the concept, the English translation of *Staatenverbund*, ‘compound of states’,²³⁷ remains clumsy. Nuances between *Verbund* (compound or composite) and *Verband* (association) pale into obscurity.

A largely neutral concept that could be used in this context is the ‘multilevel system’.²³⁸ It is especially useful that the image of distinct levels is not necessarily linked to superordination,

²³¹ This may be the difference between supremacy and primacy. On hierarchies, see R Bieber and I Salomé, ‘Hierarchy of Norms in European Law’ (1996) 33 *CML Rev* 907, 912; see also Spanish Tribunal Constitucional, Case 6603/2004, Declaration 1/2004.

²³² Pernice, ‘Europäisches und nationales Verfassungsrecht’, above n 229, 185, emphasising the difference between *Verbund* (compound or composite) and *Verband* (association). Critical of this is M Nettesheim, ‘German Report for the XX. FIDE Conference 2002’ [2004] *Europarecht* suppl 2, 7, also available at www.fide2002.org.

²³³ In this sense, see I Pernice, ‘Die Europäische Verfassung’ in Cremer et al (eds), above n 113, 1319, 1324; see also idem et al, ‘Renewing the European Social Contract’ (2001) 12 *King’s College Law Journal* 61; The problematic nature of this approach’s emphasis on the individual is highlighted inter alia by UK Preuss, ‘Contribution to the Discussion’ (2000) 60 *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* 384ff.

²³⁴ This cannot be explored in more detail at this point. On the concept of European constitutionalism, see eg the contribution by C Möllers, above chapter 5.

²³⁵ J Isensee, ‘Integrationsziel Europastaat?’ in O Due et al (eds), *Festschrift für Ulrich Everling* (1995) 567; see also GF Schuppert’s comment that the Community may only be understood with a way of thinking and a terminology which pays tribute to the specifics and the process-oriented nature of the EC: GF Schuppert, ‘Zur Staatswerdung Europas’ [1994] *Staatswissenschaften und Staatspraxis* 35, 50.

²³⁶ For the objections raised against the ‘traditional repertoire of terms and concepts’, see Schuppert, above n 235, 53; see also E-W Böckenförde, in idem, *Staat, Nation, Europa* (1999) 8, and references in the previous edition.

²³⁷ G Wegen and C Kuner, ‘Germany: Federal Constitutional Court Decision Concerning the Maastricht Treaty’ (1994) 33 *ILM* 338; note in this context L Siedentop, *Democracy in Europe* (2000) 27, though, pointing to Madison in the Federalist papers, speaking of the ‘compound republic’.

²³⁸ For more detail, see the previous edition.

supervision and subordination. Levels may also be understood as platforms that may be at equal height in one case and at different heights in another, or even circling freely around each other.

Public power is not primarily defined by the monopoly of power—the traditional concept used *inter alia* to define elements of sovereignty²³⁹—but rather by the mere decision-making power (leaving aside the question of enforcement capacity), typically expressed in the specific form of norm- or law-making capacity. The decision-making power represents a subset of the elements that characterise the traditional concept of state and public power: the monopoly of force plus exclusive law-making powers.²⁴⁰ Levels in the context of a legal multilevel system are decision-making levels.²⁴¹

Decision in this context is a cipher for decision-making operating under the rule of law, ie determined by and organised according to law.²⁴²

bb) The Role of Courts in a Multilevel System

If the European Constitution can be conceptualised as a complementary structure in the sense of multilevel constitutionalism (*Verfassungsverbund*), European constitutional adjudication may have to be conceptualised in a similar way.²⁴³ On a positive reading,²⁴⁴ ‘the’ European Constitutional Court would consist of both the highest national courts and tribunals and the ECJ. Since, from the theoretical perspective of multilevel constitutionalism, the authority of both the national courts and the ECJ stems from the individual, there is no presupposed hierarchy between the courts; rather, there is a duty of co-operation.

Empirical analysis indicates that, ultimately, the subjects of conflict in the relationship between the levels are the issue of primacy and the question of the source of European law, its basis of validity. The latter question is controversial in the context of the concept of a composite constitution or multilevel constitutionalism (*Verfassungsverbund*) to the extent that it implies a statement on the source of European law.²⁴⁵ This question can be left open if one avoids this issue by simply referring to the EU as a multilevel system.

As far as the primacy issue is concerned, the multilevel description exposes the minimum requirements for a conditional principle of primacy between distinct levels of public powers to function: the primacy question can only be answered unambiguously according to the content given to it at the overarching level. In the EU, this content is the principle of precedence in application (*Anwendungsvorrang*) of the law of the overarching level. Yet precedence in application does not necessarily imply a hierarchy; rather, it is a rule on the right of way. In English, for example, the difference between a hierarchical and a non-hierarchical right of way rule can

²³⁹ The monopoly on the (legitimate) use of force as the basis for state and public authority structures is emphasised *inter alia* by M Weber, *Wirtschaft und Gesellschaft* (1985) 835ff.

²⁴⁰ A von Bogdandy, ‘Supranationale Union als neuer Herrschaftstypus’ [1993] *integration* 210, 215.

²⁴¹ For a similar concept, see FW Scharpf, *Optionen des Föderalismus in Deutschland und Europa* (1994) 25 and 29; R Mayntz, ‘Föderalismus und die Gesellschaft der Gegenwart’ (1990) 115 *Archiv des Öffentlichen Rechts* 232; see also Schuppert’s description of the EC as a political entity with several decision-making levels, above n 235, 39, or as *Mehrebenenentscheidungssystem* (system of multilevel decision-making) by M Zürn, ‘Über den Staat und die Demokratie in der Europäischen Union’, *ZERP-Diskussionspapier* 3 (1995) 19ff.

²⁴² In this context, see the concept of the state suggested by H Heller, *Staatslehre* (1934) 228ff, according to whom the state is an organised entity of effective decision-making (*organisierte Entscheidungs- und Wirkungsseinheit*); see also von Bogdandy, above n 240, 217.

²⁴³ The German Bundesverfassungsgericht stated in *Entscheidungen des Bundesverfassungsgerichts* 73, 339, 367ff (*Solange II*) that there is a ‘functional intertwining of the European and Member State judiciaries’, including a ‘partial functional incorporation of the ECJ into the domestic court system’.

²⁴⁴ The pessimistic view would be a competition of the courts. See, eg M Kumm, ‘The Jurisprudence of Constitutional Conflict’ (2005) 11 *ELJ* 262.

²⁴⁵ In this context, see H Hofmann, ‘Von der Staatssoziologie zu einer Soziologie der Verfassung?’ [1999] *Juristenzeitung* 1065.

be grasped more easily on a terminological basis, as a distinction between (hierarchical) supremacy and non-hierarchical primacy is possible.²⁴⁶

In order to avoid conflicts, any claims for elements of national law, in particular constitutions, to be exempt from the primacy of European law have to be recognised by both levels in principle, and must be determined consensually by them, in specific cases. This leads to the core question of where to locate the ultimate jurisdictional claims of the highest national courts and tribunals at the European level. The answer points to Article 234 EC (Article 267 TFEU) in a procedural perspective and to Article 6(3) EU (Article 4(2) TEU-Lis)—ie the respect of national constitutional identity—in a substantive perspective. The interpretation of the latter norm has to be accomplished by both the highest national courts and the ECJ. The fundamental rights saga from *Solange I* to the *Banana* decisions of the ECJ and the BVerfG seems to indicate that the respective courts of ultimate decision, as guardians of the interests of the respective levels, are already working towards establishing a core of (constitutional) law exempt from the primacy of European law, which is accepted as such on both levels. This is confirmed by the decisions of the French Conseil constitutionnel on the national constitutional limits of European law set by the respective Member State's constitutional identity (see above).

c) Objections to Composite and Multilevel European Constitutional Adjudication²⁴⁷

Whether one starts out from multilevel constitutionalism or merely from a multilevel description of legal systems, the idea of a complementary structure of European constitutional adjudication raises numerous objections.

aa) Asymmetry

The heterogeneity of the highest national courts and tribunals described earlier is not limited to the role of the judge, the language of the decisions and the acceptance of judge-made law in 27 and more Member States. There are also differences in the range of powers and jurisdiction of the highest national courts. Hence, the concept of a complementary European constitutional judiciary leads to a very different shape of European constitutional law adjudication from Member State to Member State. In Germany, for example, the strong constitutional court may claim exemption from European primacy for certain national constitutional law principles, whereas in the Netherlands, which lacks a constitutional court, this possibility does not exist.

On one hand, this kind of asymmetry is intrinsic to the heterogeneity of the EU Member States, which is one of the crucial constitutional hallmarks of the Union.²⁴⁸ On the other hand, proposals in some of the Member States for judicial reforms, going as far as the introduction of genuine constitutional courts, may be part of a trend towards convergence,²⁴⁹ promoted to some extent by the ultimate jurisdiction issue. This, at least, has been indicated by the Swedish

²⁴⁶ On this in particular, see the Spanish Tribunal Constitucional, Judgment of 13 December 2004, DTC 1/2004, according to which 'primacía' means primacy in application in case of collision between national and European law, while 'supremacía' means a claim to the highest hierarchical position. See also AC Becker, 'Vorrang versus Vorherrschaft' [2005] *Europarecht* 353; see above n 78 on the difference between primacy and supremacy.

²⁴⁷ More general objections against the concept of (constitutional) jurisdiction as such and theories dealing with judicial review will not be addressed here. For the American debate on judicial review, see A Bickel, *The Least Dangerous Branch* (1962); M Tushnet, *Taking the Constitution Away from the Courts* (1999).

²⁴⁸ In this context, see J Tully, *Strange Multiplicity* (1995) 183ff (constitutions as 'chains of continual intercultural negotiation').

²⁴⁹ Considering the number of states where judicial review of parliamentary decisions is still considered an anomaly, one cannot yet speak of a general convergence in Europe towards judicial review exercised by constitutional courts. However, see Tomuschat, above n 4, 245ff.

example.²⁵⁰ In any case, almost all of the youngest Member States have established a constitutional court.

Generally speaking, this is the point where the merits of the multilevel approach become apparent: the relevant borderline between public powers in the EU is the line between the European and Member State levels. The way the fundamental rights issue developed is a good illustration that it may well be enough to have one single court on one level—say, the German BVerfG—determining the constitutional interests of that level. This is not to say that the BVerfG may be some kind of role model for other courts in other Member States; rather, it is simply to say that the reservations expressed by the BVerfG in the field of fundamental rights have contributed to making the case law of the ECJ clearer in this area. All Member States have benefited from this, whether or not they have a constitutional court that has voiced similar national concerns as the BVerfG. In that sense, the BVerfG could be seen as not only the guardian of the German Constitution, but also a guardian of the interests of the Member State level generally. The same applies, of course, for the other highest national courts and tribunals in their respective positioning towards the ECJ.

The objection that the ECJ and the highest national courts are not really comparable—in spite of occasional descriptions of the ECJ as a constitutional court²⁵¹—carries particular weight. It possibly points to an asymmetry between the courts in question, which excludes any concept of complementary jurisdiction in respect of European constitutional law.²⁵² On that reading, the ECJ and the highest national courts and tribunals are just too different.

One example of something that distinguishes the ECJ from the highest national courts is the fact that it is an exception for individuals to appear before the ECJ. In European procedural law, the Member States, the Commission and national courts (by way of references) are privileged parties. These are the ECJ's preferred interlocutors.²⁵³ The ECJ has confirmed this in its recent case law, in opposition to the Court of First Instance and against the advice of the Advocate General.²⁵⁴ This seems to indicate a conception of the ECJ's function as relating specifically to maintaining and strengthening European integration, rather than a concern for focusing on the protection of individual rights.²⁵⁵ The Convention discussed introducing a fundamental rights complaint,²⁵⁶ modelled more or less on the German *Verfassungsbeschwerde*,

²⁵⁰ In the context of the constitutional reform required by accession to the EU, the Swedish government wanted to make sure that Swedish courts would have the same powers as far as European law is concerned as the German Bundesverfassungsgericht, Justitiedepartementet, 'Våra Grundlagar och EG—förslag till alternativ', *Departementsserien* 1993:36.

²⁵¹ J Schwarze (ed), *Der Europäische Gerichtshof als Verfassungsgericht und Rechtsschutzinstanz* (1983); O Due, 'A Constitutional Court for the European Communities' in D Curtin and D O'Keefe (eds), *Constitutional Adjudication in European Community and National Law* (1992) 3; K Alter, *Establishing the Supremacy of European Law* (2001) 225.

²⁵² A similar objection is made by P Badura, 'Contribution to the Discussion' (2000) 60 *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* 353, against the multi-level concept, when pointing to the lack of comparability of the levels.

²⁵³ On this, see H Schepel and E Blankenburg, 'Mobilizing the European Court of Justice' in G de Búrca and JHH Weiler (eds), *The European Court of Justice* (2001) 9, 18ff; see also the rather strict approach of the ECJ concerning the admissibility of third party interventions, Case 6/64, Order of 3 June 1964, *Costa* [1964] ECR 614.

²⁵⁴ Case C-50/00 P, above n 216; against, see AG Jacobs, *ibid*, No 59ff, and the Court of First Instance: Case T-177/01 *Jégo-Quéré v Commission* [2002] ECR II-2365, paras 41ff, 50; overruled by Case C-263/02 P *Commission v Jégo-Quéré* [2004] ECR I-3425. There is now a minimal improvement in the position of individuals in Art 263 TFEU; for details, see J Bast, above chapter 10, section V.2(b).

²⁵⁵ H Rasmussen, *The European Court of Justice* (1998) 198ff; see also L Hooghe and G Marks, *Multi-level Governance and European Integration* (2001) 26ff.

²⁵⁶ Suggested by N Reich, 'Zur Notwendigkeit einer Europäischen Grundrechtsbeschwerde' [2000] *Zeitschrift für Rechtspolitik* 375; see also Convention document CONV 72/02, pt I.3; CONV 354/02.

as well as a substantial modification of Article 230(4) EC.²⁵⁷ In the end, there was no agreement on opening up direct access to the European courts.

The most serious objection in the present context is probably the one pointing to the differences in democratic legitimacy between the ECJ on the one hand and the highest national courts and tribunals on the other. Unlike the courts of some Member States, who take their decisions ‘in the name of the people’,²⁵⁸ the ECJ does not even reveal in whose name or on whose behalf it is speaking. This raises the question of whom or what legitimises the ECJ. According to Article 223 EC (Article 253 TFEU), the European judges are appointed by the governments of the Member States without any parliamentary participation—either European or national.²⁵⁹ In contrast, the judges of the German BVerfG, for example, are elected by the German Parliament (Article 94 of the German Constitution). It is nevertheless true that the selection of ECJ judges can be democratically justified by chains of legitimacy, some of which are longer than others. Moreover, it should be noted that European law does not prevent parliamentary participation at the Member State level, the case of Austria providing an example.²⁶⁰ The Treaty of Lisbon slightly enhances transparency by introducing a panel which is to give an opinion on candidates’ suitability to perform the duties of Judge and Advocate General.²⁶¹

Generally speaking, one will find numerous unanswered fundamental questions on the legitimacy of judges at the Member State level as well,²⁶² and the German procedure of selecting the highest judges by way of parliamentary participation could itself be criticised for not being as transparent as, say, the US solution of public hearings of the prospective judges.

In the end, the utterly different understandings of and approaches to the nature and range of democratic legitimacy of courts are probably simply the corollary of the heterogeneity of the Member States.

²⁵⁷ See the final report of WG II, CONV 354/02, point C, and the debate within the Discussion circle on the Court of Justice (Circle I), CIRCLE I WD 08, para 17ff; CONV 543/03; see also the hearing of the President of the ECJ *Rodríguez Iglesias* in Circle I on 17 February 2003, CONV 636/03 (against opening up Art 230(4) EC); the hearing of the President of the CFI *Vesterdorf* on 24 February 2003, CONV 588/03 (in favour of broadening Art 230(4) EC, see similarly AG *Jacobs*, WG II WD 20, and also judge *Skouris*, WG II WD 19)); see also U Everling, ‘Rechtsschutz im europäischen Wirtschaftsrecht auf der Grundlage der Konventsregeln’ in J Schwarze (ed), *Der Verfassungsentwurf des Europäischen Konvents* (2004) 263; FC Mayer, ‘Individualrechtsschutz im Europäischen Verfassungsrecht’ [2004] *Deutsches Verwaltungsblatt* 606; Bast, above chapter 10.

²⁵⁸ This aspect is highlighted in the comprehensive study by Dubos, above n 153, 855.

²⁵⁹ The history of the recent appointments of the German judges Everling, Zuleeg and Hirsch is not exactly a story of success, as all of them were one-term judges. This seems to indicate some deficiencies in the current procedure. Alter, above n 70, 200, reports that U Everling was initially seen as having a greater appreciation of the borders of EC authority, and that M Zuleeg, rather than being reappointed, was replaced by G Hirsch from Bavaria in part because of the perception that he was too willing to interpret European law expansively. The problem may simply be a lack of interest of the governments in the issue, though.

²⁶⁰ Art 23c of the Austrian Constitution, the Bundes-Verfassungsgesetz.

²⁶¹ Art 255 TFEU; there is still the problematic issue of former European Commission officials becoming judges or working for judges, which raises the question of informal channels between the Commission and the Court. This and the role of the judges’ collaborators, the *référéndaires*, who do not even appear on the Court’s homepage, is something that has not attracted much scholarly attention so far. It is therefore possible that important elements for understanding of the ECJ’s functioning still lie in the dark.

²⁶² For a German perspective, see A Voßkuhle and G Sydow, ‘Die demokratische Legitimation des Richters’ [2002] *Juristenzeitung* 673; Pernice, above n 1, 36, emphasises the functional legitimacy of the European judiciary.

bb) The Evaporation of Responsibilities—Who is to Define the Common Good?

There are more fundamental objections than asymmetry to a concept of complementary jurisdiction in European constitutional law. They concern the issue of accountability and the question of how to establish a concept of ‘common good’ in such a complex system.

Just as a certain fuzziness or lack of clarity has developed over time in the realm of the executive between Council, national governments and administrative structures,²⁶³ so a composite structure of jurisdiction might be vulnerable to an unclear and ill-defined division of responsibilities and jurisdiction. This could lead to a vacuum of responsibility for fundamental rights protection *in concreto*, as the *Banana* cases²⁶⁴ indicated. There, the principles were upheld, but the banana importers went bankrupt. It would be a serious problem indeed if a forum for the definition of the common good,²⁶⁵ the place where a concept of solidarity could also be developed, became less and less discernible. Solidarity-free individualisation would then have reached the realm of constitutional law as well.

cc) Is There any Added Value in Theories of Composite Structures of Adjudication?

The value of conceptualising what the courts in the EU do or should do by means of a non-hierarchic, composite multilevel structure may be summarised as follows: starting from a concept that covers the national and the European levels, and thus establishing responsibilities of adjudication on European constitutional law for both of them, the non-hierarchic relationship of the courts takes on a clearer form, constitutional clarity is enhanced and a reciprocal strengthening of constitutional bonds and limits is achieved.

The multilevel approach can serve as a starting point to develop criteria for determining the limits of responsibilities and as a conceptual basis for the constitutional dialogue between the courts, which are allotted functions according to a specific concept of constitutionalism. This means rejecting the conflict paradigm and accepting the co-operation paradigm more readily. To some extent, the non-subordination of national courts, which keep a national constitutional identity (Spain, France, see above), could be explained and legitimised in terms of European constitutional law; it would no longer automatically be seen as an infringement of European law. In any case, there would also be clear limits on how national courts may act, which would remove the foundations of misleading legal reasoning (particularly in respect of *ultra vires* acts²⁶⁶).

3. Interim Summary

The ‘frictional phenomena’ that exist between the highest national courts and tribunals of the Member States and the ECJ can be legally analysed and their specific manifestations can be shaped by law. They have a function in the relationship between EU and Member States. There are theoretical tools that can help to constructively explain and conceptualise this function and

²⁶³ See FC Mayer, ‘Nationale Regierungsstrukturen und europäische Integration’ [2002] *Europäische Grundrechte-Zeitschrift* 111.

²⁶⁴ Above n 112.

²⁶⁵ On the question of a ‘multilevel common good’ (‘Mehrebenen-Gemeinwohl’), see GF Schuppert, ‘Die Zukunft der Daseinsvorsorge in Europa’ in H-P Schwintowski (ed), *Die Zukunft der kommunalen EVU im liberalisierten Energiemarkt* (2002) 11, 20ff; see also P Häberle, ‘Gibt es ein europäisches Gemeinwohl?’ in Cremer et al (eds), above n 113, 1153, 1166ff; R Uerpman, *Das öffentliche Interesse* (1999) 266ff.

²⁶⁶ See above n 129 for examples of alleged *ausbrechende Rechtsakte*.

the empirical findings of differences between the courts. By means of concepts such as the *Verfassungsverbund*, or the multilevel system, the cooperation paradigm can be emphasised.

III. Recent Developments in the Relationship between European and National Courts

Since the fall of the iron curtain in 1989/1990, the number of EU Member States has increased from 12 to 27 and the legal basis of European integration has been changed several times. The most recent phase of the integration process came to an end in October 2007 with the Treaty of Lisbon.²⁶⁷ These changes in the circumstances and foundations of European integration have an effect on the fundamental questions of European constitutional law, which also pertain to national courts. For example, the elimination of the pillar structure of the EU with the Treaty of Lisbon carries with it a broadening of the ECJ's jurisdiction.

However, the system of adjudication on the European and national levels was not at the centre of the reform process. Neither the 'Draft Treaty establishing a Constitution for Europe' of the 2002/2003 Convention²⁶⁸ nor the modifications of that draft introduced along the ensuing Intergovernmental Conference in 2003/2004 and agreed upon in June 2004 nor the 2007 Treaty of Lisbon contain substantive changes as far as the ECJ or the national courts are concerned. The core issues of the constitutional process nevertheless touch the system of adjudication in the EU (1). Numerous open questions remain (2).

1. The Courts and the Core Topics of the Constitutional Reform Process

In the context of the debate on the delimitation of European powers and competences,²⁶⁹ a new, additional court of competence was suggested,²⁷⁰ but not agreed upon. Instead, the Treaty of Lisbon uses—just like the Treaty on a Constitution for Europe—categories of competences and a stronger control of the principle of subsidiarity, where national parliaments now have a role to play. Still, the recurring—unsubstantiated²⁷¹—accusation that the ECJ is not fulfilling its functions may have damaged the position of the ECJ, with destabilising side effects for the entire system of European constitutional law adjudication. The issue of competences is an example of how debating constitutional topics that are not directly related to the courts may generate side effects that affect the courts.

This kind of side effect can also be detected in the institutional debate. Should, for example, the Commission, due to its composition or due to changes in the institutional arrangement, be decreasingly able to fulfil its role as guardian of the Treaties, then this could have an indirect effect on the ECJ, increasing its burden of responsibility for the defence of the supranational

²⁶⁷ The Treaty of Lisbon still needs to be ratified, and should come into force in 2010.

²⁶⁸ See document CONV 850/03; it is only at a very late stage that a forum for debating ECJ-related questions was introduced, albeit with a rather limited mandate. For the mandate of this 'Discussion circle on the Court of Justice' (Circle I), see CONV 543/03. For the final report, see CIRCLE I WD 08.

²⁶⁹ According to the 'Declaration on the future of the Union' annexed to the Treaty of Nice, one point for discussion was 'inter alia' the question of 'how to establish and monitor a more precise delimitation of powers between the European Union and the Member States, reflecting the principle of subsidiarity'.

²⁷⁰ See above nn 180ff for proposals made by two judges of the German Bundesverfassungsgericht; see also U Everling, 'Quis custodiet custodes ipsos?' [2002] *Europäische Zeitschrift für Wirtschaftsrecht* 357, rejecting this kind of proposal; for the debate in the Convention see document CONV 286/02.

²⁷¹ Just see Case C-376/98 *Germany v Commission* [2000] ECR I-8419; see also Mayer, above n 187, 594ff, and German ECJ Judge Colneric, above n 188.

originality and independence of the entire integration project. The dichotomy of legislature and executive might be taken to imply that the separation of powers concept of the nation state can simply be applied to the EU. This is not necessarily the case. The judiciary may be the last remaining institution to be implementing the driving idea behind European integration of the last 50 years, which was to mediate political conflict by means of law, and its (assumed) rationality.²⁷²

The extension of qualified majority voting (QMV) in the Council of Ministers is also an issue which does not prima facie concern the courts but still affects their role. The connection between QMV and the ECJ as well as European constitutional adjudication is well illustrated by the Banana Regulation:²⁷³ Germany actually voted against the regulation in the Council but was nonetheless bound by it, and then had to solve the massive fundamental rights problems that arose at home as a result. More generally speaking: extending QMV also means that governments may no longer be able to act as guardians of certain interests in the Council. To the extent that these interests are well enough established to be covered by constitutional law (such as fundamental rights), the national courts may be forced into a more activist role as defenders of these interests against the EU, in particular when these interests can be designated integration-proof elements of national constitutional law.

In this context, the further legalisation of the protection of fundamental rights in the EU comes into view. The reference in Article 6 TEU-Lis to the Fundamental Rights Charter makes the latter legally binding.²⁷⁴ This could make more apparent the divergence in control, scrutiny and standards of protection between the European level and at least some of the Member States.²⁷⁵

The binding character of the Charter could entail fundamental changes for the ECJ as well. Even without a constitutional complaint procedure²⁷⁶ it is possible to contemplate a paradigm shift away from an economic community towards a fundamental rights community.²⁷⁷ There are sporadic calls for a transfer of responsibility for fundamental rights from the legislative power to the judiciary, which is to act once again as the ‘motor of integration’.²⁷⁸ However, it cannot be ruled out that this would overburden the ECJ.

2. Open Questions

There are numerous questions about the future of the courts which were not raised in the Convention or the IGC, but which still need answering.²⁷⁹ As well as the question already

²⁷² The *Carpenter* decision of July 2002, where the ECJ seems to disregard any limits that Art 51 of the EU Charter of Fundamental Rights might impose on the *ERT* case law—this seems to indicate that it might not be easy to circumnavigate the ECJ. See Case C-60/00, *Carpenter* [2002] ECR I-6279; I Pernice and FC Mayer, in Grabitz and Hilf, above n 200, after Art 6 EU paras 32ff.

²⁷³ On this decision, see FC Mayer, ‘Grundrechtsschutz gegen europäische Rechtsakte’ [2000] *Europäische Zeitschrift für Wirtschaftsrecht* 685.

²⁷⁴ In December 2000, the Charter was only announced as a solemn political proclamation: see [2000] OJ C364, 1.

²⁷⁵ On this point, see M Nettesheim, ‘Grundrechtliche Prüfdichte durch den EuGH’ [1995] *Europäische Zeitschrift für Wirtschaftsrecht* 106; P Selmer, *Die Gewährleistung der unabdingbaren Grundrechtsstandards durch den EuGH* (1998) 133ff.

²⁷⁶ See above n 256.

²⁷⁷ See A von Bogdandy, ‘Grundrechtsgemeinschaft als Integrationsziel?’ [2001] *Juristenzeitung* 157.

²⁷⁸ Kirchhof, above n 223.

²⁷⁹ For the debate on the reform of the European court system, which has strangely been decoupled from the general constitutional debate, see inter alia JHH Weiler, ‘Epilogue: The Judicial Après Nice’ in G de Búrca and idem (eds), *The European Court of Justice* (2001) 215ff; U Everling, ‘Zur Fortbildung der Gerichtsbarkeit der Europäischen Gemeinschaften durch den Vertrag von Nizza’ in Cremer et al, above n 113, 1103ff, with further references.

touched upon, of how to establish a concept of the common good in the EU, there are foreseeable logistical and infrastructural obstacles to a functioning ECJ in an EU of 27 or more Member States, with possible side effects for European constitutional law adjudication in the entire EU. These obstacles include the language problem²⁸⁰ and the question of how to ensure a balanced composition of the Court and its component parts based on equal representation of Member States.

One may question whether the agenda of the reform process ignored fundamental questions of European law. A decision on the range and limits of the (common) market, for example, is long overdue. This issue concerns not only social and cultural specifics of the Member States, but also fundamental choices of a society on the market–state relationship, taking into consideration social and other preferences. The ECJ's *PreussenElektra* judgment illustrates that, in the area of the relationship between free movement of goods and environmental protection, in spite of the pronouncement in *Keck*, the ECJ is finding it increasingly difficult to remain consistent in its case law on the limits of the market.²⁸¹ More recent examples of the significance of the ECJ jurisprudence on fundamental freedoms, which concerns fundamental societal decisions and the conception of the fundamental freedoms (in these cases, horizontal applicability), are the decisions *Viking* and *Laval*.²⁸²

Reflections on European constitutional adjudication are embedded into the context of attempts to conceptualise public power in an era of globalisation and internationalisation, which reaches beyond European integration. Similar frictional phenomena between the Member States and the EU may occur there, with similar lines of conflict. The ECJ may find itself, vis-à-vis courts or other adjudicating bodies outside the EU, in a position which resembles the position national courts have adopted towards the ECJ. The ECtHR needs to be mentioned in this context as, with its control inter alia of the EU,²⁸³ it also plays a role in the system of European constitutional adjudication. It remains to be seen whether, once the EU becomes a member of the Convention system, as provided for in Article 6(2) TEU-Lis, the ECtHR will only review acts of the EU on an exceptional basis.²⁸⁴ Moreover, there are numerous new

²⁸⁰ The increasing number of languages may not be just a logistical problem, it may also adversely affect the clarity of Court decisions and contribute to the fuzziness of European law: see I Pernice and FC Mayer, in Grabitz and Hilf, above n 200, Art 220 EC paras 86ff; see also FC Mayer, 'The Language of the European Constitution—Beyond Babel?' in A Bodnar et al (eds), *The Emerging Constitutional Law of the European Union* (2003) 359; see also idem, 'Europäisches Sprachenverfassungsrecht' (2005) 44 *Der Staat* 367.

²⁸¹ Case C-379/98 *PreussenElektra* [2001] ECR I-2099; on fundamental freedoms, see the contribution by T Kingreen, below chapter 14.

²⁸² Case C-438/05 *ITF (Viking Line)* [2007] ECR I-10779; Case C-341/05 *Laval* [2007] ECR I-11767.

²⁸³ See ECtHR (GC) App No 45036/98 *Bosphorus v Ireland* (2006) 42 EHRR 1, where the court establishes a kind of *Solange II* formula with respect to the EU, which allows the Court, however, to activate its control mechanism in each individual case. See also ECtHR (GC) App No 24833/94 *Matthews v UK* (1999) 28 EHRR 361, para 251; ECtHR App No 62023/00 *Emesa Sugar v Netherlands*, following Case C-17/98 *Emesa Sugar* [2000] ECR I-665 (on the right to respond to the AG's opinion, see in this context ECtHR App No 39594/98 *Kress v France* ECHR 2001-VI); see also the case ECtHR App No 56672/00 *Senator Lines v 15 EU Member States* (2004) 39 EHRR SE3; following Case T-191/98 *R Senator Lines v Commission* [1999] ECR II-2531 and Case C-364/99 P (R) *Senator Lines v Commission* [1999] ECR I-8733. The ECtHR-proceedings were not continued following the CFI decision in Cases T-191/98, T-212/98, T 213/98 and T-214/98 *Atlantic Container Line v Commission* [2003] ECR II-3275. Looking at the references to each other's cases that can be found in both ECJ and ECtHR decisions and at cases such as App No 36677/97 *Dangeville v France* ECHR 2002-III, where the ECtHR took sides with the ECJ, the relationship between the ECJ and the ECtHR seems to be characterised by co-operation and mutual respect on this point. Note that the ECtHR referred to the EU Charter of Fundamental Rights before the ECJ did, App No 25680/94 *I v UK* ECHR 2002-VI, para 80; App No 28957/95 *Goodwin v UK* ECHR 2002-VI, para 10, pointing to Art 9 of the Charter; see for the relationship between ECJ and the WTO-'courts', Case C-377/02 *Van Parys* [2005] ECR I-1465.

²⁸⁴ In its *Bosphorus* decision (above n 283), the ECtHR established the question whether the ECJ ensures a fundamental rights protection that is substantially equal to that of the European Convention on Human Rights as a test, which it did not apply eg to the Bundesverfassungsgericht.

fundamental questions, ranging from the question of how to tame new, previously unknown threats to individual freedom relating to economic power or issues related to globalisation and its effects on UN²⁸⁵ or world trade law to the question of how to legitimise new forms of governance.²⁸⁶ The answers to these questions will also affect the role and function of national and supranational courts.

IV. Summary and Conclusion

The analysis of the conflicts between the highest courts and tribunals at the European and Member State levels goes far beyond the mere relationship between these courts. Looking at this relationship offers more general insights on how Member States deal with the tension between their national legal orders and the European legal order, and where the crucial points for potential conflict are located within the European construct. Beyond the law, national courts also reflect changes in mood or opinion, regarding European integration, within the respective Member States.²⁸⁷ The differences and conflicts between the courts can be considered representative of more general trends and differences of opinion.

All in all, it is still premature to regard the relationship between the ECJ and the highest national courts and tribunals to be a consolidated relationship, but it is on the right path, heading towards a complementary structure of European constitutional law adjudication. This path is characterised by embracing cooperation instead of collision and by elements of a constitutional conversation between the courts, sometimes quite indirect, on questions of fundamental rights protection, primacy or the preservation of national constitutional identity. The character of this conversation varies, depending on the Member States involved.

It remains to be seen what effect the enlargement by 12 Member States as of 2004 and 2007 as well as the Treaty of Lisbon, with its renewed contractual foundations of European integration, will have.²⁸⁸ Thus, in these times of change in Europe, what is true in general for

²⁸⁵ In that context, see Cases C-402/05 P and C-415/05 P *Kadi et al v Council and Commission* [2008] ECR I-0000.

²⁸⁶ On this point, see J Tully, 'The Unfreedom of the Moderns in Comparison to Their Ideals of Constitutional Democracy' (2002) 65 *Modern Law Review* 204, 209, with further references; N Walker, 'The Idea of Constitutional Pluralism' (2002) 65 *Modern Law Review* 317.

²⁸⁷ JHH Weiler, 'The Reformation of European Constitutionalism' (1997) 35 *Journal of Common Market Studies* 97, 107.

²⁸⁸ Wherever the Constitutional Treaty has been or wherever the Treaty of Lisbon will be the subject of constitutional law proceedings in the Member States, European constitutional law will evolve. The cases concerning the Constitutional Treaty before the German Bundesverfassungsgericht (2 BvR 839/05 and 2 BvE 2/05, filed on 27 May 2005 by MP Peter Gauweiler) have been dropped, see also the Slovak Constitutional Court (Decision of 14 July 2005 to halt the ratification), and the Czech Constitutional Court (filed on 2 February 2005 by President Vaclav Klaus). For other cases dealing with the Constitutional Treaty, see, in Great Britain, the Court of Appeal of England and Wales, *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Southall and Anor*, [2003] 3 *CML Rev* 18 (judicial decision not to decide on a referendum); in France, Conseil constitutionnel, Decision 2004/505 DC (2004) 273 *Journal Officiel* 19885 (on that FC Mayer, 'Europarecht als französisches Verfassungsrecht' [2004] *Europarecht* 925); and in Spain, Tribunal Constitucional, Case 6603/2004, Declaration 1/2004, 13 December 2004, [2005] 1 *CML Rev* 39 (on that Becker, above n 246). For the compatibility of the Treaty of Lisbon with the French constitution, see Conseil constitutionnel, Decision 2007-560 DC (2007) 302 *Journal officiel* 21813; in that context, see Mayer et al, above n 43. The Czech Constitutional Court decided on the Treaty of Lisbon on 26 November 2008, case No Pl US 19/08 (published as No 446/2008 Coll). The German Constitutional Court considered the Treaty of Lisbon to be compatible with the German constitution in its decision of 30 June 2009 (cases 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08, 2 BvR 182/09), elaborating on the topics of national constitutional identity, ultra vires control and the principle of European law friendliness of the German constitution.

European integration in an EU of 27 or more Member States applies likewise to the relationship between the courts: when facing crucial decisions, it is all-important to preserve and secure what has already been achieved. Offering concepts and ideas to this end is not the only, but a particularly befitting task for the science of European constitutional law.